No. 23-80074

In the

United States Court of Appeals

For the Ninth Circuit

ZUFFA, LLC, D/B/A ULTIMATE FIGHTING CHAMPIONSHIP AND UFC,
Petitioner-Defendant,

v.

CUNG LE, ET AL.,
Respondents-Plaintiffs.

On Petition for Permission to Appeal
from the United States District Court for the District of Nevada
No. 15-cv-1045
The Hon. Richard F. Boulware, J.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Chamber of Commerce of the United States of America certifies that it has no outstanding shares or debt securities in the hands of the public, and does not have any parent companies. No publicly held company has a 10% or greater ownership interest in amicus curiae.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

The Chamber of Commerce of the United States of America (the "Chamber") respectfully requests leave to file the amicus curiae brief that accompanies this motion in support of Petitioner Zuffa, LLC's petition for permission to appeal under Federal Rule of Civil Procedure 23(f). Petitioner consents to this motion, but Plaintiffs-Respondents do not consent.

The Chamber is the world's largest business federation. The Chamber represents around 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 briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members and their subsidiaries are often targeted as defendants in class actions. Its members thus have a strong interest in ensuring that courts comply with the Supreme Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber is familiar with class action

litigation—both from the perspective of individual defendants in class actions and from a more global perspective—and frequently files amicus curiae briefs in major Rule 23 cases, including *Tyson Foods, Inc v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Comcast Corp v. Behrend*, 569 U.S. 27 (2013); and *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The Chamber has a significant interest in this case because the district court's misapplications of Article III and Rule 23 raise issues of immense significance not only for its members, but also for the customers, employees, and other businesses that depend on them.

Mindful of the role of amicus curiae, the Chamber's amicus brief does not duplicate the parties' arguments. The Chamber instead seeks to provide the Court with a broader perspective on the economic effects of class actions and how they are affected by the important issue raised here: the need for rigorous analysis of predominance that looks past expert jargon. That perspective reflects the interests of the Chamber's members, who are frequent targets of this particular type of litigation.

Amicus briefs by the Chamber have been regularly accepted by federal courts of appeals and the United States Supreme Court. Other recent cases where this Court has agreed to accept an amicus brief from the Chamber

supporting Rule 23(f) petitions include: *Shah v. Qualcomm Inc.*, No. 23-80025 (9th Cir. 2023); *Heredia v. Sunrise Senior Living, LLC*, No. 21-80121 (9th Cir. 2022); *Patel v. Facebook, Inc.*, No. 18-80053 (9th Cir. 2018).

CONCLUSION

For these reasons, the Chamber of Commerce of the United States requests that this Court grant its motion for leave to file a brief as amicus curiae.

Dated: August 30, 2023

Respectfully submitted,

/s/ Brian D. Schmalzbach

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 473 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point size.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

/s/ Brian D. Schmalzbach
Brian D. Schmalzbach

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/s/ Brian D. Schmalzbach
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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 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 briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members and their subsidiaries are often targeted as defendants in class actions. So the Chamber is familiar with class action litigation, both from the perspective of individual defendants in class actions and from a more global perspective. The Chamber has a significant interest

[1] No party's counsel authored this brief in whole or in part, and no such counsel nor any party here contributed money to fund the preparation of this brief or its submission. No person other than amicus, its members, or its counsel contributed money to the preparation or submission of this brief.

in this case because the district court's misapplications of Article III and Rule 23 raise issues of immense significance not only for its members, but also for the customers, employees, and other businesses that depend on them.

INTRODUCTION

This class certification order exemplifies a recurring error that systematically inflates putative classes with uninjured class members. That error is the failure to rigorously analyze expert reports that assume away the reasons why some class members have no injury. Scrutinizing those assumptions is a core judicial task in determining whether plaintiffs have provided the necessary "evidentiary proof" that each element of Rule 23 is satisfied. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013).

But the District Court substituted lax analysis for rigorous analysis by accepting an assumption-filled expert report as classwide proof of Article III injury. Plaintiffs' expert purported to measure aggregate under-compensation across all UFC athletes but attributed that aggregate injury to each class member by *hypothesis* – not by *proof*. The result was an order certifying a Rule 23(b)(3) class seeking *billions* in damages.

Even if it were permissible in some circumstances to certify a class that contains some small number of uninjured class members,[2] the District Court committed a classic Rule 23(b)(3) error by failing to rigorously analyze the predominance of any common questions. The District Court did not rigorously scrutinize Plaintiffs' expert for how his model could actually show common injury notwithstanding the individualized issues inherent in negotiating individual contracts for individual talents. Instead, it substituted an expert's say-so for real scrutiny of how any changes in contract practices would have affected each fighter. That sort of flawed analysis can be (and all too often is) invoked to certify inflated classes that burden American businesses and the economy as a whole with astounding litigation costs. This Court should grant the Petition and reverse.

[2] This case also presents a fundamental class-certification question that remains open in this Court: "whether every class member must demonstrate standing before a court certifies a class." *Van v. LLR, Inc.*, 61 F.4th 1053, 1068 n.12 (9th Cir. 2023) (quoting *Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 682 n.32 (2022) (en banc) (in turn quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n.8 (2021))). That question is before this Court in the *Google Play Store Antitrust Litigation* case, No. 23-15285, in which the Chamber filed an amicus brief explaining why no damages class can be certified without evidence that *each* class member has Article III standing.

ARGUMENT

I. The District Court erred in certifying a damages class inflated by uninjured class members without applying rigorous analysis to individualized questions of injury.

The presence of uninjured class members here would destroy predominance under Rule 23(b)(3). "When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." 31 F.4th at 668; *see also Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019) (standing for unnamed class members presents a "powerful problem under Rule 23(b)(3)'s predominance factor"). The District Court must engage in "rigorous analysis" to determine whether common issues will predominate over individualized questions. *Olean*, 31 F.4th at 664; *see also Comcast*, 569 U.S. at 34 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (noting "the court's duty to take a 'close look' at whether common questions predominate over individual ones.")). But applying that rigorous analysis here confirms that individualized questions of injury would predominate over any common questions. The District Court's conclusory analysis of

individualized injury issues exemplifies a recurring Rule 23 problem that merits this Court's review.

1. Key to the required rigorous analysis here is testing the predominance of individualized *injury* issues. Indeed, as one jurist has noted, a court's injury-in-fact analysis should be "particularly rigorous" at the certification stage "given the transformative nature of the class-certification decision." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring). One aspect of that rigorous analysis is particularly relevant here: the analysis must address whether Plaintiffs' putative classwide proof accounts for heterogeneities that would leave class members uninjured.

As here, Plaintiffs often purport to meet their burden with expert analysis asserting generalized marketwide effects while papering over variables revealing that many class members are uninjured. The proper analysis must pierce the veil of jargon to scrutinize whether any proof of injury applies to the whole class. *See* Petition 11-13, 18-19; *see also, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 252-55 (D.C. Cir. 2013) (vacating a certification order where the plaintiffs' expert evidence predicted that certain plaintiffs had been injured by a price-fixing

conspiracy even though they operated under fixed-price contracts and were not exposed to overcharges caused by the conspiracy) (cited with approval at *Olean*, 31 F.4th at 666 n.9); *Blades v. Monsanto Co.*, 400 F.3d 562, 570, 574 (8th Cir. 2005) (rejecting damages model that assumed a "common, hypothetical market" and "presume[d] class-wide [*i.e.*, uniform] impact without any consideration of whether the markets . . . at issue [] actually operated in such a manner so as to justify that presumption"); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003) (rejecting a model that "makes no effort to adjust for the variegated nature" of the market as a basis for class certification).

2. The District Court failed to engage in that rigorous analysis. As a result, it overlooked the fatal problem of uninjured class members.

The District Court gave short shrift to the variables lurking within Plaintiffs' purported classwide proof—variables that eliminate injury for many class members. Plaintiffs' expert model purportedly "estimates *aggregate* damages" for athletes, and the District Court found that it "provides a reasonable estimate of the damages *to the class*." Dkt. 839, at 70 (emphasis added). But that expert did not try to *prove* whether each class member would have been paid more in the but-for world—he just *assumed*

it. And the District Court's analysis on this point was conclusory rather than rigorous: "some individual-level variation does not alter this Court's finding." *Id.* at 71.

But there are powerful reasons why individual class members may have received the same or *worse* compensation in the but-for world. For starters, some fighters may not have signed with Zuffa *at all*—preferring instead competitors with different compensation structures. Other fighters may have preferred contracts with different risk profiles that provided a lower ceiling than Zuffa offered but a higher floor. And still others may have seen *lower* compensation under a shorter-term contract lacking guarantees for future bouts. *See* Petition 11-13. Plaintiffs' expert glossed over such conditions that require individualized inquiries to determine what fighters' pay would have been. That expert thus could not determine any *individual* fighter's undercompensation injury—let alone any *classwide* injury.

It was Plaintiffs' unmet burden to prove that individualized questions did not predominate, and it was the District Court's unmet obligation to rigorously analyze Plaintiffs' purported proof. Simply accepting the expert's conclusory assumption as proof of classwide injury is not rigorous analysis. And even if there were proof that particular class members had

Article III standing here, the lens of rigorous analysis reveals that *some* would not. The presence of uninjured and unevenly injured class members precludes a damages class, and in any event the individualized efforts needed to separate them from any actually affected class members would destroy predominance under Rule 23(b)(3). *See Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1139 (9th Cir. 2022) (When "figuring out whether each individual putative class member was harmed would involve an inquiry specific to that person . . . , common questions do not predominate.").

II. Laissez-faire analysis of uninjured class members hurts our businesses and economy.

This Court's review is sorely needed to ensure an appropriately rigorous analysis that will combat the burdens that class action litigation on behalf of uninjured class members imposes on the business community and the public.

The costs of litigating class actions in the United States are eye-popping. In 2022, those costs reached a record $3.5 billion. *See* 2023 Carlton Fields Class Action Survey, at 4–6 (2023), available at https://ClassActionSurvey.com. Defending *even one* class action can cost a business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart:*

Implications for Employment Practices Liability Insurance 1 (July 2011). And those class actions can persist for years, accruing legal fees, with no resolution of class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), available at http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). Indeed, this lawsuit was litigated for over *eight years* before reaching a decision on class certification.

Certifying a class—and especially a class bloated with the uninjured—creates extraordinary exposure and thus immense pressure on defendants to settle even meritless cases. Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As the Supreme Court explained, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the

risk of 'in terrorem' settlements that class actions entail"). Over the last five years, most class actions have resulted in settlements—including over 73% of class actions in 2021. *See* 2023 Carlton Fields Class Action Survey 22.

The solution to those mushrooming costs inflated by uninjured class members and wide disparities in class members' injuries is judicial recommitment to rigorous analysis at the class-certification stage. These legal requirements, if properly enforced, ensure that parties do not waste time and money—and defendants do not face undue settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that uninjured class members have run rampant. If this Court does not intervene to correct the District Court's laissez-faire approach to Article III's requirement of an injury-in-fact and Rule 23's requirement of a classwide injury, however, then that immense pressure to settle meritless class actions will continue to balloon regardless of whether plaintiffs have suffered any actual harm. That coercion undermines the rule of law. It also hurts the entire economy, because the attorney's fees and costs accrued in defending and settling overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages.

CONCLUSION

For these reasons and those in Zuffa's Petition, the Court should grant the Petition and reverse the order granting class certification.

Dated: August 30, 2023

Respectfully submitted,

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