No. 23-1940

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS SPEERLY, ET AL.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS, LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Michigan
Hon. David M. Lawson, District Judge

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN OPPOSITION TO DEFENDANT-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1940 Case Name: Speerly et al. v. General Motors LLC

Name of counsel: Wendy Liu

Pursuant to 6th Cir. R. 26.1, Public Citizen
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No

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No

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I certify that on November 18, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Wendy Liu

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protecting consumers and workers, public health and safety, and maintaining openness and integrity in government.

Public Citizen believes that class actions are an essential tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, which is present in many product-defect cases, a class action offers the best means for individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process. Public Citizen has often participated as amicus curiae in cases involving issues concerning class-action standards

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

and requirements. *See, e.g.*, *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc); *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018).

Public Citizen submits this brief to explain that the panel's holding that Article III was satisfied is correct and does not conflict with decisions by other courts of appeals.

ARGUMENT

I. The panel's holding that Article III was satisfied is consistent with the decisions of the other courts of appeals.

In holding that the plaintiffs had Article III standing, the panel concluded that the possibility of uninjured absent class members at the certification stage did not render the case nonjusticiable and did not defeat class certification. That conclusion is consistent with decisions of the other courts of appeals. *See Hyland v. Navient Corp.*, 48 F.4th 110, 118 (2d Cir. 2022); *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 766–67 (8th Cir. 2020); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019); *Curtis v. Propel Property Tax Funding, LLC*, 915 F.3d 234, 240 (4th Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353,

362 (3d Cir. 2015); *Kohen v. Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009).[2]

A. General Motors (GM) contends that the Second and Eighth Circuits hold otherwise. *See* Pet. 13. GM is incorrect. The Eighth Circuit, taking precisely the same approach as the panel decision in this case, has rejected the argument that all class members must have Article III standing to certify a Rule 23(b)(3) class. *See Vogt*, 963 F.3d at 766–67 (citing 1 Steven S. Gensler & Lumen N. Mulligan, *Federal Rules of Civil Procedures, Rules and Commentary*, Rule 23 (2020) for the proposition that "[if] it turns out that some members of the class are not entitled to relief, that represents a failure on the merits, not the lack of a justiciable claim"), *cert. denied*, 141 S. Ct. 2551 (2021); *Stuart v. State Farm Fire and Casualty Co.*, 910 F.3d 371, 377 (8th Cir. 2018) (stating that "[a]lthough couched as disputes about standing, State Farm's arguments really go to the merits of plaintiffs' claims" because "whether some

[2] Within this Circuit, too, district courts have agreed that the presence of uninjured class members does not present an Article III issue at the certification stage. *See Underwood v. Carpenters Pension Tr. Fund-Detroit & Vicinity*, 2014 WL 4602974, at *3 (E.D. Mich. Sept. 15, 2014); *In re Nw. Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 225 (E.D. Mich. 2002).

plaintiffs are unable to prove damages … is a merits question"). And *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021), cited by GM, expressly disclaims the notion that "every plaintiff [must] submit evidence of their individual standing." *Id.* at 988 n.3.

The Second Circuit agrees. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 241, 245 (2d Cir. 2007) ("As a threshold matter, we note that only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class"); *cf. Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 185 n.14 (2d Cir. 2020) ("Because we conclude that none of the named plaintiffs has standing to pursue their claims for prospective relief, the class proposed by [them] necessarily fails as well.").

GM focuses on a sentence in an older Second Circuit case, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), which states that "no class may be certified that contains members lacking Article III standing," *id.* at 264. The Second Circuit has explained, however, that the "single sentence" in *Denney* did *not* "suggest[] that all class members must have standing for the class to proceed." *Hyland*, 48 F.4th at 118 n.1. Rather, read in context, the sentence says only that

a class must be defined in terms of members who have suffered injury. *See id.* at 118 (citing cases for the proposition that only one named plaintiff need have standing with respect to each claim).

B. GM likewise errs in suggesting that the panel's decision is not in line with the Eleventh Circuit's decision in *Cordoba*. *See* Pet. 13–14. In *Cordoba*, the court explained that the district court erred in failing to consider whether the predominance requirement was met where it appeared "that a large portion of the class does not have standing, as it seem[ed] at first blush here, and making that determination for these members of the class will require individualized inquiries." 942 F.3d at 1277. That holding is fully consistent with the panel opinion here, where all class members have standing based on their alleged overpaying for a defective product regardless of manifestation of the defect, *see* Pet., Ex. A at 11–13; *see Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 523 (E.D. Mich. 2023), and individualized issues do not predominate over common questions in this case, *see* Pet., Ex. A at 13, 16–18.

II. The panel correctly held that Article III standing is satisfied because the named plaintiffs have standing.

Contrary to the assertions of GM and its amici, the possibility of uninjured absent class members does not preclude Rule 23(b)(3)

certification where the named plaintiffs have standing. The critical point by which uninjured class members (if any) must be excluded from a Rule 23(b)(3) class is not the time of certification, but when the class action is resolved on the merits. This conclusion follows from Article III principles and the requirements of Rule 23.

An Article III "case or controversy" exists when one plaintiff has standing. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977))); *Libertarian Party of Ohio v. Wilhem*, 988 F.3d 274, 279 (6th Cir. 2021) (stating that "further discussion of plaintiffs' standing is unnecessary to our resolution of the suit" where one plaintiff had standing).

This same principle applies in class litigation. *See Fox v. Saginaw Cnty.*, 67 F.4th 284, 288 (6th Cir. 2023) (stating that "a class-action request 'adds nothing to the question of standing'" (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976)). Thus, if a named

plaintiff has Article III standing, the district court has Article III jurisdiction to hear a case arising under federal law. *See Frank v. Gaos*, 586 U.S. 485, 492–93 (2019).[3]

Thus, the presence of injured members in a certified class does not render the case nonjusticiable. Rather, whether all members can demonstrate entitlement to relief is a merits question that does not affect a court's authority to entertain their claims. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (8th Cir. 2014) (opinion of Benton, J., respecting the denial of rehearing en banc) ("The failure of some employees to demonstrate damages goes to the merits, not jurisdiction."). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate that he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975).

The Supreme Court's treatment of the issue confirms the point. Although the Court has used the word "standing" when discussing

[3] *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017), cited by amicus Chamber of Commerce, is not to the contrary. Applying the rule that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint," *Town of Chester* holds that parties seeking to intervene as plaintiffs must show standing "when it seeks additional relief beyond that which the plaintiff requests." *Id.* at 439.

whether each member of a class has experienced injury, it has more than once declined to address the question in class-action cases. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 n.4 (2021); *Tyson Foods v. Bouaphekao*, 577 U.S. 442, 460 (2015); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997). If the matter were "jurisdictional," though, the Court could not have chosen to bypass the issue once it had identified it. *See Boechler, P.C. v. Comm'r*, 596 U.S. 199, 203 (2022) ("Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and … do not allow for equitable exceptions."); *Frank*, 586 U.S. at 492 (noting a federal court's "obligation to assure [itself] of litigants' standing under Article III" (citations omitted)).

To hold otherwise would require every plaintiff seeking damages—in both individual and class-action cases—to prove her case to avoid a jurisdictional dismissal under Rule 12(b)(1). *Cf. Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013) (stating that conditioning certification on the plaintiffs "first establish[ing] that [they] will win the fray" would "put the cart before the horse"). If a plaintiff who failed to establish damages at trial lacked standing, the proper resolution would not be judgment in the defendant's favor, but a jurisdictional dismissal

without res judicata effect. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Such a novel rule would waste judicial resources, benefit neither plaintiffs nor defendants, and contradict the longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See Gen. Inv. Co. v. N.Y. Cent. R.R.*, 271 U.S. 228, 230–31 (1926); *Bell*, 327 U.S. at 682.

III. Requiring all class members to show Article III standing at certification would create practical problems at odds with Rule 23.

Conditioning certification on proof that all class members were injured would, in many cases, create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," yet assessing class members' injuries at certification is often infeasible because their identities are unknown. In many cases, for a class to "include persons who have not been injured by the defendant's conduct … is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen*, 571 F.3d at 677. In addition, because class certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals

would be thwarted by requiring decertification based on a showing, at *any* stage, that *any* members of a certified class were uninjured. *See Neale*, 794 F.3d at 364 ("Requiring individual standing of all class members would eviscerate the representative nature of the class action.").

Further, if uninjured members come to light during litigation, several procedural solutions are available: narrowing the class; summary judgment as to the uninjured members; instructing the jury not to base any award of damages on uninjured individuals; and requiring a process to identify such members (if any) and exclude them from sharing in a classwide damages award. *See, e.g.*, *Tyson Foods*, 577 U.S. at 460–62 (remanding for trial-court proceedings to identify class members, if any, who had no damages); *see also* Pet., Ex. A at 13 (stating that "the appropriate time to 'address claims of absent class members whose vehicles never have manifested any defect is a Rule 56 motion for summary judgment'" (quoting district court opinion)).

To be sure, the presence of uninjured class members may, in some cases, be an indication that common issues do not predominate or that a class action is not a superior method of adjudication. But that concern is

not present here. Rather, under the plaintiffs' theory of the case, the evidence, if credited by the ultimate finder of fact, would establish that *all* members of the class suffered economic harm through their overpayment for a car with transmission defects or the diminished value of the defective car. *See* Pet., Ex. A at 12–13; *id.* at 13 (stating that "[i]f defective design is ultimately proved, all class members have experienced injury as a result of the decreased value of the product purchased" (quoting *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 856 (6th Cir. 2013)). Moreover, if, at the merits stage, plaintiffs fail to show that their evidence establishes injury to the entirety of the class, the district court can resolve the claims of any uninjured members through a motion for summary judgment, Pet., Ex. A at 13, or use the records produced by the defendant to "identify and cull at the merits phase … any claimants who never had any problems with their vehicles or never sought repairs," *Speerly*, 343 F.R.D. at 523. Certification in such circumstances is entirely appropriate.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs-appellees' response to General Motors's petition, the petition for panel rehearing and rehearing en banc should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4), 29(b)(4), and 32(g)(1), I certify that the foregoing brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 2,396 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ *Wendy Liu*
Wendy Liu

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Wendy Liu*
Wendy Liu