No. 24-5956

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONIECE DRAKE AND DEBORAH BOWLING, individually and on behalf of all others similarly situated,
Plaintiffs-Respondents,
v.
BAYER HEALTHCARE, LLC,
Defendants-Petitioners.

On Appeal from the United States District Court
for the Southern District of California
Case No. 3:22-cv-1085-MMA (JLB); Hon. Michael M. Anello

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS AND REVERSAL

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STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

A motion for leave to file this brief has been submitted. As that motion explains, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases addressing class actions.

Many members of the Chamber and the broader business community face putative class actions in which named plaintiffs seek certification of overbroad classes encompassing the uninjured, and without presenting adequate means of proving causation and injury through common evidence. These actions present significant risks of deadweight economic loss because the cost to businesses (and ultimately to consumers) is not related to any actual injury to the plaintiff class. The

Chamber and its members thus have a strong interest in rigorous assessment of common proof of injury and in ensuring that classes are limited to injured persons.[1]

INTRODUCTION

Common evidence of injury is critically important to class certification under Federal Rule of Civil Procedure 23. In this case, the plaintiffs' purported common evidence showed that almost all, if not all, class members were *not* injured. The class certification decision thus cries out for this Court's review to remind the district courts that they must rigorously apply the requirements of Rule 23, not certify costly no-injury class actions against businesses.

This action is one of many that try to impose liability on makers of products that use the word "natural" on labels or advertising, but do not meet some lawyer-created standard of purity. Plaintiffs in these actions often put forth a consumer survey as common proof that consumers both understood the challenged term in accord with the plaintiffs' theory of

[1] No party or counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

deception, and acted upon that understanding (and hence, were injured). The plaintiffs here commissioned and submitted a survey. But the survey results did not provide common evidence of causation and injury. On the contrary, that survey found that consumers were *not* deceived by the inclusion of the term "natural" on the label at issue. Thus, not only was common proof of injury lacking, but the plaintiffs' purported common proof indicated that none (or nearly none) of the class members was injured. Yet the class was certified.

This Court should grant review and reject that approach. Without common evidence sufficient to prove core issues of injury and causation, no class should be certified, let alone a grossly overbroad one like that certified below.

ARGUMENT

A. Article III and the Rules Enabling Act Preclude Construing Rule 23 to Permit Certification of a Class Lacking a Class-Wide Means of Proving Injury.

A damages class action must be based on common proof that class members have been actually injured and injured by "the same injurious course of conduct underlying the plaintiffs' legal theory." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017). The Supreme Court has

made clear that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (quoting *Tyson Foods, Inc. v. Bouaphakeo,* 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). And this Court has held that, while Rule 23 may permit certification of a class that "potentially includes more than a de minimis number of uninjured class members," when "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 & n.14 (9th Cir. 2022) (cleaned up), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.,* 143 S. Ct. 424 (2022).

Although this Court does not require that a class definition perfectly exclude potentially uninjured members, the class device cannot provide windfall remuneration to persons whose lack of injury would preclude them from recovering in an individual action. Such an application of Rule 23 would violate the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any

substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. § 2072(b)). It would also violate Article III, which requires a case or controversy involving concrete injury. *TransUnion*, 594 U.S. at 424.

Whether each class member was injured "is central to the validity of each one of the claims" presented here. *Dukes,* 564 U.S. at 350. And without a common means to determine whether class members are injured, the court would have to conduct mini-trials for each plaintiff here to determine whether she was injured by the accused conduct. That would present a "powerful problem under Rule 23(b)(3)'s predominance factor," *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019), and effectively defeat the purpose of the class action form.

The district court did not directly address whether there was common evidence to prove injury. And it did not identify any such evidence. In its materiality discussion—the closest the court came to addressing whether there was common evidence of injury—the court mentioned three potential sources of common evidence. But none suffices as class-wide evidence of injury.

First, the district court mentioned the named plaintiffs' depositions. Pet. App. 11. Those depositions cannot possibly be common, *class-wide* evidence; they at most reflect the preferences of two individuals. And the petition indicates that this individualized evidence was at best mixed and ambiguous. One named plaintiff had "no idea what percentage" of the product was natural. Pet. 15 (citing ECF 96-4, at 11). And neither cared whether the product was 100% nonsynthetic. *Id.* (citing ECF 96-4, at 11; ECF 96-5, at 9, 16–19). Although the district court concluded that the plaintiffs "purchased the Products because of the 'natural' representation on the labels," Pet. App. 9, valuing "natural" contents does not show that those plaintiffs—let along other class members—were injured if the products had only 98% natural ingredients.

Second, the district court mentioned Bayer's internal documents discussing whether to include the word "natural" on the label. Pet. App. 11–12. But those documents could not provide common proof of the word's understanding by, or effect on, persons who bought the vitamins at issue.

Third, the district court mentioned the plaintiffs' survey expert—but only to characterize challenges to that expert as merits issues that need not be resolved at class certification. *See* Pet. App. 12. That was not

the "rigorous analysis" of the proffered common evidence of injury that Rule 23 requires. *Dukes*, 564 U.S. at 351. The district court did not identify anything the expert said that could provide common evidence of causation or injury. And no wonder. The expert repeatedly admitted that her surveys provided no evidence that the word "natural" on the actual labels at issue deceived any consumer or affected consumer perception of the product's ingredients. *See* Pet. 9–11, 14. Even for an artificially simplified label containing only the word "multivitamin" with or without the word "natural," the expert's survey found an effect only on a minority of consumers. *See* Pet. 14.

That is facially insufficient to provide a common means of proving injury, leaving class members to "rely[] on individual testimony to establish the existence of an injury." *Bowerman v. Field Asset Servs., Inc.*, 60 F.4th 459, 469 (9th Cir. 2023). Thus, each unnamed class member would need to come forward with evidence that he read the label, understood "natural" to mean "100% natural," and purchased Bayer's Natural Fruit Bites as a consequence of that understanding. These individualized issues would overwhelm any common issues in the case. *See id.*

Worse, there is substantial reason to believe that such mini-trials would determine that many class members—quite possibly all of them—were *not* injured by the "natural" label. That is what the survey suggests. But just as uncommunicated false information could not cause injury in *TransUnion*, the word "natural" could not injure buyers it did not deceive. And this Court recognized in *Olean* that a "class is defined too broadly to permit certification" if it sweeps in "a great number of members who … could not have been harmed by the defendant's allegedly unlawful conduct." 31 F.4th at 669 n.14 (cleaned up).

This case presents an opportunity to provide additional guidance on two important points for district courts confronting class-certification motions in this Circuit. First, a proposed Rule 23(b)(3) class, like this one, that contains many possibly uninjured class members may not be certified. And second, a class should be limited to "include only those members who can rely on the same body of common evidence to establish the common issue." *Olean*, 31 F.4th at 669 n.14.

B. The Legal Standard for Materiality Cannot Excuse the Lack of Class-Wide Proof of Injury.

Like some other courts, the court below appears to have conflated the need for common evidence of injury with the legal standard for

materiality. The pattern is simple. Plaintiffs bring a class action challenging how a term is used on a product label or in its advertising. They want to certify a class of everyone who bought the product at issue but have no means of proving with common evidence that all buyers interpreted the term—or were injured by it—in the same way. They thus encourage courts to sidestep that problem by noting that the standard for materiality under various causes of action uses a "reasonable person" or "reasonable consumer" test. *See* Pet. App. 11. If a reasonable person would be influenced by the term, no further class-wide proof of materiality is necessary, and materiality may do double-duty for proof of reliance.

The court below accepted that encouragement, concluding that materiality was subject to common proof because a factfinder could determine whether a reasonable person would be influenced by the term "natural" on a vitamin label. But that does not answer two critical questions about injury for which common proof is lacking:

(1) Was there a common understanding that "natural" meant "entirely lacking in synthetic ingredients"?

(2) Did purchasers actually buy the product because of the word "natural" on the label?

Injury is separate from materiality for individuals. A label's term could be material in that it could matter to a reasonable person (though the plaintiffs' surveys here apparently did not support even that conclusion), yet not establish injury for any individual buyer. Some putative class members might not share the view that "natural" must mean "containing no synthetic ingredients whatsoever," so that, while the word "natural" mattered to them, they got what they paid for. Or, although valuing the word "natural" in the abstract, putative class members might not have been influenced by its inclusion on a particular label.

The district court's failure to address whether any of these issues could be resolved by common proof led to improper certification. Specifically, the district court said that "Plaintiffs have established materiality and, in doing so, have offered evidence that the 'natural' representation on the Products' labels was intended to meet consumers' desires." Pet. App. 13. But even assuming that were true, it would not establish that the label actually led anyone to buy the product who would

not otherwise have done so. Here, the plaintiffs' only common evidence addressing actual consumer understanding of the terms—the perception survey—suggested otherwise. Indeed, it suggested that the vast majority of the unnamed class members were uninjured. That alone should have precluded class certification.

C. No-Injury Class Actions Distort the Litigation System and Impose Unwarranted Costs on Businesses and Consumers.

Certifying a class consisting largely or entirely uninjured individuals not only violates Rule 23 and Article III, but also significantly increases unwarranted settlement pressure on a defendant. The requirement of adequate, evidence-based analysis of the Rule 23 factors is "a crucial part of avoiding the procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023). Without such rigorous analysis, businesses will be pressured to settle improperly certified class actions, at deadweight economic loss to businesses and, ultimately, consumers at large.

Litigating class actions is expensive. Defending against a single large class action can cost tens of millions of dollars—or more. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense cost of $100 million in

a single action). Among large companies alone, class action litigation costs reached a record-breaking $3.9 billion in 2023 and are expected to surpass $4.2 billion in 2024, more than doubling the figure from 2014. *See* Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6–7 (2024), available at https://ClassActionSurvey.com. And the potential liability on the line is often orders of magnitude higher.

The Supreme Court has long recognized the consequent "risk of 'in terrorem' settlements that class actions entail." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)). As Justice Ginsburg observed, even "the mine-run case" risks "'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (quoting Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment). "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). And "the prospect of aggregating thousands of weak or frivolous

individual claims into a single sprawling class action—with the potential to coerce companies into settlement—has invited a bevy of dubious consumer class action suits." U.S. Chamber of Com. Inst. for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws and the Road to Reform* 22 (2022), available at http://tinyurl.com/2jvv33az. "[W]here questionable lawsuits are allowed to proceed, companies have to choose between entering into '*in terrorem*' settlements or rolling the dice on a class trial and relying on the judgment of an unpredictable jury." *Id.*

Class certification heightens settlement pressure to the point that "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). "[I]t is no wonder why class actions settle so often: If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." *Olean*, 31 F.4th at 685 (Lee, J., dissenting).

Damages classes like this one, involving significant numbers of potentially uninjured individuals, pose a risk of coerced settlement that

exceeds any legitimate measure of liability. And that settlement pressure is heightened here by the civil penalty provisions of New York General Business Law sections 349(h) and 350-e(3), which magnify the damages available to the New York class—a class whose inclusion of uninjured parties would preclude certification in the Second Circuit. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

Although uninjured individuals in theory should be denied damages in the end, the costs of litigating against such a class, and the risks that such individuals will not actually be excluded at judgment, could pressure class action defendants to settle. Requiring valid common evidence of injury "at the class certification stage" prevents this "unjustified settlement pressure" and the waste of resources that would have occurred if a court did "conclude at final judgment that significant portions of the certified class lack standing." U.S. Chamber of Com. Inst. for Legal Reform, *TransUnion and Concrete Harm: One Year Later* 51 (2022), available at https://tinyurl.com/nheb29w4.

In light of the significant economic stakes, this Court should deliver clear guidance to ensure that district courts adequately perform the rigorous analysis of common proof of injury that Rule 23 requires.

CONCLUSION

The petition for permission to appeal should be granted and the order certifying the class should be reversed.

October 7, 2024

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Circuit Rules 5-2(b), 32-3(2), and Fed. R. App. P. 29(d)(5) because:

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October 2024, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

October 7, 2024

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