NO. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,

PETITIONER,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.,

RESPONDENTS.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States. *Amici* regularly advocate for the interests of their members in federal and state courts throughout the country in cases of national concern. They support the petition in this case because they have a strong interest in ensuring that the lower courts comply with this Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The organizations that are signatories to this brief include:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of

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[1] Pursuant to Sup. Ct. R. 37.2(a), counsel for all parties received notice of *amici*'s intent to file this brief 10 days before its due date. All parties have filed blanket consent letters with the clerk of court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

Retail Litigation Center, Inc. ("RLC"). RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the

potential industry-wide consequences of significant pending cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere paper requirements that can be brushed aside when useful for streamlining litigation. Instead, they are crucial safeguards grounded in fundamental notions of due process essential to protecting the rights of both defendants and absent class members. *See* 28 U.S.C. § 2072(b); *see also Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Accordingly, before the named plaintiffs in any case may take advantage of the class-action device, they must establish that the putative class members' claims present at least one "common question[]" that, if adjudicated on a classwide basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, named plaintiffs who seek certification under Rule 23(b)(3) must satisfy the "even more demanding" requirement of proving that common questions "predominate" over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997).

Unfortunately, there is an alarming trend of lower courts that, in violation of this Courts' precedents, have failed to enforce Rule 23's essential requirements. The courts below are part of that trend. They relaxed the requirements for class certification in at least two respects: *First*, the Eighth Circuit affirmed the district court's certification decision, even though the certified class

includes a significant number of individuals who were concededly not injured by the defendant's conduct and, therefore, do not have standing under Article III of the U.S. Constitution. *Second*, the Eighth Circuit concluded that Rule 23 allows class adjudication of liability based on a statistical sampling model that calculates an "average" class member's time spent donning and doffing protective equipment in the workplace and imputes that calculation to every single class member.

As the petition explains, the lower courts' decisions not only violate this Court's precedents, including its recent decisions in *Comcast* and *Wal-Mart*, but they also deepen entrenched divisions in lower court authority over the requirements for class certification. The fact that lower courts continue to disobey this Court's precedents calls for immediate corrective measures.

This Court's review is especially appropriate in this case, for it raises the critical and recurring issue of whether averaging and extrapolation techniques may be used to support a large class action, even when there are significant differences between the individual class members. Specifically, this case involves petitioner's purported failure to compensate employees for time spent donning and removing work equipment. The merits of those claims, brought on behalf of over three thousand employees, depend on the particular work responsibilities and individual circumstances of each employee. The evidentiary record below was clear that there were substantial variations in the protective gear worn by employees and the time associated with donning and removing

that gear. Nonetheless, the district court, as affirmed by the Eighth Circuit, held that the significant differences were immaterial for purposes of class certification and ascertaining classwide liability. In the lower courts' view, because plaintiffs developed a statistical analysis calculating the "average" time spent donning and doffing the protective equipment, that statistical average could be assigned to each employee, notwithstanding any employee's actual individualized and personal circumstances. This use of statistical averages to gloss over fundamental differences between individual claims is a pristine example of the type of "Trial by Formula" deemed impermissible by this Court, *see Wal-Mart*, 131 S. Ct. at 2561, and an inadequate substitute for the sort of individualized liability determinations that are required when individual claimants have very different factual circumstances, as is the case here. The courts below further compounded this error by certifying the class even though a significant number of the class members had no cognizable harm to support Article III standing.

If the decision below is allowed to stand, Rule 23's essential safeguards and the minimum requirements for Article III standing will be significantly eroded. And it may send an unfortunate signal that this Court is unwilling to enforce its precedents and ensure that Rule 23's requirements are properly observed. This case thus presents an excellent opportunity for the Court to resolve existing splits in lower court authority, to address ongoing abuses in class-action litigation, and to restore proper

constitutional limits on lawsuits involving individuals who have suffered no injury.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case for at least three reasons: *First*, there is a deep split in authority over whether a class may be certified and found to properly satisfy Article III standing requirements where the class includes members who were not injured. *Second*, there is another split in authority that must be reconciled over the appropriateness of certifying a class and assigning classwide liability based on statistical sampling that applies an average value to all class members even though many individual class members may differ significantly from the calculated average. *Third*, the questions presented are important and recurring.

I. The Court Should Grant Review To Clarify That The Class Action Device Cannot Be Used To Circumvent Article III's Standing Requirements.

It is well established that part of the "irreducible constitutional minimum of standing" required under Article III of the Constitution is an "injury-in-fact—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). It is equally well established that standing "is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and that a plaintiff "must demonstrate standing for each claim he seeks to press" and therefore "must demonstrate standing separately for each form of relief sought."

Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 352 (2006) (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)).

Rule 23 does not eliminate these essential constitutional safeguards. Instead, as this Court has recognized, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem*, 521 U.S. at 612–13. Rule 23 thus protects the rights of both defendants and absent class members by ensuring that the innovation of aggregating claims and dispensing with individual litigation is deployed only when it is consistent with the rights of all concerned. *See Taylor*, 553 U.S. at 901 (Rule 23's "procedural protections" are "grounded in due process").

Recognizing that class actions are an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979), this Court has held that aggregating individual claims for resolution in one stroke is impermissible if it endangers either the right of absent class members to press their distinct interests or the right of defendants "to present every available defense." *Cf. Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 to be entitled to litigate their claims through the procedural device of a class action. *Comcast*, 133 S. Ct. at 1432 (quoting

Wal-Mart, 131 S. Ct. at 2551). That is especially important in the context of Rule 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614 (internal quotation marks omitted). Rule 23(b)(3) imposes special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432.

Rule 23(b)(3)'s "demanding" requirement that common questions predominate over individual ones, *Amchem*, 521 U.S. at 623–24, works in tandem with Rule 23(a)'s commonality requirement to ensure that "proposed classes are sufficiently cohesive to warrant adjudication by representation," *id.* at 623. The requisite cohesion exists when all class members "possess the same interest and *suffer the same injury*." *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added; internal quotation marks omitted); *see also Wal-Mart*, 131 S. Ct. at 2551 ("[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The need to prove predominance by establishing a common, classwide injury protects both defendants and class members by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21; *see also Comcast*, 133 S. Ct. at 1434 (plaintiff must offer "a theory of liability that is . . . capable of classwide proof").

Because class members must suffer the same injury, it follows that for a class to be certified, each member also must satisfy the minimum requirements of Article III standing—that is, each class member must have suffered an injury in fact that is traceable to a defendant and likely to be redressed by a favorable decision. *See, e.g.*, *Amchem*, 521 U.S. at 612–13. The named plaintiffs and absent class members cannot have suffered the "same" injury, as this Court's precedents dictate, if some class members suffered no injury at all.

Those requirements for class certification were not met here as a significant number of class members did not suffer any cognizable injury. Plaintiffs' damages expert acknowledged that there were 212 members of the class who suffered no injury at all because they did not work any unpaid overtime even under the assumed calculated averages. *See* Pet. 11. Moreover, as Judge Beam explained in his dissent, the jury awarded plaintiffs less than half the damages they requested, indicating that the jury discounted the average time spent donning and donning protective equipment calculated by plaintiffs' experts, and that even more class members may have suffered no discernible harm. *See* Pet. App. 125a. Indeed, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id*.

Nonetheless, as the petition explains, the decision below joins the First, Third, Seventh, and Tenth Circuits—in square conflict with decisions from the Second, Ninth, and D.C. Circuits—in concluding that a class comprising non-injured

individuals may be certified under Rule 23. *See, e.g.*, Pet. 26–29 (citing cases and describing circuit split). The rule is perhaps best summarized by the Seventh Circuit: "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009).

In its decision, the Eighth Circuit ignored the fundamental circuit split on this issue and claimed that petitioner "exaggerates the authority for its contention." Pet. App. 9a. The Eighth Circuit also claimed that petitioner "invited" the error by requesting the following jury instruction: "Any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages." *Id.* at 10a. But the court's reasoning disintegrates on scrutiny. As the petition and Judge Beam's dissent both explain, petitioner opposed class certification at every stage, thereby preserving any rights on appeal. Pet. 30. Upon having its objections to class certification rejected by the district court, petitioner merely requested that plaintiffs be required to meet their evidentiary burdens as to issues of liability and damages. *Id.* By no means did petitioner waive its objections concerning the lack of standing by numerous members of the formed class.

The lower courts' troubling approach to class certification—allowing some class members to proceed with claims they do not possess on the assumption that some *other* class members have been injured—impermissibly enlarges class members'

substantive rights, *see* 28 U.S.C. § 2072(b), and ignores basic Article III standing requirements. The issue of class member standing is a recurring and exceptionally important issue that desperately needs this Court's guidance.

Moreover, although the Court has thus far declined to grant certiorari to resolve this entrenched circuit split, there is no reason to allow the conflict in lower court authority to percolate. Instead, the Court should take the opportunity presented by this case to establish a single, nationally uniform rule that a district court may not certify a class that contains numerous members who lack Article III standing.

II. The Court Should Grant Review To Clarify That Statistical Averaging Cannot Be Used To Support Class Actions At The Expense Of Individualized Inquiries.

This case also provides an excellent opportunity to resolve existing circuit splits and provide much-needed guidance to the lower courts about whether statistical sampling techniques may be used to support formation of a class notwithstanding significant differences among individual members that would otherwise preclude class certification. As the petition explains, by allowing a class to be formed in such circumstances, the decision below violates *Comcast* and *Wal-Mart* and deepens a yawning divide in lower-court authority over the meaning of those decisions. Pet. 22–26.

In *Comcast*, this Court clarified that lower courts must ensure that a plaintiff's damages evidence does not operate to sweep away individualized defenses

that a defendant may have to each individual class member's claim. For that reason, aggregate damages models that determine the average impact to the average class member are impermissible. Indeed, those types of models are constitutionally suspect because they sweep away individualized damages issues and transform Rule 23's "procedural . . . device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007).

Wal-Mart similarly made clear that liability and damages determinations cannot be derived from formulaic statistical techniques that gloss over key factual elements and come at the expense of individualized proceedings. Rejecting this so-called "Trial by Formula" approach, the Court reversed class certification where "[a] sample set of the class members would be selected," and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561.

Lower courts have shown widespread reluctance to comply with this Court's clear instructions. Several lower courts have all but rejected the holdings in *Comcast* and *Wal-Mart* that individualized liability and damages issues can overwhelm common questions and defeat predominance. As the petition explains, the decision

below joins the Tenth Circuit—in direct conflict with decisions from the Second and Fourth Circuits—in concluding that a class may be certified on the basis of a model that derives a statistical average across the class and imputes that calculated average to each individual class member. Pet. 16–17, 19, 24; *see also* Pet. 20–21 (noting that the Second, Fifth, and Ninth Circuits have cautioned against statistical averaging and extrapolation). This statistical averaging approach ignores the distinct claims of the individual class members and instead replaces that essential inquiry with a single computation reflecting the hypothetical "average" class member who often bears little resemblance to the individual claimants themselves.

The decisions below and their reasoning are in direct conflict with this Court's mandate that all class members "possess the same interest and suffer the same injury." *East Tex. Motor Freight Sys. Inc.*, 431 U.S. at 403 (internal quotation marks omitted). In this case, the only way to determine whether an individual class member has a viable claim is to separately determine whether the class member actually worked unpaid overtime. Among other things, that requires an individualized accounting of each employee's protective equipment and the time spent donning and doffing this gear rather than a combined average assessment spanning over three thousand employees.

As the petition highlights, there are substantial differences in the protective gear that employees wear based on their job responsibilities and their own individual choices. Pet. 4–5, 9–10. These differences

lead to large variances in the amount of time that each employee spends donning and doffing protective equipment. *See, e.g.*, Pet. 18 (noting that pre-shift donning of equipment in the locker room ranged from 0.583 minutes to 13.283 minutes, and that the post-shift range was 1.783 minutes to 9.267 minutes). In addition, there are other material differences such as where employees don their equipment—some of this activity takes place while the employees are on the disassembly line—and whether employees with setup or teardown responsibilities don/doff their equipment as part of activities that are already included within the employee's compensation. Pet. 10. These are all critical factual issues necessary to assess the merits of the individual claims for overtime compensation by each employee, yet the statistical averaging embraced by the decisions below swept aside these considerations entirely.

The Eighth Circuit in fact acknowledged that "individual plaintiffs varied in their donning and doffing routines," and that applying the statistical averaging approach to "individual overtime claims did require inference," but stated this was "allowable" under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). Pet. App. 8a. This Court in *Anderson*, however, did not hold that an inference as to liability may be drawn from a calculated average that has no direct correlation to the time spent by any individual employee. Rather, the Court made clear that an employee seeking compensation for unpaid overtime carries his or her evidentiary burden by proving "he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to

show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687.

The Eighth Circuit's decision here failed to require any proof of the first prong of this analysis, *i.e.*, whether each of the individual class members performed work for which they did not receive proper compensation. Simply assuming that individuals performed uncompensated work on the basis of a statistical averaging model—rather than assessing the actual amount of donning and doffing time spent by each employee and how much, if any, of this time was uncompensated—is an impermissible "Trial by Formula" that is squarely at odds with this Court's precedents. *See Wal-Mart*, 131 S. Ct. at 2561; *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them.").

The Eighth Circuit tried to distinguish the holding in *Wal-Mart* on the grounds that individual "employee time records [were used] to establish individual damages." Pet. 10a. But the mere fact that the court conducted an individualized inquiry as to *part* of the analysis does not cure the deficiencies with its threshold determination of classwide liability based on a formulaic statistical calculation. The serious flaws of this statistical averaging approach—*e.g.*, ignoring the substantial differences in the donning and doffing activities of individual employees and the inability of the petitioner to litigate these "defenses to individual claims" at trial, *Wal-Mart*, 131 S. Ct. at 2561—are not diminished by

the fact that individual timesheets were used to calculate damages at the back-end of the analysis.

III. The Court Should Grant Review Because The Questions Presented Are Recurring And Extraordinarily Important

The Court should also grant review because the questions presented are important, recurring ones that are of great constitutional and practical significance. Nationwide class actions often seek damages for millions (or billions) of dollars even though many class members have never suffered any actual harm. As a result, there is an urgent need for uniform rules and further guidance that can be provided only by this Court.[2]

First, in light of the large number of lower courts that have failed to comply with this Court's precedents, the entrenched circuit splits on standing, liability, and damages issues have spawned a serious problem of forum-shopping. Indeed, commentators opposed to this Court's decisions have urged

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[2] As the number of recent cases raising similar issues in the Rule 23 context demonstrates, these issues continue to arise and further percolation is not necessary, nor would it be helpful in resolving the issues presented in this case. For example, *amici* have filed briefs in support of *certiorari* in *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, 2015 WL 350579 (U.S. Jan. 27, 2015) (No. 14-910); *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed sub nom.*, *Dow Chemical Co. v. Industrial Polymers Inc.*, 2015 WL 1043612 (U.S. Mar. 9, 2015) (No. 14-1091); and *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014) (per curiam), *petitions for cert. filed*, 2015 WL 1201367, 2015 WL 1201368 (U.S. Mar. 13, 2015) (Nos. 14-1123, 14-1124).

plaintiffs to "avoid some of the worst federal case law by filing in circuits that are most receptive to class actions." Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013).

Second, allowing classes on the basis of statistical averaging makes certification (and liability) determinations rest primarily, if not, solely on the basis of expert testimony rather than the factual elements necessary to support a claim. This threatens to transform litigation into a dispute over statistical modeling rather than the facts and the law. As was the case here, defendants in similar class actions will be limited to challenging the underlying methodology used by the experts rather than litigating the factual circumstances of each claim. That improperly precludes class-action defendants from raising "defenses to individual claims," *Wal-Mart*, 131 S. Ct. at 2561, that are dependent on the unique factual circumstances of each class member.

Third, certifying loosely connected classes (like this one) is not only unfair to class-action defendants, it risks binding absent class members to class-wide dispositions that are substantially divorced from the merits of their individual claims. *Cf.* 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Those interests are particularly acute in cases, such as this one, involving a concocted average member that, by definition, will fail to adequately represent the claims of the many class members that fall above this calculated average.

Fourth, by easing the path to certification, the lower court's approach effectively predetermines a case's ultimate outcome. As this Court has often recognized, certification "may so increase the defendant's potential damages liability and litigation costs" to the point "that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also* Fed. R. Civ. P. 23(f) advisory committee notes, 1998 Amendments (defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, *et al.*, *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

It is therefore important for the Court to grant certiorari to ensure that essential requirements of Article III and Rule 23 are respected. *See Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011) ("In an era of frequent litigation [and]

class actions . . . courts must be more careful to insist on the formal rules of standing, not less so."). Because the courts below did not properly discharge these responsibilities, this Court should grant review to correct their errors, enforce its earlier decisions, and bring clarity to this important area of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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