No.

IN THE

Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In two related decisions, the Fifth Circuit held that a class may be certified consistent with Federal Rule of Civil Procedure 23 and Article III of the Constitution even when the class includes vast numbers of members who have not suffered any injury caused by the defendant. On that basis, the court of appeals upheld a class-action settlement entered into between BP and a class of plaintiffs purportedly injured by the *Deepwater Horizon* oil spill, notwithstanding the district court's determination that the agreement requires BP to compensate claimants who have not suffered any injury as a result of the spill. The Second, Seventh, Eighth, and D.C. Circuits have adopted a contrary rule, concluding that certification is inappropriate where many members of the class have not been injured by the defendant.

The question presented is whether the court of appeals erred in holding—in conflict with the Second, Seventh, Eighth, and D.C. Circuits—that district courts can, consistent with Rule 23 and Article III, certify classes that include numerous members who have not suffered any injury caused by the defendant.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

BP Exploration & Production Inc.; BP America Production Co.; and BP p.l.c. were defendants-appellees in No. 13-30095 below and defendants-appellants in No. 13-30315 below. They are petitioners in this Court. Lake Eugenie Land & Development, Inc.; Bon Secour Fisheries, Inc.; Fort Morgan Realty, Inc.; LFBP 1, LLC, doing business as GW Fins; Panama City Beach Dolphin Tours & More, LLC; Zekes Charter Fleet, LLC; William Sellers; Kathleen Irwin; Ronald Lundy; Corliss Gallo; John Tesvich; Michael Guidry; Henry Hutto; Brad Friloux; and Jerry J. Kee represent the Economic and Property Damages Class that the district court certified, for settlement purposes only, on December 21, 2012. They were plaintiffs-appellees in No. 13-30315 below and are respondents in this Court. Bon Secour Fisheries, Inc., was also a plaintiff-appellee in No. 13-30095 below.

The *Deepwater Horizon* Court Supervised Settlement Program and Patrick A. Juneau, Jr., were defendants-appellees in No. 13-30329 (consolidated with No. 13-30315) below. Cobb Real Estate, Inc.; G&A Family LP; L&M Investments, Ltd.; Mad, Ltd.; Mex-Co, Ltd.; Robert C. Mistrot; Missroe, LLC; Earl Aaron; Janie Aaron; Zuhair Abbasi; Michael Abbey; and Mohammad Abdelfattah were plaintiffs-appellants in No. 13-30095 below. Ancelet's Marina, LLC; J.G. Cobb Construction, Ltd.; Ships Wheel; Allpar Custom Homes, Inc.; and Sea Tex Marine Service, Inc., were claimants-appellants in No. 13-30095 below. Mike Sturdivant; Patricia Sturdivant; James H. Kirby, III; James H. Kirby, IV; Susan Forsyth; Troy D. Morain; Stanley Paul Baudin, Esq.; Donald

Dardar; Thien Nguyen; Daniel J. Levitan (State Prisoner: #650607); Reynaldo Abreu; Adonay Aparecio; and Miguel Arellano were claimants-appellants in No. 13-30095 below but were terminated as parties to the appeal. Shanta, LLC; SSM Hospitality, LLC; Anjani Hospitality, LLC; Ashi Hotels, LLC; and OVS Investment, Inc., were plaintiffs-appellants in No. 13-30095 but were terminated as parties to the appeal. Gulf Organized Fisheries in Solidarity & Hope, Inc., was a movant-appellant in No. 13-30095 but was terminated as a party to the appeal.

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

BP America Production Company is not publicly traded. BP America Production Company is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

BP Exploration & Production Inc. is not publicly traded. BP Exploration & Production Inc. is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

BP p.l.c. is a corporation organized under the laws of England and Wales. Shares of BP p.l.c. are publicly traded via American Depository Shares on the New York Stock Exchange and via ordinary shares on the London Stock Exchange. BP p.l.c. has no parent corporation, and no publicly held corporation owns 10% or more of the stock of BP p.l.c.

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Petitioners BP Exploration & Production Inc., BP America Production Co., and BP p.l.c. (collectively, "BP") respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Two opinions of the court of appeals (App., *infra*, 78a, 1a) are reported at 744 F.3d 370 ("*Deepwater Horizon III*"), and 739 F.3d 790 ("*Deepwater Horizon II*"); a third (App., *infra*, 295a) is unreported. One relevant opinion of the district court (App., *infra*, 109a) is reported at 910 F. Supp. 2d 891; the other two relevant orders (App., *infra*, 271a, 301a) are unreported. Two orders of the court of appeals denying rehearing and rehearing en banc (App., *infra*, 364a, 379a) are reported at 753 F.3d 509, and 753 F.3d 516; the third (App., *infra*, 394a) is not yet published but is electronically reported at 2014 WL 2118614, and the fourth (App., *infra*, 392a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on January 10, 2014 in *Deepwater Horizon II* and on March 3, 2014 in *Deepwater Horizon III*. The court denied timely petitions for rehearing in both appeals on May 19, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Federal Rule of Civil Procedure 23 and Article III of the United States Constitution are reproduced in the Appendix, *infra*, at 407a-15a.

STATEMENT

In the decisions below, the Fifth Circuit held that a class may be certified consistent with Federal Rule of Civil Procedure 23 and Article III of the Constitution even when the class includes vast numbers of members who have not suffered any injury caused by the defendant. On that basis, the court of appeals upheld a class action agreement entered into between BP and a class of plaintiffs purportedly injured by the *Deepwater Horizon* oil spill, notwithstanding the district court's determination that the agreement requires BP to compensate claimants whose injuries (if any) were not caused by the spill. Both of the court's rulings prompted dissents from the panel decisions and dissents from denial of rehearing en banc, and produced sharply divided 5-8 votes of the Fifth Circuit on rehearing en banc.

As recognized by the dissents below (App., *infra*, 61a, 100a, 385a, 396a), the Fifth Circuit's opinions deepen a circuit conflict on whether a class may be certified that contains many members with no injury caused by the defendant. Four courts of appeals have held that a class does not satisfy Rule 23 and Article III when it is defined to include numerous members who have not suffered any injury caused by the defendant. Those courts of appeals would have rejected certification of a settlement class interpreted as the Fifth Circuit has done here. In contrast, one court of appeals has, like the Fifth Circuit in these appeals, upheld certification of a class even when numerous members of that class lack any injury caused by the defendant. This Court should grant review to establish a single, nationally uniform rule governing whether classes that include numerous

members with no injury caused by the defendant can appropriately be certified.

The Fifth Circuit's decisions also warrant review because they are inconsistent with this Court's holdings that Rule 23 must be "interpreted in keeping with Article III constraints," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997), and that Article III standing must be satisfied at each "stag[e] of the litigation," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Fifth Circuit upheld class certification despite an interpretation of the class that indisputably sweeps in numerous members who lack standing to bring suit against BP because their losses (if any) were not caused by the spill. The court justified this result based on the conclusory allegation of causal nexus made in the class complaint. Yet this approach conflicts with this Court's class-certification precedents, which require district courts to "'probe behind the pleadings,'" *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted), to ensure that class proponents have met their burden of "prov[ing]" that the requirements for certification are "*in fact*" established, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011); *see also*, *e.g.*, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("[P]laintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23 . . . .").

The Fifth Circuit's approach permits certification of a class that, as interpreted, includes claimants with no injury caused by the spill, and thus does not satisfy the commonality and adequacy requirements of Rule 23(a), the predominance requirement of Rule 23(b)(3), and the bedrock standing requirements of

Article III. In each of these respects, the Fifth Circuit's decision is inconsistent with precedents of this Court and of the courts of appeals, and the question resolved below is exceptionally important to the proper interpretation and implementation of Rule 23.

> As the Fifth Circuit itself recognized,
> [t]his case is one of the largest and most novel class actions in American history. As such, significant legal questions are involved that will affect the course of class action law in this country going forward, and the class action as a suitable vehicle for the resolution of conflict for businesses and litigants.

In re Deepwater Horizon, 732 F.3d 326, 345 (5th Cir. 2013) ("*Deepwater Horizon I*"). This Court should grant review.

A. FACTUAL BACKGROUND

On April 20, 2010, an explosion on the drilling rig *Deepwater Horizon* caused an oil spill in the Gulf of Mexico. App., *infra*, 109a. In April 2012, BP and attorneys representing a putative class of injured Gulf Coast residents and businesses reached a proposed class settlement of claims arising from the spill. *See id.* at 112a.

The settlement agreement defines a class composed of individuals and entities that satisfy the agreement's geographic requirements and have claims falling within "one or more of the Damage Categories described in" the agreement. Agreement § 1 (ROA.13-30315.4069). The damage category relevant here is the "Economic Damage Category," which is expressly limited to claimants that experienced "[l]oss of income, earnings or profits suffered . . . as a result of" the spill. *Id.* § 1.3.1.2 (ROA.13-30315.4071). An entity whose claim falls within that

category may be entitled to compensation under the agreement's Business Economic Loss ("BEL") framework. *See id.* § 5.3.2 (ROA.13-30315.4095-4096).

To be eligible for compensation under the BEL framework, a BEL claimant that qualifies as a class member must, *inter alia*, satisfy the requirements of the settlement agreement's Exhibit 4B. Subject to certain exceptions, Exhibit 4B requires BEL claimants to satisfy one of several revenue-based "causation" tests, with the exception of claimants in specified regions near the Gulf Coast that are exempt from these tests. Agreement Ex. 4B (ROA.13-30315.4260-4275). Class members can satisfy Exhibit 4B by showing, for example, that their business revenues declined a specified amount following the spill and then increased by a specified amount in the year after the spill, or simply that they were located in certain regions near the Gulf. *See id.* Ex. 4B, at 1 (ROA.13-30315.4260).

By its terms, however, Exhibit 4B "does not apply to . . . Entities, Individuals, or Claims not included within the Economic Class definition." Agreement Ex. 4B, at 1 n.1 (ROA.13-30315.4260). Thus, as drafted, the Exhibit 4B tests applied only to BEL claimants who had *already* satisfied the requirements for class membership, including the requirement that they have experienced "[l]oss of income, earnings or profits suffered . . . as a result of" the spill. *Id.* § 1.3.1.2 (ROA.13-30315.4071).

On December 21, 2012, the district court approved the settlement and certified a settlement class. The district court appointed a Claims Administrator to implement the settlement agreement and to head a court-supervised claims-processing program (the "Settlement Program"), subject to judicial

review. Agreement § 4.3.10 (ROA.13-30315.4085). The district court's order certifying the class emphasized that, under the settlement, "each class member traces his injury directly to the [spill]." App., *infra*, 161a.

B. PROCEEDINGS BELOW

In January 2013, several objectors to class certification filed an appeal challenging the district court's order certifying the settlement class and approving the settlement (the "Certification Appeal"). Thereafter, in April 2013, BP filed an appeal (the "BEL Appeal") challenging the district court's interpretation of the agreement's compensation provisions.

In his brief in the BEL Appeal, the Claims Administrator conceded that he had paid claims "for losses that a reasonable observer might conclude were not in any way related to the Oil Spill." C.A. Br. of Settlement Program at 16. In processing and paying claims, the Claims Administrator was interpreting the settlement agreement to include within the class numerous claimants whose alleged injuries were not related to the spill, reasoning that, so long as the tests in Exhibit 4B were satisfied, there was no need for "any further inquiry into whether or not the loss was factually caused by the oil spill." App., *infra*, 314a; *see also id.* at 64a-65a & n.5 (Garza, J., dissenting) (noting that the Claims Administrator had "effectively eliminated" any causation requirement by "compensat[ing]" claimants "*without regard to whether* [*their*] *losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill*").

1. The BEL Decision

On October 2, 2013, in an opinion authored by Judge Clement, a panel of the Fifth Circuit (the "BEL Panel") vacated a decision of the district court that had approved a disputed methodology for calculating BEL compensation under the agreement. *Deepwater Horizon I*, 732 F.3d 326; *see also* App., *infra*, at 297a-99a (per curiam).

Judge Clement also explained, in a portion of her opinion written only for herself, that the Claims Administrator's practice of making awards to claimants whose injuries were not fairly traceable to the spill raised serious concerns under Rule 23 and Article III. *See Deepwater Horizon I*, 732 F.3d at 340-44 (opinion of Clement, J.). She emphasized that, if the settlement agreement were interpreted to include claimants with no colorable claims against BP, that interpretation would imperil the district court's certification of the class and final approval of the settlement. Rule 23 and Article III, Judge Clement explained, gave the district court "no authority to approve the settlement of a class that included members that had not sustained losses at all, or had sustained losses unrelated to the oil spill." *Id.* at 343. Accordingly, she concluded, "the district court should have rendered the Settlement lawful by adopting [an] interpretation" that "exclude[s] putative class members with no colorable legal claim." *Ibid.* Another member of the BEL Panel—Judge Southwick—agreed that this portion of Judge Clement's opinion was "logical." *Id.* at 346 (Southwick, J., concurring).

By a 2-1 vote, the BEL Panel remanded for the district court to address the problems identified in its opinion. 732 F.3d at 346; *see also id.* at 347 (Dennis, J., dissenting). On December 24, 2013, however, the

district court upheld the Claims Administrator's refusal to limit class membership to claimants that were injured by the spill. *See* App., *infra*, at 353a-55a.

The district court acknowledged that, "so long as a claim satisfied one of the tests set forth in Exhibit 4B to the Settlement," the Claims Administrator "would deem the claim eligible for payment without any further inquiry into whether or not the loss was factually caused by the oil spill." App., *infra*, 314a. Thus, the court noted, "whether a business economic loss is 'as a result of' the Deepwater Horizon Incident for purposes of the Settlement is determined exclusively and conclusively by Exhibit 4B," *id.* at 326a, rather than whether—as a matter of fact—the "claim is causally connected to the oil spill," *id.* at 325a. But even though the court thus conceded that the settlement agreement was being interpreted to permit payments for injuries with no plausible connection to the spill, it nonetheless concluded that the agreement did not violate Rule 23 or Article III. *Id.* at 330a-53a.

BP promptly challenged this ruling in the Fifth Circuit, pointing to unrebutted record evidence that the Claims Administrator had awarded hundreds of millions of dollars to thousands of entities whose purported losses were not fairly traceable to the spill. Those awards include $76 million to entities whose entire losses unquestionably had nothing to do with the spill, such as lawyers who lost their law licenses and warehouses that burned down before the spill occurred. App., *infra*, 418a, 420a.

For example, the Claims Administrator awarded nearly $3.5 million to an excavation company in Alabama, even though its revenue drop during the rele-

vant period was exclusively the result of the company's decision to sell substantially all of its assets in 2009—before the spill occurred. *See* App., *infra*, 428a-29a. Similarly, the Claims Administrator awarded more than $135,000 to a central Louisiana wireless phone retailer that was not even engaged in profit-generating activity in 2010 because its principal facility was closed because of fire damage. *See id.* at 420a. And an attorney in northern Louisiana was awarded more than $172,000 from the settlement program even though his business license had been revoked in 2009, before the spill. *See ibid.*

The record reflects many other awards to the same effect. *See*, *e.g.*, App., *infra*, 420a-44a. And the illegitimate awards also included an additional $546 million to claimants that reside far from the Gulf Coast and are engaged in business activities that bear no logical connection to the spill, such as commodity farms that sell in a nationwide or worldwide market or contingency fee law firms. *See id.* at 419a, 445a-48a.

2. The Certification Decision

On January 10, 2014, while BP's challenge to the district court's causation decision was pending, a different Fifth Circuit panel (the "Certification Panel") affirmed class certification in a divided decision. App., *infra*, 1a. Concluding that it was "not called upon to address" the settlement agreement's "appl[ication] . . . to each individual claim," the panel majority limited its analysis to the validity of the settlement agreement as written. *Id.* at 30a.

The Certification Panel therefore refused to consider the evidence presented by BP, which demonstrated that the district court had expanded class membership to include "vast numbers of members

who suffered no Article III injury." App., *infra*, 11a (internal quotation marks omitted). Instead, the majority concluded that evidence of numerous class members whose injuries are not traceable to the defendant's conduct is "simply irrelevant" at the Rule 23 certification stage. *Id.* at 26a.

Under circuit precedent, the panel majority explained, "'[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.'" App., *infra*, 26a (quoting *Mims* v. *Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009)) (alteration in original). For purposes of Article III, the majority continued, a district court need not "'probe behind the pleadings'" to "consider the evidence regarding absent class members' standing" because, so long as "the class is defined so that every absent class member 'can *allege* standing,'" "it would be improper to look for proof of injuries beyond what the claimants identified in the class definition." *Id.* at 25a-27a (citation omitted).

"The result is no different," the majority concluded, under Rule 23. App., *infra*, 60a. For example, it explained, courts need not look beyond the pleadings "to resolve the merits of [a] common contention at the Rule 23 stage." *Id.* at 37a. Thus, the majority continued, the district court "did not err by failing to determine whether the class contained individuals who have not actually suffered any injury, because this would have amounted to a determination of the truth or falsity of the parties' contentions, rather than an evaluation of those contentions' commonality." *Id.* at 39a.

According to the majority, such an approach "was expressly ruled out" (App., *infra*, 39a) in this Court's

decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Instead, the majority held, it is sufficient that class members raise a common contention in the complaint. *Id.* at 34a-39a. The majority accordingly held that the requirements of Rule 23 and Article III were satisfied at the certification stage by each settlement class member's bare allegation of "loss . . . as a result of the [spill]." *See id.* at 19a-23a (alteration omitted).

Judge Garza dissented, on the ground (which the majority did not dispute) that the district court had interpreted the agreement in such a way as to cause the class—"as actually implemented"—to "encompass individuals or entities who could never truthfully allege or establish standing, at any stage of the litigation." App., *infra*, 66a. This modification rendered the class invalid under Article III, he explained, because the class now included numerous members who lacked standing to bring a claim against BP. *Ibid.* Moreover, because Rule 23 requires that the common questions "go to the validity of each one of the claims," Judge Garza concluded that commonality was defeated here because the class included numerous members who were not harmed by the spill. *Id.* at 73a (emphasis omitted).

3. The Causation Decision

Finally, on March 3, 2014, a fractured BEL Panel rejected BP's appeal asserting that the district court's interpretation of the settlement agreement to confer class membership on numerous claimants with no colorable claims rendered class certification improper under Rule 23 and Article III. App., *infra*, 78a.

The panel majority "acknowledge[d] . . . a possible inconsistency between what the certification pan-

el says it found to satisfy Article III—namely, a requirement that class members be able to trace their claims to the defendant's conduct—and the way the Settlement Agreement is written and has been implemented," particularly because in the majority's view "the Settlement Agreement does not require a claimant to submit *evidence* that the claim arose as a result of the oil spill." App., *infra*, 89a, 90a. Nonetheless, the majority concluded that the agreement's causation requirement "remained in place during the processing of claims" because each claimant must "attest, . . . under penalty of perjury, that [its] claim in fact was due to the [spill]." *Id.* at 90a, 92a. The majority also stated that "proof of loss [was] substituted for proof of causation" under the settlement agreement, but that this interpretation was permissible because (in light of the Certification Panel's ruling) it did not run afoul of Rule 23 or Article III. *Id.* at 92a.

Judge Clement dissented. She emphasized that the district court's "interpretation and implementation of the agreement eliminated [the causation] requirement when the [Claims Administrator] informed claimants that they would be compensated whether or not their injuries 'resulted . . . from a cause other than the Deepwater Horizon oil spill." App., *infra*, 105a (quoting ROA.13-30315.15863-15864). Thus, she noted—without contradiction by the majority—that "the subsequent implementation has expanded those who can recover even to those who cannot trace their injuries to BP's conduct." *Id.* at 106a.

In this respect, Judge Clement emphasized, the district court had "expanded" the agreement beyond the limits of Article III and had improperly "us[ed]

the powers of the federal courts to enforce obligations unrelated to actual cases or controversies." App., *infra*, 106a. In doing so, the district court had "raise[d] once again the Constitutional concerns that the majority claims were 'put to rest by the certification panel.'" *Id.* at 105a-06a (quoting *id.* at 89a (opinion of Southwick, J.)). By permitting the district court's interpretation to stand, she explained, "[c]laimants whose losses had absolutely nothing to do with Deepwater Horizon or BP's conduct will recover as a result of this ruling." *Id.* at 107a.

4. The Denials of Rehearing and Rehearing En Banc

BP timely sought rehearing en banc of the Certification Panel's January 10 decision and the BEL Panel's March 3 decision. On May 19, 2014, the BEL Panel denied panel rehearing. The author of the panel majority's opinion, Judge Southwick, issued a further opinion accompanying that denial, arguing that parties to a settlement could, consistent with Article III, "stipulat[e] to the form of the proof that would demonstrate causation," and that Exhibit 4B constituted such a stipulation. App., *infra*, 377a. Judge Clement dissented from the denial of rehearing. *See id.* at 368a n.*.

That same day, the Fifth Circuit announced the denial, by a five-to-eight vote, of BP's petitions for rehearing en banc in both appeals. App., *infra*, 383a-84a, 394a-95a. Judge Clement, joined by Judges Jolly and Jones, issued opinions dissenting from the denials of en banc review. Judge Clement reiterated that the district court's implementation of the settlement agreement was "irreconcilable" with both the settlement agreement's causation requirement for class membership and with Article III. *Id.* at 397a.

She also "incorporated by reference" Judge Garza's refutation of the Certification Panel's Rule 23 analysis. *Id.* at 396a n.2 (citing *id.* at 61a-77a (Garza, J., dissenting)).

Judge Clement reemphasized that, under the Fifth Circuit's decisions, "the class of people who will recover from this settlement continues to include significant numbers of people whose losses, if any, were not caused by BP." App., *infra*, 388a. The decisions accordingly would "funnel" windfall payments "into the pockets of undeserving non-victims," an "absurd resul[t]" that effectively made the court of appeals a "party to this fraud." *Id.* at 389a Judge Clement's dissents indicated that Senior Judge Garza would have joined both dissents if he had been "able to vote as an active member of the en banc panel." *Id.* at 396a & n.1, 385a n.1.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decisions deepen an existing circuit conflict on the question whether a district court may, consistent with Rule 23 and Article III, certify a class that includes numerous members who lack any injury caused by the defendant. In addition, the decisions conflict with numerous and important aspects of this Court's Rule 23 and Article III precedents. The Fifth Circuit's decisions address a significant and recurring question in the context of class certification, and this Court should grant review to establish a uniform, nationwide approach to that issue, vacate the judgments below, and permit the lower courts to interpret and enforce the settlement agreement in light of a proper understanding of the governing legal principles under Rule 23 and Article III.

I. THE FIFTH CIRCUIT'S DECISIONS DEEPEN A CIRCUIT CONFLICT ON WHETHER RULE 23 AND ARTICLE III PERMIT CERTIFICATION OF CLASSES CONTAINING MANY MEMBERS THAT HAVE NOT SUFFERED ANY INJURY CAUSED BY THE DEFENDANT.

The Fifth Circuit upheld the settlement in this case even though the settlement class, as interpreted by the district court, contains numerous members that unquestionably have not suffered any injury caused by BP. That decision conflicts with the holdings of four other courts of appeals, which have rejected certification in such circumstances under Rule 23, Article III, or both. In contrast, the Fifth Circuit's opinions are consistent with a divided Third Circuit decision affirming certification even though many class members indisputably lacked any injury caused by the defendant. This deep conflict among the circuits warrants the Court's review.

A. FOUR CIRCUITS HAVE REJECTED CLASS CERTIFICATION WHERE NUMEROUS MEMBERS OF THE PUTATIVE CLASS LACK ANY INJURY CAUSED BY THE DEFENDANT.

The Second, Seventh, Eighth, and D.C. Circuits have rejected certification where, as here, the proposed class contains numerous members who have not sustained any injury caused by the defendant. The Fifth Circuit's opinions below cannot be reconciled with those decisions.

Second Circuit. The Second Circuit has squarely held that "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). Applying that rule in *Denney*, the Second Circuit af-

firmed certification because all members of the class *had* suffered some injury, and it was "clear" that "these injuries [were] fairly traceable to the alleged conduct of defendants." *Id.* at 266. Because it is similarly "clear" that not all members of the class as interpreted below have suffered any injury caused by BP, the Second Circuit's approach would not have permitted certification here.

Seventh Circuit. The Seventh Circuit recognized in *Kohen* v. *Pacific Investment Management Co*. 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." 571 F.3d 672, 677 (7th Cir. 2009). Applying that rule, the Seventh Circuit affirmed certification because the defendant had failed to show that the class actually encompassed individuals who had not been injured by the defendant's conduct. *Id.* at 678.[1]

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[1] The Seventh Circuit rested its "great many persons" approach on the requirements for class certification. With respect to Article III standing, however, the court concluded that "all that is necessary" is that at least "one named plaintiff [has] standing." 571 F.3d at 677. The Third, Ninth, and Tenth Circuits have reached the same conclusion. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998) ("[T]he named plaintiffs satisfy Article III. The absentee class members are not required to make a similar showing . . . ."); *Stearns* v. *Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) ("standing is satisfied if at least one named plaintiff meets the requirement" (internal quotation marks omitted)), *cert. denied*, 132 S. Ct. 1970 (2012); *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1197-98 (10th Cir. 2010) ("only named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing"). These approaches to Article III standing conflict with the Second and Eighth Circuit's precedents discussed in this section, and result in even more confusion because some (but not all) of the courts adopting a

[Footnote continued on next page]

In *Parko* v. *Shell Oil Co.*, by contrast, the Seventh Circuit reversed class certification because (among other reasons) the plaintiffs had failed to establish that class members suffered a common injury. 739 F.3d 1083 (7th Cir. 2014). In that case, a class of homeowners brought suit against oil companies for alleged contamination of the water supply underneath the class members' homes. *Id.* at 1084. Although the Seventh Circuit concluded that the class members had Article III standing, it held that certification was improper because the plaintiffs "ha[d] presented no theory, let alone credible evidence, of a connection between the leaks [and] property values . . . that would justify a class action on behalf of all the property owners whose properties sit above groundwater that contains an amount of benzene considered dangerous to human health . . . if drunk." *Id.* at 1087. And the court of appeals emphasized that "there is, as yet[,] . . . no evidence that any of [the groundwater] is ever drunk"—and thus whether some class members had suffered an injury caused by the defendants. *Ibid.* (emphasis omitted).

Although the Seventh Circuit thus might permit certification where a small number of class members lacked any injury caused by the defendant, it has squarely disapproved of classes where a "great

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lenient approach to standing have taken a more restrictive approach to class certification: The Seventh and Tenth Circuits would reject certification on non-standing grounds where, as here, many class members did not suffer any injury caused by the defendant, whereas the Third Circuit would not. *Compare infra* at 17-18, 20 n.3, *with infra* at 21-22. The caselaw in this area is confused and fractured, and this Court's review is needed to establish a uniform rule on this important question.

many" members have no such injuries. *Kohen*, 571 F.3d at 677. That is precisely the case here: Neither the Fifth Circuit nor the district court disputed BP's evidence (and the Claims Administrator's concession) establishing that the class, as currently interpreted, contains numerous class members with no injury caused by BP's conduct. *See supra* at 8-9.[2]

Eighth Circuit. The Eighth Circuit has adopted the same categorical approach as the Second Circuit. In *Halvorson* v. *Auto-Owners Insurance Co.*, the Eighth Circuit held that, under Article III and Rule 23, "each member" of a class "must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision." 718 F.3d 773, 778 (8th Cir. 2013).

In that case, a class of policyholders sued their automobile insurance company for alleged underpayments on medical expenses. 718 F.3d at 774. The district court concluded that Rule 23's predominance requirement was satisfied on the ground that the class members "'suffered the same injury,'" if any, since "'their claims were handled in a uniform manner.'" *Id.* at 776. The Eighth Circuit reversed the certification order. Emphasizing that the record did not indicate that all class members could show Article III standing, the Eighth Circuit held that certification was improper because individual questions regarding injury and damages (including the absence

[2] The Seventh Circuit's willingness to accept classes containing some, but fewer than a "great many," members with no colorable claim itself gives rise to a circuit conflict with the three other courts of appeals discussed in this section, which have adopted categorical rules. The Court could also resolve this conflict here even though the decisions below are inconsistent with both lines of authority.

of injury and damages for some class members) predominated. *Id.* at 779-80.

Because individualized inquiries would be necessary to determine whether any given class member could show an injury caused by the defendant's conduct, the Eighth Circuit concluded, those questions would predominate over common issues and certification was therefore improper. 718 F.3d at 779-80. The same is true here: Under the interpretation of the class adopted below, individualized inquiries would have been necessary to determine which members of the class actually suffered an injury caused by BP, and such individualized issues would "overwhelm" any purportedly common issues, thereby precluding class certification. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013). The fact that the parties reached a class settlement obviating the need to adjudicate these individualized issues at trial does not change the Rule 23 analysis; except for the element of manageability, "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997); *see also id.* at 623 (predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy, *questions that preexist any settlement*." (emphasis added)).

D.C. Circuit. Finally, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the D.C. Circuit held that Rule 23 requires putative class members to "show that they can prove, through common evidence, that all class members were in fact injured by

the alleged conspiracy." 725 F.3d 244, 252 (D.C. Cir. 2013) (citing *Amchem*, 521 U.S. at 623-24).

In that case, a class of freight shippers sued major freight railroads, claiming that the railroads' alleged price-fixing scheme had caused the class members to overpay. 725 F.3d at 247-48. Instead of showing individual, traceable injury, the plaintiffs attempted to satisfy Rule 23(b)(3)'s predominance requirement by relying on statistical models to establish an "inference of causation" and thereby show injury-in-fact as to the individual class members. *Id.* at 250. The court of appeals rejected that approach, vacating the district court's order certifying the class and requiring the class proponents to present sufficient "common evidence to show *all* class members suffered *some* injury." *Id.* at 252 (first emphasis added).

Under the D.C. Circuit's approach, the class as interpreted below could not be certified because there is no "common evidence to show *all* class members suffered some injury" caused by BP, 725 F.3d at 252—and, indeed, it is clear that many of them did not.[3]

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[3] The Fifth Circuit's decisions also conflict with decisions of the Tenth and Eleventh Circuits, which have indicated in unpublished decisions that they share the approach to certification adopted by the Second, Seventh, Eighth, and D.C. Circuits. In *Chieftain Royalty Co.* v. *XTO Energy, Inc.*, the Tenth Circuit vacated a certification order because the district court had failed to evaluate whether individual class members actually suffered the alleged injury that formed the basis of the class-wide claims. 528 F. App'x 938, 943-44 (10th Cir. 2013). And in *Bussey* v. *Macon County Greyhound Park, Inc.*, the Eleventh Circuit similarly reversed a class certification order because the district court had failed to conduct a "rigorous analysis" to de-

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B. TWO COURTS OF APPEALS, INCLUDING THE FIFTH CIRCUIT BELOW, HAVE UPHELD CERTIFICATION EVEN WHERE MANY CLASS MEMBERS LACK ANY INJURY CAUSED BY THE DEFENDANT.

In conflict with these decisions, the Fifth Circuit refused in these appeals to enforce the limits imposed by Rule 23 and Article III. The court below expressly upheld the settlement agreement as lawful and consistent with Rule 23 and constitutional standing requirements even while affirming the district court's interpretation of the agreement, which admittedly includes within the class numerous claimants that have no injury caused by the oil spill. App., *infra*, 89a-91a & n.1.

At least one other court of appeals has also held that class certification is appropriate even when many class members have not suffered any legally cognizable injury caused by the defendant. In *Sullivan* v. *DB Investments, Inc.*, the Third Circuit affirmed the certification of a proposed class of diamond purchasers—both direct and indirect purchasers—who sued the dominant diamond wholesaler for alleged antitrust violations. 667 F.3d 273, 285-86 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1876 (2012). The Third Circuit upheld the class of indirect diamond purchasers even though "a large proportion of the Indirect Purchaser Class lack[ed] any valid claims under applicable state substantive law," concluding that the lack of statutory standing for some

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termine whether class members had actually suffered identifiable losses. — F. App'x —, No. 13-12733, 2014 WL 1302658, at *6 (11th Cir. Apr. 2, 2014) (per curiam).

class members "does not establish a concomitant absence of other predominantly common issues." *Id.* at 305, 307.

The *Sullivan* decision was fractured and (like the opinions at issue here) included a strong dissent. As explained in the dissenting opinion, "for there to be any common questions, all class members must have at least some colorable legal claim." 667 F.3d at 344 (Jordan, J., dissenting). The dissent reiterated that, "when a federal court issues an order certifying that there are questions of fact or law common to all class members, it necessarily concludes, whether explicitly stated or not, that all class members have at least some colorable legal claim." *Id.* at 356. The Third Circuit's approach, like the Fifth Circuit's here, would thus not have regarded the fact that numerous members of the class lacked any claim against the defendant as a bar to class certification. That, however, only underscores the division within the lower courts.

* * *

The Second, Seventh, Eighth, and D.C. Circuits (and the Tenth and Eleventh Circuits as well, *see supra* at 20 n.3) would have rejected certification of a settlement class construed in the manner upheld here. Each of those circuits would have held that, to satisfy Rule 23, Article III, or both, the class could not be interpreted to include numerous members with no "injury in fact that is traceable to the defendant." *Halvorson*, 718 F.3d at 778; *see also Parko*, 739 F.3d at 1087; *In re Rail Freight*, 725 F.3d at 252; *Kohen*, 571 F.3d at 677; *Denney*, 443 F.3d at 264. Given the deep division of authority among the courts of appeals, this Court should grant review to establish a single, nationally uniform rule governing

whether a district court may certify a class that contains numerous members who lack any injury caused by the defendant.

II. THE FIFTH CIRCUIT'S DECISIONS ARE INCONSISTENT WITH THIS COURT'S CASES.

This Court also should grant review because the Fifth Circuit's decisions directly conflict with this Court's own precedents.

A. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S HOLDINGS THAT RULE 23 AND ARTICLE III ARE NOT MERELY PLEADING REQUIREMENTS.

The Fifth Circuit's decisions conflict with this Court's precedents holding that Rule 23 and Article III are not mere pleading requirements.

1. Article III. This Court has held that Rule 23 must be "interpreted in keeping with Article III constraints, and with the Rules Enabling Act," which "instructs that rules of procedure" such as Rule 23 "'shall not abridge, enlarge or modify any substantive right.'" *Amchem*, 521 U.S. at 613 (quoting 28 U.S.C. § 2072(b)). By affirming the district court's expansion of the class to include claimants whose injuries (if any) were not caused by the spill, the Fifth Circuit embraced a modified class definition that includes numerous members that lack standing to bring suit against BP. Rather than confront that undisputed fact, the Certification Panel held that Article III is satisfied if the "'the class is defined so that every absent class member 'can *allege* standing.'" App., *infra*, 26a (citation omitted).

But this blind reliance on conclusory allegations that are contradicted by the actual implementation of the settlement disregards the federal courts' duty

to ensure that Article III standing is satisfied at each "stag[e] of the litigation," and that the elements of Article III standing are not reduced to "mere pleading requirements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *accord Lewis* v. *Casey*, 518 U.S. 343, 358 (1996). The Fifth Circuit believed that "it would be improper to look for *proof* of injuries beyond what the claimants identified in the class definition," App., *infra*, 26a (emphasis added), but this simply transforms Article III into a hollow "pleading requiremen[t]" that any class proponent could satisfy through conclusory pleading.

The BEL Panel exacerbated this problem by concluding that the parties had "use[d] proof of loss [under Exhibit 4B] as a substitute for proof of causation." App., *infra*, 88a. As Judge Southwick emphasized in his opinion concurring in the denial of panel hearing, the Fifth Circuit's essential holding was that parties to a class settlement may "stipulat[e] to the form of . . . proof that would demonstrate" an element of Article III standing. *Id.* at 377a. But that conclusion directly conflicts with this Court's holdings that "no action of the parties can confer subject-matter jurisdiction upon a federal court," *Ins. Corp. of Ireland, Ltd*. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), and that parties "may not confer jurisdiction either upon this Court or the District Court by stipulation," *California* v. *LaRue*, 409 U.S. 109, 112 n.3 (1972), *overruled in part on other grounds by 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 515 (1996).

2. Rule 23. In addition to these fatal problems under this Court's Article III precedents, the Fifth Circuit's judgments are also at odds with this Court's decisions applying Rule 23. In *Wal-Mart Stores, Inc.*

v. *Dukes*, this Court confirmed that "Rule 23 does not set forth a mere pleading standard," and instead that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove" that Rule 23's requirements are "*in fact*" satisfied. 131 S. Ct. 2541, 2551 (2011). The Court recently reaffirmed this principle in *Halliburton Co.* v. *Erica P. John Fund, Inc.*, which emphasized that "plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3)." 134 S. Ct. 2398, 2412 (2014).

The Fifth Circuit's decisions simply accept, as sufficient for certification, the class members' naked assertions that they were injured by BP's conduct. The Certification Panel believed that Rule 23 was satisfied because each class member had alleged "loss . . . as a result of the [spill]." App., *infra*, 19a, 21a (emphasis and alteration omitted). And the BEL Panel was similarly satisfied, at the claims-processing stage, by the class members' "attestation . . . that the economic loss was caused by the spill." *Id.* at 90a. Yet neither an allegation nor an attestation is *proof* that each class member has a plausible claim that it suffered an injury as a result of the spill, and therefore such averments cannot suffice to carry the plaintiffs' burden of proving that all class members experienced the "'same injury.'" *Dukes*, 131 S. Ct. at 2551 (citation omitted).

The Fifth Circuit believed that class members need not have an injury caused by the defendant in light of this Court's decision in *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct.

1184 (2013), which held that the proponent of class certification in a securities-fraud case need not prove materiality at the certification stage. The Court reasoned in *Amgen* that "a failure of proof on the issue of materiality would end the case," and thus "[a]s to materiality" the class "will prevail or fail in unison." *Id.* at 1191; *see also*, *e.g.*, *ibid.* ("In no event will the individual circumstances of particular class members bear on the inquiry.").

The Fifth Circuit believed that the question whether a given class member was injured by BP's conduct similarly bears only on "the truth or falsity of the parties' contentions, rather than an evaluation of those contentions' commonality." App., *infra*, 39a. As the Second, Seventh, Eighth, and D.C. Circuits have recognized, however, and as explained further below, *see infra* at 27-29, inclusion within the settlement class of members who have not suffered any injury caused by the defendant's conduct precludes class certification in several independent respects. The fact that all class members *allege* causation does not mean that they can *prove* that issue on a class-wide basis. Instead, the "individual circumstances of particular class members" directly "bear on the inquiry," *Amgen*, 133 S. Ct. at 1191, and thus the critical question for certification is whether the class has been drawn so broadly that it includes even those with no injury caused by BP. The Fifth Circuit did not dispute that the class had indeed been expanded in this respect; it simply disclaimed any obligation to consider the certification issue thus raised. That decision cannot be reconciled with this Court's Rule 23 caselaw.

* * *

Especially in a class settlement such as this one, sole reliance on the class definition or attestations to determine whether the requirements of Article III and Rule 23 are satisfied is insufficient in the face of an interpretation of the class definition that indisputably permits recovery by numerous entities that have no injury caused by the spill. As Judge Garza stated in dissent, while "the words 'as a result of' [the spill] remain in the text of the Class Definition, the Amended Complaint, and the Settlement Agreement," under the court of appeals' interpretation they "have no significance to determining who is eligible to participate in the settlement." App., *infra*, 66a (Garza, J., dissenting).

B. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S CLASS CERTIFICATION PRECEDENTS.

The decisions below also conflict with this Court's precedents governing the requirements for class certification.

First, as re-defined by the district court and embraced by the Fifth Circuit, the class would not satisfy Rule 23(a)(2)'s requirement that there be "questions of law or fact common to the class." This Court held in *Dukes* that, to satisfy this commonality requirement, class members must have suffered the "'same injury.'" 131 S. Ct. at 2551 (citation omitted). Claimants whose purported injuries did not result from the spill cannot have suffered the "same injury" as those who actually did suffer spill-related loss. By dispensing with the requirement that class members' injuries (if any) must have been caused by the defendant's conduct, the Fifth Circuit has eviscerated the commonality requirement. The Fifth

Circuit insisted that there would be common questions regarding BP's liability across the class, App., *infra*, 38a-39a, but those questions are irrelevant to the thousands of claimants now included in the class (as interpreted by the district court) even though they have no legal quarrel with BP's conduct, *see id.* at 73a-74a (Garza, J., dissenting).

Second, as interpreted below, the settlement fails Rule 23(a)(4)'s requirement that the class representatives "will fairly and adequately protect the interests of the class." As this Court emphasized in *Amchem*, "[a] class representative must be part of the class and *possess the same interest* . . . as the class members." 521 U.S. at 625-26 (emphasis added; quotation omitted). This "structural protectio[n]" is particularly important in the settlement context, where the class representative negotiates on behalf of absent class members. *See Dewey* v. *Volkswagen Aktiengesellschaft*, 681 F.3d 170, 189 n.19 (3d Cir. 2012) (emphasis omitted). As interpreted by the courts below, the class here would not satisfy this adequacy requirement, because class members that have suffered no harm caused by BP's conduct cannot possibly have the "same interest" as those genuinely harmed by the spill.

Third, as interpreted by the district court and upheld by the Fifth Circuit, the class here cannot satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." This Court has explained that the predominance inquiry is especially critical in a class where "individual stakes are high and disparities among class members great." *Amchem*, 521 U.S. at 625. To satisfy this predominance requirement, proponents

of a class must show, *inter alia*, a reliable, common methodology for measuring class-wide damages that is tied to the plaintiffs' theory of liability. *Comcast*, 133 S. Ct. at 1433; *see also Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013) ("*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are *the result of the class-wide injury that the suit alleges*." (emphasis added)), *cert. denied*, 134 S. Ct. 1277 (2014). In this case, however, the disparity between class members is stark: As construed by the courts below, the class yokes together many claimants that suffered spill-related losses with numerous others whose alleged losses are entirely unrelated to the spill, thereby awarding damages without any connection to the theory of liability. Proponents of such a class cannot "affirmatively demonstrate" that they satisfy the predominance requirement, *Dukes*, 131 S. Ct. at 2551; *Comcast*, 133 S. Ct. at 1432, as uninjured claimants have no damages to "measure" at all—let alone damages tied to the defendant's liability and measurable on a "classwide" basis. 133 S. Ct. at 1433; *see also In re Rail Freight*, 725 F.3d at 252 (holding that a method of calculating damages that "detects injury where none could exist . . . shred[s] the plaintiffs' case for certification").

III. THE QUESTION PRESENTED IS IMPORTANT.

The Fifth Circuit's conclusion that class certification is permissible even when many class members lack any injury caused by the defendant greatly expands the potential for sprawling, disjointed classes, potentially jeopardizes defendants' willingness to enter into settlement agreements that could be misinterpreted to permit claims by uninjured class members, and harms absent class members that have po-

tentially meritorious claims. And it does all this in the context of a dispute that itself implicates hundreds of millions of dollars in payments to claimants with no plausible cause of action against BP. In each of these respects, the importance of this case further counsels in favor of review by this Court.

"A district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That is so for obvious reasons: Given the potential damages at issue, "class certification creates insurmountable pressure on defendants to settle," regardless of the merits, "whereas individual trials would not." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl. 5 (N.Y. Univ. Law & Econ. Research Paper Series, Paper No. 09-50, 2009), *available at* http://ssrn.com/abstract=1497224 (average settlement over $100 million in certified class actions).

Class certification is thus "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 the defendants)." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009) (internal quotation marks omitted). Yet the Fifth Circuit's decisions below exacerbate this problem by permitting certification of a "Frankenstein monster posing as a class action," *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974), in which the injured and uninjured alike are yoked together in a single class—and the defendant is required to address

these divergent circumstances on a class-wide basis. The inclusion of numerous class members with no injury caused by the defendant artificially inflates the defendant's potential exposure, and thus imposes significant but unjustified pressure to settle the case for a larger payment than if the class were properly defined.

Yet the Fifth Circuit's decision also has the bizarre consequence of deterring reasonable efforts to settle class-action cases. Defendants will enter into class settlements only if they can rely on district courts to implement those agreements in a manner consistent with governing law and the constraints of Rule 23 and Article III. *See*, *e.g.*, C.A. Br. of Chamber of Commerce at 2 (noting that the Fifth Circuit's interpretation of Rule 23, by upending the expectation that settlements will be executed as written, makes "settlement a far riskier and much less desirable option" for defendants). The Fifth Circuit's holdings, however, undermine the certainty necessary to enter such settlements. Resolving the circuit conflict exacerbated by the decisions below is thus crucial to class-action defendants.

Resolving that conflict is also important to legitimate class members. Rule 23 is designed to aggregate the claims of a "cohesive" group of those injured in the same way by the defendant's conduct, *Amchem*, 521 U.S. at 623—in part to avoid intra-class conflicts that risk jeopardizing the rights of absent class members. *See*, *e.g.*, *id.* at 620 (Rule 23's requirements are "designed to protect absentees by blocking unwarranted or overbroad class definitions" and they "demand undiluted, even heightened, attention in the settlement context"). When a class definition can be modified to permit those who have

not been harmed by the defendant to make claims on settlement funds, the rights of legitimate class members may be imperiled.

Finally, in addition to its implications for future class litigation and settlements in general, this particular case also raises important issues because of its sheer magnitude. The Claims Administrator has already awarded more than $76 million to entities whose losses had nothing to do with the spill, as well as an additional $546 million to claimants that are located far from the spill and are engaged in businesses whose revenues and profits bear no logical connection to the spill and thus cannot plausibly allege a causal nexus. App., *infra*, 418a, 419a. There are approximately 130,000 more claims currently pending, and the list continues to grow as claims are still being filed. The Fifth Circuit's authorization of awards untethered to any injury caused by BP exposes BP to significant losses for claims that it never agreed to pay. That "enormous potential liability" is a sufficient reason, standing alone, for Supreme Court review. *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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