

THE “CATCH-22” OF RULE 23(B)(2):
PAST PURCHASER’S STANDING TO PURSUE
INJUNCTIVE RELIEF

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INTRODUCTION

Frosted Strawberry Pop-Tarts containing as much pear as they do strawberry.¹ Betty Crocker Fudge Brownies not being fudgy enough.² A&W Root Beer, advertised as being “MADE WITH AGED VANILLA,” containing artificial vanilla.³

These are just a few of the variety of class actions that have been brought in recent years, with plaintiffs seeking to enjoin what they claim are deceptive business practices.⁴ But are these just frivolous claims brought by “bounty hunter[.]” class attorneys seeking to cash in on alleged corporate misdeeds?⁵ Or, instead, are these legitimate claims that will protect the public at large from further misrepresentation by corporations?

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1 See *Brown v. Kellogg Sales Co.*, No. 20-CV-7283, 2022 WL 992627, at *1 (S.D.N.Y. Mar. 31, 2022).

2 See *Burns v. Gen. Mills Sales, Inc.*, No. 21-cv-1099, 2022 WL 3908783, at *1 (S.D. Ill. Aug. 30, 2022).

3 *Sharpe v. A&W Concentrate Co.*, 481 F. Supp. 3d 94, 96 (E.D.N.Y. 2020).

4 See *Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 74 (1st Cir. 2020); *Kimca v. Sprout Foods, Inc.*, No. 21-12977, 2022 WL 1213488, at *10 (D.N.J. Apr. 25, 2022); *Gordon v. Target Corp.*, No. 20-CV-9589, 2022 WL 836773, at *1 (S.D.N.Y. Mar. 18, 2022); *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *1 (N.D. Ill. Mar. 1, 2022); *Nacarino v. Chobani, LLC*, No. 20-cv-07437, 2022 WL 344966, at *1 (N.D. Cal. Feb. 4), *motion to certify appeal denied*, No. 20-CV-07437, 2022 WL 833328 (N.D. Cal. Mar. 21, 2022); *Rivera v. S.C. Johnson & Son, Inc.*, No. 20-CV-3588, 2021 WL 4392300, at *1 (S.D.N.Y. Sept. 24, 2021); *Ackerman v. Coca-Cola Co.*, No. 09 CV 395, 2013 WL 7044866, at *1 (E.D.N.Y. July 18, 2013); *Ries v. Ariz. Beverages USA LLC*, 287 F.R.D. 523, 527 (N.D. Cal. 2012).

5 Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 80.

The answer may depend on one's conception of the broader purpose and function of the class action lawsuit. David Marcus encapsulates the dichotomy of views well: "The conflict involves a basic problem that, to my mind, any history of Rule 23 must address: is the class action a mere procedural device, or is it a regulatory instrument?"⁶ Early conceptions of the class action lawsuit in the United States only viewed the class action as a procedural tool, meant to aggregate similar claims.⁷ Only later did the regulatory power of the class action become clear, when it was used from the 1940s to the 1960s to advance civil rights causes.⁸ When it comes to whether past purchasers of a product have standing to pursue injunctive relief under Rule 23(b)(2),⁹ the answer to whether such plaintiffs have standing can be clearly split by one's view of the class action lawsuit.

The question of standing in the Rule 23(b)(2) context poses a unique problem. The basic fact pattern of many of the cases brought is as follows. A plaintiff purchases a product, discovers the alleged false labeling, and then tries to bring a class action to enjoin the false labeling. Many of these plaintiffs bring a suit for money damages and injunctive relief, arguably because Rule 23(b)(2) has a lower bar for class certification than Rule 23(b)(3), which requires both predominance and superiority.¹⁰

However, now that plaintiffs are aware of the alleged false labeling, many courts have held they no longer have standing to pursue injunctive relief because the plaintiffs now lack one of the three requirements of standing: future harm "likely . . . redressed by a favorable decision."¹¹ The plaintiffs, it is assumed, are unlikely to buy the product again because they know of the alleged false labeling. "A 'fool me once' plaintiff does not need an injunction if he or she is not going to buy the product again anyway. There is no risk of 'fool me twice,'

6 David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 592 (2013).

7 See Redish, *supra* note 5, at 74 ("Both its structure and description, rather, make clear that [the class action] is nothing more than an elaborate procedural device designed to facilitate the enforcement of pre-existing substantive law. A class action suit, after all, does not 'arise under' Rule 23 of the Federal Rules of Civil Procedure. If no pre-existing substantive law vests a cause of action in plaintiff class members, they cannot bring a class action suit.").

8 See David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 678–702 (2011).

9 FED. R. CIV. P. 23(b)(2).

10 See FED. R. CIV. P. 23(b)(3); Thomas Waskom, Neil Gilman & Michael Mueller, *2nd Circ. Slack-Fill Ruling Makes Injunctive Relief Harder*, HUNTON ANDREWS KURTH: LAWYER INSIGHTS (July 24, 2020), <https://www.huntonak.com/images/content/6/8/v2/68496/2nd-Circ-Slack-Fill.pdf> [<https://perma.cc/Q2HH-CRWW>].

11 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976)).

so there is no basis for an injunction.”¹² A past purchaser either will not buy the product again, or, even if they do repurchase, they now know the labeling is allegedly false and thus are not harmed anew by it. “Thus, any potential ‘future injury is merely conjectural or hypothetical’ because even if [the] plaintiff[s] purchased the [p]roducts again, [they] would do so ‘with exactly the level of information’ that [they] possessed from the outset of this suit, and accordingly would not be deceived or harmed.”¹³

The situation presents a “Catch-22” of sorts.¹⁴ The moment plaintiffs gain awareness of false labeling, they also lose standing in federal courts to ever enjoin the false labeling. The result is one that many courts are unwilling to accept because “were the Court to accept the suggestion that plaintiffs’ mere recognition of the alleged deception operates to defeat standing for an injunction, then injunctive relief would never be available in false advertising cases, a wholly unrealistic result.”¹⁵ Especially if one sees the class action as a tool that can serve a quasi-regulatory purpose, allowing plaintiffs to essentially police conduct of businesses, one might be willing to “carve out an exception to the strictures of [the] law on injunctions, so that past purchasers can maintain class actions for such relief.”¹⁶

If one views the class action as a “mere” procedural device, meant simply to aggregate similar claims for efficiency’s sake, then one would probably believe that past purchasers do lack Article III standing. This line of argument posits that courts cannot ease standing requirements “no matter how commendable” the policy objective because standing is a constitutional requirement.¹⁷ Thus, while it may be true that past purchasers of a product are then foreclosed from injunctive relief entirely, there is no entitlement to injunctive relief. Even though this result might seem unjust or “unrealistic,” there is no requirement that the courts provide injunctive relief. Plaintiffs can seek monetary damages or even pursue injunctive relief in state courts, but they do not have standing for such claims in federal courts. Many courts, in dismissing claims for injunctive relief, propose as much: “[The plaintiffs’] claim for injunctive relief is denied, but [they are] not precluded or

12 Geske v. PNY Techs., Inc., 503 F. Supp. 3d 687, 702 (N.D. Ill. 2020).

13 Grossman v. Simply Nourish Pet Food Co., 516 F. Supp. 3d 261, 275 (E.D.N.Y. 2021) (quoting *Berni v. Barilla S.p.A.*, 964 F.3d 141, 147–48 (2d Cir. 2020)).

14 *Berni v. Barilla G.e.R. Fratelli, S.p.A.*, 332 F.R.D. 14, 25–26 (E.D.N.Y. 2019), *vacated and remanded sub nom. Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020).

15 Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 533 (N.D. Cal. 2012).

16 *Barilla S.p.A.*, 964 F.3d at 148.

17 *Id.*

constrained from seeking injunctive relief in state court.”¹⁸ Such offers by federal courts, while true in theory, lack any real bite.

This Note argues that past purchasers of a product have standing to pursue injunctive relief under Rule 23(b)(2). Part I discusses class actions and the current state of caselaw on false-labeling cases. I.A discusses the history of class actions generally, as well as the differing views on the purpose of Rule 23 throughout its history. I.B then provides background on standing, both generally and in the class action context. I.C explains the existing caselaw on standing for past purchasers, illustrating the looming circuit split on the issue. Part II then begins the argument portion of this Note. II.A argues that in the typical past purchaser case, all the requirements of Rule 23 are met, both the 23(a)¹⁹ prerequisites and the 23(b)(2) injunctive relief requirements. II.B will then argue that one can embrace both the procedural and regulatory conception of the class action, simultaneously. One can recognize the truth in the largely procedural conception of the rule while also recognizing that the Rule has come to serve a powerful regulatory purpose under certain circumstances where the regulatory role of the legislative and administrative branches is lacking. II.B uses the example of food-mislabeling cases to show where the class action can fill that gap. The Food and Drug Administration (FDA), the regulatory agency meant to police false labeling, is unable to fully police mislabeling due to the sheer volume of cases it faces. II.B explains how, when applied to past purchasers, the need to embrace the regulatory role becomes all the more clear because past purchasers in food-mislabeling cases have no other viable form of relief in federal courts.

I. HISTORICAL BACKGROUND

A brief overview of the drafting history and revisions to Rule 23 are helpful for conceptualizing the overall purpose the rule was designed to serve. With the drafting history as background, this Note then turns to discussing standing. Standing is first discussed in the context of class actions, and then is explained regarding injunctive relief. Afterwards, a survey of existing caselaw on past purchasers' standing to pursue injunctive relief in federal courts is discussed.

A. *Class Actions Generally*

The role of the class action historically is one distinguishable from the role it plays in society now. Stephen Yeazell cautioned against attempts often made by academics to draw understanding from these

18 *Floyd v. Pepperidge Farm, Inc.*, 581 F. Supp. 3d. 1101, 1113 (S.D. Ill. 2022).

19 FED. R. CIV. P. 23(a).

early, seventeenth-century lawsuits that on their face bear resemblance to the modern class action²⁰: "In the earliest reported cases . . . group litigation functioned as a means of modernizing and adjusting the customary law governing manorial and parochial relationships on the eve of the agricultural revolution."²¹ Every case Yeazell looked at from this early period involved members of rural agricultural communities, and unlike the modern class action, these groups existed absent the litigation.²² Yeazell argues that these cases were less like the litigation of the modern class action and more like legislation; they redefined status groups instead of asserting individual legal rights.²³

While the difference in purpose of the historical class action and modern class action are well illustrated here, an overview of the history of the class action is still useful to answer the standing question originally posed. One of the earliest class action lawsuits in the United States was in *West v. Randall* in 1820.²⁴ There, Justice Story, sitting in the Circuit Court for the District of Rhode Island, articulated the early conception of the class action:

It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be. The reason is that the court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits.²⁵

The rule, as stated above, is clearly distinguishable from the conception of the early class action in the sixteenth and seventeenth centuries, as it forms classes based on efficiency and fairness, not preexisting social classes. This rule was promulgated in Federal Equity Rules 48 and 38, which governed class actions federally until the enactment of the Federal Rules of Civil Procedure.²⁶ The main difference between

20 Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).

21 *Id.* at 867.

22 *See id.* at 872, 877.

23 *See id.* at 890–91.

24 *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (No. 17,424).

25 *Id.* at 721.

26 *See* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES: PROMULGATED BY THE UNITED STATES SUPREME COURT AT THE OCTOBER TERM, 1912, at 104–05 (8th ed. 1933) (stating Rule 48: "Where the parties on either side are very numerous, and can not, without manifest inconvenience . . . be all brought before it, the Court . . . may proceed in the suit But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 363–64 (1921)

the two Rules was that Rule 48 specifically stated decrees were without prejudice to rights and claims of parties that were absent from the lawsuit, but Rule 38 was silent on this matter.²⁷ The Court noted the significance of this distinction in *Supreme Tribe of Ben-Hur v. Cauble*.²⁸ The change to Rule 38, which failed to bind all class members, meant that a court's decree could be inconclusive, ineffective, and lead to conflicting judgments.²⁹

In the context of class actions, the role of the Federal Rules of Civil Procedure was arguably especially difficult. Because the goal of the rules was not to alter any substantive rights, drafters were faced with the difficult issue of drafting a rule which did not alter the rights of those not before the court.³⁰ Furthermore, the drafters could not have predicted the “seismic shifts in American law and politics [that] made the 1960s The Sixties” and thus were unable to conceive the changing role the class action lawsuit would take.³¹ It kept much of the language of Rule 38 and was seen by many as changing little in the way courts handled class actions. “The new rule introduce[d] no change of principle in respect to class suits, but merely expresse[d] in a simple, intelligible way the operating principles by which the courts have been guided in dealing with class suits.”³² Edson Sunderland argued the rule just specified the requirements for the types of cases proper for class action suits as follows: (1) the parties had to be so numerous it was impractical to bring them all before the court; (2) there had to be adequate representation; and (3) there had to be a community of interests.³³ Stephen Yeazell argues the original formulation of Rule 23 created an ineffective and confusing rule, which “divided class suits into three groups, based on what amounted to property-law relationships among the members; how one might discern those relationships was a question that no one ever answered with any certainty.”³⁴ The three categories were true, hybrid, and spurious class actions:

[T]he “true” class action, involving a “joint” or “common” right, . . . a “hybrid” class action, where the rights were “several”

(stating Rule 38: “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.”).

27 Tom Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 ANTITRUST L.J. 254, 255 (1966).

28 *Ben-Hur*, 255 U.S. 356.

29 *See id.* at 367.

30 *See* 28 U.S.C. § 2072(b) (2018); Stephen C. Yeazell, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 229, 231 (1987).

31 Marcus, *supra* note 6, at 599.

32 Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 16 (1938).

33 *See id.* at 16–17.

34 YEAZELL, *supra* note 30, at 228–29.

rather than “joint,” but the action sought an adjudication regarding specific property[,] . . . [and] a “spurious” class action, involving a right that was “several” but presenting a common question and seeking common relief. In such instances, class members could elect to join the case, but unless they did the decree would not bind them.³⁵

Rule 23’s confusing and ineffective categories led many academics to theorize and formulate potential revisions for class actions. One particularly relevant proposal was formulated by Maurice Rosenfield and Harry Kalven, Jr. In theorizing a new role for class actions as a regulatory tool, they drew a comparison between suits “by private litigants and action by an administrative commission as competing methods of affording group redress. . . . [T]he two methods of group redress are not as a practical matter in competition with each other, inasmuch as the administrative law alternative is largely non-existent at the moment.”³⁶ Thus, the authors saw class actions as an important tool to fill the gap and allow remedying of group wrongs and deterrence of group injuries.³⁷

Legitimate considerations of redrafting Rule 23 began in earnest in 1953.³⁸ Nothing came of these talks, and more consideration began by a new Supreme Court Advisory Committee in 1962.³⁹ In records of these talks, there is no clear mention of a regulatory role for class actions.⁴⁰ Instead, the stated purpose was “to get away from the conceptually-defined categories of the old rule.”⁴¹ One of the major changes of the 1966 revisions was to make Rule 23(b)(3) opt-out instead of opt-in, which had enormous, and controversial, implications for money-damage class actions.⁴²

Despite what the stated purpose for the 1966 revisions may have been, in practice, the revisions birthed the modern class action, leading to a spike in class-action lawsuits using the new rule for a decidedly more regulatory purpose.⁴³ The reason for this failure to recognize the

35 Richard Marcus, *Once More unto the Breach?: Further Reforms Considered for Rule 23*, JUDICATURE, Summer 2015, at 57, 58.

36 Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 715 (1941).

37 *See id.* at 717.

38 *See* Marcus, *supra* note 6, at 602.

39 *See id.* at 604.

40 *See id.* at 605.

41 *Id.* at 604 (quoting Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 177 (1969)).

42 Brian T. Fitzpatrick, *The Ironic History of Rule 23* (Vanderbilt L. Sch., Working Paper No. 17-41, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020306 [<https://perma.cc/8D8U-R9M8>].

43 Marcus, *supra* note 35, at 58.

immense regulatory power of the new Rule 23 is unclear, but may simply boil down to the fact that the committee was not prophetic:

The Committee obviously could not predict the great growth in complicated federal and state substantive law that would take place in such fields as race, gender, disability, and age discrimination; consumer protection; fraud; products liability; environmental safety; and pension litigation, let alone the exponential increase in class action and multiparty/multi-claim practice that would flow from the expansion of those legal subjects.⁴⁴

Whatever the reason, the new Rule 23 was widely criticized and significantly weakened by the Supreme Court in *Snyder v. Harris*,⁴⁵ which limited subject matter jurisdiction over state-law class actions significantly.⁴⁶ The 1970s were marked by many attempts at reform of the Rule, but nothing ever actually came of them and instead the Rule and attitudes toward it stabilized.⁴⁷

Then, in the 1990s, the Rule was again considered by the Advisory Committee. The only actual change made was to add Rule 23(f), which allowed immediate appellate review of class-certification decisions.⁴⁸ The most recent revisions to the Rule occurred in 2003.⁴⁹ The proposed revisions, unlike those from the 1990s, were mostly implemented. “2003 could be viewed as a ‘procedural’ watershed for Rule 23 in that an array of specifics about how class-action matters should be handled were added to the rule.”⁵⁰

The most recent amendments to Rule 23 occurred in 2018, and mainly focused on notice requirements surrounding class actions and settlements.⁵¹ As is clear from this overview, Rule 23 is a constantly evolving creation, with new proposals for changes to the Rule developing constantly.

44 Fitzpatrick, *supra* note 42, at 19 (quoting Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 295 (2014)).

45 *Snyder v. Harris*, 394 U.S. 332 (1969).

46 See Marcus, *supra* note 6, at 610.

47 See *id.* at 611, 647.

48 See FED. R. CIV. P. 23(f); Marcus, *supra* note 35, at 59.

49 See Marcus, *supra* note 35, at 59.

50 *Id.* at 60 (explaining that the 2003 amendments made procedural changes to timing and content of certification decision, settlement approval criteria and procedures, class counsel, and attorneys’ fees).

51 See Andre Regard, *The Five Changes to Rule 23 Every Class Action Attorney Needs to Know*, A.B.A. (Mar. 21, 2019), <https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/five-changes-to-rule-23-every-class-action-attorney-needs-to-know/> [https://perma.cc/DHU6-D5D4].

B. Standing

I. Class Action Standing

From that overview, we arrive at the current Rule 23. The structure of Rule 23 is simple enough: a class representative must prove the Rule 23(a) “prerequisites” of numerosity, commonality, typicality, and adequate representation before showing the class also falls under one of the Rule 23(b) categories:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.⁵²

Furthermore, the proof of satisfaction of each of these categories is not met merely by pleading with plausibility as normal but instead, the class representative must “be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”⁵³

Because the Court has articulated this rigorous determination must be done at the certification stage, class actions face a unique problem that the Court has resolved only recently. Rule 23(a) is an absolute requirement that must be proven before a class can be certified, but the inquiry into whether each element is satisfied will almost invariably involve a consideration of the merits of the claim. The Court noted this tension as early as 1978, in *Coopers & Lybrand v. Livesay*, calling the determination of whether a class meets Rule 23(a) requirements a “determination generally involv[ing] considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’”⁵⁴ The Court clearly grappled with this issue of whether the merits must be considered in class certification, because only a few years earlier the Court rejected a consideration of the merits before certification: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”⁵⁵ The Court instead agreed with the Fifth Circuit’s interpretation of the Rule, that the requirements of Rule 23(a) must

52 FED. R. CIV. P. 23(a).

53 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

54 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat’l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963)).

55 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

be absolutely met before any consideration of the merits is considered.⁵⁶

Finally, in *Wal-Mart Stores, Inc. v. Dukes*, the Court flat-out rejected the idea that Rule 23(a) analysis will not involve questions of the merits of a claim⁵⁷: “Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”⁵⁸ Thus, it is now a well-settled matter that, before getting to Rule 23(b), courts must consider legal and factual disputes that may be material to the claim, to decide whether the Rule 23(a) prerequisites are satisfied.⁵⁹

After a court is satisfied the class is numerous, with common issues of law and/or fact, claims typical to the class, and an adequate class representative, the class also must meet at least one of the Rule 23(b) categories: (1) prosecuting separate actions creates the risk of “inconsistent” or “dispositive” adjudications, (2) injunctive or declaratory relief would be appropriate for the class as a whole, or (3) questions of law or fact common to the class “predominate.”⁶⁰ For the purposes of this Note, the relevant provision is Rule 23(b)(2):

A class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole⁶¹

The comments to the current provision give the prime example of such an action as being a civil rights case, echoing its use for such purposes in the 60s and 70s.⁶² However, it also specifically posits that the Rule can be used by “a numerous class of purchasers.”⁶³ Classes comprised of purchasers face the issue of showing that injunctive relief is appropriate for the class as a whole. The hurdle that past purchasers in false-labeling cases stumble on is Rule 23(b)(2). As will be shown in Part II.A, they clearly meet the Rule 23(a) prerequisites. However,

56 *Id.* at 178 (“In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” (quoting *Miller v. Mackey Int’l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971))).

57 *See Wal-Mart Stores*, 564 U.S. at 351.

58 *Id.* (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

59 *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013) (stating that Rule 23 does not grant courts “free-rang[e]” to consider merits, but instead “only to the extent” relevant to determining whether prerequisites are satisfied); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (stating that the inquiry requires “evidentiary proof”).

60 FED. R. CIV. P. 23(b).

61 FED. R. CIV. P. 23(b)(2).

62 *Id.* advisory committee’s note to 1966 amendment.

63 *Id.*

because past purchasers are aware of the alleged false labeling and many claim they no longer will buy the product or would buy only if they knew the alleged false labeling had ended, many courts rule injunctive relief is no longer appropriate and refuse to certify the class for lack of standing.

Some courts have read a further requirement into 23(b)(2) classes—cohesion: “[I]n other words, whether the legal and factual issues common to the class are of a sufficiently tight-knit quality that the class will be efficient to manage and try.”⁶⁴ While this may sound similar to the predominance and superiority requirements of Rule 23(b)(3), some courts have read it to be an even higher bar.⁶⁵ Courts have read into 23(b)(2) the need for a “strong commonality of interest” in 23(b)(2) classes since all class members are bound by the judgment,⁶⁶ and the presence of “disparate factual circumstances of class members” can defeat the cohesiveness.⁶⁷ The Supreme Court even recently addressed the issue of cohesiveness in *Wal-Mart*, explaining the need for cohesion.

In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.⁶⁸

2. Injunctive Relief Standing

Federal courts require the “irreducible constitutional minimum”⁶⁹ of standing before a claim can be brought, comprised of the following three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant,

64 JAY TIDMARSH & ROGER H. TRANGSRUD, *COMPLEX LITIGATION AND ITS ALTERNATIVES* 187 (2d ed. 2018).

65 *Grovatt v. St. Jude Med., Inc. (In re Saint Jude Med., Inc.)*, 425 F.3d 1116, 1121 (8th Cir. 2005) (“Because ‘unnamed members are bound by the action without the opportunity to opt out’ of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class.” (quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142–43 (3d Cir. 1998))).

66 *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011).

67 *Carter v. Butz*, 479 F.2d 1084, 1089 (3d Cir. 1973).

68 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011).

69 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”⁷⁰

Again, as will be shown in Part II.A, past purchasers clearly meet both the injury-in-fact and causal-connection prongs. The controversy in class action injunctive relief is on the final prong of redressability.

Redressability requires a showing that the harm alleged is likely to be redressed by a favorable decision.⁷¹ For injunctive relief, the plaintiff must then show the harm suffered is the type likely to be remedied by a court-ordered injunction. It is not enough to show previous harm: “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”⁷² As the current caselaw, as detailed in Section I.C, reflects, courts have continuously refused to certify classes of past purchasers because they are *past* purchasers. Class members also cannot rely on absent members of the class who continue to be harmed by the false labelling.⁷³

Injunctive relief generally has its own test as well. A four-factor balancing test is applied to claims for permanent injunctions to decide whether such relief is appropriate.

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between

70 *Id.* at 560–61 (alterations in original) (citations omitted) (first citing *Allen v. Wright*, 468 U.S. 737, 756 (1984); then citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975); then citing *Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972); then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); and then quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 41–42, 43 (1976)).

71 *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (citations omitted) (“[The plaintiff] ‘need not demonstrate that there is a “guarantee” that [her] injuries will be redressed by a favorable decision’; rather, a plaintiff need only ‘show a “substantial likelihood” that the relief sought would redress the injury.’” (first quoting *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012); and then quoting *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010))).

72 *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974).

73 *See Richardson v. L’Oreal USA, Inc.*, 991 F. Supp. 2d 181, 191 (D.D.C. 2013) (“[S]tanding depends on the representative plaintiffs: at least one must be able to show that she is likely to suffer future injury because of the defendant’s conduct. In other words, plaintiffs here cannot establish standing by relying on the likelihood of future injury to absent class members.” (citation omitted) (first citing *McNair v. Synapse Grp., Inc.*, 672 F.3d 213, 223 (3d Cir. 2012); and then citing *O’Shea*, 414 U.S. at 495–96)).

the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁷⁴

While the test is clear, the Court also has made clear the broad power federal courts have in issuing equitable relief.⁷⁵

C. False Labeling Cases

A circuit split on the issue of whether past purchasers have standing to pursue injunctive relief has recently emerged. The Second and Third Circuits have firmly decided, answering in the negative. In the Seventh Circuit, intracircuit splintering exists, leaving the answer not fully clear. The Ninth Circuit has diverged from other circuits, recognizing standing to pursue injunctive relief for past purchasers. Clearly, the issue is one ripe for review by the Supreme Court, especially if the splintering grows. An overview of the existing caselaw is provided below.

1. Second Circuit

The Second Circuit firmly answered the question in *Berni v. Barilla S.p.A.*⁷⁶ The case involved a new line of healthier Barilla pasta which, although sold in the same boxes as normal Barilla pasta, contained less pasta.⁷⁷ The plaintiffs alleged these boxes were intentionally under-filled to mislead consumers and sought monetary damages and injunctive relief.⁷⁸ However, the Second Circuit foreclosed any possibility of injunctive relief, holding that the plaintiffs were unlikely to be harmed in the future due to their awareness of the mislabeling, and refused to certify the class⁷⁹: "Where there is no likelihood of future harm, there is no standing to seek an injunction, and so no possibility of being certified as a Rule 23(b)(2) class."⁸⁰ While the court here recognized that

74 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (first citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982); and then citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987)).

75 *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'") (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

76 *Berni v. Barilla S.p.A.*, 964 F.3d 141 (2d Cir. 2020).

77 *See id.* at 144.

78 *See id.*

79 *Id.* at 149.

80 *Id.*

allowing the class action to move forward, as the district court had done, was a “commendable” policy objective, the court declined to create what it called an “equitable exception to Rule 23(b)(2).”⁸¹ Courts in the Second Circuit have subsequently largely followed the precedent set in *Berni*, holding that a class of past purchasers of a product generally does not have standing to pursue injunctive relief.⁸²

2. Third Circuit

The existing caselaw in the Third Circuit is much the same. In *In re Johnson & Johnson Talcum Powder Products Marketing*, the court of appeals squarely addressed the question of standing in what it called “stop me before I buy again” claims.⁸³ The class representative alleged that she suffered economic injury by purchasing Johnson & Johnson baby powder because, had she known the risk of ovarian cancer, she would not have purchased it.⁸⁴ She sought injunctive relief “in the form of ‘corrective advertising’ and ‘enjoining Defendants from continuing the unlawful practices’ of selling Baby Powder without properly warning consumers of the alleged health risks.”⁸⁵ Following a line of reasoning similar to the Second Circuit, the court reasoned that it was a “premise unmoored from reality” to believe that the customers could be deceived again by the advertising practices they sought to enjoin.⁸⁶ Even with the plaintiff’s assertion that she would buy the product again in the future, the court still found this inadequate to allege future harm because “the law accords people the dignity of assuming that they act rationally, in light of the information they possess.”⁸⁷ Thus, the court refused to find standing to pursue injunctive relief.⁸⁸

3. Seventh Circuit

The Seventh Circuit has reached the same conclusion. In *Camasta v. Jos. A. Bank Clothiers, Inc.*, the plaintiff bought shirts from the defendant under a “buy one shirt, get two shirts free” deal.⁸⁹ Sometime after

81 *Id.* at 148.

82 *See Yu v. Dreyer’s Grand Ice Cream, Inc.*, 592 F. Supp. 3d 146, 165–66 (S.D.N.Y. 2022); *Grossman v. Simply Nourish Pet Food Co.*, 516 F. Supp. 3d 261, 274 (E.D.N.Y. 2021); *Campbell v. Whole Foods Mkt. Grp., Inc.*, 516 F. Supp. 3d 370, 395 (S.D.N.Y. 2021).

83 *In re Johnson & Johnson Talcum Powder Prods. Mktg.*, 903 F.3d 278, 293 (3d Cir. 2018).

84 *See id.* at 281.

85 *Id.* at 292 (quoting First Amended Class Action Complaint at 33, *Estrada v. Johnson & Johnson*, No. 14-cv-01051 (E.D. Cal. Apr. 24, 2015)).

86 *Id.*

87 *Id.* at 293 (quoting *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225 (3d Cir. 2012)).

88 *See id.*

89 *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 735 (7th Cir. 2014).

the purchase, the plaintiff learned that the shirts were not actually priced lower, but instead were simply part of a larger pricing scheme employed by defendant to periodically advertise normal prices as sale prices.⁹⁰ The court of appeals, in affirming the lower court’s dismissal of the claim for injunctive relief, found the plaintiff’s claim of future harm was only speculative and thus not the kind for which injunctive relief was appropriate.⁹¹

While much of the existing caselaw in the Seventh Circuit follows the precedent set by *Camasta*,⁹² many district courts have also taken the alternative approach.⁹³ The District Court for the Eastern District of Wisconsin diverged in *Le v. Kohls Department Stores, Inc.*⁹⁴ There, the plaintiff alleged pricing practices similar to those in *Camasta*: “Kohls engages in a company-wide, pervasive, and continuous campaign of falsely claiming that each of their products sells at far higher prices than by other merchants.”⁹⁵ However, instead of finding that the plaintiff lacked standing to pursue injunctive relief, the court distinguished the case from *Camasta*.⁹⁶ According to the court, *Camasta* was about a “sweeping” assertion about Jos. A. Bank’s retail practices while the case at hand was about a “company-wide, pervasive” marketing scheme.⁹⁷ Furthermore, the court did not read *Camasta* to state the proposition that past purchasers of a product could never pursue injunctive relief: “Interpreting the *Camasta* court’s dicta to instead announce a broad rule that strips a prospective plaintiff of standing to seek an injunction solely because they are aware of a past wrong overreads that court’s language and leads to anomalous results.”⁹⁸

Similarly, in *Leiner v. Johnson & Johnson Consumer Cos.*, the court also found Article III standing in a past purchaser case, certifying the Rule 23(b)(2) class:⁹⁹ “While it is true . . . that public policy concerns do not confer Article III standing on a plaintiff who fails to allege an

90 *See id.*

91 *See id.* at 741.

92 *See, e.g.*, *Johnston v. Kashi Sales, L.L.C.*, No. 21-CV-00441, 2022 WL 4103973, at *2–4 (S.D. Ill. Sept. 8, 2022); *Floyd v. Pepperidge Farm, Inc.*, 581 F. Supp. 3d 1101, 1113 (S.D. Ill. 2022); *In re Herbal Supplements Mktg. & Sales Pracs. Litig.*, No. 15-cv-5070, 2017 WL 2215025, at *7–8 (N.D. Ill. May 19, 2017); *cf. Bohn v. Boiron, Inc.*, No. 11 C 08704, 2013 WL 3975126, at *4 (N.D. Ill. Aug. 1, 2013).

93 *See, e.g.*, *Le v. Kohls Dep’t Stores, Inc.*, 160 F. Supp. 3d 1096 (E.D. Wis. 2016); *Leiner v. Johnson & Johnson Consumer Cos.*, 215 F. Supp. 3d 670, 673 (N.D. Ill. 2016).

94 *Le*, 160 F. Supp. 3d 1096.

95 *Id.* at 1099 (citing Complaint at 8, *Le*, 160 F. Supp. 3d 1096 (No. 15-1171)).

96 *Id.* at 1111.

97 *Id.* (quoting Complaint, *supra* note 95, at 8).

98 *Id.*

99 *Leiner v. Johnson & Johnson Consumer Cos.*, 215 F. Supp. 3d 670, 673–74 (N.D. Ill. 2016).

individual injury in fact, I am satisfied that plaintiff has alleged a legally cognizable injury . . . , and thus has standing to bring her claims.”¹⁰⁰ As *Leiner* and *Le* suggest, some intracircuit splintering on the issue exists in the Seventh Circuit.

4. Ninth Circuit

Even more so in the Ninth Circuit, intracircuit splintering leaves the possibility of a circuit split on the issue open. The court of appeals addressed the issue as a matter of first impression in *Davidson v. Kimberly-Clark Corp.*, resolving the case in favor of the plaintiffs seeking injunctive relief.¹⁰¹ After buying and using the defendant’s premoistened wipes that were advertised as “flushable,” the plaintiff discovered the wipes were causing widespread damage to her plumbing.¹⁰² The plaintiff sought injunctive relief and claimed that she would buy wipes from the defendant in the future if she could be assured they were fully flushable.¹⁰³ The court considered both sides of the standing argument before coming down on the side of the plaintiffs seeking injunctive relief.¹⁰⁴ It found the knowledge of the alleged false labeling was not dispositive to the plaintiff’s claim for injunctive relief because:

Knowledge that the advertisement . . . was false in the past does not equate to knowledge that it will remain false in the future. . . . [T]he threat of future harm may be the consumer’s plausible allegations that she will be unable to rely on the product’s advertising . . . in the future¹⁰⁵

The court of appeals was faced with largely the same issue only three years later in *In re Coca-Cola Products Marketing & Sales Practices Litigation (No. II)*.¹⁰⁶ There, the plaintiffs alleged that Coca-Cola misled the public by advertising Coke as being free of artificial flavors and chemical preservatives when it actually contained phosphoric acid.¹⁰⁷ The court overturned the district court’s determination that the plaintiffs had standing to pursue injunctive relief because it found the plaintiffs had not sufficiently demonstrated a threat of future harm.¹⁰⁸ The court distinguished the case from *Davidson* because in *Davidson*,

100 *Id.* at 673.

101 *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 967, 969 (9th Cir. 2018).

102 *Id.* at 962.

103 *See id.*

104 *See id.* at 967–69.

105 *Id.* at 969 (footnote omitted).

106 *Engurasoff v. Coca-Cola Refreshments USA, Inc. (In re Coca-Cola Prods. Mktg. & Sales Pracs. Litig. (No. II))*, No. 20-15742, 2021 WL 3878654, at *1 (9th Cir. Aug. 31, 2021).

107 *See id.*

108 *See id.*

plaintiffs expressed a desire to purchase the flushable wipes as advertised while in the case at hand, none of the plaintiffs expressed such a desire for Coke.¹⁰⁹ The plaintiffs merely said they would consider purchasing Coke if it were properly labeled, and the court held that “such an abstract interest in compliance with labeling requirements is insufficient, standing alone, to establish Article III standing.”¹¹⁰

In recent decisions in *Nacarino v. Chobani, LLC* and *Johnson-Jack v. Health-Ade, LLC*, district courts distinguished *In re Coca-Cola*.¹¹¹ Instead, these courts relied on *Davidson* as the precedent to assess standing:

There are two circumstances in which a plaintiff in a false or misleading labeling case may seek injunctive relief: “(i) where plaintiffs ‘would like to’ buy the product again but ‘will not’ because they ‘will be unable to rely on the product’s advertising or labeling’ without an injunction; or (ii) where the consumer ‘might purchase the product in the future’ because they ‘may reasonably, but incorrectly, assume the product was improved.’”¹¹²

While the *Johnson-Jack* court simply did not mention *In re Coca-Cola*, the *Nacarino* court found that it merely expanded upon, but did not change, the standing requirement in *Davidson*.¹¹³ A district court recently read *Davidson* more narrowly, which may suggest a shift.¹¹⁴ However, that case was also factually distinguishable: the alleged mislabeling concerned the place of manufacture, and plaintiffs said they would only consider buying again if the country of manufacturing was changed.¹¹⁵ The differing result may be more about the result of that and less about a shift in jurisprudence on standing.

II. ARGUMENT

Although David Marcus presents the role of the class action as a binary question, a choice between a regulatory instrument and a procedural device, the answer is maybe not as black and white as it may seem. While the origins of the class action admittedly could be argued to be almost entirely procedural, the clear regulatory role that the

109 See *id.* at *2.

110 *Id.* (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1150 (2016)).

111 *Johnson-Jack v. Health-Ade LLC*, 587 F. Supp. 3d 957, 975 (N.D. Cal. 2022); *Nacarino v. Chobani, LLC*, No. 20-cv-07437, 2022 WL 344966, at *1 (N.D. Cal. Feb. 4), *motion to certify appeal denied*, No. 20-CV-07437, 2022 WL 833328 (N.D. Cal. Mar. 21, 2022).

112 *Johnson-Jack*, 587 F. Supp. 3d at 975 (quoting *Krommenhock v. Post Foods (Krommenhock II)*, LLC, 334 F.R.D. 552, 572 (N.D. Cal. 2020)).

113 See *Nacarino*, 2022 WL 344966, at *12.

114 See *Sinatro v. Barilla Am., Inc.*, No. 22-cv-03460, 2022 WL 10128276, at *10 (N.D. Cal. Oct. 17, 2022).

115 See *id.*

device can play has emerged. One need only look to the history of the class action itself to see that a regulatory role was clearly envisioned for the Rule 23(b)(2) class. So, if one had to choose, the regulatory role of the class action has become paramount. Even if its initial conception was purely procedural, the role it has come to play is largely regulatory. The comments to the rule show that Rule 23(b)(2) was arguably *conceived* to be regulatory. While it played a large role in civil rights cases in the 1960s and 1970s, the notes of the advisory committee on the 1966 amendment explicitly state that Rule 23(b)(2) could conceivably be used for “a numerous class of purchasers.”¹¹⁶

Specifically in areas where the legislative and administrative branches have declined or failed to act, the class action can fill that gap, providing relief and regulating acts. One clear gap that the class action can fill is regarding past purchasers of products. The regulatory role of the class action crystallizes when one looks to the “class of purchasers” example. Such consumers are the paradigm case for where the class action can best serve its role—these consumers have no real relief in state courts and the administrative and legislative branches are unable or unwilling to step in.

A. *Past Purchasers Have Standing to Pursue Injunctive Relief*

In the purely procedural sense of the class action, past purchasers can and should satisfy Rule 23. When it comes to the typical class of past purchasers seeking certification, they clearly meet the requirements of the rules. To illustrate, for the purposes of this analysis, this Note will conduct a class-certification analysis for the class the Second Circuit declined to certify in *Berni*. By simply alleging that the past purchasers would purchase the product again if they could be assured the false labeling had ended, such classes should be certified under Rule 23(b)(2).

The class and claim in *Allegra v. Luxottica Retail North America* is fairly illustrative of the typical, past-purchaser class action.¹¹⁷ The proposed class consisted of past purchasers of Luxottica Retail North America, or LensCrafters, prescription eyewear.¹¹⁸ LensCrafters marketed their AccuFit system as more accurate than other measurement systems, which the plaintiffs alleged was unsupported:

As a result of LensCrafters’ “deceptive” marketing claims, Plaintiffs allege that “consumer demand for its eyeglasses” increased, which in turn “increased the market price of those

116 FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1966 amendment.

117 *Allegra v. Luxottica Retail N. Am.*, 341 F.R.D. 373 (E.D.N.Y. 2022).

118 *See id.* at 388.

glasses.” Plaintiffs contend that “[b]ecause the market price was higher than it would have been without LensCrafters’ deceptive practices, *all* LensCrafters consumers paid more for their glasses than they otherwise would have” regardless of whether they relied upon or were deceived by misrepresentations about AccuFit. That said, Plaintiffs claim that they themselves “purchased their eyeglasses after seeing and relying on LensCrafters’ representations about AccuFit” and that they “spent significant sums on their glasses, choosing to shop at LensCrafters in part because it marketed the superiority of AccuFit’s 0.1mm centration measurements compared to traditional methods.” However, Plaintiffs do not seek to certify a class of LensCrafters customers who actually relied on or were in fact deceived by marketing or representations about AccuFit.¹¹⁹

The class is typical of most past-purchaser class actions. Consumers purchased a product, learned it was labeled in a way that was false or misleading, and sought injunctive relief to stop the mislabeling. This class, with the simple tweak of pleading that they would buy the glasses in the future absent the misrepresentation, should have been certified under Rule 23. Since courts often fail to certify, not under the Rule 23(a) prerequisites, but under 23(b)(2), this Note assumes for this analysis that these classes satisfy numerosity, commonality, typicality, and adequacy of representation.

1. Rule 23(b)(2) Is Satisfied

The true issue in most past-purchaser class actions is not in the prerequisites of 23(a), but instead in the additional requirement of Rule 23(b)(2). The court here, claiming to apply the recently settled caselaw under *Berni*, found the plaintiffs lacked standing, in part, because they did not claim they “intend[ed] to purchase LensCrafters eyeglasses or lenses again in the future.”¹²⁰ However, if the court was truly applying *Berni*, then this distinction should not have mattered, since in *Berni*, the court said that “even if [past purchasers] do purchase [the product] again, there is no reason to believe that all, or even most, of the class members will incur a harm anew.”¹²¹ Despite the *Berni* court’s dicta, past purchasers of a product that allege a future wish to purchase the product again if they can be ensured the advertising is no longer false should have standing to pursue injunctive relief.

119 *Id.* at 390 (alteration in original) (citations omitted) (quoting Motion for Class Certification at 22–25, *Allegra*, 341 F.R.D. 373 (No. 17-CV-5216)).

120 *Id.* at 405.

121 *Berni v. Barilla S.p.A.*, 964 F.3d 141, 148 (2d Cir. 2020).

Much of the rejection of standing operates around the assumption that the law believes individuals act rationally. If consumers know or suspect that labeling is misleading, the law then imputes to them that they will not buy the product in the future because of this. Or, even if they purchase the product again in the future, they will not suffer the same harm of false labeling because they knew or suspected it when they purchased the product. However, the plaintiffs in *Allegra* could have said they sought to purchase LensCrafters glasses using the AccuFit technology in the future. Furthermore, their presumption that the advertisements were misleading because they overstated the accuracy of the AccuFit technology may have been true during the period they purchased it. However, that does not equate to the inaccuracy continuing to be true. Consumers could purchase again, after a period of time, when they believe the once false labeling has been rectified. There is no plausible way for a consumer to discover the truth of the labeling unless the seller or manufacturer is enjoined from the mislabeling.

Thus, if the plaintiffs in *Allegra* had claimed they wished to purchase glasses from LensCrafters again using the AccuFit technology in the future, this should not be considered analogous to the “some day” intentions that led the Court to find lack of standing in *Lujan v. Defenders of Wildlife*.¹²² This injury is not too conjectural or hypothetical. It is entirely plausible that past consumers could wish to purchase a product they previously consumed in the future, especially after time has passed, to see whether the product is no longer misleadingly labeled. This is not so conjectural as a someday intent to return to a foreign country and potentially be unable to see endangered animals.¹²³ One need only look at common marketing conceptions of repeat and recurring consumers to know that customers often repeatedly purchase from the same brands.¹²⁴ In *Davidson*, the Ninth Circuit created the test for whether injury in fact is satisfied that, if applied to such a hypothetical conception of the *Allegra* claim, would satisfy standing:

122 See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (“And the affiants’ profession of an ‘inten[t]’ to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”).

123 See *id.*

124 See, e.g., Tyler Martin, *How to Convert Repeat Customers into Recurring Revenue*, FORBES (Sept. 23, 2021, 7:15 AM), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/09/23/how-to-convert-repeat-customers-into-recurring-revenue/?sh=491aa60840e0> [https://perma.cc/DP26-HHQQ].

[W]hen seeking injunctive relief, the injury-in-fact requirement is met when the consumer alleges that she (1) cannot “rely on the product’s advertising or labeling in the future, and so will not purchase the product although she would like to” or (2) might purchase the product again, “as she may reasonably, but incorrectly, assume the product was improved.”¹²⁵

Thus, a true claim that consumers wish to purchase the product again, or believe they may purchase again in the future, should not be considered too conjectural or hypothetical.

B. Regardless of Certification Under Rule 23, Compelling Policy Considerations Point to Allowing Standing

Even regardless of Rule 23 and procedural considerations, the policy considerations around allowing past purchasers to have standing to pursue injunctive relief are extremely compelling. The class action can and should be a powerful regulatory tool while also serving as a tool for representation. “The efficiency justification is associated with a private goal of compensation and a public goal of increasing monetary deterrence against misbehavior. The representation justification is associated with a private goal of providing access to justice and a public goal of advancing legal and ethical norms.”¹²⁶

1. Food-Mislabeling Cases

One of the most common forms of false-labeling cases is regarding the labeling of food. Like with strawberry Pop-Tarts¹²⁷ or Chobani vanilla yogurts,¹²⁸ a class of consumers claim they were misled by the labeling on food products, duped into believing the product contained more real strawberry or natural vanilla than it actually did. Upon reading these cases, one may consider the FDA’s role in regulating this conduct.

Prior to 1906, food and drug regulation in the United States was sparse; the passage of the Food and Drugs Act that year was largely

125 *Nacarino v. Chobani, LLC*, No. 20-cv-07437, 2021 WL 3487117, at *10 (N.D. Cal. Aug. 9, 2021) (quoting *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969–70 (9th Cir. 2018)), *motion to certify appeal denied*, No. 20-CV-07437, 2022 WL 833328 (N.D. Cal. Mar. 21, 2022).

126 Andrew Faisman, *The Goals of Class Actions*, 121 COLUM. L. REV. 2157, 2202 (2021).

127 *See Brown v. Kellogg Sales Co.*, No. 20-CV-7283, 2022 WL 992627, at *1 (S.D.N.Y. Mar. 31, 2022); *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *1 (N.D. Ill. Mar. 1, 2022).

128 *See Nacarino*, 2021 WL 3487117, at *1.

spurred by concerns for the physical safety of consumers,¹²⁹ not the types of harm current mislabeling cases claim.

However, the Supreme Court's holding in *United States v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar*, a food mislabeling case, made clear the Food and Drugs Act protected against mislabeling as well.¹³⁰ The suit was over the alleged mislabeling of apple cider vinegar which was made with dried apples, not fresh or unevaporated, as the name apple cider vinegar would suggest.¹³¹ However, this claim was brought not by a class of consumers but by the United States government under the Food and Drugs Act.¹³² The Supreme Court held that:

The [Food and Drugs Act] is plain and direct. Its comprehensive terms condemn every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. The aim of the statute is to prevent that resulting from indirection and ambiguity, as well as from statements which are false. It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act. The statute applies to food, and the ingredients and substances contained therein. It was enacted to enable purchasers to buy food for what it really is.¹³³

The FDA was created shortly thereafter, and its power to regulate such conduct was bolstered by the passage of the Federal Food, Drug, and Cosmetic Act ("FDCA") of 1938.¹³⁴

The FDCA's main purpose is to protect consumers and to do so, it prohibits both adulteration and misbranding:¹³⁵

Generally, FDA's mission is to promote and protect public health by ensuring the safety, efficacy, and truthful labeling of products

129 See Federal Food and Drugs Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938); *Milestones in U.S. Food and Drug Law*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-history/milestones-us-food-and-drug-law> [<https://perma.cc/Y8G2-RHQB>].

130 *United States v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar*, 265 U.S. 438 (1924).

131 See *id.* at 443–44.

132 See *id.* at 439.

133 *Id.* at 442–43 (first citing *United States v. Schider*, 246 U.S. 519, 522 (1918); then citing *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 409 (1914); and then citing *United States v. Antikamnia Chem. Co.*, 231 U.S. 654, 665 (1914)).

134 See Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.); *Milestones in U.S. Food and Drug Law*, *supra* note 129.

135 KATHRYN B. ARMSTRONG & JENNIFER A. STAMAN, CONG. RSCH. SERV., R43609, ENFORCEMENT OF THE FOOD, DRUG, AND COSMETIC ACT: SELECT LEGAL ISSUES 2–3 (2018).

subject to the Act. Consistent with this mission, FDA is statutorily empowered to provide administrative guidance on the [FDCA’s] broad mandates and to enforce the Act through administrative actions. . . . In addition to such pre-market authority, FDA also possesses significant post-market authority to monitor regulated products that have entered interstate commerce to ensure the product continues to adhere to the Act.¹³⁶

The Act authorizes courts to grant injunctions for goods, with one of the most common reasons being violation of labeling and promotion requirements.¹³⁷ The FDA does not possess the sole enforcement power though, working in conjunction with the Department of Justice, U.S. Customs and Border Protection, as well as overlapping on FDCA-covered products with the Federal Trade Commission (FTC) and some state regulatory agencies.¹³⁸ The FDCA prohibits misbranding of food and drink:¹³⁹ “A food or drink is deemed misbranded if, *inter alia*, ‘its labeling is false or misleading,’ . . . information required to appear on its label ‘is not prominently placed thereon,’ . . . or a label does not bear ‘the common or usual name of the food, if any there be’”¹⁴⁰

Notably absent from this list of enforcers, though, is the right of a private individual to bring suit for violations of the FDCA. However, while individual plaintiffs or plaintiffs seeking class certification in federal courts face the number of hurdles detailed in this Note, federal law enables corporations to bring suits under the Lanham Act¹⁴¹ against competitors for mislabeling.¹⁴² In *POM Wonderful LLC v. Coca-Cola Co.*,¹⁴³ POM Wonderful LLC brought suit against Coca-Cola Co. for misleading labeling on their pomegranate-blueberry juice, a product that contained a fraction of a percentage of pomegranate and blueberry juice respectively.¹⁴⁴ The claim looks like one that might be brought by a class of consumers seeking injunctive relief under 23(b)(2). However, unlike the hurdles class actions face, POM Wonderful LLC was able to bring suit under the Lanham Act, which “creates a cause of action for unfair competition through misleading advertising or labeling.”¹⁴⁵

136 *Id.* at 3–4 (footnotes omitted).

137 *See id.* at 15–16, 15 n.173.

138 *See id.* at 4–5.

139 21 U.S.C. §§ 321(f), 331(b) (2018).

140 *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 108 (2014) (quoting 21 U.S.C. § 343 (2018)).

141 Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n (2018)).

142 *See POM Wonderful LLC*, 573 U.S. at 106.

143 *See id.* at 102.

144 *See id.* at 110.

145 *Id.* at 107.

The disparity between corporations' ability to bring mislabeling cases resembling those for violations of the FDCA while individual consumers cannot is thus clear.

Unlike the Lanham Act, which relies in substantial part for its enforcement on private suits brought by injured competitors, the FDCA and its regulations provide the United States with nearly exclusive enforcement authority, including the authority to seek criminal sanctions in some circumstances. Private parties may not bring enforcement suits.¹⁴⁶

Thus, private plaintiffs are left with fewer remedies in federal court than corporations when it comes to mislabeling, even though consumers are arguably harmed more than competitors by such mislabeling.

The FDA does not have the administrative capacity to preapprove all food and beverage labels before they are sold to ensure there is no mislabeling.¹⁴⁷ In *POM Wonderful*, the Supreme Court noted that the FDA instead "relies on enforcement actions, warning letters, and other measures" and "does not necessarily pursue enforcement measures regarding all objectionable labels."¹⁴⁸ If the FDA admittedly does not have the capacity to pursue all mislabeling claims and courts refuse to recognize injury in fact, then consumers largely have to rely on competitors to police false labels.

CONCLUSION

The consideration of standing for injunctive relief summons the larger critique of the injury-in-fact requirement generally. Should the judicially created doctrine of standing apply to equitable claims like injunctive relief? At common law, "[a] case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law or in equity."¹⁴⁹ Critics of standing have proposed many different fixes:

Although proposed fixes vary, the most prominent proposals have entailed not so much a return to the legal-injury test as a focus on "whether Congress (or some other relevant source of law) has created a cause of action." These proposals rest on a uniquely *legal* understanding of standing that may not be so well-adapted for

146 *Id.* at 109 (citation omitted) (first citing 21 U.S.C. § 333(a) (2018); and then citing 21 U.S.C. § 337 (2018)).

147 *See id.* at 116.

148 *Id.* (citing Brief for United States as Amicus Curiae in Opposition at 16, *POM Wonderful LLC*, 573 U.S. 102 (No. 12-761)).

149 Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817 (2004).

equitable claims. Critics of the Court's injury-in-fact jurisprudence would do better, I suggest, to explore the notion of an equitable grievance as an interpretive guide for what sorts of injury should count.¹⁵⁰

A complete overhaul of standing doctrine, however, is unnecessary when considering the issue at hand. Instead, the Ninth Circuit has already articulated the proper test.

Although most circuits have come to the alternative conclusion, the Ninth Circuit offers the correct conception of class-action standing in injunctive relief cases. Class representatives satisfy standing requirements where they either assert they cannot rely on advertising and so will not purchase a product in the future despite a desire to do so or that they may purchase again on the mistaken assumption the false labeling or the product has improved.¹⁵¹ The Second Circuit's alternate conclusion in *Berni* not only applies standing doctrine far too narrowly, but it also creates a catch-22 that leaves consumers essentially without remedy for mislabeling in federal courts. While competitors can bring suit for mislabeling under the Lanham Act, individual consumers are estopped because of inability to allege future harm. Instead, consumers in these circuits must rely chiefly on administrative agencies, like the FDA or the FTC to regulate mislabeling. However, as illustrated by the FDA, the regulatory agencies are understandably unable to approve every label or advertisement before they reach consumers, and at that point, the harm is already done. Thus, consumers need the powerful tool of the class action in federal courts to protect themselves from mislabeling.

150 Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1908 (2022) (footnotes omitted) (quoting Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 222 (1992)).

151 See *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969–70 (9th Cir. 2018).

