# NOS. 22-80061, 22-80062, 22-80063

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

IN RE JUUL LABS, INC. MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION

On Petition from the United States District Court for the Northern District of California
(Case No. 3:19-md-02913) (District Judge William H. Orrick)

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND LEAVE TO APPEAL**

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July 14, 2022

## DISCLOSURE STATEMENT

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## INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in cases to oppose improper class-certification orders. *See, e.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021).

## INTRODUCTION & SUMMARY OF ARGUMENT

Class certification is often "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009); *see Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). As the Supreme Court has recognized, "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*, 552 U.S. 148, 163 (2008) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)).

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

In the late 1990s, the federal courts finally began acknowledging the unusual leverage that class-certification orders can have on defendants. Because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability," the rules committee found it appropriate to exercise the discretion granted by 28 U.S.C. § 1292(e) and proposed Rule 23(f). *See* Fed. R. Civ. P. 23 note.

Given the importance of class certification in large multi-district litigation, it is imperative that district courts properly apply Rule 23's requirements. Blindly certifying a class merely on the plaintiffs' representations is a recipe for *in terrorem* settlements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). If this Court denies the petitions, it will greenlight shortcuts by district courts in this circuit during the class-certification process. So this case has far-reaching implications beyond this MDL.

The District Court took two shortcuts here. First, the District Court erred by holding that issues central to the Plaintiffs' claims were immaterial for purposes of class certification. This narrow interpretation of materiality simply cannot be squared with either the text of Rule 23 or case law applying it. Second, the District Court did not properly analyze Petitioners' motions to exclude expert evidence under Federal Rule of Evidence 702. Rather than explore whether the experts' testimony satisfied Rule 702's requirements, the District Court deferred those questions as credibility issues for the jury to decide. That continues a trend of district courts applying a "quick-look" Rule 702 analysis. Finding this approach improper, many other courts of appeals have held that

district courts must perform a full Rule 702 analysis at the class-certification stage. It's time for this Court to do the same.

Courts of appeals should grant leave to appeal a class-certification order "when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23 note. As both situations are present here, the Court should grant the petitions and hear this important appeal.

## ARGUMENT

### I. CUSTOMERS' INDIVIDUALIZED MARKETING EXPOSURES AND NICOTINE JOURNEYS ARE MATERIAL TO PLAINTIFFS' CLAIMS.

The District Court held that "differences in advertisements that the named plaintiffs or class members may have seen over time," "differences in the 'nicotine journey' of each, such as when they learned about nicotine in JUUL," "why they first used or continued to use JUUL," "and whether they are addicted to nicotine as a result of their use of JUUL or other nicotine products" were all immaterial to the class-certification decision. Opinion at 2, 7. This flouts Rule 23's requirements.

A Rule 23(b)(3) class is appropriate only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs fell woefully short of satisfying this requirement. The individualized questions for Plaintiffs'

claims will predominate over any common questions of fact and law. The District Court erred in finding otherwise.

Plaintiffs allege common-law fraud claims under California law. *See* Opinion at 2. The elements of fraud in California are "(1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage." *Conroy v. Regents of Univ. of Cal.*, 203 P.3d 1127, 1135 (Cal. 2009) (citation omitted).

The advertisements that individual Plaintiffs saw, read, or heard are material to the question of justifiable reliance. An example proves the point. Imagine a person who speaks only Muscogee and has been exposed to JUUL advertisements only in English and Spanish. If she started using JUUL products because a friend gave them to her, there could be no fraud. She did not rely on JUUL's advertisements either when deciding to start vaping or when continuing to vape. Yet under the District Court's rationale, this is immaterial to the class-certification inquiry. That holding is absurd. A fact that is dispositive to an element of the alleged tort is always material to the claim.

The same holds true for every proposed class member. JUUL has used thousands of ads over the relevant period, and Plaintiffs cannot introduce every ad at one trial. It would violate fundamental due-process rights to allow the jury to rely on one ad that it believes was fraudulent to find that Petitioners defrauded the entire class if only five percent of the class ever saw that ad. In short, the District Court's order allows Plaintiffs to cherry-pick only the evidence that supports their claims, even if it is irrelevant to most

of the class. Both Rule 23(b)(3) and the Fourteenth Amendment's Due Process Clause require more.

District courts should examine whether a proposed class has stated a viable claim when the merits implicate the class-certification inquiry. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 n.15 (9th Cir. 2009) (citations omitted). The advertisements Plaintiffs saw affects the Rule 23 analysis; it goes to whether individualized questions or common questions will predominate. Thus, the District Court erred by not considering that at the class-certification stage.

A person's nicotine journey is also material to the fraud inquiry. As noted above, damages caused by the defendant are an essential element of fraud in California. But Plaintiffs cannot show resultant damages without exploring each individual's nicotine journey. For some people, moving from cigarettes to JUUL almost certainly saved their lives. A person who smoked two packs of cigarettes per day and could not quit before JUUL entered the market has a much tougher job proving resultant damages compared to a person who never used nicotine products before seeing a JUUL advertisement. But the District Court ignored these realities and said that a person's nicotine journey is immaterial to the class-certification inquiry. Again, a dispositive fact for an essential element of an asserted tort is, by definition, material. The District Court's contrary holding deserves the Court's immediate review.

## II. THE DISTRICT COURT ERRED BY NOT CONDUCTING A FULL RULE 702 ANALYSIS.

**A.** To satisfy Rule 23, a class-action plaintiff must "prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." to justify class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). The only way to "prove" these "facts," of course, is with admissible evidence. It follows that a district court may consider expert evidence at the class-certification stage only if it meets Rule 702's rigorous standard for admissibility. The expert's opinion must be (1) relevant; (2) based on sufficient facts or data; (3) the product of reliable principles and methods; and (4) reliably applied to the facts of the case.

At least five courts of appeals have held that expert evidence must be admissible if it used to support class certification. *See Prantil v. Arkema Inc.*, 986 F.3d 570, 574-76 (5th Cir. 2021); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("We join our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (vacating district court's class-certification order for "failing to clearly resolve the issue of . . . admissibility before certifying the class"); *see also In re Carpenter Co.*, 2014 WL 12809636, *3 (6th Cir. Sept. 29, 2014) (holding that, because of *Dukes*, the district court properly applied *Daubert* at the class-certification stage); *Sher v. Raytheon Co.*, 419 F.

App'x 887, 890 (11th Cir. 2011) ("the district court erred as a matter of law" by filing to perform a *Daubert* analysis at the class-certification stage).

This Court should join these five courts of appeals and clarify that district courts must conduct a full Rule 702 analysis at the class-certification stage. As the Third Circuit said in *Blood Regents*, requiring a full Rule 702 analysis when deciding a class-certification motion flows naturally from *Dukes* and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). *Blood Regents*, 783 F.3d at 187. This was a correct reading of *Dukes* and *Behrend*. In *Behrend*, the Court emphasized the need for "evidentiary proof" before certifying a class action. 569 U.S. at 33-34. Although not at issue in the case, the Supreme Court "doubt[ed]" in *Dukes* that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." 564 U.S. at 354.

These two Supreme Court cases strongly suggest that district courts must conduct a full Rule 702 analysis before certifying a class. "Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot prove that the Rule 23(a) prerequisites have been met in fact, nor can it establish through evidentiary proof that Rule 23(b) is satisfied." *Prantil*, 986 F.3d at 575 (cleaned up).

**B.** True, this Court has held that district courts must consider inadmissible evidence when deciding class-certification motions. *See Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1003-06 (9th Cir. 2018). And if nothing had changed since then, the Court may be bound by that precedent. The landscape, however, has changed significantly over the past four years.

*Sali* is no longer good law. It rested on the Court's interpretation of the Supreme Court's standing precedent. *See Sali*, 909 F.3d at 1006. The Supreme Court has since soundly rejected this Court's interpretation of its standing jurisprudence. In *TransUnion*, the Court reviewed an opinion of this Court holding that all class members had standing to sue for alleged Fair Credit Reporting Act violations. The Supreme Court reversed this Court's interpretation of the evidentiary requirements for proof of standing. *See TransUnion*, 141 S. Ct. at 2200.

A three-judge panel is not bound by a prior Ninth Circuit decision when "an intervening Supreme Court decision undermines an existing precedent." *Avagyan v. Holder*, 646 F.3d 672, 677 (9th Cir. 2011). In those circumstances, the Court is bound by the principles of vertical precedent to follow the Supreme Court's decision and not the undermined decision. As described above, *TransUnion*, *Dukes*, and *Behrend* together require a full Rule 702 analysis at the class-certification stage. The only circuit to address the issue for the first time since *TransUnion*, the Fifth Circuit, thus joined its four sister circuits in requiring a full Rule 702 analysis. Nothing, including *Sali*, stops this Court from doing the same.

**C.** The District Court applied a watered-down Rule 702 test when certifying the class. The analysis of Dr. Singer's testimony showcases the District Court's errors. Citing another of plaintiffs' expert witnesses, Petitioners challenged Dr. Singer's use of a numerical scale for addictiveness. *See* Opinion at 25. The District Court dismissed those

concerns as going to the weight of the evidence and thus a matter for cross-examination. *See id.* at 25-26. That was error.

Dismissing objective flaws in expert evidence as going to the "weight" of that evidence to be explored on cross-examination leaves jurors with the rarified task of resolving the basic reliability of a given expert's testimony. Jurors cannot and should not be expected to make those sorts of reliability determinations.

"The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding." Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L. Rev. 427, 437 (2009). In other words, the mere "fact that an expert witness was 'subject to a thorough and extensive examination' does not ensure the reliability of the expert's testimony; such testimony must still be assessed before it is presented to the jury." *Nease v. Ford Motor Co.*, 848 F.3d 219, 231 (4th Cir. 2017) (citation omitted).

It's no surprise, then, that legal scholars insist that "cross-examination does little to affect jury appraisals of expert testimony." Christopher B. Mueller, Daubert *Asks the Right Questions: Now Appellate Courts Should Help Find the Right Answers*, 33 Seton Hall L. Rev. 987, 993 (2003). In fact, jurors assume that, because the trial judge admitted the expert evidence, it must have passed at least some degree of scientific scrutiny. *See, e.g.*, N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y & L. 1, 7 (2009).

The rest of the District Court's class-certification order fares no better. *See, e.g.*, Order at 45 (Petitioners "attacks bear on the weight and not the admissibility of [the experts'] opinions."). The District Court applied a watered-down Rule 702 analysis rather than the full analysis required by the rules and Supreme Court precedent. This failure to properly apply the Rule 702 standard is a legal error appropriate for review on a Rule 23(f) petition. Thus, the Court should grant the petitions and hear Petitioners' appeal of the class-certification order.

* * *

The District Court's class-certification order reveals its refusal to faithfully apply the rules of civil procedure and evidence. The District Court glossed over the material differences in Plaintiffs' claims and the lack of admissible expert evidence supporting class-certification. The Court should review this decision now to save both the parties' and judiciary's resources.

## CONCLUSION

This Court should grant the petitions.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is ten pages—less than one-half the length permitted for a Rule 23(f) petition. *See* Ninth Circuit Rule 5-2(b); *cf.* Fed. R. App. P. 29(a)(5) (permitting *amicus* briefs to be one-half the length of the party's brief).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Garamond font.

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