No. 24-

IN THE

Supreme Court of the United States

NUTRAMAX LABORATORIES, INC. AND NUTRAMAX LABORATORIES VETERINARY SCIENCES, INC.,
Petitioners,

v.

JUSTIN LYTLE AND CHRISTINE MUSTHALER,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Comcast Corp.* v. *Behrend*, this Court held that plaintiffs must present "evidentiary proof" to satisfy Rule 23, but it did not reach the question on which review was initially granted: whether such evidence, including expert testimony, must be admissible. 569 U.S. 27, 32 n.4 (2013). Since *Comcast*, circuit courts have deepened a split on that question. The First, Third, Fifth, Seventh, and Eleventh Circuits require admissible evidence to support class certification. The Sixth, Eighth, and Ninth Circuits, by contrast, do not.

The decision below entrenched the Ninth Circuit's position on the short side of that split. Plaintiffs moved for class certification after the close of fact and expert discovery, alleging that an expert's model would provide common proof needed to satisfy Rule 23's predominance requirement. Although the expert proffered that he *could* develop a model to assess classwide injury, he had not yet even collected the data to do so, and he could not say what the model would show if he ever collected the needed data and ran it. The district court certified the class, and the Ninth Circuit affirmed, reasoning that evidence that supports a decision to certify a class under Rule 23 need not be admissible, and whether a court conducts a "full" or "limited" *Daubert* inquiry depends on whether an expert chooses to fully develop the model.

The question presented is:

When a plaintiff seeking to certify a class relies on an expert to establish that classwide issues predominate, must the expert testimony satisfy the requirements for admissibility, or does some lesser or variable standard apply?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. Neither is publicly traded, and no public entity owns 10% or more of either company's stock. Each is a privately held company.

Respondents are Justin Lytle and Christine Musthaler.

RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Central District of California and the Ninth Circuit Court of Appeals:

- *Lytle* v. *Nutramax Lab'ys, Inc.*, No. 5:19-cv-00835 (C.D. Cal.) (ongoing);
- *Lytle* v. *Nutramax Lab'ys, Inc.*, No. 22-80047 (9th Cir.) (Rule 23(f) petition granted (July 13, 2022));
- *Lytle* v. *Nutramax Lab'ys, Inc.*, No. 22-55744 (9th Cir.), judgment entered, August 23, 2024.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended, is reported at 114 F.4th 1011, and reproduced at Pet. App. 1a. The order of the District Court for the Central District of California granting class certification is unreported, but is available at 2022 WL 1600047, and reproduced at Pet. App. 42a.

JURISDICTION

The Ninth Circuit entered its judgment on April 22, 2024. Pet. App. 1a. The Ninth Circuit panel amended its opinion and denied petitioners' timely petition for panel rehearing and rehearing *en banc* on August 23, 2024. *Id.*

Subject matter jurisdiction exists under the Class Action Fairness Act. 28 U.S.C. § 1332(d). This Court has jurisdiction to review the Ninth Circuit's judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23 ("Rule 23") and Federal Rule of Evidence 702 ("Rule 702") are reproduced at Pet. App. 91a and 100a, respectively.

STATEMENT OF THE CASE

1. Petitioners Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. (collectively, "Nutramax") research, develop, and sell supplements for household pets. Pet. App. 3a. This action

concerns the sale of three Nutramax Cosequin® brand canine joint health supplements. *Id.* at 4a.

Respondents/Plaintiffs are two individuals who purchased Cosequin® for elderly dogs. Pet. App. 3a. Plaintiffs allege that they did not see improvements with the supplements. *Id.* at 4a–5a. Nutramax maintains that the products are not intended or represented as being able to treat disease and that substantial scientific evidence shows that the products support joint health. See, e.g., *id.* at 5a; Dkt. 120, at 4 & n.3 (Joint Br. on Class Certification).

Plaintiffs purport to bring damages claims on behalf of a putative statewide class of purchasers, alleging that various statements used on different versions of the product labels were deceptive. Pet. App. 4a.

2. In their class certification motion, Plaintiffs alleged they would "present common evidence demonstrating that Plaintiffs and class members paid a price premium for the Products as a result of the deceptive terms included on the label." 7-ER-1187. This was their sole theory of classwide damages. As of the class certification motion—which was filed *after* the close of fact and expert discovery—Plaintiffs' expert, Professor Jean Pierre Dubé, had not conducted any analysis of the potential impact of the challenged terms and did not opine that any price premium in fact existed.

Instead, Dubé's report *proposed* to conduct a choice-based conjoint analysis to determine whether a price premium associated with different challenged terms existed, and, if it did, to measure it. Pet. App. 6a. According to Dubé's report, a consumer survey could "determine the value consumers place on the challenged terms when purchasing these products," and then enable one "to calculate the price premium attributable to the challenged terms and the resulting classwide

damages." Pet. App. 83a (quoting Dkt. 120, at 37). Plaintiffs argued that the "proposed model … will not require individualized inquiry." *Id.* (quoting Dkt. 120, at 37).

Nutramax moved to exclude Dubé's opinion under Federal Rule of Evidence 702 and asserted that Dubé's report was insufficient to support class certification under Rule 23. Among other things, Dubé admitted at deposition that he had not assessed whether there are "any economic damages associated with the challenged claims," or whether as to any challenged statement "the price premium is zero or nonzero." Dkt. 124, at 5 (Joint Br. on Defs.' Mot. to Exclude Ops. and Test. of Pls.' Expert Witness, Dr. Jean-Pierre Dubé). Nutramax also argued, based on Dubé's concessions, that he lacked data and had not performed steps necessary to undertake a conjoint analysis. *Id.* at 5–7.

3. The district court granted Plaintiffs' motion for class certification and denied Nutramax's motion to exclude Dubé's opinions and testimony. In ruling on Nutramax's motion to exclude, the district court refused to apply a full *Daubert*[1] analysis, despite the close of fact and expert discovery. Rather, the district court stated that "[a]t the class certification stage, … 'admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given.'" Pet. App. 48a (quoting *Sali* v. *Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018)). At this stage, the court said, it would "consider[] only 'if expert evidence is useful in evaluating whether class certification requirements have been met.'" *Id.* (quoting *Tait* v. *BSH Home Appliances Corp.*, 289 F.R.D. 466, 495 (C.D. Cal. 2012)).

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[1] *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Having set that vague and low bar, the district court addressed Nutramax's argument that Dubé's opinion was inadmissible because he had proposed only a method of analysis and had not "performed a damages analysis using actual evidence." Pet. App. 54a (quoting Dkt. 124, at 5). The district court rejected that argument, reasoning that a "'plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof.'" *Id.* (quoting *Bailey* v. *Rite Aid Corp.*, 338 F.R.D. 390, 408 n.14 (N.D. Cal. 2021)).

As to Rule 23(b)(3)'s predominance requirement, the district court likewise found that Dubé's proposal to perform a conjoint survey was sufficient. Pet. App. 86a. The district court noted that "[c]onjoint surveys, like the one proposed by plaintiffs' expert, are a well-established method for measuring class-wide damages." *Id.* at 83a (citing cases). The court again brushed aside Nutramax's objections that no analysis had been performed, repeating the view that "[a] plaintiff is not required to actually execute a proposed conjoint analysis to show that damages are capable of determination on a class-wide basis with common proof." *Id.* at 85a n.21 (quoting *Bailey*, 338 F.R.D. at 408 n.14).

5. Nutramax petitioned for permission to appeal the class certification order under Rule 23(f). The Ninth Circuit granted that petition and ordered full briefing. See Pet. App. 6a. In that briefing, Nutramax argued it was error to certify the class when Dubé's report was not sufficiently developed to satisfy Rule 702 or allow for rigorous review, and because Dubé had not actually performed any analysis, his report was not competent evidentiary proof for purposes of satisfying Rule 23.

In a published opinion recognizing that it was further entrenching a circuit split, the Ninth Circuit

affirmed. The court acknowledged that "[t]he manner and extent to which the *Daubert* framework applies at the class certification stage is an unsettled question"; that the Ninth Circuit's "own precedent has somewhat oscillated" on the issue; and that "there is at least some divergence among the Circuits on this question." Pet. App. 24a–25a. The court nevertheless held that the district court's "limited" *Daubert* inquiry was sufficient. *Id.* at 26a. To the Ninth Circuit, "there is no requirement that the evidence relied upon by Plaintiffs to support class certification be presented in an admissible form at the class certification stage." *Id.* at 14a.

As to Dubé's failure to actually execute his model, the Ninth Circuit held that no "categorical rule" requires experts to execute a model at the class certification stage. Pet. App. 23a. The court then deemed Dubé's proposal sufficient to support certification, reasoning that because "a conjoint analysis is capable of measuring classwide damages" in general, the district court could find it likely that Dubé would be able to execute such a model in this case. *Id.* at 31a. Although Dubé had not yet collected the necessary data before the close of discovery, the court credited Dubé's "implicit" conclusion that he would be able to do so before trial. *Id.* at 27a.

Pushing all of these issues off until another day, the Ninth Circuit conceded that the standard reliability and admissibility determinations would need to occur once the model "has been fully executed." Pet. App. 33a. The court viewed the potential failure of the model to be a merits issue for summary judgment—not a class certification issue. *Id.*

The Ninth Circuit acknowledged that "[i]f discovery has closed and an expert's analysis is complete and her tests fully executed, there may be no reason for a district court to delay its assessment of ultimate

admissibility at trial." Pet. App. 26a. "By contrast, where an expert's model has yet to be fully developed, a district court is limited at class certification to making a predictive judgment about how likely it is the expert's analysis will eventually bear fruit." *Id.* In other words, class counsel may unilaterally obtain a *lower* standard of evidentiary proof for certifying a class simply by *choosing* to delay development of an expert's model until after the Rule 23 stage, even when class certification occurs after the close of discovery.

6. Nutramax petitioned for panel rehearing and rehearing *en banc*. The panel amended its opinion to remove a single sentence stating (inaccurately) that reviewing courts "give the district court 'noticeably more deference when reviewing a grant of class certification than when reviewing a denial.'" 99 F.4th 557, 569–70 (9th Cir. 2024) (quoting *Patel* v. *Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019)); see Pet. App. 1a–2a (amending opinion). The Court of Appeals otherwise left its opinion unchanged and denied the petition for rehearing.

REASONS FOR GRANTING THE PETITION

This case presents the opportunity to resolve a stubborn split that this Court first considered but did not resolve in *Comcast Corp.* v. *Behrend*, 569 U.S. 27 (2013). The courts of appeals disagree about whether and, if so when, a district court can rely on inadmissible evidence to certify a class under Rule 23. That is precisely the question that warranted review in *Comcast*, but was left unresolved due to the trial court record.

Since *Comcast*, the conflict has deepened. At least five circuits now require admissible evidence at class certification—including a full Rule 702/*Daubert* review of expert opinions when such opinions are

necessary to satisfy Rule 23. Admissible evidence is necessary, these circuits say, to ensure that courts are able to perform the "rigorous analysis" required by Rule 23. Three circuits disagree. But such an approach—under which plaintiffs can avoid rigorous analysis of a model at the class certification stage simply by developing the model later—cannot be correct. This case provides an ideal opportunity for this Court to resolve the split.

Given the prevalence of class actions and the persistence of the split of authority, this issue will most certainly continue to recur without this Court's intervention. In addition, the often (as a practical matter) outcome-determinative nature of class certification decisions, and the enormous litigation pressure that decision itself places on defendants, makes variation in the standard particularly intolerable. This Court should take the opportunity to resolve the split and restore a uniform, nationwide class certification standard not subject to manipulation by the party seeking to certify a class.

I. THE CIRCUITS ARE SPLIT ON ADMISSIBILITY STANDARDS AT CLASS CERTIFICATION.

The opinion below cemented the Ninth Circuit's position on the short side of a longstanding circuit split regarding the extent to which Rule 702 and *Daubert* apply to evidence submitted to support class certification. Most circuits have held that evidence—or at least expert testimony—must be admissible to satisfy Rule 23. Just two circuits (the Eighth and Ninth) have disagreed, holding that evidence submitted to support class certification need not be admissible. And the Sixth Circuit has held that "nonexpert evidence" need not be admissible, while reserving judgment on whether expert evidence must be admissible. *Lyngaas*

v. *Curaden AG*, 992 F.3d 412, 415, 428–29 (6th Cir. 2021) ("[E]videntiary proof required for class certification need not amount to admissible evidence, *at least with respect to nonexpert evidence*." (emphasis added)). Indeed, the Ninth Circuit has now staked out the edge of the minority position, excusing admissibility in favor of a "limited" *Daubert* analysis even when expert evidence is essential to class certification and even when plaintiffs move for class certification after the close of discovery. There is no prospect of resolution of this stark split absent this Court's intervention.

A. On one side of the split, the First, Third, Fifth, Seventh, and Eleventh Circuits have held that the Rules of Evidence and *Daubert* apply to expert opinions submitted in conjunction with class certification briefing.

In *American Honda Motor Co.* v. *Allen*, the Seventh Circuit held that "when an expert's report or testimony is critical to class certification … , a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants." 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam). The Seventh Circuit reasoned that, if an expert's testimony is "necessary to show that Plaintiffs' claims are capable of resolution on a class-wide basis," a district court cannot defer resolving challenges to the reliability of the proposed expert testimony on the theory that the defendants will be able to renew the challenge at a later time. *Id.* at 816-17. That would be "akin to the 'provisional' approach" to class certification that courts have rejected. *Id.* at 817.

The Third Circuit took the same approach in *In re Blood Reagents Antitrust Litigation*, holding that "a

plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*." 783 F.3d 183, 187 (3d Cir. 2015). This is so, the court explained, because this Court has held that "the class certification analysis must be 'rigorous,'" that "the party seeking certification must 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a),'" and must do so using "evidentiary proof." *Id.* (quoting *Comcast*, 569 U.S. at 33). But "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied." *Id.*

The Fifth Circuit built upon *American Honda*, *In re Blood Reagents*, and this Court's recent precedents to reach the same conclusion. It held that, where expert testimony is necessary to "the cementing of relationships among proffered class members of liability or damages," the "metric of admissibility [should] be the same for certification and trial." *Prantil* v. *Arkema, Inc.*, 986 F.3d 570, 575 (5th Cir. 2021). The court recognized that "certification changes the risks of litigation often in dramatic fashion." *Id.* "Thus, if an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class." *Id.* at 576. For that reason, the Fifth Circuit rejected the

district court's "hesitation to apply *Daubert*'s reliability standard with full force." *Id.*[2]

The First and Eleventh Circuits are in accord in holding that the Rules of Evidence (including *Daubert*) apply fully at class certification. As the First Circuit explained, "[t]he fact that plaintiffs seek class certification provides no occasion for jettisoning the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018). In *Sher* v. *Raytheon Co.*, the plaintiffs' expert (similar to Dubé here) testified that he "*could* develop a hedonic multiple regression model to determine diminution-in-value damages," and the Eleventh Circuit found that it was error for the district court to refuse to conduct *Daubert* analysis and resolve challenges to the expert's testimony. 419 F. App'x 887, 889 (11th Cir. 2011); *id.* at 890–91 (describing *American Honda* as "persuasive" and holding that district court "erred in granting class certification prematurely").[3]

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[2] In further contrast to the Ninth Circuit's approach here, the district court in *Prantil*—even under a "limited" *Daubert* inquiry—excluded expert testimony where the expert "ha[d] not actually built or tested any regression analyses that he suggest[ed] could be appropriate for determining damages on a class-wide basis." *Prantil*, 986 F.3d at 576.

[3] More recently, the Eleventh Circuit in an unpublished decision vacated a class certification order where the plaintiff's expert report "merely reference[d] two generic economic models" (hedonic regression and conjoint analysis), and the district court wrongly "shift[ed] the burden onto" the defendant to show that the models could not apply. *Schultz* v. *Emory Univ.*, No. 23-12929, 2024 WL 4534428, at *6 & n.3 (11th Cir. Oct. 21, 2024) (per curiam). *Schultz*, however, did not address admissibility specifically, and it suggested in a footnote that it would agree with *Lytle* that "there is no categorical prohibition on a court relying on an

In sum, as one judge put it, the question is whether class certification disputes will be governed by "the uniform rules enacted by Congress, no rules at all, or only the rules judges really like. The correct answer is the rules enacted by Congress." *Allen* v. *Ollie's Bargian Outlet, Inc.*, 37 F.4th 890, 908 (3d Cir. 2022) (Porter, J., concurring).

B. The Eighth, Ninth, and (to a potentially lesser extent) Sixth Circuits have reached a different conclusion, rejecting arguments that evidence submitted at class certification must be admissible.

1. The Eighth Circuit held in *In re Zurn Pex Plumbing Products Liability* that a court need not conduct a full *Daubert* analysis at class certification because "a court's inquiry on a motion for class certification is 'tentative,' 'preliminary,' and 'limited.'" 644 F.3d 604, 613 (8th Cir. 2011). The court thought that because "class certification decisions are generally made before the close of merits discovery, the court's analysis is necessarily prospective and subject to change, and there is bound to be some evidentiary uncertainty." *Id.* (internal citations omitted).

Judge Gruender dissented and would have held that courts are required "to conduct a full *Daubert* analysis before certifying a class whenever an expert's opinion is central to class certification and the reliability of that opinion is challenged." *Id.* at 628. In reaching that conclusion, Judge Gruender noted that "[r]equiring a full *Daubert* analysis is a natural extension of the concept that class certification should not be conditional and should be permitted only after rigorous application of Rule 23's requirements." *Id.* Judge Gruender also explained that "requiring a district court to

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unexecuted damages model to certify a class." *Id.* at *6 n.5 (quoting Pet. App. 23a).

conduct a full *Daubert* analysis before certifying a class discourages plaintiffs who may have no intention of proceeding to trial on the merits from submitting unreliable expert testimony for settlement purposes." *Id.* at 629. He expressed concern that the majority's approach, by contrast, allows plaintiffs to rely on inadmissible evidence all the way to trial.

The Sixth Circuit agreed with the *Zurn* majority that, because class certification is "inherently tentative" and may occur at an early stage, evidence at that stage need not be admissible, "at least with respect to nonexpert evidence." *Lyngaas*, 992 F.3d at 428–29. The Sixth Circuit, however, has not taken a position on "whether a district court *must* undertake a full *Daubert* inquiry at the certification stage," recognizing that question "has generated different answers across the country." *In re Kondash*, No. 20-0304, 2021 WL 12285809, at *2 (6th Cir. Mar. 11, 2021); see also *In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (holding that district court did not abuse its discretion by applying *Daubert* to "critical witness" at class certification stage).

2. The Ninth Circuit joined the Eighth Circuit in *Sali* v. *Corona Regional Medical Center*, where the court held that, at class certification, "a district court may not decline to consider evidence solely on the basis that evidence is inadmissible at trial." 909 F.3d 996, 1003 (9th Cir. 2018). The court recognized that "[o]ther circuits have reached varying conclusions on the extent to which admissible evidence is required at the class certification stage," but it decided to follow the Eighth Circuit. *Id.* at 1005. The Ninth Circuit therefore "held that a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met," and reversed and remanded the class certification denial. *Id.* at 1005, 1012.

Five judges dissented from denial of rehearing *en banc* in *Sali* v. *Corona Regional Medical Center,* 907 F.3d 1185 (9th Cir. 2018). Writing on behalf of the dissenters, Judge Bea expressed concern that the Ninth Circuit's refusal to apply evidence admissibility standards to class certification "reduced the requirements of class certification *below* even a pleading standard." *Id.* at 1185. This decision "defie[d] clear Supreme Court guidance," Judge Bea explained. *Id.* at 1189. Like the Seventh Circuit in *In re Blood Reagents*, Judge Bea and his fellow dissenters highlighted this Court's instruction that class certification requires a "rigorous analysis" in which plaintiffs "affirmatively demonstrate" and "prove" compliance with Rule 23. *Id.* at 1190.

Judge Bea also noted that the Ninth Circuit's refusal to apply evidentiary standards to class certification put the court on what was already "the wrong side of a lopsided circuit split." *Id.* at 1189. "[S]ix circuits ha[d] held in published or unpublished decisions that expert testimony must be admissible to be considered at the class certification stage," whereas only one (the Eighth Circuit) "had reached the opposite conclusion." *Id.* at 1190. The Ninth Circuit's decision in *Sali*, Judge Bea and his fellow dissenters wrote, "involve[d] a question of exceptional importance and is plainly wrong." *Id.* at 1191.[4]

It was possible that future decisions in the Ninth Circuit would limit *Sali* to its narrow factual circumstances. *Sali* was a wage-and-hour case and

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[4] After the Ninth Circuit denied the petition for rehearing, Corona Regional Medical Center filed a petition for a writ of certiorari with this Court. No. 18-1262 (2019). The parties settled, and Corona moved to dismiss its petition before the Court could decide whether to grant it.

considered a spreadsheet summarizing time records prepared by a paralegal. The defendant asserted "formalistic evidentiary objections" to the spreadsheet, but "did not dispute the authenticity of the payroll data" or "the accuracy of [the] calculations." *Sali*, 909 F.3d at 1003, 1006.

Indeed, four years later, an *en banc* decision by the Ninth Circuit appeared to correct course (albeit in a case where admissibility was not challenged). In describing the standards for class certification, the court ignored *Sali* and stated that "[i]n carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any *admissible* evidence," and that "evidence at certification must meet all the usual requirements of admissibility," including Rule 702. *Olean Wholesale Grocery Coop., Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 665 (9th Cir. 2022) (en banc) (emphasis added); see also *id.* at 665 n.7 (observing that defendants may "challenge the reliability of an expert's evidence under *Daubert* . . . and Rule 702"); *id.* at 678 (holding that the persuasiveness of an economic model is for the jury, "[p]rovided that the evidence is admissible" and subject to a "rigorous review").

But any suggestion that the Ninth Circuit had joined the majority of circuits, and limited *Sali*, has been put to rest in this case. The Ninth Circuit has now stated unequivocally that "there is no requirement that the evidence relied upon by Plaintiffs to support class certification be presented in an admissible form at the class certification stage." Pet. App. 14a. For that reason, the Ninth Circuit held that expert opinions submitted at class certification need not "meet[] the requirements of *Daubert*." *Id.* at 24a.

Accordingly, the circuit split has now ossified, with the Ninth Circuit fully embedding itself on the

extreme end of the lopsided split. Even worse, as further explained below, the Ninth Circuit has adopted a variable approach that allows putative class counsel to *choose* what evidentiary standard applies, and under which expert testimony that is *less developed* receives *less scrutiny*. The Court should grant review in order to resolve the split and confirm the evidentiary standards that apply at the Rule 23 stage.

II. THE STANDARDS FOR REVIEWING EXPERT TESTIMONY AT THE RULE 23 STAGE PRESENT A FUNDAMENTAL AND RECURRING ISSUE UNDER THIS COURT'S PRECEDENTS.

It cannot be doubted that this case meets this Court's demanding standard for certiorari. This Court in *Comcast* accepted review to address the admissibility issue presented here. The required rigorous analysis and evidentiary standards applicable to expert testimony present fundamental and recurring issues that go to the heart of what Rule 23 requires under this Court's precedents since *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). The Ninth Circuit's decision, in contrast, runs contrary to the plain language of Rule 702 and reflects an improper backslide into a pre-*Wal-Mart* view of Rule 23.

A. This Court's Precedents Emphasize the Need for "Evidentiary Proof" and a "Rigorous Analysis" at the Rule 23 Stage.

Since *Wal-Mart*, this Court has issued a series of decisions emphasizing the need for a rigorous analysis of the record before certifying a class. Those decisions indicate, where expert testimony is critical to meeting the requirements of Rule 23, the ordinary rules of admissibility should apply, and defendants must be able

to challenge the admissibility and reliability of the expert's model at the class certification stage.

The pre-*Wal-Mart* understanding is illustrated by the Ninth Circuit's decision in *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975). There, the court interpreted Rule 23 and this Court's past precedent to mean that the class certification "determination does not permit or require a preliminary inquiry into the merits," nor require an "extensive evidentiary showing." *Id.* at 901 (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170–72 (1974)). Instead, courts were "bound to take the substantive allegations of the complaint as true." *Id.* at 901 n.17.

In *Wal-Mart*, however, this Court made it clear that Rule 23 "does not set forth a mere pleading standard," and it specifically rejected how lower courts (like *Blackie*) were interpreting *Eisen*. 564 U.S. at 350 & 351 n.6. The Court emphasized Rule 23 requires a "rigorous analysis," and that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* And although it did not need to reach the issue, the Court expressed "doubt" that *Daubert* did not apply to expert testimony at the class certification stage. *Id.* at 354.

Comcast likewise declined to reach the admissibility issue (based on the petitioner's failure to preserve it), but the Court again emphasized the need for a "rigorous analysis" that "will frequently overlap with the merits of the plaintiff's underlying claim." 569 U.S. at 27–28 (citation omitted). *Comcast* and later decisions have emphasized that a party seeking class certification "must . . . satisfy *through evidentiary proof* at least one of the provisions of Rule 23(b)." 569 U.S. at 33 (emphasis added). "[P]laintiffs wishing to proceed through

a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

In *Tyson Foods, Inc.* v. *Bouaphakeo*, the Court provided the caveat that the "persuasiveness" of an expert's model is generally the province of the jury and not a basis to deny class certification. 577 U.S. 442, 454–55 (2016). But that observation necessarily accepts that the evidence has previously been determined to be admissible; the evidence could not otherwise be considered by a jury. As the Court explained: "*Once* a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." *Id.* (emphasis added); see also *id.* at 459 (citing Rule 702 and explaining that expert study could supply common proof of hours worked, "so long as the study is otherwise admissible").

B. The Ninth Circuit's Approach Contravenes Rule 702 and the Rigorous Analysis Required by Rule 23.

Requiring expert testimony to be admissible at the Rule 23 stage flows directly from these precedents and the required rigorous analysis. In any case where an otherwise individualized question that would frustrate class treatment can become a common question only *because* of expert analysis, it makes no sense to certify the class without knowing whether the factfinder will be permitted to consider the expert's analysis and thus resolve the case for the class. If the expert's model is not admissible, then the jury will not be able to render a judgment for the class as a whole. That form of "common proof" will not be available at trial, and the case inevitably will devolve into individualized inquiries. See *Comcast*, 569 U.S. at 34 (explaining that failure of

expert model is a predominance issue because it results in individual inquiries); see also *Allen*, 37 F.4th at 906 (Porter, J., concurring) ("Rigorous analysis and statutory text demand nothing less than admissible evidence at the time of certification."). This is why the majority view (rejected by the Ninth Circuit here) has explained its approach follows from the rule against provisional certification of a class. To rule as the Ninth Circuit has here—to certify the class subject to *later* deciding whether an essential factual predicate for class treatment is even admissible—is no different from a provisional class certification ruling.

1. Rule 702's requirements confirm the point. To satisfy Rule 702, it is not enough that an expert be qualified and use a methodology *generally* accepted in other cases—which were the sole factors considered by the district court below. See Pet. App. 53a–55a, 83a–86a. The expert opinion must also be "based on sufficient facts or data" and "reflect[] a reliable application of the principles and methods to the facts of the case." *Id.* at 100a (Fed. R. Evid. 702(b), (d)). Those two factors are not met—indeed, they cannot even be evaluated—when experts merely describe a general methodology that they intend to apply in yet-to-be-fully-determined ways to data they do not yet have. And absent those two factors—sufficient data and a reliable application of the methodology to the data—a model cannot supply the common proof necessary to satisfy predominance.

The Ninth Circuit's approach is especially troubling given that it effectively allows plaintiffs to *choose* what evidentiary standard applies. According to the opinion below, "[i]f discovery has closed *and* an expert's analysis is complete and her tests fully executed," *then* the district court may rule on its admissibility through a full Rule 702/*Daubert* analysis. Pet. App. 26a (emphasis added). But if the "expert's model has yet to be fully

developed," a "limited" inquiry and lesser standard applies, *id.*—even when (as here) discovery had already closed and the expert had ample time to conduct the analysis, but simply decided not to.

In other words, a class may be certified upon a *less* rigorous analysis whenever class counsel choose to delay having their experts conduct their proposed analyses. If the expert has been asked by counsel at the class certification stage only to assure the court that an analysis *can* be conducted later, then the court need only consider whether the promised method is "likely" to "eventually bear fruit"—without even trying to determine whether that fruit is forbidden to the factfinder. But if the expert has been asked by counsel to actually conduct the analysis, then the full rigorous analysis required by this Court's precedents applies.

Empowering one side in a dispute to choose the level of scrutiny applicable to its evidence at a critical stage like class certification has no basis in the language of any rule and no rationale to support it. The rules of civil procedure are designed to apply equally to all sides to ensure a fair and reliable process for the resolution of disputes. See *Am. Honda*, 600 F.3d at 815–17 (rejecting approach that would allow deferring *Daubert* and reliability challenges until after class certification decision); *Allen*, 37 F.4th at 905–06 (Porter, J., concurring) (citing Federal Rule of Evidence 1101 and explaining that "[n]othing in the rules of evidence allows [courts] to selectively apply them"). The Ninth Circuit's approach badly undermines that essential principle and policy. Moreover, it is no mystery that the Ninth Circuit's approach will perversely encourage plaintiffs to delay development of their evidence so they may reap the unmerited reward of a lower standard for class certification.

2. The Ninth Circuit's approach undermines the district court's ability to conduct a proper rigorous analysis under Rule 23. See *Comcast*, 569 U.S. at 33 (reflecting that an expert's model must be subject to a "rigorous analysis" under Rule 23, even when admissibility is not challenged).

Courts agree that *when* an expert offers a model at the Rule 23 stage, the district court must conduct a rigorous analysis of the model, including the reliability of its assumptions, inputs, and outputs. See, e.g., *Olean*, 31 F.4th at 683 (explaining that district courts must consider factors that "may undercut the model's reliability," such as "unsupported assumptions, erroneous inputs, or nonsensical outputs"); *In re Rail Freight Fuel Surcharge Antitrust Litig.,* 725 F.3d 244, 254 (D.C. Cir. 2013) (vacating certification based on a "questionable model" that yielded "false positive" results); *In re Hydrogen Peroxide Antitrust Litig*, 552 F.3d 305, 313–15, 322–26 (3d Cir. 2008) (holding that district courts must consider challenges to assumptions and analysis of plaintiffs' expert, even if disputes overlap with the merits). So the question is whether plaintiffs can avoid that level of scrutiny simply by deferring further development of the model until after class certification.

Although the Ninth Circuit's opinion states that "[m]erely gesturing at a model or describing a general method" is not enough, Pet. App. 29a, there is no meaningful way to probe or resolve disputes over a model's reliability until the expert applies the proposed methodology to the facts and data whose validity can be examined. A court cannot perform a rigorous analysis of a model's assumptions or inputs when the expert has not yet decided on key assumptions or

gathered the data for the inputs.[5] Likewise, until a model has generated at least some preliminary outputs, there is no way to ascertain whether the model is in fact producing reliable, sensible results and measuring damages consistent with a theory of class liability, as opposed to some other market effect. See *Comcast*, 569 U.S. at 38; *Rail Freight Fuel Surcharge*, 725 F.3d at 254–55 (finding model insufficient to support class certification where it produced false positive results); see also, e.g., *Parko* v. *Shell Oil Co.*, 739 F.3d 1083, 1086–87 (7th Cir. 2014) (finding it insufficient for plaintiffs to proffer expert hydrogeologist who "intend[ed] to measure" groundwater contamination to support plaintiffs' claims, but had not yet done so; explaining that "if intentions (hopes, in other words) were enough, predominance, as a check on casting lawsuits in the class action mold, would be out the window").

In this additional respect, review is warranted for the Court to clarify the nature of the "evidentiary proof" and rigorous analysis required at the Rule 23 stage where, as here, a plaintiff is relying on expert testimony to supply the common proof needed to satisfy predominance and adjudicate claims on a classwide basis at trial.

C. The Ninth Circuit's Reasoning Defies This Court's Precedents and Misconstrues Fundamental Rule 23 Principles.

The Ninth Circuit's decision also reflects a fundamental misconstruction of class action principles articulated by this Court.

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[5] As Nutramax argued below, it was far from clear that Dubé would be able to collect the necessary market data or that the model would be able to produce sensible results aligned with the theory on which class certification was granted.

First, the opinion below and *Sali* explicitly trace their view on admissibility back to the Ninth Circuit's pre-*Wal-Mart* decision in *Blackie*. Pet. App. 14a, 32a. As noted above, that case assumed that, on a Rule 23 motion, allegations must be accepted as true and no "preliminary inquiry" touching on the merits was allowed. That is the very framework that *Wal-Mart* rejected.

Second, *Sali* is based on the notion that class certification decisions are merely tentative and preliminary, and may be held early in the litigation. *Sali*, 909 F.3d at 1004. As noted, that cannot be the justification for the opinion below: class certification occurred *after* the close of fact and expert discovery, over two years after the case was filed. In any event, this Court has made it clear that plaintiffs must meet their burden of proving prerequisite facts necessary for predominance "before class certification." *Halliburton*, 573 U.S. at 275–76.

Here, the Ninth Circuit's decision effectively flips the burden of proof, requiring *defendants* to prove that a model will *not* be reliable once applied. Nothing in Rule 23 requires a court to certify a class before "it is satisfied that all Rule 23 requirements have been met." *Zurn*, 644 F.3d at 629 (Gruender, J., dissenting); see also *Prantil*, 986 F.3d at 576 ("an assessment of the reliability of Plaintiffs' scientific evidence for certification cannot be deferred"); *Allen*, 37 F.4th at 907 (Porter, J., concurring) (similar); *Am. Honda*, 600 F.3d at 817 (explaining that refusal to conduct full *Daubert* inquiry was akin to an improper "provisional" approach to certification).

Third, the Ninth Circuit was wrong to suggest that, regardless of how the model turns out or whether it is later excluded, the result will be a merits issue common to the class. Pet. App. 16a–17a. *Comcast* makes

clear that threshold issues regarding an expert's model are part of the Rule 23 inquiry, not merely a merits issue (at least where plaintiffs rely on expert testimony to show classwide injury). That is because, without a viable form of common proof of injury, damages, or other essential elements of a claim, the case will devolve into individual inquiries, and no classwide judgment will be possible. *Comcast*, 569 U.S. at 31 n.3, 34, 37–38.

Here, if Plaintiffs were bringing individual claims for deceptive advertising, they would simply testify that they would not have bought the product and/or would have purchased a cheaper alternative. Plaintiffs propose a conjoint analysis solely to generate a form of aggregate proof—in effect, a fraud-on-the-market price-inflation figure—that they can use to pursue a class action without the need for such individual proof. The failure or exclusion of such a model does not negate an element of any individual claim; it negates the showing for class certification. As a result, Plaintiffs should be required to prove—not merely plead—the existence of a reliable and useful model at the class certification stage.

At bottom, to satisfy Rule 23, plaintiffs must do more than *allege* that the case is amenable to classwide resolution and promise to deliver the facts later; they must demonstrate, with facts, that class certification is appropriate. If the proffered common proof (an expert model) is so undeveloped that it cannot yet be tested against or meet the standards for admissibility nor subjected to a proper rigorous analysis, then plaintiffs have not demonstrated through evidentiary proof that the Rule 23 requirements *in fact* are satisfied. This Court should grant the petition to answer the question that it left open in *Comcast* and confirm the

rigorous analysis required of expert testimony at the Rule 23 stage.

III. CLASS CERTIFICATION STANDARDS CARRY EXCEPTIONAL PRACTICAL IMPORTANCE, AND THIS CASE IS A GOOD VEHICLE TO ADDRESS THEM.

1. There can be no question that class action filings have increased exponentially,[6] and that class certification standards play an out-sized role in litigation outcomes in those cases. This Court has recognized that "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance" to both parties. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). For putative classes, denial of class certification, "when viewed from the standpoint of economic prudence, may induce a plaintiff to abandon the litigation." *Id.* at 471. On the flipside, "[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." *Id.* at 476. As a member of this Court once noted, "an incorrect class certification decision almost inevitably prejudices the defendant," because "[w]hen a district court allows class plaintiffs to prove an individualized issue with classwide evidence, the court relieves them of their burden to prove each element of their claim for each class member and impedes the defendant's efforts to mount an effective defense." *Tyson*, 577 U.S. at 468 (Thomas, J., dissenting).

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[6] *See*, e.g., 1 *Newberg and Rubinstein on Class Actions* § 1:17 n.12 (6th ed. June 2024 Update) ("Between 2010 and 2020 inclusive, the number of federal class action filings increased by 268%.").

Congress itself also has recognized the importance of class certification, having created an avenue for interlocutory appeal of certain class certification orders (including the one at issue in this case) via Rule 23(f) precisely because of the significant impact that such orders can have on a case. See Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment (explaining that, in the absence of Rule 23(f), to obtain appellate review of a certification denial, a plaintiff may have to "proceed[] to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation," while the grant of 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").

Partly for that reason, this Court regularly grants petitions for a writ of certiorari to decide issues related to the standard for class certification. See, e.g., *Goldman Sachs Grp., Inc.* v. *Ark. Tchr. Ret. Sys.*, 594 U.S. 113 (2021); *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011). In fact, in *Comcast*, this Court granted review to answer a question nearly identical to the question presented in this case, but ultimately answered a different question due to the posture of that case. 569 U.S. at 32 n.4 (identifying question presented as: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis").

2. The question presented in this case is particularly important. What kind of evidence is necessary to carry the plaintiffs' burden at class certification under Rule 23—and whether expert evidence will be subjected to

"limited" or "full" *Daubert* scrutiny—is a question that arises in every class action. Furthermore, that question impacts the case from day one, driving the kinds of discovery sought and produced, the experts the parties retain, the analyses that those experts perform (or not) prior to class certification, and the briefs and exhibits that parties submit as district courts consider whether to grant or deny class certification. Parties and district courts deserve clarity about this important and wide-reaching issue.

The Ninth Circuit's opinion provides a roadmap for avoiding all but the most superficial scrutiny at the class certification stage. As described above, the opinion allows plaintiffs to avoid Rule 702/*Daubert* scrutiny simply by refusing to develop a model until after class certification, even when fact and expert discovery had already closed. *Supra* at Part II.B. In effect, despite lip service to accounting for the timing of class certification, the decision below permits district courts to certify now and ask questions later, regardless of the stage of the litigation or the state of the record—precisely what this Court has condemned. Any plaintiff can, like Plaintiffs here, promise to develop evidence in the future and, thus, satisfy the Ninth Circuit's standard through a simple copy-and-paste exercise, swapping out the name of the product at issue. Such an important question that goes directly to the heart of class actions warrants this Court's review.

3. This case presents the ideal vehicle to answer the question left unanswered by *Comcast*—"whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-

wide basis." 569 U.S. at 32 n.4.[7] Unlike the defendant in *Comcast*, Nutramax argued in the district court that Dubé's opinion should be excluded under *Daubert*. See Pet. App. 7a (describing Nutramax's argument in the district court). After the district court rejected that argument, Nutramax sought permission to appeal under Rule 23(f) and urged that the expert testimony was insufficient to be admissible under Rule 702 and allow the "rigorous analysis" required by Rule 23. The Ninth Circuit engaged with—and rejected—that argument. See *id.* at 24a–27a.

The posture—with class certification proceedings occurring after the close of fact and expert discovery—creates an ideal context to consider the question presented. There was no suggestion that Plaintiffs lacked the opportunity or ability to more fully develop their model for the class certification stage; they simply chose not to. And the Ninth Circuit's decision invites future plaintiffs to do the same, in the hope of forcing a settlement before their promised model can be subjected to any meaningful scrutiny.

Moreover, this evidentiary admissibility issue is outcome-determinative here. As the district court explained, "Under *Comcast*, 'plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.'" Pet. App. 81a (quoting *Pulaski & Middleman, LLC* v. *Google, Inc.*, 802 F.3d 979, 987–88 (9th Cir. 2015)). The *only* evidence that Plaintiffs presented at class certification

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[7] This Court did not reach that question in *Comcast* because the defendant had not objected to the admission of expert testimony. 569 U.S. at 32 n.4; *see also id.* at 39–40 (Ginsburg, J., dissenting) (explaining that "Comcast did not object to the admission of Dr. McClave's model under Rule 702 or *Daubert*").

to carry this burden was "Dubé's proposed 'choice-based conjoint analysis.'" *Id.* at 83a.

Had the district court applied a "full-blown *Daubert* assessment," Pet. App. 26a, a different result would be compelled. Among other things, the report here did not meet, and the district court did not apply, the clear and explicit requirements of Rule 702. And if the report is inadmissible to establish classwide damages, Plaintiffs lack any other evidence that damages can be calculated on a classwide basis, a critical element for class certification. The answer to the question presented will significantly impact this litigation and provide much needed guidance for class actions nationwide. The question thus warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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