No. 23-1940

In the

United States Court of Appeals

For the Sixth Circuit

DENNIS SPEERLY, et al.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS LLC,

Defendant-Appellant.

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

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

Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, Va. 23219
Telephone: (804) 775-4746
bschmalzbach@mcguirewoods.com

Counsel for Amici Curiae
Additional counsel listed on inside cover

Jennifer B. Dickey
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

Charles H. Haake
ALLIANCE FOR AUTOMOTIVE
INNOVATION
1050 K Street, NW, Suite 650
Washington, DC 20001

Counsel for Amicus Curiae
Alliance for Automotive Innovation

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Counsel for Amicus Curiae
American Tort Reform Association

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Amici make the following disclosures under Sixth Circuit Rule 26.1:

1. Is any amicus a subsidiary or affiliate of a publicly owned corporation?

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

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

None known.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

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IDENTITY AND INTEREST OF AMICI CURIAE

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

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

The Alliance for Automotive Innovation ("Auto Innovators") is a collective trade organization representing the voice of the automotive

industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 98 percent of cars and light trucks sold in the United States. Auto Innovators is directly involved in regulatory and policy matters affecting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies.

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

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

INTRODUCTION

The panel opinion splits with sister circuits, steamrolling obstacles to class certification that are insuperable in other courts. That rift is especially significant in the panel's flawed Article III holding. Its analysis effectively transmutes the claims of a few dissatisfied customers into billion-dollar class actions on behalf of largely uninjured class members. But that attempted Article III alchemy cannot survive fundamental limitations on federal jurisdiction in class actions. To the contrary: "In an era of frequent litigation"—and especially in "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). Rehearing is needed to restore those Article III safeguards and the rigorous analysis required by Rule 23.

The panel opinion affirmed certification of 26 statewide classes of largely satisfied buyers of GM vehicles with alleged transmission defects. Most class members had no transmission problem with their vehicles, and thus received what they paid for. Indeed, the panel opinion acknowledged that many class members received a pre-delivery or warranty repair that "resolved" the alleged issue. Op. 5. But class members who receive a

product that functions as promised lack standing to sue for an alleged defect that never affected them.

The panel nevertheless found classwide standing. First, the opinion noted that "all of the *named* putative class members" experienced an alleged defect. *Id.* at 12 (emphasis added). Those named Plaintiffs "produced evidence supporting a suggestion" that those defects "were likely to develop at some point" for all owners. *Id.* at 13. But even for owners who never experienced any alleged defect, the panel held that "the appropriate time" to address uninjured absent class members was at summary judgment. *Id.* The opinion thus concluded that the alleged overpayment for a possibly defective product sufficed for standing at the class cert stage. *Id.*

Rehearing is needed for two fundamental errors that invite overbroad classes disproportionate to any actual injury.

First, this Court should join its sister circuits in holding that it is never permissible under Article III to certify a largely (if not entirely) uninjured class. Certification makes absent class members parties subject to the same standing requirements as named plaintiffs. Yet here, even if *some* class members had standing, the panel allowed many more uninjured class members to ride their coattails. Neither Article III nor Rule 23 permits that

approach, and this Court should confirm what *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), necessarily requires: no damages class can be certified without evidence that each class member has Article III standing. The panel's proposal to kick the can down the road until post-certification proceedings—after uninjured class members have already aggrandized the class—flouts Article III. Op. 13.

Second, even if it were sometimes permissible to certify a class containing a few uninjured class members, the Court should clarify that this is not one of those cases. Here, the need to winnow out those uninjured class members before judgment necessarily raises individual inquiries that would predominate over any common questions. Under Rule 23(b)(3), plaintiffs must show that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That is Plaintiffs' burden of *proof*, not just a "pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). That obligation applies to Article III standing and the merits alike. District courts cannot circumvent the fundamental standing issue by punting it to summary judgment, which will only preview the detailed individualized inquiries

needed at trial to test the proof of each class member's injury-in-fact. Class certification should be reversed.

ARGUMENT

I. The panel opinion erred in affirming certification of these substantially uninjured classes.

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

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

By deferring the problem of uninjured class members to summary judgment, the panel opinion wrongly resolved an enormously important question in conflict with sister circuits: Can a damages class be certified without proof that each class member has Article III standing? *See Johannessohn v. Polaris Indus., Inc.*, 9 F.4th 981, 987 (8th Cir. 2021) ("[A] class

cannot be certified if it contains members who lack standing."); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."). This Court should grant rehearing and hold instead that every member of a class certified under Rule 23(b)(3) must have proof of standing at certification.

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

Yet those same fundamental Article III principles confirm why each putative class member must show standing before certification. First, "'[e]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.'" *Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 360–61 (6th Cir. 2021). At class certification, the necessary manner and degree of evidence is, at a minimum, proof by a preponderance of the evidence. *See*

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

Second, in the analogous context of intervention-by-right, each plaintiff must demonstrate Article III standing to seek money damages in order to join. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). Like mandatory intervention, class-action procedures "enabl[e] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits . . . , leav[ing] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality). In each case, additional plaintiffs are in some sense joined. These plaintiffs would need independent Article III standing to bring an unjoined lawsuit. The rules for efficient claim resolution cannot

relax that irreducible constitutional requirement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.").

This Court thus should grant rehearing to align itself with its sister circuits refusing to certify damages classes containing uninjured members. And it should correct the panel holding that evidence merely "supporting a suggestion" of injury "at some point" satisfies Article III. Op. 13.

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

In any event, these damages classes could not be certified because the many uninjured class members destroy predominance under Rule 23(b)(3).

Before certifying a damages class, a court must engage in "rigorous analysis"—based on evidentiary proof—to determine that common issues will predominate over individualized questions. *Fox v. Saginaw Cnty., Michigan*, 67 F.4th 284, 300 (6th Cir. 2023). "If many or most" absent class members lack injury-in-fact, "that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). Standing for

unnamed class members thus presents a "powerful problem under Rule 23(b)(3)'s predominance factor." *Id.*; *accord In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (if a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate").

The overwhelming number of class members with no transmission issue creates an inescapable predominance problem here. And there are no workable fixes. That all the named Plaintiffs assert manifest defects is unsurprising, Op. 12, but testing even just their asserted experiences (let alone all class members' experiences) would require burdensome individualized inquiries. For example, GM would be entitled at a minimum to inquire into what specific "transmission" issue each owner perceived; test whether that issue is replicable; and investigate how that owner maintained the vehicle's tires (which can cause similar complaints). *See* Op. 5, 17-18. And Plaintiffs' expert's say-so that all class members will experience the purported defects could not prevent GM from proving that many individual class members never did. *Id.* at 13; *see also Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate . . . defenses to individual claims."). After all, "[w]hat matters to class

certification … is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350.

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

II. Circumventing Article III and Rule 23 restrictions on class actions harms American businesses and the economy as a whole.

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

Class-action litigation costs in the United States are oppressive and getting higher. Those costs surged to $3.9 billion in 2023, continuing a long-running rise. *See* 2024 Carlton Fields Class Action Survey, at 6-7, available at https://ClassActionSurvey.com. Defending *even one* class action can cost

over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And those class actions routinely drag on for years, accruing legal fees without resolving class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), available at http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

The extraordinary exposure created by certifying a class also coerces defendants to settle even cases that ought to be resolved in their favor. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Rigorous enforcement of both Article III and Rule 23 at the class-certification stage would be much-needed progress. "Enforcing Article III's requirements at the class certification stage ensures that parties and courts do not needlessly expend time and money—and defendants are not faced

with unjustified settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber Institute for Legal Reform, TransUnion *and Concrete Harm: One Year Later*, at 51 (June 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/06/ILR-Research-Paper-Spokeo-Transunion-v9-FINAL.pdf.

But if the panel opinion's lax analysis stands, the already immense pressure on businesses to settle improper class actions will keep ballooning regardless of actual harm. That coercion hurts the entire economy, because the attorney's fees and costs generated by overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages. *See* U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform*, at 40 (Aug. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf (explaining why "overbroad class actions are nothing more than a mechanism for expanding the size of a given class to justify a windfall for attorneys who claim to represent the interests of uninjured class members").

CONCLUSION

For these reasons, this Court should grant rehearing and reverse class certification.

Dated: October 2, 2024

Respectfully submitted,

/s/ Brian D. Schmalzbach

Jennifer B. Dickey
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Charles H. Haake
ALLIANCE FOR AUTOMOTIVE INNOVATION
1050 K Street, NW, Suite 650
Washington, DC 20001

Counsel for Amicus Curiae Alliance for Automotive Innovation

Brian D. Schmalzbach
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

Counsel for Amici Curiae

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Counsel for Amicus Curiae American Tort Reform Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2024, the foregoing was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach