No. 24-576

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Plaintiffs offer little more than a pro forma attack on the split in authority presented by this case: Do the rules regarding the admissibility of expert testimony apply in full at the class certification stage? This Court granted *certiorari* on *this* issue in *Comcast* (without resolving it), several courts of appeals have acknowledged the ongoing nature of the split, and even *after* this Petition was filed, the Sixth Circuit once again noted the split of authority. The split is live and recurring, and clearly requires this Court's resolution.

The thrust of the Brief in Opposition is that this case provides a poor vehicle to resolve the issue. Each obstacle it seeks to erect against resolving the issue in this case crumbles upon the slightest inspection.

Plaintiffs argue that the Ninth Circuit's "limited" *Daubert* analysis is mere wordplay and does not actually mean a lesser degree of scrutiny should apply. Yet the Ninth Circuit's own language makes clear that far less than a *Daubert* analysis applies, and that is how other courts view its decision. Plaintiffs also assert that Nutramax is seeking a "categorical rule" that requires an expert to run a damages model prior to certification in all class cases. But that is not true, and reversal here would not warrant such a broad holding. Dr. Dubé's report falls woefully short of merely failing to run his model. He failed even to collect the necessary data, confirm that he could collect the data, or decide on key assumptions necessary to apply his generally described method to the data. The result is a record that effectively precludes the district court from applying Rule 702's standards and cannot provide the "evidentiary proof" sufficient to satisfy Rule 23.

Plaintiffs have no way to prove that common issues predominate regarding whether putative class members were injured at all *except* by Dubé's proposed conjoint analysis. Plaintiffs' theory of class certification thus required them to come forth with evidence that they can and will have an expert's analysis that satisfies Rule 702. That is the majority view of the courts of appeals. Yet the Ninth Circuit affirmed the class certification order on something less than that, and, most importantly, on the basis of a record where nothing even approaching a proper Rule 702 analysis could have taken place. The split here is squarely implicated.

Further, this Petition presents an issue that goes hand in hand with this Court's recent grant in *Laboratory Corp. of America* v. *Davis*, No. 24-304, --- S. Ct. ----, 2025 WL 288305 (U.S. Jan. 24, 2025) (Mem.) ("*LabCorp*"). *LabCorp* will address the extent to which plaintiffs, to obtain class certification, must show that absent members have Article III standing. This Petition raises a predicate to the Article III standing inquiry in *LabCorp*, and one that must be addressed regardless of the Court's decision in that case: If plaintiffs rely on expert testimony to satisfy classwide injury, must that testimony satisfy the ordinary requirements of admissibility under Rule 702 at the class certification stage? The answer should be yes.

I. THE CIRCUIT SPLIT IS SUBSTANTIAL, RECURRING, AND REQUIRES THIS COURT'S RESOLUTION.

Plaintiffs spend little effort trying to deny the split of authority here. They mostly suggest any such split is a matter of "different ways of discussing" *Daubert*. BIO 17. Not so. Multiple courts—including the court

below—have recognized the existence of the split,[1] on an issue on which this Court previously granted *certiorari* in *Comcast Corp.* v. *Behrend*. Nevertheless, Plaintiffs attempt to gloss over the vehement and sustained disagreement among the circuits.

For example, Plaintiffs cite *American Honda*'s uncontroversial language that "courts must resolve challenges … 'to the reliability of information provided by an expert *if that information is relevant for establishing any of the Rule 23 requirements for class certification*." BIO 19 (quoting *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam)). They ignore *American Honda*'s holding "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," meaning it must "clearly resolve the issue of [the expert opinion's] admissibility before certifying the class." 600 F.3d at 815–17. *American Honda* thus required a "full *Daubert* analysis" and rejected a "'provisional' approach" of deferring the question until after certification. *Id.* at 816–17.

A later Seventh Circuit decision and the Third and Eleventh Circuits echoed these points. Where expert testimony is critical for class certification—here, to show the fact of classwide injury—the expert opinion must be shown to be "admissible under Federal Rule of Evidence 702" *before* certification is granted. *Messner* v. *Northshore Univ. Health–Sys.*, 669 F.3d 802, 811–12 (7th Cir. 2012); see *In re Blood Reagents*

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[1] E.g., *Sali* v. *Corona Reg'l Med. Ctr.*, 907 F.3d 1185, 1189 (9th Cir. 2018) (Bea, J, dissenting from denial of rehearing en banc) (writing that the Ninth Circuit was on "the wrong side of a lopsided circuit split").

Antitrust Litig., 783 F.3d 183, 188 (3d Cir. 2015) (rejecting class certification on premise that expert testimony "'could evolve to become admissible evidence'"); *Sher* v. *Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (requiring a "full *Daubert* analysis" and that district court "conclusively rule on the admissibility … of expert opinion prior to certifying the class").

Nor can Plaintiffs avoid the explicit conflict with the Fifth Circuit's holding that "the reliability of Plaintiffs' scientific evidence for certification cannot be deferred" and that the "metric of admissibility [should] be the same for certification and trial." *Prantil* v. *Arkema Inc.*, 986 F.3d 570, 575–76 (5th Cir. 2021). In fact, the district court in *Prantil excluded* testimony by one expert who, similar to Dubé, proposed a regression analysis that he had "not actually built or tested." *Id.* at 576. Plaintiffs argue here that "the district court *did* conduct the reliability assessment [*Prantil*] requires." BIO 22. But the district court did not and could not have considered Rule 702(b) and (d), and the Ninth Circuit explicitly held—contrary to *Prantil*—that a decision on the "ultimate admissibility" could be deferred until after certification. Pet.App.26a, 32a–33a.

Plaintiffs also do not address the Sixth Circuit's recent decision in *In re Nissan North America, Inc. Litigation*, 122 F.4th 239 (6th Cir. 2024)—which was issued after the Petition was filed, but was discussed at length in the Chamber's amicus brief. *Nissan* explicitly recognizes the split, identifying the Ninth Circuit—and the Eighth Circuit—as the minority view. *Id.* at 253. The Sixth Circuit also explained why the majority is correct under this Court's precedents: plaintiffs must provide "evidentiary proof" that they meet the elements of Rule 23, and thus when expert testimony is relevant to class certification, it must meet the usual requirements for admissibility. *Id.* at 253–54.

The split of authority among the courts of appeals is real and substantive. It requires this Court's resolution.

II. THIS CASE PRESENTS NO OBSTACLES TO RESOLVING THE SPLIT.

Plaintiffs offer a variety of reasons why this case is a poor vehicle for this Court to resolve the split. None withstands scrutiny.

1. Plaintiffs try to wriggle out of the split of authority by offering a gloss on the Ninth Circuit's holding that a "limited" *Daubert* analysis is appropriate here. To Plaintiffs, the court did not mean "that such inquiries were limited as to the degree of scrutiny, but rather that courts should limit their inquiry at the class certification stage to questions relevant to certification." BIO 2. But the opinion says otherwise.

In the Ninth Circuit's view, the "'limited' *Daubert* analysis" occurs "where an expert's model has yet to be fully developed," while a "full" admissibility analysis is permissible at the class certification stage "[i]f discovery has closed and an expert's analysis is complete." Pet.App.26a. In other words, the district court performs a "'limited' *Daubert* analysis" because the district court's ability to fully scrutinize a yet-to-be-developed model "is limited," *id.*, thus deferring the "ultimate scrutiny" for another day, Pet.App.32a.

Plaintiffs are not offering a way to reconcile the Ninth Circuit's ruling with other courts. They are merely reframing the split of authority. To Plaintiffs, the degree of *Daubert* analysis required turns entirely on the unilateral choice of an expert to decide how much work to put into an expert report before certification. If an expert merely promises to be able to gather data, then the expert gets a lower level of

evidentiary scrutiny. The less work the plaintiff puts in, the lower the evidentiary standard.

Tellingly, Plaintiffs do not—because they cannot—defend the notion that the Rules of Evidence vary depending on how much work the expert chooses to undertake. As the Chamber of Commerce Amicus Brief makes clear, the Rules of Evidence apply fully to all "proceedings in United States courts," including class certification proceedings. Brief of *Amici* Chamber of Commerce et al. at 9–10. That plaintiffs may, at their choosing, "delay" the question of "ultimate admissibility" until after certification misapplies the rules and contradicts the majority view.

Plaintiffs also wrongly suggest that the Ninth Circuit's admissibility discussion is mere dicta. The Ninth Circuit explicitly acknowledged the split and repeatedly relied on *Sali*—and the Ninth Circuit's outdated decision in *Blackie*—for the proposition that evidence at the class certification stage need not be admissible. Pet.App.14a, 24a–26a, 32a. It did so because, as noted above, the expert report could not have survived faithful application of Rule 702. Moreover, district courts are applying the Ninth Circuit's opinion, not as dicta, but as requiring a "somewhat relaxed" *Daubert* inquiry, which decreases the "level of scrutiny that applies at class certification." *Orshan* v. *Apple Inc.*, No. 5:14-cv-05659-EJD, 2024 WL 4353034, at *2 (N.D. Cal. Sept. 30, 2024); see also *Favell* v. *Univ. of S. Cal.*, No. CV 23-846-GW-MARx, 2024 WL 4868259, at *4, *12 (C.D. Cal. Nov. 13, 2024).

2. Plaintiffs are wrong that Nutramax is asking for a "categorical rule" that requires an expert to have run an analysis before a class may be certified. That is not Nutramax's contention (including because in many cases an expert model is not necessary to show class-wide injury). And while Plaintiffs act as if their expert

did everything but hit "run the model," that is not true either.

In reality, although Dubé outlined a proposed "conjoint" analysis, he had not meaningfully *developed* his model to allow a court to apply the Rule 702 standards, rather than some undefined "limited" (and clearly lesser) standard. As Dubé admitted at deposition:

- He had not yet collected sales data necessary to account for the varying products, sales channels, and time periods relevant to the class, nor had he developed a plan for collecting the data. See, e.g., 8-ER-1366–67, 1387–88, 1390–92.
- He had not yet determined the specific class demographics or how he would ensure that his survey of the target population yields representative results. 8-ER-1396–97, 1415–26.
- He had not yet drafted the survey questionnaire or decided exactly how he would present the choice options. 8-ER-1400, 1427–31, 1440–41, 1447–48.
- Although Dubé asserted that his model *would* account for real-world and supply-side factors, he had not decided on numerous assumptions or variables necessary to actually implement the model. 8-ER-1451–67, 1474–75, 1478–79, 1482, 1488–89, 1490–93.

Rule 702 was not and could not have been satisfied on this record. By its plain language, Rule 702 requires not only that testimony be based on a generally accepted methodology, but also that the testimony "is based on sufficient facts or data," and that the opinion "reflects a reliable application" of the principles and methods. Fed. R. Evid. 702(b), (d). Here, Dubé had

neither gathered the data nor decided on critical details necessary to apply it.

That data and those details matter. Inadequate or heterogenous data; unrepresentative samples; the failure to control for confounding factors—that is what causes models to fail. That is what courts must scrutinize to assess whether a method that may be valid in the abstract (e.g., "conjoint" or "hedonic regression") is actually reliable and capable of supporting certification as applied to a particular class. Because Dubé stopped short of further developing his model, he effectively shielded himself from any meaningful scrutiny for admissibility or the rigorous analysis required by Rule 23.

For the same reasons, the cases Plaintiffs cite representing the view that an expert need not have *run* his analysis are not at issue here. In many of those cases, and unlike Plaintiffs here, the plaintiffs were relying on experts only to calculate individual damages based on existing and objective data, *not* to create an economic model to establish certification prerequisites, such as classwide injury. See, e.g., *Green-Cooper* v. *Brinker Int'l, Inc.*, 73 F.4th 883, 893–94 & n.14 (11th Cir. 2023), *cert. denied sub nom. Brinker Int'l, Inc.* v. *Steinmetz*, 144 S. Ct. 1457 (2024); *Angell* v. *Geico Advantage Ins. Co.*, 67 F.4th 727, 732–33 (5th Cir. 2023); *Slade* v. *Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 (5th Cir. 2017). But "a district court's wide discretion to choose an imperfect estimative-damages model at the certification stage does not carry over from the context of damages to the context of liability." *Sampson* v. *United Servs. Auto. Ass'n*, 83 F.4th 414, 422–23 (5th Cir. 2023). Even in the cases Plaintiffs cited, where a party relied on an expert's "imperfect" model to establish classwide injury or liability, courts did not hesitate to vacate certification. *Id.* at 420–23.

In other cases Plaintiffs cite, the expert actually *had* performed analyses. See, e.g., *Nat'l ATM Council, Inc.* v. *Visa Inc.*, No. 21-7109, 2023 WL 4743013, at *6–8 (D.C. Cir. July 25, 2023) (per curiam), *cert. denied*, 144 S. Ct. 1381 (2024); *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, 915 F.3d 1, 12–13 (1st Cir. 2019); *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 96–97, 105–06 (2d Cir. 2017); *Green-Cooper*, 73 F.4th at 893–94 & n.14.

And *Schultz* v. *Emory University* did not grapple with the admissibility issue presented here at all, but instead vacated certification because the district court (like the courts below) wrongly "shift[ed] the burden" to the defendant to disprove plaintiffs' ability to show classwide damages. No. 23-12929, 2024 WL 4534428, at *5–6 (11th Cir. Oct. 21, 2024) (per curiam).

Nothing about this case, and resolving the split implicated here, requires adopting a categorical rule.

3. Plaintiffs' final argument is that their expert's model was not necessary to certify the class after all. BIO 26–27. That is not true.

To satisfy predominance and show the existence of classwide injury, Plaintiffs asserted in their class certification brief that they would "present common evidence demonstrating that Plaintiffs and class members paid a price premium for the Products as a result of deceptive terms included on the label." 7-ER-1187. That is the only overcharge theory Plaintiffs advanced at the Rule 23 stage, and the district court explicitly relied on their expert's proffer in finding predominance. Pet.App.75a, 83a–86a.

That assertion, however, was merely an allegation. As of class certification, the purported common evidence did not yet exist. Dubé was not opining that there in fact was a price premium associated with any

of the varying challenged statements or labels, and he had not yet collected the data, drafted the survey, or developed the economic model to test Plaintiffs' hypothesis.

Nor is it true that the success or failure of Dubé's model is solely a *merits* issue, rather than a class certification issue. Pet. 22–23; *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 31 n.3, 34, 37–38 (2013). For example, if Dubé ultimately cannot obtain sufficient data, generate representative results, or account for real-world confounding factors, that is not merely a merits issue—the model would be incapable of establishing injury or generating useable evidence for the class.[2]

Further, the results could show variation within the class. Here, Dubé's survey could show that the challenged representations were *not* material to many class members—something that Plaintiffs cannot gloss over through a formula that purports to calculate an "average" or "aggregate" price premium. As another example, this case involves varying representations and different product labels that changed over time. Dubé's model could show a price premium associated with some claims or labels but not others, or some time periods but not others, which would impact the appropriate class definition and reflect a need for individual inquiries into who bought what, and when. The ability of a methodology to generate classwide results *in*

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[2] Preliminary results or sensitivity analyses are indicators of reliability, as nonsensical outputs or false positives undercut a model's ability to survive a rigorous analysis. See *Olean Wholesale Grocery Coop., Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 683 (9th Cir. 2022) (en banc); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254 (D.C. Cir. 2013).

theory does not mean that it will be capable of establishing classwide injury as applied.

As suggested above, the Ninth Circuit's standard provides a roadmap for evasion of the "evidentiary proof" required for class certification. Several cases involving Dubé that Plaintiffs cite (BIO 14–15) merely rely on conjoint analysis as a generally accepted technique that has, in the past, successfully provided classwide evidence. But an abstract technique is not "evidentiary proof." There is nothing specific for defendants to challenge or for a district court to scrutinize. An expert who does less gets a lower degree of scrutiny. The goal, of course, is to obtain certification and exert pressure to settle before *anyone* can know whether class certification would ultimately prove sustainable.

This case squarely presents a circuit split on a recurring issue, where the Ninth Circuit's "relaxed" approach directly conflicts with the majority view, and where the split will not be resolved without this Court's intervention.

CONCLUSION

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

Respectfully submitted.

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