

No.

IN THE

Supreme Court of the United States

NESTLÉ USA, INC.,

Applicant,

v.

MARIE FALCONE, individually and
on behalf of all others similarly situated,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Al Kelly
GIBSON, DUNN & CRUTCHER LLP
1900 Lawrence Street, #3000
Denver, CO 80202

Theodore J. Boutrous Jr.
Counsel of Record
Christopher Chorba
Perlette Jura
Timothy W. Loose
Bradley J. Hamburger
Matt Aidan Getz
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
tboutrous@gibsondunn.com

Counsel for Applicant Nestlé USA, Inc.

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Under this Court's Rule 13.5, applicant Nestlé USA, Inc. respectfully requests a 60-day extension of time, to and including September 18, 2026, within which to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.[†] The court of appeals entered its judgment on January 9, 2026, App. 1a, and denied applicant's timely petition for rehearing on April 21, 2026, *id.* at 40a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on July 20, 2026. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents important, recurring questions of federal class-action law over which the lower courts have splintered. A divided Ninth Circuit panel affirmed certification of injunctive-relief and damages classes comprising millions of consumers, despite undisputed evidence that the named plaintiff faced no risk of being deceived by the labels in the future and that countless class members did not read or rely on the challenged label statements and thus suffered no injury. The majority also approved a classwide damages model that would award each class member a total refund despite equally undisputed evidence that most consumers would not have deemed the products to be worthless absent the statements. The Ninth Circuit's decision conflicts with case law from this Court and many other circuits and reflects a dangerous trend of certification orders approving inflated classes seeking impermissible remedies.

[†] Under Rule 29.6, applicant states that Nestlé USA, Inc. is a wholly owned indirect 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. No publicly held corporation owns 10% or more of the stock of Nestlé S.A.

a. Respondent sued Nestlé USA, Inc., challenging statements on labels of chocolate products that cocoa was “sustainably” or “responsibly” sourced and claiming the statements were misleading because Nestlé USA couldn’t promise a supply chain free of all risks of child labor. App. 15a. She sought class certification under Rules 23(b)(2) and (b)(3). *Id.* at 15a-16a. On behalf of the injunctive-relief class, she sought an order requiring Nestlé USA to remove all references to sustainable or responsible sourcing. *Id.* at 16a. On behalf of the damages class, she sought a full refund of the price each class member paid for certain Nestlé USA products. *Id.* at 34a.

The district court certified both classes. App. 14a. The court ruled that respondent had Article III standing to seek injunctive relief because, although she now fully understands Nestlé USA’s labels, she “would like to purchase [the chocolate] products again in the future” but “no longer can rely on [the] labeling.” *Id.* at 19a (citing *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 970 (9th Cir. 2018)). The court also approved certification under Rule 23(b)(3), rejecting Nestlé USA’s arguments that individualized questions relating to whether each class member read and relied on, and thus was injured by, the label statements would predominate over common questions. *Id.* at 28a-33a. And the court blessed respondent’s total-refund model of classwide damages, reasoning that any doubts about whether class members were entitled to a full refund presented “merits issue[s] not [to be] decided at class certification.” *Id.* at 36a.

b. After granting review under Rule 23(f), the Ninth Circuit affirmed in a divided opinion. App. 2a, 8a. The panel agreed that respondent had Article III standing to seek injunctive relief on behalf of the Rule 23(b)(2) class because, although she “stopped purchasing [Nestlé USA chocolate products] when she learned about child

labor” risks in the supply chain, she faces an “imminent injury” because “she would like to purchase these products in the future.” *Id.* at 2a (citing *Davidson*, 889 F.3d at 970). The panel likewise agreed that individual issues of injury would not predominate, applying circuit precedent holding “that the possibility that some class members suffered no injury does not, by itself, defeat class certification.” *Id.* at 3a-4a n.1 (citing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669, 680-81 (9th Cir. 2022) (en banc)). And the panel majority approved respondent’s total-refund model as consistent with *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), finding a sufficient “logical connection” between the model and respondent’s liability theory and agreeing that any doubt as to “whether the products are worthless is a merits issue not decided at class certification.” *Id.* at 6a.

Judge Clifton dissented on the *Comcast* issue, explaining that the total-refund remedy the model would award to each class member is “not supported by any evidence.” App. 9a-12a. Under Judge Clifton’s view, *Comcast* demands a “workable” and “valid” classwide model that awards damages to which individual class members would be entitled, not merely a model that “stems from [the defendant’s] liability-creating actions.” *Id.* at 12a-13a.

c. The Ninth Circuit denied rehearing. App. 40a.

2.a. The courts of appeals are intractably divided over whether a plaintiff who learns about supposedly deceptive labels has Article III standing to sue to change the labels. Five circuits have rejected Article III standing under “this sort of ‘stop me before I buy again’” theory, holding that a consumer who is “well aware” of alleged misrepresentations faces no imminent risk of harm traceable to them. *In re Johnson & Johnson*

Talcum Powder Prods. Mktg., Sales Prac. & Liab. Litig., 903 F.3d 278, 292-93 (3d Cir. 2018); accord, e.g., *Berni v. Barilla S.p.A.*, 964 F.3d 141, 148 (2d 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 Leg. Def. Fund, Inc. v. Vilsack*, 111 F.4th 1219, 1228 (D.C. Cir. 2024). The Ninth Circuit alone approves that theory of standing to seek prospective relief. *Davidson*, 889 F.3d at 970. The Ninth Circuit’s aberrant rule contravenes this Court’s case law, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), and transgresses vital limitations on the federal judicial power.

b. As this Court recognized by granting review in *Laboratory Corp. of America Holdings v. Davis*, 145 S. Ct. 1133 (2025), the courts of appeals are deeply divided over whether a Rule 23(b)(3) class may be certified when some members of the proposed class lack Article III standing. Multiple circuits have held that no class may be certified where more than a *de minimis* number of class members are uninjured. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624-26 (D.C. Cir. 2019); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018); see also, e.g., *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (“[N]o class may be certified that contains class members lacking Article III standing.”); *Halvorson v. Auto-Owners Life Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (same). But the Ninth Circuit has squarely rejected that rule. *Olean*, 31 F.4th at 669. And since the DIG in *Labcorp*, this issue has continued to bedevil the circuits. Compare, e.g., *Speerly v. GM, LLC*, 143 F.4th 306, 337-46 (6th Cir. 2025) (en banc) (Thapar, J., concurring), with, e.g., *id.* at 346-55 (Nalbandian, J., concurring). This case presents a clean, ideal vehicle for the Court to address the question it was unable to answer in *Labcorp*.

c. In *Comcast*, this Court held that parties seeking a Rule 23(b)(3) class must “establish that damages are susceptible of measurement across the entire class” by offering a classwide model that “measure[s] only those damages attributable to th[e] theory” on which class members will try to recover. 569 U.S. at 35. Although some circuits have applied *Comcast* faithfully, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013), the Ninth Circuit and others have all but read it out of existence. This case provides a perfect illustration. It is undisputed that, under California law, a full refund is available only “if not a single class member derived any benefit from the chocolate products.” App. 9a (Clifton, J., dissenting). Equally undisputed was that most class members would *not* deem Nestlé USA chocolate worthless without the challenged label statements. Yet the panel majority approved the total-refund model based on Ninth Circuit precedent reading *Comcast* to require only that a damages model “stem[] from the defendant’s actions that created the legal liability.” *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 987-88 (9th Cir. 2015). The result is what this Court warned against in *Comcast*: approval of “any method of measurement . . . so long as it can be applied classwide, no matter how arbitrary,” 569 U.S. at 36, even where the model awards class members damages they could never recover in an individual action.

3. Additional time is necessary for counsel to prepare a petition that would be helpful to the Court. Counsel for applicant has had, and will continue to have, significant professional responsibilities in other time-sensitive matters, along with preexisting travel plans, before and after the current July 20 deadline.

Accordingly, applicant respectfully requests that its time to file a petition for a writ of certiorari be extended by 60 days, to and including September 18, 2026.

Respectfully submitted.

Al Kelly
GIBSON, DUNN & CRUTCHER LLP
1900 Lawrence Street, #3000
Denver, CO 80202

/s/ Theodore J. Boutrous Jr.
Theodore J. Boutrous Jr.
Counsel of Record
Christopher Chorba
Perlette Jura
Timothy W. Loose
Bradley J. Hamburger
Matt Aidan Getz
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
tboutrous@gibsondunn.com

Counsel for Applicant Nestlé USA, Inc.

July 1, 2026