SWIMMING AGAINST THE CURRENT: THE NINTH CIRCUIT'S INCORRECT JETTISONING OF THE *DE MINIMIS* RULE IN CLASS ACTION CERTIFICATION

Abstract: On April 8, 2022, the United States Court of Appeals for the Ninth Circuit, in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*, held that a class in a Rule 23(b) class action could be certified with more than a *de minimis* number of uninjured class members, so long as a common question still predominated among the class. In doing so, it exacerbated a circuit split on the allowability of uninjured class members. Many observers have read the First, Seventh, and D.C. Circuits as suggesting a *de minimis* rule, allowing a small percentage of uninjured class members so long as there are not too many and there is some mechanism for determining who is injured. The Second, Third, and Fifth Circuits, meanwhile, have rejected the idea that a class can be certified with any number of uninjured plaintiffs. This Comment argues that the Ninth Circuit introduced confusion into the doctrine by ignoring the *de minimis* rule and instead suggesting that a class with more than a *de minimis* number of uninjured parties could recover. The Ninth Circuit's method is less clear than that of the First, Seventh, and D.C. Circuits and it also fails to satisfy the worthy policy goal of keeping meritless suits from proceeding to the settlement stage.

INTRODUCTION

The tuna industry has attracted controversy since the 1970s, when customers grew concerned with the amount of mercury in the fish and the effect of commercial tuna fishing on dolphins.[1] Facing a drop in sales, however, from 2011 to 2013 the three largest tuna companies decided to wade into more dangerous waters and embarked on a price-fixing scheme.[2] In 2015, the Department of Justice began an antitrust investigation that ended with top executives in jail.[3] Following the investigation, purchasers of tuna filed a class action anti-

[1] Seth Stevenson, *How America's Canned Tuna Industry Went Belly Up*, SLATE (Aug. 17, 2020), https://slate.com/business/2020/08/canned-tuna-industry-price-fixing-starkist-bumble-bee.html [https://perma.cc/S9ZS-LKJ4]. These concerns, along with other factors such as the American loss of interest in canned foods, has led to a drop in tuna sales since the peak tuna consumption period of 1950–2000. Roberto A. Ferdman, *How America Fell Out of Love with Canned Tuna*, WASH. POST (Aug. 18, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/18/how-america-fell-out-of-love-with-canned-tuna/ [https://perma.cc/M3GB-KR3R].

[2] Stevenson, *supra* note 1. The three companies (Bumble Bee, StarKist, and Chicken of the Sea) shared secret information among themselves to ensure uniformity of prices. *Id.*

[3] *Id.*

trust lawsuit against the tuna companies involved in the scheme.[4] The lawsuit raised a question that has been debated between the circuit courts for some time without a clear resolution: can a class action lawsuit contain uninjured parties in the class, and if so, how many?[5]

Part I of this Comment gives an overview of the substantive law regarding class certification of uninjured members, as well as the procedural history of *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*[6] Part II examines and discusses the different interpretations of the circuit courts applying Rule 23(b) to classes with uninjured members.[7] Finally, Part III argues that the Ninth Circuit's decision only muddied the issue and will likely lead to a further influx of meritless claims, and that the Supreme Court should instead adopt a *de minimis* rule.[8]

I. THE BACKGROUND OF *OLEAN V. BUMBLE BEE*

In 2022, in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*, the U.S. Court of Appeals for the Ninth Circuit held that a court may certify a class for a Rule 23(b)(3) class action suit by relying on a statistical model presented by plaintiffs, even when the validity of the model is challenged by defendants.[9] In doing so, the Ninth Circuit created a circuit split on whether the number of uninjured plaintiffs in a class action must be *de minimis* for the class to be certified, ruling that there is no *de minimis* limit.[10] Section A of this

[4] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods L.L.C., 31 F.4th 651, 662 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022).

[5] *See id.* at 692 (Lee, J., dissenting) (noting that majority's decision to allow inclusion of uninjured class members causes a circuit split).

[6] *See infra* notes 9–48 and accompanying text.

[7] *See infra* notes 50–81 and accompanying text.

[8] *See infra* notes 82–101 and accompanying text.

[9] 31 F.4th at 661–62; *see* FED. R. CIV. P. 23(b)(3) (requiring predominance of common question in class actions). *But see* Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983–84 (9th Cir. 2011) (holding that a court should analyze class certification claims rigorously to ascertain commonality of question, ruling on disputes of fact if necessary). In a class action alleging nationwide discrimination by an employer, the court was required to determine whether local or national management were responsible for decisions involving promotion because if such decisions were made at the local level, then plaintiffs would not be able to show a common question based on the individualized factors at play. *See id.* at 983–84 (holding that if gender disparities were not present nationally, then plaintiffs would not be able to show a common question). The court, however, was not required to rule on the merits of issues such as whether women actually suffered discrimination at the company. *Id.* at 983.

[10] *Olean*, 31 F.4th at 669. *But see In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 623–25 (D.C. Cir. 2019) (holding that a district court did not abuse its discretion in not certifying a class in which a damages model indicated that at least 12.7% of plaintiffs suffered no injury, because the number of uninjured class members should be around 5% or 6% or lower to be considered *de minimis*); *In re* Asacol Antitrust Litig., 907 F.3d 42, 53–54 (1st Cir. 2018) (indicating that a small number of plaintiffs who could be sorted out individually would not prevent certification, but class certification is not appropriate when there is a chance that any plaintiff cannot claim damages, and when thousands of plaintiffs were not injured).

Part discusses the past framework for determining whether a common question predominates in a class action lawsuit.[11] Section B recounts the factual history of *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*[12]

A. F.R.C.P Rule 23(b)(3) and the Predominance of Common Questions

Rule 23 of the Federal Rules of Civil Procedure, adopted in 1966, governs class action suits in federal court.[13] The Federal Rules provide that, for a class action to proceed in federal court, a judge must certify the class.[14] A court may only certify a class if it fits into one of several categories outlined in Rule 23(b).[15] Rule 23(b)(3) sets out one such category of class action, which is that the questions of fact and law common to the plaintiffs in the class must predominate over questions that matter only to individual plaintiffs.[16]

Rule 23 leaves open the question, however, of how to determine whether common questions predominate in a class action suit.[17] "Predominate" could

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[11] *See infra* notes 13–33 and accompanying text.

[12] *See infra* notes 34–49 and accompanying text.

[13] *See* FED. R. CIV. P. 23 (governing class actions). A class action lawsuit is an action where a large class of plaintiffs is represented in court by some smaller subset of the class. *Class Action*, BLACK'S LAW DICTIONARY (11th ed. 2019). Such a lawsuit is intended for cases where a person would not be able to present a case individually. *Id.* Rule 23 was modified extensively in 2003 out of a concern that class actions were resulting in large windfalls for lawyers, but minimal gains for the plaintiffs; however, the language relating to the predominance of common questions was left unchanged and the amendments instead focused on the appointment and fees of counsel. *See* Edward M. Spiro, *New Amendments to the Federal Rules of Civil Procedure*, N.Y. L.J. (Dec. 4, 2003), https://www.maglaw.com/media/publications/articles/2003-12-04-new-amendments-to-the-federal-rules-of-civil-procedure/_res/id=Attachments/index=0/07012030007Morvillo.pdf [https://perma.cc/6HC3-3J7D] (noting that the 2003 amendments "effectively overhaul the rules governing appointment and payment of attorneys, timing and notice of the certification decision, and judicial oversight of settlements").

[14] FED. R. CIV. P. 23(c). For a class to be certified, Rule 23(a) mandates that certain prerequisites must be met:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. R. 23(a).

[15] *Id.* R. 23(b). The 23(b) categories are: (1) lawsuits where there is a risk that similar plaintiffs will have their cases adjudicated differently, or that a judgment would leave other plaintiffs unable to defend their interests; (2) where declaratory or injunctive relief would only be appropriate on a class-wide basis; or (3) where a common question of law or fact predominates. *Id.*

[16] *Id.* R. 23(b)(3). As a practical reality, the Rule 23(a) requirements are almost always met; thus, the question of whether a class action may proceed often requires looking at Rule 23(b)(3), under which most class action suits are brought. J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 163 (2009).

[17] *See* 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1778 (3d ed. 2022) (noting that it is unclear how to interpret "predominate" in the context of Rule 23).

be taken to mean that the common questions are of the greatest importance among all issues (a "qualitative" approach) or of the greatest number (a "quantitative" approach).[18] Rule 23(b)(3), however, does not establish any qualitative or quantitative test.[19] Ultimately, the determination of whether a common question predominates is a balancing test: a class should be certified when doing so would save time, money, and effort and when there are people in the same situation for whom there should be the same result, but not if doing so would produce unfairness.[20] In 2011, in *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court ruled that district court judges must perform a "rigorous analysis" to determine that the burden of predominance is met; the burden is on the plaintiffs to demonstrate a predominance of the common question.[21]

Not all the dispositive elements of a Rule 23(b)(3) class action must be shared in common, but at least one element must be in common and predominate.[22] For example, it is possible for a Rule 23(b)(3) case to proceed even if affirmative defenses or damages would need to be tried on an individual basis.[23] A case may not proceed, however, unless plaintiffs were injured in the same manner.[24]

Analyzing whether a dispositive element is present in a case and common to all or most plaintiffs requires a court to make judgments on past facts with-

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[18] *See id* (referring to a potential "qualitative or quantitative test" as a means of understanding "predominate"); Richards & Brown, *supra* note 16, at 164 (outlining the two possible definitions of "predominate"). According to the Merriam-Webster dictionary, "predominate" means "to hold advantage in numbers or quantity" or "to exert controlling power or influence;" thus, the word holds both a quantitative and a qualitative meaning. *Predominate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/predominate [https://perma.cc/Z3DR-DMA8] (Jan. 13, 2023). *Black's Law Dictionary* defines "predominant" as "[m]ore powerful, more common, or more noticeable than others; having superior strength, influence, and pervasiveness." *Predominant*, BLACK'S LAW DICTIONARY, *supra* note 13.

[19] 7AA WRIGHT ET AL., *supra* note 17, § 1778; *see also* Dujanovic v. MortgageAmerica, Inc., 185 F.R.D. 660, 668 (N.D. Ala. 1999) (noting that Rule 23 "does not set forth any distinct test for measuring the quantity or quality of the issues sufficient to meet the standard of predominance" (citing 7AA WRIGHT ET AL., *supra* note 17, § 1778)).

[20] FED. R. CIV. P. 23 advisory committee's note to 1966 amendment. The advisory committee suggested as an example that victims of fraud, in which similar misrepresentations were made, would potentially be able to bring a class action suit under Rule 23(b)(3); however, if the misrepresentations were substantially different, then a common question would not predominate. *Id.* Furthermore, a "mass accident" causing separate injuries to the plaintiffs would not be suited for a Rule 23(b)(3) action because individual questions of damages as well as liability would dominate the case. *Id.*

[21] 564 U.S. 338, 350–51 (2011) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982)); *see also Falcon*, 457 U.S. at 161 (holding that certification is only appropriate if the judge determines after a rigorous analysis that the Rule 23(a) requirements are met). *Dukes* was a case involving one of the largest class sizes ever seen in a class action, as approximately 1.5 million plaintiffs sought to be included. 564 U.S. at 342.

[22] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA WRIGHT ET AL., *supra* note 17, § 1778, at 123–24.)

[23] *Id.*

[24] *Dukes*, 564 U.S. at 349–50.

out making a judgment on the merits.[25] Frequently, however, a rigorous analysis requires probing into the merits of the case.[26]

Previously, the Court had cast doubt on whether statistical or representative evidence that might not apply to all members of the class could be used to show predominance.[27] In *Dukes*, the Court ruled that representatives of a class could not use their anecdotes as evidence of a common question when there was only one representative for 12,500 potential plaintiffs in the class.[28] But cutting against this, in 2016, in *Tyson Foods Inc., v. Bouaphakeo*, the Supreme Court ruled that representative or statistical evidence could be used to demonstrate that a common question predominated, so long as each member of the class could rely on such evidence to bring an individual claim.[29]

Prior to 2008, Rule 23 was generally interpreted such that a small number of plaintiffs who potentially were not injured would not forestall certification.[30] But in 2008, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, the First Circuit ruled that a class should not be certified when the

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[25] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods L.L.C., 31 F.4th 651, 667 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022). In theory, this means that courts are only allowed to look at the narrow picture of whether there is predomination of a common question, and not to get into the merits of the case. *Id.* But there is a great pressure for defendants to reach a settlement in class action lawsuits to prevent large judgments from being entered against them. Stacy Nettleton et al., *United States*, *in* CLASS ACTIONS 2020 at 98, 98, 101 (Jonathan Polkes & David Lender eds., 2019), https://www.weil.com/~/media/files/pdfs/2020/ca2020united-states.pdf [https://perma.cc/JJ2V-QVC2]. As a result, it is likely that there will never be a jury that will have the chance to adjudicate the case on the merits, and certifying the class is in effect deciding in favor of the plaintiffs, as the case will likely soon settle. *Olean*, 31 F.4th at 686 (Lee, J., dissenting). In in his dissent to *Olean*, Judge Lee advocates for judges to take up a "gatekeeper" role when hearing Rule 23 class action cases and to decide issues involving the requirements of Rule 23. *Id.*

[26] *Dukes*, 564 U.S. at 351; *see also Falcon*, 457 U.S. at 160 (noting that class certification requires a judge to make examinations "enmeshed in the factual and legal issues comprising the plaintiff's cause of action" (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978), *superseded by* Fed. R. Civ. P. 23(f), *as recognized in* Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017))).

[27] *See Dukes*, 564 U.S. at 358 (holding that it was improper to certify based off testimony of class representatives regarding discrimination).

[28] *Id.* This was a class-action case brought by 1.5 million female employees of Wal-Mart alleging gender discrimination. *Id.* at 342. Justice Scalia, writing for the majority, did indicate that a judge could conclude the existence of a common question based off anecdotal evidence if collected from more representative members of the class. *See id.* at 358 (differentiating this case from one where there was one anecdote per eight class members).

[29] 136 S. Ct. 1036, 1046 (2016). The Supreme Court declined to rule on whether uninjured members of a class could be included, but emphasized the importance of this issue. *Id.* at 1050.

[30] *See* Richards & Brown, *supra* note 16, at 173 (noting that the consensus that a class could be certified with a small number of uninjured plaintiffs was "virtually universal"); *see, e.g.*, *In re* Nifedipine Antitrust Litig., 246 F.R.D. 365, 369 (D.D.C. 2007) (holding that class members do not have the burden of showing that every plaintiff was harmed to demonstrate class-wide injury). It is common in antitrust litigation with large classes that some plaintiffs were charged at a higher price, but had no antitrust impact. Richards & Brown, *supra* note 16, at 173. A common reason for this is that the plaintiffs managed to negotiate down the price to below what the price would have been without the antitrust conspiracy. *Id.*

plaintiffs, using a novel and complex economic model, failed to show evidence that each plaintiff was actually injured.[31]

Since then, several courts have manifested a *de minimis* rule that allows for some uninjured class members so long as the percentage of uninjured plaintiffs is some minimal amount.[32] The threshold for what percentage of uninjured class members constitutes *de minimis* is not clear.[33]

B. Factual History of Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.

StarKist, Bumble Bee, and Chicken of the Sea are suppliers of tuna that together accounted for a combined eighty percent of sales of packaged tuna to United States customers in 2022.[34] Together, these companies sell tuna both to direct purchasers in bulk as well as to individuals for personal consumption.[35] Facing a downturn in the tuna industry, these three companies entered into an agreement to fix prices, along with other commitments of an anti-competitive nature.[36]

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[31] 522 F.3d 6, 27–28 (1st Cir. 2008). *But see* Ruiz Torres v. Mercer Canyons Inc., 835 F.3d 1125, 1136 (9th Cir. 2016) (emphasizing that a properly-defined class may still include non-injured parties). The court made sure to point out, however, that individual assessments of damages would not preclude certification as a class, but there had to be common proof for evidence of harm. *In re New Motor Vehicles Canadian Exp.*, 522 F.3d at 28.

[32] *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 623–25 (D.C. Cir. 2019) (affirming judgment of district court that instituted *de minimis* rule); *In re* Asacol Antitrust Litig., 907 F.3d 42, 53–54 (1st Cir. 2018) (suggesting a class may be certified when "a very small absolute number of class members might be picked off in a manageable, individualized process at or before trial"). *Black's Law Dictionary* defines "*de minimis*" as "1. Trifling; negligible. 2. (Of a fact or thing) so insignificant that a court may overlook it in deciding an issue or case." *De Minimis*, BLACK'S LAW DICTIONARY, *supra* note 13.

[33] *See In re Rail Freight Fuel Surcharge*, 934 F.3d at 625 (indicating that uninjured plaintiffs numbering around 5%–6% would be the extent of what could be considered *de minimis*); *In re Asacol Antitrust Litig.*, 907 F.3d at 47 (suggesting 10% is too high).

[34] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods L.L.C., 31 F.4th 651, 661 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022); *see also* Roberto A. Ferdman, *The World's Biggest Canned Tuna Company Is About to Get a Lot Bigger*, WASH. POST (Dec. 19, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/19/the-worlds-biggest-canned-tuna-company-is-about-to-get-a-lot-bigger/ [https://perma.cc/XF5B-DP3Z] (noting that Chicken of the Sea, owned by Thai Union Frozen Products, and Bumble Bee Seafoods, which Thai Union was at the time considering purchasing, made up 38% of sales of canned tuna in the U.S., compared with 36% of sales made by StarKist).

[35] *Olean*, 31 F.4th at 661.

[36] Timothy Cornell & John Friel, *Tuna Tales: The Antitrust Tsunami, in* 2 DOUGLAS H. GINSBURG, LIBER AMICORUM: AN ANTITRUST PROFESSOR ON THE BENCH 179, 181 (Nicolas Charbit & Thomas Moretto eds., 2020). The issues facing the industry at the time were an oversupply of tuna and a drop in demand, spurred on by fears of contamination. *Id.* As a result, the three companies agreed to (1) shrink the size of their tuna cans; (2) follow list prices for their tuna (in essence, fixing the prices); (3) refrain from advertising if it would affect the prices they agreed upon; and (4) not offer FAD-free tuna, as doing so would lower profits from the items for which there were list prices. *Id.*

In 2015, the Department of Justice subjected the tuna industry to a federal antitrust investigation.[37] The Department of Justice eventually brought indictments alleging a criminal conspiracy to fix tuna prices, to which StarKist, Bumble Bee, and three executives eventually pleaded guilty.[38]

Following these events, many purchasers of tuna sought to bring a class-action lawsuit, claiming that the three tuna suppliers were civilly liable under antitrust law.[39] The purchasers were divided into three potential classes: direct purchasers (nationwide retailers, supermarkets, etc.), indirect purchasers (purchasers in bulk for commercial food preparation), and individual consumers.[40]

In 2018, the tuna purchasers attempted to have each of these three potential classes certified for a Rule 23(b)(3) class action.[41] As evidence, each potential class utilized reports prepared by an economist, each using a similar methodology, to show that each class had overpaid for tuna because of the antitrust violation.[42] The tuna suppliers also produced expert witnesses to contest this economic evidence.[43] One piece of contested evidence was how many class members were potentially uninjured; the plaintiffs' economist claimed that around 5.5% of the class may not have been injured, whereas the defendants' economist alleged that up to 28% of class members may not have been injured.[44] After hearing the evidence, the district court certified each of the three classes.[45]

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[37] *Olean*, 31 F.4th at 661. The indictments began after a merger was proposed between Chicken of the Sea and Bumble Bee, which caused regulatory concerns. Cornell & Friel, *supra* note 36, at 183–84.

[38] *Olean*, 31 F.4th at 661–62; *see* Stevenson, *supra* note 1 (noting that Chicken of the Sea admitted to price fixing in exchange for leniency and so was not sentenced).

[39] *Olean*, 31 F.4th at 662. The actions were combined in a multidistrict pretrial hearing in the Southern District of California. *Id.*

[40] *Id.* Each potential class sought to show that they paid prices that were above what they would have paid in a competitive market. *Id.*

[41] *In re* Packaged Seafood Prods. Antitrust Litig., 332 F.R.D. 308, 316–18 (S.D. Cal. 2019), *aff'd en banc*, 31 F.4th 651 (9th Cir.), *cert. denied*, 143 S. Ct. 424 (2022).

[42] *Id.* at 317. It is common for plaintiffs to rely on expert evidence, such as econometric evidence, to prove commonality of interest in an antitrust case. *Olean*, 31 F.4th at 665.

[43] *Olean*, 31 F.4th at 662. The debate over the evidence regarding the direct purchasers was similar to debates regarding the evidence used by each of the other proposed classes. *See id.* at 683, 684 (noting the methodologies used by the economists for each of the classes were similar). The direct purchasers used evidence produced by Dr. Russell Mangum. *Id.* at 670. Dr. Mangum tested the prices of tuna for correlation and found that prices in the market moved in sequence, indicating collusion. *Id.* at 671. He then developed a model using a regression analysis, which is an econometric tool used to ascertain the correlation between a dependent and independent variable. *Id.* This model indicated that the direct purchasers paid 10.28% extra for tuna during the period of collusion. *Id.*

[44] *Id.* at 672–73. The tuna suppliers introduced their own expert testimony, presented by Dr. John Johnson, who alleged that Dr. Mangum's model was not appropriate to use in this scenario, considering the differences between plaintiffs. *Id.* at 673. Instead, Dr John Johnson used a different statistical model, producing the 28% figure. *Id.*

[45] *Id.* at 662.

Upon appeal by the tuna suppliers, a panel of the Ninth Circuit overturned the district court's decision and remanded for further proceedings.[46] The Ninth Circuit then heard the matter en banc and affirmed the holding of the district court.[47] The defendants then filed for certiorari.[48] On November 14, 2022, the Supreme Court denied certiorari.[49]

II. Circuit Disagreement over Whether a Class May Recover with Uninjured Class Members

The Supreme Court's 2016 decision in *Tyson Foods Inc., v. Bouaphakeo* opened the possibility that a class could be certified with uninjured members.[50] Since then, the U.S. Courts of Appeals for the First and D.C. Circuits have held that no more than a *de minimis* number of uninjured members could be included in a certifiable class.[51] In contrast, the Ninth Circuit in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.* held that a class could be certified with more than a *de minimis* number of uninjured plaintiffs.[52]

Section A of this Part discusses the positions of the Fifth, Second, and Third Circuits, which held prior to *Bouaphakeo* that a class could not be certified with uninjured parties.[53] Section B reviews the Supreme Court's holding in *Bouaphakeo*, which challenged the prior consensus on uninjured parties.[54] Section C discusses the holdings of the First, Seventh, and D.C Circuits, allowing a limited *de minimis* number of uninjured members in a class.[55] Finally, Section D explains how the Ninth Circuit decided to do away with the *de minimis* limit, permitting more uninjured members.[56]

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[46] Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods L.L.C, 993 F.3d 774, 776 (9th Cir. 2021), *rev'd en banc*, 31 F.4th 651 (9th Cir.), *cert. denied*, 143 S. Ct. 424 (2022).

[47] *Olean*, 31 F.4th at 661–62. *En banc*, as defined by *Black's Law Dictionary*, means that the court is sitting "with all judges present and participating; in full court." *En Banc*, BLACK'S LAW DICTIONARY, *supra* note 13. Because of the size of the Ninth Circuit, however, not all judges participate in en banc proceedings; instead, ten judges are randomly selected to serve with the Chief Judge. Sigel, James,

[48] Petition for Writ of Certiorari, StarKist Co. v. Olean Wholesale Grocery Coop., No. 22-131 (filed Aug. 8, 2022).

[49] StarKist Co. v. Olean Wholesale Grocery Coop., 143 S. Ct. 242 (2022) (mem.).

[50] *See* 136 S. Ct. 1036, 1050 (2016) (acknowledging that allowing inferences from statistical evidence opens the question of whether a class may recover with uninjured plaintiffs).

[51] *See In re* Asacol Antitrust Litig., 907 F.3d. 42, 53–54 (D. Mass. 2017) (concluding that around 10% of uninjured class members is not *de minimis*); *In re* Rail Freight Fuel Surcharge Antitrust Litigation, 934 F.3d 619, 625 (D.C. Cir. 2019) (holding that 12.7% is not *de minimis*, but 5%–6% likely is).

[52] *See Olean*, 31 F.4th at 669 (holding that uninjured plaintiffs may be included in class beyond a *de minimis* amount).

[53] *See infra* notes 57–60 and accompanying text.

[54] *See infra* notes 61–66 and accompanying text.

[55] *See infra* notes 67–75 and accompanying text.

[56] *See infra* notes 76–81 and accompanying text.

*A. Pre-*Bouaphakeo *Consensus on a No De Minimis Class Members Rule*

Prior to the Supreme Court's decision in *Bouaphakeo*, three circuits ruled on the issue of whether a class could be certified with uninjured members, each suggesting that a class would only be certified if all members could show injury.[57] In 2003, in *Bell Atlantic Corp. v. AT&T Corp.*, the Fifth Circuit rejected the idea that a judge could certify a class if the proof offered by the plaintiffs could not prove damages for each individual member.[58] In 2006, in *Denney v. Deutsche Bank AG*, the Second Circuit took up a similar argument, holding that a class can only be defined so that anyone in it would have standing to sue.[59] In 2008, in *In re Hydrogen Peroxide Antitrust Litigation*, the Third Circuit held similarly that a court can only certify a class if the members can show antitrust liability through common, not individual, evidence.[60]

B. Bouaphakeo*'s Impact on the Use of Statistical Evidence in Certifying Classes*

In 2016, in *Bouaphakeo*, the Supreme Court indicated that it was willing to allow certification on the basis of statistical data showing class-wide liability.[61] The question before the Court was whether a judge could certify a class by inferring from statistical evidence that each member of a class was injured to the same degree, even though in reality some class members were more wronged than others.[62] The Court held that this was acceptable, because each

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[57] *See, e.g.*, Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) (establishing a no *de minimis* class members rule and requiring proof of common liability).

[58] *See id.* (holding that if there is no common proof that will establish individual liability for each class member, there is no predominance of a common question).

[59] *See* 443 F.3d 253, 263–64 (2d Cir. 2006) (holding that certification is improper if individual plaintiffs do not have standing under Article III, but noting that individual evidence of standing is not required). Injury-in-fact is one requirement of Article III standing; therefore, under this rule a court cannot certify a class if it includes members without injury. *Id* at 263. The Ninth Circuit had previously cited *Denney* approvingly in *Mazza v. American Honda Motor Co.* 666 F.3d 581, 594 (9th Cir. 2012), *overruled by* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir.), *cert. denied*, 143 S. Ct. 424 (2022). However, *Olean* overruled *Mazza*'s requirement that each member of a class must be able to show Article III standing. *Olean,* 31 F.4th at 682 n. 32. Instead, the Ninth Circuit mentioned that the question of standing is only a factor in the predominance analysis. *See id.* at 668 n.12 (interpreting Rule 23 to require a court to inquire into whether individual standing questions will predominate at certification stage).

[60] *See* 552 F.3d 305, 311 (3d Cir. 2008) (holding that, for an antitrust class action to prevail, each plaintiff must be able to show some injury with a causal relationship to the antitrust violation).

[61] *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016) (holding that representative evidence should be allowed for class certification hearing if it is relevant).

[62] *Id.* Employees of a meat-processing facility brought this case seeking recompense for unpaid overtime under the Fair Labor Standards Act for the time they spent donning and doffing their work gear. *Id.* at 1042; *see also* Fair Labor Standards Act § 7, 29 U.S.C. § 207 (mandating that employees be paid time-and-a-half for any hours worked over forty). As the employer did not keep records of the time spent donning and doffing, the employees relied on a study conducted by an expert in industrial

plaintiff could have relied on the same statistical evidence in an individual claim.[63] As a result, the question of whether the statistical evidence accurately portrayed damages was a question that applied to the entire class, and the class could be certified.[64]

The Court then considered the question of whether plaintiffs needed to either show all class members were injured or demonstrate that uninjured plaintiffs would not recover.[65] Because the district court had not yet determined a method of allocation, however, the Court declined to rule on the matter.[66]

*C. Post-*Bouaphakeo *Tendency Toward a Limited De Minimis Class Members Rule*

In 2018, in *In re Asacol Antitrust Litigation*, the First Circuit became one of the first courts post-*Bouaphakeo* to rule on whether a class may be certified when uninjured members are present.[67] Based on expert reports, the district

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relations, Dr. Kenneth Mericle, who calculated that the average time spent was either eighteen minutes a day or 21.25 minutes a day, depending on the department. *Bouaphakeo*, 136 S. Ct. at 1043. The employees then presented evidence from another expert, Dr. Liesl Fox, who used Dr. Mericle's averages to calculate the total hours of overtime for each employee. *Id.* at 1043–44. Dr. Fox found that 212 of 3,344 members of the class had not worked over forty hours and thus had no damages; the rest potentially could claim a recovery. *Id.*

[63] *Bouaphakeo*, 136 S. Ct. at 1048. The court referred to *Anderson v. Mt. Clements Pottery Co.*, a 1946 Supreme Court case, for the proposition that the anecdotes of some employees could be representative of the whole workforce. *Id.*; *see also* 328 U.S. 680, 687 (1946) (holding that when employer does not keep accurate timekeeping records and an employee sues under a Fair Labor Standards Claim, the burden is on the employer to show that the employee did not work those hours), *superseded by statute*, Portal-to-Portal Act, ch. 52, 61 Stat. 84 (1947), *as recognized in*, Integrity Staffing Sol., Inc. v. Busk, 574 U.S. 27 (2014). It was important for the Court that there was no other way for the plaintiffs to show damages and that the lack of data was the fault of the employer for not keeping proper records. *Bouaphakeo*, 136 S. Ct. at 1047. Accordingly, the plaintiff's case would proceed the same either individually or as a class, and the burden shifting framework in *Anderson* applied, requiring the employer to disprove plaintiff's evidence. *Id*.

[64] *Bouaphakeo*, 136 S. Ct. at 1048. The Court emphasized that the defendants could have challenged the expert evidence under *Daubert*, which they did not do. *Id.* at 1049. The question of whether such evidence is persuasive, however, was a common question. *Id* at 1047.

[65] *Id.* at 1050. Initially, the defendants in *Bouaphakeo* argued that a class could not be certified if it contained members who were uninjured. *See* Petition for Writ of Certiorari at i, *Bouaphakeo*, 136 S. Ct. 1036 (No. 14-1146), 2015 WL 1285369, at *i. (raising question of whether certification was appropriate "when the class contains hundreds of members who were not injured"). Because the petitioners dropped this argument, however, the court did not rule on it. *Bouaphakeo*, 136 S. Ct. at 1049.

[66] *Bouaphakeo*, 136 S. Ct. at 1050. One of the factors the Court considered in deciding not to take the issue was that the defendants had an opportunity to bifurcate the trial and hold a separate trial to determine damages and decided not to do so. *Id.*

[67] *See* 907 F.3d 42, 53 (1st Cir. 2018) (holding that a class could not be certified because the facts of the case meant that any plaintiff could be without injury). This case was an antitrust claim brought by several union-sponsored benefit plans on behalf of purchasers of the drug Asacol, which treats ulcerative colitis. *Id.* at 44–45.

court had ruled that approximately one-tenth of the plaintiffs were uninjured.[68] This did not prevent the district court, however, from certifying the class.[69]

The First Circuit accepted the definition of *de minimis* set out in *In re Nexium Antitrust Litigation*, in which the court adopted a functional test, examining if the number of uninjured plaintiffs was so large that a common question no longer predominated.[70] In *Asacol*, however, the court held that the number of uninjured members was not *de minimis*, focusing on the impracticability of identifying injured class members and the number (around 10 percent) of uninjured members.[71]

In 2019, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, D.C. Circuit took a similar position to the First Circuit.[72] Accepting the existence of a *de minimis* rule *arguendo*, the court ruled that this case, in which 12.7% of plaintiffs were uninjured, would not fall within such an exception.[73] The D.C. Circuit affirmed the district court's holding that a *de minimis* rule could not extend beyond five or six percent of plaintiffs.[74] Similarly, in 2012, in *Messner v. Northshore University HealthSystem*, the Seventh Circuit suggested the existence of a *de minimis* rule by stating that it would be improper to certify a

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[68] *Id.* at 45. The issue at hand was which of the plaintiffs would have chosen Asacol over a generic drug if such a drug was available because the plaintiffs alleged that the defendant's behavior prevented such a generic drug from entering the market. *Id.* at 45–47.

[69] *In re* Asacol Antitrust Litig., 323 F.R.D. 451, 482 (D. Mass. 2017), *rev'd*, 907 F.3d at 58. The district court judge relied upon a prior 2015 First Circuit opinion, *In re* Nexium Antitrust Litigation, in which it was held that "the need for some individualized determinations at the liability and damages stage does not defeat class certification." 777 F.3d 9, 21 (1st Cir. 2015).

[70] *In re Asacol Antitrust*, 907 F.3d at 54; *see In re Nexium Antitrust*, 777 F.3d at 30–31 (holding that class with small percentage of uninjured members, likely around 5%, could be certified).

[71] *In re Asacol Antitrust*, 907 F.3d at 47, 53–54. It was relevant also to the court that there was no way of determining from the statistical model who was among the 10% of uninjured class members. *Id.* at 53. The court also emphasized that this was not a case where the evidence offered by the plaintiffs would be sufficient to carry any one plaintiff's case, in contrast to *Bouaphakeo*. *Id.* at 54.

[72] *See* 934 F.3d 619, 625 (D.C. Cir. 2019) (holding that the number of uninjured plaintiffs in the current class exceeded any potential de minimis rule established in other caselaw). Sixteen thousand shippers brought this case against some of the largest railroad companies in the United States, alleging an agreement to fix prices. *Id.* at 620. The plaintiffs relied on a regression model that showed that two thousand class members had negative damages. *Id.* Similar to *Asacol*, however, the regression analysis did not show which class members were uninjured. Lauren M. Weinstein & Leonid Grinberg, *Courts Face Controversy Over Uninjured Antitrust Class Members*, NAT'L L.J. (Feb. 27, 2020), https://www.mololamken.com/assets/htmldocuments/National%20Law%20Journal%20Grinberg%20Weinstein.pdf [https://perma.cc/D3CX-27XM].

[73] *In re Rail Freight Fuel Surcharge*, 934 F.3d at 625. The court noted that in its previous decision on the matter, it had ruled that in a class action, plaintiffs must show that all members of the class had been injured in some way. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C. Cir. 2013). In the current case, however, the D.C. Circuit moved closer to a *de minimis* standard. *See In re Rail Freight Fuel Surcharge*, 934 F.3d at 625 (suggesting that the 12.7% of uninjured plaintiffs in this case was double the *de minimis* standard established by other case law).

[74] *In re Rail Freight Fuel Surcharge*, 934 F.3d at 625. The D.C. Circuit also emphasized that a class should have a "winnowing mechanism" for manageably determining whether members were uninjured, such as the plaintiffs in *Nexium* who could rely on affidavit testimony. *Id.*

class if a great number of its members were not injured, but that there was no precise number that would be too great.[75]

D. The Ninth Circuit's Rejection of a De Minimis Limit

The Ninth Circuit, in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*, was willing to certify a class with uninjured members without limiting themselves with a *de minimis* rule.[76] Instead, the Ninth Circuit took the opinion that a district court could conclude predominance of a common question, even if the number of uninjured plaintiffs is greater than *de minimis*.[77] The Ninth Circuit instead looked at whether individual questions of injury outweighed common questions of injury.[78]

In 2023, in *Williams v. Martarello*, the Fourth Circuit cited *Olean* approvingly when deciding a related class-certification issue.[79] The question before the Court was whether a class could be certified without demonstrating that each member had paid the defendant, a requirement to show liability under the plaintiffs' theory of the case.[80] The court held that the class could be certified even without proof that the defendant had benefited from the plaintiffs, because the evidence that would prove the defendant received loan payments was common to the class.[81]

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[75] 669 F.3d 802, 825 (7th Cir. 2012). That the Seventh Circuit overturned the refusal to certify, when 2.4% of class members could have been uninjured, is further evidence that it adopted a *de minimis* rule. *Id.* at 825–26.

[76] *See* 31 F.4th 651, 669 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022) (rejecting the contention that "Rule 23 does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members").

[77] *Id.* The Ninth Circuit asserted that this decision did not cause a circuit split and was actually in line with the view of the First and D.C. Circuits. *Id.* at 669 n.13. The court held that neither the First nor the D.C. Circuits actually adopted a *de minimis* rule. *Id.* Instead, those courts suggested that a class with a *de minimis* group of uninjured plaintiffs does not offend the conception of predominance. *Id.*

[78] *See id.* at 668–69 (holding that a court should analyze the common injury question similar to the common damages question when certifying a class).

[79] 59 F.4th 68, 91–92 (4th Cir. 2023). The facts in this case involved an alleged Rent-a-Tribe scheme, when a provider of payday loans and a Native American tribe joined together to use the tribe's sovereign immunity in an attempt to circumvent usury laws. *Id.* at 73–75. Dozens of Native American tribes became involved in such agreements in the 2000s, but starting in 2013 the Justice Department began investigating these schemes. Ryan Goldberg, *How a Payday Lender Partnered with a Native Tribe to Bypass Lending Laws and Get Rich Quick*, THE INTERCEPT (May 31, 2021), https://theintercept.com/2021/05/31/payday-lender-native-american-tribe-american-web-loan/ [https://perma.cc/UDC4-8RBJ].

[80] *See Williams*, 59 F.4th at 86–87 (noting that the defendant argued that questions common to the class did not predominate in part because individual proof would be required for the class' claims of violations of usury law and unjust enrichment). Both the usury and unjust enrichment claims required that the defendant actually take payments for liability to attach to him. *Id.* at 91.

[81] *See id.* at 91 (stating that class action plaintiffs only have to show a predominant common question, not the merits of their case). The court emphasized that the question of the sufficiency of the class's common evidence was a question for trial. *Id.* at 91-92.

III. THE NINTH CIRCUIT'S APPROACH TO UNINJURED CLASS MEMBERS IS INCORRECT

The U.S. Court of Appeals for the Ninth Circuit was incorrect not to adhere to a *de minimis* rule when considering class certification under Rule 23(b)(3), as such a rule adds much-needed clarity to the text of Rule 23(b)(3).[82] Instead, the Ninth Circuit should have followed the approach suggested by the First, Seventh, and D.C. Circuits and adopted a *de minimis* rule, within the range suggested by these circuits (roughly five percent).[83] This represents a missed opportunity by the Ninth Circuit to actually define a *de minimis* standard, as prior cases included percentages of uninjured class members that were clearly either *de minimis* or not.[84]

Section A of this Part argues that the Ninth Circuit's rule fails to establish a clear standard for trial courts to utilize in certification decisions.[85] Section B argues that the Ninth Circuit's rule will lead to oversized classes, causing unfavorable policy results.[86] Section C argues, however, that the Ninth Circuit's holding is still preferable to the rule of the Second, Third, and Fifth Circuits, which does not allow any uninjured members in a class.[87]

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[82] *See* FED. R. CIV. P. 23(b)(3)(D) (emphasizing that courts should look at "the likely difficulties of managing a class action" when deciding to certify a class). It has been suggested that judges should not assess how similar class members are, but how dissimilar they are, as that is a more manageable inquiry. *See* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1005 (2005) (arguing that absence of dissimilarity is what assures fairness in a class action). The approach of the First, Seventh and D.C. Circuits is also more effective under the dissimilarity framework because it places a special emphasis on the number of class members who are not in common with the rest. *See id.* (noting that "the lack of substantial dissimilarity . . . makes class actions a fair and procedurally viable means of rendering judgment").

[83] *See In re* Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018) (suggesting that it is only appropriate to certify a class with uninjured parties when the class is small and can be handled in a manageable process so that the uninjured parties do not recover); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 825–26 (7th Cir. 2012) (concluding that a class may not contain a "great many" uninjured plaintiffs, but that 2.4% of plaintiffs being uninjured is within *de minimis* bounds (quoting Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009))); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 625 (D.C. Cir. 2019) (noting that previous cases "suggest that 5% to 6% constitutes the outer limits of a *de minimis* number" (quoting *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14, 137 (D.D.C. 2017))).

[84] *See Messner*, 669 F.3d at 826 (2.4% of plaintiffs being uninjured is *de minimis*); *In re Asacol Antitrust*, 907 F.3d at 45 (10% of plaintiffs being uninjured is not *de minimis*); *In re Rail Freight Fuel Surcharge*, 934 F.3d at 625 (12.7% of plaintiffs being uninjured is not *de minimis*).

[85] *See infra* notes 88–91 and accompanying text.

[86] *See infra* notes 92–97 and accompanying text.

[87] *See infra* notes 98–101 and accompanying text.

A. The Ninth Circuit's Rule Does Not Give Enough Guidance to Courts in Certification Decisions

The first issue that the Ninth Circuit's decision raises is one of clarity.[88] The court suggests that a trial court need only conduct a "rigorous analysis" of the case in the certification stage and determine that common questions of liability predominate over individual questions.[89] This further undermines the uniformity of the circuits for this issue by introducing a new test, which gives much less guidance than the *de minimis* test.[90] Giving this much discretion to trial judges to certify class actions runs against the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, in which Justice Scalia noted there should be a high standard of "rigorous review" for certifying a class.[91]

B. The Ninth Circuit's Rule Raises Policy Concerns Regarding Class Size

The second issue that the Ninth Circuit's decision raises is a policy concern: that allowing cases to proceed with uninjured plaintiffs beyond a *de minimis* number will make it impossible for defendants to proceed to trial for fear of outsized liability.[92] Companies spent three billion dollars defending class action lawsuits in 2021, and this number is expected to rise by twenty-seven percent in

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[88] *See, e.g.*, Erbsen, supra note 82, at 1005 (noting that the predominance balancing test relies on comparing in a subjective way factors that are often incomparable, without regard to the significance that each factor may have individually).

[89] *See* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods L.L.C., 31 F.4th 651, 668–69 (9th Cir.) (en banc), *cert. denied*, 143 S. Ct. 424 (2022).

[90] *See Olean*, 31 F.4th at 692 (Lee, J., dissenting) (arguing that this decision ignores without cause the approach established by the other courts for determining when the percentage of uninjured plaintiffs is too high).

[91] *See* 564 U.S. 338, 350 (2011) (noting that a judge should not certify a class just based on the pleadings). As Justice Scalia noted, a well-drafted complaint in a class action necessarily includes common questions. *Id.* at 349. As a result, the burden is on the plaintiff to show compliance with the predominance requirement—including, significantly, that all parties have been injured the same. *Id.* at 349–50.

[92] *See Olean*, 31 F.4th at 692 (Lee, J., dissenting) (suggesting that, without a *de minimis* rule, plaintiffs will be incentivized to increase the size of their class with uninjured members and that, accordingly, defendants will not be able to take even meritless cases to trial because the cost of losing at trial would simply be too high).

2022.[93] Many of these cases no doubt have merit, but it is hard to know one way or the other as the majority of them will settle.[94]

Allowing classes to be certified where, as in *Olean*, over a quarter of plaintiffs may not be injured will deny defendants access to the courts by constructively forcing them to settle.[95] Certified classes where the number of uninjured parties is more than *de minimis* also raise concerns of due process, as it may not be possible to separate the wheat from the chaff with too many uninjured plaintiffs.[96] Accordingly, the responsibility should be on the district court judge to prevent meritless claims from going forward, and a *de minimis* rule is one way to ensure that a class actually stands a chance of recovering for each of its members.[97]

C. The Ninth Circuit's Rule is Still Preferable to the No De Minimis Class Members Rule

The Ninth Circuit's rule is still preferable, however, to the rule of the Second, Third, and Fifth Circuits, which requires plaintiffs to prove that every member of the class was injured.[98] This standard is too high for plaintiffs, because a *de minimis* number of uninjured class members can be winnowed away without damaging the defendant.[99] Instead, this improperly places a higher burden of proof on plaintiffs than is called for in the predominance of common

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[93] D. Matthew Allen & John E. Clabby, *Survey Says U.S. Companies Anticipate Record Class Action Matters in 2022, Project 27% Matter Increase—Highest Level Reported in 11 Years*, CARLTON FIELDS (Feb. 22, 2022), https://www.carltonfields.com/about-us/newsroom/news/2022/class-action-survey-developments-best-practices [https://perma.cc/E5UA-AJPN]. This survey did note, however, that companies were facing fewer class action suits in which the entire net worth of the company could potentially be liquidated; instead, lawsuits that opened up the company to lesser exposure were much more common. *Id.* Several types of class actions have led this increase, such as claims related to COVID-19 and data breaches. *Id.*

[94] *See* Nettleton et al., *supra* note 25, at 101 (noting the great pressure on defendants in class actions to settle their cases to avoid outsized liability).

[95] *See Olean*, 31 F.4th at 692 (Lee, J., dissenting) (arguing that actions of questionable merit would be settled out of fear of bet-the-company type liability).

[96] *See* Danielle R. Foley, Asacol*: The First Circuit Tightens the Reins on Class Certification*, ANTITRUST, Summer 2019, at 45, 46 (noting that the First Circuit's decision in *Asacol* required a manageable plan for determining the injury of plaintiffs, maintaining the rights of the defendants to due process and Seventh Amendment protections).

[97] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (noting that the district court judge in a certification hearing will often have to make a ruling on the merits to determine whether a common question predominates).

[98] *See, e.g.*, Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003) (stating that a failure to show that all plaintiffs were injured should lead to failure of certification).

[99] *See In re* Asacol Antitrust Litig., 907 F.3d 42, 53 (1st Cir. 2018) (suggesting that a case may proceed if a small number of uninjured class members can be selected away from the rest of the class either before or at trial).

question analysis.[100] As class actions serve an important purpose in our judicial system as a mechanism for system-wide change, it is important to ensure the viability of these actions by not maintaining an excessively-high bar for certification.[101]

CONCLUSION

In 2022, in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C.*, the United States Court of Appeals for the Ninth Circuit held that a class action case could proceed even if the number of uninjured defendants in the class was more than *de minimis*, so long as a common question prevailed. This decision was misguided because it ignores a fair test developed by the First, Seventh and D.C. Circuits which allows only a *de minimis* number of uninjured plaintiffs. Instead, this decision only obscures how a district court is supposed to determine if a common question predominates and opens the floodgates for plaintiff's lawyers to enlarge their classes to the breaking point to scare defendants into settling. The Supreme Court, by denying certiorari, missed an important opportunity to side with the First, Seventh and D.C. Circuits and set a *de minimis* limit for future class action certification cases with uninjured plaintiffs.

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[100] *See* Richards & Brown, *supra* note 16, at 176–77 (noting that a preponderance of the evidence standard should be applied here).

[101] *See* Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2469 (2022) (recommending that Congress reduce the class-certification standard to enable civil-rights plaintiffs to litigate against endemic discrimination).