No. 24-304

In the Supreme Court of the United States

LABORATORY CORPORATION OF AMERICA HOLDINGS, D/B/A LABCORP,

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND AMERICAN COUNCIL OF THE BLIND, individually and on behalf of all others similarly situated,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

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INTRODUCTION

The question presented is whether a federal court may certify a damages class that includes uninjured members. Labcorp asks the Court to answer that question through one of two alternative paths—either by interpreting Rule 23(b)(3)'s predominance requirement or by holding that Article III imposes a freestanding barrier to certifying any damages class if it includes even a single uninjured member. The first path presents a recurring procedural issue on which the lower courts largely agree—although none has adopted Labcorp's proposed categorical answer to this inherently case-specific inquiry. The second path proposes a novel constitutional rule that no circuit has adopted, that the Solicitor General does not embrace, and that would prove profoundly disruptive in practice.

At the threshold, however, Labcorp faces more fundamental problems. For one, the question presented is not actually presented. It presumes a scenario in which "some members of the proposed class lack any Article III injury." But neither court below determined that there are *any* uninjured class members here. To the contrary, the court of appeals found that "*all* class members were injured" in the same way. JA397, 399 (emphasis added).

For another, Labcorp's contrary position relies entirely (at 2, 8, 22, 43) on a class definition that the Ninth Circuit held was beyond "the bounds of [its] jurisdiction" and so was "not properly before th[e] court" on appeal—a holding on which Labcorp did not seek certiorari. JA400. Because that separate class definition falls outside the "case[] in the court of appeals," it also falls outside this Court's certiorari jurisdiction. 28 U.S.C. § 1254(1). The Court may therefore wish to dismiss the writ of certiorari as improvidently granted.

If this Court nevertheless reaches the question presented, it should conclude that Labcorp is wrong on the merits. Labcorp interprets Rule 23(b)(3) to impose two requirements. On its reading, not only must courts ask whether there is an administratively feasible way to identify uninjured class members and ensure that they receive no damages, but courts must go further—categorically denying certification of any damages class that contains more than what Labcorp calls an "appreciable number" of uninjured members.

Labcorp's amorphous new "appreciable number" standard has no basis in Rule 23(b)(3)'s text and would be unworkable in practice. Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members." This text necessitates an inquiry into the existence of individualized issues, but it creates no special rule for questions of injury. It doesn't require those (and only those) questions to be perfectly uniform in every case. Nor does it impose some arbitrary cap on the percentage of the class that may be uninjured.

Instead, when a class is credibly shown to contain uninjured members, predominance turns on whether there is an administratively feasible way to identify them before they receive relief. This assessment necessarily requires courts to "undertake a case-specific inquiry into whether [the] class issues predominate." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011). Sometimes, the presence of uninjured members will not defeat predominance because they can be identified through administratively feasible procedures. Other times, the process of separating injured from uninjured class members will be sufficiently individualized that it will overwhelm common issues and defeat certification.

Reading Rule 23 in this way is consistent with this Court's decision, and Chief Justice Roberts's concurrence, in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016). And it is consistent with the Ninth Circuit's controlling approach to the issue, set forth in Judge Ikuta's en banc opinion in *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668 n.12 (9th Cir. 2022).

As Labcorp recognizes (at 37 n.3), resolving the Rule 23 question may make it unnecessary to reach the constitutional one: whether, *if* a court were to find that Rule 23 authorizes certification of a class with uninjured members, Article III would then impose its own barrier to certification. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 612 (1997) (explaining that "any Article III issues" created by class certification should be addressed only after the application of Rule 23, because those issues "would not exist but for the [class-action] certification").

In any event, if it does reach the issue, the Court should hold that Article III does not require all absent members to have standing for the class to be certified. Historically, representative actions followed a bifurcated procedure: first establishing the "general right" through a representative party, *Mayor of York v. Pilkington* (1737) 25 Eng. Rep. 946, 947 (Ch.), and only later requiring individual claimants to "come in under the decree" to prove their entitlement to relief. Story, *Commentaries on Equity Pleadings* § 99 (2d ed. 1840). Both Rule 23 and this Court's precedents adhere to this bifurcated approach. They distinguish between named plaintiffs, who must establish standing to invoke federal jurisdiction, and absent class members, who need not do so until the court acts on them as individuals.

This approach coheres with two core principles of Article III standing. The first is that standing is necessary "to justify [the] exercise of the court's remedial powers." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976). The second is that standing is necessary to keep a court from "deciding issues [that it] would not otherwise be authorized to decide." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). Under these principles, if a class member invokes the court's remedial powers as to her own claim—for example, by requesting relief—she must show standing. And if a court is asked to decide an issue that is not one of the common issues—for example, a question peculiar to one class member—that member must have standing for the court to address it. But neither of these principles is implicated at the certification stage

Labcorp's contrary view would cause chaos. It would threaten global peace via settlements that resolve some of the largest mass controversies today, splintering them into thousands of individual cases. The Court shouldn't open that Pandora's box. If it does, neither Congress nor the Rules Committee can put the lid back on.

Nothing about this case justifies Labcorp's quest for sweeping constitutional change. If there's a problem here, it isn't the result of some plot to "inflate" classes to "extort" innocent corporations. Pet. Br. 3. It is instead a problem of Labcorp's making. It was *Labcorp's* attack on the original class definition as *too* tethered to class members' injuries that led to the definition on which Labcorp now pegs its arguments. The hitch, though, is that the new definition wasn't within the scope of the appeal below. So it's not before this Court either. This rickety vessel simply cannot take Labcorp where it wants to go. The better course, for now, is restraint.

STATEMENT

A. Legal background

1. "[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999). As early as the 12th century, representative cases were heard in the court of the Archbishop of Canterbury. *See* Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 688 (1997). While the shape of representative litigation evolved in the ensuing centuries, it was alive and well at the time of the founding. *See* Yeazell, *From Medieval Group Litigation to the Modern Class Action* 176-94 (1987).

A common feature of representative litigation in that period was the bifurcation of proceedings. "In the first stage"—the classwide stage—the chancellor entered a decree determining the class's entitlement to the common right asserted. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213, 253 (1990). "Assuming entry of an interlocutory decree favorable" to the class, a second stage was then overseen by a master, at which point those being represented would "come in and litigate their individual claims." *Id.*

This equitable tradition carried over to America and was well established by the early 1800s. *See, e.g.*, *West v. Randall*, 29 F. Cas. 718 (D.R.I. 1821) (Story, J.); *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829). Justice Story, for instance, discussed the bifurcated process in his classic equity treatise. *See* Story, *Commentaries on Equity Pleadings* §§ 96, 99 (2d ed. 1840). And in *Swith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), this Court allowed a representative action to proceed, awarded relief

to the class, and ordered the case referred "to a master" on remand for proceedings about the "distribution" of the fund among the class. *Id.* at 303, 309.

2. "From these roots, modern class action practice emerged in the 1966 revision of Rule 23." *Ortiz*, 527 U.S. at 833. Like its forebearers, a Rule 23 class action has two phases: (1) a representative phase, when the named plaintiff pursues a class claim on behalf of absent members, and (2) a phase when the court acts on class members as individuals (by, for example, issuing relief).

This is clear from the rule's text. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). It says that a plaintiff who is part of a proposed class may act as a "representative part[y] on behalf of all members" only if four prerequisites are met. Fed. R. Civ. P. 23(a). Each reinforces the action's representative nature: (1) joinder of class members must be "impracticable"; (2) there must be a common legal or factual question such that answering it for the named plaintiff will answer it for the class; (3) the "representative parties" must have claims typical of the class; and (4) they must adequately represent the class. *Id.*

Rule 23 also requires the named plaintiff to satisfy one of Rule 23(b)'s subsections. Relevant here is (b)(3), which requires that common questions "predominate over any questions affecting only individual members." This subsection further reinforces the representative nature of the proceeding. It requires courts to consider, as part of the analysis, "class members' interests in individually controlling the prosecution … of separate actions,"

thereby making clear that absent members do *not* control the prosecution of the class claim. *Id.* 23(b)(3)(A).

If a named plaintiff satisfies Rule 23(a) and (b)(3), the court must certify a class action and "define the class and the class claims." *Id.* 23(c)(1)(B). The court then directs notice to absent members informing them of their right to opt out. *Id.* 23(c)(2)(B). Those who do not opt out become part of the class, and the named plaintiff pursues his claim as a class claim on their behalf. The absent class members may monitor the proceedings and seek "to intervene and present [their] claims" or "to otherwise come into the action." *Id.* 23(d)(1)(B)(iii). But they will "come into the action" only with court permission. *Id.* It is only in the final judgment—which the rule calls a "class judgment"—that the court must "specify or describe those … whom [it] finds to be class members." *Id.* 23(c)(2)(B)(vii), (3)(B).

In many cases—both litigated judgments and class settlements approved by the district court under Rule 23(e)—the court will also establish and oversee a post-judgment claims process. Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 30 (3d ed. 2010). During this process, class members may come forward to request relief on their individual claims. Claims-administration firms and special masters are often tapped to aid the court in implementing this process and ensuring that only valid claims are paid. *Id.*

B. Factual background

Labcorp is a diagnostic-testing company that earns over $11 billion annually providing patients with medical tests like blood and urine screenings. JA205, 605. It operates around 2,000 patient service centers nationwide, including 280 in California. JA574-75, 605.

In 2016, Labcorp replaced traditional patient check-in at its service centers with self-service kiosks. JA573. The new system—for which it registered the new service mark "Labcorp Express"—allows patients to register and check themselves in, and to perform other tasks like making appointments, tracking test results, and paying bills. JA579-80. Labcorp predicted that, by reducing staff and increasing the number of patients served, Labcorp Express would save $14 million per year—paying for itself in under four years. JA575, 578.

Internal documents, however, show that Labcorp recognized a "risk" to its plan: Blind patients would be "unable to check in" at the kiosks. JA168, 576; *see* 4-ER-909. Labcorp could have easily addressed this problem. At the time, a "number of companies provide[d] kiosks … for healthcare check-in" that were "fully accessible." JA238. As the plaintiffs' expert explained, accessible kiosks were thus a readily available and cost-effective option that would not have interfered with functionality. JA236. Indeed, the first vendor proposal that Labcorp received was for such a device—an ADA-compliant kiosk with accessibility features. JA477, 582; *see* 5-ER-1185-88.

Yet Labcorp declined that option, instead selecting kiosks that are "not accessible to blind users." JA235-36, 582. Although these kiosks are built around iPads, which come equipped with various accessibility features, Labcorp left their screen-reading software disabled and covered up their built-in headphone jacks. JA237-38, 575, 582-83. And although Labcorp considered offering "a braille option," JA64, it took no action to do so, nor to implement an accessible alternative. JA596-98.

There is thus "no way for a blind user" to "interact with this kiosk." JA236. Labcorp "explicitly recognized"

as much, noting internally that its "device could not service a blind person." JA207. It nevertheless chose to implement "identical" inaccessible kiosks in nearly 2,000 waiting rooms nationwide. 1-ER-37.

Making matters worse, Labcorp trained its staff to instruct patients that kiosks were "mandatory" for check-in. JA382, 584-85. That left blind patients with no choice but to ask for help navigating the touchscreen devices—usually from a stranger—forcing them to divulge personal medical information in public. *See* 6-ER-1484-86; 7-ER-1507, 1510. Blind patients were thus not only denied the benefits of express check-in, but were forced to endure longer waits and less privacy than before. That is especially problematic in a medical office, where patients are often sick, elderly, or weak from fasting for blood tests, and where spending time in the waiting room risks exposure to disease. JA573; *see* 6-ER-1366-67.

Although Labcorp now claims (at 1) that blind patients have "zero interest" in kiosks, it presented "no evidence" below to back this up. JA382, 584-85. It asserts (at 9) that "[u]nrebutted record evidence shows that over a third of all Labcorp patients prefer not to use a kiosk." That is false. The only evidence it cites shows that, during a limited time period, a third of patients didn't use the kiosks. 3-ER-509. That says nothing about the *preferences* of those patients, let alone of blind patients. For that, Labcorp relies on the testimony of a single class member (at 9) who, because he is blind, was never informed that the kiosks existed and was therefore, as the Ninth Circuit recognized, denied "the ability to make [the] choice" to use them. JA399; *see* 3-ER-452.[1] In any

[1] Labcorp also suggests (at 9) that the record has "indication[s]" that a "higher" percentage of blind patients prefer not to use kiosks.

event, subjective preferences are irrelevant here. Labcorp does not dispute that using Labcorp Express was "not optional" for patients. JA382, 591.

C. Procedural background

1. After Labcorp ignored their complaints, the plaintiffs—two blind patients unable to access Labcorp Express—sued Labcorp under the ADA and California's Unruh Civil Rights Act. Their complaint alleges that Labcorp violated these statutes by denying them (1) equal access to Labcorp's services and (2) auxiliary aids and services, such as qualified screen-reading software or braille alternatives, necessary "to ensure effective communication." *See* 42 U.S.C. § 12182(b)(1)(A)(ii), (b)(2)(A)(ii); 28 C.F.R. § 36.303(b)(2), (c)(1); *see also* Cal. Civ. Code § 51(f) (incorporating same).

The plaintiffs sought certification of a Rule 23(b)(3) class of California plaintiffs seeking damages under the Unruh Act. JA358-59, 370-71, 394; 1-ER-65. They argued that common questions predominate because all plaintiffs are entitled to statutory damages. JA357. But "should the need arise for class members to confirm eligibility to recover statutory damages," they explained, the "issue may properly be addressed by way of a claim form after class wide liability has been determined." JA357-58.

The district court agreed. It found that Labcorp's kiosks are "identical" and that it could, if needed, "create a claims process by which to validate individualized claim determinations." JA360. The district court defined the damages class as: "All legally blind individuals who

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But the testimony it relies on establishes only that having "a staff member [] available" at check-in is, for privacy reasons, preferable to forcing patients to rely on a stranger's help. JA328-29.

visited a LabCorp patient service center in California during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to Labcorp's failure to make its e-check-in kiosks accessible to legally blind individuals." App.33. The district court issued that order in May 2022, and Labcorp promptly filed a Rule 23(f) petition in the Ninth Circuit. JA394.

Soon thereafter, in June, the district court issued an amended class-certification order (the only amendment was the inclusion of a footnote noting Labcorp's waiver of an argument). JA 335, 341 n.4. A few days later, the plaintiffs moved to amend the class definition. 2-ER-123. Because Labcorp had complained that the prior definition was "fail-safe"—meaning only people who prevailed in proving their claims would be in the class—the plaintiffs sought to refine the definition. 2-ER-130. In August, the district court granted the motion and adopted the new class definition. JA372-87. That definition defined the class to include those "who, due to their disability, were unable to use the LabCorp Express" kiosk. JA387. Labcorp never appealed the June 13 or August 4 orders, and "never attempted to amend or refile" its appeal of the May 23 order. JA 400.

Because the dates of the orders are important, we recap them briefly here:

- May 23: District court grants class certification. This order—and only this order—is appealed.
- June 13: District court issues amended class certification order (adding one footnote).
- August 4: District court grants motion adopting the new class definition.

Contrary to Labcorp's claim (at 2), at no point in any of these orders did the district court suggest that "the class contained a sizable number of members who lacked any Article III injuries." The district court's limited discussion of standing on which Labcorp relies came entirely in the August 4 order. *See* Pet. Br. 10 (citing JA379-87). The order ruled that Labcorp had "provide[d] no evidence or citation to the record" showing that any class member is uninjured. JA379. When discussing the class definition that is before this Court, the district court explained that *all* class members are blind patients "who attempted to or were discouraged from using LabCorp's kiosks." JA358.

2. The Ninth Circuit granted Labcorp's Rule 23(f) petition for interlocutory review of the district court's original May 23 class certification order. JA393-400. On appeal, Labcorp argued that certification was improper because some class members were uninjured and hence lacked standing. The Ninth Circuit disagreed, noting that "all class members maintain that their injury resulted from the inaccessibility of a LabCorp kiosk." JA397; *see also* JA399. Regardless, the court noted in a footnote, Labcorp's bare "allegation that some potential class members may not have been injured does not defeat commonality at this time." JA397 n.1 (citing *Olean*, 31 F.4th at 668-69). The Ninth Circuit expressly refused to consider Labcorp's challenges to class definitions found in later district-court orders, noting the importance of "polic[ing] the bounds of [its] jurisdiction." JA400.

SUMMARY OF ARGUMENT

I. Although the question presented presumes that "some members of the proposed class lack any Article III injury," neither court below found that *any* members lack

injury here. To the contrary, the Ninth Circuit explicitly found that "all class members were injured." JA397, 399. Because there's nothing to reverse, this Court should either dismiss as improvidently granted or affirm.

In addition, the Court cannot reach the question presented without first addressing a series of logically antecedent jurisdictional and prudential barriers. Among others, Labcorp's entire argument about uninjured class members is based on a *subsequent* class definition that the Ninth Circuit held was outside its appellate jurisdiction—a holding from which Labcorp did not seek certiorari.

II. If the Court nevertheless reaches the question, it should hold that Rule 23(b)(3) requires courts to ask whether there is an administratively feasible way to identify uninjured members and bar them from recovery.

The parties agree that Rule 23(b)(3) neither requires a class entirely free of uninjured members nor permits certification when individual inquiries into standing would overwhelm common questions. Where we diverge is Labcorp's invented "appreciable number" standard, which has no basis in Rule 23's text. The correct analysis is not quantitative (how many?) but qualitative (how difficult will it be to identify them?). The difference, in other words, is not whether there is an "appreciable number" of uninjured class members. It is whether there is an "administratively feasible" "mechanism for distinguishing the injured from the uninjured class members" before the recovery phase. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

III. Article III poses no freestanding barrier to certifying a class containing uninjured members. At certification, only the named plaintiff, as the party invoking federal jurisdiction, must show standing. Absent

members take no action to invoke judicial power at this stage—indeed, this Court has rejected as "surely erroneous" the "argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (quoting *Devlin v. Scardelleti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). Text, history, and precedent confirms this understanding. From early English privateer suits to American creditor actions, representative litigation had two phases: first determining class rights, then adjudicating individual claims. As Justice Story described, first "the decree is made for the benefit of all," then individuals "come in under the decree" and "prove their debts." Story, *Commentaries* § 99. Rule 23's text and this Court's precedents follow this bifurcated approach.

Labcorp's theory of Article III is not only contrary to history and precedent but would also greatly disrupt class-action practice and deprive defendants of global peace. Settling complex mass claims would become difficult or impossible, and courts would be flooded with individual suits that could have been efficiently aggregated and resolved through class proceedings. Adopting Labcorp's novel constitutional barrier would upset decades of settled practice, with sweeping real-world consequences for the American legal system that neither Congress nor the Rules Committee could undo.

ARGUMENT

I. This Court should either dismiss the writ as improvidently granted or affirm the judgment.

A. Labcorp contends (at 37 n.3) that this Court could reverse the judgment below based on the Ninth Circuit's supposed failure to apply its "appreciable number" test.

But even assuming that test had some basis in Rule 23, it is hard to see how this Court could do that here. For a simple reason: There is nothing to reverse. Neither the district court nor the Ninth Circuit had any occasion to decide the question presented *at all* because neither found that there were any uninjured members to begin with.

B. This is not just a barrier to reversal—it is a basic vehicle problem that should lead the Court to dismiss the writ as improvidently granted. The question presented assumes a premise—that "some members of the proposed class lack any Article III injury"—that was never established below.[2] Again, no court below determined that there are any uninjured members here. The district court thus did not certify a class on that basis, and the Ninth Circuit did not affirm on that basis.

The Ninth Circuit, in fact, did the opposite. It held that "all class members" suffered an "injury [that] resulted from the complete inaccessibility of a Labcorp kiosk." JA397; *see also* JA 399. One reason it did so is because the class definition that the district court initially adopted—and the only one that Labcorp properly appealed—limited the class to those blind patients who "were denied full and equal enjoyment" of Labcorp's services. App.33. It is *that* definition that the Ninth Circuit addressed and that is now before this Court. Yet Labcorp makes no attempt to show how anyone who meets that definition could be uninjured. And this would be a tough sell for it to make: In its Rule 23(f) petition, Labcorp complained that the only people in

[2] In the district court, Labcorp made only a "skimp[y]" "one-sentence" argument about standing. JA385. But that was in briefing on a *different* motion leading to a *different* order that Labcorp did not separately appeal. The district court therefore ruled that Labcorp "provide[d] no evidence or citation to the record" on this issue. JA379.

that definition were those who were "denied access" and therefore were injured. No. 22-80053, ECF1-2 at 18.

So Labcorp instead tries to rewrite the procedural history and change the terms of the debate based on a different, revised class definition that was not before the Ninth Circuit. *Compare* Pet. Br. 8 (citing class definition adopted in August 4 order modifying class), *with* App.33 (class definition in May 23 order that Labcorp appealed). Based on that subsequent definition, Labcorp argues (at 2) that the class at issue here "include[s] all blind patients who had merely been exposed to the kiosks in California"—which, in Labcorp's view, covers anyone who "walked into a Labcorp facility with a kiosk, regardless of whether they knew about or wanted to use it."

But the Ninth Circuit did not "bless the certification" of this class. *Contra* Pet. Br. 22. Rather, it expressly declined to consider *any* class definition issued after the original order—including the one Labcorp now relies on—because "Labcorp never attempted to amend or refile its interlocutory appeal." JA399-400. Accordingly, that class definition is outside the "[c]ase[] in the courts of appeals" for purposes of this Court's certiorari jurisdiction under 28 U.S.C § 1254(1). And, in any event, Labcorp did not seek certiorari on the Ninth Circuit's jurisdictional holding, so this Court should not disturb it. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 104 n.3 (2007).

Where, as here, a "mare's nest" of issues "stand[s] in the way of" reaching the question presented, the prudent course is to dismiss the writ as improvidently granted. *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring); *see also Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S 81, 97 (2014) (Scalia, J., dissenting) (same for jurisdictional issues).

And there is no way around the thicket here: Before this Court could review the August order that contains the operative class definition (and the only one that Labcorp complains about here), it would have to address two threshold issues—one jurisdictional and one prudential:

- What is the scope of the Rule 23(f) appeal, and thus this Court's certiorari jurisdiction?
- Should Labcorp be permitted to make this argument given that it didn't seek certiorari on the Ninth Circuit's jurisdictional holding?

Conversely, if the Court were to limit its review to the May order, it would *still* have to address two threshold issues—again, one jurisdictional issue and one prudential:

- Is the appeal moot because the order has been supplanted by a subsequent order, and it's only that order that gives rise to Labcorp's arguments?
- Given Labcorp's contrary position and failure to include any separate challenge to the May order in its brief to this Court, has Labcorp forfeited any argument premised on that class definition?

Should the Court surmount these hurdles, it would then have to address yet another threshold issue—this one factual. Labcorp asks this Court to pass for the first time on what it calls "[u]ndisputed record evidence," arguing (at 1) that blind patients have "zero interest" in kiosks. And it claims (at 8) that this evidence "shows that over a third of all Labcorp patients prefer not to use a kiosk." Neither statement is true or relevant. The documents that Labcorp cites show, at best, that, during a limited period, a third of patients simply didn't use the kiosks—with no data about blind patients. 3-ER-509. At any rate, this Court does not sit to referee disputes about the facts in the first instance.

Even aside from its scanty evidentiary presentation, the lack of any decision or even a record on the question presented means that this Court could not resolve how the predominance requirement works when "some members" are uninjured, let alone apply it to the class here (whatever it may be). Pet. Br. i. That is especially problematic given that predominance is inherently "case-specific." *Dukes*, 564 U.S. at 362-63. A proper vehicle would include evidence identifying which members might be uninjured; expert testimony on methods to identify these members; a developed record on the administrative feasibility of separating injured from uninjured members; and reasoned decisions by lower courts applying the legal standards to the facts. This case has none of that.

C. If the Court does not dismiss the writ, it should affirm because Labcorp has identified no legal error in the judgment below. Labcorp contends (at 48) that the Ninth Circuit "upheld the certification of a class that contains uninjured members, and a significant number of them at that." But, as noted, the class definition that was before the Ninth Circuit included only those who "were denied full and equal enjoyment" of Labcorp's services because of their disability, which is why the Ninth Circuit saw no merit to Labcorp's unsupported "allegation" about uninjured class members. JA397 n.1, 399-400. And having rejected that argument, the Ninth Circuit affirmed an order issued by a district court that engaged in a rigorous application of Rule 23. The many case-specific rulings that the district court made in applying Rule 23 are reviewed for an abuse of discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Labcorp has challenged none.

The Court could also affirm because all of the class members, regardless of which class definition one

considers, suffered injury. Labcorp knowingly chose to implement identical inaccessible kiosks in all locations, despite recognizing the risk that blind patients would be unable to use them; deliberately declined accessible options that were readily available; and told patients that kiosk use was "mandatory." Labcorp's sighted patients can and do check in privately, and quickly, via Labcorp Express. Its blind patients cannot.

D. Finally, if the Court has any doubts about the factual premise, it would at minimum need to vacate and remand for a determination on the existence of uninjured class members. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not [] first view."). That disposition would be necessary were the Court to resolve the case based on either Rule 23 *or* Labcorp's much bolder Article III argument, both of which only matter in this case if there *are* uninjured class members.

II. Common issues can predominate under Rule 23 notwithstanding that some members—or even an "appreciable number" of them—are uninjured.

If this Court somehow reaches the merits, several important points of agreement between the parties should guide its analysis. As Labcorp acknowledges (at 37 n.3), this Court can begin with Rule 23. And, depending on how that question is resolved, the Court can end there too. At certification, Article III requires that the named plaintiff have standing before a court may address the Rule 23 issues. But when the Article III concerns are said to arise only from *granting* certification, this Court has repeatedly held that the Rule 23 issues are "logically antecedent to Article III concerns" and "thus should be treated first." *Ortiz*, 527 U.S. at 831; *see Amchem*, 521 U.S. at 612. That approach comports with principles of constitutional

avoidance and judicial restraint, and this Court should follow it here.

The parties further agree on two points as to Rule 23(b)(3). On the one hand, Rule 23(b)(3) does "not require a class unsullied by *any* uninjured member." Pet. Br. 42. On the other hand, the presence of uninjured members can, depending on the circumstances, defeat certification under Rule 23(b)(3). Because "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021), a court must assess "whether individualized inquiries into [] standing" will "predominate over common questions," *Olean*, 31 F.4th at 668 n.12.

Where the agreement ends is on Labcorp's attempt to read Rule 23(b)(3) to contain an arbitrary (yet undefined) limit on the number of uninjured members. Labcorp says (at 13) that predominance—the only part of Rule 23(b)(3) it invokes—cannot possibly be satisfied if the class "contains an appreciable number of uninjured members." But this "appreciable number" test is wholly untethered from Rule 23(b)(3)'s text, and this Court should reject it. Instead, the Court should apply the rule as written.

The rule's text makes two things clear:

First, the rule subjects all questions to the same test: The common questions must "predominate over *any* questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). "Any" relevant questions—whether injury, causation, or something else—must be assessed under this rule. *Contra* Pet. Br. 46; U.S. Br. 11.

Second, the rule requires district courts to "undertake a case-specific inquiry into whether [the] class issues predominate." *Dukes*, 564 U.S. at 362-63. The text of Rule 23 is thus not susceptible to judge-made, categorical rules

of the kind Labcorp advocates, which is why this Court has rejected "across-the-board rule[s]" before. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

No more is needed to reject Labcorp's proposal. As with any other certification issue, the correct outcome will depend on the particulars of the case. If identifying uninjured members will "overwhelm" the resolution of the common questions, predominance will not be met. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). If, by contrast, the named plaintiff shows that no such inquiry (or any individual question) will swamp the resolution of common issues—because, for example, there is a feasible way to excise uninjured members before distributing damages—then predominance is satisfied.

A. Rule 23(b)(3) treats all questions alike.

1. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398. If the criteria are met, certification follows. *See id.* at 406.

As the text of Rule 23(b)(3) makes clear, no *particular* issue—injury included—need be common to the class. All that (b)(3) demands is that the common questions "predominate over any [individualized] questions." That requirement is met if "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 577 U.S. at 453.

Nor does the rule license courts to treat any type of individualized question differently than others. The comparative analysis requires weighing the common questions against "*any* questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added).

"[A]ny has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). In other words, the rule treats *all* kinds of individualized questions the same. It does not prize injury above all else, insisting that the answer to this question—and only this question—be perfectly uniform.

2. Despite the rule's text, Labcorp insists (at 46) that "questions of member standing are different in kind from other questions of law or fact because they go to the *size* of the class and, in turn, the *specter* of liability." This policy argument makes little sense even on its own terms.

Standing questions are not unique in their ability to affect the class "size" or "specter of liability." *Any* individual question affecting the viability of a claim does so. Affirmative defenses are an example. Yet courts are "reluctant to deny [certification] under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016); *see Tyson Foods*, 577 U.S. at 453 (common questions can predominate even when "damages or some affirmative defenses" "will have to be tried separately"). Courts regularly certify classes, for instance, despite individualized statute-of-limitations questions. *See* Rubenstein, 2 *Newberg and Rubenstein on Class Actions* § 4:57 (5th ed. 2011).

3. Like Labcorp, the government thinks that standing questions merit special treatment. It argues that, if injury is not perfectly common, "it is hard to see how some *other* common question could predominate." U.S. Br. 11; *see id.* at 23-24. That conclusory assertion leads the government to propose a rule (at 7, 12) that goes beyond what even

Labcorp advocates: that Rule 23(b)(3) does not permit a class to contain *any* uninjured members.

That view stands in stark contrast to the position that the government took before this Court in *Tyson Foods*. There, it repeatedly emphasized that, under Rule 23(b)(3), the "inclusion of some" uninjured class members "neither preclude[s] certification of the class … at the outset nor require[s] decertification following a jury verdict" so long as a mechanism exists to "ensure" that uninjured individuals will "not be granted relief." U.S. Br., *Tyson Foods*, 2015 WL 5719741 at *13, 25, 31-35.

Without so much as acknowledging the fundamental change in its position (or citing *Tyson Foods*), the government now says (at 2) that its categorical rule is justified by a single "all but dispositive" sentence from *Dukes*. But the sentence that it plucks out of context says nothing about the question presented here.

Dukes addressed Rule 23(a)(2)'s commonality requirement. The Court explained that common questions are questions that are capable of "generat[ing] common *answers* apt to drive the resolution of the litigation," which requires the class's claims to "depend upon a common contention." 564 U.S. at 350. So when this Court said that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury," it was addressing *that* problem—where, as in *Dukes*, a class presses heterogeneous legal claims. *See id.* at 350-51.

But some variation in whether class members suffered an injury—rather than the *kind* of injury suffered—does not invariably defeat the existence of common questions or the conclusion that they predominate. This Court has twice said as much. In *Tyson Foods*, the Court affirmed certification of a class that undoubtedly contained

uninjured members. 577 U.S. at 451, 454, 461. And in *Halliburton*, this Court held that a securities class may be certified even where the defendant could "pick off" class members through "individualized" evidence showing that they were uninjured. 573 U.S. at 277. Such individual inquiries, the Court stressed, do not defeat predominance.

B. Whether a Rule 23(b)(3) class may be certified requires a qualitative assessment of the difficulty of identifying uninjured members, not a quantitative one about their number.

Unlike the government, Labcorp does not argue for a categorical reading of Rule 23 that would bar certification of any class with uninjured members. It does, however, ask this Court to adopt a different categorical rule (at 37): that "Rule 23(b)(3) prohibits certification of a proposed class with an appreciable number of uninjured members."

This novel, atextual rule—apparently coined by Labcorp in its merits brief—is grounded in Labcorp's predictive judgment (at 48) that individual questions will "inevitably" predominate in cases involving appreciable numbers of uninjured class members.[3] The text of Rule 23(b)(3) does not lend itself to such sweeping judgments, though, and Labcorp's prediction is inaccurate regardless. The right approach—which lower courts have coalesced around, albeit with a range of verbal formulations—requires asking if there is a credible reason to believe that some members are uninjured, and if so, whether there is an administratively feasible mechanism for identifying them and excluding them before damages are distributed.

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[3] A Westlaw search of all cases, briefs, and sources using the phrase "appreciable number" in the same sentence as "uninjured," "class," and "members" yields only one hit: Labcorp's merits brief.

1. Rule 23(b)(3) requires courts to "undertake a case-specific inquiry" into predominance, *Dukes*, 564 U.S. at 362-63, and provides "a nonexhaustive list of factors" bearing on that case-specific determination, *Amchem*, 521 U.S. at 615-16. The rule introduces those factors as "matters pertinent to" predominance and delineates four specific examples that are "include[d]" among those to be considered. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Provisions like this—which use "the term[] 'including'" to indicate the "illustrative and not limitative function" of enumerated factors—are "not to be simplified with bright-line rules." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). They call for "case-by-case analysis," *id.* at 577, not an "across-the-board rule," *Falcon*, 457 U.S. at 160.

2. The presence of uninjured members, of course, affects that case-by-case analysis. Because only injured people may recover damages, there must be "some way to segregate the uninjured from the [] injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*Rail Freight II*), 934 F.3d 619, 625 (D.C. Cir. 2019).

But the driving consideration for predominance is not the *number* of uninjured class members; rather, it is the ease with which they can be identified and excluded. *See* Br. of Rubenstein & Miller 4. ("[T]he issue for predominance purposes is the *ease of excision*, not the number to be excised."). At bottom, "predominance is a qualitative rather than a quantitative concept. It is not determined simply by counting noses." *Brown*, 817 F.3d at 1239 (William Pryor, J).

Some examples help make the point. On one end of the spectrum: A class could contain a large group of members who are uninjured, but that group is readily identifiable.

That's *TransUnion*. The evidence there allowed for easy identification of which class-member records were given to third parties and which were not—and thus who could recover after the verdict and who could not. *See* 594 U.S. at 439. That case thus disproves the idea that the *number* of uninjured members is what matters: Over 75% of class members were uninjured (6,332 out of 8,815) but excising them was simple.

Conversely, a class might contain only a relatively small number of uninjured members. But if they will be impossible to identify, the class definition would likely require modification to ensure their exclusion. If that, too, is impossible, certification would be inappropriate.

The difference, then, is not whether there is an "appreciable number" of uninjured members. Pet. Br. 37. It is whether there is an "administratively feasible" "mechanism for distinguishing the injured from the uninjured class members" before the recovery phase. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *see* Pet. Br., *Tyson Foods*, 2015 WL 4720265, at *49-51 (arguing same).

This case doesn't afford an opportunity for this Court to concretely expound on what it means for a mechanism to be administratively feasible, given that no court below addressed this issue. But the federal courts have a great deal of experience sorting out what is, and isn't, workable. They have, for instance, considered the permissibility of using expert witnesses, sworn class-member affidavits, or the defendants' own records. *See, e.g., Hargrove v. Sleepy's LLC*, 974 F.3d 467, 479-81 (3d Cir. 2020) (relying on a combination of evidence). If, using these mechanisms, "there is no reason to think that [individualized] questions will overwhelm common ones and render class

certification inappropriate," class treatment is permissible. *Halliburton*, 573 U.S. at 276.

3. Labcorp's principal support (at 44) for its sweeping prediction, and resulting rule, is this Court's statement in *Comcast Corp. v. Behrend* that—*in that specific case*—"individual damage calculations [would] inevitably overwhelm [common] questions." 569 U.S. 27, 34 (2013). That case-specific holding is not anything close to the broad rule that Labcorp says it is.

Comcast was describing the specific flaw with the class there. The plaintiffs alleged four antitrust-injury theories, only one capable of classwide proof. 569 U.S. at 31. So the plaintiffs had to show "that the damages resulting from that injury" could be measured with a "common methodology." *Id.* at 30. Their damages model, however, "failed to measure damages resulting from the particular antitrust injury on which" liability was premised. *Id.* at 36. It instead "assum[ed] the validity of all four theories of antitrust impact." *Id.* Because this model "identifie[d] damages that [were] not the result of the wrong," Rule 23 was not satisfied. *Id.* at 37-38.

Comcast did not hold that, even where there *is* a single liability theory and damages are tied to it, damage calculations may not be individualized or depend on individual proof to satisfy Rule 23(b)(3). That is why, even after *Comcast*, the "black letter rule recognized in every circuit is that individual damage calculations generally do not defeat a finding that common issues predominate." *Brown*, 817 F.3d at 1239. This Court has expressly said as much. *See Tyson Foods*, 577 U.S. at 453 (reiterating post-*Comcast* that a Rule 23(b)(3) class may be certified despite individualized "damages").

4. Not only is Labcorp's "appreciable number" rule without any basis in Rule 23's text or this Court's cases, it also lacks the benefits of a purportedly bright-line rule. The virtue of bright-line rules is in their "clarity" and the "certainty" of their application. *Maryland v. Shatzer*, 559 U.S. 98, 111 (2010). Labcorp's rule achieves neither.

Just what is an appreciable number? Is it an absolute number? Or is it defined in relation to the class size? Does it depend on the type of case? Does it depend on the substantive law at issue? Labcorp answers none of these questions. But the lower courts have grappled with some of them. Their answers reveal the folly of Labcorp's rule.

The First Circuit, for example, has used the words "de minimis" (which sounds like a numerical inquiry). But that court "define[s] de minimis in functional terms." *Nexium*, 777 F.3d at 30. Rather than count heads, it asks if there's a "mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 54 (1st Cir. 2018). The D.C. Circuit requires a similar "winnowing mechanism." *Rail Freight II*, 934 F.3d at 92.

If these cases are any guide, Labcorp's appreciable-number rule cannot actually be applied based on numbers. And if the inquiry is "functional" and turns on the realities of each individual case, *Nexium*, 777 F.3d at 30, then the purportedly bright-line rule turns out to be no rule at all.

C. Rule 23 already addresses the policy concerns raised by Labcorp and the Solicitor General.

With the text against them, Labcorp and the Solicitor General raise policy concerns about settlement pressure. *See* Pet. Br. 3, 13, 32-36; U.S. Br. 8, 19-21. This Court has rejected such arguments before. *See Amgen Inc. v. Conn.*

Ret. Plans & Tr. Funds, 568 U.S. 455, 474-77 (2013) (dismissing policy arguments about "in terrorem settlements"). And here, the arguments ignore the many ways in which these concerns are already addressed.

As noted, Rule 23(b)(3) ensures that a class is certified only if uninjured members can be barred from recovery. If that cannot be done, certification is improper. Labcorp's parade-of-horribles cases (at 41-42) only prove this point. In each, the court of appeals either affirmed the denial of certification or remanded for a closer look.

District courts also have many tools to ensure that the uninjured don't recover. They can "(1) bifurcat[e] liability and damage trials"; "(2) appoint[] a magistrate judge or special master to preside over individual damages proceedings; (3) decertify[] the class after the liability trial" and notify class members how to "proceed to prove damages; (4) creat[e] subclasses; or (5) alter[] or amend[] the class." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayor, J.), *abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 70 (2d Cir. 2007). And quite often, a defendant's *own* records and information will readily permit the removal of uninjured members. *See supra* 26; Br. of Claims Administrators 7–10.

Labcorp ignores these realities, arguing (at 13) that "the promise of back-end review [] is illusory given the in terrorem effect … of certifying inflated classes." The premise seems to be that the existence of uninjured class members induces *incremental* settlement pressure above and beyond the mere fact of certification. But that doesn't make sense. After *TransUnion*, everybody knows that the uninjured can't recover. They likewise know that, if a class has been certified, there is a mechanism for ensuring that

will not happen. So it is difficult to see why a rational defendant would account for the presence of uninjured members in deciding whether to settle, and for how much. *See* U.S. Br., *Tyson Foods*, 2015 WL 5719741 at *34 (explaining that "the presence" of some uninjured class members will have "no effect" on a defendant's "liability to the class" and "is relevant only to allocation of the award among the class members").[4]

In short, Labcorp's proposed rule conflicts with the text of Rule 23 and with this Court's precedents, would be unworkable in practice, and is not needed to advance any legitimate policy goals. It should be rejected.

III. A court does not lack Article III jurisdiction to grant a named plaintiff's motion to certify a Rule 23(b)(3) class simply because some putative absent class members are uninjured.

Labcorp's constitutional argument is ambitious: Even if a class satisfies Rule 23(b)(3), it argues (at 15-16), Article III imposes a freestanding jurisdictional barrier to certification if the class contains uninjured members. Not even the Solicitor General embraces this theory. And this Court need not address it should the Court elect to decide the Rule 23(b)(3) question in the abstract and vacate the Ninth Circuit's judgment. The Article III question would arise only if, on remand, the courts below held that the proposed class contains uninjured members and certified

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[4] Labcorp also exaggerates the damages in this case. The top-line conclusion of the report on which Labcorp relies (at 9) in fact states that the California class had "at least 8,861 legally blind members" and estimates annual damages of $35 million. JA246. In any event, various other limitations prevent the imposition of massive statutory damages in class actions. *See* 2 *Newberg and Rubenstein on Class Actions* § 4:83.

it. *See Amchem*, 521 U.S. at 612. Normal principles of constitutional avoidance and judicial restraint caution against going any further. But should the Court reach Labcorp's constitutional argument, it should reject it.

A federal court has Article III jurisdiction to grant a named plaintiff's class-certification motion so long as the named plaintiff has standing. If the named plaintiff has standing and Rule 23(b)(3) is met, the court has the power to certify the class notwithstanding "any subsequent jurisdictional question" as to particular absent members. *Waetzig v. Halliburton Energy Servs., Inc.*, 145 S. Ct. 690, 696 (2025). Simply put: The existence of uninjured class members is not a jurisdictional problem at certification.

Nor does it become a jurisdictional problem just after certification. Text, history, and precedent confirm that litigated class actions have two phases: (1) a *representative* phase, when the named plaintiff pursues the litigation on behalf of the class, the class definition is subject to change, and absent class members do not invoke the power of the court; and (2) a phase when the court acts on class members as *individuals*, typically when it orders relief to them. In the first phase, whether each absent class member has standing is irrelevant to the court's jurisdiction over the class claim. In the second phase, by contrast, each member must have standing for the court to order relief as to their own individual claim.

A. If a court has jurisdiction over the named plaintiffs' claims and Rule 23(b)(3) is satisfied, the court may—and indeed, must—certify the class despite "any subsequent jurisdictional question" as to absent class members' claims.

1. "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion*,

594 U.S. at 423. This Court has "long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties." *Carney v. Adams*, 592 U.S. 53, 58 (2020). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).

As the "party invoking federal jurisdiction," a named plaintiff quite obviously "bears the burden of establishing" standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). But the named plaintiff is the *only* "person invoking the power of [the] federal court" when the case is filed, *Hollingsworth*, 570 U.S. at 704—even if the complaint is styled as a proposed class action. So, unless someone else seeks to "become[] a party by intervention, substitution, or third-party practice," *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011), the named plaintiff is the only one whose standing matters at the start.

That remains true at the certification stage. A putative absent class member—that is, "an unnamed member of a proposed but uncertified class," *id.*—does nothing to invoke the power of the court, and her claim will not even arguably be a part of the case until a class is certified and the opt-out period has passed. Putative class members, therefore, are jurisdictional non-entities. They are not parties to the underlying case, nor are they parties to the motion to certify a class. Stated differently, they are not invoking "the court's remedial powers," *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976), nor are they asking the court to "decid[e] issues [that it] would not otherwise be authorized to decide" or to expound on the merits, *DaimlerChrysler*, 547 U.S. at 353. So long as the named plaintiff has standing, then, the court has Article

III jurisdiction over the case and may rule on the named plaintiff's motion to certify the class. Whether that motion should be granted is a question for Rule 23.

Labcorp, but not the government, disagrees. It argues (at 18) that Article III erects a freestanding requirement that absent members "demonstrate standing *before* a court certifies a class." *TransUnion*, 594 U.S. at 431 n.4. But this Court has already rejected the "surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Smith*, 564 U.S. at 313 (quoting *Devlin v. Scardelleti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). Any jurisdictional concerns raised by uninjured members exist *downstream* of class certification; they are not a jurisdictional *bar* to it.

This Court's recent decision in *Waetzig* supports this understanding. There, the plaintiff voluntarily dismissed his claims after they were sent to arbitration and then, upon losing in arbitration, sought to reopen the case and vacate the arbitral award. 145 S. Ct. at 694. The question presented was whether the district court had the power to reopen the case under Rule 60(b). This Court held that it did. The Court so held even though the defendant argued that the district court "lacked jurisdiction" to do the only thing Waetzig was asking it to do *after* reopening the case: "vacate the arbitration award." *Id.* The district court's power to grant the Rule 60(b) motion, the Court explained, was "separate from, and antecedent to," its jurisdiction to later grant the motion to vacate. *Id.* at 695. Whether the federal rules gave the district court the "power" to do the former (reopen the case) "must be addressed before any subsequent jurisdictional question" arises about its power to do the latter (vacate the award). *Id.* at 696.

Similarly, here, whether a court may certify a class under Rule 23 is "separate from, and antecedent to," any question about a court's power over, and ability to award relief to, absent class members. As in *Waetzig*, that is "confirm[ed]" by the fact that a district court issues at least "two separate orders," *id.*, over the course of a class action: one certifying the class, and another for the "class judgment." Fed. R. Civ. P. 23(c)(1), (3).

Amchem and *Ortiz* further reinforce this point. The question in those cases was whether the district court had properly certified a class containing potentially uninjured members. In both, the Court considered that question in the context of a settlement class, where the certification and judgment phases were collapsed into one. Even so, the Court made clear in both cases that "the class certification issues" are "logically antecedent to Article III concerns" and "should be treated first." *Ortiz*, 527 U.S. at 831; *see Amchem*, 521 U.S. at 612. If the certification issues are logically antecedent for a settlement class, the same would have to be true for a litigation class like this one. In that context—this context—the certification issues are not just logically antecedent to any subsequent Article III issues, but temporally distinct as well.

2. Labcorp seeks to avoid this conclusion by comparing class certification to intervention. Because a proposed intervenor "may not join a case through intervention to pursue his own damages claim unless he establishes Article III standing in his own right," Labcorp contends that putative absent class members should be held to the "same rules." Pet. Br. 17-20 (relying on *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433 (2017)).

This conclusion does not follow. A person who seeks to intervene in a lawsuit to assert her own damages claim is

seeking to "become a party"—namely, a plaintiff. *Karcher v. May*, 484 U.S. 72, 77 (1987). She must attach a complaint setting forth her claims as if she were a plaintiff. Fed. R. Civ. P. 24(c). And that complaint must satisfy Article III. If the court grants intervention, she becomes a party to the case, no different than a named plaintiff. She can file her own motions, conduct discovery, present evidence and argument at trial, and control the litigation. At the same time, she must comply with procedural rules and court orders and is subject to crossclaims, discovery, and costs. Thus, this Court has made clear that "intervention is the requisite method for a nonparty to become a party to a lawsuit" and thereby "assume the rights and burdens attendant to full party status." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933-34 (2009). A proposed intervenor, in other words, is both "a party (obviously, as the movant) to the motion he filed," *Devlin*, 536 U.S. at 17 (Scalia, J., dissenting), and a would-be party to the case. It thus makes sense to require proposed intervenors to meet the same standing requirements as named plaintiffs.

Putative absent class members are different in both respects. They did not file, and so are not parties to, the named plaintiff's motion for class certification. Nor is that motion asking that they be joined as "parties to the case" in the same way as intervenors. *Contra* U.S. Br. 3, 12; *see Smith*, 564 U.S. at 314 (noting that "unnamed members of a class action," even once certified, are "not parties to the suit"). Certification of any class presupposes that joinder of class members is "impracticable." Fed. R. Civ. P. 23(a)(1). And the rule itself leaves no doubt that absent class members are *not* intervenors, do *not* "come into the action" at the certification, *id.* 23(d)(1)(B)(iii), do *not* "control[]" the litigation, *id.* 23(b)(3)(A), and have none of the burdens of a party, *see Phillips Petroleum Co. v.*

Shutts, 472 U.S. 797, 810 (1985). They can only have a lawyer enter an appearance to receive notifications—which even an *amicus* may do—and object to a settlement. Fed. R. Civ. P. 23(c)(2)(B)(iv) & (e)(5)(A). Accordingly, a named plaintiff who seeks certification is not seeking to join the absent members as parties or have them intervene, but to pursue a "class claim[]" as a "representative part[y]" on their "behalf." *Id.* 23(a) & (c)(1)(B).

B. Text, history, and precedent make clear that absent class members need not demonstrate their standing until the court acts on them as individuals, typically at the relief phase.

Because the question presented focuses exclusively on the propriety of certifying a *proposed* class that contains uninjured members, this Court need not, and should not, address the separate question of when the members of a *certified* class must establish standing as a jurisdictional matter. But the answer to that question can be found in the text of Rule 23, history, and this Court's precedents: Article III does not require absent class members to establish their standing until the court acts on them as individuals, which usually occurs when it orders relief to them on their individual claims. That is when absent members are invoking the power of the court over their individual claims and must "justify [the] exercise of the court's remedial powers." *Simon*, 426 U.S. at 38.

Text. Article III limits the power of the federal courts to "Cases" and "Controversies." U.S. Const. Art. III. This phrase requires "a plaintiff [to] demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester*, 581 U.S. at 439. Applying that requirement to a class action means determining who

is the plaintiff, what claim he is pressing, and what relief he is seeking. Rule 23's text provides the answer to these questions. It shows that class actions have two phases: (1) a *representative* phase, when the named plaintiff is pursuing a class claim seeking classwide relief on behalf of the absent class members (and class-member standing is *not* required by Article III), and (2) a phase when the court acts on the class members as *individuals* (when class-member standing *is* required by Article III).

This is clear from the very first sentence of Rule 23. It says that named plaintiffs may act as "representative parties on behalf of all members" only if four prerequisites are met, all of which reinforce the representative nature of the action. Fed. R. Civ. P. 23(a). The rest of the rule does the same. It confirms that the named plaintiffs are the only ones who "control[]" the litigation, and that absent members do not "come into the action" simply because the class is certified. *Id.* 23(b)(3)(A), (d)(1)(B)(iii). (That, after all, is why they are *absent*.) When the court grants a class-certification motion, it "must define" not only the class but also the "class claims" pursued by the named plaintiff. *Id.* 23(c)(1)(B). In other words, as Judge Sutton has observed, class actions "present a unitary, coherent claim that moves through litigation at the named plaintiff's direction and pace." *Canaday v. Anthem Cos.*, 9 F.4th 392, 403 (6th Cir. 2021); *see also United States v. Cammarata*, 129 F.4th 193, 216-17 (3d Cir. 2025).

A certified class is also "inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978). After certifying a class action and defining the class and class claims, the court directs appropriate notice to the class, which informs class members of their right to opt out. Fed. R. Civ. P. 23(c)(2). Even after the opt-out period passes,

the certification order "may be altered or amended before final judgment." *Id.* 23(c)(1)(C). And it often is: Because "courts must be vigilant to ensure that a certified class is properly constituted" at all times, they have an "obligation to make appropriate adjustments to the class definition as the litigation progresse[s]." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.2d 592, 619 (6th Cir. 2007). It is only at the judgment phase that the class definition is set, and the court must "specify or describe"—as part of the "class judgment"—those whom it "finds to be class members." Fed. R. Civ. P. 23(c)(2)(B)(vii), (3)(B). Up until that point, class members who have not "come into the action"—either to have their "individual" issues resolved or to "intervene," *id.* 23(b)(3), (d)(1)(B)(iii)—are being represented entirely by the named plaintiff's prosecution of the class claim on their behalf.

This procedure shapes the Article III inquiry. During the representative phase, absent class members are not "parties to the case." *Contra* U.S. Br. 3, 12; *see Smith*, 564 U.S. at 314 ("[The] unnamed members of a class action" are "not parties to the suit."). They might not even be *class members* by the end of the litigation, depending on how it unfolds. They have done nothing to "pursue relief" on their own behalf. *Town of Chester*, 581 U.S. at 435. Nor have they done anything to "invok[e] the power" of the court. *Hollingsworth*, 570 U.S. at 704. They are simply part of an abstract and subject-to-change entity (the class) on whose behalf the named plaintiff is pursuing a claim (the class claim). So they need not establish their own standing to be part of the class during that phase. It is only during the second phase of the class action, when the court acts on them as individuals, that they must establish standing to recover on their individual claim.

History. The historical tradition of representative actions confirms that the class representative pursues one claim—the class claim—until the final phase of the case, when the absentees come into the case and the court acts on them as individuals. That is reflected in the bifurcation of representative proceedings in the 18th and early 19th century. Representative litigation was typically conducted in two phases. The representative first sought a "decree … for the benefit of all." Story, *Commentaries* § 99. Only after that did individual absentees "come in under the decree" to recover damages. *Id.*

1. Bifurcation was a recurring feature of founding-era representative litigation. Take the privateer suits, to which the government alludes (at 16). Beginning in 1751, the English courts instructed individual crewmembers to bring claims about their entitlement to prize money on "behalf of the whole crew," rather than in individual actions. *Leigh v. Thomas* (1751) 28 Eng. Rep. 201, 202 (Ch.). This was some of the most common representative litigation in the 18th century. *See* Yeazell, *From Medieval Group Litigation to the Modern Class Action* 182.

These suits were "normally handled in two stages." Bone, *History of Adjudicative Representation*, 70 B.U. L. Rev. at 253. First, the chancellor entered a decree "establishing the [entire] crew's entitlement and declaring the total amount of the fund." *Id.* "[T]he chancellor then referred the case to a master to conduct the second stage." *Id.* In the second stage, the master "identified all crew members with claims to the fund, gave notice to all inviting them to come in and litigate their individual claims, and determined the proper distribution of the fund according to the proven claims." *Id.*

So, too, with the "bill of peace"—"an equitable device" from which the class action evolved. *Ortiz*, 527 U.S. at 832. Chancery used a bill to establish a "general right." *Mayor of York v. Pilkington* (1737) 25 Eng. Rep. 946, 947 (Ch.). "[T]he presence of independent questions" did not "deprive equity of jurisdiction over the bill of peace so long as there [were] substantial common questions." Chafee, *Some Problems of Equity* 161 (1950). Instead, the "flexibility of equity procedure [made] it possible to segregate the common questions from the independent questions, and to consider the latter in separate hearings." *Id.* at 155-56.

These bifurcated proceedings were not anomalous. It was settled practice that representative litigation could proceed where "the Court can by arrangement afterwards introduce the persons." *Cockburn v. Thompson* (1809) 33 Eng. Rep. 1005, 1007 (Ch.). Justice Story, for instance, described the use of bifurcated proceedings in representative litigation on behalf of creditors, noting that, after "the decree is made for the benefit of all the creditors" in the first stage, "other creditors may come in under the decree" and "prove their debts before the Master[] to whom the cause is referred." Story, *Commentaries* § 99. But, he explained, if they "decline so to come in" or fail to "prove" their entitlement, "they will be excluded from the benefit of the decree" yet bound by it. *Id.*

2. This history offers three important lessons. First, it shows the changing nature of the absentees' relationship to the litigation. In the first phase, the case proceeded without the absentees' involvement. They then were "introduce[d]" to the case in the second phase, at which point they became "*Quasi* parties." *Cockburn*, 33 Eng.

Rep. at 1007; *see also* Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* 65 (2d ed. 1847); Story, *Commentaries* § 140, 139 n.1. That introduction, though, only took place if the absentees elected to "come in under the decree." Story, *Commentaries* § 99 & 99 n.2, 100 n.1.

Second, when the absentees did "come in under the decree," they had to "prove" their entitlement to recover. *Id.* § 99. That's because, in the first stage, all that was proved was the representative's classwide claim that "benefit[ed] [] all" of the absentees. *Id.* These two aspects of founding-era representative litigation are consistent with how class litigation works today: First, the court resolves the class claim that is pursued on behalf of all, and then, acts on the individuals by awarding individual relief.

The third lesson proceeds from the first two. When the absentees came in under the decree to "prove the[ir] claims," they could not deprive the court of its "jurisdiction" to have entered the classwide decree in the first place. *Stewart v. Dunham*, 115 U.S. 61, 64 (1885) (a non-diverse claimant who comes in "before a master, under a decree" in representative litigation, does not deprive the court of diversity jurisdiction). Stated another way, issues that might arise at the final stage of the representative action—like class-member standing—do not strip the court of jurisdiction in the earlier phase.

Precedent. This Court's precedents accord with the text and history. They draw the same dividing line: Absent members need not establish their standing during the representative phase, when the named plaintiff pursues "the claim [] brought on behalf of [the] class," *Tyson Foods*, 577 U.S. at 455, and must "prove the class claim[]" at trial, *Falcon*, 457 U.S. at 159. But before a court acts on

class members as individuals—typically by ordering monetary relief on their individual claims—it must assure itself that they have standing.

Chief among these precedents is *Tyson Foods*. The Court there upheld a classwide damages award and rejected the defendant's argument that the class should not have been certified. The Court did so even though "it [was] undisputed that hundreds of class members suffered no injury." 577 U.S. at 463 (Roberts, C.J., concurring). In its opinion, the Court acknowledged that "the question whether uninjured class members may recover is one of great importance." *Id.* at 461. But it held that this question was not "yet fairly presented by th[e] case, because the damages award ha[d] not yet been disbursed, nor [did] the record indicate how it [would] be disbursed." *Id.* The Court could therefore wait until the distribution phase to address the Article III question. Although this Court has since resolved the question left open in *Tyson Foods*, the analysis in the opinion remains relevant here: If Article III erected a freestanding barrier to maintaining any class action that includes uninjured class members, *Tyson Foods* would have come out the other way.

If there were such a barrier, it would not have escaped the Court's attention. Chief Justice Roberts—who joined the Court's opinion in full—wrote separately to express his view that "Article III does not give federal courts the power to order relief to any uninjured plaintiff," so there must be "a way to ensure that the jury's damages award goes only to injured class members." *Id.* at 466. He explained that, on remand, the district court would have to "fashion a method for awarding damages only to those class members who suffered an actual injury" to comply with this constitutional limitation. *Id.* at 462. But like the

opinion of the Court that he joined, he did not see any Article III barrier to affirming the lower court's judgment.

This Court's decision in *TransUnion* provides a useful contrast with *Tyson Foods*. Like *Tyson Foods*, that case involved a classwide damages award. Unlike *Tyson Foods*, however, the jury awarded a specific amount to each class member (nearly $7,000 in total damages per member). 594 U.S. at 421. That made all the difference. Because the district court ordered the defendant to pay damages to each class member on their individual claim, it had acted on them as individuals with their own claims, triggering Article III's limitations.

Other cases support the same distinction. *Halliburton*, for example, held that securities classes may be certified even though the defendant can "pick off" individual class members by showing they did not suffer an injury caused by the defendant's conduct. 573 U.S. at 276. That anticipated "individualized rebuttal" poses no jurisdictional barrier to certification. *Id.*; *see also, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402-03, 403 n.22 (1982) ("declin[ing] to address" a plaintiff's standing even though the plaintiff "sought attorney's fees in its own right," because that inquiry could wait until the plaintiff moved for fees).

C. Adopting Labcorp's understanding of Article III would make it difficult or impossible for defendants to settle mass claims and would flood the courts with individual cases.

Labcorp's understanding of how Article III interacts with class actions ignores the nature of class litigation, the history of representative actions, and this Court's cases. It also invites chaos. Rule 23 screens out cases where

standing issues defeat predominance, while allowing cases that merit class treatment to proceed. Labcorp's Article III rule, by contrast, creates an inflexible new barrier.

Labcorp's rigid rule would eviscerate the operation of the class device in a wide range of contexts. Rule 23(c)(1)(A) requires certification at an "early practicable time." Yet, "at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen v. Pac. Inv. Mgmt Co.*, 571 F.3d 672, 677 (7th Cir. 2009). To "entirely separate the injured from the uninjured at the class certification stage" would—at least "[w]ithout the benefit of further proceedings"—be "almost impossible in many cases." *Nexium*, 777 F.3d at 22.

The upshot of Labcorp's Article III argument, then, would not be a more narrowly drawn class, but no class at all. That wouldn't just harm plaintiffs; it would also make it difficult or impossible for defendants to achieve "global peace" in cases where their wrongful conduct has harmed many people. Lahav, *The Continuum of Aggregation*, 53 Ga. L. Rev. 1393, 1395-97 (2019). Defendants "often take advantage of the class action device as a litigation closure mechanism" in cases where "liability is widespread and virtually unavoidable." Br. of Rubenstein & Miller 5.

After the BP oil spill, for example, "hundreds of cases with thousands of individual claimants" were filed. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 900 (E.D. La. 2012). The parties negotiated a settlement, and the district court certified a settlement class that included citizens of five states. *See id.* at 910. But if the parties needed to "plausibly establish" that every class member suffered injury before certification, Pet. Br. 25, it would have been impossible to

craft a sufficiently broad release to ensure global peace for BP. *See In re Deepwater Horizon*, 739 F.3d 790, 805 (5th Cir. 2014) ("application of a stricter evidentiary standard might reveal persons or entities" in the class who "suffered no loss"). The same is true of other recent large class settlements. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 425 (3d Cir. 2016) (class included NFL players with "no currently known injuries"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (class included a "half million" members).

Labcorp's constitutional rule wouldn't just make it harder for defendants to settle. Requiring a class "unsullied by any uninjured member," Pet. Br. 42, would force plaintiffs to adopt definitions that closely track the elements of a successful claim. That raises concerns of fail-safe classes, which are defined such that "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 170 n.4 (3d Cir. 2023).

Despite Labcorp's insistence (at 25 n.2) that class definitions cannot be "fail-safe," its own flip-flopping *in this case* demonstrates the pressure its proposed rule would put on plaintiffs. Labcorp complained that the class definition in the May 23 order was fail-safe, so the plaintiffs revised the definition. 2-ER-130. But now, Labcorp says the revised definition is faulty because it includes uninjured class members.

Finally, when certification is denied, plaintiffs are forced to file separate lawsuits, flooding the system with individual claims and imposing an enormous "burden on the courts." *In re Visa Check*, 280 F.3d at 146 (Sotomayor, J.). More cases would be filed in state courts, too, where

Article III does not apply. That would undo Congress's decision in passing the Class Action Fairness Act to pull more class actions into federal court.

CONCLUSION

If the Court does not dismiss the writ as improvidently granted, it should affirm the judgment below.

March 31, 2025

Respectfully submitted,

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