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 Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Plaintiffs do not dispute that this petition asks a question of "great importance" that this Court has already granted certiorari to answer. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016). Nor do they dispute that this question implicates billions of dollars, including legal fees and massive settlements. But Plaintiffs nonetheless implore this Court to stay on the sidelines—no doubt because this suit is the textbook example of why the *status quo* must change.

Plaintiffs offer no sound reason for this Court to do so. Foremost, Plaintiffs disclaim that there is really a split here. But the same split that prompted this Court to grant review in *Tyson Foods* is the one at issue now. And Plaintiffs do not even try to explain how this divide among the circuits has resolved itself since. Nor could they. As everyone else agrees—from the bench, to the academy—it has only gotten worse.

Plaintiffs other points fare no better. They insist that their classes do not really include any uninjured members. But in the next breath, they accept that a significant number of members have *zero interest* in using the kiosks at issue. That is dispositive under this Court's cases: If someone has no interest in using a service (and does not use that service), he has not suffered a concrete injury from its alleged deficiencies.

Finally, Plaintiffs contend there is nothing to worry about, because there are plenty of tools for weeding out the uninjured *after* certification. But that misses the whole point: Certification is the ballgame; and if plaintiffs can swell classes with uninjured members, the next (and final) stop is settlement. It is time this Court say whether federal law allows such a gambit.

ARGUMENT

I. THERE IS A SPLIT.

Every objective observer seems to agree on one thing in this otherwise unsettled area of law: The circuits are deeply divided on the question presented.

As Judge Kayatta put it recently: The "circuits are split" over "the presence of uninjured class members." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46-47 (1st Cir. 2018). This "divergence" is across some circuits that "fram[e] the issue of uninjured class members through the lens of Article III," and those that "view[] the issue of uninjured class members through the prism of Rule 23(b)(3) predominance"—following a spectrum of differing approaches, from strict to lax. *Id.* at 56-57.

The professors agree. The "question whether every class member must demonstrate standing before a court certifies a class" is "unresolved" and "has generated differing approaches" across the circuits. 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 2:3 (6th ed. 2024). Indeed, not only are the courts of appeals "divided on whether certification must be denied where the proposed class includes persons who have suffered no injury," but they are also "divided on whether the presence of uninjured class members raises a question of predominance or standing." 8 Julian O. von Kalinowski, *Antitrust Laws and Trade Regulation* § 166.03[4][b][ii] (2d ed. 2024).

According to Plaintiffs, however, everyone has gotten it wrong. On their telling, while circuits have used different words and varying frameworks, they all essentially say "it depends"—sometimes uninjured

class members prevent certification, sometimes not; it all turns on each case's facts. *See* BIO 20-30.

Not so. The circuits have not coalesced around a "know it when you see it" test for class certification. They have instead adopted meaningfully different sets of rules for guiding this inquiry—all in an area where a single set of clear rules is critically important. Plaintiffs' attempt to gloss over all this is unavailing.

Article III Circuits. As Labcorp explained, the Second and Eighth Circuits "require that in order for a class to be certified, the class must be defined such that anyone within it would have standing to pursue the claim." 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:28 (20th ed. 2023); *see* Petn. 14-16.

In fact, everyone agrees on this. *Compare* Petn. 15 (In these circuits, "any class must therefore be defined in such a way that anyone within it would have standing."), *with* BIO 26-28 ("[A] class must be defined in terms of members who have suffered injury."). Plaintiffs insist these courts do not require definitive *proof* that every single member has been injured, but nobody has said otherwise. These courts only require a class be defined in a way to cover just those with an Article III injury, and where common evidence would be able to show as much. *E.g.*, *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013).

From this common ground, it is impossible to see how Plaintiffs disclaim a split. As Labcorp detailed—and as the BIO does not dispute—there are many circuits that *allow* classes to be defined in ways that include those lacking an Article III injury, and see *no* constitutional problem in doing so—including, of course, the Ninth Circuit. *See Torres v. Mercer*

Canyons Inc., 835 F.3d 1125, 1136-39 (9th Cir. 2016); *see also In re Asacol*, 907 F.3d at 51; *Neale v. Volvo Cars of N. Am.*, *LLC*, 794 F.3d 353, 362 (3d Cir. 2015); *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 779 (4th Cir. 2023); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009); *Green-Cooper v. Brinker Int'l, Inc.*, 73 F.4th 883, 888 (11th Cir. 2023).

Moreover, by Plaintiffs' account, *their very own class* would not survive under the rule adopted by the Second and Eighth Circuits. *See* 9th.Cir.Doc.32 at 60 ("The Class definition here does not tautologically exclude uninjured Class members but limits the Class to individuals who were unable to use the kiosk."). But such a class was totally fine in the Ninth Circuit.

Rule 23(b)(3) Circuits. For circuits that approach the question presented from the vantage point of Rule 23(b)(3) versus Article III, there are two camps: Those courts that do not permit more than a *de minimis* number of uninjured class members and those that do.

1. Plaintiffs claim that "*no circuit* has adopted a de minimis rule," BIO 20, but that does not match what these courts have said. For instance, in *In re Rail Freight Fuel Surcharge Antitrust Litig.*, Judge Katsas recognized that a number of courts have adopted a "*de minimis*" rule, and reasoned that even if this "exception" was valid, it was the outermost bound of what Rule 23(b)(3) would tolerate. 934 F.3d 619, 624-25 (D.C. Cir. 2019). Thus, the court rejected the proposed class, because uninjured members were greater than a "*de minimis* portion" of it. *Id.* at 626.

The First Circuit is in accord. The Plaintiffs rely on a stray line from *In re Nexium* (BIO 21), but ignore how—again, to borrow from Judge Katsas—"the First

Circuit sharply limited that decision in *Asacol*." *Id.* at 625. And there, the court made plain a class cannot have more than a "very small absolute number" of uninjured members. 907 F.3d at 53-54; *see Rail Freight*, 934 F.3d at 626 (reading *Asacol* this way). True, the First Circuit barely used the Latin (BIO 22); instead, it just used its English translation.

2. Plaintiffs also insist there are no laxer circuits willing to allow classes swelled by the uninjured. BIO 23. This too does not square with what they have said.

Start with the Ninth Circuit. Plaintiffs admit that the Ninth has squarely rejected the suggestion of a *de minimis* rule. *Id.* 24-25 (discussing *Olean Wholesale Grocery Coop. Inc. v. Bumble Bee Foods*, 31 F.4th 651, 668 (9th Cir. 2022)). And as Judge Lee detailed in dissent, that holding decidedly "split with other circuits that have endorsed a *de minimis* rule"—*i.e.*, the D.C. and First Circuits. *Id.* at 692. Plaintiffs say this part of *Olean* was "dicta" (at 24), but then ignore it provided the rule of decision *in this case*—where the panel relied on *Olean* alone to hold it did not matter whether "some potential class members may not have been injured." Pet.App.2a-7a & n.1; *see* Petn. 11-12; 9th.Cir.Doc.32 at 33-34 (Plaintiffs: *Olean* permits a "significant number of uninjured class members.").

Other circuits follow the same path. As Plaintiffs note, the Seventh Circuit has criticized the notion of worrying about unharmed members at all, reasoning that their inclusion is "almost inevitable because at the outset of the case many of the members of the class may be unknown." BIO 32 (quoting *Kohen*, 571 F.3d at 677). That circuit has thus rejected the notion of any brightline limit, and instead has held it is a case-

by-case inquiry, pegged only to whether there is a "great many" of unharmed class members. *Kohen*, 571 F.3d at 677.

The Eleventh Circuit uses the same flexible approach. In *Cordoba v. DIRECTV*, for instance, the court remanded a class with a "large portion" of uninjured members so the district court could decide whether predominance was satisfied. 942 F.3d 1259, 1277 (11th 2019). Plaintiffs stress the court did not *reject* the class itself; but in holding a class with a "large portion" of uninjured was *possibly* valid, that court necessarily rejected a *de minimis* rule. BIO 25.

3. Finally, Plaintiffs' discussion of the Fifth and Sixth Circuits only underscores how the law is a mess here—and how this Court's guidance is badly needed.

As for the Fifth, Plaintiffs cite a 2009 case where the court seemed to disclaim the Article III position. BIO 29 (citing *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009)). But they ignore that the Fifth has since cabined that case to Rule 23(b)(3). *In re Deepwater Horizon*, 739 F.3d 790, 801-02 (5th Cir. 2014). And more recently it held that the issue was open in that circuit. *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020); *see also* Petn. 15.

As for the Sixth, its opinions have something for everyone. Plaintiffs agree that court has suggested a class must be defined to exclude parties lacking an Article III injury; but also has said such an argument must be preserved. BIO 28-29. Likewise, in *Speerly v. General Motors, LLC* (cited at BIO 29), the court's opinion cuts both ways, with the decision ultimately resting on how the complaint sufficiently alleged that

all members had experienced a concrete injury. 115 F.4th 680, 695-96 (6th Cir. 2024).

In short, whatever else can be said about this area of law, the only clear thing is that clarity from this Court is needed. Indeed, that is why this Court granted certiorari on this question back in *Tyson Foods*. And more telling than anything, the BIO does not even *attempt* to argue that the split that prompted this Court's review has somehow resolved itself since. Nor could it. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 n.4 (2021). In fact, it has only gotten worse.

II. THE SPLIT IS IMPLICATED.

Plaintiffs do not dispute that their classes include hundreds-of-thousands of people, and seek hundreds-of-millions of dollars in damages. Nor do Plaintiffs challenge that *many* of these people have zero interest in ever using one of Labcorp's kiosks. *See* Petn. 8-9. Instead, Plaintiffs say none of this matters, because those people still *walked into* a Labcorp, and thus were *exposed* to an allegedly violative kiosk. BIO 11.

That does not work, and only reaffirms that the classes at issue here are in fact saturated with members lacking any Article III injury—thus cleanly teeing up the question presented. The upshot of *TransUnion* was that if a class member learns he was "injured" by way of a settlement check in the mail, the heavy odds are that he did not suffer a concrete harm sufficient for standing. That is this case in spades.

To be very clear, nobody doubts that suffering ADA discrimination is an Article III injury; nor is anyone arguing that so long as a person is able to later receive the desired medical services, there can be no standing. *See* BIO 13-14. Labcorp's only point is a basic one,

which this Court has long endorsed: To incur a concrete injury from discrimination, someone must be "personally subject to discriminatory treatment." *Allen v. Wright*, 468 U.S. 737, 757 & n.22 (1984). And when a person has zero "interest" in using a given service (and indeed does not use it), then he has not suffered any concrete harm from that service's discriminatory defects. *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 491 (6th Cir. 2019) (Sutton, J.).

To tweak a line from *TransUnion*: No interest, "no concrete harm, no standing." 594 U.S. at 417. And on Plaintiffs' *own evidence*, a substantial number of their class members match that description because they do not want to use the kiosk. *See* Petn. 8-9. Whether that is fatal for certification is *precisely* what the question presented asks, and what is at issue here.

Plaintiffs also argue that none of this, at minimum, bears on the injunctive class. BIO 14-19. But this too is not a sound reason for the Court denying certiorari.

To start, it does not matter. Plaintiffs' *half-billion-dollar* damages class squarely tees up the question presented, and very much warrants review on its own.

But even putting that aside, this Court should also review the injunctive class, because if Labcorp is right about Article III, that class must fall too. To be sure, in some injunctive-relief cases, this Court has said that it only needs to determine that one party has standing. But that was because reaching the other plaintiffs was *unnecessary*; awarding relief to that *one party* would provide incidental (and total) relief to the others—so as a formal matter, this Court would never need to actually adjudicate their claims. For a class, however, the dynamic is different, and this luxury is

unavailable. When a court adjudicates a class's claim, it is actually adjudicating all of its members' claims at once. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 n.5 (2013). And *that* is an Article III problem if any of those members lack standing: An unnamed class member without a concrete injury cannot obtain a ruling on the merits of his claim, even if his suit happens to be bundled with those who can.[1]

III. THE SPLIT IS IMPORTANT.

Plaintiffs make no effort at downplaying the importance of the question presented. And it would be awfully hard for them to do so, given this Court has already said it is one of "great importance." *Tyson Foods*, 577 U.S. at 461.

At most, Plaintiffs say not to worry, because there are a number of tools available for a court to gradually weed out uninjured members over the course of litigation, *after* a class has been certified. *See* BIO 33.

This misses the point entirely. As Labcorp detailed, it is cold comfort that uninjured members may be filtered out later, because with classes, certification is often the ballgame. Petn. 28-29. Indeed, as this Court has noted time and again, once a class is certified, the next step is typically some "in terrorem settlement," which hurts everyone but the plaintiffs' bar. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

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[1] Plaintiffs' waiver argument (BIO 14-18) is meritless: Whether Article III bars certification is *only* a jurisdictional argument. *TransUnion*, 594 U.S. at 431 & n.4; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997). It therefore cannot be waived.

Here, Plaintiffs do not discuss settlements *at all*—let alone contest how growing numbers of plaintiffs have been able to use artificially swelled classes to extort settlements. *See* Petn. 27-28. That silence is quite telling, but not surprising: After all, Plaintiffs are the posterchild beneficiaries of this phenomenon.

IV. THE DECISION BELOW IS ON THE WRONG SIDE OF THE SPLIT.

Plaintiffs also spend little time defending the Ninth Circuit's position on the merits. For Rule 23(b)(3), they never explain how common issues can genuinely "predominate" within a class saturated by uninjured members; nor do they try to square such a class with the procedural principles underlying the Rule. *Olean*, 31 F.4th at 691-92 (Lee, J., dissenting) (discussing these problems). As for Article III, Plaintiffs rely only on inapposite cases dealing solely with injunctive relief (BIO 31-32) and ignore this Court's far more analogous precedent—namely, how a party must have standing to intervene whenever he seeks "separate monetary relief." *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439-40 (2017). The BIO never tries to distinguish this line of cases, and it is hard to see how it could: Intervention—like a class action—is a procedural device for aggregating claims; if standing is needed in one context, it is needed in the other too.

Lacking on the merits, Plaintiffs mostly pick a fight with a strawman, arguing that it makes no sense for plaintiffs to have to definitively "prove" every member has been injured for a class to be certified. *See* BIO 30-33. Nobody says otherwise. Here as elsewhere, the "manner and degree of evidence required" is shaped by the "stage[] of the litigation." *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 561 (1992). And at this stage, a plaintiff's burden is threefold. At minimum, it must (i) define the class in a way that does not include those lacking an Article III injury; (ii) plausibly establish that all class members have been so harmed; and (iii) show that they can prove, through common evidence, that all class members were in fact injured by the at-issue conduct. *See, e.g.*, *Halvorsen*, 718 F.3d at 778-79; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013).

Anything less opens the very floodgates that are now swamping circuits like the Ninth. And that flood of meritless and extortionate class litigation will only continue—until this Court "resolve[s] this" split. *In re Deepwater Horizon*, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissental). It should wait no longer.

CONCLUSION

The petition should be granted.

December 20, 2024 Respectfully submitted,

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