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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, BUSINESS ROUNDTABLE, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici represent a diverse array of businesses and business interests across the United States whose members are frequent targets of class-action lawsuits. They support the petition because they have a strong interest in ensuring that lower courts comply with the rigorous analysis required by Federal Rule of Civil Procedure 23 and Article III before permitting a case to proceed as a class action.

The organizations joining this brief are:

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

American Tort Reform Association. ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with a goal of ensuring

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[1] Pursuant to Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties received timely notice of this brief under Rule 37.2(a).

fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

Business Roundtable. Business Roundtable represents the chief executive officers of America's leading companies. Business Roundtable CEOs lead U.S.-based companies that support one in four American jobs and almost a quarter of U.S. gross domestic product. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as amicus curiae when important business interests are at stake.

The Retail Litigation Center, Inc. The RLC is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for hundreds of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases, and has filed more than 250 amicus briefs on issues of importance to the retail industry.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court is no stranger to the Ninth Circuit's role as a veritable conveyor belt of candidates for certiorari in class action matters. Time and again, the Court has seen the hyper-permissive approach to the certification-stage inquiry in the Ninth Circuit spawn calls for this Court's intervention. Indeed, since the start of this Term alone, the Ninth Circuit's lax gatekeeping of threshold Rule 23 and Article III prerequisites in class certification decisions has produced the pending petitions in *Kroger Co. v. Solano*, No. 26-244, *Bayer v. Drake*, No. 26-376, and now this case.

As amici argued in both *Kroger* and *Bayer* and reiterate here, this Court should follow through on what it has already recognized twice before: lower courts need clarity on whether they may certify a class containing members with no concrete injuries. Numerous courts, including the Ninth Circuit, have codified what is, in effect, an injury-optional analysis that impermissibly certifies Rule 23(b)(3) damages classes sweeping in scores of uninjured members. The upshot is that sprawling classes are routinely certified without what Article III unquestionably requires at the get-go of any individual suit: a showing that plaintiffs actually suffered harm from the challenged conduct.

Kroger presents an opportunity to clarify that a class containing injured and uninjured class members cannot be squared with Rule 23(b)(3) predominance and Article III. In addition, *Bayer* and this case

present excellent opportunities to resolve the question in the context of consumer-protection law. In this context, the combination of California's "reasonable consumer" standard for assessing the materiality of alleged misrepresentations and application of a class-wide "presumption of reliance" has produced overbroad classes containing members who manifestly suffered no injury-in-fact. Either way, this Court should not hesitate to bring long-overdue clarity by granting one or more of the pending petitions.

This petition pairs that question with an equally pressing, corollary question about damages: whether a Rule 23(b)(3) class may be premised on a model that would award damages to class members who could never recover damages in an individual suit. This Court's seminal decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), requires class plaintiffs to proffer a damages model that is not simply "applied classwide, no matter how arbitrary the measurements may be"—but that instead actually "measure[s] *only those damages attributable* to th[e] theory" of liability. *Id.* at 35-36 (emphasis added). Under Ninth Circuit precedent, however, a damages model need only show that it "'stem[s] from' or bear[s] a 'nexus' to the defendant's challenged conduct." Pet. 5 (quoting *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) and *Noohi v. Johnson & Johnson Consumer Inc.*, 146 F.4th 854, 867 (9th Cir. 2025)). This standard falls far short of the rigorous, liability-focused showing *Comcast* establishes, and thus cries out for this Court's review.

Here, plaintiffs are purchasers of sundry Nestlé USA chocolate products who allege that they were misled by 59 variants of a sustainability label. Plaintiffs proposed a model providing full refunds to every purchaser, and the Ninth Circuit deemed this model to have a generalized "nexus" to the challenged conduct. Yet the model produces arbitrary calculations, treating *every* Nestlé USA product as having been rendered "*entirely valueless*" to "*every purchaser*" as a result of the challenged product labels. App.8a (Clifton, J., dissenting). That defies common sense and the evidence. Many purchasers obtained some value from their chocolate nonetheless, and many did not rely on the label at all in their purchase decisions. The model thus manifestly fails to "measure[] only those damages attributable" to a theory of liability supported by evidence.

The lax attribution of damages is only compounded by the Ninth Circuit's penchant for painting any discussion of flaws with the damages model as a "merits" issue. Plaintiffs here *conceded* that some portion of class members would have purchased Nestlé USA's products regardless of the labels, yet the Ninth Circuit approved the certification—going so far as to invite the district court to jettison the full-refund model down the line and swap in a different model instead. In fact, whether damages are susceptible to non-arbitrary class-wide measurement is a certification-stage question that bears directly on predominance, and mere overlap with the merits does not obviate the need to address it. As *Comcast* makes clear, plaintiffs seeking class treatment cannot avoid committing to a workable damages methodology supported by the

evidence. Nor can they hide individualized issues behind half-baked, unexecuted models.

The erroneous approach reflected below has paved the way to the certification of overbroad classes that are being put on the glidepath to *in terrorem* settlements. The losers have been American businesses that find ever-more attractive targets put on their backs, and the consumers and workers that depend on them.

ARGUMENT

I. Review Is Needed to Clarify That Federal Courts May Not Certify a Rule 23(b)(3) Class Containing Uninjured Class Members.[2]

A. This Court Has Before It Multiple Excellent Vehicles.

This Court correctly judged 11 years ago in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), and again two years ago in *Laboratory Corp. of America Holdings v. Davis*, 605 U.S. 327 (2025) ("*LabCorp*"), that whether a class may be certified under Rule 23(b)(3) when it sweeps in uninjured class members warrants resolution. The importance of the question and the lower-court divisions over how to answer it prompted the Court to grant certiorari, and those same considerations apply with even greater force

[2] Although not the focus of this brief, Nestlé USA's petition additionally highlights divisions over prospective standing in consumer-fraud class actions—further underscoring the Ninth Circuit's hyper-permissive approach and the compelling need for review.

today. Multiple vehicles pending before this Court—*Kroger*, *Bayer*, and now this case—present all the upsides of review from *Tyson Foods* and *LabCorp* and none of their pitfalls. And they each exemplify the Ninth Circuit's outlier approach among circuits, which rejects the view that Rule 23(b)(3) "does not permit the certification of a class that potentially includes more than a de minimis number of uninjured class members." *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc); *see also Weiner v. Ocwen Fin. Corp.*, 343 F.R.D. 628, 632 (E.D. Cal. 2023) ("Put affirmatively," *Olean* means that "a class containing *more than a de minimis number* of uninjured class members *may be certified* pursuant to Rule 23.") (emphases added).

This Court should grant review in at least one of the pending vehicles and resolve the issue of uninjured class members once and for all. *See* Amici Br. of Chamber of Commerce, ATRA, and Business Roundtable, *Kroger Co. v. Solano*, No. 26-244; Amicus Br. of Retail Litigation Center, *Kroger Co. v. Solano*, No. 26-244; Amici Br. of Chamber of Commerce, ATRA, Business Roundtable, and Retail Litigation Center, *Bayer v. Drake*, No. 26-376. *Kroger* squarely tees up the question in a Rule 23(f) vehicle. Meanwhile, both *Bayer* and this case, which likewise arise from Rule 23(f) rulings, present excellent opportunities to resolve the same question in the context of consumer-protection laws, where permissive certification-stage gatekeeping has effectively produced default class treatment. Either way, this Court's intervention is long overdue.

B. The Ninth Circuit's Approach is Wrong, and Compounded By the Flawed "Presumption of Reliance" in California Consumer Protection Law.

1. For the reasons amici have previously articulated, the Ninth Circuit's certify-first approach to class certification is wrong on the merits. Its view that "a class containing *more than a de minimis number* of uninjured class members *may be certified* pursuant to Rule 23," *Weiner*, 343 F.R.D. at 632 (citing *Olean*, 31 F.4th at 669) (emphases added), contorts core tenets of both Rule 23(b)(3) predominance and Article III standing. *See Kroger* Amici Br. of Chamber et al. at 7-13; *Bayer* Amici Br. of Chamber et al. at 7-17.

Rule 23(b)(3)'s threshold requirement that common issues predominate is a "demanding" one. *Comcast*, 569 U.S. at 34. Rule 23's plain text—"predominate"—connotes that individualized issues should be de minimis. *Id.* at 33-34. Individualized standing assessments for each class member would plainly not be. As this Court made clear in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), it is not enough for class members to allege common *exposure* to a potential harm; they must show common resulting *injury*. *See id.* at 622-26 (class decertified because predominance is "not met" by "members' shared experience of asbestos exposure"; some were "currently injured," others suffered "exposure only," and others had further "disparities"). Nor can members rest on the abstract claim that they "suffered a violation of the same provision of law"; they must "affirmatively demonstrate" that "their

claims can productively be litigated at once" and are "capable of classwide *resolution*." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis added); *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) ("[U]nder Article III, an injury in law is not an injury in fact."). It follows that a "straightforward" application of "Rule 23 and this Court's precedents" compels the view that "when a damages class includes both injured and uninjured members, common questions do not predominate." *LabCorp*, 605 U.S. at 328, 332 (Kavanaugh, J., dissenting).

So too with Article III standing. As a threshold matter, "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion*, 594 U.S. at 431. Thus, where proposed class members lack evidence of concrete harm, the class-action device cannot manufacture a stake that does not otherwise exist. *See* 28 U.S.C. § 2072(b); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 331 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). Nor does it permit Article III defects to be waved aside for post-certification winnowing, rather than addressed at certification.

The Ninth Circuit below flouted those principles. In its view, common questions predominated because "all the class members were exposed to the misrepresentation" on Nestlé USA's chocolate product labels. App.3a-5a. Deeming common exposure "all that is required," the court relegated its discussion of injury-in-fact to a footnote. App.3a. Circuit precedent, the footnote stated, makes clear that if "some class members suffered no injury," that

"does not, by itself, defeat class certification." App.3a n.1 (citing *Olean*, 31 F.4th at 669, 680-81). In any event, the footnote went on, plaintiffs' "*argument* that class members would not have spent money on Nestlé USA's products had they known about the misrepresentations" amounted to "quintessential injury-in-fact." *Id.* (emphasis added).

Mere "argument," however, cannot substitute for evidence; "plaintiffs wishing to proceed through a class action must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). And injury-*in-fact* is meaningless if merely asserting a generalized allegation surmounts that bar. In reality, the evidence presented by plaintiffs laid waste to the "highly implausible" premise that every class member derived zero value from the purchased chocolate due to the supposed misrepresentation. App.8a (Clifton, J., dissenting); *see also infra* Part II. Indeed, differences in how and whether commonly-exposed members saw, relied on, or were remotely harmed by the alleged misrepresentation are precisely the kind of disparities that unraveled the class in *Amchem*. *Cf.* 521 U.S. at 624 (noting that "'members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods," and "[s]ome … suffer[ed] no physical injury"). The simple fact of exposure cannot satisfy class plaintiffs' affirmative obligation to "actually prove" their satisfaction of the Rule 23 prerequisites and Article III standing before certification. *Halliburton*, 573 U.S. at 275-76.

2. Here, as in *Bayer*, the errant approach to uninjured class members at certification is only exacerbated by the backdrop of consumer-protection law. Various features of California consumer-protection law have, in practice, transformed product-labeling claims into (in the Ninth Circuit's eyes) the gold standard for class treatment, further augmenting the Ninth Circuit's admitted "lean[] toward approving class certifications and class settlements." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 582 (9th Cir. 2019) (Ikuta, J., dissenting).

For claims under the state's Unfair Competition Law ("UCL") and Consumers Legal Remedies Act ("CLRA"), California law allows materiality to be established based on whether an objective, "reasonable consumer" would view the challenged statement as important in the purchase decision. *Noohi*, 146 F.4th at 868. Upon finding that "a material misrepresentation was made," moreover, plaintiffs are afforded a class-wide "presumption of reliance." *Lytle v. Nutramax Lab'ys, Inc.,* 114 F.4th 1011, 1019 (9th Cir. 2024). Through this presumption, California sidesteps individualized inquiries into each class member's reliance and resulting injury altogether. *See* App.32a (although CLRA requires "'a showing of actual injury as to each class member,'" "[t]his may be presumed … if the misrepresentation is material").

That state-law presumption of reliance stands on unsound footing and is at odds with the federal Article III analysis. It is premised on an inapt analogy to the presumption in federal securities-fraud cases. *See*

Vasquez v. Superior Ct., 4 Cal. 3d 800 (1971) (applying the presumption in fraud cases and analogizing to securities fraud); *Massachusetts Mut. Life Ins. Co. v. Superior Ct.*, 97 Cal. App. 4th 1282 (2002) (extending *Vasquez* from fraud to CLRA context). There, the presumption of reliance of *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), rests on the understanding "that investors rely on the market price of a company's security, which in an efficient market incorporates all of the company's public misrepresentations." *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 117 (2021). But those considerations do not translate to the consumer-goods market. Consumers have a panoply of personal and emotional motivations for purchasing goods untethered to prices. Product prices do not tick fluidly up and down based on labeling. Accordingly, "[m]ost courts have not permitted plaintiffs in consumer cases to overcome the predominance shortcoming … through use of the securities law 'fraud on the market' presumption of reliance." 1 McLaughlin on Class Actions § 5:55 (22nd ed. 2025).

In California consumer-protection cases, the threshold prerequisites of Rule 23(b)(3) and Article III are as critical as they are everywhere else, yet courts have shown inordinate willingness to short-circuit them. California is free to fashion a "reasonable consumer" standard and "presumption of reliance" to make product-labeling claims more amenable to class treatment as a matter of state law. But it cannot establish a federally-sufficient Article III injury that does not actually exist. Where, as here, the putative class consists of injured and uninjured class members—consumers who relied on the label in

purchase decisions and consumers who did not—California law cannot and should not bridge that gap.

The unfortunate result has been a discernible thumb on the scale for certification, and the propagation of massive consumer classes in which scores of members cannot show threshold harm. Precisely because the Ninth Circuit has pronounced such claims "generally susceptible to common proof," *Lytle*, 114 F.4th at 1034, and "generally 'ideal for class certification,'" *Noohi*, 146 F.4th at 868, the need for course-correction is especially acute.

II. Review Is Also Needed to Clarify that Under *Comcast*, Flawed Damages Models Cannot Be Waved Through As Future "Merits" Issues.

The petition tees up a similarly important, related question over whether deficiencies in a damages model—here, the model's disconnect from injury—should be addressed at certification or relegated to the bin of future "merits issues."

In *Comcast*, this Court made clear that plaintiffs seeking Rule 23(b)(3) treatment—in that case, for antitrust claims—must commit to a damages calculation method and "establish that damages are susceptible of measurement across the entire class *for purposes of Rule 23(b)(3)*." 569 U.S. at 35-36 (emphasis added); *see also id.* at 33 (party seeking class certification "must ... satisfy through evidentiary proof … provisions of Rule 23(b)"). Plaintiffs had proposed four theories of antitrust impact, only one of which the district court permitted. Comcast argued that plaintiffs' damages model was

flawed because it did not isolate damages resulting from plaintiffs' sole remaining theory of liability—an argument that the Third Circuit dismissed as an attack on the model's "merits." *Id.* at 33-34.

This Court, however, saw it differently, reversing certification. As this Court explained, Comcast's argument—that the model was disconnected from the "particular … injury on which [the defendants'] liability" rested—required "'rigorous analysis'" because it bore directly on the propriety of Rule 23(b)(3) certification. *Id.* at 36-37. Plaintiffs need to proffer a damages model that is not simply "applied classwide, no matter how arbitrary the measurements may be"—but that instead actually "measure[s] *only those damages attributable* to th[e] theory" of liability. *Id.* at 35-36 (emphasis added). Absent such a model, "individual damage calculations" would predominate over common issues, not vice versa. *Id.* at 34.

1. Courts have learned drastically different lessons from *Comcast*. The Fourth Circuit recently placed *Comcast* at "center stage," holding that it requires courts to "conduct a rigorous analysis" of whether "plaintiffs, at the class-certification stage, [have] put forth evidentiary proof of a damages methodology showing how damages are calculable on a class-wide basis in a manner that is consistent with their theory of liability." *Off. of Gen. Treasurer ex rel. Emps. Ret. Sys. v. Boeing Co.*, 182 F.4th 422, 428 (4th Cir. 2026). The court explained that plaintiffs' methodology must yield "'a just and reasonable inference'" of damages, lest predominance be

rendered "'a nullity.'" *Id.* at 441 (quoting *Comcast*, 569 U.S. at 35-36).

The D.C. Circuit has likewise held, post-*Comcast*, that "[i]t is now indisputably the role of the district court to scrutinize" a proffered damages model "before granting certification," even if doing so entails some "inquiry into 'the merits.'" *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013). Criticisms about the damages model being "prone to false positives," it explained, were questions to be dealt with before certification, not after. *Id.*; *see also id.* ("No damages model, no predominance, no class certification.").

Most circuits, however, have treated *Comcast* as a non-event, continuing to certify classes around common issues of liability while punting individualized damages questions to the merits. The Third Circuit, for instance, stated in *Neale v. Volvo Cars of N. Am., LLC* that "to interpret [*Comcast*] as precluding certification under Rule 23(b)(3) in any case where the class members' damages are not susceptible to a formula for classwide measurement" would be a "misreading." 794 F.3d 353, 374 (3d Cir. 2015); *see also, e.g.*, *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015) ("*Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis[.]"); *In re Deepwater Horizon,* 739 F.3d 790, 815, 817 (5th Cir. 2014) ("nothing in *Comcast* mandates a formula for classwide measurement of damages in all cases" or impacts cases "in which predominance was based … on … common issues of liability"); *Butler v. Sears,*

Roebuck & Co., 727 F.3d 796, 801 (7th Cir. 2013) (similar); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.,* 722 F.3d 838, 860-61 (6th Cir. 2013) (similar). In these circuits, there is no certification-stage prerequisite that plaintiffs establish the susceptibility of damages to class-wide measurement, let alone with evidentiary proof.

So too in the Ninth Circuit. There, the *Comcast* inquiry is simply whether a damages model "'stem[s] from' … or bear[s] a 'nexus' to … the defendant's challenged conduct." Pet. 5. Far from probing whether the model "measure[s] only those damages attributable to" the "particular … injury on which [defendant's] liability … is premised," *Comcast*, 569 U.S. at 35-36, the Ninth Circuit treats deficiencies in attribution as a merits issue.

As amici have long urged, *e.g.,* Amicus Br. of Chamber of Commerce, Business Roundtable, and Nat'l Assoc. of Mfrs. as Amici Curiae in Support of Petitioners, *Sears, Roebuck & Co. v. Butler*, No. 13-430, this Court should resolve the divisions and bring courts that have failed to heed *Comcast* into line. Entertaining further percolation would only further defang *Comcast*'s critical message.

2. In the meantime, defanging *Comcast* makes little sense, freeing from scrutiny flawed damages models that bear only tenuous connections to theories of liability. Glossing over injury gaps in nominally "class-wide" damages models only distorts the predominance analysis and pads classes with members who could never prevail in individual suits. *See TransUnion*, 594 U.S. at 431 ("[e]very class

member must have Article III standing in order to recover individual damages").

That problem is particularly stark here, where Plaintiffs proposed a full-refund model that presupposes that all class members would view their purchased Nestlé USA products as "*entirely valueless*" in light of the challenged label. App.8a (Clifton, J., dissenting). Applying its lax standard, the Ninth Circuit summarily blessed that model, reasoning only that "Falcone's full refund theory of liability stems from her theory of deception." App.5a. But that model is also "highly implausible and not supported by *any* evidence." App.8a (Clifton, J., dissenting). Many purchasers would not have seen or relied on the sustainability label, or would have purchased the Nestlé USA product nonetheless. The model's premise is even contradicted by the named plaintiff's admission that she could not resist buying a Butterfinger *after* she became aware of the allegations. *Id.* In fact, she readily acknowledged that many purchasers would not merit full refunds and proposed to later introduce evidence of "what percentage of consumers" that would be. App.9a (Clifton, J., dissenting); *see also* Pet. 31-32 (explaining that California law warrants full refunds only if purchasers derived no benefit from the product).

Rather than grapple with these facially apparent shortcomings of the proposed model, the Ninth Circuit dismissed them as "merits issue[s] not decided at class certification" but "'at trial.'" App.6a. But even if questions about arbitrary damages bleed into the merits to some degree, they strike at the heart of the Rule 23(b)(3) predominance inquiry. *Comcast*'s

focus on whether a model "measure[s] only those damages attributable to th[e] theory" of liability, *Comcast*, 569 U.S. at 35-36, was rooted in the recognition that individualized damages issues will otherwise predominate. It is cold comfort to know that a damages model produces "common" refunds if many are unjust and unwarranted. And requiring only a loose nexus between the damages model and challenged conduct—as opposed to tethering damages to liability—falls well short of the standard announced in *Comcast*. The full refund model approved in this case therefore casts into sharp relief the perils of the Ninth Circuit's departure from this Court's precedents.

Nor should the Ninth Circuit permit plaintiffs to obtain certification while leaving the damages methodology up in the air. Just as quickly as the Ninth Circuit purported to accept plaintiffs' full-refund model for certification purposes, the court urged the district court to substitute in a *different* damages model that the court had never addressed—noting that Dr. Ingersoll, the same expert in *Bayer,* could offer a price-premium theory of damages in lieu of the full refunds. App.6a n.2; *but see Drake v. Bayer Healthcare LLC*, No. 24-7158, 2026 WL 1079027, at *4 (Forrest, J., dissenting) (price premiums are no answer to the problem that "only those class members who *relied* on the misrepresentation have suffered a *legally cognizable injury*") (emphases added). The mention of a damages model that was never even addressed by the district court shows how far afield the scrutiny of models has strayed from that envisioned in *Comcast.*

Courts should not accept half-baked damages models unsupported by the evidence, nor reflexively relegate defects in those models to be addressed at trial. Whether or not plaintiffs have a workable plan for computing non-arbitrary damages on a class-wide basis goes to the heart of whether class-wide adjudication is permissible.

III. The Ninth Circuit's Approach "Raise[s] the Costs of Doing Business."

1. The practical consequences of the Ninth Circuit's certify-first approach are "overinflated" classes that threaten businesses with "massive liability" and "substantially raise the costs of doing business." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

As amici have previously laid out, Ninth Circuit caselaw reflects a rinse-and-repeat of *Olean*'s takeaway that uninjured members—even *many* uninjured members—are no obstacle to class certification. *See Kroger* Amici Br. of Chamber et al. at *13-21 (summarizing cases); *Bayer* Amici Br. of Chamber et al. at *17-22 (summarizing cases). What began with the Ninth Circuit's resistance to *capping* the uninjured at a de minimis number has hardened into an affirmative endorsement of *including* more-than-de-minimis numbers of the uninjured in certified classes. The Ninth Circuit has repeatedly certified classes while treating injury gaps as problems to be solved, if at all, after certification.

The Ninth Circuit's approach to damages models has similarly produced sprawling classes while deferring defects in those models to be addressed, if

at all, after certification. In case after case, even when individualized damages issues loom large, the court has shied away from demanding a showing that damages are susceptible to class-wide treatment.

In *Leyva v. Medline Industries, Inc.,* 716 F.3d 510, the Ninth Circuit reversed a denial of certification, reviving a putative employee class alleging labor law violations. The Ninth Circuit held that "damages determinations are individual in nearly all wage-and-hour class actions," but that this "'does not detract from the action's suitability for class certification.'" *Id.* at 513-14. *Comcast*, it maintained, merely held that "plaintiffs must be able to show that their damages *stemmed from* the defendant's actions that created the legal liability." *Id.* at 514 (emphasis added). That nexus was satisfied, it concluded, simply because "damages will be calculated based on the wages each employee lost due to Medline's unlawful practices." *Id.* In its view, "damages could … efficiently be calculated once the common liability questions are adjudicated." *Id.*

Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979 (9th Cir. 2015), similarly reversed a denial of certification, reviving a class of "hundreds of thousands of" advertisers that claimed, under California consumer-protection laws, to have been misled by a search engine over sites on which advertisements could appear. *Id.* at 984-85. The district court noted that "individual inquiries" were required to sift through which advertisers warranted restitution, given that "many … derived direct economic benefits" from the conduct. *Id.* at 985. But the Ninth Circuit maintained that *Comcast* requires

only that damages "'stemmed from the defendant's actions that created the legal liability.'" *Id.* at 987-88 (quoting *Leyva*, 716 F.3d at 514). Plaintiffs' proposed methodology focused on what a "reasonable consumer" would have paid, and "'California has created what amounts to a conclusive presumption that when a defendant puts out tainted bait … the defendant has caused an injury'" to all. *Id.* at 986. Thus, the Ninth Circuit reasoned, the methodology was not "arbitrary" and sufficiently stemmed from the alleged harm. *Id.* at 989.

Lytle v. Nutramax Laboratories, Inc., 114 F.4th 1011, meanwhile, affirmed certification of a class of consumers of dog products marketed as promoting healthy joints. The Ninth Circuit rejected any "requirement that class action plaintiffs actually prove that classwide damages exist," painting it as a conflation of the certification and merits stages. *Id.* at 1025. And it read *Comcast* to permit reliance on "unexecuted" models and to stand only "for the unremarkable proposition that 'plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability.'" *Id.* at 1024-25 (quoting *Leyva*, 716 F.3d at 514). It brushed aside concerns that plaintiffs' price-premium "model, once executed, might show no injury at all." *Id.* at 1026-27. So too, it downplayed the possibility that the model might leave "an ascertainable portion of the class … unable to recover" because they were "not exposed to a statement with any attributable overcharge." *Id.* Individualized damages issues, it maintained, would not amount to a *Comcast* problem no matter what, because the model "allows a damages figure to be associated with each challenged

statement." *Id.* at 1028. Today, an $11.5 million class settlement awaits final approval. *See* Order at 7, *Lytle v. Nutramax Lab'ys, Inc.*, No. 19-0835 (C.D. Cal. Feb. 2, 2026), Dkt. No. 218.

Noohi v. Johnson & Johnson Consumer Inc., 146 F.4th 854, similarly affirmed certification, this time of a class of consumers of Johnson & Johnson products who took issue with a representation that products were "oil-free." The Ninth Circuit found no error in the district court's acceptance of the proposed, unexecuted price-premium damages model as sufficient for certification purposes. It maintained that the inquiry under *Comcast* is simply whether Noohi has "'demonstrated the nexus between [her] legal theory ... and [her] damages model.'" *Id.* at 867. By this measure, the model "adequately *for present purposes* matched Noohi's theory of harm." *Id.* (emphasis added). In its view, "[w]hether the proposed calculation of the price premium will prove accurate" when later executed was a "merits inquir[y] unrelated to class certification." *Id.*

Drake v. Bayer Healthcare LLC, No. 24-7158, 2026 WL 1079027 (9th Cir. Apr. 21, 2026), *cert. pending*, is more of the same. The Ninth Circuit affirmed class certification—in another unpublished disposition over a dissent, reflecting the circuit's entrenched approach—of thousands of "Natural Fruit Bites" multivitamin purchasers. Plaintiffs relied on a proposed, unexecuted price-premium damages model, which Bayer contended "cannot constitute evidence of classwide injury." *Id.* at *2; *see also id.* at *5 (Forrest, J., dissenting) ("I disagree … that the results of Dr. Ingersoll's proposed conjoint analysis will necessarily

answer whether the entire class suffered legal injury."). Yet the Ninth Circuit reaffirmed that class plaintiffs "may rely on … not-yet-executed damages model[s]." *Id.* at *2. It underscored that "the key inquiry ... is simply whether Plaintiffs have demonstrated the nexus between their legal theory ... and their damages model." *Id.* And it found, once again, the price-premium model to pass muster.

In case after case, classes are routinely certified on the premise that any serious grappling with flaws in those models—including broad disparities in injury—can be left to the merits stage. And because certification so often proves outcome-dispositive, that merits stage will in all likelihood never come to pass.

2. In any event, there are "serious real-world consequences" extending well beyond the Ninth Circuit of treating injury gaps in classes and damages models as no bar to certification. *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting).

Today, more businesses than ever face class-action lawsuits. "[A]round 10,000 class action lawsuits are filed annually." *Class Actions 2021* at 91, Jonathan D. Polkes & David J. Lender, eds. (2021). 74.7% of companies—three of four—have reported managing class actions, a steep increase from 54.4% in 2018. *See* 2026 Carlton Fields Class Action Survey at 8, https://www.carltonfields.com/insights/class-action-survey. Meanwhile, class-action defense spending has grown from $2 billion in 2011 to $4.53 billion in 2025, with $4.8 billion projected for 2026. *See id.* at 6-7. Such defense typically takes years, imposing protracted burdens on businesses irrespective of the merits. *See* Adam Mills & Laura Hopkins, *Lex*

Machina, Class Action Litigation Report 18 (April 2026) ("the median time to class certification was over two years, and the median time to class action settlement was over two and a half years"); Cornerstone Research, *2025 Review & Analysis of Securities Class Action Settlements* 13, https://www.cornerstone.com/wp-content/uploads/2026/02/Securities-Class-Action-Settlements-2025-Review-and-Analysis.pdf ("median duration from case filing to settlement hearing was 3.5 years").

Class-certification rulings, moreover, often prove outcome-dispositive. "[C]lass certification sets the litigation on a path toward resolution by way of settlement." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). The catastrophic liability threatened by class actions, coupled with the costs of defending against them, "coerce[] businesses into costly settlements." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). As this Court has recognized, class actions can "place pressure on the defendant to settle even unmeritorious claims." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524 (2018); *see also* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973) (describing, as "blackmail settlements," those induced by a small chance of a very large judgment). But even settlements have become more difficult and expensive to come by, as plaintiffs' counsel have been emboldened in their litigation strategy. *See* 2026 Carlton Fields Class Action Survey at 24 (noting recent drop in settlements).

The astronomical costs to businesses will undoubtedly redound "to consumers in the form of higher prices; to retirement account holders in the form of lower returns; and to workers in the form of lower salaries and lesser benefits." *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). Incorrectly-certified classes only ensure that consumers "share the cost of litigation in the grocery store's checkout counter, at the dealership, and in their health and auto insurance rates, through less consumer choice, and damage to the economy." Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation: Where Should Tort Law Draw the Line?,* 80 Brook. L. Rev. 599, 675 (2015).

This Court's guidance is needed to restore predominance to its proper place—not as a box to be ticked off by mere argument or proposed theories, but as a rigorous requirement that demands, with evidentiary proof, sufficient cohesion to merit class-wide adjudication.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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