No. 24-7158

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONIECE DRAKE; DEBORAH BOWLING,
Plaintiffs-Appellees,

v.

BAYER HEALTHCARE, LLC,
Defendant-Appellant.

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, THE AMERICAN TORT REFORM ASSOCIATION, PhRMA, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-7158

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○ I have reviewed this form, FRAP 26.1, and Circuit Rule 26.1-1 and, to the best of my knowledge, have no information to disclose at this time.

Signature s/ Donald M. Falk **Date** March 24, 2025

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The American Tort Reform Association

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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.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are laser focused on developing innovative medicines that transform lives and create a healthier world. Together, we are fighting for solutions to ensure patients can access and afford

medicines that prevent, treat and cure disease. Over the last decade, PhRMA member companies have invested more than $800 billion in the search for new treatments and cures, and they support nearly five million jobs in the United States.

Amicus curiae Business Roundtable represents the chief executive officers of America's leading companies. The CEO members lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as amicus curiae when important business interests are at stake.

A motion for leave to file this brief has been submitted. As that motion explains, *amici* regularly file amicus curiae briefs in cases, like this one, that raise issues of concern to their members, including cases addressing class actions.

Many members of *amici* 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. *Amici* and their 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. That is enough to preclude certification under this Court's precedent. And the Supreme Court's impending

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

decision in *Laboratory Corporation of America Holdings v. Davis*, No. 24-304 (U.S., to be argued Apr. 29, 2025), should confirm—and compel—that result. Rule 23 does not permit certifying a class where the great bulk of members are not injured and only individualized inquiry could sift out the few that are.

This action is one of many that try to impose liability on makers of products that use some form of the word "natural" on labels or advertising, but do not meet some lawyer-created standard of purity. Because of the imprecise meaning of the term, 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 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. Even a second survey, using two hypothetical fake labels

designed to isolate and enhance the effect of the word "natural," found that most consumers would not have been deceived even by the spurious label. Yet classes of *all* consumers in two states were certified nonetheless.

Without common evidence sufficient to prove core issues of injury and causation—including the constitutional prerequisite of injury in fact—no class should be certified, let alone grossly overbroad ones like those certified below. Classes cannot include uninjured members, and they cannot include persons as to whom the plaintiffs cannot present the type of common evidence of injury appropriate to each stage of the litigation. The certification order should be reversed.

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 requires 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) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 34–38 (2013)). That rule is derived from both Rule 23 and Article III. That is because "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 individualized issues of injury would otherwise predominate over the common issues in the case.

By the end of the Supreme Court's current Term, the Court will decide "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury." *Laboratory Corp. of Am. v. Davis*, No. 24-304, 2025 WL 288305, at *1 (U.S. Jan. 24. 2025) (mem.). But wherever the Court ultimately draws the line on that question, this Court's precedent already makes clear that certification of a class is inappropriate where the class, like this one, "include[s] a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct[.]" *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)). Under *Olean*, "a class [that] is defined so

broadly … is defined too broadly to permit certification." *Id.* at 669 n.14 (quoting *Messner*, 669 F.3d at 824).

That rule makes sense. The class device cannot provide windfall remuneration to persons whose lack of injury would preclude them from recovering in an individual action. Nor can the device provide a means to prolong the participation of such persons in litigation they lack standing to pursue. The Rules Enabling Act "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)). Applying Rule 23 to allow persons without standing to pursue a federal court 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.

Construing Rule 23 to allow class certification to bring uninjured parties before a federal court would also violate Article III, which places upon each plaintiff the burden to establish a case or controversy involving concrete injury, *TransUnion*, 594 U.S. at 424; *Murthy v. Missouri*, 603 U.S. 43, 58 (2024). Whether each class member was injured "is central to

the validity of each one of the claims" presented here. *Wal-Mart,* 564 U.S. at 350. Indeed, that question is central to jurisdiction over claims for damages in any class action. Because "standing is not dispensed in gross," *Murthy v. Missouri*, 603 U.S. 43, 61 (2024) (cleaned up), "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431. Thus persons who "could have suffered no injury" cannot be included in a class. *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403–04 (1977).

Standing must be analyzed precisely according to each plaintiff, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), each claim, *id.*, and each form of relief sought, *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439–41 (2017). And "class actions" are among the settings in which this Court has instructed the lower courts to be "more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

A district court addressing class certification must determine whether plaintiffs have presented a common means of showing that class members have suffered a concrete injury sufficient to support standing. Without a common means to determine whether class members are

injured, the court would have to conduct mini-trials to determine whether each plaintiff 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 device. 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).

The district court in the present case did not directly address whether there was common evidence to prove injury. And its order 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. 1-ER-12. Those depositions cannot possibly be common, *class-wide* evidence; they at most reflect the preferences of two individuals who cannot prove the preferences of a class simply by saying so. And it

appears that even this individualized evidence was mixed and ambiguous as to the existence of an injury. For example, one named plaintiff had "no idea what percentage" of the product was natural. 3-ER-338. Nor did she value whether the product was 100% nonsynthetic. *Id*. Although the district court concluded that the plaintiffs "purchased the Products because of the 'natural' representation on the labels," 1-ER-10, valuing "natural" contents does not show that those plaintiffs—let along other class members—were injured if the inclusion of synthetic vitamins meant that the products' total ingredients were only 98% natural.

Second, the district court mentioned Bayer's internal documents discussing whether to include the word "natural" on the label. 1-ER-12–13. But those documents could not provide common proof of the word's understanding by, or effect on, persons who bought the vitamins at issue. Nor did the district court identify any internal documents addressing the gravamen of the misrepresentation alleged here: that the product contained synthetic vitamins so that the total ingredients were only 98% natural.

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, thus dodging the issue of common proof. *See* 1-ER-13. That was not the "rigorous analysis" of the proffered common evidence of injury that Rule 23 requires. *Wal-Mart*, 564 U.S. at 350–51. At class certification, a court must analyze whether a means of proof is sufficiently common "even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35 (citing *Wal-Mart*, 564 U.S. at 351–52 & n.6). That may (and here does) require inquiry into the soundness and significance of expert testimony. *See id.*; *Wal-Mart*, 564 U.S. at 351. This threshold analysis cannot be postponed until the merits of the claims are resolved.

Yet the district court did not even 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* 3-ER-264, 277–79, 284–87, 290, 295, 298, 306, 308; 2-ER-55, 57, 59, 61, 64, 67–68, 71. Even for a hypothetical and 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* 2-ER-154–55. This finding could reflect consumers' awareness that vitamins themselves are always or almost always produced synthetically, or their assessment that the "natural" status of a small multivitamin was too *de minimis* to affect a purchasing decision.

In sum, the evidence that the district court recited 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). Each unnamed class member would have needed to come forward with evidence that he read the label, understood "natural" to mean "100% natural," and purchased the product at issue as a consequence of that understanding. These individualized issues "rais[e] the spectre of class-member-by-class-member adjudication," *Van*, 61 F.4th at 1067, and would overwhelm any common issues in the case. *See Bowerman*, 60 F.4th at 469.

And there is substantial reason to believe, based on the plaintiffs' own survey evidence, that such mini-trials would determine that many class members—quite possibly all of them—were *not* injured by the "natural" label. Just as uncommunicated false information could not

cause injury in *TransUnion*, the word "natural" could not injure the majority of buyers that, the plaintiffs' expert's survey indicates, it did not deceive. The scope of such evidence limits the scope of certification; the absence of such evidence precludes certification.

Contrary to the decision below, a district court lacks power to certify a proposed Rule 23(b)(3) class, like this one, that contains many possibly uninjured class members. In addition, 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" of injury. *Olean*, 31 F.4th at 669 n.14.

B. The Means of Proving Injury With Common Evidence Must Be Demonstrated at Class Certification, Not Postponed or Delegated to a Claims Administrator.

A class cannot be certified chock-full of uninjured parties on the speculation that the injured may be sifted out through some later procedure. Standing is a "threshold" matter that determines a court's "power to adjudicate" any party's claims in the first place. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88–89 (1998) (emphasis omitted). That limit on the Article III power attaches when a party commences an action (or seeks to intervene, *see Town of Chester*, 581 U.S. 433, 439–41);

it does not arise only at judgment or some intermediate stage. For absent class members, it attaches at class certification, the moment when they are effectively brought before the court such that they can be bound by its judgment.

The Supreme Court has made clear that plaintiffs must satisfactorily demonstrate standing at each stage of the litigation with the proof appropriate to that stage. *See TransUnion*, 594 U.S. at 431. As always, it is useful here to consider the fate of an absent class member who pressed an individual action under the same circumstances. No individual plaintiff could postpone—let alone avoid—an inquiry into injury-in-fact until a later stage of the litigation. A plaintiff whose purchase decision was not affected by the inclusion of the word "natural" on the label could not pursue a claim based on the theory that some other people might have cared. That plaintiff would be dismissed as soon as that information came out. But under the certification order below, that plaintiff—and the vast bulk of buyers in the same situation—are class members who will remain part of this litigation until it ends.

That is not a permissible result. Even variations of the *type* of injury have been held to preclude commonality (and usually predominance as

well) under Rule 23. *See Wal-Mart*, 564 U.S. at 349–50; *East Texas*, 431 U.S. at 403. Certainly variations in the *existence* of injury preclude certification at the threshold, as any determinations on other issues would be merely advisory as to the uninjured class members and thus beyond the scope of federal jurisdiction under Article III.

Some have suggested that a court could certify an overbroad class so long as there *later* would be a common method that could separate the injured from the uninjured without requiring individualized proceedings that would predominate over any common issues. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625–26 (D.C. Cir. 2019) (discussing similar proposals). But such a method would conflict with Article III's limits on judicial power, as in the interim the court would be making rulings as to parties who the court knows do not belong there.

Thus, even when a court is aware that additional evidence may ultimately show that a class includes uninjured individuals, the class cannot be certified unless the court is presented with both enough evidence to establish standing at the class-certification phase of the litigation *and* a mechanism for winnowing out any hypothetically uninjured individuals before judgment. That mechanism must be "robust

enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Rail Freight*, 934 F.3d at 625–26. And the district court would have to identify that robust second-stage process "at the time of certification" rather than kicking the can down the road and hoping for the best. *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018). That would amount to conditional class certification, which is no longer authorize. *See* Fed. R. Civ. P. 23(c)(1), advisory committee's note to 2003 amendments.

Certainly any winnowing process could not rest on the mere submission of an affidavit or questionnaire, without opportunity even for cross-examination, at the liability stage or as part of a post-judgment claims process subject to review by a claims administrator. *See In re Asacol Antitrust Litig.*, 907 F.3d 42, 51–54 (1st Cir. 2018). *But cf. Speerly v. General Motors LLC*, 115 F.4th 680, 698 (6th Cir.) (affirming district court on ground that uninjured parties "can be culled, either via a Rule 56 motion for summary judgment or disposal after trial"), *vacated and reh'g en banc granted*, 123 F.4th 840 (6th Cir. 2024). That is why many "[c]ourts have rejected proposals to employ class member affidavits and

sworn questionnaires as substitutes for traditional individualized proofs[.]" 2 Joseph M. McLaughlin, McLaughlin on Class Actions § 8:6 & n.11 (21st ed. Oct. 2024 update). Such a process would deprive defendants of their rights to present their defenses and other evidence to a jury, violating defendants' Seventh Amendment and due process rights, while giving plaintiffs an advantage that the Rules Enabling Act forbids. *See Wal-Mart*, 564 U.S. at 367; *Asacol*, 907 F.3d at 53–54. Given the likelihood that such evidence could quickly come to predominate over any common issues, a district court could not certify a class that may eventually be shown to include more than a de minimis number of uninjured individuals.

C. The Legal Standard for Materiality Cannot Excuse the Lack of a Class-Wide Means of Proving Injury.

Like some other courts, the court below appears to have conflated the constitutional 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* 1-ER-12. If a reasonable person would be influenced by the term, these courts reason, no further class-wide proof of materiality is necessary, and materiality may do double-duty for proof of reliance.

The court below fell into that trap, 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 vitamins"?

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

Constitutional injury is separate from statutory or common-law 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 vitamins 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. That is why "the question of likely deception does not automatically translate into a class-wide question." *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014), *abrogated in part on other grounds by Microsoft Corp. v. Baker*, 582 U.S. 23 (2017).

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." ER 14. 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.

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

Certifying a class consisting largely or entirely of uninjured individuals not only violates Rule 23 and Article III, but also significantly increases unwarranted settlement pressure on a defendant. 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). 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 were projected

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.*

That is why certification often "ends the litigation as a practical matter." *Microsoft*, 582 U.S. at 29 & n.2. 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). Indeed, companies reported that they settled 47% of open putative class actions in 2022. *See Class Action Survey*, *supra*, at 26. "[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).

Certifying an oversize 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. And permitting classes to be certified when the most pertinent evidence—offered by the class *plaintiffs*—indicates that most, if not all, members were not injured, multiplies this effect.

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. 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). A "statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages*

and Class Actions, 74 Mo. L. Rev. 103, 104 (2009). Exacerbating the problem, few courts have been willing to address due process limits on statutory damage awards until after a class has been certified and a judgment entered—which, as "a practical matter," means never. *Id.*

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. Certifying classes that have not carried their burden of establishing standing with common proof "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).

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 ensure that district courts adequately perform the rigorous analysis of common proof of injury that Rule 23 requires.

CONCLUSION

The order certifying the classes should be reversed.

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Respectfully submitted,

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I hereby certify that on this 24th day of March 2025, 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.

March 24, 2025

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