No. 23-1940

---

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
Hon. David M. Lawson, District Judge

---

# BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLEES AND AFFIRMANCE

Wendy Liu
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
wliu@citizen.org

April 23, 2024

*Counsel for Amicus Curiae*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1940 Case Name: Speerly et al. v. General Motors LLC

Name of counsel: Wendy Liu

Pursuant to 6th Cir. R. 26.1, Public Citizen
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 23, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Wendy Liu

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

## TABLE OF CONTENTS

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS CURIAE ..... 1

ARGUMENT ..... 2

CONCLUSION ..... 12

CERTIFICATE OF COMPLIANCE ..... 13

CERTIFICATE OF SERVICE ..... 14

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Bouaphakeo v. Tyson Foods, Inc.*,
214 F. Supp. 3d 748 (D. Iowa 2016) ..... 12

*Cordoba v. DIRECTV, LLC*,
942 F.3d 1259 (11th Cir. 2019) ..... 6

*Curtis v. Propel Property Tax Funding, LLC*,
915 F.3d 234 (4th Cir. 2019) ..... 6

*Denney v. Deutsche Bank AG*,
443 F.3d 253 (2d Cir. 2006) ..... 8

*Department of Commerce v. New York*,
139 S. Ct. 2551 (2019) ..... 2

*Devlin v. Scardelletti*,
536 U.S. 1 (2002) ..... 5

*Fallick v. Nationwide Mutual Insurance Co.*,
162 F.3d 410 (6th Cir. 1998) ..... 4

*Fox v. Saginaw County*,
67 F.4th 284 (6th Cir. 2023) ..... 4, 7

*Frank v. Gaos*,
139 S. Ct. 1041 (2019) ..... 4, 7

*Horne v. Flores*,
557 U.S. 433 (2009) ..... 3

*Hyland v. Navient Corp.*,
48 F.4th 110 (2d Cir. 2022) ..... 6, 8, 9

*In re Asacol Antitrust Litigation*,
907 F.3d 42 (1st Cir. 2018) .....2, 6

*In re Northwest Airlines Corp. Antitrust Litigation*,
208 F.R.D. 174 (E.D. Mich. 2002) .....6

*In re Zurn Pex Plumbing Products Liability Litigation*,
644 F.3d 604 (8th Cir. 2011) .....11

*Kohen v. Pacific Investment Management Co.*,
571 F.3d 672 (7th Cir. 2009) .....6, 9

*Lewis v. Casey*,
518 U.S. 343 (1996) .....5

*Libertarian Party of Ohio v. Wilhem*,
988 F.3d 274 (6th Cir. 2021) .....3

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) .....9

*Mays v. LaRose*,
951 F.3d 775 (6th Cir. 2020) .....3

*Neale v. Volvo Cars of North America, LLC*,
794 F.3d 353 (3d Cir. 2015) .....6

*Olean Wholesale Grocery Cooperative v. Bumble Bee Foods LLC*,
31 F.4th 651 (9th Cir. 2022) .....2

*Ruiz Torres v. Mercer Canyons Inc.*,
835 F.3d 1125 (9th Cir. 2016) .....9

*Simon v. Eastern Kentucky Welfare Rights Organization*,
426 U.S. 26 (1976) .....4

*Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*,
549 U.S. 422 (2007) .....10

*Sosna v. Iowa*,
419 U.S. 393 (1975) ..... 4

*Steel Co. v. Citizens for a Better Environment*,
523 U.S. 83 (1998) ..... 10

*Town of Chester v. Laroe Estates, Inc.*,
581 U.S. 433 (2017) ..... 5

*TransUnion LLC v. Ramirez*,
594 U.S. 413 (2021) ..... 3, 8, 10

*Tyson Foods, Inc. v. Bouaphakeo*,
577 U.S. 442 (2016) ..... 6, 7, 11

*Underwood v. Carpenters Pension Trust Fund-Detroit & Vicinity*,
2014 WL 4602974 (E.D. Mich. Sept. 15, 2014) ..... 6

*United States ex rel. Eisenstein v. City of New York*,
556 U.S. 928 (2009) ..... 5

*Uzuegbunam v. Preczewski*,
141 S. Ct. 792 (2021) ..... 10

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*,
429 U.S. 252 (1977) ..... 3

**Rules**

Federal Rule of Civil Procedure 23 ..... 4

**Other Authorities**

Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*,
92 N.Y.U. L. Rev. 971 (2017) ..... 10

William B. Rubenstein, *Newberg & Rubenstein on Class Actions* (6th ed., Nov. 2023 update).....6

13D Charles Alan Wright et al., *Federal Practice & Procedure* (3d ed., April 2023 update) .....3

## INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protecting consumers and workers, public health and safety, and maintaining openness and integrity in government.

Public Citizen believes that class actions are an essential tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, which is present in many product defect cases, a class action offers the best means for individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. Public Citizen has often participated as amicus curiae in cases involving issues concerning class action standards

---

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

and requirements. *See, e.g.*, *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018). Public Citizen submits this brief to explain that Article III does not pose a jurisdictional barrier to the certification and adjudication of a class action that might contain uninjured class members.

## ARGUMENT

Because plaintiffs in this case contend that all members of the certified class have standing, *see Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 523 (E.D. Mich. 2023), this Court need not address the question whether all class members must show Article III standing at certification. Nonetheless, appellant General Motors argues that not all class members have been injured and that a class therefore cannot be certified. Should this Court reach the issue, it should hold that the possible inclusion of uninjured class members at the certification stage is not an Article III jurisdictional defect.

An Article III "case or controversy" exists when one plaintiff has standing. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) ("For a legal dispute to qualify as a genuine case or controversy, at least

one plaintiff must have standing to sue."); *Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977))); *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 279 (6th Cir. 2021) (stating that "further discussion of plaintiffs' standing is unnecessary to our resolution of the suit" where one plaintiff had standing); *Mays v. LaRose*, 951 F.3d 775, 782 (6th Cir. 2020) (quoting *Vill. of Arlington Heights*, 429 U.S. at 264 & n.9). The principle applies irrespective of whether the relief sought is equitable or compensatory. *See* 13D Charles Alan Wright et al., *Federal Practice & Procedure*, § 3531 (3d ed., April 2023 update) (stating that in analyzing standing, "[t]he focus is on the party, not the claim itself"). Thus, where a plaintiff "demonstrate[s] standing for each claim that they press and for each form of relief that they seek," the court has jurisdiction to adjudicate the case. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

The class action context does not alter these Article III principles. *See Fox v. Saginaw Cnty.*, 67 F.4th 284, 288 (6th Cir. 2023) (stating that "a class-action request 'adds nothing to the question of standing'" (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976)). Thus, jurisdiction to entertain a class action depends on whether "any named plaintiff has alleged [injuries] that are sufficiently concrete and particularized to support standing." *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019). Once the named plaintiff establishes Article III standing, the inquiry shifts "from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *see Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998) ("Once [the named plaintiff's] standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends *solely* on whether he is able to meet the additional criteria encompassed in Rule 23 of the Federal Rules of Civil Procedure." (emphasis added)). Thus, whether "the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a standing issue nor an Article III case or controversy

issue." *Lewis v. Casey*, 518 U.S. 343, 395–96 (1996) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Newberg on Class Actions* § 2.07 (3d ed. 1992)).

Citing *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017), amicus Chamber of Commerce contends that Rule 23 class actions are "analogous" to Rule 24 "intervention[s] by right" and asserts that, in the intervention context, "each plaintiff must show Article III standing to seek money damages." Chamber Br. 9. *Town of Chester*, however, does not support that position. There, the Supreme Court reiterated the "simple rule" that "[a]t least *one* plaintiff must have standing" to pursue the alleged claim. 581 U.S. at 439 (emphasis added). The Court's holding that "an intervenor must meet the requirements of Article III if the intervenor wishes to pursue relief *not* requested by a plaintiff," *id.* at 435 (emphasis added), is inapposite here, where the named plaintiff seeks the same relief on behalf of all class members. Moreover, unlike intervenors, who are "part[ies] to a lawsuit," *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009), absent class members are not "parties" in all respects. *Cf. Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002)

(stating that "[n]onnamed class members … may be parties for some purposes and not for others").

This Court therefore should join the "[c]ourts in nearly every circuit" in holding that absent members in a damages class action need not demonstrate their standing for the class action to be justiciable. William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 2:3 n.16 (6th ed., Nov. 2023 update) (collecting cases); *see Hyland v. Navient Corp.,* 48 F.4th 110, 117 (2d Cir. 2022); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019); *Curtis v. Propel Property Tax Funding, LLC*, 915 F.3d 234, 240 (4th Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018); *Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353, 362 (3d Cir. 2015); *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009). District courts in this Circuit have agreed. *See Underwood v. Carpenters Pension Tr. Fund-Detroit & Vicinity*, 2014 WL 4602974, at *3 (E.D. Mich. Sept. 15, 2014); *In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 225 (E.D. Mich. 2002).

The Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), illustrates that the possible inclusion of uninjured members in a damages class action at the time of certification is not

impermissible, let alone a defect in a court's Article III jurisdiction. There, although Tyson Foods' petition for certiorari argued that a class may not be certified it if contains uninjured members, its merits brief "concede[d] that '[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action … can never be certified in the absence of proof that all class members were injured.'" *Id.* at 460. The Supreme Court held that because Tyson Foods had abandoned the argument, "the Court need not, and does not, address it." *Id.* Had the presence of some uninjured members presented an Article III barrier to certification or adjudication, the Court would have had to address the issue, though, because a federal court has an "obligation to assure [itself] of litigants' standing under Article III." *Frank*, 139 S. Ct. at 1046 (citation omitted); *see Fox*, 67 F.4th at 292 (stating that "a court has no power to certify a class if it lacks jurisdiction"). Instead, the Court remanded the case for trial-court proceedings to determine a method of disbursement of the damages award, including whether uninjured class members could be identified at that stage. *Tyson Foods*, 577 U.S. at 461–62.

Notwithstanding the heavy reliance by General Motors and amicus Chamber of Commerce on *TransUnion*, that decision does not require proof of standing for every member of a class at the certification stage. There, the Supreme Court explained that "[e]very class member must have Article III standing in order to recover individual damages," 141 S. Ct. at 2208, because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," *id.* (citation omitted). That decision expressly did not address, however, "the distinct question whether every class member must demonstrate standing before a court certifies a class." *Id.* at n.4.

The Second and Eighth Circuit decisions cited by General Motors and the Chamber rely on one out-of-context sentence in *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006), that "no class may be certified that contains members lacking Article III standing." As the Second Circuit has clarified, that "single sentence" did *not* "suggest[] that all class members must have standing for the class to proceed." *Hyland*, 48 F.4th at 118 n.1. Rather, "taken in context," it "signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification

phase." *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016) (discussing *Denney*); *see Hyland*, 48 F.4th at 118 (citing numerous cases for the proposition that only one named plaintiff need have standing with respect to each claim).

Finally, the point that standing must be supported with the degree of proof needed at a particular stage of litigation, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), goes to the evidence needed to prove standing, not the questions whether or when absent class members must show standing. The Chamber's suggestion otherwise, *see* Chamber Br. 7–8, conflates justiciability requirements with evidentiary ones. At the certification stage, only the named plaintiff need demonstrate Article III standing—with the "manner and degree of evidence required" at that stage, *Lujan*, 504 U.S. at 561—for the class action to be a justiciable case or controversy.

**B.** Here, the district court found that "*every* class member suffered a loss" under plaintiffs' theory of liability. *Speerly*, 343 F.R.D. at 523 (emphasis added). The possibility that some class members ultimately might not be able to show that they were, in fact, injured does not render a district court without jurisdiction. *Kohen*, 571 F.3d at 677. The point by

which uninjured class members (if any) must be excluded from the class or from receiving a share of a damages award is at final judgment on the merits. *See TransUnion*, 141 S. Ct. at 2208 ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." (citation omitted)).

That uninjured plaintiffs cannot share in a money judgment follows from the principle that a binding adjudication on the merits presupposes a case or controversy between the parties who are bound by that judgment. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–104 (1998). Article III jurisdiction "is vital … if the court proposes to issue a judgment on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted). "[N]o federal court has jurisdiction to enter a judgment unless it provides a remedy that can redress the plaintiff's injury." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021). Therefore, to obtain a merits judgment awarding monetary relief, a plaintiff must establish by a preponderance of the evidence entitlement to that relief, including injury. *Cf. TransUnion*, 141 S. Ct. at 2208; *see also* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. Rev. 971, 986 (2017) (noting that an "Article III

problem would arise only if a court intended to distribute funds to uninjured people").

If the existence, or possible existence, of uninjured members comes to light before or after trial, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; (3) instructing the jury not to base any award of damages on uninjured individuals; and/or (4) requiring a process to identify such members (if any) and exclude them from sharing in a classwide damages award. *See, e.g.*, *Tyson Foods*, 577 U.S. at 461–62 (remanding for trial-court proceedings to determine whether class members who had no damages could be identified); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617–18 (8th Cir. 2011) (noting that courts may amend class definitions or grant summary judgment to defendants on claims that turn out to be barred).

In determining which of these courses to take, a district court should determine whether the issue is lack of standing or failure of proof on the merits. Class members who were never exposed to the injurious conduct of the defendant may be excluded from the class and from the binding effect of the judgment. Those who properly claimed to suffer legal

injury but lose on the merits because they cannot prove damages should take nothing from the class-action judgment while being subject to its binding effect. Regardless, where a definable class has proved injury, liability, and entitlement to relief, the failure (for whatever reason) of claims of some class members should not deprive other class members of the ability to proceed as a class or, if they prevail on the merits, the fruits of their victory. *See, e.g.*, *Bouaphakeo v. Tyson Foods, Inc.*, 214 F. Supp. 3d 748 (D. Iowa 2016) (remand proceedings).

## CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

/s/ Wendy Liu
Wendy Liu
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
wliu@citizen.org

*Counsel for Amicus Curiae*

April 23, 2024

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g)(1), I certify that the foregoing brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 2,421 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Wendy Liu
Wendy Liu

**CERTIFICATE OF SERVICE**

I hereby certify that on April 23, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Wendy Liu
Wendy Liu