No. 24-304

IN THE

Supreme Court of the United States

LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA LABCORP,

Petitioner,

v.

LUKE DAVIS, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming certification of two classes of plaintiffs who were injured by petitioner's discrimination against individuals with disabilities.

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INTRODUCTION

Petitioner LabCorp is a diagnostic testing company that operates 1,853 patient service centers across the country. In 2016, in an effort to reduce staff and costs, LabCorp introduced a new service, LabCorp Express, and required its staff to instruct patients to utilize it. With LabCorp Express, patients use a self-service kiosk to perform tasks like checking in, updating contact information, making or modifying appointment times, accessing patient data and billing information, and setting up a callback so that they can wait for their appointment outside, rather than in the waiting room.

Although LabCorp's kiosk vendor had presented the company with an accessible option for legally blind patients, LabCorp selected a kiosk that it knew was inaccessible to those patients. This corporate-level decision deprived all of LabCorp's legally blind patients of the use and advantages of LabCorp Express. Further, because LabCorp reduced its front desk staff after introducing the inaccessible LabCorp Express kiosks, legally blind patients face delays while waiting for assistance to check in or perform other administrative functions that sighted patients can perform through LabCorp Express.

Respondents, two legally blind patients who visited LabCorp for diagnostic testing and the American Council of the Blind, sued LabCorp under the Americans with Disabilities Act and California's Unruh Civil Rights Act. Their complaint alleges that LabCorp denied legally blind patients the many advantages that LabCorp offers sighted patients through LabCorp Express. The district court certified both a nationwide injunctive relief class and a

California damages class, and the court of appeals affirmed. In this Court, LabCorp asks whether a federal court may certify a class when some members purportedly lack Article III injury. The petition should be denied.

To begin with, this case does not involve *any* uninjured class members. Rather, as both the district court and court of appeals found, the classes are defined to include only individuals who were denied the full and equal enjoyment of the LabCorp Express service on account of their disability, because the self-service kiosk is inaccessible to all of them. LabCorp's response—that the company provides an adequate alternative to the inaccessible LabCorp Express service—is not a standing argument, but a claimed defense on the merits.

Moreover, although the petition largely conflates them, this case involves two certified classes: an injunctive relief class certified under Federal Rule of Civil Procedure 23(b)(2) and a damages class certified under Rule 23(b)(3). As to the injunctive relief class, LabCorp failed to raise below the question that it asks this Court to consider. Because the question presented does not go to subject-matter jurisdiction, LabCorp has waived the question as to this class. In addition, both this Court and the courts of appeals agree that injury to every class member is not a prerequisite to Rule 23(b)(2) certification.

As to the damages class, and putting aside the absence of uninjured class members, LabCorp is wrong that the courts of appeals are in conflict on its question presented. The courts all consider the possibility of uninjured members as part of the commonality and predominance inquiries under

Rule 23(b)(3). In arguing that some circuits take a different approach, LabCorp relies on out-of-context quotations of single sentences, while ignoring more recent rulings from those courts that make clear that LabCorp's contention is flatly wrong.

The courts of appeals' approach to considering the effect of uninjured members on certification under Rule 23(b)(3) is correct. This Court's precedents establish that, as long as *one* plaintiff can establish standing at the outset of the suit, the possibility of uninjured class members who may be weeded out before remedies are granted does not defeat subject-matter jurisdiction. And limiting Rule 23(b)(3) class actions to cases where the plaintiffs could prove at the certification stage that all class members suffered compensable injuries would flout Rule 23(b)(3)'s recognition that issues of individual proof may be resolved following certification as long as they do not predominate over common issues.

The petition should be denied.

STATEMENT

Factual background

LabCorp operates patient service centers that offer laboratory services such as blood and urine tests. In 2016, LabCorp decided that it could reduce staffing costs and increase profits by placing kiosks at its centers to enable patients to independently perform various tasks, including checking themselves in for appointments. Reflecting the advantage to patients of using the kiosk independently, LabCorp calls the kiosk-based service "LabCorp Express."

LabCorp considered two vendor proposals for the LabCorp Express kiosks: one for kiosks that were

accessible to legally blind patients and one for kiosks that were not. Before choosing, LabCorp conducted an internal risk scenario that identified inaccessibility to blind patients as a barrier to implementation of the latter option. Nonetheless, LabCorp made a corporate-level decision to deploy the inaccessible kiosk nationwide. Specifically, LabCorp selected an iPad-based kiosk design but disabled a suite of built-in accessibility features and covered the built-in headphone port (crucial for audio output to legally blind users). Now, approximately 1,853 LabCorp centers—280 in California—have the inaccessible kiosks.

For LabCorp to achieve its projected cost savings, patients *had* to use the LabCorp Express kiosks. LabCorp therefore instructed remaining staff to redirect patients who sought to check in at the front desk back to the kiosks. For example, LabCorp staff redirected legally blind respondent Luke Davis to the inaccessible kiosk for check in on at least six visits.

Because legally blind patients cannot access the LabCorp Express service kiosk, they must check in with the assistance of an employee. In hundreds of LabCorp locations, however, the front desk is no longer staffed. Instead, staff is limited to one or two phlebotomists who are not located in the patient waiting area, but rather in a blood-draw room located behind a secure door. While the phlebotomists are in the blood-draw rooms, LabCorp's sighted patients can check in quickly and privately through LabCorp Express and be placed in the service queue. But before legally blind patients can be placed in the queue or access any other features of LabCorp Express, they must wait for a phlebotomist to enter the waiting room to call another patient, must get the phlebotomist's attention, and must ask to be checked in. The only

other check-in option for a legally blind patient is to ask for help using the kiosk from a sighted person—usually a stranger—and thereby divulge personal medical information in a nonconfidential setting.[1]

Beyond check in, the LabCorp Express service offers many additional advantages to sighted patients, including (1) allowing patients to independently update their contact information; (2) granting patients full access to their patient data, which LabCorp considers important for patients to manage their own healthcare; (3) allowing patients to pay and manage past invoices; (4) allowing patients to make and manage appointments without staff assistance; and (5) providing a "Wait Where You're Comfortable" option that allows patients to wait outside, rather than in the waiting room. Because the express check-in service is inaccessible to blind patients, none of these privileges or advantages are available to them.

Immediately after rolling out LabCorp Express, LabCorp began receiving complaints from blind patients that its self-check-in kiosks were inaccessible. LabCorp received at least 190 complaints across each of its six nationwide divisions.

Respondents Luke Davis and Julian Vargas both visited one of LabCorp's patient service centers but,

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[1] LabCorp also offers its sighted patients the option of booking appointments online through a website. Patients can manage appointments made online through use of the LabCorp mobile app, which in turn allows those patients to check in at a LabCorp Express kiosk by scanning a QR code. Like the kiosks, neither the website nor the mobile app is accessible for legally blind customers. Most legally blind patients therefore cannot make appointments in advance and instead present as "walk ins" who must check in through the inaccessible kiosk or wait for an employee to appear before they can enter the queue to be seen.

due to their disability, could not access LabCorp Express and had to wait for assistance before checking in. On some visits, after being redirected to check in at the inaccessible kiosk, Mr. Davis had to disclose personal information out loud in the public waiting room so that a family member or, on one occasion, a stranger could complete the check in.

Respondent American Council of the Blind (ACB) is a national membership organization of thousands of blind and visually impaired persons. Since at least December 2018, it has received complaints from members reporting that LabCorp Express is inaccessible. Members have reported that, because they cannot use LabCorp Express independently, they must wait to check in. Numerous ACB members have arrived at a LabCorp patient service center to find that no staff member was present at the front desk, forcing them to request assistance from strangers.

Procedural background

Respondents' class-action complaint asserts several causes of action against LabCorp, including for violation of the Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act, which incorporates the ADA. Respondents assert that they were denied access to LabCorp's services on equal terms with individuals who lacked respondents' disability, *see* 42 U.S.C. § 12182(b)(1)(A)(ii), that they were denied appropriate auxiliary aids and services necessary to ensure effective communication, *see* 28 C.F.R. § 36.303(c)(1), and that LabCorp failed to make reasonable accommodations to policies, practices, or procedures necessary to afford access, *see* 42 U.S.C. § 12182(b)(2)(A)(ii). *See* First Am. Compl., D. Ct. Dkt. 40 at ¶¶ 41–59.

Following discovery, respondents moved for class certification. The district court granted the motion, certifying a nationwide injunctive relief class and a California statuory damages class. Pet. App. 2a; *id.* at 46a–47a (June 13, 2022, certification order); *see id.* at 35a–36a (listing numerous common issues that predominate over individual issues). On June 16, 2022, respondents filed a motion to refine the class definitions, which the court granted. *Id.* at 63a. As refined, the nationwide injunctive class is defined as: "All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in the United States during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk." *Id.* at 57a. The Unruh Act damages class definition is the same but replaces "the United States" with "California." *Id.*

While the motion to refine the definitions was pending, LabCorp filed a Rule 23(f) petition seeking interlocutory appellate review of the class-certification order. In September 2022, the court of appeals granted the Rule 23(f) petition.

On appeal, LabCorp raised a host of arguments, only one of which LabCorp raises here. Specifically, in challenging certification of the California damages class, LabCorp argued that certification was improper because Mr. Vargas and other class members were not injured and, therefore, lacked standing. To begin with, LabCorp misstated the relevant inquiry as whether class members were "deprived of accessing Lab[C]orp's medical testing services," Appellant Br. 27, rather than whether they were deprived of access to services on equal terms as individuals without legal blindness, whether they were denied appropriate

auxiliary aids or services needed to ensure effective communication, and whether LabCorp failed to make reasonable accommodations to policies, practices, or procedures necessary to afford access. Having misstated the deprivation at issue, LabCorp argued that Article III barred certification of the damages class because the record did not show that "all class members" suffered injury. *Id*. at 28.

As to the nationwide injunctive relief class, LabCorp did not question standing. Rather, as to that class, the issue that LabCorp raised and argued was "[w]hether the District Court manifestly erred in certifying the … class pursuant to Rule 23(b)(2) when there is no evidence that an injunction would provide a remedy to even a meaningful portion of class members." *Id.* at 6. Consistent with that statement of the issue, LabCorp, in a short section near the end of its brief, asserted in summary fashion that the class did not satisfy typicality or adequacy of representation, *id.* at 46—points it had raised as to the damages class separately from its Article III argument. *Compare id*. at 25–29 (standing), *with id*. at 41–44 (adequacy and typicality). It then argued briefly that class certification was improper because no single uniform injunction would remedy the injury to all class members, given that not all vision-impaired people prefer the same accommodations. *Id.* at 46–48.

In an unpublished, non-precedential opinion, the Ninth Circuit affirmed the district court's certification of the two classes.

With respect to the California class, the court held that the district court did not abuse its discretion in certifying the class. As to Mr. Vargas, the court had no difficulty finding concrete injury. The court explained:

> [H]e … intended to check in using the kiosk but was unable to do so because the kiosk was not accessible to the blind. Instead, Vargas was forced to wait until he was noticed by a staff member who aided him with check-in. As a result of the inaccessibility of the kiosk, Vargas was unable to immediately preserve his place in the patient queue, as sighted patients could, or to access any other kiosk features, such as the ability to privately alter account information. Thus, Vargas was denied effective communication and, by extension, the full and equal enjoyment of LabCorp's services.

Pet. App. 3a–4a.

Turning to commonality, the court noted that "the relevant inquiry" was "whether class members were subject to the same injuring behavior." *Id.* at 5a. Here, it concluded, commonality was satisfied because "all class members maintain that their injury resulted from the inaccessibility of a LabCorp kiosk." *Id.* And as to "LabCorp's allegation that some potential class members may not have been injured," the court cited *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668–69 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 424 (2022), and held that the allegation "does not defeat commonality at this time" in any event. Pet. App. 5a n.1.

With respect to the nationwide class, reflecting that LabCorp did not suggest an Article III problem, the appellate opinion does not address that issue. Instead, addressing the argument that LabCorp *did* make, the court explained:

> LabCorp argues that no single injunction could provide relief to all class members, because not

> all blind people prefer the same accommodations. But the class members in this action were not injured by LabCorp's failure to meet their preferences; instead, *all class members were injured by the complete inaccessibility of LabCorp kiosks for blind individuals*. As the district court reasoned, by adding technological accommodations, the kiosks could be rendered accessible to the blind, thus addressing the injuries of the entire class. Although some class members may still prefer not to use the kiosks, providing them the ability to make that choice in the first place relieves any current injury. The district court did not abuse its discretion in reaching the same conclusion.

Id. at 7a (emphasis added).

LabCorp petitioned for rehearing en banc. As to standing, it did not argue the issue that it asks this Court to consider: whether a class can be certified when some class members experienced no injury. Pet. i. Instead, it argued that making the LabCorp Express service available to sighted people, but not to blind people, caused no injury. Reh'g Pet. 7–10. It also asked the court to hold that the federal-service-mark-protected "LabCorp Express" was not a "service," so that providing that option only to sighted people, but not to blind people, did not violate the ADA or the Unruh Act. *Id.* at 11–12.

As to the injunctive relief class, the rehearing petition mentioned standing only in a footnote, asserting that the panel did not address the standing of class representatives Mr. Davis or ACB because they had "failed to show" that they had standing. *Id.* at 3 n.1. In fact, LabCorp's panel briefing had not

argued that those respondents lacked standing, respondents' brief had described their injuries, *see* Appellee Br. 12–14, 15–17, and the panel had stated that "all class members were injured." Pet. App. 7a.

LabCorp's rehearing petition was denied, with no judge calling for a vote. *Id.* at 10–11a.

Fully briefed cross-motions for summary judgment are now pending in the district court. *See* D. Ct. Dkt. 144, 147. Argument on the motions is scheduled for January.

REASONS FOR DENYING THE WRIT

I. The court of appeals did not affirm certification of classes including uninjured members.

The court below did not uphold class certification on the premise that a class can contain uninjured members. Rather, it concluded that every member of the certified classes maintained that they had experienced a common injury and that "all class members were injured by the complete inaccessibility of LabCorp kiosks for blind individuals." Pet. App. 7a. Thus, the question stated in LabCorp's petition is not presented by the decision below. Only if the Court were to hold that the court of appeals was wrong in holding that LabCorp's alleged wrongdoing, if proven, injured all class members would LabCorp's question arise in this case. But reviewing a court of appeals' resolution, in an unpublished opinion, of such a fact-bound determination is not an appropriate use of this Court's discretionary jurisdiction. Moreover, the court of appeals was correct to recognize that all class members were subjected to unfavorable treatment by LabCorp on account of their disability.

A. Title III of the ADA prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The Unruh Act similarly provides that people with disabilities or medical conditions, including blindness, are "entitled to full and equal access, as other members of the general public, to accommodations, advantages, facilities, [and] medical facilities, including hospitals, clinics, and physicians' offices." Cal. Civ. Code § 54.1(a)(1).

Every member of the certified classes has been injured by the violation of these provisions. The LabCorp Express service is an accommodation, advantage, facility, privilege, or service that is inaccessible to blind patients. *See* First Am. Compl., D. Ct. Dkt. 40 at ¶ 63. This inaccessibility denies blind patients full and equal access to the accommodations, advantages, facilities, privileges, and services that LabCorp makes available to sighted patients, in violation of the ADA and state law. Each class includes only legally blind individuals who visited a LabCorp center with a LabCorp Express self-service kiosk and who, due to their disability, were unable to access the kiosk's services. Pet. App. 57a.[2]

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[2] LabCorp's assertion that some class members "did not even *know* there was a kiosk available," Pet. 9, only underscores that legally blind patients—unlike sighted patients—lacked equal access to the LabCorp Express service and its many advantages. In addition, LabCorp asserts that some patients, sighted and unsighted, may prefer to *check in* with a receptionist. *Id*. at 9, 31. It does not deny, however, that sighted patients—but not blind patients—have the option of accessing LabCorp Express for self-

(*Footnote continued*)

B. LabCorp's contention that some class members are uninjured because they received the desired *medical* service, *see* Pet. 7, misunderstands the nature of the discriminatory conduct. Respondents do not assert that they were unable to have their blood drawn. Rather, as explained above, *supra* p. 6, they assert that they were denied access to LabCorp's services on full and equal terms, that they were denied appropriate auxiliary aids and services necessary to ensure effective communication, and that LabCorp failed to make reasonable accommodations to policies, practices, or procedures necessary to afford access—including to LabCorp Express. *See also Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 10 (2023) (Thomas, J., concurring in the judgment) (explaining that a plaintiff who alleges a violation of her rights under the ADA has standing); *303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023) ("[P]ublic accommodations laws 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))); *Sessions v. Morales-Santana*, 582 U.S. 47, 73 (2017) (recognizing harm of adverse differential treatment).

Putting aside LabCorp's misstatement of respondents' claims, LabCorp's proffered defense—that the ability to check in at the front desk is an effective alternative under the ADA and the Unruh Act, Pet. 2, 7–8—goes to the merits, not to standing. *See* Pet. App. 55a ("Ultimately, [LabCorp's] argument reflects a merits dispute about the scope of … liability, and is

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service check-in, and that sighted patients—but not blind patients—may benefit from the many other advantages that LabCorp Express offers in addition to check-in.

not appropriate for resolution at the class certification stage of this proceeding." (citation omitted)).

In short, LabCorp's argument that some class members are uninjured misunderstands respondents' claims and case law regarding injury.

II. The question presented does not warrant review as to the nationwide injunctive relief class.

The question presented does not warrant review as to the nationwide injunctive relief class for two additional reasons: LabCorp waived the issue of uninjured class members below; and courts, including this Court, agree that, as to certification of an injunctive relief class under Rule 23(b)(2), the standing inquiry focuses solely on the named plaintiff.

A. LabCorp waived its question presented as to the injunctive relief class.

LabCorp asks this Court to decide whether a class may be certified "when some of its members lack any Article III injury." Pet. i. Importantly, although LabCorp invokes Article III, its question presented does not go to jurisdiction. And because the issue is not jurisdictional, LabCorp was required to raise it below to preserve it for this Court's review. With respect to the nationwide injunctive relief class, LabCorp did not do so.

1. Although LabCorp frames its question presented in terms of Article III standing, it does not dispute that the district court properly exercised subject-matter jurisdiction over the case if one of the named plaintiffs has standing. As this Court and the lower courts agree, if a named plaintiff has Article III standing, the district court has jurisdiction to hear a

case arising under federal law. *See Frank v. Gaos*, 586 U.S. 485, 493 (2019) (per curiam) (stating that jurisdiction over a class action depends on whether "any named plaintiff has alleged [injuries] that are sufficiently concrete and particularized to support standing"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (stating that if a single plaintiff "demonstrate[s] standing … for each form of relief sought," the court has jurisdiction to resolve the plaintiff's claims (citation omitted)).

Rather than a jurisdictional inquiry, then, the question whether each class member must have an Article III injury is a Rule 23 inquiry. That is, the question does not go to whether the district court can preside over the case, but to whether a class can be certified. *See* 1 *Newberg and Rubenstein on Class Actions* § 2:1 (6th ed. 2024) ("Whether a plaintiff with standing will be permitted to present not only her own individual claims but also those of a class is not properly a question of standing doctrine but of class action law."); *Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring in part and dissenting in part).[3] Indeed, that the petition's merits discussion begins with the requirements of Rule 23, not Article III, *see* Pet. 20–23, reflects that LabCorp's question presented is a Rule 23 issue, not a jurisdictional one.

This Court's treatment of the issue illustrates the point. Although this Court has used the word

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[3] As the leading class-action treatise explains:

> [T]he standing inquiry should simply focus on the class representative's individual standing while the representational inquiries should be made through the lens of Rule 23, not standing.

1 *Newberg and Rubenstein on Class Actions* § 2:1.

"standing" when discussing whether each member of a class has experienced injury, it has more than once declined to address the question in class-action cases. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 n.4 (2021); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997). If the matter were "jurisdictional," though, the Court could not have chosen to bypass the issue after identifying it. *See Boechler, P.C. v. Comm'r*, 596 U.S. 199, 203 (2022) ("Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and … do not allow for equitable exceptions."); *Frank*, 586 U.S. at 492 (noting a federal court's "obligation to assure [itself] of litigants' standing under Article III" (citation omitted)). The Court could avoid the issue in each of the cited cases because, notwithstanding use of the word "standing," the issue is not jurisdictional.[4]

2. LabCorp did not contest below that nationwide class representative Mr. Davis has standing, and the petition likewise does not dispute his standing or ACB's standing. Because these plaintiffs have standing to pursue their claims, the district court has Article III jurisdiction to adjudicate them. *Cf. Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint.").

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[4] This context is not the only one in which "standing" is used to connote a non-jurisdictional concern. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26, 128 n.4 (2014) (noting that the term "prudential standing" is not a matter of Article III jurisdiction and, likewise, that the term "statutory standing" is "misleading" and "'does not implicate subject-matter jurisdiction'" (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002))).

Because LabCorp's question presented is not jurisdictional, LabCorp was required to raise the issue below to preserve it for review by this Court. *See Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399 (2024); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider issues not addressed in the court of appeals, "mindful that we are a court of review, not of first view"). With respect to the nationwide injunctive relief class, LabCorp failed to do so.

As explained above, *supra* pp. 7–8, LabCorp's appellate brief challenged the standing of named plaintiff Mr. Vargas, who is the statutory damages class representative. It did not, however, challenge Mr. Davis's standing or argue that all members of the nationwide class must have standing.[5] Rather, as to the injunctive relief class, the issue that it raised and argued did not concern uninjured class members, but the feasibility of a class-wide remedy. Appellant Br. 6 (statement of the issue); *id.* at 23–24 (summary of argument). Likewise, although the panel had stated expressly that all members of the injunctive class had standing, Pet. App. 7a, LabCorp's petition for rehearing en banc did not seek review of that point.

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[5] LabCorp's opposition to the class-certification motion and its opening brief on appeal were clear that its standing arguments concerned only the damages class. Its reply brief on appeal made some broad statements that, taken alone, could leave the argument's scope unclear. But the brief's focus on the damages class representative, Mr. Vargas, makes clear that the standing argument there also concerned only the damages class. Issues not raised in the opening brief on appeal are waived. *See SNJ Ltd. v. Comm'r*, 28 F.4th 936, 939 n.1 (9th Cir. 2022) (citing *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)).

In sum, the petition's question presented is not properly presented to this Court as to the injunctive relief class.

B. With respect to an injunctive relief class, the question is well settled in this Court and among the lower courts.

LabCorp had good reason for its decision not to argue that every member of the injunctive relief class must have standing: In cases seeking injunctive relief, "it is well settled that … the standing inquiry focuses solely on the named plaintiff or proposed class representative." 1 *Newberg and Rubenstein on Class Actions* § 2:3; *see, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009) ("Because the superintendent clearly has standing to challenge the lower courts' decisions [to enter declaratory judgment], we need not consider whether the Legislators also have standing to do so."); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (in a case seeking injunctive relief, explaining that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and stating that because one of the plaintiffs had standing, the Court had no need to address the others (citation omitted)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263–64 & n.9 (1977) (stating that, where one named plaintiff has demonstrated standing to contest a zoning decision, "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) ("If at least one plaintiff has standing, the suit may proceed.").

Unsurprisingly given this Court's case law, the courts of appeals likewise do not inquire into the

standing of each member in cases involving injunctive relief classes certified under Rule 23(b)(2). *See, e.g.*, *Montoya v. Jeffreys*, 99 F.4th 394, 399 (7th Cir. 2024); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 779 (4th Cir. 2023); *Hyland v. Navient Corp.*, 48 F.4th 110, 117–18 (2d Cir. 2022); *Daves v. Dallas Cnty.*, 22 F.4th 522, 542 (5th Cir. 2022) (en banc); *J.D. v. Azar*, 925 F.3d 1291, 1323–24 (D.C. Cir. 2019); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 223 (3d Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978–79 (9th Cir. 2011); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010); *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1339 (Fed. Cir. 2008); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279–80 (11th Cir. 2000).

The cases cited by LabCorp do not suggest otherwise. All but two of the cited cases address the issue with respect to a Rule 23(b)(3) damages class, not a Rule 23(b)(2) injunctive relief class. And the two cases cited by LabCorp that concern Rule 23(b)(2) classes, *Carolina Youth Action Project* and *DG ex rel. Stricklin*, *see* Pet. 18 n.5 & 19 n.6, are consistent with the uniform rule: The possibility that a Rule 23(b)(2) class includes members unharmed by the defendant's conduct does not preclude certification if the "challenged practices are based on grounds that apply generally to the class." *DG ex rel. Strickland*, 594 F.3d at 1201; *see* Fed. R. Civ. P. 23(b)(2) (providing for class certification where a defendant "has acted or refused to act on grounds that apply generally to the class").

The absence of a disagreement among the circuits, coupled with LabCorp's failure to brief and argue the issue below, leave the question presented wholly unworthy of review as to the injunctive relief class.

III. The question presented does not warrant review as to the Unruh Act damages class.

A. The courts of appeals agree that the presence of uninjured class members is a consideration under Rule 23(b)(3).

Each of the courts of appeals take into consideration the presence of uninjured class members when assessing the Rule 23(b)(3) requirements of commonality and predominance. Contrary to LabCorp's argument otherwise, *no* circuit bars class certification where not all class members have Article III standing. Even putting aside that the class in this case does not include uninjured members, Pet. App. 7a, and that LabCorp's argument to the contrary goes to the merits, not to standing, *id.* at 55a, the absence of a conflict among the circuits provides an additional reason to deny the petition.

1. LabCorp seeks to distinguish cases addressing the requirements set forth in Rule 23(b)(3) that take a "de minimis" approach from those that take a "back-end" approach. The cited cases do not support the distinction crafted by LabCorp, however, because *no circuit* has adopted a de minimis rule. Rather, in each case, based on the particular facts, each court considered whether Rule 23(b)(3)'s predominance requirement was satisfied, or whether the steps that would be required to identify uninjured class members defeated predominance. *See Olean Wholesale Grocery*, 31 F.4th at 669 n.13 (explaining that neither the D.C. nor the First Circuit has adopted the de minimis rule that LabCorp ascribes to them).

a. LabCorp relies heavily on the D.C. Circuit's opinions in *In re Rail Freight Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), and 934 F.3d

619 (D.C. Cir. 2019). *See* Pet. 16–17. Neither mentions Article III or standing. Those cases therefore cannot reasonably be deemed to stake out a position on the question presented.

Rather, in that large antitrust case, the D.C. Circuit considered the presence of thousands of uninjured class members in the context of considering whether Rule 23's predominance requirement was met. *See* 725 F.3d at 252–53; 934 F.3d at 624. Contrary to LabCorp's contention, the case did not adopt a rule that certification is categorically prohibited where a class includes more than a "de minimis" number of uninjured plaintiffs. Rather, the court assumed "[f]or the sake of argument" that "the district court correctly recognized a *de minimis* exception to the general rule that, for claims under section 4 of the Clayton Act, causation and injury must be capable of classwide resolution." 934 F.3d at 624 (internal quotation marks omitted). It neither adopted nor rejected that exception, however, instead focusing on whether injury and damages could be resolved on a classwide basis. Holding that the district court had not abused its discretion in declining to find predominance, the court of appeals noted the large number of uninjured shippers in the proposed class and the "absence of any winnowing mechanism," other than "full-blown, individual trials," to distinguish injured from uninjured shippers. *Id.* at 625.

Likewise, the First Circuit's decisions in *In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015), and *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018), do not state a de minimis rule. In *In re Nexium*, in response to the defendants' argument that "even a de minimis number" of uninjured class members "defeats the 23(b)(3) predominance require-

ment," 777 F.3d at 18, the First Circuit held that "a certified class may include a de minimis number of potentially uninjured parties," *id.* at 25. Emphasizing that it was addressing the defendants' argument—and not adopting the rule that LabCorp ascribes to it—the court added: "We need not decide whether it is ever permissible to define a proper class including more than a de minimis number of uninjured parties since we conclude that it has not been shown that the class here includes more than a de minimis number of uninjured parties." *Id.*

In re Asacol likewise does not reflect "a strict approach," Pet. 17, barring certification based on a de minimis rule. There, the First Circuit found that "any class member may be uninjured, and there are apparently thousands who in fact suffered no injury." 907 F.3d at 53. For that reason, the court concluded that "[t]he need to identify those individuals will predominate and render an adjudication unmanageable." *Id.* at 53–54. Far from adopting a de minimis rule, it used the term "de minimis" only twice: once in quoting the district court's finding that only a de minimis number of class members were uninjured, and once in a parenthetical quote. *Id.* at 47, 54. Further refuting LabCorp's description of First Circuit case law, Judge Barron's concurrence notes that, "even where the number of uninjured class members is de minimis, plaintiffs' reliance on individualized means of proving injury [may be] so great that it can no longer comport with the predominance requirement." *Id.* at 59. That is, the First Circuit has not held either that predominance is satisfied where only a de minimis number of class members are uninjured or that predominance is not satisfied in that circumstance. Rather, the court has

focused on whether, in light of the number of uninjured class members within the class definition, common issues do or do not predominate.

LabCorp agrees that Third Circuit case law is consistent with these cases. *See* Pet. 17 n.4 (citing *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362, 365 (3d Cir. 2015)); *see also Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 155 (3d Cir. 2023) ("[A]t certification, the standing of individual class members may inform whether a proposed class satisfies the requirements of Federal Rule of Civil Procedure 23, but it is not necessary for each member to prove his or her standing for the class action to be justiciable." (citations omitted)).

b. The circuits that LabCorp places in its "back-end" category are no different. Contrary to LabCorp's contention, those courts have *not* held that uninjured class members pose a barrier to class certification under Rule 23(b)(3) "only if there is a *really* large number of uninjured members." Pet. 18. Rather, each decision addresses whether the proposed class satisfies Rule 23(b)(3)'s requirements in light of the facts before it, including, in those cases where some members may not have been injured, the need for individualized inquiry.

LabCorp turns first to the Ninth Circuit. To support its view, LabCorp starts by citing as "[*s*]*ee also*" a footnote in *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125 (9th Cir. 2016). Pet. 18. The footnote discusses a sentence in the Second Circuit decision in *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), which a previous Ninth Circuit opinion had read to mean that a class containing members lacking Article III standing cannot be certified. *Ruiz Torres*,

835 F.3d at 1137 n.6. The footnote explains that the earlier Ninth Circuit panel read the sentence out of context but states no view on the Article III question, which was not before it. (The Second Circuit reads *Denney* the same way as the Ninth. *See infra* pp. 26–27.) *Ruiz Torres* took no position on the question presented; indeed, it did not even involve uninjured class members. *See Ruiz Torres*, 835 F.3d at 1137 (explaining that, in the case before it, "the existence of a common policy or practice, if proven, is evidence that *the class as a whole*" experienced the wrongful conduct (emphasis added)).

The other Ninth Circuit case briefly cited by LabCorp, *Olean Wholesale Grocery*, 31 F.4th 651, likewise does not support its view. As in *Ruiz Torres*, the court found that all class members had standing and, therefore, that the issue was not before it. *Id.* at 682 ("We need not consider the … argument that the possible presence of a large number of uninjured class members raises an Article III issue, because the [plaintiffs] have demonstrated that all class members have standing here."); *see id.* ("[T]he [plaintiffs] have adequately demonstrated Article III standing at the class certification stage for all class members, whether or not that was required.").

LabCorp is correct that *Olean*, in dicta, declined the defendants' urging that it adopt a de minimis rule, stating that such a rule would be "inconsistent with Rule 23(b)(3), which requires only that the district court determine after rigorous analysis whether the common question predominates over any individual questions, including individualized questions about injury or entitlement to damages." *Id.* at 669. At the same time, the court made clear that, "[w]hen individualized questions relate to the injury status of class

members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions." *Id.* at 668. The opinion offers no support for the assertion that the court has embraced the view that certification is proper absent "a *really* large number of uninjured members." Pet. 18.

The Seventh Circuit cases cited by LabCorp are similar: They neither opine on Article III nor state a rule as to the number of uninjured class members that would defeat predominance. *See Messner v. Northshore Univ. HealthSystem,* 669 F.3d 802, 825–26 (7th Cir. 2012) (in an antitrust case where the defendant argued that 2.4% of the class was uninjured, finding predominance of common questions on liability and stating that whether the class definition contains too many uninjured members is "a matter of degree, and will turn on the facts as they appear from case to case"); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677–78 (7th Cir. 2009) (stating that the defendant had argued "statutory standing," not Article III standing, and agreeing that, "if the class definition clearly were overbroad, this would be a compelling reason to require that it be narrowed"); *see also In re Dealer Mgmt. Sys. Antitrust Litig.*, 2024 WL 3509668, at *15 (N.D. Ill. July 22, 2024).

The Eleventh Circuit also has not adopted the view, ascribed to it by LabCorp, that predominance is not satisfied "only where a 'large portion' of members lack injury." Pet. 19 (quoting *Cordoba v. DIRECTTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019)). Instead, in the case that LabCorp cites, the court mentioned "a large portion" of members in referring to its concern about the facts of the case before it. As the court explains, its "only hold[ing]" on the issue was that the

district court erred in failing to "sort out the uninjured class members" when it "appear[ed] that a *large portion* of the class does not have standing, as it seem[ed] at first blush here, and making that determination for these members of the class will require individualized inquiries." *Cordoba*, 942 F.3d at 1276–77 (emphasis added).

2. Although a few appellate-court decisions have described the matter in terms of Article III standing, they have done so within the confines of applying Rule 23. LabCorp asserts that those circuits deny class certification "where [the class] includes members who have suffered no Article III injury." Pet. 14. In every one of those circuits, however, the case law definitively refutes that assertion.

a. LabCorp leads with the Second Circuit decision in *Denney v. Deutsche Bank AG*. LabCorp is correct that *Denney* includes a sentence stating that "no class may be certified that contains members lacking Article III standing." 443 F.3d at 264; *see* Pet. 14. *The Second Circuit, however, has expressly rejected LabCorp's reading of this sentence.* As the Second Circuit has explained, the "single sentence" in *Denney* did *not* "suggest[] that all class members must have standing for the class to proceed." *Hyland*, 48 F.4th at 118 n.1. Rather, in context, the sentence says only that a class must be defined in terms of members who have suffered injury. *See id.* at 117–18 (citing several cases for the proposition that only one named plaintiff need have standing with respect to each claim); *see Ruiz Torres*, 835 F.3d at 1137 n.6; *Kohen*, 571 F.3d at 677 (describing *Denney* as "focus[ing] on the class definition; if the definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad").

Other post-*Denney* Second Circuit cases likewise belie LabCorp's reading of Second Circuit case law. *See Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 241, 245 (2d Cir. 2007) (noting "[a]s a threshold matter … that only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class," and citing *Denney* for boilerplate proposition); *cf. Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 185 n.14 (2d Cir. 2020) ("Because we conclude that none of the named plaintiffs has standing to pursue their claims for prospective relief, the class proposed by [them] necessarily fails as well.").

b. Similarly, LabCorp's discussion of Eighth Circuit law is both inaccurate and incomplete. Like the other circuits, the Eighth Circuit does not require evidence of standing as to each class member before certification—as confirmed by recent Eighth Circuit decisions that LabCorp fails to cite. *See Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 766–67 (8th Cir. 2020) (rejecting the argument that all class members must have standing to certify a Rule 23(b)(3) class, and citing 1 Steven Gensler & Lumen Mulligan, *Federal Rules of Civil Procedures, Rules and Commentary*, Rule 23 (2020) for the proposition that "[i]f it turns out that some members of the class are not entitled to relief, that represents a failure on the merits, not the lack of a justiciable claim"); *Stuart v. State Farm Fire & Casualty Co.*, 910 F.3d 371, 377 (8th Cir. 2018) (stating that "[a]lthough couched as disputes about standing, State Farm's arguments really go to the merits of plaintiffs' claims" because whether some plaintiffs are unable to prove damages "is a merits question").

Arguing otherwise, LabCorp cites *Avritt v. Reliastar Life Insurance Co.*, 615 F.3d 1023 (8th Cir. 2010), *cited in* Pet. 14–15. But *Avritt* agrees that proof of each class member's standing is not a prerequisite to certification. 615 F.3d at 1034. In the one sentence on which LabCorp relies, the court was addressing the plaintiff's argument that individual issues of reliance and injury posed no obstacle to commonality and predominance because state law allowed the claim at issue to be brought on the state's behalf by an uninjured person. In responding to that argument, which suggested that *uninjured* people were proper plaintiffs in federal court, the court stated that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.*, *quoted in* Pet. 14–15. The opinion is not fairly read to state the position suggested by LabCorp.

LabCorp briefly cites two other Eighth Circuit cases, neither of which supports its description of Circuit law. The first, *Halvorson v. Auto-Owners Insurance Co.*, 718 F.3d 773, 778 (8th Cir. 2013), finds that the individualized inquiries needed to determine who was injured and in what way defeated predominance. The second, *Johannessohn v. Polaris Industries Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021), expressly disclaims the notion that proof of all members' standing is a prerequisite to certification.

c. LabCorp's brief assertion that the Sixth Circuit, in an unpublished opinion, "endorsed" a rule that a class cannot be certified if any members might lack standing, Pet. 15, is also off base. To begin with, that non-precedential opinion, *In re Carpenter Co.*, 2014 WL 12809636 (6th Cir. Sept. 29, 2014), suggests that the issue had to be raised below to be preserved for appeal. *Id.* at *3 ("[a]ssuming that the Petitioners

preserved their standing argument"). The opinion thus reflects that the Sixth Circuit was not endorsing the view that the question derives from Article III. *See supra* Part II.A.

Furthermore, a recent precedential decision from the Sixth Circuit makes clear that the court is in line with its sister circuits: In *Speerly v. General Motors, LLC*, 115 F.4th 680 (6th Cir. 2024), *pet. for reh'g pending*, the court considered the certification of a class of purchasers of certain allegedly defective vehicles. *Id.* at 688. On appeal, the defendant argued that the class should not have been certified because some class members' vehicles had not manifested the defect, and those members lacked injury. Rejecting that argument, the court of appeals explained that "whether all class members must actually experience an alleged defect in order to establish Article III injury-in-fact for a proposed class," the "appropriate time to address claims of absent class members whose vehicles never have manifested any defect is a Rule 56 motion for summary judgment." *Id.* at 695–96 (citation omitted).

Finally, LabCorp states that Fifth Circuit "has not squarely addressed" the question, but suggests that it would adopt the view that Article III bars certification if any class members are uninjured. *See* Pet. 15. In fact, the Fifth Circuit has held that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (citing *Kohen*, 571 F.3d at 677); *see id.* ("The district court was not required to determine that every class member had

suffered damages as a prerequisite to class certification.").[6]

In sum, in every circuit, the existence of uninjured class members may inform whether a proposed class satisfies the requirements of Rule 23(b)(3). In no circuit is it necessary to prove that every member was injured for the class action to be certified or the case to be justiciable.

B. The courts of appeals are correct that Article III does not bar certification where some class members may be uninjured.

The critical point by which uninjured class members (if any) must be excluded from a Rule 23(b)(3) class and from receiving a share of a judgment for damages is not at the time of class certification, but at the time the claims are resolved on the merits. This conclusion is consistent with both longstanding Article III principles and Rule 23.

1. As this Court has repeatedly held, an Article III "case or controversy" exists when one plaintiff has standing. *See, e.g.*, *Horne*, 557 U.S. at 446–47 ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of

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[6] The single-judge opinion on which LabCorp relies, *In re Deepwater Horizon*, 732 F.3d 326 (5th Cir. 2013) (opinion of Clement, J.), did not address the issue. Rather, in the context of considering proposed modifications to an existing settlement of claims arising from the Deepwater Horizon explosion, one judge opined that an uninjured claimant should not be able to recover. *Id.* at 341–42 (stating that Rule 23 and Article III do not "[a]llow[] recovery from the settlement fund by those who have no case and cannot state a claim"). That issue, addressed by this Court in *Tyson Foods*, 577 U.S. at 460, is not presented here.

this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Vill. of Arlington Heights*, 429 U.S. at 264 & n.9)). The same principles that apply to individual claims apply to class claims, which, "like traditional joinder, ... leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Although the Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices to create a justiciable controversy, the controversy exists whether the form of redress is compensatory or preventive.

Thus, the presence of uninjured members in a class does not render the case nonjusticiable. The merits question of whether *all* members can demonstrate entitlement to relief, although it may impact the Rule 23(b)(3) predominance determination, does not impact a court's authority to entertain the claims. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (8th Cir. 2014) (opinion of Benton, J., respecting the denial of rehearing en banc) ("The failure of some employees to demonstrate damages goes to the merits, not jurisdiction."), *aff'd*, 577 U.S. 442 (2016). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate that he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To hold otherwise would be to require every plaintiff seeking damages—in both individual and class-action cases—to prove her case *prior to trial* to avoid a jurisdictional dismissal under Rule 12(b)(1).

And if a plaintiff who failed to establish damages at trial lacked standing, the proper resolution would not be judgment in the defendant's favor, but a jurisdictional dismissal without res judicata effect. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Such a novel rule would waste judicial resources, benefit neither plaintiffs nor defendants, and contradict the longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See Gen. Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230–31 (1926); *Bell*, 327 U.S. at 682; *see also Kohen*, 571 F.3d at 677 (noting that "when a plaintiff loses a [damages] case [at trial] because he cannot prove injury the suit is not dismissed for lack of jurisdiction").

2. Conditioning certification on proof that all class members were injured would, in many cases, create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," yet assessing class members' injuries at certification is often infeasible because their identities are unknown. In many cases, for a class to "include persons who have not been injured by the defendant's conduct … is almost inevitable because 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*, 571 F.3d at 677. In addition, because class certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring decertification based on a showing, at *any* stage, that *any* members of a certified class were uninjured. *See Neale*, 794 F.3d at 364 ("Requiring individual standing of all class members would eviscerate the representative nature

of the class action."). Further, if uninjured members come to light during litigation, several procedural solutions are available: narrowing the class; summary judgment as to the uninjured members; instructing the jury not to base any award of damages on uninjured individuals; or requiring a process to identify such members and exclude them from sharing in a classwide damages award. *See, e.g.*, *Tyson Foods*, 577 U.S. at 460–62 (remanding for trial-court proceedings to identify class members, if any, who had no damages).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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