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No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

THE PROCTER & GAMBLE COMPANY,

Petitioner,

v.

DINO RIKOS, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

D. JEFFREY IRELAND
FARUKI IRELAND & COX
201 East Fifth Street
Suite 1420
Cincinnati, OH 45202

GLEN D. NAGER
Counsel of Record
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
gdnager@jonesday.com

CHAD A. READLER
JONES DAY
325 John H. McConnell Blvd.
Columbus, OH 43215

Counsel for Petitioner The Procter & Gamble Company

QUESTIONS PRESENTED

1. Whether a district court at the class certification stage must evaluate the evidence regarding whether putative class members in fact suffered a common injury, and thus that the class is sufficiently cohesive to bind all putative class members under plaintiffs' proffered theory of liability, or whether such an inquiry should occur only at the merits stage.

2. Whether Article III permits a class to be certified based on (a) the standing of the named plaintiffs or (b) the violation of a state statute, where the record demonstrates that many unnamed class members have not suffered an injury caused by the defendant's alleged conduct.

3. Whether a class may be certified under Federal Rule of Civil Procedure 23(b)(3) where the named plaintiffs fail to demonstrate a reliable and feasible way to ascertain class membership beyond relying on class members' affidavits.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner in this case is The Procter & Gamble Company. There is no parent corporation or publicly held company that owns 10% or more of Procter & Gamble's stock.

Respondents are Dino Rikos, Tracey Burns, and Leo Jarzembrowski, who have brought this action on behalf of a class of all persons who have purchased the product Align in California, Illinois, Florida, New Hampshire, and North Carolina.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Procter & Gamble Company (“P&G”), respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit’s order affirming the District Court’s grant of class certification (Pet. App. 3a) is reported at 799 F.3d 497 (6th Cir. 2015). The order of the United States District Court for the Southern District of Ohio (Pet. App. 64a) is reported at 782 F. Supp. 2d 522 (S.D. Ohio 2015).

JURISDICTION

The Sixth Circuit entered judgment on August 20, 2015. On September 3, 2015, P&G requested rehearing en banc, which was denied by the Sixth Circuit on September 29, 2015. On October 27, 2015, the court of appeals granted P&G’s motion to stay the mandate pending this Court’s review. Pet. App. 1a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Civil Procedure 23. It also involves the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 et seq., the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 et seq., the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 et seq., the New Hampshire Consumer Protection Act, N.H.R.S.A. 358-A et seq., and the

North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. All relevant provisions are reproduced at Pet. App. 104a.

INTRODUCTION

As made clear in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), and *Halliburton v. Erica P. John Fund*, 134 S. Ct. 2398 (2014), district courts are required to test the cohesiveness of a putative class before certification to ensure that the Rule 23 requirements are met with evidentiary proof, rather than conjecture. This case presents the important question of whether, as a sharply-divided Sixth Circuit panel held, named plaintiffs need not “produce actual proof at the class-certification stage of classwide injury,” because that is a merits inquiry only, Pet. App. 43a, or whether a district court at the class certification must, as other circuits have held, “investigate the realism” of plaintiffs’ theory of liability to evaluate whether all putative class members have suffered a common injury. *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014). Certiorari is warranted to answer that question.

In this case, the named Plaintiffs brought a large-scale consumer class action that rests entirely on the theory that P&G’s probiotic, Align, is “snake oil” that fails to provide its advertised benefit of “promoting digestive health” to a single consumer. Pet. App. 10a, 13a. At class certification, the named Plaintiffs offered no evidence supporting their theory that Align fails to “promote digestive health” for every putative class member. Instead, they promised that someday their expert could conduct “correctly designed randomized, double-blind and placebo

controlled clinical trials” to test their theory, and if successful, seek to prove it. *Id.* at 43a. By contrast, P&G offered scientific evidence indicating that countless consumers experienced digestive benefits from using Align and that the effectiveness of Align (like all supplements) varies from person to person. *Id.* at 60a (Cook, J. dissenting).

The District Court certified the class. Over a vigorous dissent, the Sixth Circuit affirmed. Judge Moore, writing for the majority, held that courts must accept named Plaintiffs’ liability theory for the class without question, even in the face of un rebutted contradictory evidence. *Id.* at 51a. Thus, the Sixth Circuit bound all unnamed class members under the same broad liability theory, despite evidence that the class was not cohesively tied together by the “snake oil” allegations.

By certifying such an overbroad and unsubstantiated class, the Sixth Circuit waded into a series of unresolved class-action questions and circuit conflicts.

First, the Sixth Circuit’s decision raises the question of whether a district court’s duty to examine class cohesiveness includes examining all of the record evidence and testing the theory of liability proffered by the named plaintiffs to ensure that the putative class actually shares the common injury alleged. This Court has oft-repeated that class certification must rest on facts, not allegations, for nothing is simpler than to craft a complaint that “literally raises common questions.” *Dukes*, 131 S. Ct. at 2551.

Similarly, appellate courts require judges at class certification to “investigate[] the realism” of the plaintiffs’ claims of class injury, especially “in light of the defendants’ counterarguments,” *Parko*, 739 F.3d at 1086. Without scrutinizing claims of liability and ensuring that there is evidence of common injury, a district court allows the named plaintiffs to “induce [pressure for] a substantial settlement even if the customers’ position is weak.” *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). By allowing the named plaintiffs to dictate the terms upon which unnamed class members’ claims will be presented, the court also compromises its important role in protecting absent class members. *Id.* at 677.

The Sixth Circuit, however, relegated any such inquiry to the merits stage. Pet. App. 41a-42a. It stated that so long as a common question could be posed that applied to all class members (i.e., whether Align “promotes digestive health” for even a single consumer), “[n]o more investigation into the merits (i.e., whether Align actually works) is needed” for class certification. *Id.* at 13a. P&G offered evidence that many customers experienced digestive benefits from using Align, the effectiveness of which (like all supplements) varies from person to person. P&G thus established that the putative class did not share the alleged common injury. The majority, however, concluded that such evidence went “solely to the merits; it [had] no relevance to the class certification issue.” *Id.* at 41a-42a. Without analyzing Plaintiffs’ allegations in light of the record evidence, the court allowed named Plaintiffs to evade the Rule 23 requirement that the class actually be cohesive. It ignored the danger that sending such an extreme

claim to the merits on behalf of all unnamed class members would do a disservice to their interests.

As Judge Cook concluded, the majority's decision not to test the named Plaintiffs' "snake oil" theory at the class certification stage "conflicts with the Supreme Court's Rule 23 jurisprudence" and the principles followed by other courts. *Id.* at 60a. "*Dukes* and its progeny teach us that [it] is insufficient to justify class certification" on named Plaintiffs "promise" to "design and conduct a clinical trial" demonstrating common injury; the Supreme Court requires lower courts to test class liability theories at class certification, even when it "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Id.* at 60a-64a (Cook, J., dissenting (citing *Dukes*, 131 S. Ct. at 2551-52)). The majority should not have affirmed the district court's "certify first, question the evidence later" approach. "[W]hether Align works similarly for each class member is relevant to certification" because it reveals whether putative class members have suffered a common injury, and "therefore [is] not beyond the scope of the court's rigorous analysis" at the certification stage. *Id.* at 62a (Cook, J., dissenting).

Certifying classes on mere allegations, as the Sixth Circuit affirmed here, contravenes Rule 23 jurisprudence to the prejudice of multiple parties. The Sixth Circuit's decision leaves defendants with *in terrorem* settlement pressures stemming from unsupported claims. And it leaves unnamed plaintiffs with the risk that their potentially valid claims will be extinguished, should the broader class fail. Because this case exemplifies the problems with

broad consumer class actions driven by allegations and not evidence, the Court should grant certiorari.

Second, this case raises two class action standing questions that have divided the courts of appeals. By certifying a class that includes many members who have not suffered any injury from P&G's allegedly false advertising, the Sixth Circuit affirmed a "class definition that includes a clutch of members without standing." Pet. App. 62a-63a (Cook, J. dissenting). Other courts of appeals, in contrast, have refused to certify a class when the record demonstrates that unnamed class members lack Article III standing.

The Sixth Circuit's holding also implicates a second circuit split on class action standing: whether the violation of a statute alone creates standing for unnamed class members. The Sixth Circuit concluded that class members need not demonstrate that they purchased Align as a result of P&G's allegedly false advertising to state a claim under several state consumer protection statutes. *Id.* at 25a. Hence, many class members' standing rests not on their individual ability to demonstrate causation but on the violation of a state statute—a ground for standing that is rejected in other circuit courts.

Indeed, these class action standing questions are already before the Court. See *Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146, cert. granted 135 S. Ct. 2806 (2015) (argued Nov. 10, 2015) and *Spokeo, Inc. v. Robins*, No. 13-1339, cert. granted 135 S. Ct. 1892 (2015) (argued Nov. 2, 2015). Therefore, if the Court does not grant this petition independently, it should at minimum hold this case pending its decisions in *Tyson Foods* and *Spokeo*.

Third, the Court should grant certiorari here to define the “ascertainability” requirement for class certification. Because P&G manufactures and distributes (but does not retail) Align, it does not have a list of Align purchasers, and thus has no records, either in its possession or otherwise available, to identify class members. Plaintiffs thus propose to identify class members based largely on class members’ own say-so as to whether they purchased Align during the purported class period. Recognizing the due process concerns inherent in relying on bare affidavits, the Third Circuit would have denied certification here, concluding that the class is not ascertainable. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013). But the Sixth and Seventh Circuits have explicitly rejected this approach to ascertainability, creating yet another division in the courts of appeals meriting this Court’s review. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (petition for certiorari docketed Oct. 25, 2015, No. 15-549) (presenting same question).

For any of these independent reasons, P&G respectfully requests that this Court grant certiorari, or at a minimum hold this Petition pending the decisions in *Tyson Foods* and *Spokeo*.

STATEMENT OF THE CASE

1. Align is an over-the-counter probiotic supplement developed by P&G that contains the probiotic strain *Bifidobacterium infantis* 35624. Pet. App. 5a. Concisely put, probiotics are good bacteria that help maintain natural balance in the human digestive system.

Scientific evidence presented in the District Court demonstrates that the probiotic strain in Align “provides digestive health benefits.” *Id.* at 40a. P&G presented expert testimony from Dr. Daniel Merenstein, a professor at Georgetown University Medical Center and an expert in probiotics, who explained that *Bifidobacterium infantis* 35624 has been “well-studied,” including in human clinical trials and randomized controlled trials, and that many studies have demonstrated the strain’s “efficacy.” *See id.* at 43a. Dr. Merenstein acknowledged that the “effectiveness of probiotics varies from person to person, as is the case with all supplements and drugs.” But he concluded that, “[t]here is robust evidence” supporting Align’s claim to improve gastrointestinal health. *See id.* at 40a.

Based on this body of research and evidence, P&G markets Align as a supplement that “naturally helps build and support a healthy digestive system, maintain digestive balance, and fortify your digestive system with healthy bacteria.” Pet. App. 5a. Countless consumers report improvements to their digestive health as a result of using Align, and P&G’s market research demonstrates that many consumers purchase it over and over again precisely because it provides them digestive health benefits. *Id.* at 67a.

For the past five years, Align has been the #1 gastroenterologist-recommended probiotic. *Id.* at 69a. As a result, many consumers purchase Align not in reliance on any advertising, but based on recommendations from their doctors, including Plaintiffs’ own expert witness. *Id.* at 20a. Others purchase Align as a result of recommendations from

friends, family, or other sources of information unrelated to the advertising at issue. *Id.* at 21a.

2. The three named Plaintiffs, all purchasers of Align, claim that Align did not work as advertised because it did not promote their digestive health. *Id.* at 4a. Yet far from limiting their claims to their own experience, Plaintiffs instead brought a suit on behalf of all Align consumers in five states, alleging that Align provided no digestive health benefit to *any* of these consumers, and thus that P&G violated those states' unfair or deceptive practices statutes. *Id.*

In seeking to certify this purported class of consumers, Plaintiffs offered no evidence that Align is "snake oil" and fails, as advertised, to "promote digestive health" for even a single purchaser. Rather, they offered argument that P&G's evidence and studies supporting Align's effectiveness were not (by Plaintiffs' standards) good enough. Plaintiffs likewise dismissed (again without scientific proof) the countless positive reviews of Align and physician recommendations as based solely on a "placebo effect." *Id.* at 60a-61a (Cook, J., dissenting).

3. The District Court certified five separate classes composed of all consumers who purchased Align in California, Florida, Illinois, North Carolina, or New Hampshire, between March 1, 2009 and the date notice is first provided to the classes. *Id.* at 67a.

In granting class certification, the District Court concluded as a threshold matter that "whether or not Align actually provides benefit[s] to digestive health is not yet properly before the Court." *Id.* at 70a n.2. The District Court deemed any analysis related to

whether any consumer received the advertised benefits of Align as a “merits” question. *Id.* Relying on a 1990 decision from the District of Minnesota, the District Court “g[a]ve the benefit of the doubt to approving the class” and assumed Plaintiffs’ allegations that Align is “snake oil” were true for class certification purposes. *Id.* at 68a, 70a (quoting *In re Workers’ Comp.*, 130 F.R.D. 99, 103 (D. Minn. 1990)).

4. A panel of the Sixth Circuit granted interlocutory review under Federal Rule of Civil Procedure 23(f). Pet. App. 65a. In a split decision, a different panel of the Sixth Circuit affirmed the District Court’s certification decision.

a. The majority concluded that, even without proof that Align fails to provide digestive health benefits for anyone, and even in the face of evidence that Align does benefit numerous consumers, Plaintiffs met the commonality and predominance standards.

As for commonality, the majority concluded that Plaintiffs had “identified a common question—whether Align is ‘snake oil’ and thus does not yield benefits to *anyone*—that will yield a common answer for the entire class.” *Id.* at 13a. Articulation of that up or down question, Judge Moore reasoned, was sufficient for Rule 23(a)’s commonality requirement. The majority further found that, because the question of whether Align is “snake oil” that does not provide digestive benefits “for *anyone*” is “capable of classwide resolution” by future yet-to-be-conducted studies, Rule 23’s predominance requirement was satisfied. *Id.* at 11a.

For the majority, P&G's un rebutted evidence that the purported class members had not suffered the same injury, because many benefit from Align, had "no relevance to the certification issue," and instead was a merits question only. *Id.* at 41a-42a. Like the District Court, the majority claimed that it had to accept "the theory of liability Plaintiffs present to us"—the theory that Align does not work "for *anyone*, i.e., that Align is 'snake oil.'" *Id.* Repeating that Plaintiffs do not have the burden of *proving* common injury at class certification, the majority asked only whether their claim could be proven true or false for the entire class. *Id.* at 10a. Judge Moore twice stated that, "if Align is shown to work, even for only certain individuals, then presumably Plaintiffs lose," *Id.* at 47a, 50a, but such a question could not be considered at the class certification stage.

As for standing, the majority reasoned that all class members were injured if the advertising was deceptive, so it need not consider circuit disagreement as to whether unnamed class members had to satisfy Article III. *Id.* at 51. Accordingly, it allowed Plaintiffs' bare allegations that Align fails to work for anyone to satisfy Article III for unnamed class members. Further, the majority found that the class was sufficiently ascertainable, directly rejecting the ascertainability standard applied by the Third Circuit in *Carrera*. *Id.* at 53a-57a.

b. District Judge Avern Cohn, sitting by designation, concurred. Even so, he emphasized that, given Plaintiffs' broad claim that Align "has no digestive health benefits to *anyone*," P&G could move to dismiss the case *after* the class was certified by

showing that Align provides the advertised benefits to even a single person. Pet. App. 58a.

c. Judge Cook dissented from the majority opinion. She emphasized that “Plaintiffs offer[ed] no proof in support” of their claim that no putative class member received any digestive health benefits from Align, as Plaintiffs’ expert “ha[d] yet to study” Align, and merely “promised to design and conduct” at some future point “a clinical trial that will prove definitively whether Align works as advertised.” *Id.* at 60a, 61a. Instead, the certification record “tends to show the opposite: that consumers benefit more or less from Align based on their individual gastrointestinal health.” *Id.* at 60a. At the very least, the record showed “that patients suffering from irritable bowel syndrome (IBS) benefit from Align.” *Id.*

Given this record, Judge Cook concluded that certification was improper and contrary to this Court’s class-action precedents. *Id.* at 60a. She reiterated that 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.” *Id.* at 58a (quoting *Halliburton*, 134 S. Ct. at 2412). Specifically, she criticized the majority for failing to test the named Plaintiffs’ allegations with the record evidence. Emphasizing the conflict with this Court’s decision in *Dukes*, 131 S. Ct. at 2551 (2011), she stated:

“Nothing about the district court’s analysis here was ‘rigorous,’ and the majority papers over this abuse of discretion by claiming that any further inquiry would result in an

impermissible 'dress rehearsal' for trial. More often than not, however, a district court's 'rigorous analysis' will entail 'some overlap with the merits of the plaintiff's underlying claim.' . . . And this case is no exception to that rule."

Id. at 60a.

For Judge Cook, certifying a class including members who were not injured also raised Article III problems. *Id.* at 61a.

6. After the Sixth Circuit denied rehearing en banc, P&G moved for a stay of the mandate. *See* Fed. R. App. P. 41(d)(2)(A). P&G asserted that the divided panel decision regarding commonality and predominance, the pending Supreme Court decisions on class action standing, and the circuit split on class ascertainability made a grant of certiorari (or a hold and GVR) likely in this case. The Sixth Circuit granted the motion, staying the mandate pending the Court's resolution of this Petition. *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

As Judge Cook explained in her dissent, the decision below "conflicts with the Supreme Court's Rule 23 jurisprudence" and the Rule 23 principles followed by other circuits. Pet. App. 60a. Certiorari is warranted for three independent reasons.

I. THE SIXTH CIRCUIT'S DECISION IMPROPERLY PROHIBITS COURTS FROM QUESTIONING NAMED PLAINTIFFS' CLAIMS OF COMMON INJURY, ALLOWING UNSUPPORTED CLASS LIABILITY THEORIES TO BIND UNNAMED PLAINTIFFS.

The Sixth Circuit's decision raises the question of whether courts must evaluate the named plaintiffs' theory of liability—or accept it as true—in assessing class cohesiveness. The majority here recognized that Plaintiffs' ability to prove a common injury was critical to class certification, and that, at some point, Plaintiffs would need to prove that alleged common injury on a classwide basis. Yet, for class certification purposes, the majority did not require *any* evidence that there was “*in fact*” a common injury suffered by the class. *See Dukes*, 131 S. Ct. at 2551. It ignored evidence, presented by P&G at the class certification stage, demonstrating that there was *in fact* no common injury. Whether such an approach comports with Rule 23's commonality and predominance requirements is a critical question meriting this Court's review.

A. The Rule 23 requirements ensure that a class is sufficiently cohesive such that unnamed class members may be fairly bound by the case's outcome. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). In particular, Rule 23(a)(2) and (3)'s commonality and typicality requirements “serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their

absence.” *Dukes*, 131 S. Ct. at 2551 n.5 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). Rule 23(b)(3)’s predominance inquiry similarly “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.*, 521 U.S. at 623. Failing to enforce these standards risks binding persons with “little in common but . . . [a] lawsuit.” *Dukes*, 131 S. Ct. at 2557.

Accordingly, the Supreme Court has repeatedly held that Rule 23 is “not . . . a mere pleading standard” but instead requires courts to engage in “rigorous analysis [to ensure] that the prerequisites of Rule 23(a) [and (b)(3)] have been satisfied.” *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161); see also *Comcast Corp.*, 133 S. Ct. at 1432 (“rigorous analysis” applies to Rule 23(b)(3)). That inquiry is not satisfied merely by framing a class liability theory, for “any competently crafted class complaint literally raises common ‘questions.’” *Dukes*, 131 S. Ct. at 2551 (citation omitted). Rather, courts must “probe behind the pleadings” to ensure that named plaintiffs meet the evidentiary prerequisites of Rule 23’s commonality, typicality, and predominance requirements; and courts must ensure that plaintiffs have “*in fact*” provided the evidentiary “glue” necessary to make a class sufficiently cohesive. *Id.* at 2551-52. Courts must analyze the evidentiary record even if it results in “some overlap with the merits of the plaintiff’s underlying claim.” *Id.* at 2551 (citations omitted).

In *Dukes*, this Court rejected certification of a class based simply on named plaintiffs’ allegations that were not supported by evidence of common

injury. 131 S. Ct. at 2552. The class in *Dukes* sought to proceed on the question “whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies . . . that may have worked to unlawfully discriminate against them.” *Id.* at 2549 (quotation and citation omitted). That binary question was applicable to the entire class; there either was a nationwide policy of discrimination affecting the entire class or not. But the Court still evaluated the named plaintiffs’ purported evidence in support of that question, and found that it failed to show the “same injury” to all class members. *Id.* at 2555-56. It did not matter that the evidence also related to the merits of plaintiffs’ claim. *Id.* at 2551-52.

Similarly, this Court’s decision in *Halliburton* 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.” 134 S. Ct. at 2412. Because Rule 23(b)(3) is an “adventuresome innovation” in which class treatment is “not as clearly called for,” *Comcast*, 133 S. Ct. at 1432, courts must examine defendants’ evidence—not just plaintiffs’ allegations—at the class certification stage, and should deny certification if the record shows that the class has not suffered a common injury, *Halliburton*, 134 S. Ct. at 2416-17.

B. Consistent with these precedents, courts of appeal have held that the named plaintiffs’ theory of liability must be scrutinized at the class certification stage to ensure that it is sufficiently factually supported to bind class members going forward. Even before *Dukes*, in *Szabo*, the Seventh Circuit

decertified a class asserting false-advertising claims where the class liability theory did not match the evidence of the putative class members' experiences. 249 F.3d at 676. In the Seventh Circuit, a rigorous analysis of the class claims and evidence supporting them is necessary at the certification stage because "[c]ertifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys—who may use it in ways injurious to other class members, as well as ways injurious to defendants." *Id.* at 677.

More recently, the Seventh Circuit has held that a judge must "investigate[] the realism of the plaintiffs' [common] injury . . . in light of the defendants' counterarguments, and to that end should [take] evidence." *Parko*, 739 F.3d at 1086. As it explained in decertifying a class action in *Parko*, "[n]othing is simpler than to make an unsubstantiated allegation." *Id.* The plaintiffs there alleged that defendant's oil had entered the water supply, but a close look at the expert's opinion revealed that evidence of contamination was unclear. *Id.* As a result, it was not "even clear that the plaintiffs ha[d] identified a common issue," because, "[i]f the expert's evidence is rejected, there will be no basis for" the common injury claimed. *Id.*

Accordingly, in the Seventh Circuit, among others, district courts cannot rest on plaintiffs' intent to produce common evidence. "[I]f intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window." *Id.* Likewise, the Tenth Circuit has recognized in decertifying a class that the "mere raising of a common question does not

automatically satisfy Rule 23(a)'s commonality requirement." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013). And the D.C. Circuit has emphasized that predominance requires "the common evidence to show all class members suffered *some* injury." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). See also *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266, 270 (3d Cir. 2011) (certification improper where only evidence of "hypothetical, composite persons" provided, as Rule 23(b)(3) "require[s] considering individual proof").

C. Together, these decisions require a thorough review of the record evidence, at the certification stage, to ensure that the putative class is cohesive enough to merit certification. The decision below conflicts with this Supreme Court and circuit court jurisprudence.

Neither the District Court nor the Sixth Circuit majority here considered any evidence regarding whether named Plaintiffs' actually could show a common injury based on their theory of liability. Specifically, the Sixth Circuit recognized named Plaintiffs' theory of liability was that Align is composed of inert ingredients and does not provide the advertised benefits to anyone. Pet. App. 51a. And it "accepted" the theory as true for class certification purposes, recognizing that at the merits stage, if P&G could show that even one consumer benefitted from Align, the entire class would fail. *Id.* at 50a. It did so even though the named Plaintiffs had offered no evidence in support of their theory, and P&G had offered ample evidence contradicting it. *Id.* at 61a (Cook, J., dissenting). Despite evidence

showing that the class was indeed not cohesive on the named Plaintiffs' theory, the Sixth Circuit said it had to turn a blind eye and wait for the merits stage. *Id.* at 41a-42a. Accordingly, this case raises the question whether named plaintiffs' theory of liability and resulting common injury can be tested at the class certification stage or not.

To be clear, the Sixth Circuit's decision did not mistakenly overlook evidence showing the class was not cohesive. No member of the panel disputed that Plaintiffs lacked evidence of a common injury (and the District Court identified none), so this case is not factbound. Instead, the majority explicitly held that evidence that established the absence of a common injury was *irrelevant* and could not be considered at class certification. *Id.* ("P&G's claim that Align works for some individuals goes solely to the merits; it has no relevance to the class certification issue."). The majority noted that the District Court could "allow[] rebuttal evidence on issues that affect predominance, not evidence that affects only the merits of a case." *Id.* at 49a. And "[g]iven Plaintiffs' theory of liability in this case, the evidence that P&G has presented [showing that Align works] fails this test—it affects only the merits of this case, not predominance." *Id.* For the majority, the named Plaintiffs need only show "that there is a common question that will yield a common answer for the class," and they need not "produce actual proof at the class-certification stage of classwide injury," *id.* at 11a, 45a. It made no difference whether the evidence in the record supported the liability theory or instead showed no common injury. Hence, the entire class

could be tied together on a theory that had no basis in fact.

The Sixth Circuit's decision conflicts with the jurisprudence of the Supreme Court, the Seventh Circuit, and the other courts cited above. As Judge Cook stated, it is insufficient for Rule 23 to "trot out an expert without any opinion as to the supplement's efficacy, and promise to conduct the definitive trial of Align that accounts for all variables of human physiology." *Id.* at 63a-64a. Quite simply, "*Dukes* and its progeny teach us that this is insufficient to justify class certification." *Id.* at 64a.

Moreover, the Sixth Circuit's decision has important implications meriting this Court's review. Certifying a class based on an overbroad, unsubstantiated theory risks the extinguishment of potentially viable individual claims, threatening absent class members' interests, and creating further tension in circuit court precedent. "Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiffs' allegations," to ensure that class adjudication is fair to all concerned. *Szabo*, 249 F.3d at 677; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("dominant" concerns in class certification include "the protection of absent parties").

This case demonstrates that very danger. The class liability theory named Plaintiffs present is extremely broad. As both judges in the majority recognized, Plaintiffs' framing of the class question means that every single class member's claim rises or falls on P&G's ability to point to even a single individual aided by Align. Judge Moore twice stated

that, “if Align is shown to work, even for only certain individuals, then presumably Plaintiffs lose.” Pet. App. 47a, 50a. District Judge Cohn concurred: if “Plaintiffs’ proof fails to establish that Align has no digestive health benefits, the case should be dismissed.” *Id.* at 59a. Pointing out that the entire class could lose so easily on the merits begs the question whether it is fair and proper to require unnamed class members to bet their claims on named Plaintiffs’ unsupported “snake oil theory”—especially given the record here.

Moreover, under the Sixth Circuit’s reasoning, certification of false advertising claims is appropriate anytime a litigant alleges that a product does not work for any purchaser, on the promise that evidence adduced post-certification will support that claim—even if evidence at the certification stage shows otherwise. This lenient approach not only allows plaintiffs with “weak claims to extort settlements from innocent companies,” but also threatens the viability of products that provide relief to millions. *See Halliburton*, 134 S. Ct. at 2424 n.7 (quotation marks and citation omitted). Thus, the Sixth Circuit’s decision subjects numerous consumer products to the threat of class claims based upon alleged false advertising, a result with widespread national impact. Certiorari review is warranted.

II. COURTS ARE SPLIT REGARDING THE SHOWING NECESSARY TO SATISFY ARTICLE III STANDING FOR ABSENT CLASS MEMBERS.

The Sixth Circuit’s decision also implicates two critical Article III standing questions. *First*, the decision raises the question of whether a class may

be certified when the record reflects that many class members lack Article III standing. *Second*, this case raises the question whether a defendant's violation of a state statute creates Article III standing for unnamed class members. Because these questions are presently pending in cases before the Court (in *Tyson Foods* and *Spokeo*, respectively), at a minimum P&G requests that the Court hold this petition pending those outcomes, and GVR in light of its decisions. If the Court does not reach these issues in the matters already pending before it, then this case provides an optimal vehicle for resolving these acknowledged certworthy questions.

A. CIRCUITS ARE SPLIT AS TO WHETHER STANDING FOR ABSENT CLASS MEMBERS MAY BE ESTABLISHED EXCLUSIVELY BY CLASS REPRESENTATIVES' STANDING.

This Court's review is needed to resolve a circuit conflict concerning whether a class may be certified based on named plaintiffs' standing alone, even where the evidence shows that many unnamed class members lack Article III standing.

Rule 23 must be "interpreted in keeping with Article III constraints." *Amchem Prods.*, 521 U.S. at 613. And the federal courts, of course, are open only to justiciable cases. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Justiciability requires a plaintiff to have suffered an injury in fact attributable to the defendant that may be redressed by a favorable decision. *Id.* Because granting certification opens the doors of federal court to *all* members of that class, and not just the named

plaintiff or plaintiffs, absent class members must also have standing for a class case to proceed past certification.

In this case, the three named Plaintiffs satisfied Article III's standing requirements based on their testimony that they relied on P&G's advertising that Align would "promote digestive health" in purchasing the product, and that Align failed to provide any digestive health benefit. But P&G has long maintained—and has produced evidence demonstrating—that many class members (unlike the named plaintiffs) received the advertised benefits from taking Align, and thus would have no standing to sue. Pet. App. 63a (Cook. J. dissenting); *id.* at 67a. Equally true, not all unnamed class members purchased Align as a result of the allegedly false advertising, and plaintiffs do not contend as much. Nor could they. Indeed, the record shows the opposite—many consumers purchased it because of recommendations from doctors or relatives, not because of any allegedly false advertising. *Id.* at 20a.

By affirming certification despite evidence that many consumers benefitted from Align and/or did not rely on P&G's advertising in purchasing Align, the Sixth Circuit waded into a circuit split. *See In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014) *cert. denied sub nom. BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, 135 S. Ct. 754 (2014). As the Fifth Circuit recently noted, circuits have followed two distinct approaches in evaluating standing for class certification purposes, with some circuits taking internally conflicting approaches. *Id.*

The Third and Seventh Circuits take the position that, as long as the class representatives have standing, Article III is satisfied as to the entire class. *See, e.g., In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306–07 (3d Cir. 1998) (holding that if “the named plaintiffs satisfy Article III,” the “absentee class members are not required to make a similar showing.”); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009) (holding that “as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied.”).

By contrast, the Second and D.C. Circuits have held that lower courts must closely scrutinize the class to be sure that all members suffered a common injury, giving them standing to sue. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (“no class may be certified that contains members lacking Article III standing.”); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252 (vacating certification order where plaintiffs could not “prove, through common evidence, that all class members were in fact injured”).

Adding to the confusion, several circuits, including the Eighth and Ninth, have issued inconsistent decisions, making it uncertain which test will apply in any given case. *Compare e.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779–80 (8th Cir. 2013) (reversing certification order because “it contains members who lack standing”), *with Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014) (certifying class despite evidence that many class members were not injured); *compare Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020–

21 (9th Cir. 2011) (“In a class action, standing is satisfied if at least one named plaintiff meets the requirements . . .” (internal quotation marks and citations omitted)), *with Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012) (adopting Second Circuit test).

The Sixth Circuit’s decision below adds to the circuit split. To be sure, the court attempted to evade this split by assuming, for purposes of class certification, that “P&G falsely advertised to every purchaser of Align” and hence every purchaser has standing. Pet. App. 52a. But Article III requires more than a “mere pleading.” *Lujan*, 504 U.S. at 561. And as Judge Cook observed, “[t]he only evidence before the court shows that IBS patients suffered no injury (because Align works as-advertised for them).” Pet. App. 63a. The record evidence also demonstrated that many class members could not prove causation, because they purchased Align not as a result of the advertising, but because of a doctor’s recommendations. As such, the Sixth Circuit affirmed a “class definition that includes a clutch of members without standing.” *Id.* at 62a-63a.

The Court should grant certiorari in this case to resolve the circuit split on this issue. Indeed, this Court already has acknowledged the importance of this issue in granting certiorari in *Tyson Foods* to address “[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.” Petition for Writ of Certiorari

at i, *Tyson Foods*, No. 14-1146. There, the Eighth Circuit affirmed class certification even though “evidence at trial showed that some class members did not work overtime” and hence had no injury for Tyson’s alleged labor violations. *Tyson Foods*, 765 F.3d at 797.

The Court’s resolution of *Tyson Foods* therefore could directly impact a central question in this case, potentially requiring Plaintiffs to make a clearer demonstration of standing for its absent members before the district court may certify a class. Should the Court decline to reach the second question presented in *Tyson Foods*, this case presents an optimal vehicle to resolve the circuit split. Accordingly, the Court should, at a minimum, hold this Petition pending the outcome in *Tyson Foods*.

**B. THE COURT SHOULD RESOLVE A
CIRCUIT SPLIT AS TO WHETHER A
STATUTORY VIOLATION ALONE CAN
SATISFY ARTICLE III STANDING.**

This case also presents the question of whether an alleged violation of a statute—here a state statute—is sufficient to confer Article III standing for unnamed class members. As noted above, the record below demonstrates that many putative class members purchased Align as a result of information *unrelated* to P&G’s advertising. Instead, they purchased Align based on, for example, a recommendation from a doctor or relative. As such, many unnamed class members never suffered an injury caused by the allegedly false advertising.

Despite this evidence, Plaintiffs claim that they can maintain actions under California’s consumer

protection statutes and other state laws as long as the plaintiffs allege that P&G's advertising was "deceptive." Plaintiffs contend that, under these statutes, they need not prove that any purchaser actually relied on the allegedly deceptive advertising. The Sixth Circuit agreed. Pet. App. 37a. Instead, according to the majority, a material misrepresentation in advertising directed "in a generally uniform way to the entire class" is enough to state a claim under these state statutes. *Id.* at 25a. As a result, even though unnamed class members could never show Article III "causation," *Lujan*, 504 U.S. at 562, the Sixth Circuit allowed their claims to proceed in federal court. Their standing rests only on the alleged statutory violation and nothing more.

The courts of appeal are divided over whether an alleged statutory violation satisfies Article III standing requirements. The Sixth, Seventh, and Ninth Circuits have held that plaintiffs can maintain an action in federal court for a violation of a statute even without a showing that they suffered any injury as a result of the challenged practice. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705–07 (6th Cir. 2009) (FCRA violation); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952–53 (7th Cir. 2006) (FCRA violation); *Edwards v. First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (RESPA violation), cert. granted, 131 S. Ct. 3022 (2011), cert. dismissed as improvidently granted, 132 S. Ct. 2536 (2012).

By contrast, the Second and Fourth Circuits have rejected the notion that deprivation of a statutory right is sufficient to create Article III standing for absent class members. *See Kendall v. Emp. Ret.*

Plan of Avon Prods., 561 F.3d 112, 121 (2d Cir. 2009) (plaintiff cannot maintain claim without “alleg[ing] some injury or deprivation of a specific right that arose from a violation of [ERISA].”); *David v. Alphin*, 704 F.3d 327, 338-39 (4th Cir. 2013) (“this theory of Article III standing [based on a statutory violation] is a non-starter as it conflates statutory standing with constitutional standing.”).

The Court should grant certiorari to resolve the circuit split. This issue too is already pending before the Court. In *Spokeo, Inc. v. Robins*, the Court is considering “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.” No. 13-1339, *cert. granted* 135 S. Ct. 1892 (2015) (oral argument held Nov. 2, 2015). In *Spokeo*, the Ninth Circuit concluded that violation of a statute *ipso facto* satisfies Article III’s injury-in-fact requirement even in the absence of any concrete and particularized injury. 742 F.3d 409, 413-14 (9th Cir. 2014). Even though the plaintiff and absent class members did not suffer any monetary, emotional, or other “tangible” harm, the Ninth Circuit concluded that the class had standing based solely on the defendant’s alleged violation of the Fair Credit Reporting Act. *Id.*

Given the similarities between the respective plaintiffs’ standing theories in *Spokeo* and this case, there is a reasonable probability that this Court’s resolution in *Spokeo* will impact at least several of the state law claims in this case. Accordingly, if the Court does not grant certiorari in this case, the

Petition should be held pending the outcome of *Spokeo*, and disposed of as appropriate depending on the outcome of that decision.

III. THE SIXTH CIRCUIT'S DECISION REGARDING ASCERTAINABILITY DEEPENS AN EXISTING CIRCUIT SPLIT.

Finally, the Court should grant certiorari here for another, independent reason: to resolve a deepening circuit split regarding the generally accepted “ascertainability” requirement for class certification. See William B. Rubenstein, *Newberg on Class Actions* § 3:3 (5th ed.); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:2 (11th ed. 2014). To be ascertainable, a class must be defined by “objective criteria” and “identifying class members [must be] a manageable process that does not require much, if any, individual factual inquiry.” Rubenstein, *Newberg on Class Actions* § 3:3. Accordingly, the district court at class certification must determine how class members will be identified. See Fed. R. Civ. P. 23 Advisory Committee Note, 2003 Amendments.

As P&G argued before the Sixth Circuit, there is no reliable and feasible way to identify the class members in this case, even assuming that the other Rule 23 requirements are met. P&G does not retail Align (except for a limited number of purchases through its website), and it does not have the names or identities of customers who purchased Align from a vast array of retailers. Most customers, moreover, would not have saved receipts or proof of purchase—notably, none of the Plaintiffs did. Likewise, many consumers may be unsure which probiotic they purchased, when they purchased it, where they

purchased it, and how much they paid. In short, to identify most class members, Plaintiffs would have to rely on class members' bare affidavits.

Under the standard adopted by the Third Circuit, exemplified by *Carrera*, Plaintiffs' class is not ascertainable. See *Carrera*, 727 F.3d at 304. In *Carrera*, the Third Circuit held that "if class members cannot be ascertained from a defendant's records," the plaintiffs must demonstrate that there is a "reliable, administratively feasible alternative," beyond relying on individuals' bare affidavits. *Id.* There, like here, Plaintiffs brought a false advertising claim against a product's manufacturer on behalf of all purchasers. Because the dietary supplements at issue were sold in retail stores, "Bayer ha[d] no list of purchasers," and, as here, purchasers were "unlikely to have documentary proof of purchase." *Id.* at 304. The Third Circuit rejected the plaintiffs' proposal to rely on "potential class members' say so," through the use of affidavits, as that approach would raise serious due process concerns. *Id.* at 304-06.

The same is true here. If this were an individual claim, due process would require Plaintiffs to prove that they purchased Align, and P&G would have a chance to challenge that showing. See *Hayes v. Wal-Mart Stores Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). Given that not even the three named Plaintiffs can remember how many packages they purchased, or when, certifying five statewide classes of all Align purchasers invites enormous due process concerns. As *Carrera* holds, "a class action cannot be certified in a way that eviscerates [due process]," which is

why making sure class members can be reliably identified is so crucial. 727 F.3d at 307.

Citing *Carrera*, the Fourth and Eleventh Circuits have also required plaintiffs to demonstrate that members of a proposed class be “readily identifiable.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (internal quotation marks and citation omitted); *Karhu v. Vital Pharm., Inc.*, __ F. App’x __, 2015 WL 3560722, at *2-4 (11th Cir. June 9, 2015). And numerous district courts outside of the Third Circuit have followed its ascertainability standard.¹

The Sixth Circuit in this case, however, explicitly rejected the *Carrera* approach, Pet. App. 53a, as did the Seventh Circuit in *Mullins*, 795 F.3d at 657 (petition for certiorari docketed Oct. 25, 2015, No. 15-549).² Instead, the Sixth Circuit deemed Plaintiffs’ class ascertainable because it could be “defined by objective criteria: anyone who purchased Align” in the five states at issue. Pet. App. 55a. As for how those individuals could be identified, the majority referenced “internal P&G data, . . . receipts,

¹ See, e.g., *Jenkins v. White Castle Mgmt. Co.*, No. 12 CV 7273, 2015 WL 832409, at *3-4 (N.D. Ill. Feb. 25, 2015); *Jones v. ConAgra Foods, Inc.*, No. C 12-01633 CRB, 2014 WL 2702726, at *8-11 (N.D. Cal. June 13, 2014), appeal docketed, No. 14-16327 (9th Cir. July 15, 2014); *In re POM Wonderful LLC*, No. ML 10-02199 DDP RZX, 2014 WL 1225184, at *5 (C.D. Cal. Mar. 25, 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5-6 (N.D. Cal. Feb. 13, 2014).

² If the Court grants the petition for certiorari in *Direct Digital, LLC v. Mullins*, No. 15-549, this case should be held pending a resolution of the standard for ascertainability, and then remanded for the Sixth Circuit to consider its decision in light of that decision.

affidavits, and a special master”—even though P&G’s data does not identify class members, the named Plaintiffs did not even keep their receipts, and it is unclear how a special master could effectively screen self-serving affidavits for fraud. *Id.* The Sixth Circuit *sua sponte* proposed that P&G could verify whether a “customer purchased Align by, for instance, requesting a signed statement from that customer’s physician,” even though Align is an over-the-counter probiotic taken by individuals based on recommendations of friends and family, not solely doctors. *Id.* at 58a.

Notably, after rejecting *Carrera*, the Sixth Circuit did not make an alternative holding that Plaintiffs’ class would pass the Third Circuit’s ascertainability standard. Rather, it stated that Plaintiffs’ class was “more ascertainable” than the class in *Carrera*, where not a “single” class member could be ascertained. *Id.* at 56a. And it made this comparison based on its *sua sponte* evaluation of a powerpoint included in the record showing that almost half of Align’s sales were completed online, where there are records of who purchased the product. *Id.* at 57a. Yet Plaintiffs never claimed that half of their class’s sales were completed online, nor did the District Court make that conclusion in evaluating the class’s ascertainability. And for good reason. That powerpoint included Align sales only from 2005 to 2009, when Align was sold exclusively online or in a few individual retail test markets. *Id.* at 68a. Align did not fully launch retail sales nationwide until 2009, which is when Plaintiffs’ class period begins. *Id.*

Thus, unlike the standard applicable in the Third, Fourth, and Eleventh Circuits, the Sixth Circuit's approach leaves room for individuals to claim membership in a class based on foggy memories, confusion, conjecture, or even outright fraud. The Sixth Circuit's decision thus deepens an existing circuit split on the standard courts should use in assessing a class's ascertainability. The Court should grant certiorari to resolve this important issue for countless consumer class actions nationwide.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted. Alternatively, the Petition should be held pending this Court's decisions in *Tyson Foods* and *Spokeo*, and adjudicated as appropriate in light of those decisions.

Respectfully submitted,

D. JEFFREY IRELAND
FARUKI IRELAND & COX
201 East Fifth Street
Suite 1420
Cincinnati, OH 45202

GLEN D. NAGER
Counsel of Record
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3939
gdnager@jonesday.com

CHAD A. READLER
JONES DAY
325 John H. McConnell Blvd.
Columbus, OH 43215

Counsel for Petitioner The Procter & Gamble Company

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