

No. 26-400

IN THE
Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioner,

v.

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

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

**BRIEF OF THE NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL BUSINESS
LEGAL CENTER, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center)² is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

SUMMARY OF ARGUMENT

This case presents three consequential questions concerning the requirements for class certification in federal courts. Each question presented is important to maintaining the constitutional and procedural limits governing representative litigation in federal court. The Court's resolution of these questions would clarify the boundaries that govern classwide exposure before small and independent businesses must decide whether to continue litigation or settle.

¹ Under Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2, *amicus* affirms that counsel of record for all parties received proper notice of intent to file this brief.

² The George Washington University takes no position on this case.

For class action defendants, class certification may result in a “reverse death knell” situation, where the costs of litigation and risk of an adverse judgment pressure a defendant to settle, even if victory on the merits seems achievable. *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 & n.2 (2017). Smaller companies face greater pressure due to their limited resources: “what might be ‘ruinous’ to a company of modest size might be merely unpleasant to a behemoth.” *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869*, 725 F.3d 244, 251 (D.C. Cir. 2013) (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000)). These consequences for small and independent businesses emphasize the need to resolve the three questions presented.

Whether past purchasers have standing to pursue an injunction in a consumer protection class action is of enormous significance to small businesses. The Ninth Circuit permits previously deceived consumers to proceed based on plausible allegations that they cannot trust future labeling or may again be deceived because they reasonably believe the product has improved. *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969-71 (9th Cir. 2018). But a consumer’s previous reliance upon a misrepresentation cannot, standing alone, establish the threat of future harm needed to support a request for prospective relief. Certification can pressure a resource-strapped small business to accept settlement terms requiring changes to packaging, product lines, or marketing. The Court should answer the first question presented to resolve the underlying circuit split.

Additionally, this case presents the same core legal issue left unresolved in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025): whether a

damages class may be certified when some members lack Article III standing. *TransUnion LLC v. Ramirez* expressly reserved whether every class member must demonstrate standing before certification. 594 U.S. 413, 431 n.4 (2021). When courts defer treatment of uninjured class members, small business defendants may face the costs and settlement pressure of an overinclusive class prior to obtaining correction. Interlocutory review, decertification, or settlement approval does not eliminate the expense and risk of reaching that later decision. This Court should resolve when unnamed class member standing must be determined and how the presence of uninjured members bears on certification.

The third question concerns the scrutiny required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013). Rule 23 is a procedural rule that cannot “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b); see *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Certifying a class under a damages model that would award class members relief they could not obtain in individual litigation threatens to do exactly that by enlarging a substantive right through aggregation. Small businesses are especially ill-equipped to absorb the added litigation risks this poses. The Court should clarify the scrutiny required at certification to ensure that the proposed damages model tracks legally recoverable damages for both named and unnamed class members.

The Court should grant certiorari on all three questions presented.

ARGUMENT

I. Past Alleged Deception, Alone, Does Not Establish Standing for an Injunction.

The Ninth Circuit differs from other circuits in allowing previously deceived purchasers to seek injunctive relief based on their inability to trust future labeling. *Contrast Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018) (holding “that a previously deceived consumer may have standing to seek an injunction against false advertising or labeling”), *with Berni v. Barilla S.p.A.*, 964 F.3d 141, 148 (2d Cir. 2020) (explaining that an injunction would not redress the injury of consumers who had already discovered the deception), *and In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 292 (3d Cir. 2018) (rejecting as “unmoored from reality” the assumption that past purchasers would be deceived again by a deception they had already uncovered), *and Conrad v. Boiron, Inc.*, 869 F.3d 536, 542 (7th Cir. 2017) (finding no redressability, and therefore no standing, when a consumer had already discovered a product did not work and knew of the manufacturer’s refund program), *and Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243, 1254-56 (11th Cir. 2023) (finding no standing because the only injury the previously deceived consumers sufficiently alleged was past injury from the deception, as their alleged future injury was neither actual nor imminent).

In the Ninth Circuit’s view, two theories support the notion that past consumer deception creates future injury: (1) that a lack of trust will cause consumers to refrain from purchasing products they would otherwise like to buy, and (2) that a previously deceived consumer may fall for it again. *See Davidson*,

889 F.3d at 969-70. At the motion-to-dismiss stage, the court held that the consumer had adequately alleged future harm. *Id.* at 971. But the fact of purchase does not itself establish future injury. Relative to this purported injury, those who learn through news reports or word-of-mouth that a product is mislabeled are similarly situated to those who discover as much after purchase. And if a future decision not to purchase a product due to some missing quality suffices for Article III injury-in-fact, then, assuming a cause of action, consumers could invoke the jurisdiction of the federal courts whenever a product they would otherwise purchase appears to be unsatisfactory. *Davidson's* first theory therefore treats frustrated consumer preferences as injuries arising from deception, even though correcting the deception would not necessarily satisfy those preferences. Tripartite standing cannot be sliced in such a way. The requirements of Article III reflect the traditional relationship among a private wrong, the injury it inflicts, and the remedy sought against the wrongdoer. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The injury is the object of redressability.

Davidson's other theory at least identifies a potentially cognizable injury: that a consumer “might purchase the product in the future” because she may “reasonably, but incorrectly, assume the product was improved.” 889 F.3d at 970. But as this Court has long recognized, past harm only matters for Article III standing to seek prospective relief insofar as it establishes ongoing harm or affects a court’s probabilistic predictions as to a separate, future harm. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 & n.7 (1983); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Thus, a consumer’s previous reliance upon a misrepresentation cannot, standing alone, establish the threat of

future harm needed to support a request for prospective relief.

The pressure to settle following certification, combined with the power of injunctions to require a party to take certain actions, has grave implications for small businesses. Certification can function as a means of extracting a settlement, pressing a resource-strapped small business to accept the settlement to avoid further litigation and continue operations. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 29 & n.2 (2017). As part of the settlement agreement, small businesses may be compelled to change business operations, such as packaging, product lines, or marketing. The Court should grant certiorari here and determine whether a consumer who is aware of alleged deception has Article III standing to seek injunctive relief requiring those changes.

II. The Treatment of Class Members Who Lack Article III Injury Warrants Review.

In *TransUnion LLC v. Ramirez*, this Court held that, in a class action, “[e]very class member must have Article III standing in order to recover individual damages.” 594 U.S. 413, 431 (2021). However, this Court expressly reserved the question of “whether every class member must demonstrate standing *before* a court certifies a class.” *Id.* at 431 n.4. This Court has not resolved when a class member must demonstrate standing. Federal courts of appeals have taken varying approaches, resulting in a significant circuit split.

At the crux of this split is whether the inclusion of uninjured class members is itself a constitutional bar to certification or instead presents questions to be addressed under Rule 23. *Contrast Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010)

(explaining that a class cannot be certified if it contains members who lack standing, although each member need not submit individual evidence of standing), *with Solano v. Kroger Co.*, No. 25-536, 2026 WL 1396385, at *1 (9th Cir. May 19, 2026) (explaining that, even if the class contains uninjured unnamed members, the standing inquiry at certification focuses on the named plaintiffs), *petition for cert. filed*, No. 26-244 (U.S. Aug. 17, 2026). *Solano* separately considered whether individualized injury inquiries would predominate over common questions. *Solano*, 2026 WL 1396385, at *2. The availability of common proof does not resolve the separate question whether a class may include members who lack standing. Addressing the second question presented would resolve the disagreement and clarify the certification requirements before small and independent businesses must decide whether to continue litigating or settle.

A. Overinclusive Classes Increase Settlement Pressure on Small Businesses.

Certification decisions often have a dispositive effect on litigation. Brief of Nat'l Fed'n of Indep. Bus. Small Bus. Legal Ctr., Inc. as Amicus Curiae in Support of Petitioner at 19-20, *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327 (2025) (No. 24-304); *see Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). The steep costs of litigation and the risk of an adverse verdict already create strong pressure for businesses to settle, rather than roll the dice with a jury. *See Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 324 (6th Cir. 2025) (en banc) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 119-20 (1973)). As this Court has recognized, “[c]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find

it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

When the certified class includes uninjured members, the additional asserted liability and expense of contesting individual recovery can compound that pressure. More recently, Justice Kavanaugh echoed this concern, emphasizing that overbroad classes can “coerce businesses into costly settlements that they sometimes must reluctantly swallow rather than betting the company on the uncertainties of trial.” *Lab’y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 333 (2025) (Kavanaugh, J., dissenting). The later exclusion of uninjured members does not eliminate the costs and risks of reaching that decision.

This pressure is particularly acute for small and independent businesses because of their limited resources. Even if a small business defendant could succeed on the merits of a class action, the cost and risk of continuing litigation can outweigh the anticipated benefit of prevailing. *Examination of Litigation Abuses: Hearing Before the Subcomm. on the Const. & Civ. Just. of the H. Comm. on the Judiciary*, 113th Cong. 15-16 (2013) (statement of Elizabeth Milito, Senior Exec. Couns., Nat’l Fed’n of Indep. Bus. Small Bus. Legal Ctr.). Small businesses often operate with few assets and “on razor thin margins.” *Id.* at 15. The costs are substantial relative to revenue. A study of 2021 commercial tort costs estimated that businesses with annual revenues below \$1 million incurred \$35.56 in tort costs per \$1,000 of revenue, compared with \$4.75 for businesses with annual revenues above \$50 million. David McKnight & Paul Hinton, *Tort Costs for Small Businesses* 14 tbl. 3 (U.S. Chamber of Com. Inst. for Legal Reform, Dec. 2023).

Against that financial background, a small business may lack the resources to benefit from a later decision narrowing the class.

The financial constraints can persist even after years of litigation. In *Cruz v. MM 879, Inc.*, the court considered plaintiffs' counsel's declaration reporting that the small employer "has made numerous representations that it would be required to file for bankruptcy if required to pay its own attorneys to defend the case through trial, given the great costs associated with trying a case." No. 1:15-cv-01563, 2025 WL 3004096, at *12 (E.D. Cal. Oct. 27, 2025). Such constraints make the costs of obtaining post-certification correction important to the defendant's settlement decision.

**B. Later Review Does Not Eliminate
Certification's Immediate Costs to
Small Businesses.**

In recognition of the practical pressures of class certification, the Rules Advisory Committee supported Rule 23(f)'s interlocutory appeal provision. *See* Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."). Some courts of appeals consider whether certification creates settlement pressure that amounts to a "death knell" situation when deciding whether to permit an interlocutory appeal. *See In re Humana, Inc.*, 163 F.4th 376, 384 (6th Cir. 2025); *accord In re White*, 64 F.4th 302, 307 (D.C. Cir. 2023). Although Rule 23(f) can alleviate settlement pressure, interlocutory review does not eliminate the costs and risks that small businesses

must endure to obtain correction of an erroneous certification order, for two reasons.

First, an interlocutory appeal of an order granting class certification is discretionary, rather than an appeal as of right. Fed. R. Civ. P. 23(f). And obtaining permission to appeal is no small feat. As noted by the Ninth Circuit, it and many other circuits “are of the view that petitions for Rule 23(f) review should be granted sparingly.” *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam); see also *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (per curiam) (“[T]he Rule 23(f) appeal is never to be routine.”). Moreover, the D.C. Circuit has explained that “interlocutory appeals are generally disfavored as ‘disruptive, time[-]consuming, and expensive’ for both the parties and the courts.” *In re White*, 64 F.4th at 307 (alteration in original) (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002)). A business must bear the expense of seeking review without assurance that the certification decision will receive immediate appellate consideration.

Second, even if a small business obtains permission to appeal, Rule 23(f) does not automatically stay the district court’s proceedings. Fed. R. Civ. P. 23(f). A small business may therefore have to litigate the appeal and the underlying case simultaneously, unless either the district or appellate court grants a stay. This can further exhaust a small business’s limited resources, adding to the existing settlement pressure while the appeal remains unresolved. Even a successful appeal does not eliminate the expenditures already incurred in obtaining correction.

Decertification likewise does not eliminate the consequences of erroneous initial certification. Class certification requires a “rigorous analysis” into whether the plaintiff and proposed class “*in fact*”

satisfy the requirements of Rule 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). A plaintiff must “affirmatively demonstrate his compliance” with Rule 23 because the Rule “does not set forth a mere pleading standard.” *Wal-Mart*, 564 U.S. at 350. The 2003 amendments removed the provision allowing certification to be conditional: “A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.” Fed. R. Civ. P. 23 advisory committee’s note to 2003 amendment. The possibility of later decertification does not excuse the showing required at the initial certification stage.

A court may alter or amend its certification decision before final judgment under Rule 23(c)(1)(C), and the original certification order does not limit that authority. *See Jacks v. DirectSat USA, LLC*, 118 F.4th 888, 894-95 (7th Cir. 2024). But making a persuasive decertification argument may require a small business defendant to undertake additional discovery and briefing to establish that the class does not satisfy Rule 23’s requirements. Going through this costly and lengthy process is not always feasible for a small business. That functional burden exists even where the plaintiff retains the burden of establishing compliance with Rule 23. Even if a defendant wins a motion to decertify, the class representative may seek permission to appeal that decision, further prolonging the litigation. *See* Fed. R. Civ. P. 23(f); 3 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 7:38 (6th ed. June 2026 update).

Regarding settlements, Rule 23(e)(2) requires a court to determine whether a proposed settlement is “fair, reasonable, and adequate” for the class, including

consideration of “the costs, risks, and delay of trial and appeal.” Fed. R. Civ. P. 23(e)(2)(C)(i). Such inquiry, however, fails to restore a defendant’s opportunity to litigate its substantive defenses before agreeing to settle. The limited financial resources of a small business defendant may instead weigh in favor of compromise because further litigation could jeopardize class members’ recovery. In *Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, the court described counsel’s report that the defendant had ceased operating and had approximately \$100,000 in assets, and that “the primary impetus of the proposed settlement agreement [was] Defendant’s limited financial resources.” No. 1:15-cv-1489, 2025 WL 2591396, at *3 (E.D. Cal. Sep. 8, 2025) (alteration in original).

The inconsistent ways in which federal courts approach class certification and class member standing create a cloud of uncertainty for small businesses. By deferring treatment of uninjured members until after certification, courts are exposing defendants to significant litigation costs and pressure to settle prior to obtaining correction. Interlocutory review, decertification, or settlement approval does not eliminate this expense and the associated risks.

III. Class Certification Cannot Enlarge Individual Recovery.

Approving damages models that would award class members relief that they could not otherwise recover as individual litigants increases pressure to settle. The Court should grant review of the third question presented to clarify the scrutiny required by *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), before a proposed damages model supports class certification. The Rules Enabling Act provides that procedural rules “shall not abridge, enlarge or modify any substantive right.” 28

U.S.C. § 2072(b). Rule 23 should not allow certification of a damages class based on a model that would award class members damages they could not recover in individual litigation. This Court has long recognized that “the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980).

Certification should preserve a defendant’s ability to contest individual entitlement to recovery through defenses available under governing substantive law. Courts should account for these defenses in the proposed method of adjudication. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366-67 (2011) (rejecting certification premised on denying Wal-Mart its statutory defenses to individual backpay claims). A damages model should not assume away those limits merely because it can be applied to the entire class.

Comcast provides a necessary safeguard at the certification stage. It requires a court to evaluate whether a proposed damages model properly measures damages attributable to the theory of liability supporting class treatment. 569 U.S. at 34-36. There, the proposed model failed to isolate damages attributable to the theory of liability the district court accepted for class treatment; thus, plaintiffs did not satisfy predominance. *Id.* at 35-38. The Court rejected the refusal to consider challenges to the model simply because those challenges also bore on the merits. *Id.* at 34. The model’s ability to produce a classwide calculation did not answer whether it measured the relevant damages. *Id.* at 35-36.

As part of the Rule 23(b)(3) predominance inquiry, that examination of the fit between the damages claims and the theory of liability should extend not

only to the named class representatives but also to the unnamed members of the proposed class. If individual class members could not recover under a given damages theory in their own suits, they should not be permitted to recover under that theory collectively. The Fourth Circuit recently required plaintiffs to identify their actual methodology and provide evidentiary support for its consistency with their liability theory, rather than offer a menu of possible approaches. *R.I. Off. of the Gen. Treasurer v. Boeing Co.*, 182 F.4th 422, 440-42 (4th Cir. 2026) (requiring plaintiffs to explain how their proposed methodology would measure damages consistent with their liability theory with supporting evidence).

Certifying a class with a damages model that would allow class members to recover damages they could not recover in individual litigation increases asserted damages exposure and thus adds to the pressure on small businesses to settle. The presence of an injury by itself does not establish the amount recoverable. The third question presented therefore complements the second. A certification inquiry must account for both who may recover and the recovery the proposed model attributes to those claimants.

Accordingly, the Court should grant review and delineate how *Comcast* requires courts to examine any disconnect between the theory of liability advanced and the proposed damages model at certification. This rigor would provide small business defendants with a meaningful opportunity to challenge the model before its asserted recovery shapes a settlement decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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