

17-1605

Langan v. Johnson & Johnson Consumer Cos.

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
5
6

7 AUGUST TERM, 2017

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9 ARGUED: FEBRUARY 6, 2018

10 DECIDED: JULY 24, 2018

11
12 No. 17-1605

13
14 HEIDI LANGAN, on behalf of herself and all others similarly situated,
15 *Plaintiff-Appellee,*

16
17 *v.*

18
19 JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,
20 *Defendant-Appellant.*

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23 Appeal from the United States District Court
24 for the District of Connecticut.

25 No. 13 Civ. 1471 – Jeffrey A. Meyer, *Judge.*
26

27
28 Before: WALKER, LYNCH, and CHIN, *Circuit Judges.*
29

30
31 Connecticut resident Heidi Langan sued Johnson & Johnson
32 Consumer Companies, Inc. (“Johnson & Johnson”) on behalf of
33 herself and “all others similarly situated” for deceptive labeling.

1 Plaintiff alleged that several of the company's baby products were
2 labeled "natural" when they were not. Langan claimed that this
3 labeling violated the Connecticut Unfair Trade Practices Act
4 (CUTPA), as well as the state consumer protection laws of twenty
5 other states, and sought to certify a plaintiff class. After both parties
6 moved for summary judgment, the district court denied both
7 motions, and certified a class of consumers who purchased two baby
8 bath products in eighteen states. We granted Johnson & Johnson leave
9 to appeal the class certification. On appeal, Johnson & Johnson
10 principally challenges the district court's conclusions that (1) Langan
11 has Article III standing to bring a class-action claim on behalf of
12 consumers in states other than Connecticut and (2) the state laws in
13 the other states are sufficiently similar to support certifying the class.
14 Although we hold that Langan has Article III standing, on the record
15 before us, it is not clear that the district court undertook the requisite
16 considered analysis of the material differences in the state laws at
17 issue before concluding that their similarities predominated over
18 their differences. We therefore VACATE the district court's grant of
19 certification, and REMAND for further proceedings consistent with
20 this opinion.

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8
9
10 JOHN M. WALKER, JR., *Circuit Judge*:

11 Connecticut resident Heidi Langan sued Johnson & Johnson
12 Consumer Companies, Inc. (“Johnson & Johnson”) on behalf of
13 herself and “all others similarly situated” for deceptive labeling.
14 Plaintiff alleged that several of the company’s baby products were
15 labeled “natural” when they were not. Langan claimed that this
16 labeling violated the Connecticut Unfair Trade Practices Act
17 (CUTPA), as well as the state consumer protection laws of twenty
18 other states, and sought to certify a plaintiff class. After both parties
19 moved for summary judgment, the district court denied both
20 motions, and certified a class of consumers who purchased two baby
21 bath products in eighteen states.¹ We granted Johnson & Johnson
22 leave to appeal the class certification. On appeal, Johnson & Johnson
23 principally challenges the district court’s conclusions that (1) Langan

¹ Although the district court inadvertently omitted Alaska from the list of relevant states on page 26 and in n.3 of its opinion, the district court did include Alaska in the list of states for which it certified a class. Accordingly, we refer to a plaintiff class in eighteen states.

1 has Article III standing to bring a class-action claim on behalf of
2 consumers in states other than Connecticut and (2) the state laws in
3 the other states are sufficiently similar to support certifying the class.
4 Although we hold that Langan has Article III standing, on the record
5 before us, it is not clear that the district court undertook the requisite
6 considered analysis of the material differences in the state laws at
7 issue before concluding that their similarities predominated over
8 their differences. We therefore VACATE the district court's grant of
9 certification, and REMAND for further proceedings consistent with
10 this opinion.

11 **BACKGROUND**

12 Connecticut resident Heidi Langan purchased several Johnson
13 & Johnson sunscreens and bath products for her baby in 2012. Langan
14 alleges that she purchased those products in part because their labels
15 said they contained "natural" ingredients. In reality, the products
16 were made up of a high percentage of non-natural, non-water
17 ingredients.

18 In October 2013, Langan sued Johnson & Johnson on behalf of
19 herself and "all others similarly situated" alleging that the company's
20 labeling was deceptive and violated CUTPA as well as the "mini-FTC
21 acts" of twenty other states. Langan sought to certify a plaintiff class
22 and requested compensatory and punitive damages as well as
23 attorney's fees. Both parties moved for summary judgment.

1 The district court denied both parties' motions for summary
2 judgment and certified a class as to two bath products, but not the
3 sunscreens. The two products, sold under the Aveeno Baby Brand,
4 were the "Calming Comfort Bath" ("bath") and the "Wash and
5 Shampoo" ("wash"). App'x 197. Johnson & Johnson petitioned for
6 permission to appeal pursuant to Federal Rules of Civil Procedure
7 23(f), and we granted leave. On appeal, Johnson & Johnson
8 principally challenges the district court's conclusions that (1) Langan
9 has Article III standing to bring a class-action claim on behalf of
10 consumers in states other than Connecticut, and (2) the state laws in
11 the other states are sufficiently similar to support certifying the class.²

² Johnson & Johnson also argues that that the district court erred by not requiring Langan to demonstrate that the proposed class was "administratively feasible." This argument is foreclosed by *In re Petrobras Sec.*, 862 F.3d 250, 267–70 (2d Cir. 2017) (rejecting the argument that proposed classes must be "administratively feasible" and holding that the class was "clearly objective" and "sufficiently definite" where it included people who acquired specific securities during a specific period in "domestic transactions" because class was "identified by subject matter, timing, and location," which made it "objectively possible" to ascertain members (emphasis omitted)). Since the class at issue here is identified by subject matter (purchasers of the two products), timing (before November 2012 and 2013 respectively), and location (the eighteen identified states), it is likewise "clearly objective" and "sufficiently definite" such that determining who purchased the products is undoubtedly "objectively possible." *Id.* at 269–70. Moreover, we think Johnson & Johnson's identification concerns are overstated. In *Petrobas*, we cited approvingly the district court's grant of certification where the district court allowed putative class members to provide a sworn affidavit indicating when and where they purchased the olive oil at issue (862 F.3d at 267 (citing *Ebin v.*

DISCUSSION

“We review a district court’s decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo*, and any findings of fact for clear error.” *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 79 (2d Cir. 2015) (internal quotation marks omitted).

I. Article III Standing

Johnson & Johnson argues that Langan lacks constitutional standing to represent putative class members whose claims are governed by the laws of states other than Connecticut. Because a plaintiff’s standing to sue implicates our power to hear the case, we must consider the issue even though it was barely raised in and not addressed by the district court. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 39 (2d Cir. 2015) (noting that standing may be raised “for the first time on appeal”).

“Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to the resolution of ‘cases’ and ‘controversies.’” *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62 (2d Cir. 2012) (internal

Kangadis Food Inc., 297 F.R.D. 561, 567 (S.D.N.Y. 2014)). Since we think it is more likely that a consumer would remember the time frame in which he purchased a bath or wash for his baby—that is, when his child was still a baby—than when he purchased a bottle of olive oil, we see no ascertainability problem with having the class members submit sworn affidavits describing the circumstances under which the purchases were made.

1 quotation marks omitted). “To ensure that this bedrock case-or-
2 controversy requirement is met, courts require that plaintiffs establish
3 their standing as the proper parties to bring suit.” *Id.* (internal
4 quotation marks and alterations omitted). To have standing to sue, “a
5 plaintiff must demonstrate (1) a personal injury in fact (2) that the
6 challenged conduct of the defendant caused and (3) which a favorable
7 decision will likely redress.” *Id.*

8 Unremarkably, the parties agree that Connecticut’s consumer
9 protection statute, CUTPA, does not apply to the purchase of bath and
10 wash products in other states. Likewise, the parties agree that Langan
11 herself has standing to sue Johnson & Johnson under CUTPA because
12 she alleged that she paid a premium in Connecticut for the products,
13 based on Johnson & Johnson’s representations that they were natural,
14 and that those injuries can be redressed by an order compelling
15 Johnson & Johnson to pay Langan money damages. *See Mahon*, 683
16 F.3d at 62.

17 The only point of contention is whether Langan has standing to
18 bring a class action on behalf of unnamed, yet-to-be-identified class
19 members from other states under those states’ consumer protection
20 laws. Because there has been considerable disagreement over this
21 question in the district courts, we write to make explicit what we
22 previously assumed in *In re Foodservice Inc. Pricing Litigation*, 729 F.3d
23 108 (2d Cir. 2013): as long as the named plaintiffs have standing to sue

1 the named defendants, any concern about whether it is proper for a
2 class to include out-of-state, nonparty class members with claims
3 subject to different state laws is a question of predominance under
4 Rule 23(b)(3), *id.* At 126–27, not a question of “adjudicatory
5 competence” under Article III, *Morrison v. YTB Int’l, Inc.*, 649 F.3d 533,
6 536 (7th Cir. 2011). *Compare Richards v. Direct Energy Servs., LLC*, 120
7 F. Supp. 3d 148, 154–56 (D. Conn. 2015) (denying certification as to
8 out-of-state class members for lack of standing), *with In re Bayer Corp.*
9 *Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F. Supp.
10 2d 356, 376–77 (E.D.N.Y. 2010) (distinguishing standing from the Rule
11 23 inquiry and certifying class action brought under laws of multiple
12 states after finding no standing problem).

13 “[A]s the Supreme Court has acknowledged, there is some
14 ‘tension’ in its case law as to whether ‘variation’ between (1) a named
15 plaintiff’s claims and (2) the claims of putative class members ‘is a
16 matter of Article III standing . . . or whether it goes to the propriety of
17 class certification’” *NECA-IBEW Health & Welfare Fund v. Goldman*
18 *Sachs & Co.*, 693 F.3d 145, 160 (2d Cir. 2012) (quoting *Gratz v. Bollinger*,
19 539 U.S. 244, 263 & n.15 (2003)). To understand why variations in state
20 law present a class certification problem and not a constitutional
21 standing problem, it is helpful to consider the complicated

1 relationship between the standing requirement and class actions
2 generally.

3 The doctrine of standing tests whether a prospective litigant
4 may properly invoke the power of the federal courts. *See Spokeo, Inc.*
5 *v. Robins*, 136 S. Ct. 1540, 1547 (2016). The standing requirement
6 acknowledges that not all injuries can be remedied by courts, and that
7 even some injuries that could be the responsibility of the political
8 branches instead. *See id.* (“The law of Article III standing serves to
9 prevent the judicial process from being used to usurp the powers of
10 the political branches.” (internal quotation marks and alterations
11 omitted)); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998).
12 To avoid giving advisory opinions, we require that parties that come
13 before us have a sufficient stake in the outcome of the case to render
14 it a case or controversy. *See Steel Co.*, 523 U.S. at 97, 101; *see also* U.S.
15 Const. art. III, § 2.

16 Class actions under Rule 23 of the Federal Rules of Civil
17 Procedure are an exception to the general rule that one person cannot
18 litigate injuries on behalf of another. *See Wal-Mart Stores, Inc. v. Dukes*,
19 564 U.S. 338, 348 (2011). Through Rule 23, Congress has authorized
20 plaintiffs to bring, under limited circumstances, a suit in federal court
21 on behalf of, not just themselves, but others who were similarly
22 injured. *See id.* at 348–49. Such suits result in efficiencies of cost, time,
23 and judicial resources and permit a collective recovery where

1 obtaining individual judgments might not be economically feasible.
2 *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“The
3 policy at the very core of the class action mechanism is to overcome
4 the problem that small recoveries do not provide the incentive for any
5 individual to bring a solo action prosecuting his or her rights.”
6 (internal quotation marks omitted)); *Gen. Tel. Co. of the Sw. v. Falcon*,
7 457 U.S. 147, 155 (1982). Although a named class action plaintiff has
8 not actually suffered the injuries suffered by her putative class
9 members (and therefore would not normally have standing to bring
10 those suits), Congress has said that the fact that the parties “possess
11 the same interest” and “suffer[ed] the same injury” gives the named
12 plaintiff a sufficient stake in the outcome of her putative class
13 members’ cases. *Wal-Mart*, 564 U.S. at 348–49.

14 This requirement is easy enough to satisfy when the would-be
15 class members’ cases are substantially identical. For example, a
16 plaintiff who purchased the same product, on the same day, at the
17 same place, from the same defendant, because of the same misleading
18 offer as many other purchasers would plainly have standing to sue
19 on behalf of those similarly situated purchasers.

20 In reality, it rarely happens that the circumstances surrounding
21 one plaintiff’s claim end up being identical to the claims of another
22 putative class member, let alone all of the others. Anticipating this,
23 some of Rule 23’s requirements (*e.g.*, commonality and typicality

1 under 23(a), and predominance under 23(b)) exist to prevent courts
2 from certifying classes that do not share sufficiently similar
3 characteristics. *See Wal-Mart*, 564 U.S. at 349. At some point, however,
4 a named plaintiff's claims can be so different from the claims of his
5 putative class members that they present an issue not of the prudence
6 of certifying a class under Rule 23 but of constitutional standing. *See*
7 *Mahon*, 683 F.3d at 62–63. The question for our purposes is at what
8 point the claim of a named plaintiff is so different from the claims of
9 her would-be class members that the exception that we make to the
10 general standing requirements for class actions should not apply. Our
11 caselaw supplies a few answers.

12 We have held that the claims of putative class members are too
13 dissimilar to support standing against a particular defendant when
14 that defendant did not actually injure a named plaintiff. In *Mahon*, we
15 considered a putative consumer class action against title insurance
16 companies that allegedly concealed the availability of reduced rates.
17 *See id.* at 60. The district court denied certification as to one of the
18 defendant companies that had not actually sold insurance to the
19 plaintiff, and we affirmed. *See id.* at 60–61. Even though the company
20 used forms and practices that were similar to those used by the
21 company that did sell to the plaintiff and was owned by the same
22 parent company, we held that the plaintiff lacked standing to sue the
23 company that had not actually misled her because, “with respect to

1 each asserted claim” against each defendant, “a plaintiff must always
2 have suffered a distinct and palpable injury to herself.” *Id.* at 64
3 (alterations, quotation marks, and emphasis omitted).

4 On the other hand, non-identical injuries of the same general
5 character can support standing. *See NECA*, 693 F.3d at 148–49. In
6 *NECA*, we held that the plaintiff, a purchaser of mortgage-backed
7 certificates, could certify a class including certificate holders outside
8 the specific tranche from which the named plaintiff purchased
9 certificates, even though the certificates from each tranche varied in
10 their payout priority. *See id.* at 164. We reasoned that these different
11 payment priorities did not render a certificate holder who would be
12 paid sooner incapable of representing a certificate holder who would
13 be paid later, or vice versa, because all certificate holders had “the
14 same necessary stake in litigating whether [the] lenders . . .
15 abandoned their” responsibilities to follow underwriting guidelines.
16 *Id.* (internal quotation marks omitted). *Compare Gratz*, 539 U.S. at 262–
17 63 (finding no standing problem even though factual differences
18 existed between the challenged race-based transfer policy applied to
19 plaintiff and the freshman admissions policy applicable to others in
20 class), *with Blum v. Yaretsky*, 457 U.S. 991, 1001–02 (1982) (holding that
21 plaintiffs in state-run facilities who were threatened with transfers to
22 facilities with lower levels of care did not have standing to sue on
23 behalf of patients who were threatened with transfers to higher levels

1 of care because the conditions of the transfers were “sufficiently
2 different” such that “judicial assessment of their procedural adequacy
3 would be wholly gratuitous and advisory”).

4 The question in this case is whether there is a standing problem
5 when a plaintiff attempts to sue on behalf of those who may have
6 claims under different states’ laws that generally prohibit the same
7 conduct. Although we have not expressly resolved this question, we
8 have previously assumed that this is an issue best addressed under
9 Rule 23, rather than as a standing issue. *See In re Foodservice*, 729 F.3d
10 at 112. For example, in *In re Foodservice*, we considered a consumer
11 class action against a food distributor that, the plaintiffs alleged,
12 fraudulently overbilled its customers. *See id.* The defendants appealed
13 the district court’s certification of the class, claiming that certification
14 was improper because the class action implicated the distinct contract
15 laws of multiple states. *See id.* at 126. We rejected that argument and
16 affirmed the certification, reasoning that “putative class actions
17 involving the laws of multiple states are often not properly certified
18 pursuant to Rule 23(b)(3) because the variation in the legal issues to be
19 addressed overwhelms the issues common to the class.” *Id.* at 126–27
20 (emphasis added).

21 This approach of considering variations in state laws as
22 questions of predominance under Rule 23(b)(3), rather than standing
23 under Article III, makes sense. For one, it acknowledges the obvious

1 truth that class actions necessarily involve plaintiffs litigating injuries
2 that they themselves would not have standing to litigate. *See In re*
3 *Bayer Corp.*, 701 F. Supp. 2d at 377 (“Whether the named plaintiffs
4 have standing to bring suit under each of the state laws alleged is
5 ‘immaterial’ because they are not bringing those claims on their own
6 behalf, but are only seeking to represent other, similarly situated
7 consumers in those states.”). Since class action plaintiffs are not
8 required to have individual standing to press any of the claims
9 belonging to their unnamed class members, it makes little sense to
10 dismiss the state law claims of unnamed class members for want of
11 standing when there was no requirement that the named plaintiffs
12 have individual standing to bring those claims in the first place. *See*
13 *id.*

14 This approach also accords with the Supreme Court’s
15 preference for dealing with modest variations between class
16 members’ claims as substantive questions, not jurisdictional ones. *See*
17 *Gratz*, 539 U.S. at 266 (explaining that differences in use of race
18 between transfer- and freshman-admissions policies “clearly ha[d] no
19 effect on petitioners’ standing to challenge the [policies]” but “might
20 be relevant to a narrow tailoring analysis”); *see also Lewis v. Casey*, 518
21 U.S. 343, 358 n.6 (1996) (“The standing determination is quite separate
22 from certification of the class.”).

1 Finally, the only other circuit to have addressed this issue has
2 reached the same conclusion. *See Morrison*, 649 F.3d at 536 (explaining
3 that whether plaintiff could bring putative class action on behalf of
4 out-of-state class members “ha[d] nothing to do with *standing*, though
5 it may affect whether a class should be certified—for a class action
6 arising under the consumer-fraud laws of all 50 states may not be
7 manageable, even though an action under one state’s law could be”).

8 We are not convinced by the reasoning of those district courts
9 that have addressed the issue we confront as a standing issue. For
10 example, in *Richards v. Direct Energy Servs., LLC*, the district court
11 concluded that a Connecticut plaintiff that alleged that the defendant
12 energy company had attracted customers with misleading promises
13 of low rates lacked standing to sue on behalf of Massachusetts
14 consumers who were injured by the same defendant. 120 F. Supp. 3d
15 at 151. The court reasoned that “[w]ithout an allegation that [the
16 named plaintiff] personally was injured in Massachusetts,” the
17 plaintiff’s claim was essentially that, like the plaintiffs in
18 Massachusetts, he had “suffered in some indefinite way in common
19 with people generally.” *Id.* at 155 (internal quotation marks and
20 alteration omitted). This reasoning falters upon its premise: the harm
21 the plaintiff alleged was not a general grievance common to people
22 generally; it was a specific grievance based on the defendant’s falsely
23 advertised rates, suffered by specific people (Connecticut and

1 Massachusetts customers of the defendant), under a specific set of
2 circumstances. *See id.* We fail to see how the fact that the defendant's
3 wrongful conduct impacted customers in two states rendered the
4 injuries of the Massachusetts consumers somehow more indefinite
5 than the identical injuries of the Connecticut consumers.³

6 Accordingly, we conclude that whether a plaintiff can bring a
7 class action under the state laws of multiple states is a question of
8 predominance under Rule 23(b)(3), not a question of standing under
9 Article III. Since Langan's individual standing to sue is not in doubt,
10 we turn to the question of whether the district court correctly
11 determined that the predominance requirement of Rule 23(b)(3) was
12 satisfied.

13 II. Predominance

14 Langan attempted to certify a class under Rule 23(b)(3), the
15 provision that allows for the common "opt-out" class action, a class
16 action designed to bind all class members except those who

³ Johnson & Johnson's argument that *Mahon*, discussed earlier, requires a different result is unpersuasive. First, *Mahon*'s rejection of "analyz[ing] class certification before Article III standing" only requires that a district court first determine that the party plaintiff was actually injured by each of the named defendants before proceeding to the Rule 23 inquiry. *See Mahon*, 683 F.3d at 64. Second, because the redressability and fundamental fairness concerns that arise when a plaintiff attempts to haul a non-injurious defendant into court are not present when a plaintiff initiates a class action under various state laws prohibiting similar conduct by the same defendant, this case is distinguishable from *Mahon*. *See id.* at 65–66.

1 affirmatively choose to be excluded. *See Amchem*, 521 U.S. at 614–15;
2 *see also* Scott Dodson, *An Opt-In Option for Class Actions*, 115 Mich. L.
3 Rev. 177–79 (2016). To ensure that binding absent class members is
4 fair, *see Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013), before a district
5 court may certify a class under Rule 23(b)(3) the party seeking
6 certification must show that “questions of law or fact common to class
7 members predominate over any questions affecting only individual
8 members.” Fed. R. Civ. P. 23(b)(3). This predominance requirement
9 “tests whether proposed classes are sufficiently cohesive to warrant
10 adjudication by representation.” *Mazzei v. Money Store*, 829 F.3d 260,
11 272 (2d Cir. 2016) (internal quotation marks omitted). The
12 predominance requirement is satisfied if “resolution of some of the
13 legal or factual questions that qualify each class member’s case as a
14 genuine controversy can be achieved through generalized proof,” and
15 “these particular issues are more substantial than the issues subject
16 only to individualized proof.” *Roach v. T.L. Cannon Corp.*, 778 F.3d 401,
17 405 (2d Cir. 2015).

18 Variations in state laws do not necessarily prevent a class from
19 satisfying the predominance requirement. *See In re U.S. Foodservice*,
20 729 F.3d at 127 (holding that there was no predominance problem
21 with a putative class action brought under the state contract law of
22 various states where all of the jurisdictions had adopted the Uniform
23 Commercial Code). As with all Rule 23 requirements, the party

1 seeking certification has the ultimate burden to demonstrate that any
2 variations in relevant state laws do not predominate over the
3 similarities. *See Wal-Mart*, 564 U.S. at 350; *In re U.S. Foodservice*, 729
4 F.3d at 127 (finding no predominance issue where defendant had
5 alleged but not proffered evidence to support its claim that variation
6 in evidentiary standards among states overwhelmed the similarities).

7 The decision to certify a class is a discretionary determination,
8 which we will only overturn if the district court abused its discretion.
9 *See In re U.S. Foodservice*, 729 F.3d at 116. To be afforded this deference,
10 however, the certification must be sufficiently supported and
11 explained. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 690
12 (9th Cir. 2018); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006 (D.C. Cir.
13 1986) (“[I]t is unquestionably the role of an appellate court to ensure
14 that class certification determinations are made pursuant to
15 appropriate legal standards.”).

16 The district court found that Langan had shown predominance
17 since there was no indication that any of the minor differences
18 Johnson & Johnson identified between the various state consumer
19 protection laws “should overwhelm the questions common to the
20 class” given that “[a]ll the states have a private right of action for
21 consumer protection violations, allow class actions, and have various
22 other important similarities.” App’x 195–96. On appeal, Johnson &
23 Johnson argues that the district court erred by failing to engage in a

1 rigorous analysis of the similarities and differences in the various
2 state laws at issue. We agree.

3 Under Rule 23(b)(3), the district court has a “duty,” before
4 certifying a class, to “take a close look” at whether the common legal
5 questions predominate over individual ones. *Comcast*, 569 U.S. at 34
6 (internal quotation marks omitted). Although, to date, we have not
7 explained what such a “close look” requires, out-of-circuit precedent
8 offers helpful guidance.

9 To begin, district courts must do more than take the plaintiff’s
10 word that no material differences exist. *See Walsh*, 807 F.2d at 1016
11 (refusing to accept “on faith” the plaintiffs’ claims on appeal that “no
12 variations in state . . . laws relevant to [the] case exist[ed]”). Rather,
13 district courts themselves must undertake a considered analysis of the
14 differences in state laws. *See Sacred Heart Health Sys., Inc. v. Humana*
15 *Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010). In
16 *Sacred Heart*, the Eleventh Circuit reversed the district court’s
17 certification of a class of hospitals that claimed they were underpaid
18 for medical services by a health maintenance organization. *See id.* The
19 district court, in discussing the potential predominance issue
20 regarding certain differences in relevant state laws, had stated only
21 that there were “some variations” but that since the laws of “only six
22 states” were involved, common issues would not be overwhelmed.
23 *Id.* The Eleventh Circuit found this cursory explanation not to be a

1 “serious analysis of the variations in applicable state law,” and that
2 by certifying a class based on it, the district court abused its discretion.
3 *Id.*

4 As part of its analysis, a district court that relies on subclasses
5 to cure predominance issues as a prerequisite to certification must
6 identify the required subclasses and explain why they are necessary.
7 *See id.* at 1183. In *Sacred Heart*, the district court had also suggested in
8 passing that identifying subclasses could be a way to address
9 predominance problems. The district court, however, had not
10 identified any potential subclasses, nor discussed how those
11 subclasses would cure the predominance issues. *See id.* The Eleventh
12 Circuit concluded that the district court’s oblique reference to
13 subclasses failed to explain how subclasses would prevent “the
14 proliferation of disparate factual and legal issues,” given that, in
15 addition to the state law variations, material provisions of the
16 individual contracts for legal services varied as well. *Id.* Because these
17 factual and legal differences suggested a need for multiple sets of
18 subclasses, the district court’s mere mention of subclasses was not an
19 “adequate response.” *Id.*

20 We are not convinced that the district court here undertook the
21 requisite considered analysis of the variations in state law and the
22 potential need for subclasses that might result from those variations.
23 Although both parties submitted complicated and conflicting

1 summaries of the state consumer protection laws in eighteen states,
2 the district court's analysis consisted of one paragraph. In that
3 paragraph, it is our view that the district court did not sufficiently
4 engage with Johnson & Johnson's arguments about reliance, instead
5 concluding that "it appears" that none of the states' high courts have
6 insisted on reliance. *See* App'x at 195. The other identified
7 differences—including whether intent to deceive is required, and
8 whether causation can be presumed—were not discussed. As in
9 *Sacred Heart*, the district court only stated generally that the identified
10 differences were "minor" and "should [not] overwhelm the questions
11 common to the class." App'x at 195. We believe that more precise and
12 greater depth of analysis is required to comport with the "close look"
13 required by the precedent.

14 Accordingly, we remand the case to the district court to
15 conduct a more thorough analysis. *See In re Am. Int'l Grp., Inc. Sec.*
16 *Litig.*, 689 F.3d 229, 243 (2d Cir. 2012) (vacating grant of class
17 certification and remanding for further consideration as to
18 predominance where it was not clear from the record on appeal
19 "whether variations in state law might cause class members' interests
20 to diverge"); *Walsh*, 807 F.2d at 1019 (remanding to the district court
21 after clarifying the Rule 23(b)(3) predominance inquiry so the district
22 court could redo the analysis). Although this court is free to consider
23 variations in state laws in the first instance, *see, e.g., Johnson v. Nextel*

1 *Commc'ns Inc.*, 780 F.3d 128, 146–48 (2d Cir. 2015), the judgment
2 whether to certify a class under Rule 23(b)(3) is a discretionary
3 determination that we think is best made by the district court upon
4 appropriate analysis of the circumstances of the case. *See generally In*
5 *re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 31 (2d Cir. 2006), *decision*
6 *clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007). Out of respect for
7 the district court's comparative advantage at weighing whether,
8 under the circumstances of this case, state law similarities or
9 differences will predominate, we remand the case to the able district
10 judge to carefully analyze the relevant state laws, decide whether
11 subclasses are appropriate, reconsider the predominance question,
12 and explain in greater detail its conclusion on that question.

13 CONCLUSION

14 For these reasons, we VACATE the district court's grant of
15 certification, and REMAND for further proceedings consistent with
16 this opinion.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 Catherine O'Hagan Wolfe