No. 25-779

In the United States Court of Appeals for the Second Circuit

TANYSHA NEWMAN, individually
and on behalf of all others similarly situated,
Plaintiff-Respondent,
v.
BAYER CORPORATION and BAYER HEALTHCARE LLC,
Defendants-Petitioners.

On Petition for Permission to Appeal from the
United States District Court for the Southern District of New York
No. 22-CV-7087 (KMK); Hon. Kenneth M. Karas

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Chamber of Commerce of the United States of America states that it is a non-profit corporation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held corporation has 10% or greater ownership in the Chamber.

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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.[1] 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.

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[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.

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 the nation's business community.

Many members of *amici* and the broader business community face putative class actions in which named plaintiffs seek certification of overbroad classes encompassing uninjured persons, without presenting common means of proving causation and injury. 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.

INTRODUCTION

Common evidence of injury is central to class certification under Federal Rule of Civil Procedure 23. Yet the plaintiff's purported common evidence in this case showed that most class members were *not* injured. The class certification order cries out for this Court's review to ensure that district courts rigorously apply Rule 23's requirements, not certify costly no-injury class actions against businesses.

This class action is one of many that rely on strained, lawyer-driven interpretations of product labels or advertising. Plaintiffs often put forth a consumer survey as common proof that consumers understood the challenged term in accord with the plaintiffs' theory, acted upon that understanding, and hence were injured. The plaintiff 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 almost three-quarters of consumers were *not* deceived by the "One A Day" brand statement on the label at issue. *See* Pet. 6–8. Thus, the plaintiff's purported common proof indicated that deception and injury were *un*common, affecting a barely a quarter of the putative class. Yet the district court did not address the substance of that survey evidence at all, let alone incorporate it into the necessary "rigorous analysis" of commonality and predominance. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). Instead, the court certified a class including more uninjured members than injured ones.

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. As the Petition points out (at 16–17), the

Supreme Court soon will decide whether a Rule 23(b)(3) class may be certified "when some members of the proposed class lack any Article III injury." *Laboratory Corp. of Am. v. Davis*, __ S. Ct. __, 2025 WL 288305, at *1 (U.S. Jan. 24. 2025) (mem.). Review in this case would allow the Court to revisit its precedent in light of that forthcoming guidance.

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.

1. Article III and Rule 23 require a damages class action to be based on common proof that class members have been actually 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)). Without common proof of injury, individualized inquiries would predominate over any common issues, 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) (cleaned up).

This Court has held that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443

F.3d 253, 264 (2d Cir. 2006). Rather, based upon the evidence presented at class certification, it must be "'reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief.'" *Id.* (quoting *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980)).

This rule prevents the class device from providing windfalls 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*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)). It would also violate Article III, which places the burden on 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). 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. And because "standing is not dispensed in gross," *Murthy*, 603 U.S. at 61 (cleaned up), "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431.

Moreover, as this Court has already held, plaintiffs must "show that they can prove, *through common evidence*, that all class members were ... injured." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 82 (2d Cir. 2015) (emphasis added) (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)).

Unless questions of injury are "answerable through evidence generally applicable to the class," *Myers v. Hertz Corp.*, 624 F.3d 537, 549 (2d Cir. 2010), the court would have to conduct mini-trials for each plaintiff 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 defeat the purpose of the class action.

2. The district court declined to address whether the certified class was "limited to deceived consumers." Pet. Add. 21 n.2. Improperly postponing consideration of the class's overbreadth until summary judgment, *see id.*, the court did not even mention that the survey of plaintiff's expert showed 72.9% of consumers were not deceived—or injured—by the "One A Day" label. *See* Pet. 10. By punting that critical issue, the district court violated this Court's requirement that a district

court "assess all of the relevant evidence admitted at the class certification stage" to "determine whether each Rule 23 requirement has been met." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006), *clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007).

Without common proof of injury, the class members here must "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 she read the label, understood "One A Day" to mean "one gummy a day" and not "one serving a day," and purchased the product because of that understanding. These individualized issues would overwhelm any common issues in the case.

Worse, the survey strongly suggests that such mini-trials would determine that most class members were *not* injured by the "One A Day" label. Just as uncommunicated false information could not cause injury in *TransUnion*, the phrase "One A Day" could not injure buyers it did not deceive.

3. This case presents an opportunity to provide necessary guidance on two important issues to district courts confronting class-certification

motions in this Circuit. First, a proposed Rule 23(b)(3) class, like this one, that contains many uninjured class members may not be certified. *See Denney*, 443 F.3d at 264. And second, a class should "include only those members who can rely on the same body of common evidence to establish the common issue." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc) (cleaned up).

Clarification on both points is needed in this Circuit. Although this Court has held that, even for a Rule 23(b)(2) injunction class, the presence of class members without standing invalidated class certification, *Berni v. Barilla S.p.A.*, 964 F.3d 141, 148–49 (2d Cir. 2020), a later panel called both *Denney* and *Berni* into question. *Hyland v. Navient Corp.*, 48 F.4th 110, 117–18 & n.1 (2d Cir. 2022), *cert. denied sub nom. Yeatman v. Hyland,* 143 S. Ct. 1747 (2023), *and Carson v. Hyland,* 143 S. Ct. 1474 (2023). District courts and litigants alike would thus benefit from guidance on the required showing of injury for unnamed class members at the class-certification stage.

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

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

materiality. The confusion arises when class plaintiffs challenge how a term is used on a product label or in its advertising. Unable to prove with common evidence that all buyers interpreted the term—and were injured by it—in the same way, plaintiffs encourage courts to sidestep that problem by noting that the relevant standard for materiality uses a "reasonable person" or "reasonable consumer" test. If a reasonable person would be influenced by the term, they argue, no further class-wide proof of materiality is necessary, and materiality may do double-duty for proof of injury.

The court below adopted that view, concluding that materiality was subject to common proof because a factfinder could determine whether a reasonable person would be influenced by the term "One A Day." *See* Pet. Add. 22–24. But materiality is separate from injury. A label's term could be material because it could matter to a reasonable person, yet not establish injury for any individual buyer. For example, some buyers might not share the view that "One A Day" must mean "no more than a single gummy daily"; they could view "One A Day" as meaning "one serving of any size daily." Or they could understand "One A Day" as a familiar brand name rather than instructions for use. While the "One A

Day" feature mattered to them, they got what they paid for. Or, like the named plaintiff, they might always take one gummy daily regardless of label or instructions. *See* Pet. 8.

The district court overlooked these complications even though the plaintiff's own expert's survey raised them. Instead, the court focused only on whether class members were exposed to the same label, and whether it was possible to deem "One A Day" objectively misleading. Pet. Add. 22–24. The district court also confused the fact of injury with the measure of damages, stating that a plaintiff could satisfy predominance simply by "propos[ing] a damages model consistent with her theory." *Id.* at 24. But assigning a value to any injury that may have occurred says nothing about *whether* any injury occurred.

Here, the only common evidence addressing actual consumer understanding of the terms—the survey—suggested that most class members were uninjured. That 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 mostly of uninjured individuals 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.

Litigating class actions is expensive. Among large companies alone, class action litigation costs reached a $4.21 billion in 2024 and are expected to surpass $4.5 billion in 2025. *See* Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6–7 (2025), available at https://tinyurl.com/2pa7txds. And the potential liability can be far higher.

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). The Supreme Court has long recognized the "risk of 'in terrorem' settlements that class actions entail." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022) (cleaned up). 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). "[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." 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.

Damages classes involving significant numbers of potentially uninjured individuals exert settlement pressure that exceeds any legitimate measure of liability—especially when, as here, statutory penalties can magnify available damages. *See* Pet. 26. 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).

Although uninjured individuals in theory should be denied damages in the end, the costs of litigating against such a class, and the risk that such individuals will not actually be excluded, intensify pressure 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 result 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 rigorously analyze common proof of injury, as Rule 23 requires.

CONCLUSION

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

April 9, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) and Local Rule 29.1(c) because it contains 2,589 words, excluding the parts exempted by Fed. R. App. P. 32(f); and (2) the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. Rule 32(a)(6) because the body of the brief has been prepared in 14-point Century Schoolbook font using Microsoft Word 2016.

Dated: April 9, 2025

/s/ Donald M. Falk
Donald M. Falk