No. 26-376

IN THE

Supreme Court of the United States

BAYER HEALTHCARE LLC,
Petitioner,

v.

DONIECE DRAKE AND DEBORAH BOWLING,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court acted within its discretion when it certified two classes of consumers pursuant to Federal Rule of Civil Procedure 23(b)(3), where all class members are alleged to have incurred damages by paying an inflated price for the defendant's products due to misrepresentations on the products' labels.

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INTRODUCTION

Bayer HealthCare LLC produces multivitamin products that it brands as "natural" but that contain synthetic ingredients. Although Bayer's own regulatory department objected to this branding, the company's vice president of marketing decided to use it anyway because consumers "love[] those words." Pet. App. 29a.

Plaintiffs Doniece Drake and Deborah Bowling—two consumers who purchased Bayer products in reliance on Bayer's representation that they were "natural"—filed a putative class action on behalf of consumers who purchased the products in California or New York during specified time periods. According to Plaintiffs, Bayer's misrepresentation that the products were "natural" violated California and New York statutes prohibiting certain deceptive advertising practices. And because the misrepresentation increased the products' value to the average consumer, Plaintiffs alleged, Bayer was able to charge an inflated premium price for the products.

The district court certified California and New York damages classes pursuant to Federal Rule of Civil Procedure 23(b)(3), finding class treatment proper because, among other things, common issues predominated over issues that might need to be individually tried. As the court explained, injury could be determined on a class-wide basis because, under Plaintiffs' theory, every class member had paid a price premium attributable to Bayer's misrepresentation. The court also noted that Plaintiffs had produced expert testimony that set forth a well-accepted and undisputedly reliable methodology for calculating the amount of that price premium.

In an unpublished opinion, the Ninth Circuit affirmed, concluding that the district court had not abused its discretion in holding that the requirements of Rule 23 were satisfied. Although Bayer had argued that certification was improper because the classes might contain uninjured members, the court of appeals reiterated that, because the issue of injury turned on "the presence or absence of a price premium" paid by every consumer who purchased the products at issue, "either all class members were injured or they were not." Pet. App. 4a.

The Ninth Circuit's case-specific application of uncontroversial Rule 23 standards does not merit review. Although Bayer asks this Court to decide whether certification is appropriate in a case where evidence of injury is lacking as to almost all class members, this case does not present that question. As the Ninth Circuit held, Plaintiffs presented evidence from which an inference of injury can be drawn as to *all* class members. The court's simultaneous recognition that a factfinder ultimately might *not* find a price premium does not imply an evidentiary deficiency; rather, it reflects the settled point—recognized by this Court and every court of appeals—that a plaintiff is not obliged to prove his or her case at the class-certification stage.

Bayer's claim that the decision below contributes to a circuit split is meritless. Tellingly, Bayer does not contend that courts are split on the question that it asks this Court to review: whether a court may certify a class even before it has evidence of absent class members' injury. In fact, the courts of appeals have uniformly answered that question in the affirmative. At the class-certification stage, courts agree, the relevant question is whether the fact of absent class

members' injuries *can be* determined in a way that will not cause individual issues to predominate over issues that are common to the class—not whether the alleged injuries have in fact occurred.

Rather than focusing on its own question presented, Bayer contends that the courts of appeals are split on a different question: whether a class may be certified if it is defined in such a way that it might include some uninjured members who must be identified and excluded from any eventual recovery in the event that the plaintiffs prevail on their claims. To start, any split on that issue is irrelevant here because, if Plaintiffs prevail on their claims, *all* class members were necessarily injured by paying an inflated price for Bayer's products. In any event, the courts of appeals are in alignment on this issue too. The possibility of uninjured class members is a factor for district courts to consider in assessing whether Rule 23(b)(3)'s predominance requirement is satisfied, not a categorical barrier to certification.

Although Bayer quibbles with the strength of Plaintiffs' evidence of a price premium, Bayer does not dispute that the existence and amount of a premium are issues that can be resolved with respect to the entire class at a single stroke by reference to common proof. And while Bayer makes policy arguments grounded in the cost of defending against class actions, Bayer's general distaste for class litigation is no reason to grant review.

This Court should deny Bayer's petition.

STATEMENT

1. Plaintiffs Doniece Drake and Deborah Bowling are consumers who purchased Bayer's multivitamin products in New York and California, respectively.

Pet. App. 14a–15a. Bayer labeled the products as "natural," and Plaintiffs relied on that representation when buying the products. *Id.* The products, however, contained synthetic ingredients. *Id.* at 14a.

Alleging that Bayer's misrepresentation violated California and New York state law, Plaintiffs filed a putative class action in federal district court. *Id.* at 15a–16a. Plaintiffs moved to certify two damages classes pursuant to Federal Rule of Civil Procedure 23(b)(3): a class of people who purchased any of four specified Bayer products falsely labeled as "natural" in California between March 1, 2020, and May 30, 2023, and a class of people who purchased those same products in New York between May 31, 2020, and May 30, 2023. *Id.*; *see id.* at 17a–18a.

The district court granted Plaintiffs' motion for class certification, holding that they had satisfied the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3). *Id.* at 22a. As for Rule 23(a), the court found that the members of the proposed classes are sufficiently numerous to justify collective litigation, *id.* at 23a; that the class members' claims involve common issues of law or fact, *id.* at 23a–24a; that the named plaintiffs' claims are typical of the class members' claims, *id.* at 24a–25a; and that class counsel will adequately protect the interests of the class members, *id.* at 25a–26a.

Turning to Rule 23(b)(3), the court concluded that issues common to class members predominate over individual issues and that class litigation is superior to individually tried actions. *Id.* at 26a–35a. Although Bayer disputed that its alleged misrepresentation was material to a reasonable consumer, the court noted that Plaintiffs had "offer[ed] several means of showing

materiality," including Plaintiffs' testimony that "they bought the [p]roducts because the label[s] had the word 'natural' on them," *id.* at 28a, and internal communications revealing that Bayer's vice president of marketing decided to retain the "natural" label despite objection from Bayer's regulatory department because, in the vice president's telling, "[c]onsumers loved those words," *id.* at 29a (alteration in original). And because Plaintiffs had produced evidence sufficient for a factfinder to conclude that Bayer's claims were material, the court held, the relevant state laws did not require "individualized inquiries into how each consumer interpreted the claims," *id.* at 30a, or customer-specific evidence of reliance on those claims, *id.* at 30a–31a.

The court also rejected Bayer's argument that the need for individualized damages inquiries defeated predominance. *Id.* at 31a–34a. As the court explained, damages can be determined on a class-wide basis where evidence shows that consumers "paid more for a product than they otherwise would have paid (e.g., a price premium)" due to deceptive labeling. *Id.* at 31a. And here, the court observed, Plaintiffs had produced expert evidence that it would be possible to use a conjoint survey—a "well-established method for measuring class-wide damages in mislabeling cases" by examining consumer preferences—to "measure the value" to consumers of the "natural" labeling and thus "determine the price premium attributable" to the deceptive labeling. *Id.* at 32a (citation omitted). Although Bayer emphasized that Plaintiffs' expert had not yet conducted the conjoint survey and calculated the price premium, the court explained that, under circuit precedent, a plaintiff need not execute a damages model prior to class certification as

long as the plaintiff has shown that the model, once executed, will supply a "reliable" measure of class-wide damages that is "consistent with [the plaintiff's] theory of liability." *Id.* at 34a.

2. The Ninth Circuit granted Bayer's Rule 23(f) petition for interlocutory appeal and affirmed in an unpublished memorandum opinion. Pet. App. 2a. As relevant here, the court of appeals held that the district court did not abuse its discretion in finding that Plaintiffs satisfied the predominance requirement of Rule 23(b)(3). *Id.* at 2a–8a.

The court of appeals first rejected Bayer's contention that "the proposed classes include uninjured plaintiffs." *Id.* at 4a. The court explained that "Plaintiffs' theory is premised on the notion that all class members were exposed to an alleged misrepresentation on the label of the product they purchased" and so "paid 'an inflated premium price'" for the product. *Id.* Thus, it continued, a ruling for Plaintiffs on the merits would establish that "all class members were injured." *Id.* And because "the presence or absence of a price premium is an objective, reasonable consumer inquiry," that merits issue was capable of resolution on a class-wide basis. *Id.*

The court next addressed Plaintiffs' damages model and concluded that it was "sufficient to establish that injury is common to all class members." *Id.* Reiterating that "Plaintiffs can demonstrate injury-in-fact by showing that putative class members paid more for the product than they otherwise would have paid," the court explained that the conjoint analysis proposed by Plaintiffs' expert would be able to establish the measure of damages on a class-wide basis by "determin[ing] the price premium attribut-

able" to Bayer's allegedly misleading "label claims." *Id.* (citation omitted). Although Bayer again objected that the expert had not yet applied his proposed methodology to arrive at a specific monetary value for class members' damages, the court of appeals, like the district court, noted that "[c]lass action plaintiffs may rely on a reliable though not-yet-executed damages model to demonstrate that damages are susceptible to common proof" at the class-certification stage "so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial." *Id.* at 5a (quoting *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1019 (9th Cir. 2024)). Because Bayer had not challenged the reliability of Plaintiffs' expert's proposed conjoint methodology, *id.* at 5a n.2, and because that methodology, "when applied, can establish whether the putative classes in fact paid a premium price for the product[s]," the court of appeals held that the district court did not abuse its discretion in holding that damages issues did not defeat predominance, *id.* at 6a.

Finally, the court held that Plaintiffs had "adduced sufficient common evidence of deception and causation" under the governing state statutes to establish predominance. *Id.* As the court explained, under the California statute, "[i]f the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises *as to the class*." *Id.* (alteration and emphasis in original; quoting *Lytle*, 114 F.4th at 1034); *see id.* at 7a (explaining that because "California law does not require an individualized inquiry into each … class member's reliance on the allegedly misleading statements," the issue of reliance "is generally

susceptible to common proof" (citation omitted)). As to the New York statute, the court explained that it too "adopts an objective standard and asks whether a deceptive act is likely to deceive a reasonable consumer," not whether an individual consumer in fact relied on a seller's misrepresentation in making a purchase. *Id.* at 8a. Observing that Plaintiffs had produced evidence—including in the form of Bayer's own "internal documents"—that Bayer's claim that its products were "natural" would be material to a reasonable consumer, *id.* at 7a, the court held that the issues of materiality and reliance under the California and New York statutes were susceptible to common proof, *id.* at 7a–8a.

Judge Forrest dissented in part. Although she agreed with the majority's analysis with respect to the New York class, she disagreed as to an issue of California law. In her view, the California statute requires an individualized showing of each consumer's reliance on Bayer's alleged misrepresentation. *Id.* at 10a. Based on this view of state law, Judge Forrest would have held that individual issues predominate over class-wide issues with respect to the California class. *Id.*

3. Bayer petitioned for panel rehearing and rehearing en banc. Pet. App. 39a. That petition was denied. *Id.* at 40a.

REASONS FOR DENYING THE WRIT

I. This case does not present the question that Bayer asks this Court to resolve.

Bayer urges this Court to grant review to answer the question "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when virtually all members of the

proposed class lack evidence of an Article III injury." Pet. i. This case does not present that question. As the Ninth Circuit recognized, because Plaintiffs produced evidence that Bayer's allegedly misleading labeling claims would be material to an "objective, reasonable consumer," Pet. App. 7a, it would be reasonable to infer that Bayer was able to charge "an inflated premium price" for the products at issue, *id.* at 4a. If the factfinder credits this evidence, "all class members were injured" by paying a higher price than the price that Bayer could have charged for a product that omitted the misleading claim. *Id.*

To be sure, the factfinder could reject the existence of a price premium as a factual matter and, accordingly, conclude that *no* class members were injured. *See id.* (stating that "either all class members were injured or they were not"). But, as this Court has held, "Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 568 U.S. 455, 459 (2013) (emphasis in original); *see Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016) (explaining that the existence of a potentially viable defense against liability does not defeat class certification where the defense "is itself common to the claims made by all class members" and can be effectively litigated on a class-wide basis on a motion for summary judgment). Indeed, this Court has addressed the point specifically in the context of proof of materiality, explaining in the context of federal securities law that, "[b]ecause materiality is judged according to an objective standard, the materiality of [a defendant's] alleged misrepresentations … is a question common to all members of [a] class." *Amgen*,

568 U.S. at 459. Thus, "the class is entirely cohesive: It will prevail or fail in unison." *Id*. at 460.

Consistent with *Amgen*, *Tyson Foods*, and decisions of every other court of appeals, then, the Ninth Circuit's decision in this case recognizes that a plaintiff who can show that the issue of injury is capable of resolution on a class-wide basis need not, at the class-certification stage, take the further step of proving that the class-wide injury in fact occurred. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 24 (1st Cir. 2015) (rejecting "a requirement that the injury determination must be completed by the class-certification stage"); *Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020) (summary order) (affirming certification of a damages class in a deceptive advertising case where a jury might find that the evidence "either d[id] not or [could not] establish a price premium"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (observing that a plaintiff's "burden at the class certification stage is not to prove the element" of injury but instead "to demonstrate that the element … is capable of proof at trial through evidence that is common to the class"); *In re Zetia (Ezetimibe) Antitrust Litig.*, 7 F.4th 227, 237 (4th Cir. 2021) (explaining that the question whether a class member in fact suffered an alleged injury "is a[] … question for the jury" that is not properly resolved at the class-certification stage); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007) (stating that "it is sufficient for standing purposes" at the class-certification stage "that the plaintiffs seek recovery for an economic harm that *they allege* they have suffered" (emphasis added)); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 521 (6th Cir. 2015) (stating that, at the

class-certification stage, "named plaintiffs must show that *they will be able* to prove injury through common evidence, not that they have in fact proved that common injury" (emphasis in original)); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) ("If the [district] court thought that no class can be certified until proof exists that every member has been harmed, it was wrong."); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (explaining that the proper inquiry at the class-certification stage is "whether, *if* [plaintiffs'] basic allegations [are] true, common evidence [can] suffice, given the factual setting of the case, to show classwide injury" (emphasis added)); *Dunn v. Santa Fe Natural Tobacco Co.*, 185 F.4th 999, 1029 (10th Cir. 2026) (reversing denial of class certification in a deceptive advertising case based on a price premium theory and stating that "the relevant inquiry at the certification stage" is "how—not whether—plaintiffs will prove their claims"); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) (rejecting as "wrong" the "proposition that all class members must prove their standing before a class [can] be certified"); *Nat'l ATM Council, Inc. v. Visa Inc.*, 2023 WL 4743013, at *6 (D.C. Cir. July 25, 2023) (per curiam) (approvingly citing district court statement that "common evidence sufficient for class certification need not conclusively establish class-wide liability and damages").

Bayer quibbles with the Ninth Circuit's view of the evidence, characterizing the evidence as insufficient to establish injury. *See* Pet. 8–13. As explained below, *see infra* Part III, Bayer's criticisms are misguided. But regardless of who has the better of the factual disagreement, where, as here, the courts of appeals agree on the governing legal standards, the case-

specific question whether the evidentiary record satisfies those standards does not warrant this Court's review. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

II. This case does not present a question on which the lower courts are divided.

A. Bayer identifies no split of authority on the question presented.

There is no split of authority on Bayer's question presented: whether a court may certify a class action without evidence of injury to absent class members. *See* Pet. i. As explained above, *see supra* Part I, this case does not present that question. Even putting that point aside, however, it is well established that certification can proceed without such evidence. As long as the named plaintiffs have standing to assert their claims, "absent class members do not need to submit evidence of personal standing at the motion to dismiss or class certification stages; in fact, they are not parties who will be bound by the action unless and until a class is certified." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:28 (22d ed. 2025).

The courts of appeals unanimously agree on this point. *See Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 66 (1st Cir. 2010) (rejecting a rule that "the requirement[] to show injury[] … must be sustainable as to specific [unnamed] plaintiffs" prior to class certification); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) ("We do not require that each member of a class submit evidence of personal standing."); *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 155 (3d Cir. 2023) (stating that, "at certification,

… it is not necessary for each [class] member to prove his or her standing"); *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232, 252 (4th Cir. 2026), *certiorari petition filed* (U.S. No. 26-592) ("[W]here … a Named Plaintiff has standing to bring the claim that is the subject of the class action, Article III standing is satisfied at the class certification stage."); *In re Deepwater Horizon*, 739 F.3d 790, 805–06 (5th Cir. 2014) (finding "no authority … that would permit an evidentiary inquiry into the Article III standing of absent class members during class certification"); *Fox v. Saginaw Cnty.*, 67 F.4th 284, 296 (6th Cir. 2023) ("Because class members are not parties before class certification, a court need not worry about their standing until it certifies the class." (citations omitted)); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (rejecting the idea that "before certifying a class [a] district judge [is] required to determine which class members ha[ve] suffered damages"); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (observing that "federal courts 'do not require that each member of a class submit evidence of personal standing'" (quoting *Denney*, 443 F.3d at 263)); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1214 (10th Cir. 2014) ("[C]lass 'standing' does not require individualized proof from class members."); *Cordoba*, 942 F.3d at 1273 (11th Cir.) (rejecting the idea that "all class members must prove their standing before a class [can] be certified"); *Nat'l ATM Council*, 2023 WL 4743013, at *6 (D.C. Cir.) (requiring, at class certification, only that plaintiffs "provide a reliable *method* for establishing class-wide injury" (emphasis added)).

Thus, where, as here, the named plaintiffs have shown injury to themselves and offered a method of

undisputed reliability, *see* Pet. App. 5a n.2, to establish whether "all class members were injured or [whether] they were not," *id.* at 4a, courts routinely find certification to be appropriate. *See, e.g.*, *Lytle*, 114 F.4th at 1024 (holding that named plaintiffs may, "in appropriate circumstances, satisfy th[eir] burden" at class certification "through a proffer of a reliable method of obtaining evidence that will come into existence once a damages model is executed, even when the results are not yet available at the class certification stage"); *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 893 (11th Cir. 2023) ("At the class certification stage, all that the named plaintiffs ha[ve] to prove [is] that a reliable damages methodology exist[s], not the actual damages plaintiffs sustained."); *In re Nexium*, 777 F.3d at 21 (affirming class certification based on "confidence" that a workable "mechanism would exist for establishing injury at the liability stage of th[e] case"). Bayer has not identified a single case rejecting this approach.

B. Bayer's contention that there is a circuit split as to a different question is irrelevant and incorrect.

Pivoting from its question presented, Bayer devotes a substantial portion of its petition to a *different* question: whether a class must be "defined in such a way that anyone within it would have standing." Pet. 16 (quoting *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021)). The answer to this question—which is distinct from Bayer's question presented regarding a plaintiff's evidentiary burden at the class-certification stage—is irrelevant here. Even if this Court were to hold, as Bayer asks, that a class must be defined to include only those members with Article III standing, the

classes here would satisfy that requirement because, if Plaintiffs are correct on the merits, every class member paid an inflated price. *See* Pet. App. 4a; *see also FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022) (stating that, "[f]or standing purposes, [courts] accept as valid the merits of [plaintiffs'] legal claims").

What is more, Bayer is wrong that "the circuits are divided" over whether a court may properly certify a Rule 23(b)(3) class—unlike the classes here—that is defined in such a way that, even on the plaintiff's theory, it might include some uninjured members. Pet. 15. Rather, every court of appeals to have addressed the issue has held that such a class may be certified, provided that doing so does not cause individualized issues to predominate over issues common to the class and that uninjured class members can be identified and excluded from recovery.

Bayer admits that the First, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all adopted this approach, but it claims that these circuits "disagree over how many" potentially uninjured plaintiffs defeat predominance. *Id.* at 16. In fact, none of the opinions that Bayer cites from these circuits adopts a categorical rule as to how many potentially uninjured plaintiffs are too many. Rather, each opinion engages in a case-specific inquiry as to whether Rule 23(b)(3)'s predominance requirement has been satisfied, notwithstanding the need for an individualized process of identifying and excluding uninjured class members. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018), *cited at* Pet. 16 (reversing class certification where "any class member may be uninjured, and there [were] apparently thousands who in fact suffered no injury" because it would not be possible to "pick[] off" uninjured class

members "in a manageable, individualized process at or before trial"); *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925, 933 (4th Cir. 2025), *cited at* Pet. 18 (holding that district court did not abuse its discretion in declining to certify a class where 32% of the class members were uninjured and "even among the class members that arguably did show injury, the circumstances … varied substantially"); *Spurlock*, 175 F.4th at 252 (4th Cir.), *cited at* Pet. 18 (affirming class certification where there was "no concrete evidence … that uninjured class members would be anything but outliers"); *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883, 898 (7th Cir. 2025), *cited at* Pet. 17 (stating that the point at which individualized inquiries into injury overwhelm common questions is "a matter of degree, and will turn on the facts as they appear from case to case" (citation omitted)); *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc), *cited at* Pet. 18–19 (explaining that Rule 23(b)(3) "requires only that the district court determine after rigorous analysis whether … common question[s] predominate[] over any individual questions, including individualized questions about injury"); *Rider v. OXY USA, Inc.*, 175 F.4th 1214, 1228 (10th Cir. 2026), *cited at* Pet. 17, *certiorari petition filed* (U.S. No. 26-613) (reversing denial of class certification where the defendant failed to show that "it would be … onerous" to identify the class members who are not entitled to recovery); *Cordoba*, 942 F.3d at 1277 (11th Cir.), *cited at* Pet. 17 (holding that a district court "must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in [a] case, when it appears that a large portion of the class does not have standing, …

and making that determination … will require individualized inquiries"); *In re Rail Freight Fuel Surcharge Antitrust Litig.—MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019), *cited at* Pet. 16–17 (holding that the district court did not abuse its discretion in denying class certification where it had engaged in a "nuanced" analysis showing that "individualized adjudications" would be necessary to weed out thousands of uninjured class members).

The only courts that Bayer contends have taken a different approach are the Second and Eighth Circuits. *See* Pet. 15–16. According to Bayer, these courts categorically preclude certification of any class that might include uninjured members. *See id.* Yet these circuits, too, consider the possibility of uninjured class members as part of a fact-specific predominance inquiry.

Contrary to Bayer's representation, the Second Circuit does not require a showing at the class-certification stage that "all class members … have suffered an Article III injury." *Id.* at 15. Rather, the Second Circuit requires only a showing that "at least one named plaintiff can demonstrate the requisite injury." *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir. 2022). Although Bayer cites the Second Circuit's earlier decision in *Denney* as holding that "no class may be certified that contains members lacking Article III standing," Pet. 15–16 (quoting *Denney*, 443 F.3d at 264), *Hyland* expressly disavows that reading of *Denney*. *See Hyland*, 48 F.4th at 118 n.1. And following *Denney*, the Second Circuit, like other courts, has treated the possibility of individualized injury determinations as a factor in the predominance analysis, not as a categorical bar against certification. *See, e.g.*, *Cordes & Co. Fin. Servs., Inc. v. A.G.*

Edwards & Sons, Inc., 502 F.3d 91, 95 (2d Cir. 2007) (remanding for district court to "decide whether … factual questions" related to injury "are common to the class" and, if not, "whether common questions nonetheless predominate"). In fact, two of the recent district court decisions that Bayer faults for being consistent with the decision below arose in the Second Circuit. *See* Pet. 29–30 (citing *Washington v. Reynolds Consumer Prods. LLC*, 2026 WL 2210008 (S.D.N.Y. July 30, 2026), and *Sharpe v. A&W Concentrate Co.*, 2021 WL 3721392 (E.D.N.Y. July 23, 2021)).

The Eighth Circuit likewise treats individualized issues of injury as a consideration that goes to predominance. *See, e.g.*, *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008) (treating the need for "individual determinations concerning the extent to which particular plaintiffs have suffered injuries" as a factor in the predominance analysis). In arguing to the contrary, Bayer relies on language from *Avritt*, which states that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." Pet. 16 (quoting *Avritt*, 615 F.3d at 1034). The Eighth Circuit, though, made this observation in rejecting the argument that individual issues of injury posed no obstacle to predominance where state law conferred a right to relief on uninjured parties. *Avritt*, 615 F.3d at 1033. *Avritt*, in other words, stands for the idea that an uninjured party is not a proper plaintiff in federal court. It is not fairly read to create a categorical rule that a court must be able to identify and exclude all uninjured class members prior to certification.

Bayer also cites the Eighth Circuit's decision in *Johannessohn* for the proposition that "a class cannot be certified unless it is 'defined in such a way that

anyone within it would have standing.'" Pet. 16 (quoting *Johannessohn*, 9 F.4th at 987). *Johannessohn* made this statement only after concluding that the district court had acted within its discretion in finding that Rule 23(b)(3) predominance was *not* satisfied. *See* 9 F.4th at 984–85. And Eighth Circuit cases that have applied *Johannessohn* have done so in the course of conducting a straightforward predominance analysis. *See In re Folgers Coffee Mktg.*, 159 F.4th 1151, 1156–58 (8th Cir. 2025) (reversing class certification in a false advertising case on predominance grounds where, among other things, "consumer-by-consumer inquiries" would be necessary to determine which class members had experienced an "ascertainable loss" as a result of the challenged misrepresentations).

Ultimately, then, Bayer has not identified any case that treats the possibility of uninjured class members as a categorical bar to certification, rather than as a consideration in the Rule 23(b)(3) predominance analysis. In any event, as explained above, any claimed circuit-level disagreement on this point is irrelevant here, because if Plaintiffs prevail on the merits of their claims, it necessarily follows that "all class members were injured." Pet. App. 4a.

III. The Ninth Circuit correctly held that the district court acted within its discretion in granting class certification.

The Ninth Circuit's straightforward application of established Rule 23 standards led to the correct result: The district court did not abuse its discretion in finding class treatment appropriate for Plaintiffs' claims. In fact, Bayer does not identify any Rule 23 requirement that it claims Plaintiffs have failed to

satisfy. Bayer instead largely attempts to cast doubt on the merits of Plaintiffs' state-law claims. But the question whether Plaintiffs will prevail at trial or even at the summary-judgment stage is not the inquiry at the class-certification stage. At this stage, the inquiry is whether Plaintiffs' claims can be efficiently resolved on a class-wide basis. Bayer identifies no error in the district court's conclusion that they can be, let alone an error that amounts to an abuse of discretion.

Not only are they beside the point, but Bayer's criticisms of Plaintiffs' evidence are also baseless. Bayer first focuses on one expert report that found that removing the word "natural" from Bayer's product labels did not have a statistical impact on the beliefs of the consumers that the expert surveyed. *See* Pet. 8–12. Defendants, however, disregard other evidence that the "natural" label is material to a reasonable consumer's purchase decisions, including Plaintiffs' unrebutted testimony that they purchased Bayer's products in reliance on the label and the statement of Bayer's vice president of marketing that she decided to retain the "natural" label to influence consumer perception. *See* Pet. App. 28a–29a. More to the point, Bayer does not challenge the Ninth Circuit's determination that the relevant state laws do not require individualized proof of materiality and reliance, so, regardless of whether Plaintiffs are correct or Bayer is, the issue of materiality can be decided on a class-wide basis once the evidentiary record is complete.

Bayer also challenges the adequacy of Plaintiffs' expert testimony that a conjoint analysis can reliably measure the price premium attributable to the "natural" label. Because the expert has not yet run the analysis, Bayer contends, it is possible that the

analysis could reveal that there was no price premium at all. *See* Pet. 12–13. Given the evidence of materiality, however, it is reasonable to infer that there is *some* price premium attributable to Bayer's labeling claim. And here again, Bayer simply disregards that the fact and amount of the price premium is subject to common proof, such that it can be determined with respect to all class members at once. At any rate, the parties' case-specific, factual disagreement over the existence of a price premium does not merit this Court's review.

IV. Bayer's policy arguments do not counsel in favor of review.

Bayer is ultimately left to urge this Court to grant review for policy reasons. *See* Pet. 26–30. Bayer's policy concerns, though, largely amount to little more than objections to Rule 23's class-action mechanism itself. Those objections, which are better addressed to the Rules Committee, offer no reason why review is warranted in this case.

Bayer first emphasizes that defending against a class action can be costly and maintains that class certification can increase a defendant's incentive to settle. Pet. 26–27. But Bayer offers no reason why mounting a defense in this case will be unusually costly, nor does it explain how resolution of its question presented would influence its settlement incentives. Bayer faces class-wide liability only to the extent that Plaintiffs produce sufficient evidence of a price premium to withstand a summary judgment motion. To the extent that Plaintiffs do so, certification is proper even under Bayer's view of the law. In other words, Bayer's liability risk (and its corresponding incentive to settle the case) hinges on the strength

of Plaintiffs' evidentiary showing—not on the timing of when Plaintiffs are required to make that showing.

Bayer next voices concern that other courts will mimic the analysis that the Ninth Circuit performed in this case. *Id.* at 28–30. But two of the cases that Bayer cites to support its concern that other courts will follow the Ninth Circuit's "roadmap," *id.* at 28, predate the Ninth Circuit's decision in this case by years, *see id.* at 29–30 (citing *Sharpe v. A&W Concentrate Co.*, 2021 WL 3721392 (E.D.N.Y. July 23, 2021), and *Bechtel v. Fitness Equip. Servs., LLC*, 339 F.R.D. 462 (S.D. Ohio 2021)). Rather than identifying a problem with the court of appeals' decision in this case, Bayer's argument underscores that the court properly applied established principles.

Finally, Bayer maintains that its question presented arises repeatedly. Pet. 30. Bayer, however, cites to petitions that have presented the question whether a class may be defined in such a way that it might include uninjured members even if the plaintiffs prevail on the merits of their claims—a distinct question from Bayer's question presented, and a question whose resolution has no consequence for this case in any event. *See supra* Part II.B. If Bayer is correct that this definitional question regularly arises, this Court will have ample opportunity to consider whether review of that question is warranted in the context of a case that actually presents it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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