

No. 25-7927

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THOMAS J. LOSAVIO, ON BEHALF OF HIMSELF
AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,

v.

TESLA INC., ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:22-cv-05240-RFL; Hon. Rita F. Lin

**MOTION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA FOR
LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS AND REVERSAL**

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**MOTION OF THE CHAMBER OF COMMERCE OF
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The Chamber of Commerce of the United States of America (the “Chamber”) respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the defendants-appellants in this case. Counsel for *amicus curiae* endeavored to obtain the consent of all parties to this filing. Defendants-appellants have consented. Plaintiff-appellee did not consent.

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.

The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation’s business community. For example, the Chamber has participated as *amicus curiae* in class action cases around the United States. *See, e.g., Drake v. Bayer Healthcare,*

LLC, No. 24-7158, (9th Cir. argued Dec. 10, 2025); *Laboratory Corp. of Am. Holdings v. Davis*, 605 U.S. 327 (2025); *Sonneveldt v. Mazda Motor of Am., Inc.*, No. 23-55325, 2024 WL 5242611 (9th Cir. Dec. 30, 2024); *Speerly v. General Motors, LLC*, 143 F.4th 306 (6th Cir. 2025) (en banc); *In re Nissan North Am., Inc. Litig.*, 122 F.4th 239 (6th Cir. 2024); *Chase v. Plan Benefit Servs., Inc.*, 108 F.4th 297 (5th Cir.), *cert. denied*, 145 S. Ct. 774 (2024); *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1051 (2025).

Many members of the Chamber and the broader business community face putative class actions in which named plaintiffs seek certification of overbroad classes encompassing uninjured persons, and without presenting adequate means of proving 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. Common proof of exposure to alleged misrepresentation is the necessary

first step to certifying a class seeking to impose liability for false advertising or other forms of consumer deception.

The proposed brief *amicus curiae* may aid the Court's decision-making process in several ways. The brief first explains that the limits imposed by Article III, the Rules Enabling Act, 28 U.S.C. § 2072(b), and California substantive law foreclose certification of any class containing substantial numbers of persons who were not exposed to the allegedly misleading statement—a threshold showing necessary to prove injury and standing to sue. The brief then explains that classwide exposure has been inferred only when class members inevitably encountered the challenged statement. The narrow path to such an inference recognized in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), and adopted by this Court, does not apply here and should not be extended. Finally, the brief explains in detail some of the deleterious consequences for the business community and consumers when overbroad classes containing substantial numbers of uninjured persons are erroneously certified.

Amicus curiae states that no party or counsel for any party authored the accompanying 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 the accompanying brief.

CONCLUSION

The motion for leave should be granted and the accompanying brief *amicus curiae* filed.

March 19, 2026

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I hereby certify that on this 19th day of March 2026, I electronically filed the foregoing motion with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

March 19, 2026

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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. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to its members, including cases addressing class actions. A motion for leave to file this brief has been submitted.

Many members of the Chamber and the broader business community face putative class actions in which named plaintiffs seek certification of overbroad classes encompassing uninjured persons. 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 the common proof of

injury—here, proof of exposure to allegedly misleading statements, a prerequisite for any possible injury. Only rigor in that analysis can ensure that damages classes are limited to injured persons.¹

INTRODUCTION

Can a person who bought a product without ever seeing an alleged misrepresentation about it recover damages for false advertising? No individual could under Article III or California law. Yet under the ruling below, all buyers of the Tesla Full Self Driving capability (FSD) package, including those who never saw the statements about FSD hardware capability alleged to be misleading, are eligible to recover damages for false advertising and similar claims.

That ruling both expands the susceptibility of American businesses to class actions and threatens to substantially increase the costs to businesses and consumers of overbroad and meritless class proceedings. Despite its significant and harmful implications, however, the ruling lacks mooring in law or logic.

¹ *Amicus curiae* states that no party or counsel for any 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.

Exposure to an alleged misstatement is the *sine qua non* of any misrepresentation claim. No one can be harmed by an advertising statement that she never saw. And common, classwide exposure is a necessary predicate to class certification.

Yet the district court took an unwarranted shortcut to sweep all FSD buyers into two classes (excluding only buyers who had agreed to arbitrate their claims). The district court concluded that classwide exposure had been proved because the challenged statements appeared on the “Autopilot” subpage of Tesla’s website, where Tesla provided “key information about the FSD features.” 1-ER-11. The court recognized that buyers could purchase the FSD package without visiting the Autopilot subpage. *Id.* Most obviously, they could walk into a Tesla sales center and order the FSD package based on what they learned about it there rather than from any written source, perhaps because of its many current functions and immediate benefits. But the district court nonetheless “inferred” that all class members reviewed the subpage. *Id.*

As a result, the certified classes inevitably include members who never saw the challenged statements, could not have been injured, and could not be separated out from the class at any stage without intensely

individualized inquiries into what they saw before they bought the FSD package. Those persons cannot recover damages and should not be included in any damages class.

The certification order should be reversed.

ARGUMENT

A. Because Plaintiffs Failed to Show Classwide Exposure, the District Court Erred in Certifying the Classes.

In certifying the classes here, the district court’s consideration of class members’ exposure to the challenged statements did not measure up to the “rigorous analysis” required by Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Article III and Rule 23 do not permit substantial numbers of uninjured persons to be included in a damages class. *E.g.*, *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)); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 & n.14 (9th Cir. 2022) (en banc) (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)). There is no injury under federal law to a person who was not exposed to Tesla’s allegedly misleading statement, because his

or her purchase decision could not have been affected by it. And the relevant California substantive law also makes clear that exposure is a prerequisite to injury because “one who was not exposed to the alleged misrepresentations” cannot have been deceived or damaged by them. *Downey v. Pub. Storage, Inc.*, 44 Cal. App. 5th 1103, 1115 (2020) (collecting overwhelming authority on the point). The district court accordingly was required to police the boundaries of these classes to ensure that they do not include an excessive number of persons who were not exposed to the challenged statements and thus are not injured.

Consistent with these principles, this Court has long held that a damages class action requires common means of proving both that class members have been actually injured and that they have been 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) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013)). Moreover, in cases involving claims like those at issue here, plaintiffs bear the burden to establish a common means of proving the exposure that is necessary for injury. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581,

588 (9th Cir. 2012), *overruled in part on other grounds by Olean*, 31 F.4th at 682 n.32; *Comcast*, 569 U.S. at 33.

These rules follow from the interaction of Rule 23 with Article III. Article III requires each plaintiff to establish a case or controversy involving concrete injury. *TransUnion*, 594 U.S. at 424; *Murthy v. Missouri*, 603 U.S. 43, 58 (2024).² “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.” *TransUnion*, 594 U.S. at 431 (quoting *Tyson Foods*, 577 U.S. at 466 (Roberts, C.J., concurring)). Further, plaintiffs have the burden to demonstrate standing at *each stage* of the litigation with the proof appropriate to that stage. *See id.* The same thus goes for each member of a putative class action under Rule 23: “federal courts may not certify a damages class pursuant to Rule 23 when the class includes both injured and uninjured class members.” *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333–34 (2025) (Kavanaugh, J., dissenting) (*LabCorp*). After all, the class-action device can neither provide windfall remuneration to persons whose lack of injury would preclude them from recovering in an

² Here, in contrast, the district court erroneously placed the burden on Tesla to show that buyers did *not* peruse the Autopilot or other subpages of Tesla’s website before buying the FSD package. *See* 1-ER-12.

individual action, nor prolong the participation of such persons in litigation they lack standing to pursue.

In addition, the Rules Enabling Act “forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right.’” *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)); *see also* Fed. R. Civ. P. 82 (rules “do not extend or limit the jurisdiction of the district courts”). Applying Rule 23 to allow persons without standing to pursue a federal action as part of a certified class would violate “the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.” *Tyson Foods*, 577 U.S. at 458. Under both Article III and California law, an individual plaintiff who did not see—and thus whose purchase decision was not affected by—the hardware statement could not pursue a claim based on the theory that some other people were misled. That plaintiff would be dismissed as soon as his lack of exposure was discovered. But under the certification order below, that plaintiff and all other buyers in the same situation are class members who will remain part of this litigation until it ends. That is not a permissible result.

This Court applied this principle when it rejected certification of a class that included persons who could not have been harmed by the challenged practice in *Wit v. United Behavioral Health*, 79 F.4th 1068, 1084–85 (9th Cir. 2023). As the Court recognized, because the certified “classes were not limited to” those injured by the “challenged provisions,” “Rule 23 was applied in a way that enlarged or modified Plaintiffs’ substantive rights in violation of the Rules Enabling Act.” *Id.* at 1086. So it is here.

Even if it were permissible under Article III to certify classes containing a potentially significant number of unexposed and thus necessarily uninjured members, the district court erred in certifying the classes here because the inquiries involved in removing uninjured members from the classes will defeat predominance. While this Court’s precedent does allow a class to include “more than a de minimis number of uninjured class members,” *Olean*, 31 F.4th at 669, a position in conflict with other circuits, *see id.* at 691–92 (Lee, J., dissenting) (identifying circuit split), this Court permits uninjured parties to initially remain in a class only if separating them out later (due to their inability to recover damages) will not defeat predominance, *id.* at 669.

Here, it is unclear exactly how many buyers of the FSD package bought it without seeing the challenged statements, but it appears that only intensely individualized inquiries could establish who those buyers are. And those inquiries would predominate over every other aspect of the litigation. Indeed, this Court recently vacated a class-certification order because the district court did not consider how individual inquiries into injury would affect whether common or individual issues predominated in the case. *See Van v. LLR, Inc.*, 61 F.4th 1053, 1068–69 (9th Cir. 2023). Yet the certification order here does not even address how the court plans to separate the exposed—and potentially injured—from the unexposed, necessarily unharmed members of the classes it certified. It appears that class members will have 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). That alone should have precluded class certification. *See id.* at 470–71.

B. Classwide Exposure May Be Inferred Only When Exposure Was Unavoidable.

In accord with the governing principles explained above, this Court has repeatedly recognized that, to certify a class challenging advertising statements, “everyone in the class [must] have viewed the allegedly

misleading advertising.” *Mazza*, 666 F.3d at 596 (citing authority from this Court and California courts). A class that consists of many people who never saw—and thus “could not have been harmed” by—the alleged misrepresentations “does not satisfy Rule 23(b)(3).” *Castillo v. Bank of Am., NA*, 980 F.3d 723, 730 (9th Cir. 2020) (cleaned up). Plaintiffs are thus required to show that common evidence can establish that the threshold requirement that all (or materially all) class members encountered the alleged misrepresentation. In this Court’s cases, certain types of evidence have sufficed to support an inference of classwide exposure. Under the relevant California substantive law, however, such classwide exposure can be inferred only when exposure is effectively inevitable. *See Downey*, 44 Cal. App. 5th at 1117 (no inference when exposure was not a “practical inevitability”).

For example, this Court has permitted an inference of classwide exposure when the challenged statement is “prominently displayed on the front of the packaging,” so that the buyer cannot avoid seeing the statement before buying the product. *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 869 (9th Cir. 2025), *pet. for cert. docketed*, No. 25-874 (U.S. Jan. 22, 2026). This Court has suggested such an

inference is particularly apt if the front-label statement is closely tied to the product's primary purpose. *See id*; *see also Lytle v. Nutramax Lab's, Inc.*, 114 F.4th 1011, 1023 (9th Cir. 2024) (front-label statements about improving joint health on “joint health supplement”), *cert. denied*, 145 S. Ct. 1308 (2025). Back-label statements, however, have not received the same inference of exposure, because the buyer must take an extra step—one not strictly necessary—in order to see them. *See Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 778 (9th Cir. 2024) (rejecting “the assumption that reasonable consumers [of consumer products] are back-label scrutinizers”) (quoting *Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1174 (2018)); *In re Clorox Consumer Litig.*, 301 F.R.D. 436, 444 (N.D. Cal. 2014) (“[O]nly 11 percent of consumers read the back panel of the [at-issue] packaging.”).

This Court has also inferred classwide exposure based on handouts provided to every customer before purchase. Thus, this Court approved certification of a class that was limited to insurance policyholders who received allegedly misleading illustrations of the policy terms and practices in handouts before they applied for coverage. *See Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 627, 631 (9th Cir. 2020). And this Court

has inferred classwide exposure to oral alleged misrepresentations when loan officers or salespeople are trained to follow a “script” that “was to be memorized verbatim” and presented to every prospective customer. *In re First Alliance Mortg. Co.*, 471 F.3d 977, 985, 991 (9th Cir. 2006).

Cases involving software or websites stand for similar principles. In one, the Court found it “undisputed” that an alleged misrepresentation “was shown to every advertiser” because it appeared on the “advertisement creation interface” that advertisers had to use. *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1231, 1235 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1051 (2025). And in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1017–18, 1020–21 (9th Cir. 2011), *abrogated on other grounds by Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), a ticketing website’s purchase confirmation page displayed to all buyers an allegedly deceptive message and link that purportedly induced many buyers to inadvertently enroll in a separate program that charged a monthly fee. In a third case, allegedly misleading statements appeared not only on a bank website and marketing brochures, but on a welcome document that was customarily provided to *all* customers and where plaintiffs

themselves saw the statements. *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 728-29 (9th Cir. 2012).

This case is meaningfully different from all these. The district court maintained that “[t]he representations at issue in this case are more akin to those in the product labeling cases,” noting that “some consumers may not read the packaging when opening an item,” but averring that other courts have nonetheless “inferred class-wide exposure based on the ‘inherently high likelihood’ that consumers would have relied on those representations when encountering them.” 1-ER-12 (citing *Ehret v. Uber Techs., Inc.*, 148 F. Supp. 3d 884, 895 (N.D. Cal. 2015)). But the *exposure* to the alleged misrepresentations in this case differed for each class member. The key characteristic of statements made on a label on the front of a product is that they are inevitably visible to anyone who buys the product. Courts have recognized that, whether buying in person or online, a purchaser has to scrutinize the front label to identify the product, and necessarily sees whatever few statements may be made there without any need to click on another webpage or scour the back of the package. *See Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 913, 915 (2010) (rejecting presumption of exposure to statement made on

“Additional Info” link that buyers did not need to click in order to purchase); *Whiteside*, 108 F.4th at 778 (declining to assume that consumers “are back-label scrutinizers”) (citation omitted).

Nor does the trial court decision in *Ehret* support an inference of exposure here. *Ehret* declined to infer exposure to a “consistent” alleged misrepresentation that had been made on Uber’s “website and blog posts,” but was not on the Uber app itself, 148 F. Supp. 3d at 900–01, and thus was not necessarily viewed before purchasing a ride. Even on the website, the challenged statement “was not highlighted or especially set off to ensure that visitors would see it.” *Id.* at 901.

In any event, as noted above, the relevant standard to infer exposure based on the means of presenting a statement is the “practical inevitability” of exposure, *Downey*, 44 Cal. App. 5th at 1117, not the mere “high likelihood” stated by the *Ehret* district court. 148 F. Supp. 3d at 895. Rather, the determining factor is whether “all plaintiffs *must* have been exposed to” the alleged misrepresentations. *Walker*, 953 F.3d at 631 (emphasis added). When a business has ensured that a statement will be seen by all buyers, courts have found it fair to assume that all buyers

have seen it. But in other circumstances, plaintiffs must carry their burden of demonstrating actual exposure.

Other circuits, too, have recognized that exposure has not been proved—and cannot be inferred—merely because there is some likelihood that a buyer saw a particular statement. Thus, the Eleventh Circuit denied certification where one plaintiff had not seen a challenged website statement, making clear that exposure was not universal, and contrasted a situation in which uniform statements appear on customer bills. *See Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1236, 1237 (11th Cir. 2016). And the Fifth Circuit reversed certification where the challenged statements appeared on door tags attached to new recreational vehicles, but some class members nonetheless had not read them. *See McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 550 (5th Cir. 2003).

C. *Tobacco II* Provides Only a Narrow, Nearly *Sui Generis* Path to Inferring Classwide Exposure and Does Not Apply Here.

While recognizing that what the plaintiffs pointed to here “ordinarily” would be insufficient “to establish class-wide exposure,” the district court seized upon *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), as a basis to presume universal exposure based on Tesla’s “distinctive

advertising strategy.” 1-ER-10–11. But *Tobacco II* endorsed only a narrow and strictly limited modification of the normal exposure analysis, a modification resulting from consumers’ exposure to an overwhelming saturation advertising campaign over decades. Nothing in the decision supports extending that limited inference of exposure whenever a business uses a “distinctive” strategy employing different channels that do not inevitably expose consumers to the challenged statements. To infer exposure in such circumstances would penalize businesses for innovation in publicizing their products and services.

In *Tobacco II*, the California Supreme Court held that, when “a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements.” 46 Cal. 4th at 328. Thus, the core holding was that class members do not “*necessarily*” need to “plead and prove individualized reliance on specific misrepresentations or false statements where ... those misrepresentations and false statements were part of an extensive and long-term advertising campaign.” *Id.* (emphasis added). Indeed, the exposure aspect of that holding accorded with the exposure rule applying to

common-law fraud class actions, which permits certification when “the same material misrepresentations have actually been communicated to each member of a class.” *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1095 (1993) (emphasis omitted).

This Court has repeatedly clarified the limitations of *Tobacco II* as applied to evidence of classwide exposure in a federal class action. In *Mazza*, the Court characterized *Tobacco II* as limited to a “decades-long” tobacco advertising campaign where there was little doubt that almost every class member had been exposed to defendants’ misleading statements.” *Mazza*, 666 F.3d at 596. In contrast to the district court in the present case, this Court squarely held that, “[i]n the absence of the kind of massive advertising campaign at issue in *Tobacco II*, the relevant class must be defined in such a way as to include only members who were exposed to advertising that is alleged to be materially misleading.” *Id.*

More recently, this Court phrased the standard as “whether the defendant so pervasively disseminated material misrepresentations that all plaintiffs *must* have been exposed to them.” *Walker*, 953 F.3d at 631 (emphasis added). Thus, in that case, a class was limited to purchasers who had received hard copy materials containing the alleged

misrepresentation. *See id.* And other circuits have adopted a similar reading of *Tobacco II*. *E.g.*, *Tershakovec v. Ford Motor Co., Inc.*, 79 F.4th 1299, 1314 (11th Cir. 2023) (quoting *Walker*).

California courts, applying *Tobacco II* in the context of state class-certification principles that overlap with those of Rule 23, also recognize that “[c]ommon issues do not predominate (and class certification is properly denied) when the evidence demonstrates variations in how—and, critically, *whether*—class members were exposed to an allegedly deceptive advertisement.” *Downey*, 44 Cal. App. 5th at 1117 (emphasis in original); *see also, e.g.*, *Walker*, 953 F.3d at 631; *Mazza*, 666 F.3d at 596. And in construing *Tobacco II*, the *Downey* court concluded that exposure could be inferred only if a “practical inevitability.” 44 Cal. App. 5th at 1117.

Indeed, California courts—again applying analogous class certification standards—have rejected class certification where the challenged representations could be accessed only through an “Additional Info” link on a retailer’s website. *Sevidal*, 189 Cal. App. 4th at 910, 913. Buyers could complete their purchases without clicking that link, however, and many undoubtedly did. *Id.* at 913, 915. Noting that the

Sevidal plaintiffs presented no common evidence to determine which buyers clicked the link, the court concluded that too many “absent class members never saw the Web page containing the alleged misrepresentation and thus were never exposed to the alleged wrongful conduct.” *Id.* at 910; *see also id.* at 914–15, 928.

The district court in the present case based its finding of universal exposure on the appearance of the statements on a subpage of the Tesla website.³ Without identifying evidence that could separate curious web surfers from persons who bought the FSD package, the district court held that raw “view counts are consistent with a finding of class-wide exposure, as it appears thousands of people on average—which does not include those using ad blockers—viewed the Autopilot page and blog post each month throughout the class period.” 1-ER-13. The court held that Tesla had “failed to rebut Plaintiff’s showing of class-wide exposure as to the Hardware Statement.” *Id.* But the court did not hold the plaintiffs to

³ The court properly recognized that, “where the Hardware Statement did not appear on the Tesla site, the remaining channels of communication are insufficient to support an inference of class-wide exposure.” 1-ER-11 n.2. The remaining statements—one-offs made at or near the beginning of the class period—appear to be even less widely distributed than the statements found insufficient in *Mazza*, 666 F.3d at 586–87, 595–96.

their burden of establishing classwide exposure in the first place. Indeed, the court did not even account for FSD buyers who learned about FSD only at a Tesla sales center or from other Tesla owners, and arrived at the decision to buy the FSD package without visiting the Autopilot subpage. There is no evidence that the challenged statements were communicated to in-person buyers at all, much less uniformly. That alone should have precluded any inference of classwide exposure here.

The insufficient evidence that even all online buyers saw the challenged statements underscores the impropriety of certification. And the inadequate evidence of classwide exposure cannot be cured by “alternative sources” that did not even make the challenged statement but (in the district court’s view) somehow “reinforce[d]” it in an unidentified way. 1-ER-11. *Tobacco II* involved a consistent message pervasively disseminated through multiple mass media, not different messages provided through different narrowcasting channels.

The district court’s improper inference of exposure cannot stand.

D. Improperly Presuming Universal Exposure Inflates Damages Classes by Including Uninjured Persons, Imposing Significant and Unwarranted Costs on Businesses and Consumers.

Several harmful effects would ensue if the *Tobacco II* presumption of exposure expanded to encompass not only saturation advertising through traditional media but also any “distinctive advertising campaign,” whether or not reaching saturation levels. That approach would impose unwarranted penalties on companies that use websites and other so-called non-traditional communications channels by making class certification easier.

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) (per curiam). And in cases involving claims like those here, exposure may be the most important factor in the commonality and predominance inquiries under Rule 23(b). Without rigorous analysis of exposure, businesses will be pressured to settle improperly certified class actions, at deadweight economic loss to businesses and, ultimately, consumers at large.

Allowing plaintiffs to presume rather than prove universal exposure to an alleged misstatement, even when buyers may buy the product or feature without being exposed to the statement, necessarily inflates a damages class by sweeping in uninjured persons who cannot ultimately recover but nonetheless contribute to settlement pressure. *See Tershakovec*, 79 F.4th at 1326–27, 1337 (Tjoflat, J., concurring in part and dissenting in part). (explaining how some applications of *Tobacco II* may violate Article III). As courts and commentators have long recognized, “the consequences of overbroad and incorrectly certified damages class actions can be widespread and significant.” *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). “Classes that are overinflated with *uninjured* members raise the stakes for businesses that are the targets of class actions,” *id.*, significantly increasing unwarranted settlement pressure on a defendant.

That pressure arises in part because 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*, Marsh (July 2011) (noting defense cost can reach \$100 million in a single action),

available at <https://tinyurl.com/255pppec>. “Class action defense remains one of the fastest-growing areas of legal spending.” Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6 (2025), available at <https://ClassActionSurvey.com>. Among large companies alone, class action litigation costs reached a record-breaking \$4.21 billion in 2024 and were projected to surpass \$4.5 billion in 2025, up from \$2.9 billion in 2020. *See id.* at 7. And the potential liability is often orders of magnitude higher.

More than 70% of major U.S. companies defended class actions in 2024; most of them face class actions frequently, with the growth in “baseless claims” presenting the “dominant concern.” *Id.* at 8, 16, 17. Courts “remain reluctant to dismiss” even seemingly meritless claims. *Id.* at 16. As a result, “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) (*Unfair, Inefficient, Unpredictable*), available at <http://tinyurl.com/2jvv33az>. And those cases can persist for

years before class certification, let alone resolution. See U.S. Chamber Inst. for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013) (“Approximately 14 percent of all class action cases remained pending four years after they were filed.”), available at <https://bit.ly/3rrHd29>.

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) (citation omitted). “[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). “[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.” *Unfair, Inefficient, Unpredictable, supra*, at 22. The extraordinary exposure created by certifying a class coerces defendants into “blackmail settlements” even in cases that ought to be resolved in their favor. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

Damages classes like those here, involving significant numbers of potentially uninjured individuals, pose a risk of coerced settlement that exceeds any legitimate measure of liability. *Concepcion*, 563 U.S. at 350 (noting that “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”). Certifying an overbroad class improperly increases the already substantial pressure on a defendant “to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” Fed. R. Civ. P. 23(f) advisory committee’s note to 1998 amendment. That some courts allow unreliable expert testimony to serve as common proof at the class certification stage exacerbates the problem

by easing the path to unwarranted class certification and grossly inflating the amount of damages at issue. *See* Tesla Br. 23–24, 28–33 (Dkt. 7.1).

Although uninjured individuals in theory should be denied damages in the end, bloating the class at an early stage improperly increases settlement pressure even if there is some possibility that the class will be purged of uninjured members later. Indeed, “later” rarely comes, and it can be time-consuming and costly to weed out uninjured class members. Because the magnified risks can “unfairly place pressure on the defendant to settle even unmeritorious claims,” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018) (cleaned up), certification often “ends the litigation as a practical matter,” *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 & n.2 (2017). 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). “With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs’ case by trial.” Richard

A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). As a result, the certification stage often provides the only opportunity for courts to meaningfully scrutinize putative class plaintiffs' claims, including whether class members have been exposed to, and hence potentially injured by, the alleged misconduct. *See id.* at 99–100; *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (Thomas, J., concurring).

Certifying classes that include uninjured persons “invite[s] plaintiffs to concoct oversized classes stuffed with uninjured class members,” which lets them “inflate the potential liability (and ratchet up the attorney’s fees based in part on that amount) to extract a settlement, even if the merits of their claims are questionable.” *Olean*, 31 F.4th at 692 (Lee, J., dissenting). Requiring valid common evidence of exposure, and thus even arguable injury, “at the class certification stage” prevents this “unjustified settlement pressure” and the waste of resources that would occur if a court eventually 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>.

Ultimately, “coerced settlements substantially raise the costs of doing business.” *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Unwarranted settlements of unmeritorious cases impose a deadweight loss, not only on businesses, but also on “consumers in the form of higher prices; ... retirement account holders in the form of lower returns; and ... workers in the form of lower salaries and lesser benefits.” *Id.* Coerced settlements help no one except “attorneys who claim to represent the interests of uninjured class members.” *Unfair, Inefficient, Unpredictable*, *supra*, at 40; *see also* Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995).

The significant economic stakes underscore why it is important that this Court correctly resolve the issues in this case to ensure that certified classes are no broader than Article III and Rule 23 allow.

CONCLUSION

This Court should ensure that district courts adequately perform the rigorous analysis of exposure—and thus of common proof of injury—that Rule 23 requires. The order certifying the classes should be reversed.

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Respectfully submitted,

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I hereby certify that on this 19th day of March 2026, 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 ACMS system. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

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