

No. 25-874

IN THE
Supreme Court of the United States

JOHNSON & JOHNSON CONSUMER INC.,
Petitioner,

v.

NARGUESS NOOHI, INDIVIDUALLY AND ON BEHALF OF
OTHER MEMBERS OF THE GENERAL PUBLIC SIMILARLY
SITUATED,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a district court abuses its discretion in considering a “reliable though not-yet-executed damages model” in deciding whether to grant class certification under Federal Rule of Civil Procedure 23(b)(3).

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INTRODUCTION

In *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), this Court held that, to establish predominance under Federal Rule of Civil Procedure 23(b)(3), a plaintiff seeking class certification must produce a model that can “measure only those damages attributable” to the plaintiff’s theory of liability. In 2024, in *Lytle v. Nutramax Laboratories, Inc.*, 114 F.4th 1011, 1019 (9th Cir. 2024), *cert denied*, 145 S. Ct. 1308 (2025), the Ninth Circuit held that, to meet this requirement, “class action plaintiffs may rely on an unexecuted damages model to demonstrate that damages are susceptible to common proof so long as the district court finds that the model is reliable and, if applied to the proposed class, will be able to calculate damages in a manner common to the class at trial.” No court of appeals disagrees.

In this case, the Ninth Circuit applied the rule from *Lytle* in addressing the appeal by Petitioner Johnson & Johnson Consumer Inc. (JJCI) from the district court’s (pre-*Lytle*) consideration, in granting class certification, of an unexecuted damages model developed by an experienced economist. Over several pages of its opinion, the court of appeals applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and analyzed JJCI’s challenges to both the model’s reliability and its relevance to the Rule 23 inquiry, ultimately concluding that “the district court did not abuse its discretion in finding that [the] model could reliably measure damages on a classwide basis.” Pet. 13a–19a.

In this Court, JJCI does not ask this Court to address the rule adopted in *Lytle* and applied by the Ninth Circuit in this case. Indeed, JJCI acknowledged

below that it “has never advanced the categorical argument that an expert must run a damages (or other) model before certification.” Appellant’s Supp. Br. 7. And while below JJCI identified the “main point of disagreement” as whether a court could permissibly rely on “underdeveloped” expert testimony at the certification stage, *id.* at 8, in this Court it pivots and seeks review of a different question: whether Federal Rule of Evidence 702 and its reliability standard are applicable at the class certification stage. But neither the Ninth Circuit nor Respondent disagree with JJCI that they are applicable.

To suggest otherwise, JJCI myopically focuses on the court of appeals’ use of the word “limited” to describe the nature of the inquiry that district courts should perform in analyzing class-certification evidence under *Daubert*. As is clear in context, however, the court did not hold such inquiries are limited as to the degree of scrutiny applied to expert evidence, but rather that courts should limit their inquiry at the class-certification stage to questions relevant to certification. The court’s use of the word “limited” thus neither runs afoul of this Court’s precedent nor implicates any circuit split. Indeed, it is consistent with the position that JJCI *itself* took in briefing below, where it argued that “[a] district court must resolve disputes about the admissibility and reliability of expert testimony when challenged at the class-certification stage *if those disputes bear on the elements of Rule 23.*” Appellant’s Br. 23 (emphasis added).

Each of the courts of appeals to which JJCI points as being on the other side of a circuit split agree, as JJCI did below, that district courts must address the

reliability of expert testimony only insofar as that testimony is relevant to questions at that stage—many using the word “limited” themselves to describe the scope of the mandatory *Daubert* inquiry in connection with class certification motions. None of the cases suggest that unexecuted damages models are categorically unreliable or inadmissible under Rule 702. Rather, the cases largely involve situations where district courts failed to assess at all the reliability of expert testimony at the certification stage—something that is also prohibited under the Ninth Circuit’s rule.

Here, the lower courts, after analyzing the expert’s detailed model and JJCI’s arguments about the model’s reliability, concluded that the model, grounded in generally accepted methods and backed by substantial experience, bore sufficient indicia of reliability and spoke to the question relevant at the certification stage—whether it was possible to measure damages on a classwide basis. This assessment of reliability and relevance is exactly what *Daubert* requires. JJCI’s disagreement with the lower courts’ fact-bound conclusion as to the reliability and sufficiency of the model does not warrant review.

The petition should be denied.

STATEMENT OF THE CASE

District Court Proceedings

JJCI manufactured, marketed, and sold a variety of Neutrogena brand skin care products that it labeled “oil free,” including the “Neutrogena Oil-Free Face Moisturizer for Sensitive Skin, Fragrance Free, Non-Comedogenic.” 9th Cir. ER-72–73. Having been advised by a doctor to avoid products containing oils of any kind, Respondent Narguess Noohi bought that

product based on the representation that it was “oil free.” *Id.* ER-17–19, 28–33. Unbeknownst to Ms. Noohi, though, the “oil-free” moisturizer contained three oils: ethylhexyl palmitate, soybean sterols, and dimethicone. 9th Cir. SER-352–53.

After discovering the true contents of the “oil-free” moisturizer that she had purchased, Ms. Noohi sued JJCI in the Central District of California on behalf of herself and a putative class of consumers, alleging that JJCI had “intentionally label[ed] its skin care products with false and misleading claims that they contain no oil and are ‘oil free.’” 9th Cir. ER-72. Her complaint includes claims for violations of California’s Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, 17500, and its Consumer Legal Remedies Act (CLRA), Cal. Civ. Code § 1750, and for common law fraud. *Id.* ER-71.

After the parties engaged in extensive fact and expert discovery, Ms. Noohi moved for class certification. In her motion, Ms. Noohi relied on the analyses and reports of two experts—only one of whom JJCI addresses in its petition, Dr. Wade Roberts. Dr. Roberts, a forensic economist with more than a decade of experience who had provided expert analysis in more than 100 cases, *id.* ER-284–85, produced a 15-page report as to “whether a method exists to determine economic damages (on a class wide basis) using common evidence relating to the ‘oil-free’ misrepresentation,” *id.* ER-268. Answering in the affirmative, he set out a model for doing so that would utilize both qualitative and quantitative market survey research. The proposed model would rely on a survey that “involves a pre/post-exposure price elasticity method,” “intentionally explores the key

metrics related to Neutrogena’s ‘oil-free’ products and incorporates consumer’s overall satisfaction, likelihood of recommending the product, likelihood of repurchasing or reusing the product, and feelings of brand loyalty.” *Id.* ER-270. He explained that damages would be calculated “using multivariate statistics utilizing paired-samples t-tests, quantifying the differences in ratings of oil-free and not oil-free perceptions.” *Id.* His report set out details as to the methodologies he would employ at each step of data collection and analysis. *Id.* ER-271–82. JJCI’s lawyers also deposed Dr. Roberts, where he answered numerous questions about the analysis he planned to conduct, how he came up with the proposed methodology, and his experience. *Id.* ER-152–266.

JJCI opposed class certification on numerous grounds, while also submitting “evidentiary objections” to both of Ms. Noohi’s experts. Dist. Ct. Dkt. 80-25. JJCI did not request a *Daubert* hearing.

The district court granted Ms. Noohi’s motion to certify a class. Pet. 30a–44a. In so doing, it explained that “[a] court ‘evaluating challenged expert testimony in support of class certification ... should evaluate admissibility under the standard set forth in *Daubert*.’” *Id.* 37a (quoting *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018)). Addressing damages, the court held that, to satisfy Rule 23, Ms. Noohi “need not show the actual amount of damages incurred[,] just that a ‘valid method has been proposed for calculating those damages.’” *Id.* 41a (quoting *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 817 (9th Cir. 2017)).

The court concluded that Dr. Roberts’s model satisfied this requirement. *Id.* 41a–43a. First, the

court noted that “numerous courts have approved damages models” like Dr. Roberts’s in CRLA cases. *Id.* 42a. As to JJCI’s challenges to the “admissibility” of Dr. Roberts’s opinions, the court dismissed several as “lack[ing] an evidentiary basis.” *Id.* And the court found that Ms. Noohi had established that Dr. Roberts “is qualified to deliver his econometric analysis, that his analysis will, ultimately, be useful to the fact finder, and that, ultimately, Noohi can support her damages calculations with admissible evidence when she needs to.” *Id.* (citing *Sali*, 909 F.3d at 1006). Finally, the court rejected JJCI’s challenges to Dr. Roberts’s proposed model—including its argument that the model was inadequate because it had not yet been executed. *Id.* 42a–43a. The court explained that JJCI’s critiques “d[id] not establish that Noohi’s proposed methodology is inadequate,” but rather went to the weight that would be given to “the conclusions it might deliver.” *Id.* 43a. Such challenges, it continued, were “not yet ripe” and could be raised “at summary judgment or trial.” *Id.* 43a (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016)).

Court of Appeals Proceedings

The Ninth Circuit granted JJCI’s Rule 23(f) petition for permission to appeal the district court’s class certification order. On appeal, JJCI renewed its challenges to Dr. Roberts’s damages model, while also making separate arguments related to materiality and reliance. As to Dr. Roberts’s model, it argued that “the district court did not conduct the rigorous analysis that Rule 23 requires,” contending that “Dr. Roberts’s damages methodology does not align with Plaintiff’s theory of harm” as required by *Comcast*, and “was too skeletal for the district court to conduct

the required analysis.” Appellant’s Br. 22–23. In so doing, JJCI asserted that “[a] district court must resolve disputes about the admissibility and reliability of expert testimony when challenged at the class-certification stage *if those disputes bear on the elements of Rule 23.*” *Id.* at 23 (emphasis added).

After oral argument, the court of appeals deferred ruling pending a decision in *Lytle*. In a supplemental brief filed after the court issued its opinion in that case, JJCI asserted that *Lytle* was “consistent with JJCI’s arguments” as to the “district court’s task at class certification” and reaffirmed its position that the district court was not required to hold a *Daubert* hearing. Appellant’s Supp. Br. 7–8. While noting that it “disagree[d]” with *Lytle*, *id.* at 9 n.5, JJCI maintained that the Ninth Circuit’s decision in that case was irrelevant to what it identified as “the main point of disagreement”—“the permissibility of relying on ‘underdeveloped’ expert testimony at certification”—because *Lytle* itself recognized that the “underdeveloped” nature of a model was a relevant factor in both the Rule 702 and Rule 23 analyses. *Id.* at 8. As to Dr. Roberts, the supplemental brief focused on arguments that his model would not yield a “proper measure of restitution/damages under California law,” *id.* at 3–5, and that it was insufficiently developed, *id.* at 10–12.

The court of appeals unanimously affirmed the class certification order, rejecting JJCI’s arguments as to Dr. Roberts’s damages model, as well as its materiality and reliance arguments. Pet. 1a–29a. As to Dr. Roberts’s model, the court first held that JJCI had sufficiently preserved its *Daubert* arguments, despite not seeking a hearing or filing a motion in

limine. Pet. 12a n.4. The court then looked to *Lytle* for “the appropriate inquiry into a damages model at class certification,” recognizing its holding “that there is no categorical prohibition” on reliance on unexecuted damages models, but that “evaluation of an unexecuted damages model at class certification ‘requires determining whether the expert’s methodology is reliable.’” *Id.* 11a–12a (quoting *Lytle*, 114 F.4th at 1029, 1025). To conduct such an evaluation, the court explained, “a limited *Daubert* analysis may be necessary,” even though a more “full-blown *Daubert* assessment of the *results* of the application of the model would be premature.” *Id.* 12a (quoting *Lytle*, 114 F.4th at 1031; emphasis added).

As *Lytle* more fully explained, “the distinction between a ‘full’ and ‘limited’ *Daubert* inquiry is a function of what aspect of FRCP 23 is being addressed.” 114 F.4th at 1030. Where, as here, the question is whether damages are capable of being assessed on a classwide basis, not what those damages are, some of the considerations suggested in *Daubert* are not yet relevant. *Id.* Further, “*Daubert* itself stressed that its suggested factors were simply illustrative and needed to be applied flexibly, and this surely means applying them only to the extent helpful to the issue at hand.” *Id.*

Applying the standard set forth in *Lytle*, the court of appeals concluded that “the district court’s application of *Daubert* at the class certification stage was not an abuse of discretion.” *Id.* 12a. In so holding, the court noted that the district court “considered and explained how Dr. Roberts proposed to” measure damages on a class-wide basis, “found Dr. Roberts qualified as an expert in econometrics and relied on

the fact that other courts have approved similar damages models in other CLRA cases.” *Id.* 12a–13a.

The court then explained why JJCI’s argument that the “model was not sufficiently developed to support the district court’s approval of class certification” was “unpersuasive,” as Dr. Roberts had done more than “merely gestur[e] at a model or describe[] a general method.” *Id.* 13a. Referencing Dr. Roberts’s qualifications “as an expert in econometrics with experience in survey design and execution,” the court explained that, although Dr. Roberts “had not yet finally worded the questions or executed the survey,” he “had designed the survey methodology and identified target respondent populations.” *Id.* 13a–14a. “The speculative possibility that [Dr. Roberts] might slip up in executing his model, standing alone,” the court explained, was not a basis to deny class certification. *Id.* 14a (quoting *Lytle*, 114 F.4th at 1033). Further, the court found that a challenge to the *outputs* of Dr. Roberts’s model was “not ripe.” *Id.* 14a.

In addressing JJCI’s arguments that Dr. Roberts’s model was inconsistent with Ms. Noohi’s theory of harm, the court of appeals further explored Dr. Roberts’s proposed methodology—analyzing the Van Westerndorp price elasticity test that he planned to use to measure the price premium. Addressing JJCI’s critique that Dr. Roberts’s model would “improperly include the ‘emotional value’ that consumers associate with learning that the ‘Product’s label contains a lie,’” the court found that those arguments were based “on an improper understanding of the measure of the price premium under California consumer protection law,” and noted the similarity of Dr. Roberts’s model

to damages models approved in other cases. *Id.* 15a–18a.

Finally, the court acknowledged Dr. Roberts’s own testimony “emphasiz[ing] the need to conduct the pricing survey in a ‘neutral’ matter.” *Id.* 19a. As the district court had, the court of appeals made clear that, “[s]hould Dr. Roberts’ execution of the survey fall short of that mark, JJCI may explore that failure at summary judgment, in a renewed *Daubert* motion, or during cross-examination at trial.” *Id.* But, based on its careful consideration, the court concluded that “Roberts’ proposed damages model was designed to measure a price premium associated with the misleading label at the heart of Noohi’s claims”—the only question relevant under *Comcast* at this stage. *Id.* Whether the calculations produced by that model were accurate, the court concluded, “is a merits inquiry unrelated to class certification.” *Id.* (quoting *Nguyen*, 932 F.3d at 821).

JJCI petitioned for rehearing en banc, which was denied without any judge requesting a vote. Pet. 45a.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit’s rule—that unexecuted damages models may be considered where they are reliable and relevant—is consistent with that of the other courts of appeals.

A. As JJCI advised the Ninth Circuit, “the main point of disagreement” on appeal in this case was whether and how an unexecuted expert damages model should be considered at the class certification stage. Appellant’s Supp. Br. 8. In resolving that disagreement, the Ninth Circuit explained “that there is no categorical prohibition on a district court relying on an unexecuted damages model to certify a class,”

Pet. 11a (quoting *Lytle*, 114 F.4th at 1029), but that the model must be “reliable” and “likely to provide common answers at trial,” *id.* 12a (quoting *Lytle*, 114 F.4th at 1031, 1032 n.8). That is, a plaintiff must show both “that an expert’s model is sufficiently reliable to meet the standard of FRE 702” and “that the model will be capable of generating common answers” to satisfy Rule 23(b)(3). *Lytle*, 114 F.4th at 1032.

Importantly, the fact that the expert’s model has not been executed is a “factor that must be considered” as part of the reliability analysis. *Id.* at 1028. That a model may be “underdeveloped may weigh against a finding that it will provide a reliable form of proof.” *Id.* at 1032. And the Ninth Circuit made explicit that “[m]erely gesturing at a model or describing a general method will not suffice” to meet a plaintiff’s burden, and that “plaintiffs—or their expert—must chart out a path to obtain all necessary data and demonstrate that the proposed method will be viable as applied to the facts of a given case.” Pet. 13a (quoting *Lytle*, 114 F.4th at 1032).

Following that instruction, district courts in the Ninth Circuit have taken seriously their obligation to ensure that a particular unexecuted damages model is reliable before finding it admissible for purposes of class certification. Notably, several courts have invoked *Lytle* in finding that an unexecuted damages model was *not* sufficiently reliable to support class certification. *See, e.g., LeGrand v. Abbott Labs.*, 2025 WL 2323352, at *5–6 (N.D. Cal. Aug. 12, 2025) (applying *Lytle* and excluding expert’s proposed damages model as unreliable); *Blain v. Liberty Mut. Fire Ins. Co.*, 2025 WL 886966, at *4–9 (S.D. Cal. Mar. 21, 2025) (same); *Cambridge Lane, LLC v. J-M Mfg.*

Co., 2025 WL 1843110, at *7–15 (C.D. Cal. Feb. 24, 2025) (same); *Orshan v. Apple Inc.*, 2024 WL 4353034, at *2–7 (N.D. Cal. Sept. 30, 2024) (applying *Lytle* to find one unexecuted model unreliable under *Daubert* and others reliable).

B. JJCI has disclaimed any argument that the Ninth Circuit erred in refusing to adopt a categorical prohibition on reliance on unexecuted damages models. See JJCI Supp. Br. 7. Such a categorical prohibition would be in tension with this Court’s recognition that a party need not produce “exact” calculations of damages at the class-certification stage, *Comcast*, 569 U.S. at 35, and no court of appeals has adopted it.

To the contrary, four courts of appeals have approved the use of unexecuted damages models to demonstrate predominance—including three of the courts of appeals that JJCI argues apply a different rule than the Ninth Circuit did here. To start, the Eleventh Circuit stated that it saw “much merit” in *Lytle*’s holding that there is no categorical prohibition on reliance on such models. *Schultz v. Emory Univ.*, 2024 WL 4534428, at *6 n.5 (11th Cir. Oct. 21, 2024). That statement is consistent with the Eleventh Circuit’s earlier holding that plaintiffs seeking class certification must prove only “that a reliable damages methodology existed, not the actual damages plaintiffs sustained.” *Green-Cooper v. Brinker Int’l, Inc.*, 73 F.4th 883, 893 (11th Cir. 2023).

The Fifth Circuit takes the same approach. For example, in *Slade v. Progressive Security Insurance Co.*, 856 F.3d 408 (5th Cir. 2017), the plaintiffs’ expert testified that damages could be calculated on a classwide basis, but she had not yet calculated

damages and acknowledged that she currently did not have all of the data necessary to run her model. *See Slade v. Progressive Sec. Ins. Co.*, 2014 WL 6484588, at *6 (W.D. La. Oct. 31, 2014). Over the defendant’s objections, the district court admitted her testimony and certified the class. *Id.* at *6, *8. On appeal, the Fifth Circuit affirmed in relevant part, finding that the expert’s testimony that she *could* calculate damages on a classwide basis was sufficient to support class certification. *Slade*, 856 F.3d at 410–11. Likewise, the Fifth Circuit also affirmed a district court’s class certification order in *Angell v. GEICO Advantage Insurance Co.*, 67 F.4th 727, 739–40 (5th Cir. 2023), where the plaintiffs’ expert provided a formula by which damages could be calculated, without running that formula. These decisions are consistent with the Fifth Circuit’s recognition that “‘estimative techniques’ for measuring damages ‘need not be exact at the class certification stage.’” *Sampson v. United Servs. Auto. Ass’n*, 83 F.4th 414, 421 (5th Cir. 2023) (citing 4 *Newberg & Rubenstein on Class Actions* § 12:4 (6th ed.)).

The Second Circuit, too, has found sufficient evidence of a common damages methodology based on an expert’s unexecuted model and his opinion that “damages for individual class members *could* be calculated by applying a method across the entire class.” *Waggoner v. Barclays PLC*, 875 F.3d 79, 105–06 (2d Cir. 2017) (emphasis added). In so doing, the court affirmed a district court order that rejected arguments that *Comcast* requires an expert to perform his analysis at the class certification stage. Rather, the district court explained, “[w]hether plaintiffs will be able to prove ... damages” was a “question[] that go[es] to the merits and not to

whether common issues predominate.” *Strougo v. Barclays PLC*, 312 F.R.D. 307, 327 and n.136 (S.D.N.Y. 2016).

Finally, the Third Circuit also agrees that a district court properly may rely on an unexecuted damages model to satisfy *Comcast*, approving of class certification in a case where a defendant argued otherwise. *Forsythe v. Teva Pharmaceutical Industries Ltd*, 102 F.4th 152, 159 (3d Cir. 2024). There, as here, the defendant had argued that the proffered study was “too vague to constitute a sufficient showing that damages can be reasonably calculated.” *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, 2023 WL 7285167, at *20 (E.D. Pa. Nov. 3, 2023). Denying review under Rule 23(f), the Third Circuit held that the proposed methodology was sufficient to satisfy Rule 23’s class-certification requirements, and noted that questions about the output of the methodology “need not be determined at the class certification stage.” *Forsythe*, 102 F.4th at 159.

The Second, Third, Fifth, and Eleventh Circuits’ holdings are sound applications of the broader principle, recognized by other courts of appeals, that “common evidence sufficient for class certification need not conclusively establish class-wide liability and damages, but that Plaintiffs must present creditable evidence from which questions common to the class members’ claims could be resolved at trial in one stroke.” *Nat’l ATM Council, Inc. v. Visa Inc.*, 2023 WL 4743013, at *6 (D.C. Cir. July 25, 2023) (per curiam) (mem. op.); see *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, 915 F.3d 1, 12 (1st Cir. 2019) (“The central issue ... is not whether the method of

proof would or could prevail. Rather, it is whether the method of proof that would apply is common to all class members.”). Plaintiffs must present a model that can be applied to the class, consistent with their theory of damages, but need not run that model at the certification stage.

District courts across the country have similarly held that plaintiffs may rely on unexecuted damages models to show that damages are susceptible to classwide proof. These district courts include those in each of the circuits that JJCI contends conflict with the approach taken by the court in this case. Pet. 2; *see, e.g., Clayton v. FCA US LLC*, 2025 WL 2265432, at *5 n.4 (E.D. Mich. Aug. 7, 2025) (citing the decision in this case for the proposition that “[t]here is no categorical prohibition on a district court relying on an unexecuted damages model to certify a class”); *In re Concho Res., Inc. Sec. Litig.*, 2025 WL 1040379, at *20 (S.D. Tex. Apr. 7, 2025) (finding an unexecuted damages model sufficient under *Comcast*); *In re Upstart Holdings, Inc. Sec. Litig.*, 348 F.R.D. 612, 629–30 (S.D. Ohio 2025) (same); *In re Cassava Scis., Inc. Sec. Litig.*, 2024 WL 4824243, at *19 (W.D. Tex. Nov. 15, 2024) (same); *In re Takata Airbag Prod. Liab. Litig.*, 677 F. Supp. 3d 1311, 1329 (S.D. Fla. 2023) (same); *Durgin v. Allstate Prop. & Cas. Ins. Co.*, 2023 WL 3855139, at *2–3 (W.D. La. June 6, 2023) (rejecting a *Daubert* challenge to an expert’s proposed testimony on the ground that model had not been applied); *Benson v. Newell Brands, Inc.*, 2021 WL 5321510, at *5 (N.D. Ill. Nov. 16, 2021) (relying on an unexecuted damages model to find predominance); *Utesch v. Lannett Co.*, 2021 WL 3560949, at *15–17 (E.D. Pa. Aug. 12, 2021) (rejecting a *Daubert* challenge to an expert’s unexecuted damages model),

aff'd on other grounds sub nom. Univ. of P.R. Ret. Sys. v. Lannett Co., 2023 WL 2985120 (3d Cir. Apr. 18, 2023); *Pub. Emps.' Ret. Sys. of Miss. v. TreeHouse Foods, Inc.*, 2020 WL 919249, at *9 (N.D. Ill. Feb. 26, 2020) (rejecting an argument that certification was improper because the expert's damages model had not been executed); *Monroe Cnty. Emps.' Ret. Sys. v. Southern Co.*, 332 F.R.D. 370, 399 (N.D. Ga. 2019) (similar).

In this case, the district court and the court of appeals engaged in a similar analysis, concluding that Dr. Roberts's proposed model was admissible to show commonality based on a finding of reliability and relevance. This uniformity among the lower courts shows that there is no conflict among the circuits relevant to the class certification order on appeal in this case. Rather, no matter how the *Daubert* inquiry is described, courts agree that the inquiry does not preclude reliance on a reliable unexecuted damages model to show that damages are susceptible to classwide proof.

II. Differences in how courts have discussed *Daubert* and Rule 23 do not present a basis for review.

Given the lack of disagreement among the lower courts as to what JJCI referred to below as the “main point of disagreement,” JJCI pivots to a different question: It asserts that the decision below implicates a divide among the courts of appeals as to the “extent to which Rule 702 and *Daubert* apply to evidence submitted to support class certification.” Pet. 7. In JJCI's telling, the approach of the Ninth Circuit in this case and in *Lytle* conflicts with the approach of

the Third, Fifth, Sixth, Seventh, and Eleventh Circuits.

JJCI is wrong. The cases on which JJCI relies show no conflict with respect to the standard for consideration of proffered expert evidence at the class certification stage. The courts of appeals agree that district courts are required to assess expert evidence under *Daubert* only to the extent that the evidence implicates questions relevant to class certification. Indeed, JJCI *itself* espoused that rule in this case, when it asserted that “[a] district court must resolve disputes about the admissibility and reliability of expert testimony when challenged at the class-certification stage *if those disputes bear on the elements of Rule 23.*” Appellant’s Br. 23 (emphasis added).

The cases cited by JJCI reflect, at most, different courts’ different ways of discussing this core precept—a precept upon which the Ninth Circuit itself has relied to hold that expert evidence was properly *excluded* at the class certification stage. See *Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 984–87 (9th Cir. 2020). And, as noted above, district courts within the Ninth Circuit continue to engage in *Daubert* analyses with respect to the questions relevant at the certification stage and decline to rely on unreliable expert testimony. See *supra* pp. 11–12 (collecting cases).

A. That the *Daubert* inquiry with respect to expert testimony proffered at the certification stage is tailored to the questions before the court at that stage follows from *Daubert* itself. *Daubert*, like other evidentiary doctrines, ties admissibility to the purposes for which evidence is offered, by requiring

district courts to determine whether evidence is “relevant to the task at hand.” 509 U.S. at 597. The “task at hand” at class certification (establishing that the requirements of Rule 23 are met) is different from the “task at hand” at trial (establishing whether liability and damages have been proved). Indeed, the common practice of bifurcated discovery in putative class actions is premised on this idea. *See* Ann. Manual for Complex Lit. § 21.14 (4th ed. 2025). And while “a court’s class-certification analysis must be ‘rigorous,’ ... Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66 (2013). Courts may consider merits questions only “to the extent ... they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Id.* at 466. Just as Rule 23 does not allow courts to address at the certification stage questions that go solely to the merits, *Daubert* does not require it.

The Ninth Circuit’s distinction between “full” and “limited” *Daubert* inquiries is an application of this principle. Rather than conducting a “full-blown *Daubert* assessment of the results of the application of [an unexecuted] model,” district courts at the certification stage may conduct an inquiry “limited” to the question whether evidence is reliable for the sole purpose for which it is being offered at that stage: its reliability in showing that damages are *capable* of being calculated on a classwide basis. Pet. 12a. Although courts may use different terminology, they agree that, at the class certification stage, “the *Daubert* inquiry should be limited to the relevance and reliability of the expert’s testimony as it relates to class certification under Rule 23.” *Wilson v. Centene*

Mgmt. Co., __ F.4th __, 2026 WL 473217, at *8 (5th Cir. Feb. 19, 2026).

B. The petition’s primary assertion is that the Ninth and Eighth Circuits take a different approach than the Third, Fifth, Sixth, Seventh, and Eleventh Circuits. The cases soundly rebut that assertion.

To start, JJCI cites the concurrence in *Allen v. Ollie’s Bargain Outlet*, 37 F.4th 890 (3d Cir. 2022)—a case that did not involve expert evidence at all. *See* Pet. 16. The language quoted by JJCI summarizes the Third Circuit’s earlier decision in *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), which vacated and remanded a class certification order when the district court had not addressed *at all* “the reliability of plaintiffs’ expert’s methodologies” underlying a proposed damages model. *Id.* at 188. That opinion directed the district court on remand “to decide in the first instance which of [the defendant’s] reliability attacks, if any, challenge those aspects of plaintiffs’ expert testimony *offered to satisfy Rule 23* and then, *if necessary*, to conduct a *Daubert* inquiry.” *Id.* (emphases added). Implicit in this direction is that the district court would *not* have to conduct a *Daubert* inquiry to the extent that the defendant’s reliability attacks did not go to Rule 23 considerations. That direction is consistent with the Ninth Circuit’s rule that a *Daubert* inquiry should be “limited” to the issues relevant to class certification. And it is consistent with the Ninth Circuit’s *Daubert* analysis as to the evidence challenged in this case. *See* Pet. 13a.

Moreover, *Blood Reagents* explained why any “variation” among courts of appeals’ “formulations” about the nature of the required *Daubert* inquiry was not meaningful. 783 F.3d at 188 n.8. Citing decisions

that JJCI wrongly asserts fall on opposite sides of a purported split, the Third Circuit described those decisions as “[c]onsistent with our holding here” in that they “limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of Rule 23’s requirements.” *Id.* (citing *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) and *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)). Thus, the lead case that JJCI offers as evidence of a conflict among the circuits explains that there is no meaningful difference among the circuits at all.

Next, JJCI turns to the Fifth Circuit’s decision in *Prantil v. Arkema Inc.*, 986 F.3d 570 (5th Cir. 2021), cited at Pet. 16–17. There, the parties agreed that the district court was required to apply *Daubert* to the evidence at issue, but disagreed as to whether the district court had done so. *Id.* at 576. The Fifth Circuit remanded because the district court’s wording suggested that the court “was not as searching in its assessment of the expert reports’ reliability as it would have been outside the certification setting.” *Id.* In so doing, the court recognized that some of the challenges being raised by the defendant likely went only to the weight of the challenged reports, not to their reliability. *Id.*

Prantil poses no conflict here. As discussed above, the Ninth Circuit does not limit how “searching” the district court’s reliability analysis should be, but what aspects of the proffered evidence must be examined. The Fifth Circuit itself recently explained how a *Daubert* inquiry should be “limited” in such a way. In *Wilson*, the court explained that, while *Prantil* requires courts to apply the same “metric of

admissibility ... for both certification and trial,” “the *Daubert* inquiry should be limited to the relevance and reliability of the expert’s testimony as it relates to class certification under Rule 23.” 2026 WL 473217 at *8. That “limited” *Daubert* analysis is what the Ninth Circuit requires as well.

The Sixth Circuit’s decision in *In re Nissan North America, Inc. Litigation*, 122 F.4th 239 (6th Cir. 2024), cited at Pet. 17, reflects this same distinction. There, the court held that, “[i]f challenged expert testimony is material to a class certification motion, the district court must demonstrate the expert’s credibility under *Daubert*.” *Id.* at 253. The court remanded because the lower court did not assess the reliability of an expert report that was “a critical piece of the plaintiff’s effort to answer th[e] commonality inquiry.” *Id.* at 253–54. The district court, the Sixth Circuit concluded, was required to assess whether the expert’s opinion, which did not address damages, “reflects the ’knowledge and experience of his discipline.” *Id.* at 254 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999)). Here, both the district court and the court of appeals did just that—noting Dr. Roberts’s qualifications, that his methodology was similar to that regularly deployed by others in the field, and that his proposed model was properly designed to measure a relevant price premium. *See* Pet. 13a–19a, 42a–43a. Nothing in *Nissan* conflicts with the courts’ observation here that challenges to the outputs of the not-yet-executed model were not yet ripe. *See id.* 43a.

In *Nissan*, the Sixth Circuit did suggest there was a divide amongst courts of appeals, reading the Ninth Circuit’s 2018 opinion in *Sali* to hold that *Daubert* should be used “to assess the weight of evidence,

rather than to exclude evidence.” 122 F.4th at 253 (citing *Sali*, 909 F.3d at 1003–06). Whether or not that was an accurate view of *Sali*, the Ninth Circuit more recently, both here and in *Lytle*, made clear that evidence must be reliable to be considered at all. See Pet. 12a. Thus, as noted above, district courts in the Ninth Circuit applying *Lytle* regularly use *Daubert* to exclude unreliable evidence at the class certification stage. See *supra* pp. 11–12.

Next, JJCI turns to the Seventh Circuit’s per curiam decision in *American Honda*, 600 F.3d at 814–15, cited at Pet. 17–18. There, the Seventh Circuit held that a district court erred in considering expert evidence despite “definite reservations about the reliability” of the expert’s methodology, where the evidence was not “supported by empirical evidence” and was not “generally accepted by the [relevant] community.” *Id.* at 814–15. While stating that “the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants,” the Seventh Circuit explained that it was not asking district courts to make the inquiry required at the merits stage, but instead that the courts must resolve challenges “to an individual’s qualifications” and “to the reliability of information provided by an expert *if that information is relevant to establishing any of the Rule 23 requirements for class certification.*” *Id.* at 816 (emphasis added).

The Seventh Circuit’s subsequent cases confirm this point. In *Messner v. Northshore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012), for example, the court explained that *American Honda* requires a *Daubert* ruling as to expert testimony to the extent it is “important to an issue decisive for the

motion for class certification.” *Id.* at 812 (emphasis added). And as the Seventh Circuit put it last year, the court is “not required to resolve every expert dispute” at the class certifications stage—and is indeed not permitted to resolve those questions “unrelated to the decisions essential to Rule 23.” *Arandell Corp. v. Xcel Energy Inc.*, 149 F.4th 883, 894 (7th Cir. 2025).

Finally, the Eleventh Circuit’s unpublished opinion in *Sher v. Raytheon Co.*, 419 F. App’x 887 (11th Cir. 2011), *cited at* Pet. 18–19, likewise does not conflict with the decision below. The opinion holds that the district court erred when it “refused to conduct a *Daubert*-like critique of the proffered expert’s qualifications” and should have “ruled on the admissibility” of the expert’s testimony for purposes of the class certification motion. *Id.* at 890–91. The district court did just that here. And, as discussed above, the Eleventh Circuit’s more recent opinions, including one favorably citing the *Lytle* opinion, make clear that the Eleventh Circuit does not prohibit reliance on unexecuted damages models. *See Schultz*, 2024 WL 4534428, at *6 & n.3; *see also Green-Cooper*, 73 F.4th at 893 (recognizing that, at class certification stage, plaintiffs must prove only “that a reliable damages methodology exist[s] not the actual damages plaintiffs sustained”).

In sum, the courts of appeals agree that, at the class certification stage, district courts must assess whether expert evidence is reliable under the guideposts established by *Daubert* and Rule 702, and that they should “limit” their inquiries to the extent that the evidence addresses questions relevant to the

Rule 23 inquiry. The decision below follows that uniform approach.

III. This case is a poor vehicle to address JJCI's question presented.

As JJCI told the Ninth Circuit, the parties' "main point of disagreement" in this case has always related to the specific question of how unexecuted expert models should be examined under *Daubert* at class certification. That is the question that the Ninth Circuit addressed in its opinion in this case and in *Lytle*. It remains the dispositive question in the case. Yet JJCI insists that it is *not* the question on which it seeks certiorari.

Instead, JJCI frames its question presented as whether *Daubert* and Rule 702 apply at the class certification stage. *See* Pet. i. Both parties agree, however, that they apply, as do the lower courts—including the district court and the court of appeals in this case. *See* Pet. 12a & n.4; *id.* 37a–38a; *see also Lytle*, 114 F.4th at 1029–1031; *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 665, 665 n.7 (9th Cir. 2022); *Grodzitsky*, 957 F.3d at 984–85.

JJCI's suggestion that this case is a vehicle to address the (undisputed) question of whether Rule 702 applies at all because the Ninth Circuit "did not analyze or apply the requirements of Rule 702," Pet. 22, is a misleading representation of the court of appeals' several pages of analysis responding to JJCI's critiques. *See* Pet. 12a–20a. *Daubert* held that Rule 702 requires courts to "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. at 597. There is no "definitive checklist or test" that courts are to

apply in assessing reliability under *Daubert*. *Kumho Tire*, 526 U.S. at 150. Rather, *Daubert*'s "test of reliability is 'flexible,'" and courts are granted "broad latitude" both as to "how to determine reliability" and in their "ultimate reliability determination." *Id.* at 141–42.¹ Under *Daubert*, the focus is "solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595. For that reason, reliability "is primarily a question of the validity of the methodology employed by an expert, not the quality of the data used in applying the methodology or the conclusions produced." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013).

In concluding that Dr. Roberts's model was reliable based on Dr. Roberts's experience and training, the similarity of his proposal to those regularly accepted by courts, and a detailed examination of how exactly he proposed to measure the price premium, the Ninth Circuit's analysis was consistent with this flexible test. And the lower courts' conclusions that Dr. Roberts's proposed model was relevant and reliable reflect the hallmarks of *Daubert* analysis. *See* Pet. 13a (noting that the district court "determin[ed] that Dr. Roberts' model was reliable and capable of measuring damages on a classwide basis"); *id.* 19a (holding that "the district court did not abuse its discretion in finding that Dr. Roberts' model could reliably measure damages on a classwide basis").

The actual disagreement between the parties, then, is not whether *Daubert* applies, but whether the particular unexecuted damages model proposed here

¹ JJCI is *not* arguing that the district court was required to hold an evidentiary hearing under *Daubert*. Appellant's Supp. Br. 6 n.3.

passes muster under *Daubert*. For good reason, the petition does not seriously engage with that question. *See* Pet. 22 (inaccurately dismissing Dr. Roberts’ detailed proposed methodology as no more than a “promise to develop an opinion”). As JJCI seems to recognize, the particular merit of the particular expert model introduced below is not a question justifying certiorari. *See* S. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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