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

RESPONDENTS' BRIEF IN OPPOSITION

MARK R. SIGMON
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
5 W. Hargett Street
Suite 1001
Raleigh, NC 27601
(919) 451-6311

ADAM R. PULVER
ADINA H. ROSENBAUM
Counsel of Record
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Respondents

January 2025

QUESTION PRESENTED

Whether, in granting a motion for class certification, the district court abused its discretion by concluding that an expert's testimony, based on a "well-accepted economic methodology," was reliable and admissible for the purposes of showing that damages were capable of being measured on a classwide basis.

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INTRODUCTION

Certification of a class under Federal Rule of Civil Procedure 23(b)(3) is appropriate where, among other things, "the questions of law or fact common to class members predominate over any questions affecting only individual members." As part of this showing, the named plaintiff will often need to establish that damages are capable of measurement on a classwide basis. In *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013), this Court held that, to do so, a plaintiff must produce a model that can "measure only those damages attributable" to the plaintiff's theory of liability.

Here, as the district court and the court of appeals both held, the plaintiffs did just that: The plaintiffs submitted testimony from a well-credentialed economist explaining how damages attributable to their theory of liability could be determined on a classwide basis using conjoint analysis and detailing how he would go about doing so should a class be certified. Recognizing that this testimony reflected a "well-accepted economic methodology" and considering the expert's qualifications, the district court found the expert's opinion reliable and admissible under Federal Rule of Evidence 702 and concluded that the proffered model sufficed to meet the plaintiffs' burden under Rule 23.

In reaching these conclusions, the district court and the court of appeals rejected Petitioners' arguments that Rule 702 and Rule 23 categorically require plaintiffs not just to produce a model for measuring classwide damages, but also to execute that model pre-certification. In holding that an unexecuted damages model that is "otherwise

reliable" may be both admissible and sufficient to show predominance, the court of appeals struck no new ground. No court of appeals has held otherwise. Perhaps for this reason, Petitioners do not ask this Court to grant review as to the dispositive question whether the execution of a damages model is a prerequisite to class certification.

Instead, seizing on dicta in the court of appeals' opinion, Petitioners recast this case as one raising a different question: whether, as a general matter, expert evidence submitted as part of the predominance inquiry must "satisfy the requirements for admissibility." Pet. i. That question, however, is not actually raised by this case, because the district court *did* determine that the challenged evidence was relevant and reliable under the standard set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). And the court of appeals concluded that that determination was not an abuse of discretion, while confirming that such a relevance and reliability inquiry was required by the Rules of Evidence. *See* Pet. App. 3a.

Petitioners focus on the court of appeals' use of the word "limited" in describing the *Daubert* analysis that district courts undertake at class certification. Petitioners misread the opinion. The court did not suggest 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. The court of appeals' use of the word "limited" in this way neither runs afoul of this Court's precedent nor implicates any circuit split. To the contrary, each of the courts of appeals to which Petitioners point has recognized

that, at the class certification stage, district courts need address the reliability of expert testimony only to the extent that the testimony is relevant to questions at the class certification stage. And nothing in the cases cited suggests unexecuted damages models are categorically unreliable or inadmissible under Rule 702—or even addresses unexecuted damages models at all. Rather, the cases largely involve situations where district courts, unlike the district court here, failed to assess at all the reliability of expert testimony at the class certification stage.

Importantly, district courts in each of the Circuits that Petitioners claim requires a more searching *Daubert* analysis than was applied here regularly rely on experts' unexecuted damages models—including models proposed by the same expert at issue here—for the purpose of showing a common damages question post-*Comcast*, rejecting challenges under both Rule 702 and Rule 23. As in those cases, the district court did not abuse its discretion here by concluding the plaintiffs' expert's detailed model, grounded in generally accepted methods and backed by substantial experience, bore sufficient indicia of reliability to speak to the limited question before it. Moreover, even without the challenged evidence, the class would have been properly certified based on other common issues of law and fact identified by the lower courts, and not challenged by the petition.

For all these reasons, certiorari is not warranted.

STATEMENT OF THE CASE

Petitioners Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. (collectively, Nutramax) develop and sell supplements for pets, including Cosequin, which Nutramax

markets as promoting canine joint health. Pet. App. 43a. These marketing claims, though, are unsupported by reliable science and are refuted by peer-reviewed evidence that shows Cosequin and its active ingredient confer no more benefits than a placebo. *Id.*; 9th Cir. ER 1072, 1090–93. Respondents Justin Lytle and Christine Musthaler purchased Cosequin for their dogs, relying on Nutramax's representations as to the product's health benefits. Pet. App. 44a; 9th Cir. ER 1101. They did not see any improvement in their dogs' health, however. *Id.*

District Court Proceedings

Mr. Lytle and Ms. Musthaler filed this putative class action in May 2019. The operative complaint alleges that Nutramax made misleading claims about Cosequin, in violation of various states' consumer protection laws. 9th Cir. ER 1105–09. During discovery, Respondents identified Dr. Jean Pierre Dubé, a professor of marketing at the Chicago Booth School of Business and a research fellow at the National Bureau of Economic Research, as an expert witness and produced a report authored by Dr. Dubé. *See id.* 131–67. The report explained that a choice-based conjoint analysis would "successfully isolate the economic damages associated" with Respondents' marketing claims, and it described in detail the four steps he would use in performing such an analysis in this case. *Id.* 137, 143–57.[1] Dr. Dubé opined that,

[1] As the court of appeals explained, a "conjoint survey" or "conjoint analysis" "allows a researcher to test the economic value a consumer places on a given product feature, such as a particular statement on a package, by showing the product to individual survey participants with and without certain features, and then using survey responses to calculate the economic value

(footnote continued)

although he had "not yet been asked at this juncture to conduct a Conjoint Analysis," and thus had not yet "determine[d] the incidence or magnitude of damages," he was "confident that [he] w[ould] be able to do so" using the conjoint model that he had fully designed. *Id.* 157. Dr. Dubé was also deposed by Nutramax's counsel. *See id.* 359–60.

Respondents moved for certification of a Rule 23(b)(3) class of California residents who had bought Cosequin during the relevant limitations period. They argued that the predominance requirement was satisfied because both liability under the California Consumer Legal Remedies Act (CLRA) and the calculation of damages could be adjudicated on a classwide basis. As to liability, Respondents relied on a range of evidence, including two expert reports "addressing the evidence base for the contested label claims," Pet. App. 74a, an advertising expert, Nutramax's market research, and the testimony of one of Nutramax's own experts, *id.* 75a. As to damages, Respondents relied on Dr. Dubé's opinion and report to show that damages were capable of measurement on a classwide basis. *Id.* 83a.

Nutramax opposed class certification on a variety of grounds. After the close of briefing on the class certification motion, and two days before the hearing on that motion, Nutramax filed untimely motions to exclude under Federal Rule of Evidence 702 and

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consumers place upon the feature.... [I]n conducting a conjoint analysis, a researcher is able to control for other variables such as package size and the competing products by modifying the underlying choice-tasks presented to participants." Pet. App. 6a–7a.

Daubert the testimony of two of Respondents' experts, including Dr. Dubé. *Id.* 47a.

The district court issued a consolidated order denying Nutramax's motions to exclude and granting Respondents' motion for class certification. Citing appellate court precedent, the court held that it was required to apply the *Daubert* standard to make a determination as to the reliability of the proffered experts' testimony. *Id.* 48a (quoting *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011)). It noted, though, that the analysis was to be "tailored to whether an expert's opinion was sufficiently reliable to admit for the purpose of proving or disproving Rule 23 criteria, such as commonality and predominance." *Id.* (citation omitted).

Applying this standard to Dr. Dubé's testimony, the district court first noted Dr. Dubé's extensive experience and publications in relevant areas. *Id.* 53a–54a. Then, addressing Nutramax's argument that Dr. Dubé's testimony was unreliable because the damages model was unexecuted, the court explained that an executed model was not necessary "to show that damages are capable of determination on a class-wide basis with common proof at the class certification stage," *id.* 54a (cleaned up), a conclusion the district court further expanded upon in its Rule 23 analysis, *see id.* 81a–86a.

The court also rejected, as a factual matter, Nutramax's argument that Dr. Dubé's model would provide relief to consumers who were not exposed to the challenged statements. *Id.* 54a. It further noted that Nutramax did not dispute that "conjoint analysis is a well-accepted economic methodology," recognizing that "similar conjoint surveys and analyses have been

accepted against *Comcast* and *Daubert* challenges by numerous courts in consumer protection cases challenging false or misleading labels." *Id.* 55a (quoting *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1107 (N.D. Cal. 2018), and *Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 575 (N.D. Cal. 2020)). And Nutramax's challenges to the specifics of Dr. Dubé's survey design, the court advised, went to "the weight given the survey, not its admissibility." *Id.* Having rejected Nutramax's objections and in light of Dr. Dubé's experience, the court concluded that Dr. Dubé's expert report and testimony were admissible for the court's consideration in determining class certification. *Id.*

The court then turned to the requirements for class certification under Rule 23. As to predominance, the Court found that "plaintiffs have met their burden of showing that common questions of fact and law predominate over individual questions with respect to their CLRA claim," *id.* 81a, based on the evidence—not addressed in the petition—as to how Respondents planned to establish the deceptive nature of Nutramax's health claims and the materiality of those claims to their purchasing decisions, *id.* 73a–81a. The court also concluded that Respondents had "sufficiently shown that their proposed damages model is consistent with their theory of liability under *Comcast*," *id.* 86a, after addressing each of Nutramax's arguments as to why Dr. Dubé's model was "defective," *id.* 83a–86a.

Court of Appeals Proceedings

Proceeding under Rule 23(f), Nutramax obtained permission to appeal the class certification decision with respect to two issues. First, Nutramax argued

that the district court abused its discretion in relying on Dr. Dubé's testimony regarding damages. Second, it argued that the district court erred in rejecting its position that individualized issues predominated as to materiality and reliance. In this Court, Nutramax is pursuing only the first issue.

As to Dr. Dubé's testimony, Nutramax made two arguments. First, it argued that Dr. Dubé's damages model could not satisfy the Rule 23(b)(3) standard set out in *Comcast* "without knowing what the results of his model would show." 9th Cir. Dkt. 14 at 46 (capitalization altered). Second, Nutramax argued that the district court's determination that Dr. Dubé's testimony was admissible was an abuse of discretion under the Ninth Circuit's en banc decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)—which addressed Rule 23, not Rule 702—because "he had not yet run a model to produce any outputs." *Id.* 54. The word "*Daubert*" appeared nowhere in Nutramax's Ninth Circuit briefs.

The court of appeals affirmed and denied Nutramax's subsequent petition for rehearing and rehearing en banc. Pet. App. 1a–2a. With respect to Nutramax's arguments as to Dr. Dubé's testimony, first, the court held that "there is no general requirement that an expert actually apply to the proposed class an otherwise reliable damages model in order to demonstrate that damages are susceptible to common proof at the class certification stage." *Id.* 2a–3a. Second, the court held that "the district court did not abuse its discretion in finding Dr. Dubé's proposed model was sufficiently sound and developed

to satisfy this standard at the class certification stage." *Id.* 3a.

Expanding on these holdings, the court of appeals explained that Nutramax's contrary arguments "rest[] upon a misapprehension of the temporal focus of the class certification inquiry." *Id.* 13a. "[C]lass action plaintiffs are not required to actually prove their case through common proof at the class certification stage," the court explained. *Id.* Rather, they "must show that they will be able to prove their case through common proof *at trial*." *Id.* Plaintiffs may satisfy this burden, the court held, "through a proffer of a reliable method of obtaining evidence that will come into existence once a damages model is executed, even when the results are not yet available at the class certification stage." *Id.*

In a passage on which Petitioners focus, *see* Pet. 5, 14, 22, the court stated that "there is no requirement that the evidence relied upon by Plaintiffs to support class certification be presented in an admissible form." Pet. App. 14a (citing *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018)). At the same time, the court explained, "if it is unlikely that a particular piece of common proof will be available or admissible at trial, that possibility weighs against a finding that common questions (and common answers) will predominate." *Id.*

In any event, the court went on to consider whether the district court had abused its discretion in finding Dr. Dubé's testimony was admissible under Rule 702. *Id.* 23a–33a. In doing so, it acknowledged that courts of appeals, including the Ninth Circuit itself, had used different language in different opinions in discussing "[t]he manner and extent to

which the *Daubert* framework applies at the class certification stage." *Id.* 24a–25a (collecting cases). The court noted that a treatise had suggested "at least some divergence among the Circuits on this question, with some employing a 'full' *Daubert* inquiry and others employing a more limited one." *Id.* 24a. But it explained "that, at least for purposes of this case, the distinction between a 'full' and 'limited' *Daubert* inquiry is a function of what aspect of [Rule] 23 is being addressed." *Id.* 25a. Noting that "*Daubert* itself stressed that its suggested factors were simply illustrative and needed to be applied flexibly," the court reasoned that only those factors relevant to "the issue at hand" should be considered when addressing a particular Rule 23 question. *Id.* 26a. Where an expert has yet to execute his damages model, the court explained, the task before the district court is "to mak[e] a predictive judgment about how likely it is the expert's analysis will eventually bear fruit," not whether "the later-executed results of the test" will be admissible at trial. *Id.* At the certification stage, then, the district court still must "determin[e] whether the expert's methodology is reliable"—what the court referred to as "a limited *Daubert* analysis" but not a "full-blown *Daubert* assessment of the results of the application of the model." *Id.*

As to Dr. Dubé's model, the court of appeals held that the district court did not abuse its discretion in conducting its *Daubert* analysis and that Nutramax had failed to show "either that Dr. Dubé's methodology is flawed or that there is a likelihood that he will improperly apply that method to the facts." *Id.* 27a. The court of appeals also held that many of Nutramax's "attacks on the reliability of Dr. Dubé's model … were never presented to the district court,"

and, as such, could not be a basis for finding that the district court abused its discretion. *Id.* 30a.

REASONS FOR DENYING THE WRIT

I. There is no disagreement among the courts of appeals as to the real issue on appeal—whether plaintiffs may rely on unexecuted models to show the susceptibility of damages to classwide proof.

In this Court, Petitioners seek review of a broad question about the standard for admissibility of expert testimony at the class certification stage. *See* Pet. i. Below, the parties and courts addressed a much narrower question: whether an expert's model can be used to show that damages can be calculated on a classwide basis if that model has not yet been executed. Answering that question, the court of appeals held that "class action plaintiffs may rely on a reliable though not-yet-executed 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." Pet. App. 3a. On this point—the chief issue addressed by the parties and courts in this case—there is no disagreement among the courts of appeals. And because Petitioners' more broadly stated question reflects a misunderstanding of the issue on appeal, certiorari should be denied.

In its decision, the Ninth Circuit declined to adopt a "categorical prohibition," urged by Nutramax, "on a district court relying on an unexecuted damages model to certify a class." *Id.* 23a. At the same time, the court also made clear that an unexecuted damages model is not categorically *sufficient* to satisfy Rule 23,

holding that "[t]he fact that a model is underdeveloped may weigh against a finding that it will provide a reliable form of proof." *Id.* 29a; *see also id.* 21a ("[T]he fact that an expert's model has not yet been executed is simply one factor that must be considered."). And contrary to Nutramax's parade-of-horribles argument, the court was explicit that "[m]erely gesturing at a model or describing a general method will not suffice" 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." *Id.* 29a.

No court of appeals has held that unexecuted models are categorically inadequate to show the ability to calculate classwide damages. As the Eleventh Circuit recently stated, there is "much merit in th[e] view," expressed in the Ninth Circuit's holding in this case, that unexecuted damages models can be relied on for demonstrating predominance. *Schultz v. Emory Univ.*, 2024 WL 4534428, at *6 n.5 (11th Cir. Oct. 21, 2024) (citing this case); *see Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 893 (11th Cir. 2023) (holding that plaintiffs seeking class certification needed to prove only "that a reliable damages methodology existed, not the actual damages plaintiffs sustained").

The Fifth Circuit, too, has endorsed reliance on an unexecuted damages model. For example, in *Slade v. Progressive Security Insurance Co.*, 856 F.3d 408 (5th Cir. 2017), the plaintiffs' expert, like Dr. Dubé, testified that damages could be calculated on a classwide basis, but she did not calculate those damages and acknowledged that she currently did not

have all of the data that would be 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 this 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. 856 F.3d at 410–11. The Fifth Circuit similarly affirmed a class certification involving an unexecuted damages model in *Angell v. GEICO Advantage Insurance Co.*, 67 F.4th 727, 739–40 (5th Cir. 2023) (affirming class certification 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.)).

Similarly, in *Waggoner v. Barclays PLC*, the Second Circuit found sufficient evidence of a common damages methodology based solely 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." 875 F.3d 79, 105–06 (2d Cir. 2017) (emphasis added). There, the district court had rejected arguments that *Comcast* requires an expert to perform his analysis at the class certification stage, finding that "[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, 327 n.136 (S.D.N.Y. 2016).

The Second, 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) (memorandum op.); *see also 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 would apply in common to all class members.").

District courts across the country have similarly declined to adopt categorical rules that either Rule 23 or *Daubert* precludes reliance on unexecuted damages models to show that damages are susceptible to classwide proof. These district courts include those in the First, Third, Fifth, Seventh, and Eleventh Circuits—the five circuits that Nutramax points to, Pet. i, as being on the other side of a circuit split warranting this Court's intervention. *See, e.g.*, *In re Cassava Scis., Inc. Sec. Litig.*, 2024 WL 4824243, at *19 (W.D. Tex. Nov. 15, 2024) (finding unexecuted damages model sufficient under *Comcast*); *In re Takata Airbag Prod. Liab. Litig.*, 677 F. Supp. 3d 1311, 1329 (S.D. Fla. 2023) (rejecting similar challenges to conjoint analysis model proposed by Dr. Dubé); *Durgin v. Allstate Prop. & Cas. Ins. Co.*, 2023

WL 3855139, at *2–3 (W.D. La. June 6, 2023) (rejecting *Daubert* challenge to expert's proposed testimony on grounds that model had not actually been applied); *Benson v. Newell Brands, Inc.*, 2021 WL 5321510, at *5 (N.D. Ill. Nov. 16, 2021) (finding conjoint analysis model proposed, but not executed, by Dr. Dubé showed predominance); *Utesch v. Lannett Co.*, 2021 WL 3560949, at *15–17 (E.D. Pa. Aug. 12, 2021) (rejecting *Daubert* challenge to 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) (unpublished op.); *Pub. Emps.' Ret. Sys. of Miss. v. TreeHouse Foods, Inc.*, 2020 WL 919249, at *9 (N.D. Ill. Feb. 26, 2020) (rejecting argument that unexecuted nature of expert's damages model precluded certification); *Monroe Cnty. Emps.' Ret. Sys. v. Southern Co.*, 332 F.R.D. 370, 399 (N.D. Ga. 2019) (similar); *In re Dial Complete Mktg. & Sales Pracs. Litig.*, 320 F.R.D. 326, 331–33 (D.N.H. 2017) (rejecting *Daubert* challenge based on tentative nature of conjoint analysis model); *In re Fluidmaster, Inc., Water Connector Components Prods. Liab. Litig.*, 2017 WL 1196990, at *27–30, 28 n.21 (N.D. Ill. Mar. 31, 2017) (denying motion to exclude expert and holding that *Daubert* does not preclude reliance on unexecuted conjoint analysis model); *Sanchez-Knutson v. Ford Motor Co.*, 310 F.R.D. 529, 539 (S.D. Fla. 2015) (rejecting argument that expert's failure to execute proposed damages methodology made it insufficient under *Comcast*), *class decertified in part on other grounds by* 2016 WL 11783302 (S.D. Fla. July 25, 2016).

The analysis and reasoning of these courts is similar to that of the district court in this case. And this uniformity among the lower courts shows that the

purported split as to the question presented in the petition is not 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 an unexecuted damages model to show that damages are susceptible to classwide proof.

In their brief argument in favor of a categorical rule against unexecuted damages models to show that damages are susceptible to classwide proof, Nutramax cites two cases in which courts of appeals found specific unexecuted models to be insufficient. Pet. 21 (citing *In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869,* 725 F.3d 244 (D.C. Cir. 2013), and *Parko v. Shell Oil Co.*, 739 F.3d 1083 (7th Cir. 2014)). Importantly, neither case suggests a categorical rule against the use of unexecuted damages models. Rather, in each case, the court of appeals held that the district court had abused its discretion by failing to address specific weaknesses in the proffered model. *See Rail Freight Fuel Surcharge*, 725 F.3d at 255 (vacating and remanding because "the district court never grappled with the argument concerning legacy shippers"); *Parko*, 739 F.3d at 1086 ("The judge should have investigated the realism of the plaintiffs' injury and damage model in light of the defendants' counterarguments, and to that end should have taken evidence."). Neither opinion is in tension with the decision here—where the district court addressed each of Nutramax's critiques. *See* Pet. App. 84a–86a. And, notably, neither opinion cited grounded

its holding in *Daubert* or questions of admissibility—i.e., the issue in Petitioners' question presented.

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

Nutramax contends 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. Specifically, it argues that the approach taken by the Ninth Circuit in this case conflicts with the approach of the First, Third, Fifth, Seventh, and Eleventh Circuits. Nutramax is wrong.

To begin with, as discussed above, the actual question at issue below was the consideration of unexecuted damages models at the class certification stage to show that damages can be assessed on a classwide basis; that question is one on which the courts of appeals have no disagreement.

In any event, the cases on which Nutramax relies show no conflict with respect to the standard for consideration of proffered expert evidence at the class certification stage more generally. The courts of appeals agree that district courts are required to assess expert evidence under *Daubert* to the extent that the evidence implicates questions relevant to class certification. The cases cited by Nutramax reflect, at most, different courts' different ways of discussing this core recognition—one that the Ninth Circuit itself has previously relied on 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).

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. 2024). 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.

Referring to "full" and "limited" *Daubert* inquiries, the opinion below applies this principle to the certification question before it. Rather than conducting a "full" inquiry with respect to the expert's damages model and the damages computed by executing that model, district courts at the

certification stage may conduct an inquiry "limited" to the evidence's reliability as to the sole purpose for which it is being offered at that stage—i.e., its reliability in showing that damages are capable of being calculated on a classwide basis. Pet. App. 25a–26a.

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

Nutramax begins with *American Honda Motor Co. v. Allen*, 600 F.3d 813, 814–15 (7th Cir. 2010) (per curiam), *cited at* Pet. 8. 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, as it 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 opinion in *Messner v. Northshore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012), confirms the point. There, 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. This is exactly what the district court did here and what the Ninth Circuit affirmed was required—holding that district courts must determine "whether the expert's methodology is reliable" to the extent it is relevant "to the issue at hand." Pet. 26a. Unlike in *American Honda*, there is no suggestion that Dr. Dubé's methodology fails to meet the generally accepted standards of the field, and the district court expressly found his opinion reliable to the extent it spoke to the issue decisive for the motion for class certification—whether the calculation of damages tied to Respondents' theory of liability based on a classwide model was possible. The Ninth Circuit simply rejected Nutramax's arguments that Respondents needed to show that Dr. Dubé's testimony was reliable as to issues *not* at hand—i.e., the final calculation of damages.

Similarly, in the Third Circuit's decision in *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183 (3d Cir. 2015), *cited at* Pet. 8–9, the district court had refused to address *at all* "the reliability of plaintiffs' expert's methodologies" underlying a proposed damages model. *Id.* at 188. Noting that "[e]xpert testimony that is insufficiently reliable to satisfy the *Daubert* standard" may not be used to satisfy the requirements of Rule 23(a), and that the defendant had "consistently challenged the reliability of plaintiffs' expert's methodologies and the sufficiency of his testimony to satisfy Rule 23(b)(3)," the court remanded with instructions that the district court

consider the challenges to reliability, *id.* at 187–88—i.e., to do what the district court in this case has done.

Moreover, in a footnote, the Third Circuit noted that it need not address whether "there might be some variation" between the Seventh and Eighth Circuits' approaches as to the nature of the required *Daubert* inquiry. *Id.* at 188 n.8. Instead, citing decisions of those courts—decisions that Nutramax argues fall on opposite sides of a purported split—the Third Circuit described those cases 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*, 600 F.3d at 816, and *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011)). The Third Circuit's characterization of a "limit[ed]" *Daubert* inquiry as consistent with its own approach indicates no conflict with the Ninth Circuit's similar "limited" *Daubert* inquiry.

Nutramax next cites the Fifth Circuit decision in *Prantil v. Arkema Inc.*, 986 F.3d 570, 575–76 (5th Cir. 2021), *cited at* Pet. 9–10. There, the parties disagreed as to whether the district court had conducted the reliability analysis required by *Daubert*. *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, rather than their reliability. *Id.* Nonetheless, the court concluded, "an assessment of

the reliability of Plaintiffs' scientific evidence for certification cannot be deferred." *Id.*

Prantil poses no conflict here, where the district court *did* conduct the reliability assessment it requires. Pet. App. 47a–55a. Moreover, the district court's rejection of Nutramax's challenges as going to the weight given Dr. Dubé's testimony, not its reliability, is also consistent with *Prantil*'s distinction between these two considerations. And while Nutramax notes that the district court in *Prantil* had excluded the testimony of the plaintiffs' damages expert on reliability grounds because he "ha[d] not actually built or tested any regression analyses that he suggest[ed] could be appropriate for determining damages on a class-wide basis," Pet. 10 at n.2 (quoting 986 F.3d at 576), that point has no applicability to this case. Here, Dr. Dubé did build a damages model that he testified, and the court found, could be used to "determin[e] damages on a class-wide basis." *See, e.g.*, 9th Cir. ER 159–64 (Dr. Dubé's specific formulas for the model).

Likewise, the Eleventh Circuit's unpublished opinion in *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011), *cited at* Pet. 10, says nothing that conflicts with the decision below, simply holding that a 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. The district court certainly did that here. And, as discussed above, the Eleventh Circuit's more recent opinions, including one favorably citing the opinion in this case, make clear that the Eleventh Circuit has not adopted any rule

prohibiting reliance on unexecuted damages models. *See Schultz*, 2024 WL 4534428, at *6 & n.3; *see also Green-Cooper*, 73 F.4th at 893.

Finally, the First Circuit's decision in *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), *cited at* Pet. 10, says nothing about either the question presented by the petition or the question actually implicated in this case. There, in addressing standing, the First Circuit held that the fact that the case was a class action did not allow plaintiffs to "use … inadmissible hearsay to prove injury to each class member at or after trial." *Id.* at 53. It did not address expert testimony at all. The court's unremarkable statement that "the rules of evidence and procedure" apply "at or after trial" to class actions, *id.*, says nothing about what the rules—or to use Nutramax's words, "requirements for admissibility," Pet. i—are or how those rules are to be applied at the class certification stage.

In sum, the courts of appeals agree that, at the class certification stage, district courts must determine whether expert evidence is reliable to the extent that the evidence addresses questions relevant at that stage. The decision below follows the uniform approach. Review is not warranted.

III. This case presents a poor vehicle to address Nutramax's question presented.

A. The district court did not abuse its discretion under *Daubert*.

While Respondents disagree with Nutramax's characterization of the court of appeals' opinion and the case law, the disagreement is an academic one. Here, the district court *did* apply *Daubert* to find Dr. Dubé's testimony admissible, and that application

was not an abuse of discretion. This case thus presents no opportunity to decide whether an admissibility determination was required.

In *Daubert*, this Court held that, under Federal Rule of Evidence 702, district courts serve a "gatekeeping role" with respect to expert testimony and thus must "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. The relevance requirement will generally be satisfied where testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592. As to reliability, *Daubert* identifies several factors that courts may consider, including whether the theory or technique can be or has been tested, whether it has "been subjected to peer review and publication," "in the case of a particular scientific technique, … the known or potential rate of error," and "general acceptance" of the technique. *Id.* at 593–94. These factors "do not constitute a definitive checklist or test," and each one "may or may not be pertinent in assessing reliability" in any given scenario. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (cleaned up). In that way, *Daubert*'s "test of reliability is 'flexible,'" and district courts are granted "broad latitude" both as to "*how* to determine reliability" and in their "ultimate reliability determination." *Id.* at 141–42.

Here, the district court's determinations as to the relevance and reliability of Dr. Dubé's opinion that, though he had "yet to determine the incidence or magnitude of damages," he was "confident that [he] w[ould] be able to do so" on a class wide basis upon execution of his model, 9th Cir. ER 157, were well

within its broad discretion. Noting Dr. Dubé's credentials, the data that he reviewed, the well-established nature of his methodology, and his success performing conjoint analyses in similar cases, the district court found Dr. Dubé's opinion—including his opinion that he would be able to obtain any information that was currently missing—both relevant and reliable. Pet. App. 27a. Further, the court explained, Nutramax failed to show "either that Dr. Dubé's methodology is flawed or that there is a likelihood that he will improperly apply that method to the facts." *Id.* Given that "there is no dispute that a conjoint analysis is capable of measuring classwide damages, at least in the abstract," the court explained that "[t]he speculative possibility that Dr. Dubé might slip up in executing his model" was not a basis for disregarding his opinion. *Id.* 31a–32a. The court's decision that sufficient indicia of reliability existed to consider Dr. Dubé's testimony is consistent with that of other courts that have found Dr. Dubé's conjoint analysis models reliable and relevant after undertaking *Daubert* analyses. *See, e.g.*, *In re Takata Airbag Prod. Liab. Litig.*, 2022 WL 3584510, at *2 (S.D. Fla. Aug. 16, 2022); *Goldemberg v. Johnson & Johnson Consumer Cos.*, 317 F.R.D. 374, 393–96 (S.D.N.Y. 2016).

In the petition, Nutramax's only argument that Dr. Dubé's testimony was unreliable is its proposed categorical rule that unexecuted damages models are insufficient because courts cannot perform a "rigorous analysis of a model's assumptions or inputs" until that model is executed. Pet. 20. That assertion is incorrect as a factual matter, as shown by the many decisions evaluating unexecuted damages models. *See supra* part I. Indeed, Nutramax retained its own expert to

rebut Dr. Dubé's methodology. *See* Pet. App. 30a n.9. Moreover, the district court *was* able to evaluate Nutramax's critiques of the model—the court just rejected them, either on the merits or because they went to weight, not admissibility. *Id*. 54a–55a, 84a–86a.

More importantly, Nutramax's argument ignores that, 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). Thus here, each of the *Daubert* factors was capable of being applied to the conjoint analysis methodology proposed by Dr. Dubé prior to his execution of that methodology. Any objections to the final inputs used and the conclusions the model generates would go to the weight of the final report and its conclusions—not to its admissibility, as the district court explained. *See* Pet. App. 55a.

Further, the court of appeals also noted that, on appeal, many of Nutramax's "attacks on the reliability of Dr. Dubé's model … were never presented to the district court," and, therefore, could not be a basis for finding that the district court abused its discretion. *Id.* 30a. Such forfeiture presents an additional reason why this case is a poor vehicle to consider Nutramax's arguments.

B. The class was properly certified even without the challenged evidence.

As this Court has held, so long as "one or more of the central issues in the action are common to the

class and can be said to predominate," certification "may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) (citing 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, pp. 123–24 (3d ed. 2005)); *see also* Pet. App. 12a n.2 (recognizing that "individual questions of damages do not necessarily defeat class certification, as the district court here expressly acknowledged"). Here, the district court expressly found, based on evidence not challenged in the petition, other central issues that could be resolved based on common proof—specifically, whether Nutramax's conduct was deceptive, and whether any deceptive conduct was material and thus caused injury to class members. Pet. App. 73a–81a. The common methods of proof for these two central issues would have been sufficient to show predominance, even if damages were not susceptible to common proof. Thus, even without Dr. Dubé's testimony, the class should have been certified, making resolution of the question presented by the petition unnecessary in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK R. SIGMON
MILBERG COLEMAN
BRYSON PHILLIPS
GROSSMAN, PLLC
5 W. Hargett Street
SUITE 1001
Raleigh, NC 27601
(919) 451-6311

ADAM R. PULVER
ADINA H. ROSENBAUM
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

Counsel for Respondents

January 2025