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, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF REHEARING

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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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STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE

The Chamber of Commerce of the United States of America ("the Chamber") 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.

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 that include the uninjured, and for which there is no adequate means of proving causation or injury through common evidence. These actions impose costs on businesses (and ultimately on consumers) not related to any actual injury suffered by the plaintiff class and thus harm the economy more broadly. *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

The panel decision warrants *en banc* review because it reveals significant confusion in this Court's precedent on the evidence required to establish injury and causation at the class certification stage, and that confusion has serious practical consequences for businesses in the Circuit.

First, there is confusion about the circumstances in which plaintiffs may rely upon a proposed generic means of calculating damages to establish class-wide injury. Although class certification is supposed to rest on evidence rather than wishful thinking, wayward panels of this Court have allowed proposed but unexecuted analyses to substitute for evidence so long as an expert identifies a recognized genus of analysis and proposes to use unselected variables to apply the generic analysis to

[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.

uncollected data. That falls far below the evidentiary standard that plaintiffs must meet at the class certification phase.

Second, there is confusion in this Court's precedents about whether a presumption of *reliance* can demonstrate causation for purposes of standing in a misrepresentation case. Even if reliance could bear that weight in some contexts, it certainly cannot in a case like this one, where there is unrebutted evidence in the record that a large number of class members were not deceived by the challenged representations and thus got what they paid for. Guidance is therefore needed to help district courts better understand how reliance may be relevant to injury in a misrepresentation case.

This case presents an ideal vehicle for addressing these issues. Deceptive labeling cases are common in this Circuit and around the country, so these issues frequently recur, with cases against manufacturers of natural foods and consumer products becoming increasingly prolific. And an appeal from class certification is the perfect posture in which to address them, given the hydraulic settlement pressure and skyrocketing litigation costs that follow from class certification decisions. It is critical that courts and litigants alike know

the evidentiary standards that apply at this moment. And the record here is unusually clear as to the lack of consumer deception from the challenged term.

Rehearing should be granted and the certification order reversed.

ARGUMENT

A. Rehearing Should Be Granted To Clarify The Standards Applicable to Establishing Class-Wide Injury.

Rehearing is warranted because the panel allowed purported evidence of two different issues—materiality and the measure of damages—to substitute for the necessary common evidence of injury and causation. But at most, the proffered means of proving those other elements might establish that *no* class member was injured, not that *all* were injured.

Common proof of injury is not an afterthought. This Court has previously explained that a class should not be certified if it "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) (cleaned up).

That rule is derived from both Article III and Rule 23 of the Federal Rules of Civil Procedure. "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)). Indeed, "class actions" are among the settings in which the Supreme 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). And 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.

For its part, 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.

Further, plaintiffs must present a common means of showing that class members have suffered a concrete injury 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. *See Van v. LLR, Inc.*, 61 F.4th 1053, 1068–69 (9th Cir. 2023) (remanding to consider the effect of individualized inquiries into injury). 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 Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). But despite the counsel of *Olean*, this Court's precedents (and the lower court decisions generating them) reflect ongoing and persistent confusion.

1. The Panel Decision Reflects Confusion About Evidence Needed to Establish Class-wide Injury.

The panel here made two critical errors in its assessment of the evidentiary record on injury in this case. First, it erroneously relied upon an expert report speculating that a not-yet-executed conjoint analysis might calculate a price premium for "natural" ingredients generally (not "natural" vitamins specifically, as at issue in the case) and thus establish class-wide injury. Second, it ignored countervailing evidence from plaintiffs' other expert showing that there was no class-wide injury here. Both errors warrant this Court's attention.

On the first point, the relevant report did not actually conduct any analysis to show a price premium, and *a proposal* to submit evidence is not evidence for class certification purposes. As the Sixth Circuit has already made clear, "if the predominance inquiry is to serve its critical function, it cannot be answered by 'maybe,' 'perhaps,' and other 'what ifs' that leave the hard questions for later[.]" *Speerly v. General Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025) (en banc). Indeed, this Court has previously held that "evidence at certification must meet all the usual requirements of admissibility[.]" *Olean*, 31 F.4th at 665 (citing *Tyson*, 577 U.S. at 454–55). But an intervening panel of this Court created confusion

when it commented that "there is no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage." *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1019 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1308 (2025). But that statement in *Lytle* was addressing damages, not injury. The panel here confused the two distinct concepts.

Moreover, even if an unexecuted conjoint study that (as in *Lytle*) "identif[ied] the target population, analyz[ed] economic data to determine the structure of the market, and specif[ied] the mathematical analysis he will perform on the survey results," *id.* at 1031, could suffice (for damages), that rule certainly should not apply to a report like this one that did none of that. The panel's acceptance as evidence of the abstract possibility that an expert could conduct a conjoint analysis to measure damages underscores the need for this Court to provide clear guidance on the status of expert reports at class certification.

This case is an especially apt vehicle for providing guidance as to the first issue because of the panel's second error—its failure to grapple with other evidence that conflicted with the speculative expert report on

damages. Specifically, another one of plaintiffs' experts admitted that the surveys she had conducted of customers provided no evidence that the word "natural" on the actual product labels 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 when testing 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. In light of this record evidence, the obvious conclusion should have been that plaintiffs failed to establish class-wide injury and thus could not obtain class certification. But the panel reached the opposite conclusion. The rule that it embraced—requiring only speculation as to a possible conjoint analysis—cries out for this Court's attention and reversal.

2. An Objective Legal Standard for Materiality Cannot Excuse the Lack of a Class-wide Means of Proving Injury.

The panel also improperly conflated the necessity of common evidence of injury with the objective legal standard for materiality. *See* Mem. Op. 6–7 (Dkt. 64.1). The panel's materiality discussion mentioned

three potential sources of "common" evidence, none of which suffices as class-wide evidence of injury or causation: First are named plaintiffs' depositions, *id.* at 7, which at most reflect the preferences of two individuals who cannot prove the preferences of a class. Second are Bayer's internal documents, *id.*, which did not provide evidence of a disputed word's understanding by, or effect on, the customers at issue. Third is a survey expert, *id.*, whose report actually demonstrated that most class members were *not* deceived.

In confusing materiality with injury, the panel fell into a well-worn trap. Under that common pattern, a class action challenges how a term is used on a product label or in its advertising. Plaintiffs seek to certify a class of everyone who bought the product 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 consumer" test. *See* Mem. Op. 7–8. 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 injury and causation. *See, e.g.*, *Noohi v.*

Johnson & Johnson Consumer Inc., 146 F.4th 854, 868–70 (9th Cir. 2025), *cert. denied,* --S. Ct.--, 2026 WL 1052179 (U.S. Apr. 20, 2026).

Yet constitutional injury is separate from statutory or common-law materiality. A label's term could be material in that it could matter to a reasonable person and still not establish actual 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. Others might value the word "natural" in the abstract, but 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). Just as a lack of common evidence that consumers were exposed to an alleged misrepresentation can preclude class certification, *see id.* at 1068–1069, so too can evidence that consumers do not interpret or react to statements the way plaintiffs contend they do.

Here, the plaintiffs' only common evidence addressing actual consumer understanding of the terms—the perception survey—suggested that the label caused no injury to the vast majority of the unnamed class members. It did not deceive them into purchasing the product. That alone should have precluded class certification.

Because the evidence is facially insufficient to provide a common means of proving injury, class members would 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). Each unnamed class member would have to come forward with evidence that he read the label, understood "natural" to mean "100% natural," and purchased the product at issue based on 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 this recurring issue demands the Court's review.

B. The No-Injury Class Action Issues Presented Here Are Important to Businesses and Consumers.

The issues presented are undoubtedly important. As the Petition points out (Dkt. 71.1 at 22), the Supreme Court and individual Justices

have recognized the importance of confining damages class actions to injured persons. The panel decision here warrants *en banc* review because the issues are important, recurring, and impose significant costs on the economy.

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.

Deceptive-label class actions in particular are a persistent feature of class-action litigation. Accounting for more than a hundred cases a year, various types of attacks on false labels account for most of the class actions against food, beverage, and packaged goods manufacturers. *See* Perkins Coie, *Food and Consumer Packaged Goods Litigation: 2023 Year in Review* 5 fig.1, 6 fig.3 (2024), https://tinyurl.com/36wws95u; Perkins Coie, *Food and Consumer Packaged Goods Litigation: 2025 Year in Review* 5 figs. 1 & 2, 26 figs. 4 & 5, 33 figs. 6 & 7 (2026), https://tinyurl.com/yd5mnnjj (*2025 Year in Review*). And those cases are

filed disproportionately in district courts of this Circuit. *See 2025 Year in Review*, *supra*, at 5 figs. 1 & 2, 26 figs. 4 & 5, 33 figs. 6 & 7.

Litigating class actions is also 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 & McLennan Cos. (July 21, 2011), https://tinyurl.com/255pppec (noting defense cost of up to $100 million in a single action). "Class action defense remains one of the fastest-growing areas of corporate legal spending." Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 6 (2026), https://tinyurl.com/568dpkea. Among large companies alone, class action litigation costs reached a record-breaking $4.53 billion in 2025 and were projected to reach $4.8 billion in 2026, up from $2.46 billion in 2018. *See id.* at 3, 7. And the potential liability is often orders of magnitude higher.

The Supreme Court, moreover, 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). As the Supreme Court put it, "extensive 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).

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 "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), 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). "[I]t is no wonder why class actions settle so often: If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." *Olean*, 31 F.4th at 685 (Lee, J., dissenting).

Damages classes like this one, involving significant numbers of potentially uninjured individuals, pose a particular risk of coerced settlement that exceeds any legitimate measure of liability. 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. Approving the certification of 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." *Id.* at 692 (Lee, J., dissenting).

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), https://tinyurl.com/nheb29w4.

These issues are vitally important to American businesses. "A record percentage of companies are now dealing with class actions—the highest level in 15 years." Carlton Fields, *Class Action Survey*, *supra*, at 8; *see id.* at 17. Class actions alleging consumer fraud have "surged as the top class action risk." *Id.* at 14. Given the significant economic stakes, this Court should grant rehearing to ensure that district courts adequately perform the rigorous analysis of common proof of injury that Rule 23 requires.

CONCLUSION

Rehearing should be granted and the order certifying the classes should be reversed.

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Respectfully submitted,

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I hereby certify that on this 26th day of May 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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