No.

IN THE
Supreme Court of the United States

CORONA REGIONAL MEDICAL CENTER;
UHS OF DELAWARE, INC.,

Petitioners,

v.

MARLYN SALI and DEBORAH SPRIGGS, on behalf of themselves and others similarly situated and the general public,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a class cannot be certified unless the requirements of Rule 23 have been "satisf[ied] through evidentiary proof" while reserving the question whether that "evidentiary proof" must be "admissible." *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 n.4 (2013); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In this case, the Ninth Circuit reversed a denial of class certification and, while acknowledging a circuit split on the issue, held that "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." Pet. App. 13a. That ruling—which the court declined to rehear en banc over a dissent from Judge Bea and four other judges—puts the Ninth Circuit (along with the Eighth Circuit) squarely on the minority side of a lopsided circuit split; the majority (including the Second, Third, Fifth, and Seventh Circuits) recognizes that evidence supporting class certification must be admissible. The question presented is:

Whether the requirements for class certification under Federal Rule of Civil Procedure 23 can be satisfied with inadmissible evidence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption accurately reflects all parties to the proceeding.

UHS of Delaware, Inc. and UHS-Corona, Inc. (d/b/a Corona Regional Medical Center) are wholly owned subsidiaries of Universal Health Services, Inc. No publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners UHS-Corona, Inc. d/b/a Corona Regional Medical Center and UHS of Delaware, Inc. (collectively, "Corona") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' original opinion is reported at 889 F.3d 623. Pet. App. 29a. The amended opinion is reported at 909 F.3d 996. *Id*. at 1a. The order denying rehearing and rehearing en banc is reported at 907 F.3d 1185. *Id*. at 95a. The district court's order is available at 2015 WL 12656937. *Id.* at 57a.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2018. The court of appeals denied Corona's petition for rehearing and rehearing en banc on November 1, 2018. The court amended its opinion on November 27, 2018. On January 11, 2019, Justice Kagan granted an extension of time for filing this petition until March 31, 2019. No. 18A723. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Appendix E.

STATEMENT

Because Federal Rule of Civil Procedure 23 "does not set forth a mere pleading standard," a party seeking to certify a class "must be prepared *to prove*"

that the Rule's requirements have been met. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added). This includes "satisfy[ing] *through evidentiary proof* at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (emphasis added). This Court has not yet decided, however, whether class-certification evidence must meet the standards of admissibility set forth in the Federal Rules. *Id*. at 32 n.4; *see also Dukes*, 564 U.S. at 354.[1] Although it granted certiorari on the question in *Comcast*, 567 U.S. 933, 933 (2012), the Court could not resolve it in light of vehicle problems. Because no such vehicle problems exist here, while the question remains as important as ever and, as the dissent from the denial of rehearing en banc points out, continues to be the subject of a deep split across at least six circuits, the Court should grant certiorari and reverse the decision below.

1. Petitioner and Defendant UHS-Corona, Inc. operates Corona Regional Medical Center, a hospital in Southern California. Pet. App. 3a; 31a. Petitioner and Defendant UHS of Delaware, Inc. provides management services to UHS-Corona, Inc. Respondents and Plaintiffs Marlyn Sali and Deborah Spriggs were employed as registered nurses by Corona Regional Medical Center. *Id*. Plaintiffs brought a putative class action lawsuit against Corona alleging that its employment practices violated California wage-and-

[1] The term "admissibility" is used throughout as a shorthand for compliance with the Federal Rules of Evidence, as modified for motion practice by Federal Rules of Civil Procedure 43(c) and 56(c)(4).

hour laws. *Id*. at 3a; 31a. Plaintiffs sought certification of seven classes, each tethered to a different alleged violation of California law. *Id*. at 4a–5a; 32a.

In an attempt to satisfy Rule 23(a)(3)'s typicality requirement, Plaintiffs initially offered only a single piece of evidence: a declaration from Javier Ruiz, a paralegal at their counsel's law firm, who reviewed "time and payroll records" (in the form of manipulated Excel spreadsheets and other data, which were attached as exhibits to the declaration) "for the named plaintiffs to determine whether they were fully compensated under Corona's rounding-time pay practice." Pet. App. 9a; 37a. Ruiz did not explain why he was qualified to render this opinion, did not purport to have analyzed a random sample of time records, did not describe how he created the spreadsheets, and did not explain whether the spreadsheets represented all or merely a portion of the time records, or what methods he used to identify alleged violations of the relevant laws and regulations. *Id*. at 98a–99a. Indeed, his declaration contains no explanation of his methodology at all.

Corona objected to the admissibility of Ruiz's declaration on the grounds that it constituted "improper lay opinion testimony"; that Ruiz's opinions were "unreliable"; that the declaration "lacked foundation"; that Ruiz "lacked personal knowledge of the information analyzed"; and that the data underlying Ruiz's analysis was unauthenticated hearsay. Pet. App. 9a–10a; 37a–38a. In response to these objections, Plaintiffs submitted new, additional declarations from the named plaintiffs with their reply brief "attesting to the authenticity and accuracy of the data and conclusions." *Id.* at 10a; 38a. The district court,

in its discretion, declined to consider that evidence because Plaintiffs could have submitted the evidence with their moving papers, and Corona did not have an opportunity to rebut it. *Id*. at 84a–85a; *see also* Dist. Ct. D.E. 115 at 7–8.

The district court declined to certify all seven putative classes, including because Plaintiffs did not "offer any admissible evidence of [their] injuries in their motion for class certification," and therefore had not established typicality under Rule 23(a)(3) for any of the classes. Pet. App. 82a (alteration in original).[2] This ruling turned on the district court's finding that the Ruiz declaration was inadmissible under several different provisions of the Federal Rules of Evidence. *Id*. at 82a–84a. First, the court found that Ruiz could not properly authenticate under Rule 901 "the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis because he d[id] not have personal knowledge to attest to the fact that the data accurately represents Plaintiffs' employment records." *Id*. at 83a. Second, the court found that, in violation of Rule 701, Ruiz, as a lay witness, "offered improper opinion testimony." *Id*. Third, the court found that Ruiz, a paralegal, lacked the qualifications required by Rule 702 to perform the "manipulation and analysis of raw data to reach cumulative conclusions," which "is the technical or specialized work of an expert witness." *Id*. at 84a (quotations omitted).

2. Following the denial of class certification, the parties reached a settlement in which they stipulated

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[2] The court also held that Plaintiffs had not satisfied Rule 23(b)(3)'s predominance requirement as to four of the putative classes. *See* Pet. App. 63a–81a.

to the dismissal of the action without prejudice under Federal Rule of Civil Procedure 41 so that Plaintiffs, who retained a personal stake in the litigation, could appeal the court's certification order. Dist. Ct. D.E. 162, 163. Plaintiffs then appealed, but challenged the denial of class certification only as to four of the seven proposed classes.

The Ninth Circuit reversed the denial of class certification. The court concluded that "[t]he district court's typicality determination was premised on an error of law," Pet. App. 8a; 36a (emphasis omitted), because in assessing the requirements of Rule 23, "a district court may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial," *id*. at 8a–9a; 36a–37a. The Ninth Circuit reasoned that because a class-certification decision "is far from a conclusive judgment on the merits of the case," and because "the evidence needed to prove a class's case often lies in the defendant's possession and may be obtained only through discovery," limiting the proof offered at that stage "to admissible evidence risks terminating actions" prematurely. *Id*. at 12a; 40a. Thus, "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification," *id*. at 13a; 41a; rather, "in evaluating a motion for class certification, a district court need only consider 'material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.'" *Id*. at 13a; 41a (quoting *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). Curiously, though, the court did state that "in evaluating challenged *expert* testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993)]," though admissibility must not be "dispositive." *Id*. at 17a; 45a (emphasis added).

In so ruling, the Ninth Circuit acknowledged the direct conflict between its decision and the Fifth Circuit's in *Unger v. Amedisys Inc*., 401 F.3d 316, 319 (5th Cir. 2005), which "directly held that admissible evidence is required to support class certification." Pet. App. 14a; 42a. The court also recognized that decisions from the Seventh and Third Circuits had reached similar conclusions to the Fifth Circuit. *Id*. (citing *Messner v. Northshore Univ. Health Sys*., 669 F.3d 802, 812 (7th Cir. 2012); *In re Blood Reagents Antitrust Litig*., 783 F.3d 183, 187 (3d Cir. 2015)). The court, however, "agree[d] with the Eighth Circuit," which held in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), "that a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met." *Id*. at 14a; 42a.

Corona sought rehearing by the panel and rehearing en banc, arguing that the court's decision conflicted with its prior precedent in *Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2011), with the decisions of several other circuits, and with this Court's decisions in *Dukes* and *Comcast*. The court denied the petition for panel rehearing and rehearing en banc, but did amend the opinion to address an issue of California state law that is not relevant to this petition. Pet. App. 24a.

Judge Bea, joined by Judges Bybee, Callahan, Ikuta, and Bennett, dissented from the denial of rehearing en banc. Judge Bea wrote that the court's de-

cision has "reduced the requirements of class certification below even a pleading standard," by accepting an "undisputedly inadmissible opinion of plaintiffs' paralegal" in deciding that Rule 23's typicality requirement had been satisfied. Pet. App. 96a (emphasis omitted). That holding, he said, is "contrary to decisions of four other circuits and clear Supreme Court guidance," *id*. at 97a, and rests on faulty premises about both the availability of evidence to the class, and the importance of the class-certification determination to the case. In the dissenters' view, the court's perception that class certification is merely "preliminary" is simply out of line with the court's statements in other cases that class certification "sounds the death knell of the litigation," whether by dismissal, if class certification is denied, or by settlement, if it is granted. *Id*. at 102a (citing *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 957 (9th Cir. 2005)).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens a lopsided and acknowledged circuit split in which six federal courts of appeals have held that a class-certification order must be supported by admissible evidence, while two federal courts of appeals hold that admissible evidence is not required at the class-certification stage. Expressly joining the short end of this split, the Ninth Circuit departed from this Court's teaching that a plaintiff seeking class certification "must be prepared to prove" that she "*in fact*" satisfies the prerequisites of Rule 23. *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

The Court has once before granted certiorari to resolve this question in *Comcast Corp. v. Behrend*,

567 U.S. 933, 933 (2012), but ultimately did not reach the issue. This important question—which is relevant in nearly all class actions—has percolated in the lower courts long enough. The Court should grant certiorari to promote uniformity in class-certification proceedings across the country.

I. THE NINTH CIRCUIT'S DECISION DEEPENS AN ENTRENCHED CIRCUIT SPLIT

The Ninth Circuit's decision has deepened a split among the federal courts of appeals concerning whether a class-certification decision must be supported by admissible evidence. "In total, six circuits have held in published or unpublished decisions that expert testimony must be admissible to be considered at the class-certification stage," while "only one circuit had reached the opposite conclusion—and even that circuit created a more stringent evidentiary standard than the one applied by the panel here." Pet. App. 106a. The Ninth Circuit nevertheless "agree[d] with" that outlier, despite acknowledging that "[o]ther circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage." *Id.* at 13a; 41a.

A. As Judge Bea noted in his dissent from denial of rehearing en banc, "the Second, Third, Fifth, and Seventh Circuits all require expert testimony to be admissible to be considered at the class certification stage," and "[t]wo other circuits have so held in unpublished rulings." Pet. App. 104a.

1. The Fifth Circuit has "h[e]ld that a careful certification inquiry is required and findings must be made *based on adequate admissible evidence* to justify class certification." *Unger v. Amedisys Inc.*,

401 F.3d 316, 319 (5th Cir. 2005) (emphasis added); *see also* Pet. App. 14a; 42a (acknowledging that "the Fifth Circuit has directly held that admissible evidence is required to support class certification"). In that case, plaintiffs sought to prove the reliance element of their securities-fraud claim through a fraud-on-the-market theory. *Unger*, 401 F.3d at 322. Because that theory applies only in efficient markets, however, "a demonstration of an efficient market [wa]s a prerequisite for certification." *Id.* The district court found that the defendant's stock traded on an efficient market based on its "high stock trading volume, market makers trading the stock, and a cause-and-effect relationship between corporate events and price movement." *Id.* at 324. But the Fifth Circuit vacated the class-certification order, emphasizing that the district court's market-efficiency determination was based on "unverifiable evidence" that was "hardly better than relying on bare allegations." *Id.* In doing so, the Fifth Circuit instructed the district court that, when it reconsidered class certification on remand, it "must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, *and base its ruling on admissible evidence*." *Id.* at 325 (emphasis added).

2. The Seventh Circuit reached a similar conclusion in *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010) (per curiam), which considered "whether [a] district court must conclusively rule on the admissibility of an expert opinion prior to class certification [where] that opinion is essential to the certification decision," *id.* at 814. The court answered in the affirmative, "hold[ing] that when an expert's report or testimony is critical to class certification . . . [,]

a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." *Id.* at 815–16. The district court in that case evaluated the many deficiencies of the expert opinion that proved critical to its class-certification decision, yet "ultimately declined, without further explanation, 'to exclude the report in its entirety at this early stage of the proceedings.'" *Id.* at 816. The Seventh Circuit vacated the class-certification order, explaining that although the district court made an "effective statement of admissibility," that statement was insufficient because, among other things, "it le[ft] open the question[] of what portions of [the expert's] testimony it may have decided (or will decide) to exclude." *Id*. Because the district court "fail[ed] to clearly resolve the issue of [the expert opinion's] admissibility before certifying the class, the district court erred." *Id.* at 817.

3. The Third Circuit is in accord with the Fifth and Seventh Circuits. In *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), the plaintiff sought certification of a settlement class based in part on expert testimony. The district court "h[eld] that the testimony 'could evolve to become admissible evidence' at trial, [and therefore] determined that plaintiffs had met Rule 23(b)(3)'s predominance requirement." *Id.* at 186. The Third Circuit vacated the class-certification order, explaining that the district court's "'could evolve' formulation of the Rule 23 standard did not survive *Comcast*." *Id.* Under *Comcast*, "the party seeking certification must 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typ-

icality of claims or defenses, and adequacy of representation . . . [,] [and] must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).'" *Id.* at 187 (quoting *Comcast*, 569 U.S. at 33). Because the expert testimony offered in support of class certification was "insufficiently reliable to [be admissible under] the *Daubert* standard," the Third Circuit concluded that it "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." *Id.*

4. The Second Circuit reached the same conclusion in *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006). There, thousands of investors filed numerous class actions against underwriters and issuers of securities, alleging that they engaged in a scheme to defraud investors. *Id.* at 27. The district court determined that "'plaintiffs—who have the burden of proof at class certification—must make *some showing*'" that they satisfy Rule 23. *Id.* at 30 (emphasis in original). The Second Circuit disagreed with the district court's lax "some showing" standard. Instead, it held that "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met," which requires "resolv[ing] factual disputes relevant to each Rule 23 requirement." *Id.* at 41. In doing so, "[a] district judge is to assess all of the relevant evidence *admitted* at the class certification stage and determine whether each Rule 23 requirement has been met, *just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit*." *Id.* at 42 (emphases added).

5. In addition to these published decisions, the Sixth and Eleventh Circuits have each held that a class-certification decision must be supported by evidence admissible at trial—and in doing so, each of these cases expressly followed the Seventh Circuit's decision in *American Honda*. *See In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (holding that in the wake of *Comcast* and *Dukes*, "expert testimony supporting class certification [must] be admissible under *Daubert*"); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (noting that it "consider[s] the Seventh Circuit's opinion in *American Honda* . . . persuasive" and holding that "the district court erred as a matter of law" when it failed to conduct a *Daubert* analysis).

B. Standing in the minority on this issue is the Eighth Circuit, now joined by the Ninth Circuit with its published opinion in this case.

In *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011), the Eighth Circuit declined "to follow the approach used by [the] Seventh Circuit . . . in *American Honda Motor Company*," on the grounds that the court "ha[s] never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial." *Id.* at 611. Reasoning that "[c]lass certification 'is inherently tentative' and may 'require revisiting upon completion of full discovery,'" the court determined that a definitive resolution of admissibility at the class-certification stage "cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings." *Id.* at 613. And although the court acknowledged that it "require[s] district courts to rely only on admissible

evidence at the summary judgment stage," it explained that such a posture is distinguishable from class certification "[b]ecause summary judgment ends litigation without a trial," whereas "a decision to certify a class is far from a conclusive judgment on the merits of the case." *Id.*

As the dissent from the denial of rehearing en banc noted, the Ninth Circuit here not only aligned itself with the Eighth Circuit's views in *Zurn Pex*, but went even further in watering down the evidentiary standards applicable at class certification. *See* Pet. App. 105a–106a. The Eighth Circuit did not hold that the admissibility of evidence was *irrelevant* at the class-certification stage. Instead, the court endorsed a "'tailored'" admissibility analysis under which a district court must "examine[] the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered." *Zurn Pex*, 644 F.3d at 612. Thus, although "*Zurn Pex* is consistent with the [Ninth Circuit]'s position that inadmissible expert testimony can be used to support a class certification motion," its "requirement that district courts undertake a 'focused' *Daubert* analysis is more specific and rigorous than the [Ninth Circuit]'s analysis and holding w[ere] here." Pet. App. 106a.

* * *

If this action were brought in the Second, Third, Fifth, Sixth, Seventh, or Eleventh Circuits, the district court's order denying class certification would have been affirmed because Plaintiffs' motion was not adequately supported with evidence admissible at trial. Even if this action had been brought in the Eighth Circuit, and a "tailored" inquiry into the Ruiz

declaration's admissibility had been undertaken, the district court's order may well have been upheld. Only by departing from the rule adopted by the majority of courts was the Ninth Circuit able to reach a contrary conclusion. The Court should grant certiorari to resolve this conflict.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND THE PLAIN TEXT OF THE FEDERAL RULES OF EVIDENCE

This Court has not yet squarely addressed whether a class-certification order must be supported by evidence admissible at trial. In *Comcast Corp. v. Behrend*, the Court granted certiorari to resolve the question "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a classwide basis." 567 U.S. at 933. Although the Court was unable to resolve the question in that case, the Court in several cases has signaled that it would answer in the negative—a conclusion that is supported by the Federal Rules of Evidence. The decision below is in clear tension with this authority. And while the Ninth Circuit has offered various policy justifications for its lax approach to class certification, those justifications wither under scrutiny.

A. In *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011), the Court explained that "Rule 23 does not set forth a mere pleading standard," but instead requires that the plaintiff "affirmatively demonstrate his compliance with the Rule." *Id.* at 350. To do so, the plaintiff "must be prepared to prove that there are *in fact*

sufficiently numerous parties, common questions of law or fact, etc." *Id.* Crucially, "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] *have been satisfied*,'" *id.* at 350–51 (emphasis added, citation omitted)—not that they could potentially be satisfied at trial or some other stage of the proceedings. It thus comes as no surprise that the Court expressed "doubt" concerning the district court's conclusion in *Dukes* "that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings." *Id.* at 354.

The Court was even more explicit in *Comcast*, where it made clear that a party seeking class certification "must . . . satisfy *through evidentiary proof* at least one of the provisions of Rule 23(b)." 569 U.S. at 33 (emphasis added). Even if inadmissible evidence is still "evidentiary," it can hardly constitute "proof" that the putative class satisfies Rule 23(b) when it would not be admissible at trial. And because "actual, not presumed, conformance with Rule 23(a) remains . . . indispensable" at the class-certification stage, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982), plaintiffs must support a motion for class certification with evidence sufficient to show "actual" conformance—that is, evidence that would be admissible at trial.

Both the Ninth Circuit here and the Eighth Circuit in *Zurn Pex* supported their non-rigorous approach to class certification with the Court's observation in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that class-certification proceedings are "not accompanied by the traditional rules and procedures applicable to civil trials." *Id.* at 178; *see also Zurn Pex*,

644 F.3d at 613; Pet. App. 12a; 40a. But as this Court explained in *Dukes*, "in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) . . . , but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants." 564 U.S. at 351 n.6. The Court then emphasized that *Eisen* is limited to its particular facts: "To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, *it is the purest dictum and is contradicted by our other cases*." *Id.* (emphasis added). By relying on this expressly disclaimed dictum, while disregarding the Court's clear statements in *Dukes* and *Comcast*, the Ninth Circuit has promulgated a rule that is irreconcilable with this Court's teachings.

B. There is no basis in the Federal Rules of Evidence for allowing class-certification decisions to rest on inadmissible evidence. Those Rules "apply to proceedings in United States courts," subject only to the "exceptions . . . set out in Rule 1101." Fed. R. Evid. 101(a). But notably, this list of exceptions does not include class-certification proceedings. Fed. R. Evid. 1101(d). This is all but dispositive here, as where an act "creates a number of limited . . . exceptions" to a statute, "we must presume that these were the only [exceptions] Congress intended." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (quotation marks omitted); *see also Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) ("The Federal Rules of Evidence 'govern proceedings in the courts of the United States . . . to the extent and with

the exceptions stated in rule 1101.' . . . Fairness hearings conducted under Fed. R. Civ. P. 23(e) are not among the proceedings excepted from the Rules of Evidence.").

Nor is there any basis in Rule 23 for exempting class-certification proceedings from the Rules of Evidence. On the contrary, Rule 23(b)(3) expressly requires district courts to "*find[]*" that common questions will predominate, Fed. R. Civ. P. 23(b)(3) (emphasis added), which necessarily implies a consideration of admissible evidence, *cf.* Black's Law Dictionary 749 (10th ed. 2014) (defining "finding of fact" as "[a] determination by a judge, jury, or administrative agency of a fact supported by the *evidence in the record*" (emphasis added)).

Any rule to the contrary simply does not make sense in light of the broader rules governing class certification. For example, "[t]he proposition that a district judge must accept all of a [plaintiff's] allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). But there is no discernible difference between the allegations in a lawyer-drafted complaint and the averments in the *paralegal's* declaration at issue here. If anything, a complaint provides more solid grounds for a class-certification decision, as those allegations are at least subject to the constraints of Rule 11.

C. The justifications offered by the Eighth and Ninth Circuits in defense of their lax class-certification standard do not withstand scrutiny. *First*, the

Eighth and Ninth Circuits both reasoned that it is improper to require admissible evidence at class certification because class certification often takes place "before the close of merits discovery," such that "there is bound to be some evidentiary uncertainty." *Zurn Pex*, 644 F.3d at 613; *see also* Pet. App. 14a–15a; 42a–43a. But this concern is overstated. Although "Rule 23(c)(1)(A) provides that a district court should address class certification at an 'early practicable time after a person sues or is sued as a class representative,'" *Zurn Pex*, 644 F.3d at 611, this language was the result of the 2003 amendments to the Federal Rules of Civil Procedure, which were specifically designed "to allow . . . *more time* for class discovery" before a district court must rule on class certification. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1807 (2018) (emphasis added). Because these revisions "expanded the opportunity for parties to engage in discovery prior to moving for class certification," they in effect "raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision." Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. Kan. L. Rev. 755, 785 (2010); *see also ABS Entertainment, Inc. v. CBS Corp.*, 908 F.3d 405, 427 (9th Cir. 2018) (holding that the Central District of California's "strict 90-day time frame from the filing of a complaint to the motion for class action certification . . . is in direct contrast to the flexibility of" Rule 23, which was adopted because "[t]he class action determination can only be decided after the district court undertakes a 'rigorous analysis' of the prerequisites for class certification" and thus "may require discovery"). Thus,

there is no reason plaintiffs should be unable to procure admissible evidence to support a class-certification motion before bringing such a motion.

Second, and relatedly, the Eighth and Ninth Circuits emphasized that class certification is "'tentative'" and "'preliminary,'" unlike a motion for summary judgment that "ends litigation." *Zurn Pex*, 644 F.3d at 613; Pet. App. 14a–15a; 42a–43a. True though this may be in theory, it is well-recognized that class certification "often 'sounds the death knell of the litigation,' whether by dismissal, if class certification is denied, or by settlement, if class certification is granted." Pet. App. 102a (quoting *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005)). Indeed, as this Court has recognized, "a district court's ruling on the certification issue is often the most significant decision rendered in . . . class action proceedings." *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 251 (D.C. Cir. 2013) (acknowledging that there are "instances in which 'the grant of class status raises the cost and stakes of the litigation so substantially that a rational defendant would feel irresistible pressure to settle'" (quoting *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000))). Because class-certification rulings are often dispositive, the Ninth Circuit erred by deferring the "rigorous analysis" required by this Court's cases until a later stage in the litigation. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting that a close review of a complaint's sufficiency cannot be delayed until discovery given that "the threat of discovery expense will

push cost-conscious defendants to settle even anemic cases before reaching those proceedings").

Third, the Ninth Circuit suggested that even if expert opinion evidence may be considered at class certification only if it would be admissible at trial, a lower standard may apply to non-expert evidence like the Ruiz declaration. Pet. App. 17a; 45a. To be sure, many of the cases on the majority side of the above-described circuit split dealt with expert evidence, but nothing in those cases *limited* their holdings to such evidence. *See, e.g.*, *Am. Honda*, 600 F.3d at 817 (explaining that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," including "the issue of . . . admissibility"); *Unger*, 401 F.3d at 324 ("At the certification stage, reliance on unverifiable evidence is hardly better than relying on bare allegations."). And the Ninth Circuit offered no explanation for why different standards would apply to different forms of evidence. Neither *Dukes* nor *Comcast* supports such a distinction, either: A party is no more "prepared to prove" that it has "*in fact*" satisfied Rule 23's requirements when it presents inadmissible lay evidence as compared to inadmissible expert evidence, *Dukes*, 564 U.S. at 350, and it is certainly not prepared to do so "through evidentiary proof," *Comcast*, 569 U.S. at 33. Such an approach would have perverse consequences, insofar as it would not only allow, but encourage, litigants to avoid *Daubert* scrutiny simply by repackaging an expert report as a non-expert declaration. Indeed, that is precisely what happened in this case with the Ruiz declaration.

III. This Case Presents An Ideal Vehicle For The Court To Resolve A Question Of Exceptional Importance To Class Action Litigants

In light of this Court's statements in *Dukes* and *Comcast*, the class-certification decision often turns on the evidence submitted by the parties. Given that Rule 23 requires a district court to make findings in support of its decision whether to certify the class, the scrutiny to be applied to the evidence submitted by the parties in support of, or in opposition to, class certification is likely to arise in nearly every class action case. Such cases comprise nearly 40% of the entire federal court caseload, *see* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1661 (2017), and thus, the issues presented here are implicated in thousands of cases.

Rule 23 "provides a one-size-fits-all formula for deciding the class action question." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). A similarly uniform standard should apply to the evidence used to support or oppose a class-certification motion. At present, however, the declaration the Ninth Circuit required the district court to consider—and which was the *only* evidence offered with Plaintiffs' motion to show that Plaintiffs had suffered injuries and that those injuries were typical of the class—would not be sufficient to support class certification in any circuit other than the Eighth and Ninth Circuits. The Ninth Circuit's ruling is thus outcome-determinative on the question of class certification, and the conflicting approaches adopted by the courts of appeals will encourage forum-shopping and

lead to dissimilar treatment of otherwise similarly situated litigants.

This Court need not await further developments in the courts of appeals to resolve this issue. The original and amended *Sali* decisions already have been cited nine times within the last several months by courts within and outside the Ninth Circuit for the proposition that a case's suitability for class treatment need not be proved using admissible evidence, with some courts interpreting the Ninth Circuit as having endorsed an evidentiary free-for-all at the class-certification stage. *See, e.g.*, *Magadia v. Wal-Mart Assocs., Inc.*, No. 17-cv-00062, 2018 WL 5923449, at *3 & *6 n.2 (N.D. Cal. Nov. 13, 2018) (stating that "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification" and overruling objections to declaration submitted on reply); *Dawson v. Hertz Transporting, Inc.*, No. 17-8777, 2018 WL 6112623, at *2 (C.D. Cal. Nov. 5, 2018) (holding that "[a]t this preliminary stage, a district court may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial" and may consider "any material necessary to its determination"); *Hamilton v. TBC Corp.*, 328 F.R.D. 359, 372–73 (C.D. Cal. 2018) (considering evidence in ruling on certification despite acknowledging that the assumptions underlying the evidence might be proven false at trial); *Moussouris v. Microsoft Corp.*, No. C15-1483, 2018 WL 3328418, at *11 n.7 (W.D. Wash. June 25, 2018) (stating that "unlike the summary judgment cases . . . the court is not

limited to considering only admissible evidence" at the class-certification stage).[3]

This case presents a sound vehicle in which to address this critical issue. Whether Plaintiffs' claims are typical of the remaining classes they seek to represent is dispositive of the class-certification question—if that requirement is not met, then it does not matter whether any of Rule 23's remaining requirements are satisfied. *Comcast*, 569 U.S. at 33 ("Certification is proper only if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.") (quotation marks and citation omitted). And the only evidence Plaintiffs

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[3] The *Sali* opinions have also been cited by numerous treatises offering practical advice on class action litigation. *See, e.g.*, 3 William Rubenstein et al., Newberg on Class Actions § 7:24 (5th ed. Supp. 2018) (interpreting *Sali* to mean that the Ninth Circuit had "appeared to soften its stance [articulated in *Costco*] on *Daubert*"); 7AA Charles Alan Wright et al., Federal Practice & Procedure Supplemental Service § 1785 (3d ed. Supp. 2019) (citing *Sali* for the proposition that a district court "need only consider material sufficient to form a reasonable judgment on each Rule 23(a) requirement"); George L. Blum et al., Am. Jur. 2d Federal Courts § 1770 (2d ed. Supp. 2019); William C. Holmes & Melissa H. Mangiaracina, Antitrust Law Handbook § 1:8 (2017-2018 ed.) (noting that *Sali* "depart[ed] from the Fifth Circuit" on the admissibility issue); Timothy D. Cohelan, Cohelan on California Class Actions § 7:5 (2018-2019 ed.) (explaining that federal procedure now differs from California procedure insofar as "district courts may not decline to consider evidence solely on the basis that the evidence is inadmissible at trial"); 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:12 (15th ed. Supp. 2018) (noting that "[c]ourts have not achieved consensus on whether only evidence that is admissible under the Rules of Evidence may be considered in deciding whether a class may be certified").

timely presented to "demonstrate [their] various injuries," and to show that those injuries were typical of the class—both of which Corona disputed below—was the Ruiz declaration. Pet. App. 82a ("Plaintiffs do not offer any admissible evidence of Plaintiffs' injuries in their motion for class certification.").

Although Plaintiffs subsequently submitted two declarations on reply, the district court acted within its discretion in not considering those declarations because Corona did not have an opportunity to respond to them. *See* Pet. App. 84a–85a; *Glenn K. Jackson, Inc., v. Roe*, 273 F.3d 1192, 1202 (9th Cir. 2001) (explaining that a district court has "discretion" to consider issues raised on reply); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (declaring it "unfair" for one party to submit new evidence on reply without affording the other side a chance to respond); *cf. Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 112 (2011) (declining to consider argument raised for the first time in petitioner's reply brief). To the extent the Ninth Circuit suggested otherwise in chiding the district court for its "evidentiary formalism," and stating that those declarations should have been considered, Pet. App. 16a; 44a, that statement was dicta. The Ninth Circuit held that the "evidentiary proof" submitted in support of class certification "need not be admissible evidence." *Id*. at 12a; 40a. That holding—and the reasoning that went along with it—would have been unnecessary had the declarations submitted on reply been sufficient, by themselves, to establish typicality, or at least, to warrant a revisitation of that element by the district court. And surely the Ninth Circuit cannot have been endorsing a rule that a district court must consider *any* evidence submitted

by the parties even if it fails to comply with the court's own rules or practices.

CONCLUSION

Because the Ninth Circuit's decision deepens a lopsided and longstanding circuit split, departs from this Court's guidance in *Dukes* and *Comcast*, and presents an ideal vehicle for this Court to resolve an issue that has vexed the lower courts and is likely to arise in thousands of class actions, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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