No. 25-874

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON CONSUMER INC.,

Petitioner,

v.

NARGUESS NOOHI, INDIVIDUALLY AND ON BEHALF OF OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Narguess Noohi's argument against certiorari rests on a mischaracterization of the decision below. In her telling, the Ninth Circuit requires expert testimony offered in support of class certification to be admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The decision below, she claims, held only that courts may not resolve evidentiary disputes that stray beyond the issues relevant to class certification. Based on this reading, Noohi claims there is no circuit split or question deserving of this Court's attention.

That is not what the decision below held. The decision below held that district courts may apply "a limited *Daubert* analysis" under which expert testimony does not need to be admissible to satisfy Rule 23. Pet. App. 11a-12a (quotations omitted). Rather, expert testimony may support certification so long as the expert identifies a reliable methodology and "chart[s] out a path" to developing an admissible opinion using that methodology. Pet. App. 12a-13a (quotations omitted). A defendant will have "the opportunity to test the admissibility" of an expert's testimony critical to class certification *after* his testimony was used to certify a class. Put simply, the Ninth Circuit held that expert testimony may satisfy the requirements of Rule 23 so long as it could develop into admissible trial evidence later.

That holding calls out for this Court's review. In other circuits, "[i]t is not sufficient for the court simply to determine that the testimony could evolve into something admissible by the time of trial."

Wright & Miller, 7AA *Federal Practice & Procedure* § 1785 (3d ed. 2025). The Ninth Circuit's rule implicates an entrenched circuit split, *see In re Nissan N. Am., Inc. Litig.*, 122 F.4th 239, 253 (6th Cir. 2024) (Sutton, C.J.), as the Ninth Circuit itself has recognized, *see Lytle v. Nutramax Lab'ys, Inc.*, 114 F.4th 1011, 1030 & n.6 (9th Cir. 2024). This Court has granted certiorari once before to resolve the question at the heart of this split. *Comcast Corp. v. Behrend*, 567 U.S. 933 (2012). And Noohi does not even defend the Ninth Circuit's rule.

Until this Court intervenes, the Ninth Circuit's erroneous rule will distort class-action practice nationwide. *See* Pet. 3, 21-22, 29-30. This case is an ideal vehicle to restore uniformity and resolve the question *Comcast* left open.

A. Split. Contrary to Noohi's claim (BIO 16-24), there is an open and acknowledged circuit split about whether and how Rule of Evidence 702/*Daubert* apply to evidence offered in support of class certification. *See*, *e.g.*, *Nissan*, 122 F.4th at 253; 3 Newberg & Rubenstein on Class Actions § 7:24 (6th ed. 2025); Wright & Miller, *supra*, § 1785; Pet. 10-19. Even the Ninth Circuit has recognized "divergence among the Circuits." *Lytle*, 114 F.4th at 1030.

The minority rule, reflected below, is that expert testimony may satisfy Rule 23 so long as the court believes it can develop into admissible trial testimony; admissibility review may be reserved until after the class is certified. But in several other circuits, Rule 702/*Daubert* apply in full at class certification, so a court cannot certify a class based on an expert's plan to develop an admissible opinion later. Had Noohi

filed suit in one of these circuits, the class could not have been certified. In arguing otherwise, Noohi mischaracterizes the decision below and the holdings of other circuits.[1]

1. The Ninth Circuit's holding is clear: Dr. Roberts's testimony did not need to be admissible under Rule 702/*Daubert* to satisfy Rule 23. Pet. App. 11a-14a. Instead, it was sufficient for Dr. Roberts's report to describe his plan to develop admissible testimony, Pet. App. 13a-14a, which Petitioner would "be given the opportunity to test" only after a class was certified, Pet. App. 20a. Noohi's description of the Ninth Circuit's rule, by contrast, is difficult to pin down, a strong signal it is inaccurate.

a. At first, Noohi asserts the Ninth Circuit's rule is about *how* Rule 702 applies at class certification. She claims that admissibility is required, but that the Ninth Circuit "tailor[s]" the admissibility inquiry to the elements of Rule 23. BIO 17-18. That assertion finds no support in the decision below.

In the decision below, the Ninth Circuit did not apply Rule 702 at all. In fact, the court mentioned Rule 702 only once—in describing Petitioner's argument. Pet. App. 11a. It did not, for example, ask whether Dr. Roberts's opinion "is based on sufficient facts or data," Fed. R. Evid. 702(b), or "reflects a reliable application of [reliable] principles and methods to the

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[1] Noohi first argues (BIO 10-16) there is no split about the permissibility of an unexecuted damages model. That argument is irrelevant. Noohi recognizes this case has never been about "a categorical prohibition … on unexecuted damages models." BIO 12.

facts of the case," *id.* 702(d). Neither inquiry would have made sense because Dr. Roberts had not collected facts or data, let alone applied a reliable methodology to them. Pet. 7-8, 14-15. At most, he identified the type of model he planned to use and sketched out some loose parameters. Pet. 7-8. If the Ninth Circuit had applied Rule 702 as written, Dr. Roberts's testimony would have been excluded and the class decertified.

The Ninth Circuit instead endorsed a "limited *Daubert* analysis" under which expert testimony need not be admissible. Pet. App. 11a-12a (quotations omitted). In the Ninth Circuit, expert testimony can justify certifying a class if the expert identifies a reliable type of "methodology," Pet. App. 12a (quotations omitted), and "chart[s] out a path to obtain all necessary data and demonstrate[s] that the proposed method will be viable as applied to the facts," Pet. App. 13a (quotations omitted). The court below approved Dr. Roberts's testimony because he allegedly "did so." Pet. App. 13a-14a. That is, the court held Dr. Roberts's testimony justified certifying a class because, it thought, Dr. Roberts would be able to develop admissible testimony *in the future*. Under the Ninth Circuit's rule, Petitioner needs to wait until after class certification "to test the admissibility" of testimony critical to certification. Pet. App. 20a.[2]

b. In attempting to distinguish contrary circuit case law, Noohi offers a different take. She argues the

[2] Noohi's suggestion (BIO 18) that the Ninth Circuit shifted Rule 702(a)'s relevance inquiry to the elements of Rule 23 is also

Ninth Circuit's rule is about *what* evidence Rule 702 applies to at class certification. According to her, when the Ninth Circuit approved a "limited *Daubert* analysis," Pet. App. 12a (quotations omitted), it did not relax "the degree of scrutiny applied to expert evidence," BIO 2, but instead held that courts are limited to resolving evidentiary disputes relevant to certification, BIO 19-24. That, too, is incorrect. *See Lytle*, 114 F.4th at 1030-31 (addressing "[t]he manner and extent to which the *Daubert* framework applies" and holding district courts are "limited" to predicting whether "the expert's analysis will eventually bear fruit").

To start, the parties never disputed that Dr. Roberts's testimony was relevant to certification. Nor did Petitioner argue that district courts should resolve irrelevant evidentiary disputes, as Noohi acknowledges, *see* BIO 2, 17. The Ninth Circuit obviously did not confine its analysis to an issue that was irrelevant and undisputed.

The dispute below was about the substance of the Rule 702/*Daubert* analysis. Petitioner argued that "expert evidence offered at class certification must satisfy the usual requirements of admissibility." CA9 Appellant's Supp. Br. 9 n.5 (quotations omitted); *see also* CA9 Appellant's Br. 34. The Ninth Circuit rejected that argument, holding it was sufficient under

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legally flawed. The district court is not a "trier of fact," Fed. R. Evid. 702(a), in ruling on class certification, *see In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). And Dr. Roberts's assertion that damages can be measured on a class-wide basis is an inadmissible legal conclusion, Pet. 14, a point Noohi ignores.

a "limited *Daubert* analysis" for Dr. Roberts to identify a reliable methodology and "chart out a path" to developing an admissible opinion based on it. Pet. App. 12a-14a (quotations omitted). As the decision below makes plain—and as Noohi's own cited cases (BIO 11-12) confirm—the Ninth Circuit "relaxed" "[t]he level of scrutiny that applies at class certification" when the expert's analysis is incomplete. *Orshan v. Apple Inc.*, 2024 WL 4353034, at *2 (N.D. Cal. Sept. 30, 2024).[3] Thus, although Noohi claims the decisions below "reflect the hallmarks of *Daubert* analysis," BIO 25, they do not bear even a passing resemblance to a traditional admissibility analysis, which (the Ninth Circuit has recognized outside the certification context) "requires a proponent of expert testimony to demonstrate each of the requirements of Rule 702," *Engilis v. Monsanto Co.*, 151 F.4th 1040, 1050 (9th Cir. 2025).

2. Noohi also misrepresents other circuits' case law. According to her, decisions on the other side of the split stand for the limited proposition "that district courts are required to assess expert evidence under *Daubert* only to the extent that the evidence implicates questions relevant to class certification." BIO 17. While those courts of course prohibit resolution of evidentiary disputes irrelevant to class certification, *see Amgen, Inc. v. Conn. Ret. Plans. & Tr. Funds*, 568 U.S. 455, 466 (2013), they *also* hold "that the requirements of Daubert and Rule 702 apply with full force"

[3] *Accord LeGrand v. Abbott Lab'ys*, 2025 WL 2323352, at *3-5 (N.D. Cal. Aug. 12, 2025) (admissibility not dispositive; expert must chart path to admissible opinion); *Blain v. Liberty Mut. Fire Ins. Co.*, 2025 WL 886966, at *3 (S.D. Cal. Mar. 21, 2025).

to expert evidence critical to certification. 1 McLaughlin on Class Actions § 3:14 (22nd ed. 2025). In other circuits, "[i]t is not sufficient for the court simply to determine that the testimony could evolve into something admissible by the time of trial." Wright & Miller, *supra*, § 1785.

For example, the Third Circuit held in *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), that if challenged expert testimony is critical to certification, a district court must find that the "testimony satisfies the standard set out in *Daubert*." *Id.* at 187. Applying that rule, *Blood Reagents* vacated certification where the district court held the plaintiffs satisfied Rule 23 with expert testimony that "could evolve to become admissible evidence at trial." *Id.* at 188 (quotations omitted); *see id.* at 186 (rejecting "could evolve" standard). As Judge Porter accurately summarized his court's rule: "expert evidence used to certify a class action must be admissible under [Rule] 702," which is why *Blood Reagents* "rejected the trial court's acceptance of evidence that 'could evolve' into admissible form later." *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890, 904-05 (3d Cir. 2022) (Porter, J., concurring); *see* McLaughlin, *supra*, § 3:14 (same reading). In the decision below, the Ninth Circuit approved the standard *Blood Reagents* rejected. It held that Dr. Roberts's testimony satisfied Rule 23 because he "chart[ed] out" a path to develop

an admissible opinion. Pet. App. 13a-14a (quotations omitted).[4]

The outcome of this appeal also would have been different in the Fifth Circuit. Following the Third Circuit, the Fifth Circuit holds that "if an expert's opinion would not be admissible at trial, it [can]not pave the way for certifying a proposed class." *Prantil v. Arkema Inc.*, 986 F.3d 570, 576 (5th Cir. 2021). It has thus vacated class-certification orders where (as here) the district court did not apply Rule 702/*Daubert* "with full force." *Id.*; *see* Pet. 16-17.

Noohi offers two responses. First, she says there is no conflict because "the Ninth Circuit does not limit how 'searching' the district court's reliability analysis should be, but [limits instead] what aspects of the proffered evidence must be examined." BIO 20. As just explained, that is incorrect. Second, she suggests (BIO 20-21) the Fifth Circuit holds only that the Rule 702 inquiry should be limited to evidence relevant to class certification. While the decision she cites addressed that issue, *Wilson v. Centene Management Co.*, 168 F.4th 217, 230 (5th Cir. 2026), it also reaffirmed the Fifth Circuit's longstanding rule that "'when scientific evidence is relevant to the decision to certify,' the 'metric of admissibility' is the same for

[4] Although *Blood Reagents* noted that other courts "limit the *Daubert* inquiry to expert testimony offered to prove … Rule 23's requirements," 783 F.3d at 188 n.8, that is not the issue here. The issue is whether the admissibility requirements under Rule 702/*Daubert* apply to expert testimony offered in support of class certification, not whether district courts may apply Rule 702/*Daubert* to evidence unrelated to certification.

both certification and trial," *id.* (quoting *Prantil*, 986 F.3d at 575), as Noohi recognizes, BIO 20-21.

Noohi takes a similar tack in trying to explain away the conflict with the Seventh Circuit. Noohi is correct that the Seventh Circuit forbids district courts from deciding admissibility disputes irrelevant to class certification. *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883, 894 (7th Cir. 2025). But she errs in arguing (BIO 22-23) this circuit does not apply a traditional Rule 702 analysis to expert evidence "relevant to establishing any of the Rule 23 requirements." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816-17 (7th Cir. 2010). For that testimony, district courts must "clearly resolve the issue of its admissibility before certifying the class." *Id.* Thus, in *American Honda*, the Seventh Circuit reversed class certification after concluding the expert's testimony was inadmissible. *Id.* at 817-19. Contrary to Noohi's suggestion (BIO 23), the Seventh Circuit has not backed away from this rule. *Compare Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 813 (7th Cir. 2012) (district court must rule on evidentiary challenge as a matter of "admissibility," not "weight"), *with* Pet. App. 11a (admissibility goes to weight); *see also Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587, 601 (7th Cir.

2021) ("Before relying on [expert] opinions … the [district] court should have ensured that they lived up to the standards of *Daubert* and Rule 702.").[5]

Finally, Noohi grudgingly acknowledges that the Sixth Circuit, in an opinion by Chief Judge Sutton, has expressly rejected the Ninth Circuit's rule in favor of the "majority view" reflected in cases like *Blood Reagents*, *American Honda*, and *Prantil*. *See Nissan*, 122 F.4th at 253. She nevertheless insists there is no daylight between these courts because the Ninth Circuit also requires expert testimony offered in support of class certification to be "reliable." BIO 22. But there is a big difference between reliability, as the Ninth Circuit uses the term, and admissibility under Rule 702/*Daubert*.

The Ninth Circuit's "required showing of reliability [is] less demanding" than "full *Daubert* analysis." *Orshan*, 2024 WL 4353034, at *2. Expert testimony is considered reliable in the Ninth Circuit if the expert identifies a reliable type of "methodology" (e.g., conjoint survey) and "chart[s] out a path" to obtaining data and reliably applying the methodology "to the facts." Pet. App. 12a-14a (quotations omitted). Admissibility under Rule 702/*Daubert*, by contrast, requires the proponent of the evidence to demonstrate actual compliance with all four requirements in Rule 702. *Engilis*, 151 F.4th at 1050. The "majority view,"

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[5] The Eleventh Circuit has endorsed *American Honda*. *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011). Noohi asserts (BIO 23) that the Eleventh Circuit has since agreed with the Ninth Circuit that there is no categorical prohibition on relying on an unexecuted damages model to certify a class. But that is a different issue. *Supra* n.1.

adopted by the Sixth Circuit, requires the latter—and the Sixth Circuit correctly understood the Ninth Circuit to require only the former.

B. Vehicle. Noohi's only other argument is that this case presents a poor vehicle to resolve the question presented. Here, too, she mischaracterizes the decision below. She erroneously claims (BIO 24-25) the Ninth Circuit *did* apply the requirements of Rule 702/*Daubert*, even though the court below did not so much as mention Rule 702 in its analysis. In doing so, Noohi again conflates the Ninth Circuit's free-floating concept of reliability (BIO 25), with the requirements for admissibility under Rule 702/*Daubert*.

Noohi also suggests Petitioner limited this case to disputes about "unexecuted expert models," BIO 24—the implication being a decision from this Court would not apply to expert testimony inadmissible for other reasons. Noohi badly misrepresents Petitioner's position.

Petitioner's argument has always been that expert testimony "must satisfy the requirements of Rule 702 and *Daubert*." CA9 Appellant's Br. 34; *see also* CA9 Appellant's Reply Br. 6 n.2. In this particular case, Dr. Roberts's testimony was inadmissible because it was undeveloped. But Petitioner never confined its argument to undeveloped expert testimony. For instance, in the same paragraph of the brief from which Noohi cherry-picks her quote, Petitioner explained that it disagreed with *Lytle*'s "application of Rule 702" and that "expert evidence offered at class certification must satisfy the usual requirements of admissibility."

CA9 Appellant's Supp. Br. 9 n.5.[6] In other words, Petitioner argued that Dr. Roberts's undeveloped testimony was incompetent proof under Rule 23 *because* it was inadmissible under Rule 702. *Id.* at 8-9 & n.5.

That is how the Ninth Circuit understood Petitioner's argument. It recognized Petitioner's "argument on appeal that Dr. Roberts' proposed damages model was too underdeveloped at the time of class certification to be admissible or reliable under *Daubert* and Federal Rule of Evidence 702." Pet. App. 11a. And it rejected that argument based on its rule that Rule 702's admissibility criteria do not apply fully (or really, at all) to evidence offered in support of class certification. It endorsed a "limited" analysis that diverges sharply from the requirements of Rule 702, Pet. App. 11a-14a, while holding that Petitioner's challenge to the "admissibility" of Dr. Roberts's testimony would need to wait until after the class was certified, Pet. App. 20a. This case is thus an ideal vehicle to resolve the question *Comcast* left open.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] The sentence Noohi quotes from this brief describes the "main point of disagreement" between Petitioner and *Lytle*, not between the parties. CA9 Appellant's Supp. Br. 8-9.

Respectfully submitted,

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