

No.

In the Supreme Court of the United States

NESTLÉ USA, INC., PETITIONER,

v.

MARIE FALCONE, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

*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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QUESTIONS PRESENTED

Marie Falcone sued Nestlé USA over statements on product labels that cocoa was “sustainably” or “responsibly” sourced. She claimed the statements were misleading because Nestlé USA could not guarantee a supply chain free of all risks of child labor. Falcone sought certification of injunctive-relief and damages classes. Undisputed evidence showed that many consumers did not see the statements, understand them as promises about labor practices, or rely on the statements in deciding to buy the chocolate. It was also undisputed that most consumers would not have considered the chocolate worthless without the statements. Falcone herself testified that she now has a full understanding of Nestlé USA’s labels and sourcing practices. Yet the district court certified both classes, approving the injunctive-relief class based on Falcone’s testimony and the damages class based on a model that would award all class members a full refund of every cent they paid for the chocolate. A divided Ninth Circuit panel affirmed.

The questions presented are:

1. Whether a consumer who is aware of alleged deception has Article III standing to seek injunctive relief requiring removal of the allegedly deceptive statements.
2. Whether a damages class may be certified when some members lack Article III standing.
3. Whether, under *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), a damages class may be certified based on a model that would award class members damages they could not recover in individual litigation.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 DISCLOSURE STATEMENT**

1. Petitioner Nestlé USA, Inc. was the defendant in the district court and the appellant below. Nestlé USA, Inc. is a wholly owned subsidiary of Nestlé Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé US Holdco, Inc., which is a wholly owned subsidiary of Société des Produits Nestlé S.A., which is a wholly owned subsidiary of Nestlé S.A., a publicly traded Swiss corporation whose shares are traded in the United States in the form of American Depositary Receipts (NSRGY). No publicly held corporation owns 10% or more of the stock of Nestlé S.A.

2. Respondent Marie Falcone was the plaintiff in the district court and the appellee below.

RELATED PROCEEDINGS

Under this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *Falcone v. Nestlé USA, Inc.*, No. 24-7707 (9th Cir.) (judgment entered Jan. 9, 2026; rehearing en banc denied Apr. 21, 2026);
- *Falcone v. Nestlé USA, Inc.*, No. 24-6196 (9th Cir.) (petition for permission to appeal filed Oct. 10, 2024; petition granted Dec. 23, 2024); and
- *Falcone v. Nestlé USA, Inc.*, No. 3:19-cv-723 (S.D. Cal.) (class certification granted Sep. 26, 2024).

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INTRODUCTION

Class actions are meant to be the “‘exception,’” not the rule. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013); *see American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234 (2013) (Rule 23’s requirements are “stringent” by design, and “in practice exclude most claims”). But enormous class actions are on the rise. All across the country, plaintiffs are using the class-action device to seek sweeping injunctions and colossal damages awards—even if they or the people they seek to represent suffered no Article III injury traceable to the defendant’s challenged conduct. Some circuits are holding the line. But on issue after issue, the

Ninth Circuit has adopted inappropriately permissive rules that treat class certification as an empty formality. This case, from the Ninth Circuit, presents three issues of staggering importance.

The first involves Article III standing to seek injunctive relief. Consumer plaintiffs often claim to have been misled by some statement on a company's labels or ads for its products. So the question often arises whether those once-deceived consumers have standing to seek injunctions requiring the companies to change the statements. Five courts of appeals have held that such consumers lack standing: because they now know of the alleged deception, they cannot show any substantial risk that they will again be harmed by the statements in the future. *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147-49 (2d Cir. 2020); *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 896 (3d Cir. 2020); *Conrad v. Boiron, Inc.*, 869 F.3d 536, 542 (7th Cir. 2017); *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1254-56 (11th Cir. 2023); *Animal Legal Defense Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1228 (D.C. Cir. 2024). Only the Ninth Circuit disagrees, holding that previously deceived consumers have Article III standing to seek injunctive relief so long as they assert that they "would like" to buy a product again but are "unable to rely on the product's advertising or labeling." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969-70 (9th Cir. 2018). The Ninth Circuit applied that rule here, certifying an injunctive-relief class even though respondent has a full understanding of the labels she is seeking to have changed.

The *Davidson* rule is deeply flawed. It finds Article III standing even when consumers face no risk that they will again be misled by statements they already

know are deceptive. And it is causing serious harm. It facilitates the certification of Rule 23(b)(2) classes seeking far-reaching injunctions even though the plaintiff representing the class will not be injured by the statements she challenges. That puts federal courts into abstract disputes where they ought not be, diverts power from the representative branches and regulators charged with ensuring general compliance with the law, and subjects defendants to unwarranted injunctions that change how they do business and describe their offerings across the country.

The second issue is one this Court knows well: “Whether a federal court may certify a class action pursuant to [Rule] 23(b)(3) when some members of the proposed class lack any Article III injury.” *Laboratory Corp. of America Holdings v. Davis*, 145 S. Ct. 1133, 1134 (2025). As the Court recognized in granting review in *Labcorp*, the courts of appeals are deeply fractured on that question. Many see serious problems arising in connection with uninjured class members. The D.C., First, and Fourth Circuits hold that Rule 23(b)(3)’s predominance criterion forbids the certification of classes containing more than a “*de minimis*” number of uninjured members. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 624-26 (D.C. Cir. 2019); *see In re Asacol Antitrust Litigation*, 907 F.3d 42, 53-54 (1st Cir. 2018); *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232, 252 (4th Cir. 2026). And the Second and Eighth Circuits hold that Article III itself precludes the certification of classes “defined in such a way to include individuals who lack standing.” *Johannessohn v. Polaris Industries Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021); *see Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

But again, the Ninth Circuit disagrees, holding that Rule 23 and Article III permit the certification of a class that “includes more than a *de minimis* number of uninjured class members.” *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc). The court below applied *Olean*, certifying a Rule 23(b)(3) damages class filled with consumers who did not read, rely on, or care about alleged misrepresentations on product labels and who thus couldn’t have been injured by the label statements.

That conflict—and the Ninth Circuit’s outlier position—is no less certworthy than when this Court granted review in *Labcorp*. If anything, the confusion and diverging views among the lower courts have only gotten worse since then. So has the pressure on defendants to settle even meritless cases after class certification, which in turn results in harm to consumers and businesses alike. This case presents the question in a clean vehicle, with none of the threshold disputes about mootness or the nature of the Article III injury that complicated this Court’s review in *Labcorp*.

The third issue involves not only a conflict among the circuits, but also open and flagrant defiance of one of this Court’s most important class-action decisions. In *Comcast*, this Court held that plaintiffs seeking class certification must “establish that damages are susceptible of measurement across the entire class” by offering a model that “measure[s] only those damages attributable to th[e] theory” on which they seek classwide recovery. 569 U.S. at 35. That model must not be “arbitrary”; it must measure only those damages to which individual class members would be entitled. *Id.* at 35–36. And without such a model, no class may be certified

because “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 34-36.

A few circuits have applied *Comcast* faithfully. *E.g.*, *Office of the General Treasurer v. Boeing Co.*, 182 F.4th 422, 440-46 (4th Cir. 2026); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 253 (D.C. Cir. 2013). But more, led by the Ninth Circuit, have essentially written *Comcast* out of existence. In the Ninth Circuit, no classwide damages model is needed, and when plaintiffs *do* offer a damages model, they need not show that it captures only those damages that individual class members could recover. Instead, it is enough that the damages captured by the model “stem[] from,” *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013), or bear a “nexus” to, *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 867 (9th Cir. 2025), the defendant’s challenged conduct.

The disregard for *Comcast*’s reasoning could scarcely be starker. Only this Court can restore that decision to its proper place in the class-action pantheon. Doing so would prevent plaintiffs from placing additional pressures on defendants via crude models yielding extensive, unwarranted damages. Here, for instance, the panel majority approved (over a dissent) a full-refund model that would award every California purchaser every cent spent on the relevant products since mid-2015, even though the undisputed evidence is that most members derived real value from the products and thus aren’t entitled to a full refund.

The Ninth Circuit is committed to each of these aberrant positions. As this case shows, it is content to apply its outlier decisions in terse unpublished opinions and reject calls for rehearing en banc. And in kicking

many issues down the road—including concerns over the Article III standing (or lack thereof) of absent class members or defects in classwide damages models—the Ninth Circuit may rest easy knowing that few defendants have the money, resources, and commitment to withstand the pressures class certification brings. This Court should grant review to address these important, recurring questions and bring the nation’s largest circuit back in line.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported but available at 2026 WL 74510. The order of the district court granting class certification (Pet. App. 12a) is unreported but available at 2024 WL 4868298.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2026. Pet. App. 1a. A timely petition for rehearing en banc was denied on April 21, 2026. Pet. App. 45a. On July 7, 2026, this Court granted petitioner’s application to extend the time to file this petition to September 18, 2026. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions are reproduced in the appendix. Pet. App. 46a-57a.

STATEMENT

1. Petitioner sells chocolate products like Toll House chocolate chips and Nesquik chocolate milk. Pet.

App. 14a-15a. It sources the cocoa for these products through the Nestlé Cocoa Plan, which has spent hundreds of millions of dollars to improve conditions in farming communities worldwide. C.A. E.R. 600. The Cocoa Plan provides resources to help independent farmers and seeks to improve social conditions by monitoring and supporting remediation of child-labor risks. C.A. E.R. 586-96.

This case involves 59 different labels on various products. Pet. App. 3a-4a. The labels feature different statements, mostly on the back of the packaging, referring to the Cocoa Plan—for instance, that the products feature “[s]ustainably sourced cocoa through Nestlé Cocoa Plan” or that the Plan “works to help improve the lives of cocoa farmers.” C.A. E.R. 446-48, 546-50.

2. Respondent sued petitioner under California consumer-protection statutes. Pet. App. 2a. Her complaint alleges that petitioner’s labels were “deceptive” because they “impl[ied]” that the chocolate products “were produced free of child labor” even though some risk of child labor remains in the global cocoa supply chain. *Id.* at 1a-2a; *see* C.A. E.R. 889-928.

During her deposition, respondent asserted that “she would like to purchase [petitioner’s] products again in the future” but doesn’t “‘know what to trust anymore.’” Pet. App. 19a. But after being shown the current labels and public reports from the Cocoa Plan, respondent found that, to her “surprise,” the labels were “perfect” and petitioner was “putting [its] money where [its] mouth is.” C.A. E.R. 526-31, 537, 540-41.

3. Respondent moved for certification of damages and injunctive-relief classes comprising millions of California consumers who bought any of eight popular Nestlé USA products since mid-2015. C.A. E.R. 844.

Respondent did not offer an expert on damages, instead claiming that the products are “worthless” without the challenged statements and that every class member thus deserves a “full refund.” Pet. App. 37a-39a.

Petitioner argued that respondent lacked Article III standing to seek injunctive relief to change petitioner’s labels because, given that she now has a full understanding of the labels, she could not again be injured by them. Pet. App. 18a-19a; *see* C.A. E.R. 453-55, 471. It also argued that the vast majority of class members could not have been injured by the labels, including because they never saw the challenged statements and would not construe them as making implicit claims about labor practices or rely on them in deciding to buy chocolate products. C.A. E.R. 694-701. For instance, petitioner’s expert explained that when hundreds of consumers examined one of the most popular products at issue, “virtually *no one* indicated seeing any of the challenged” statements. C.A. E.R. 723. And petitioner argued that respondent’s full-refund model contravened this Court’s decision in *Comcast* because the vast majority of class members received at least some value from the products and so could not be entitled to a full refund. Pet. App. 37a-40a; *see id.* at 7a-11a (Clifton, J., dissenting); C.A. E.R. 468-71. Petitioner’s expert demonstrated that the challenged statements would have no effect on the price consumers were willing to pay for the chocolate products, C.A. E.R. 694-701, and even respondent’s expert indicated that over 30% of consumers of chocolate products were at least “indifferent” to supply-chain issues, C.A. E.R. 419.

The district court certified both classes. On the Rule 23(b)(2) class, the court held that respondent had

standing to seek injunctive relief. Applying Ninth Circuit precedent, the court concluded that even though respondent now understands petitioner’s labels, she could sue for prospective relief to change the labels merely by stating that she “would like to purchase [the] products again” but “no longer can rely on [the] labeling.” Pet. App. 18a-19a (citing, *e.g.*, *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018)).

On the Rule 23(b)(3) class, the district court reasoned that issues affecting individual class-member injury—for instance, whether each consumer read or relied on the challenged statements—would not predominate over common questions. Pet. App. 31a-34a. And it approved respondent’s full-refund model, reasoning that any defects with the model, including whether class members in fact could recover a full refund, could be “‘decided at trial.’” *Id.* at 37a-39a.

4. The Ninth Circuit granted Rule 23(f) review. Pet. App. 2a. It then affirmed in a divided decision.

The panel made quick work of the arguments involving respondent’s standing to seek prospective relief. Applying Ninth Circuit precedent, it agreed with the district court “that plaintiffs in consumer fraud cases can satisfy the imminent injury requirement by showing they will be unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although they would like to.” Pet. App. 2a (cleaned up) (quoting *Davidson*, 889 F.3d at 970).

The panel relegated the issue of class-member standing to a footnote. Again applying circuit precedent, it concluded “that the possibility that some class members suffered no injury does not, by itself, defeat class certification.” Pet. App. 3a n.1 (citing *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee*

Foods LLC, 31 F.4th 651, 669, 680-81 (9th Cir. 2022) (en banc)).

The panel then split over respondent’s full-refund model. The majority, leaning on Ninth Circuit case law, felt that it was enough that the model “stems from” petitioner’s alleged “liability-creating actions,” reasoning that any defects with the model would be “a merits issue not decided at class certification.” Pet. App. 5a-6a.

Judge Clifton dissented, objecting that the full-refund model is “highly implausible,” “not supported by any evidence,” and “contradicted by [respondent’s] personal acknowledgment” that she bought a Butterfinger even after suing because she likes the taste. Pet. App. 8a. Judge Clifton would have held that the model violates *Comcast*. As he put it, respondent cannot “merely allege that her theory . . . stems from” petitioner’s conduct; she “must proffer *evidence* to support ‘a workable model.’” *Id.* at 11a (emphasis added).

5. The Ninth Circuit denied panel and en banc rehearing. Pet. App. 45a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE AN ENTRENCHED CONFLICT OVER PROSPECTIVE STANDING IN CONSUMER-FRAUD CASES.

“To seek injunctive relief, a plaintiff must show” an “actual and imminent” risk that she will be injured absent an injunction. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). “Past exposure to illegal conduct” is never enough; the plaintiff must prove a “threat of repeated injury” to justify prospective relief. *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). That threat

must rest on “more than conjecture.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983).

A lopsided split has developed in the lower courts over how to analyze standing for prospective relief in consumer-fraud cases. In such cases—hundreds of which are filed in federal courts each year—the plaintiff typically alleges that she was misled into making a purchase, later learned the truth, and then sued. Five circuits have held that such a plaintiff cannot seek injunctive relief because she faces no actual or imminent risk of again being deceived by the same statements. The Ninth Circuit alone has departed from this rule. This Court should grant review to resolve this important, frequently recurring issue.

A. Six circuits have addressed whether previously deceived consumers have standing to seek injunctions to change the statements that deceived them.

1. The Second, Third, Seventh, Eleventh, and D.C. Circuits have held that previously deceived consumers lack standing to seek injunctive relief.

Start with the Second Circuit. In *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020), the plaintiffs claimed to have been deceived by a box of pasta—they thought it would contain more pasta than it did—and sought an injunction to force the company to put a disclaimer on the packaging about the amount of pasta inside. *Id.* at 143-44. The Second Circuit held that the plaintiffs lacked standing to seek such relief. Consumers who learn about supposed deception, it explained, “are not bound to purchase [the] product again.” *Id.* at 147. “[E]ven if they do purchase it again,” they will not “incur a harm anew”: having “been deceived by the product’s packaging once, they will not again be under the

illusion.” *Id.* at 148. And unless a plaintiff faces imminent, concrete harm, no Rule 23(b)(2) class may be certified, “no matter how commendable that objective” may seem. *Ibid.*

The Third Circuit agrees. It has called the notion that consumers already “aware of” alleged deception “could again be deceived” a “premise unmoored from reality.” *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Liability Litigation*, 903 F.3d 278, 292 (3d Cir. 2018). It has thus rejected “‘stop me before I buy again’ claim[s],” explaining that courts must afford each plaintiff “the dignity of assuming that she acts rationally” and so will not “again suffer the same alleged ‘injury.’” *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879, 896 (3d Cir. 2020) (cleaned up); *accord McNair v. Synapse Group Inc.*, 672 F.3d 213, 223-25 (3d Cir. 2012).

The Seventh Circuit embraced the same rule in *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017). The plaintiff bought a homeopathic flu remedy that he later discovered was “a placebo” and sought an injunction to force the defendant to “revise its labels to make them accurate.” *Id.* at 538. The court held that the plaintiff lacked standing to seek such relief because he was already “aware of the fact that [the remedy] is nothing but sugar water,” meaning an injunction could not “redress any potential injury for him.” *Id.* at 542; *accord Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 741 (7th Cir. 2014) (a consumer “now aware of [challenged] sales practices” is “not likely to be harmed by the practices in the future”).

The Eleventh Circuit followed suit in *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243 (11th Cir. 2023),

where the plaintiffs bought “brain performance supplements” that they alleged did not deliver the promised benefits. *Id.* at 1247-48. In seeking injunctive relief, the plaintiffs asserted that they would “like” to purchase the supplements in the future but felt they would be “unable to rely on [any] representations regarding the[ir] effectiveness.” *Id.* at 1254. The court rejected that theory as “plainly insufficient to establish a threat of imminent or actual harm.” *Ibid.* Such a theory would require the court to conclude that consumers plan to again buy products that they have challenged as misleading or even “worthless.” *Id.* at 1256. The Eleventh Circuit has since reaffirmed that reasoning. *Smith v. Miorelli*, 93 F.4th 1206, 1212-13 (11th Cir. 2024).

Finally, the D.C. Circuit agreed in *Animal Legal Defense Fund, Inc. v. Vilsack*, 111 F.4th 1219 (D.C. Cir. 2024). An animal-advocacy group sued the government over its role in the labeling of meat and sought injunctive relief based on allegations that one of its members had been deceived by the labels. *Id.* at 1223-24. The court rejected this theory, reasoning that if the member knew the labels were misleading and continued to rely on them, that would be “a self-inflicted injury” insufficient for standing. *Id.* at 1228.

2. The Ninth Circuit alone has disagreed. In *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018), a consumer alleged that the “flushable” baby wipes she bought “were not, in fact, flushable,” and sought an injunction to change the labels. *Id.* at 961. The Ninth Circuit held that she had standing to seek an injunction. In its view, “a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer

now knows or suspects that the advertising was false at the time of the original purchase.” *Id.* at 969. *Davidson* reasoned that Article III requires little more than assertions that a consumer “will be unable to rely on the product’s advertising or labeling in the future, and so will not purchase the product although she would like to.” *Id.* at 970.

The Ninth Circuit has dug in on that position. It denied rehearing in *Davidson*, *see* 889 F.3d at 960; has continued to apply the decision, *e.g.*, *Moore v. Mars Pet-care US, Inc.*, 966 F.3d 1007, 1021 n.13 (9th Cir. 2020); and has resisted calls to reconsider the decision in light of intervening precedent of this Court, *see Clark v. Eddie Bauer LLC*, 2024 WL 177755, at *2 (9th Cir. Jan. 17, 2024).

This case proves the point. Below, the Ninth Circuit wasted little time in applying *Davidson* and holding that respondent has standing to seek injunctive relief. Pet. App. 2a-3a. The panel concluded it was enough that respondent “would like to purchase [petitioner’s] products in the future” but “does not trust” the labels. *Id.* at 2a.

3. In the near-decade since *Davidson* was before this Court (No. 18-304, cert. denied Dec. 10, 2018), the then-nascent split has deepened and broadened. Some circuits, like the Second and Third, had pre-*Davidson* case law that was inconsistent with the Ninth Circuit’s view and have reinforced their case law after *Davidson*. *Berni*, 964 F.3d at 147-49; *Thorne*, 980 F.3d at 896. Others, like the Eleventh and D.C. Circuits, have entered the fray after *Davidson*. *Williams*, 65 F.4th at 1254-56; *Animal Legal Defense Fund*, 111 F.4th at 1228. The result is a stark, asymmetrical split, with only the Ninth

Circuit construing Article III to permit once-deceived consumers to seek injunctions.

B. The Ninth Circuit’s approach contravenes this Court’s case law.

The Ninth Circuit embraces standing for consumers who “might purchase [a] product in the future.” *Davidson*, 889 F.3d at 970. But that a consumer *might* one day walk into a store and buy a product (despite knowing the product’s label is supposedly misleading) represents just the sort of “‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—[that] do not support” standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see Thorne*, 980 F.3d at 896.

The Ninth Circuit’s view also “relies on a highly attenuated chain of possibilities.” *Clapper v. Amnesty International USA*, 568 U.S. 398, 410 (2013). Cases like *Davidson* assume consumers with full knowledge of alleged deception will cast aside any wariness of ads that deceived them before, assume things have changed, and do nothing to verify whether that is the case. Article III does not permit courts to assume that consumers will stray so far from “rational[]” behavior. *Johnson & Johnson*, 903 F.3d at 293.

Davidson neglects still another feature of Article III’s mandate. “Absent a sufficient likelihood that he will again be wronged in a similar way, [a plaintiff] is no more entitled to an injunction than any other citizen.” *Lyons*, 461 U.S. at 111. Consumers who were previously deceived by, but now know about, supposed misrepresentations do not fit the bill. If they choose to buy the same products again, they do so with full knowledge, and any “injury” would be “self-inflicted” at best. *Clapper*, 568 U.S. at 418. And if they choose *not*

to buy the products based on their understanding of the labels, that is not an injury; it is simply a decision in the marketplace made with full knowledge.

Nor does any Article III injury arise merely because a consumer declares she would like to buy goods of a different kind—for instance, in *Davidson*, where the plaintiff asserted a “desire to purchase truly flushable wipes.” 889 F.3d at 971. Since *Davidson*, this Court has reiterated that Article III demands a concrete injury with “a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). But there is no tradition of suits by consumers who are fully aware of a product’s alleged limitations but who wish the product had different characteristics. If someone knows that wallets advertised as “high-quality” are not 100% leather, he cannot claim a future injury by wishing the wallets *were* leather and complaining that the “high-quality” label cannot be trusted. *See Williams*, 65 F.4th at 1254. And if the supposed injury facing consumers involves the nature of the product rather than statements on the label, then an injunction to change the label could not “redress [the] potential injury.” *Conrad*, 869 F.3d at 542.

Most fundamentally, the Ninth Circuit’s view neglects the reasons for Article III’s limitations. The standing requirement guarantees “that federal courts exercise ‘their proper function in a limited and separated government.’” *TransUnion*, 594 U.S. at 423. But under *Davidson*, a consumer facing no imminent risk of harm may enlist a federal court to order sweeping changes to consumer labels that will not affect her. That risks turning federal courts into the very sort of “roving commission[s]” the Framers rejected. *Ibid.*; *see FDA v.*

Alliance for Hippocratic Medicine, 602 U.S. 367, 381 (2024) (“general legal, moral, ideological, or policy objection[s]” are insufficient to confer standing).

C. This question is important and cleanly presented.

The court below found Article III standing where five other circuits would not have. Applying *Davidson*, the Ninth Circuit held that respondent has standing to seek an injunction because “she would like to purchase [petitioner’s] products in the future” but “does not trust” the labels. Pet. App. 2a. The court did not explain how respondent, who brought this lawsuit based on the premise that petitioner’s labels are misleading, faced any concrete or imminent injury traceable to the labels in the future. Respondent’s ““stop me before I buy again”” theory, *Thorne*, 980 F.3d at 896, was all the Ninth Circuit required.

This case shows just how senseless *Davidson*’s rule can be. Although respondent’s complaint alleges that petitioner’s labels are deceptive, in her deposition she told a different story: after reviewing the current labels and public reports from the Cocoa Plan, respondent called the labels “perfect,” agreed petitioner is “putting [its] money where [its] mouth is,” and testified that she would gladly continue buying the chocolate products. C.A. E.R. 526-31, 537, 540-41. Even so, the Ninth Circuit held that respondent could lead the Rule 23(b)(2) class on the premise that she is *not* willing to buy the chocolate products again without changes to the labels. Pet. App. 2a-3a.

Ultimately, then, even where a plaintiff’s testimony and theories contradict her assertions of standing, the Ninth Circuit will overlook those defects, apply *Davidson*, and hand the plaintiff the keys to a Rule 23(b)(2) class. Although only the Ninth Circuit embraces this

open-season approach to prospective standing, the effects of its approach are widely felt. Far more cases are filed in the Ninth Circuit each year than in any other circuit. *U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2024 and 2025*, U.S. Courts, <https://tinyurl.com/4vufke98> (accessed Sep. 6, 2026). And given the realities of the national marketplace—with distribution networks and sales that seamlessly cross state lines—it is infeasible for companies like petitioner to comply with a class injunction issued in the Ninth Circuit without also adjusting their labels everywhere else.

“Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982). It is a foundational feature of our system of government. *TransUnion*, 594 U.S. at 422-24. The Ninth Circuit’s watered-down treatment of Article III in this context subverts that scheme, permitting the federal courts to adjudicate controversies in service of issuing “sweeping injunctions with prospective effect” even without any party with the constitutionally required concrete stake in the controversy. *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 146 (2011). It also aggrandizes judicial power at the expense of authority properly assigned to the representative branches, including state regulators.

This Court should grant review to resolve the conflict and reject *Davidson*’s outlier rule.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER A DAMAGES CLASS MAY BE CERTIFIED IF SOME MEMBERS LACK ARTICLE III STANDING.

This Court has held that “[e]very class member must have Article III standing in order to recover individual damages” and that standing must be demonstrated “at all stages of litigation.” *TransUnion*, 594 U.S. at 431. Yet the millions-strong damages class in this case includes every person who bought any of eight popular products in California since mid-2015, Pet. App. 14a-15a—many of whom suffered no injury connected to petitioner’s labels. That should have precluded certification. But the Ninth Circuit brushed that aside, applying circuit precedent holding that a class may be certified even when more than a *de minimis* number of class members lack Article III standing. Pet. App. 3a n.1 (citing *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669, 680-81 (9th Cir. 2022) (en banc)).

The Court has seen this problem before. *Olean* was at the heart of *Laboratory Corp. of America Holdings v. Davis*, No. 24-304, in which this Court granted certiorari to decide the very question presented here. 145 S. Ct. 1133, 1133-34 (2025). Vehicle defects led the Court to dismiss the writ as improvidently granted. 605 U.S. 327, 327 (2025) (per curiam); *id.* at 330 (Kavanaugh, J., dissenting). This case has none of those defects. And since the DIG, the disagreement and confusion among the lower courts have worsened. As this case shows, the Ninth Circuit continues to apply an inappropriately permissive approach that blesses the certification of

classes filled with uninjured members, subjecting defendants to crushing settlement pressures and ultimately harming consumers and businesses alike. The Ninth Circuit’s approach conflicts with Rule 23(b)(3)’s predominance requirement and Article III. And it will not give way without this Court’s intervention.

A. This Court recognized, in granting review in *Labcorp*, that the circuits are split over whether damages classes may include uninjured members. In fact, “[c]ourts have struggled with [this question] for decades.” *Speerly v. General Motors, LLC*, 143 F.4th 306, 336 (6th Cir. 2025) (en banc) (Thapar, J., concurring). Over time, the circuits have largely split into two camps. Many hold that damages classes laden with uninjured members offend either Article III or Rule 23(b)(3). Others—the Ninth Circuit chief among them—certify these sorts of classes more readily, treating the presence of uninjured members as a loose end to be tied up after certification.

1. For the First, Fourth, and D.C. Circuits, the chief problem with classes containing uninjured members relates to Rule 23(b)(3)’s predominance requirement. As Judge Katsas put it, “[u]ninjured class members cannot prevail on the merits, so their claims must be winnowed away as part of the liability determination.” *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 624 (D.C. Cir. 2019). That raises the question: “When does the need for individualized proof of injury and causation destroy predominance?” *Ibid.* The answer these circuits have given is that, when a class contains more than a “*de minimis*” number of uninjured members, individualized inquiries required to sort out who is and isn’t injured will predominate. *Id.* at 625; accord *In re Asacol Antitrust Litigation*, 907 F.3d 42, 53-

54 (1st Cir. 2018) (permitting only “a very small absolute number” of uninjured class members); *Spurlock v. Wexford Health Sources, Inc.*, 175 F.4th 232, 252 (4th Cir. 2026) (where uninjured members are “mere outliers”).

For the Second and Eighth Circuits, the problem stems from Article III itself. In their view, a damages class may not contain *any* uninjured members because a plaintiff who could not sue on his own cannot be swept into federal court through the class device. The class must therefore “be defined in such a way that anyone within it would have standing.” *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *accord Johannesson v. Polaris Industries Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021).

2. The Ninth Circuit, conversely, has held that Article III permits the certification of a class that “potentially includes more than a *de minimis* number of uninjured class members.” *Olean*, 31 F.4th at 669.

The Seventh and Eleventh Circuits generally agree, spotting a predominance problem only when the uninjured swell to a “great many” members, *Kohen v. Pacific Investment Management Co.*, 571 F.3d 672, 677 (7th Cir. 2009), or a “large portion” of the class, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019).

3. This Court recognized the stark divide on this important question by granting review in *Labcorp*. But *Labcorp* presented an unwelcome complexity. Normally, cases (like this one) arising on Rule 23(f) review provide an ideal vehicle to answer important questions of class-action law because they arrive unburdened by the results of a class trial. But in *Labcorp*, after the petitioner sought interlocutory review of the class-certification order, the district court entered another or-

der revising the class definition, prompting the plaintiffs to argue the case was moot. *Labcorp* Respondents’ Br. 14-19 (No. 24-304). Rather than fight to untangle that threshold issue, this Court dismissed the writ as improvidently granted. 605 U.S. at 328 (Kavanaugh, J., dissenting).

Since then, the disagreement has only sharpened in the lower courts. Various judges on the Sixth Circuit, for instance, have produced competing opinions on the right way to approach the problem. *Compare Speerly*, 143 F.4th at 336-46 (Thapar, J., concurring) (“Courts should look to Rule 23, not Article III, in determining whether a named plaintiff may represent a class of members who assert different injuries—or no injury at all.”), *with id.* at 346-55 (Nalbandian, J., concurring) (under Article III, “a district court cannot certify a putative class when a significant number of unnamed [members] lack standing”), *and Clippinger v. State Farm Automobile Insurance Co.*, 173 F.4th 817, 842-43 (6th Cir. 2026) (Bush, J., concurring) (uninjured class members pose a Rule 23(a)(1) numerosity problem). The Second Circuit has begun to fracture, too: Judge Pérez recently questioned whether the circuit’s rule in *Denney* is right, suggesting that “[t]he standing of absent class members . . . comes into play only in the predominance inquiry required to certify a damages class, if ever.” *A.H. ex rel. E.H. v. New York State Department of Health*, 147 F.4th 270, 287-88 n.2 (2d Cir. 2025) (Pérez, J., concurring in part).

This question recurs in countless Rule 23(b)(3) cases. Yet judges across the country cannot agree on the answer, or even where to look for it. Only this Court can end the search.

B. The Ninth Circuit’s approach contravenes this Court’s decisions and results in serious harms to consumers, businesses, and our system of government.

Rule 23(b)(3) authorizes the certification of a damages class only when common questions predominate over individual ones. That requirement is especially “demanding.” *Comcast*, 569 U.S. at 34. And for good reason. For damages classes, the predominance requirement draws the last line between collective justice and collective coercion. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

That line holds only because predominance demands something real—that a class be “sufficiently cohesive to warrant adjudication by representation,” *Amchem*, 521 U.S. at 623, with class members sharing in the questions *and* answers that decide the case, *Comcast*, 569 U.S. at 33-34. But a damages class consisting of both injured and uninjured members does not meet those criteria. Only some members will share an injury in common; others will not. And because the difference between injury and lack of injury determines whether each class member may recover, *TransUnion*, 594 U.S. at 431, that inquiry *must* be resolved, even if one class member at a time. So when a class includes uninjured members, Rule 23(b)(3)’s predominance requirement cannot be satisfied, precluding certification. *Labcorp*, 605 U.S. at 332-33 (Kavanaugh, J., dissenting).

Defendants’ rights matter, too. Rule 23, a mere procedural device, can neither “enlarge” a class member’s rights nor “abridge” a defendant’s. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. § 2072(b)). In an individual action, a defendant may challenge the plaintiff’s showing of standing at

each “successive stage[] of the litigation.” *TransUnion*, 594 U.S. at 431. Defendants cannot be deprived of that right as to absent class members. But when class ranks swell to include thousands or even millions of class members, it may be impossible for defendants to assert those rights without recourse to exactly the sort of individualized inquiries Rule 23(b)(3) forbids. If so, the solution is not to deprive defendants of those rights; it is to deny class certification.

Even beyond Rule 23, Article III itself forbids the Ninth Circuit’s approach. Standing is the “irreducible constitutional minimum” for any case in federal court. *Defenders of Wildlife*, 504 U.S. at 560-61. And it confines federal courts to resolving “real controvers[ies] with real impact on real persons.” *TransUnion*, 594 U.S. at 424.

That vital requirement isn’t limited to the end of the case. Quite the opposite: Article III standing matters from the moment a request for relief is asserted. This Court made that clear in *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017), stressing that the requirements of Article III apply “whether [a] litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right.” *Id.* at 439. Otherwise, a court could adjudicate the merits of a dispute and only later determine whether there is standing to support the dispute—a form of “hypothetical jurisdiction” that exceeds federal courts’ proper role. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

That a case is a putative class action “adds nothing to the question of standing.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). If anything, in this “era” of “class actions,” “courts must be more careful to insist on the formal rules of standing, not less so.” *Arizona Christian*,

563 U.S. at 146. Class actions operate as a species of “joinder” that “enables a federal court to adjudicate claims of multiple parties at once.” *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Class members may not be full-fledged parties in the way a named plaintiff or intervenor would be, *see Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002), but once their claims come into a federal proceeding via class certification, the court must have a valid basis in Article III to adjudicate them. Otherwise, a person with no right to assert claims in federal court would suddenly obtain that right via the class-action device. That too would violate the Rules Enabling Act, which “forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right.’” *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)).

Classes filled with uninjured members strike at the heart of Article III. Federal courts may not act as open forums for “general complaints,” *Allen v. Wright*, 468 U.S. 737, 760 (1984), or “roving commission[s]” to enforce the law, *TransUnion*, 594 U.S. at 423. Yet decisions like the one below permit federal courts to throw open their doors to people who suffered no injury and resolve claims that people never could have brought on their own. Rule 23 cannot confer that power. No rule can. *See Fed. R. Civ. P.* 82.

C. Now is the time and this is the case for the Court to answer the question it took up in *Labcorp*.

In the Ninth Circuit’s view, the critical question of class-member injury may be deferred until long after class certification. *See Pet. App.* 3a n.1. But by then, the plaintiff has already banked the leverage that certification confers.

That leverage generates “serious real-world consequences.” *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). “Certification 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.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017) (cleaned up). Faced with a potential class judgment of enormous magnitude, few defendants will bet the company. *Labcorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). So they are coerced to settle “rather than run the risk of potentially ruinous liability.” *Baker*, 582 U.S. at 41-42 (cleaned up). Even the prospect of later victory offers little relief: a defendant that eventually prevails in securing the reversal of class certification still has suffered the “extensive discovery and the potential for uncertainty and disruption” that force defendants to settle in the first place. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

These “‘in terrorem’ settlements” are a familiar feature of oversized class actions. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). But as Justice Kavanaugh explained in *Labcorp*, the defendant is not the only one who pays. Companies ultimately “pass on” these settlement costs to other stakeholders—to consumers in higher prices, to workers in fewer raises, to shareholders in thinner dividends, and so on. 605 U.S. at 333 (Kavanaugh, J., dissenting). The result is perverse. A rule meant to vindicate the injured instead taxes the innocent, all to enrich class members who were never injured at all.

Unlike in *Labcorp*, in this case there are no antecedent issues involving revised class-certification orders.

Nor is there doubt about the nature of the Article III injury that class members did or did not suffer. *Cf. Labcorp* Respondents’ Br. 15-16 (arguing all class members were injured “from the complete inaccessibility” of the kiosks). As the court below put it, spending more on a product because of asserted misrepresentations is a recognized pocketbook injury. Pet. App. 3a n.1. But for the many class members whose spending was unaffected by the labels—because, for instance, they did not read or care about them—there is no Article III injury to speak of.

This issue is not going away. The Court should grant the petition and address it.

III. THE COURT SHOULD GRANT REVIEW TO REINFORCE ITS HOLDING IN *COMCAST*.

In *Comcast*, this Court established a critical safeguard: plaintiffs seeking class certification must supply a classwide damages model consistent with their liability theory, or else individualized disputes over damages will predominate over common questions. 569 U.S. at 35-38. A handful of circuits have applied *Comcast* faithfully. But more, the Ninth Circuit chief among them, have subjected *Comcast* to death by a thousand cuts. As the divided decision below shows, to obtain class certification, plaintiffs in the Ninth Circuit need little more than a crude classwide model with an abstract connection to the defendant’s conduct. The majority approved certification based on a full-refund model that would award countless class members damages they could never recover in an individual action. Pet. App. 5a-6a. This Court should grant certiorari to reject that approach, reinforce *Comcast*’s protections, and resolve a persistent conflict among the circuits.

A. *Comcast* was a landmark decision. It held that plaintiffs seeking certification must “establish that damages are susceptible of measurement across the entire class” by offering a model that “measure[s] only those damages attributable to th[e] theory” on which plaintiffs seek classwide recovery. 569 U.S. at 35. Otherwise, plaintiffs could secure certification based on “any method of measurement . . . so long as it can be applied classwide, no matter how arbitrary.” *Id.* at 35-36. *Comcast* enforces not only Rule 23(b)(3)’s predominance requirement, but also the Rules Enabling Act’s prohibition on using procedural rules to alter substantive rights. It does so by rejecting arbitrary damages models that would award class members relief to which they would not be entitled in an individual proceeding. *Id.* at 36-38; see *Dukes*, 564 U.S. at 367 (citing 28 U.S.C. § 2072(b)).

That principle drove the outcome in *Comcast*. There was no question that the model there “‘provided a method to measure and quantify damages on a classwide basis’”—i.e., that it spat out numbers for all class members. 569 U.S. at 35-36. Nor was there doubt that the model bore some relationship to the defendant’s conduct—there, by estimating prices in a hypothetical market without the four categories of conduct the plaintiffs had challenged. *Ibid.* The problem was that only one of those categories of conduct was properly in the case. *Id.* at 36-37. The model thus “failed to measure damages resulting from the particular . . . injury on which [the defendants’] liability” rested. *Id.* at 36. That in turn meant the model “cannot possibly establish that damages are susceptible of measurement across the en-

tire class,” so “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” *Id.* at 34-36.

B. Thirteen years on, courts are “struggl[ing]” with what *Comcast* “mean[s] for the predominance analysis.” 2 Newberg & Rubenstein on Class Actions § 4:54 (6th ed. June 2026 update). Some courts require meaningful scrutiny of plaintiffs’ damages models before certification, but many have all but limited *Comcast* to its facts.

1. Only a handful of circuits have faithfully adhered to *Comcast*’s command.

Following *Comcast*, the D.C. Circuit emphasized that courts evaluating proposed classwide damages models must carefully “scrutinize the evidence,” “even when doing so ‘requires inquiry into the merits of the claim.’” *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 253 (D.C. Cir. 2013). If the model does not track the damages to which class members would be entitled—for instance, if it is “prone to false positives”—“that is not just a merits issue.” *Ibid.* It means the plaintiffs have offered no classwide way to resolve damages issues, which in turn means no class may be certified. “No damages model, no predominance, no class certification.” *Ibid.*

Other circuits also have given *Comcast* its due. In *Office of the General Treasurer v. Boeing Co.*, 182 F.4th 422 (4th Cir. 2026), the Fourth Circuit detailed *Comcast*’s requirements, including the need for “‘evidentiary proof’” that a proposed model captures only those “damages attributable to theories of liability” that are properly in the case. *Id.* at 440-42. Without that proof, “it’s impossible to know whether [a] methodology might . . . cause individualized damages questions to

predominate over common questions.” *Id.* at 445. *Boeing* also emphasized that courts cannot pitch that analysis at too high a level of generality: plaintiffs need a model that closely tracks the damages individual class members could recover, not just “a legal description of damages” that theoretically could be available. *Id.* at 442-43.

2. The Ninth Circuit and other courts have largely treated *Comcast* as a paper tiger.

Just two months after *Comcast*, the Ninth Circuit delivered its first blow. *Comcast* had held that, without a viable classwide model, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.” 569 U.S. at 34. But in *Leyva v. Medline Industries Inc.*, 716 F.3d 510 (9th Cir. 2013), the Ninth Circuit announced that “the presence of individualized damages cannot, by itself, defeat class certification” and that *Comcast* requires plaintiffs to show only “that their damages stemmed from the defendant’s actions that created the legal liability.” *Id.* at 514. Over time, the Ninth Circuit has repeatedly applied *Leyva*’s narrow and flawed reading of *Comcast*. *E.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120 (9th Cir. 2017); *Vaquero v. Ashley Furniture Industries, Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016); *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987-88 (9th Cir. 2015).

The Ninth Circuit has undercut *Comcast* in additional ways. It has held that plaintiffs may obtain class certification merely by outlining a model that they haven’t actually applied yet. *Lytle v. Nutramax Laboratories, Inc.*, 114 F.4th 1011, 1019, 1027 (9th Cir. 2024). And it has approved a model even though it would

award class members “damages beyond those reflecting [the plaintiff’s] theory of overpayment.” *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 866 (9th Cir. 2025). As the Ninth Circuit sees it, all that is required to obtain a class-certification order is a “nexus” between the defendant’s challenged conduct and the damages awarded. *Id.* at 867.

The Ninth Circuit is the prime offender, but other circuits too have given *Comcast* short shrift. Many have concluded that “individual damages calculations do not preclude class certification.” *Neale v. Volvo Cars of North America, LLC*, 794 F.3d 353, 374-75 (3d Cir. 2015) (quoting *Comcast*, 569 U.S. at 42 (Ginsburg & Breyer, JJ., dissenting)); *see id.* at 374 n.10 (collecting cases); *see also Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). Some have even suggested that *Comcast* should be limited “to the antitrust claim at issue” there. *Neale*, 794 F.3d at 374.

In short, in the Ninth Circuit and elsewhere, *Comcast* presents only the slightest stumbling block for plaintiffs seeking class treatment.

C. The Ninth Circuit’s approach is deeply flawed, and this case is an ideal opportunity to correct it.

Like the plaintiffs in *Comcast*, respondent proposed a way to measure damages across the class: award all class members a full refund of the price of the relevant products they bought. Pet. App. 37a. But as in *Comcast*, that model did not match the viable theories on which individual class members could hope to recover. As Judge Clifton explained, “a full refund is only warranted if not a single class member derived any benefit from the chocolate products.” Pet. App. 8a (dissenting) (citing, *e.g.*, *In re Tobacco Cases II*, 240 Cal. App. 4th 779, 795-96 (2015)). The problem was that the notion

that “*every purchaser*” would treat petitioner’s products as “*entirely worthless*” was “implausible and not supported by any evidence.” *Ibid.* In fact, all the evidence was to the contrary: respondent admitted that she couldn’t “resist purchasing a Butterfinger bar even after she became aware of” the deception she alleged, *ibid.*; respondent’s experts agreed that people buy chocolate products for a host of reasons unrelated to cocoa sourcing, C.A. E.R. 415-17; and petitioner’s expert showed that the challenged statements wouldn’t affect the price that consumers would pay *at all*, C.A. E.R. 694-701.

That should have spelled the end for class certification. Countless class members would not be entitled to a full refund because they “obtained value” from the chocolate products they bought. *Tobacco II*, 240 Cal. App. 4th at 794; *accord Rosenwald v. Kimberly-Clark Corp.*, 152 F.4th 1167, 1178 (9th Cir. 2026). Yet respondent’s model would award them a full refund anyway. In *Comcast* terms, respondent hung her hat on a model that, though it “can be applied classwide,” was “arbitrary.” 569 U.S. at 36.

Yet the majority rubber-stamped the model. Pet. App. 5a-6a. It reasoned that it was enough for there to be some “logical connection” between respondent’s damages model and her theory of liability. *Id.* at 5a (citing *Pulaski*, 802 F.3d at 987-88). Any defect in the model, it concluded, “is a merits issue not decided at class certification.” *Id.* at 6a.

That decision represents a full-scale assault on *Comcast*’s reasoning. This Court held that defects in proposed damages models may *not* be overlooked “simply because those arguments would also be pertinent to the

merits determination.” 569 U.S. at 34. That’s a principle this Court has long insisted on, *Dukes*, 564 U.S. at 351-52 (citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)), and repeated since, e.g., *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113, 122 (2021). Yet while this Court demanded rigorous analysis *before* any class may be certified, *Comcast*, 569 U.S. at 33, the majority below was (consistent with Ninth Circuit precedent) content to kick the can down the road.

The Ninth Circuit’s approach works serious harm. Crude models like respondent’s threaten to make class certification, “often the most significant decision rendered in . . . class-action proceedings,” *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980), an empty formality. Worse, overinflated damages models multiply the already crushing pressures that accompany class certification, *Concepcion*, 563 U.S. at 350, exposing defendants to dramatic and even potentially ruinous monetary liability. Defendants’ substantive rights are under threat, too, because class adjudication would be inconsistent with the inquiries needed for defendants to raise their arguments as to individual class members. The all-too-appealing temptation for courts may be to suppress those individualized issues in service of class adjudication, putting the case on a collision course with the Rules Enabling Act. *Dukes*, 564 U.S. at 367.

The Court should grant certiorari to resolve the conflict in the lower courts over the application of *Comcast* and to reaffirm that Rule 23 requires meaningful scrutiny of plaintiffs’ proposed damages methodology before a class may be certified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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