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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Established in 1977, Atlantic Legal Foundation ("ALF") is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as amicus curiae in carefully selected appeals before this Court, federal Courts of Appeals, and state Supreme Courts. *See* About ALF, https://atlanticlegal.org/about/ (last visited Mar. 10, 2025).

ALF has an abiding interest in the application of sound principles of law to class actions. The question presented by this case is of exceptional importance to ALF. Several intermediate federal appellate courts, like the Ninth Circuit here, allow district courts to certify broad classes with numerous absent members who have suffered no injury. By doing so, these courts contravene the jurisdictional limits placed on federal courts by the Constitution. ALF has an interest in ensuring that Petitioner Laboratory

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[1] No party's counsel authored this amicus brief in whole or in part. No one other than Atlantic Legal Foundation or its counsel contributed money to prepare or submit this brief.

Corporation of America Holdings ("Labcorp"), like all defendants, is subject to class litigation in federal court only when all members of the putative class have standing to proceed in the federal forum.

SUMMARY OF ARGUMENT

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). This constitutional restriction, which is "fundamental to the judiciary's proper role in our system of government," *Raines v. Byrd*, 521 U.S. 811, 818 (1997), requires litigants seeking relief in federal courts to demonstrate they have standing to sue, *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016).

To satisfy this standing requirement, litigants must prove that they have suffered "an 'injury in fact'" that is "'fairly traceable' to the conduct being challenged" and is redressable by a favorable judicial decision. *Id.* (citation omitted).

Class actions are not exempt from this limitation. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215–16 (1974). "Every class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

Despite this constitutional imperative, some federal courts permit the certification of a damages class under Federal Rule of Civil Procedure 23(b)(3) without requiring named plaintiffs to demonstrate absent class members have standing to pursue relief in federal court. *See*, *e.g.*, *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998). These courts do so even though class certification necessarily renders those members parties to the case who seek individualized monetary relief.

Other courts forbid the certification of classes that include any uninjured members. Pet. 14–16. Still others permit class certification only if the number of uninjured members is not excessive. *Id.* at 16–19. But these courts differ over the extent to which a class may encompass uninjured members before class treatment is no longer appropriate, with some courts (like the Ninth Circuit) adopting especially lax standards that fail to weed out large swaths of uninjured members. *See id.*

This Court should hold that district courts *cannot* certify a damages class where it includes *any* uninjured members. During the class-certification stage, named plaintiffs must present evidence demonstrating that each and every class member suffered an injury-in-fact. The Constitution permits no other conclusion.

Even were that not the case, this Court should in the alternative hold that, under Rule 23(b)(3)'s plain language, class certification is improper where

the number of uninjured members is more than *de minimis*. This limitation precludes class certification unless no more than a tiny fraction (for example, 1% or less) of the class consists of uninjured members. The *de minimis* standard cannot be satisfied unless named plaintiffs present a case-specific, administratively feasible mechanism for sifting out uninjured members as the litigation progresses—a method that must preserve a defendant's constitutional right to present individualized challenges to class members' standing.

ARGUMENT

I. Article III prohibits the certification of class actions that include any uninjured class members.

A. Article III requires that each class member have standing at the class-certification stage.

Article III "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). This restriction requires plaintiffs to "establish that they have standing to sue" in federal courts. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and actual or imminent,' not 'conjectural' or 'hypothetical.'" *Steel Co. v. Citizens for*

a Better Env't, 523 U.S. 83, 103 (1998) (citations omitted). "Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.*

Because the "usual rule" in federal courts permits "litigation [to be] conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011), the focus of the standing requirement is ordinarily easy to identify. The individual plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines*, 521 U.S. at 818. But Federal Rule of Civil Procedure 23 is an exception to the usual rule, permitting a plaintiff in certain narrowly defined circumstances to represent the interests of absent class members. *See Wal-Mart*, 564 U.S. at 348–49.

"That a suit may be a class action," however, "adds nothing to the question of standing." *Spokeo*, 578 U.S. at 338 n.6. Article III applies with full force to class actions, including to absent members represented by named plaintiffs. *TransUnion*, 594 U.S. at 430–31.

Consequently, "a class cannot be certified if it contains members who lack standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). Named plaintiffs cannot be permitted to represent a class that includes those who "lack the ability to bring a suit themselves" in federal court. *Id.*

Any conclusion to the contrary would contravene Article III.

Article III does *not* exempt anyone—and certainly not an absent class member—from the obligation to establish the existence of a case or controversy. To the contrary, any "*party*" invoking a federal court's jurisdiction must demonstrate the requisite standing—including an injury-in-fact caused by the challenged conduct—to satisfy the case-or-controversy requirement. *Wittman*, 578 U.S. at 543 (emphasis added); *accord Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (holding that Article III requires a "party" to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"). In short, an "Article III case or controversy is one where *all parties* have standing." *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996).

This necessarily means named plaintiffs must demonstrate absent class members have standing when seeking to certify a class. This is so because if a federal case is certified as a class action the absent members become parties to the lawsuit. *Devlin v. Scardelletti*, 536 U.S. 1, 9–10 (2002); *accord United States v. Sanchez-Gomez*, 584 U.S. 381, 387 (2018) (explaining that absent class members are considered parties once the class is certified). Like any other party, each and every member must have standing to seek relief—particularly damages—in federal court. *TransUnion*, 594 U.S. at 431. This is why, following class certification, this Court considers *all* of the class

members—including the absent members—to be "plaintiffs" in the federal case. *See id.* at 430–39 ("determin[ing] whether the 8,185 class members have standing to sue" and concluding "6,332 plaintiffs" who were absent members lacked standing).

Thus, courts cannot certify a class that includes any absent members who lack the requisite injury-in-fact. Doing so would unconstitutionally inject into the litigation new plaintiffs over whom the courts lack jurisdiction. "Those who do not possess Art[icle] III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 475–76. "*Every* party that comes before a federal court must establish it has standing to pursue its claims." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013) (emphasis added). Each and every class member must be shown to have suffered the injury-in-fact necessary to have standing before they can be added as parties to the lawsuit through the certification of a damages class.

B. Absent class members cannot circumvent Article III at the class-certification stage by relying on the standing of named plaintiffs.

Respondents insist that courts may certify a class, regardless of whether the class includes uninjured members, as long as one of the named plaintiffs has standing. Brief in Opp'n to Pet. for Writ of Cert. 16. But the authority they rely on—*Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017)—said no such thing. To the contrary, *Laroe Estates*

confirms class certification is inappropriate unless each absent member has standing.

The passage that Respondents cite from *Laroe Estates* simply says: "At least one plaintiff must have standing to seek each form of relief requested in the complaint." 581 U.S. at 439. That a particular plaintiff must have standing to seek specific relief does not mean other parties who *lack* standing may likewise seek the same, or any other, relief—particularly when damages are the relief at issue. *Laroe Estates* does not say otherwise, nor have Respondents cited any authority for such a remarkable proposition.

Indeed, this Court's case law contradicts Respondents' premise. When confronting a lawsuit seeking damages, this Court has analyzed whether *each* plaintiff has standing to sue. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 95, 109–16 (1979) (holding that some, but not all, of the plaintiffs had standing to sue, where they sought damages among other relief).

Notably, the cases in which this Court has elected not to consider whether each plaintiff has standing before reaching the merits typically involved requests for generalized equitable relief rather than damages. *See*, *e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 421, 425 n.9, 431 n.19 (1998) (concluding there was no need to consider the standing of every plaintiff where all plaintiffs sought the same declaratory judgment that the Line Item Veto Act was unconstitutional).

This practical approach is understandable, since a victory by even one of several plaintiffs secures the same relief sought by every plaintiff, regardless of whether each had standing. *But see* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481, 483–86, 514–47, 552–53 (2017) (criticizing this so-called "one-plaintiff rule" because "it is inconsistent with the Constitution and the larger web of standing doctrine," and calling upon the Court to "stop using it"). In *Clinton*, for example, this Court's determination that the Line Item Veto Act was unconstitutional had precedential force across the nation, regardless of whether only some of the plaintiffs had standing to secure this declaratory relief.

Regardless of how this Court treats standing in lawsuits seeking generalized equitable relief, a federal court may certify a distinct *damages* class under Rule 23(b)(3) only where each and every member has been shown to have standing. *See TransUnion*, 594 U.S. at 431 ("Every class member must have Article III standing in order to recover individual damages"); 15 James Wm. Moore, Moore's Federal Practice § 101.23 (3d ed. 2024) (explaining that "to qualify for the award of damages each plaintiff must establish injury" and thus any approach declining to consider whether each plaintiff has standing "must logically be confined to suits in which generalized equitable relief is sought.").

Laroe Estates confirms this rule. There, land developer Steven Sherman sought damages against a town for the taking of his interest in property. 581 U.S. at 435–37, 440. A real estate company moved to

intervene, requesting that damages be awarded to *the company*. *Id.* at 436–37, 440. This Court rejected the notion that the company could be added to the lawsuit via intervention without first showing it had standing to sue for its own money damages. *Id.* at 438–42. The Court held that a party seeking intervention "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing," which meant the company needed to show standing before it could intervene to pursue damages for itself rather than for the developer. *Id.* at 440.

Much as in *Laroe Estates*, the certification of a damages class necessarily involves the addition of absent class members as new parties who seek damages for *themselves* rather than money due to the named plaintiffs. "[A] nonnamed class member is [not] a party to the class-action litigation before the class is certified." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). But once a class is certified under Rule 23, the absent members are added as parties to the lawsuit, *Devlin*, 536 U.S. at 9–10; *accord Sanchez-Gomez*, 584 at 387, thus becoming plaintiffs themselves, *see TransUnion*, 594 U.S. at 437. This is what "gives an Article III court the power to 'render dispositive judgments' affecting unnamed class members." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770–71 (5th Cir. 2020) (Oldham, J., concurring) (citation omitted); *see Devlin*, 536 U.S. at 10 (holding absent class members are bound by a judgment because they are parties to the case following class certification). And when a court certifies a *damages* class under Rule 23(b)(3), these newly added parties each seek individualized money damages *for themselves*. *See Wal-Mart*, 564

U.S. at 362 (explaining that Rule 23(b)(3) authorizes classes seeking "individualized monetary claims," with each member having an "individualized claim for money").

In other words, for purposes of Article III, the certification procedure for a damages class does not meaningfully differ in kind from the intervention procedure in *Laroe Estates*. Just as the real estate company there sought to add itself as a party to pursue damages for itself, so too does Rule 23(b)(3) afford a procedure for adding numerous new plaintiffs to a case so they can seek individualized damages for themselves. Thus, much like intervention could not be granted in *Laroe Estates* unless the real estate company could first "establish its own Article III standing," 581 U.S. at 442, class representatives must show that each absent member has Article III standing before a court certifies a damages class to add these absent members as parties.

C. Class certification rules do not permit federal courts to evade Article III's strictures.

While several intermediate federal appellate courts have permitted the certification of class actions that included uninjured members, they have done so based on flawed rationales that are at odds with Article III.

Some courts suggest that Rule 23's prerequisites for class certification will protect against the possibility that uninjured members will ultimately recover by the end of the case; others maintain that

later developments (such as a trial on the merits following classwide discovery) perform the same sifting function. *See*, *e.g.*, *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) (asserting that the presence of uninjured members "does not necessarily defeat certification of the entire class" because a "district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition"); *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016) (insisting that, at class-certification stage, named plaintiffs need not show every member was injured as long as the class does not include "too many" uninjured members and each member must "ultimately" show injury "to recover"); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197–98, 1201 (10th Cir. 2010) (maintaining that, at class-certification stage, named plaintiffs need not show absent class members suffered an injury caused by the defendant in part because "classwide discovery and further litigation answer th[is] question after certification"); *Prudential*, 148 F.3d at 307 (claiming that whether absent class members are properly in federal court is an issue of "compliance with the provisions of Rule 23, not one of Article III standing").

None of these rationales permit federal courts to ignore whether absent members satisfy Article III's standing requirement at the class-certification stage. Indeed, these are nothing more than policy justifications for certifying class actions with uninjured members notwithstanding Article III's strictures. But "policy concerns do not suffice on their own to confer Article III standing to sue in federal

court." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 386 (2024). At any rate, these policy rationales cannot be squared with Article III for at least two reasons.

1. Rule 23 cannot be used to evade Article III's unalterable standing requirement. Article III bars Rule 23 from allowing named plaintiffs to litigate on the merits the claims of absent class members who lack the constitutional right to proceed in federal court on the assumption that later developments will prevent uninjured members from recovering damages. *See Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (holding that the Federal Rules of Civil Procedure cannot "expand the judicial authority conferred by Article III"). Class actions are nothing more than a "procedural" mechanism for the "litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)—a device that does not itself furnish any substantive rights but instead provides "only the procedural means by which the remedy may be pursued," *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 402 (2010) (majority opinion). This procedural device "leaves the parties' legal rights and duties intact and the rule of decision unchanged." *Id.* at 408 (plurality opinion).

Simply put, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (quoting 28 U.S.C. § 2072(b)). The possibility that the class may lose on the merits after certification because of a

failure to prove injury—or that uninjured members might otherwise be winnowed out through post-certification proceedings—does not permit uninjured parties who lack standing to nonetheless litigate the merits of their claims in federal court merely because they are absent class members. "[F]ederal jurisdiction cannot be based on contingent future events." *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013). Because "merits question[s] cannot be given priority over an Article III question," there is no basis for "allowing merits questions to be decided before Article III questions." *Steel Co.*, 523 U.S. at 97 n.2.

This necessarily means that federal courts may grant certification only to add *injured* members to the lawsuit, and lack jurisdiction to permit uninjured members to become parties via class certification. *See Laroe Estates*, 581 U.S. at 439–42 (holding that party seeking monetary relief for itself cannot be added to a case through intervention *unless* the party first establishes it has Article III standing).

2. Rule 23's prerequisites for class certification—such as the need to show typicality, adequacy of representation, or predominance—are not a substitute for scrutiny of absent members' Article III standing at the class-certification stage. Article III's requirements and Rule 23's criteria "spring from different sources and serve different functions." 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 2:6 (6th ed. 2022 & Supp. 2024).

The constitutional standing requirement serves the purpose of "assur[ing] an actual factual setting in

which the litigant asserts a claim of injury in fact," so that "a court may decide the case with confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts actually decided by the court." *Valley Forge*, 454 U.S. at 472. The requirement also safeguards against the use of the judicial process to vindicate the interests of mere bystanders with no actual injury. *Id.* at 472–73. This requirement aims to identify "those disputes which are appropriately resolved through the judicial process," thereby ensuring the federal judiciary is not "being used to usurp the powers of the political branches." *Driehaus*, 573 U.S. at 157 (citation omitted).

The purpose of Rule 23 is different. It aims "to provide a mechanism for the expeditious decision of common questions." *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 881 (1984).

Given these different goals, "[c]are must be taken, when dealing with apparently standing-related concepts in a class action context" because, although "individual standing requirements" and "Rule 23 class prerequisites . . . appear related, in that they both seek to measure whether the proper party is before the court to tender the issues for litigation, they are in fact independent criteria. . . . Often satisfaction of one set of criteria can exist without the other." *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F.Supp.2d 579, 605 (S.D.N.Y. 2006).

Huber v. Simon's Agency, 84 F.4th 132 (3d Cir. 2023), illustrates how Rule 23's prerequisites often fail

to effectuate Article III's standing requirement. There, the defendant argued that the district court erred in certifying a class because the named plaintiff failed to demonstrate each of the absent class members had standing. *Id.* at 151. But the Third Circuit insisted that it was unnecessary for "each member to prove his or her standing" before the class could be certified. *Id.* at 155. In doing so, the Third Circuit acknowledged that some class members might lack standing. *Id.* Yet the court concluded that the question of whether certification was justified under Rule 23(b)(3) should instead focus on whether the proposed class could be certified "notwithstanding the individualized evidence class members must submit to demonstrate standing and recover damages." *Id.* at 158. The court decided that "if there is a plausible straightforward method to sort" out class members without standing "at the back end of the case, then the class might appropriately proceed as it is currently defined." *Id.* at 157–58. This was so, in the Third Circuit's view, because the "presence of individual questions does not *per se* rule out a finding" that Rule 23(b)(3)'s prerequisites for class certification could be satisfied. *Id.* at 156.

Rule 23's requirements in *Huber* failed to safeguard Article III's purpose of ensuring federal courts preside over litigation involving only proper parties who were actually injured and not mere bystanders. The Third Circuit allowed a class to be certified, even though it included uninjured members, as long as Rule 23's criteria were satisfied because "common, aggregation-enabling issues" were "more prevalent or important than the non-common, aggregation-defeating individual issues." *Id.* at 156.

According to the Third Circuit, if each member could establish standing by the remedial phase of the case—well after the parties had litigated the merits—standing problems would not derail class treatment.

Article III forecloses this approach. *See Steel Co.*, 523 U.S. at 97 n.2 (holding that Article III does not permit the determination of merits questions before Article III questions). Allowing courts improperly to "reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' that the Constitution leaves for resolution through the political process." *Id.* (citation omitted).

And in reality, it is highly unlikely uninjured members will be sifted out by an eventual remedial phase. "[A]s a practical matter, that day will likely never come to pass because class action cases almost always settle once a court certifies a class." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC* (*Olean II*), 31 F.4th 651, 686 (9th Cir. 2022) (en banc) (Lee, J., dissenting). When courts certify a class with uninjured members, courts allow "plaintiffs to weaponize Rule 23 to impose an in terrorem effect" by "dramatically expand[ing] the potential exposure and artificially jack[ing] up the stakes." *Id.* at 691 (Lee, J., dissenting). This "often, if not usually," leads "to a substantial settlement by the defendant because the costs and risks of litigating are so high." *Id.* (Lee, J., dissenting) (citation omitted). "Punting the key question [of each member's standing] until later amounts to handing victory to plaintiffs because th[e] case will likely settle without the court ever deciding"

whether it had jurisdiction over every party. *Id.* at 686 (Lee, J., dissenting).

Since "there is a fundamental analytical distinction between" Rule 23's prerequisites for class certification and "Article III standing," *In re Aggrenox Antitrust Litig.*, 94 F.Supp.3d 224, 250 (D. Conn. 2015), courts cannot be permitted to replace an examination of whether each member has standing during the class-certification stage with an analysis of whether Rule 23's prerequisites are satisfied. This Court has always insisted on strict compliance with standing requirements because they serve the constitutional separation of powers by "keeping the Judiciary's power within its proper constitutional sphere." *Raines*, 521 U.S. at 819–20. In this era of frequent class actions, "courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

D. Article III requires named plaintiffs to present evidence showing each absent class member has been injured.

Some courts maintain that a damages class can be certified without evidence that each class member has standing. *See* Rubenstein, *supra*, § 2:3. They do so for a practical reason, insisting that it would be unworkable for judges to determine as part of the class-certification inquiry whether each member sustained an injury. *See*, *e.g.*, *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084–85 (7th Cir. 2014). According to these courts, this inquiry would "put the cart before

the horse" because the question of whether each class member suffered an injury-in-fact turns on whether each has proven a "valid claim," which is an "issue to be determined *after* the class is certified." *Id.* at 1085.

As we now explain, this view fundamentally misunderstands the nature of the standing inquiry mandated by Article III, and in any event overestimates the difficulties involved in assessing standing during the class-certification stage.

1. Even assuming an evidentiary inquiry into whether each member was injured entails significant burdens, that practical concern does not permit courts to avoid determining whether each member has standing. "[C]onsiderations of practical judicial policy cannot overcome the Constitution's mandates." *All. for Hippocratic Med.*, 602 U.S. at 405 (Thomas, J., concurring); *see id.* at 386 (majority opinion). Absent this inquiry, courts will exercise jurisdiction over contested merits issues as the class action progresses following certification. Article III precludes courts from assuming such "hypothetical jurisdiction," as it "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101.

2. The standing inquiry mandated by Article III requires *evidentiary proof* of each member's standing at the class-certification stage. Since the elements of standing, including injury-in-fact, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element

must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of *evidence* required at the successive stages of litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added).

Early in the case, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (citation omitted). But once a case proceeds beyond the pleading stage, plaintiffs can no longer rest on mere allegations and must present evidence of injury-in-fact. *Id.*

As a result, when named plaintiffs seek class certification, the Constitution requires them to present evidence of each member's standing. This is so because "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Instead, named plaintiffs must justify certification based on evidence, so courts must often "probe behind the pleadings" in deciding whether to certify a class. *Id.*; *see Harnish v. Widener Univ. Sch. of L.*, 833 F.3d 298, 304 (3d Cir. 2016) (holding that named plaintiff cannot satisfy Rule 23 "without any evidentiary support"). Named plaintiffs seeking to certify a damages class must therefore demonstrate, through evidence, that each member suffered an injury-in-fact. *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*Rail Freight I*), 725 F.3d 244, 252 (D.C. Cir. 2013).

3. Conducting this evidentiary inquiry into each member's standing at the class-certification stage does not put the cart before the horse by calling on the court to decide the merits of a claim. Whether a member has standing does not determine the merits of any claim. *Byrd v. United States*, 584 U.S. 395, 410–11 (2018) (holding that Article III standing "is jurisdictional and must be assessed before reaching the merits"); *see FEC v. Cruz*, 596 U.S. 289, 298 (2022) ("For standing purposes, we accept as valid the merits of [plaintiffs'] legal claims.").

4. Requiring federal courts to make an evidentiary determination as to whether each member has standing at the class-certification stage is not unworkable.

To begin with, the inquiry does not require proof that each member has a valid claim. *See Cruz*, 596 U.S. at 298 (assuming as true the merits of plaintiffs' claims for standing purposes). Rather, the evidence must demonstrate no more than that each member suffered some concrete harm. *See TransUnion*, 594 U.S. at 417. There is little if any reason to think courts would be unable to examine the evidence to see if each member satisfied this standard. In fact, *this Court* recently conducted precisely this type of analysis. *See id.* at 430–42 (determining the standing of all 8,185 class members by examining whether the evidence demonstrated each had suffered a concrete harm). Surely district courts, which are even better positioned to examine evidence in the first instance, are at least as well-equipped to do the same.

Nor is there anything unworkable about requiring class representatives to present evidence of each member's standing at the certification stage and demanding that courts assess whether this evidence shows all members suffered an injury. This Court has approved the use of representative evidence in class actions, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459–60 (2016)—for example, statistical methodologies, *id.*—as long as the evidence does not amount to an improper "Trial by Formula" that deprives a defendant of the right to litigate its individualized defenses, *Wal-Mart*, 564 U.S. at 367, and is proper under governing evidentiary standards (such as Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)), *see Tyson Foods*, 577 U.S. at 459–60. Although *Tyson Foods* allowed representative evidence to prove classwide liability under certain circumstances, 577 U.S. at 459–60, such evidence might equally suffice to show standing at the certification stage and thereby ease the burden this determination supposedly entails, *see id.* at 460–62 (remanding for the parties to litigate in the district court whether there was a representative methodology that could successfully identify uninjured class members). In fact, lower courts already permit statistical methodologies developed by experts to show, at the class-certification stage, whether class members have been injured, as long as these methodologies can withstand evidentiary scrutiny. *See, e.g.*, *Rail Freight I*, 725 F.3d at 252–55; *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*Rail Freight II*), 292 F.Supp.3d 14, 54–59, 91, 107–08, 132–41 (D.D.C. 2017).

Of course, defendants must be allowed to contest such expert testimony. *See*, *e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 322–25 (3d Cir. 2008). "Expert opinion with respect to class certification" must be subject to "rigorous analysis." *Id.* at 323. If a defendant contests an expert's opinion, the district court must weigh all the evidence, resolve any disputes between the parties' experts or disputes over an expert's credibility, and determine whether "the testimony of either (or neither) party's expert" is persuasive. *Id.* Consequently, "[i]n its rigorous analysis of the evidence presented" by experts, district courts "not only must determine which evidence is most persuasive," but also "resolve any factual disputes between the experts." *Rail Freight II*, 292 F.Supp.3d at 90.

Ultimately, district courts must decide at the class-certification stage whether expert testimony presented by named plaintiffs has established, "through common evidence, *that all class members were in fact injured*." *Rail Freight I*, 725 F.3d at 252 (emphasis added); *cf.* *Wal-Mart*, 564 U.S. at 350 (holding that class treatment is appropriate only where issues central to each claim are "capable of classwide resolution" in "one stroke"). The expert's methodology must "reliably prove that *each* putative class member suffered individual injury." *In re Aluminum Warehousing Antitrust Litig.*, 336 F.R.D. 5, 56 (S.D.N.Y. 2020).

For that matter, even absent representative evidence, it is far from clear that it would be unworkable for named plaintiffs to show each

member's standing by submitting affidavits from every member at the certification stage. Before trial, parties can show standing "by affidavit or other evidence of 'specific facts,'" even if these are contested. *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (citation omitted). Thus, contrary to the suggestion of some courts, *see Parko*, 739 F.3d at 1085, allowing named plaintiffs to show each member's standing via affidavits submitted in support of class certification would not require any "trials." And if these courts instead mean to suggest that the need to review numerous affidavits would be burdensome, that would add nothing new to the certification process, which already involves the presentation (and review) of voluminous evidence. *See* Fred Fresard et al., *For Proper Risk Management: Doing Business in the U.S. and Canada*, 55 No. 11 DRI For the Defense 82, 86 (2013) ("Class certification motions typically involve extensive briefing by each side, and voluminous deposition transcripts, documents produced by the parties, and expert reports usually support the briefs.").

Besides, any purported burdens associated with requiring named plaintiffs to submit, and courts to review, numerous affidavits at the certification stage are typically consequences of named plaintiffs' own making. The extent of this supposed burden in a particular case will likely depend on how broadly or narrowly named plaintiffs define their proposed class. The broader the class, the larger the number of class members involved and the more affidavits are needed. To minimize the burden, both on themselves and the court, named plaintiffs need only define the class more

narrowly. *Cf. Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1248 (7th Cir. 2021) (explaining that the named plaintiff in a class action "controls her own case" and may offer "a class definition that is narrower than it might have been").

For example, Respondents here sought to certify a damages class of all legally blind individuals who visited Labcorp facilities with express self-service kiosks in California during the class period and were exposed to the kiosks. *See* Pet. Br. 7–8; J.A. 381–82. But nothing prevented Respondents from seeking the certification of a narrower class—for example, a class of members who visited such kiosks in just a few locations during a relatively short time period. Had Respondents done so, the burden to show each member had standing through affidavits would likely have been straightforward. But Respondents presumably sought to inflate the class size to magnify the amount of a damages award (and corresponding attorney's fees award). As this Court has emphasized, however, the "desire to obtain (sweeping relief) cannot be accepted as a substitute for compliance" with the "requirement of concrete injury" imposed by Article III. *Schlesinger*, 418 U.S. at 221–22.

As for the burden the standing inquiry might impose on district courts at the certification stage, this Court has already recognized that evidence must show each class member has standing by the end of the case, and the Court itself undertook the burden of analyzing whether thousands of members had standing in *TransUnion* following *a full-blown trial*. 594 U.S. at 421–22, 430–39. It is implausible to believe district

courts would be unable to undertake a similar standing analysis at the certification stage—especially since named plaintiffs can readily mitigate any major burden by narrowly defining their class or relying on adequate and admissible representative evidence.

* * * *

In sum, Article III prohibits courts from certifying class actions under Rule 23(b)(3) unless and until named plaintiffs present common evidence, at the class-certification stage, that each member suffered some concrete harm.

II. Alternatively, federal courts cannot certify a class that includes more than a *de minimis* number of uninjured members.

A. Due to constitutional and statutory constraints, Rule 23(b)(3) forbids class certification where the number of uninjured class members is more than *de minimis*.

Even assuming for the sake of argument that a damages class action could be certified where the class includes members who suffered no injury, the Constitution, the Rules Enabling Act, and Rule 23(b)(3) prohibit the certification of a class that includes more than a *de minimis* number of uninjured members.

Constitutional due process requires that defendants have an opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56, 66

(1972). Thus, the Rules Enabling Act prohibits certification where class treatment would deprive defendants of their opportunity to litigate individualized defenses. *Wal-Mart*, 564 U.S. at 367.

This applies to Article III's standing requirement, since defendants have the right to challenge each party's standing. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65–66 (1987), *superseded by statute on another ground*, Clean Air Act, Pub. L. No. 101–549, 103 Stat. 2574. Because "standing is not dispensed in gross," *TransUnion*, 594 U.S. at 431, and instead mandates an inquiry into "individualized harm," *United States v. Hays*, 515 U.S. 737, 744 (1995), a standing challenge will unavoidably require an individualized inquiry into whether each member suffered an injury-in-fact.

Even if Article III permitted this inquiry to occur following the litigation of the merits after class certification (it does not), Rule 23(b)(3)'s plain language bars the certification of a damages class if the anticipated individualized inquiries into standing will require numerous mini-trials.

Under this provision, a damages class action cannot be certified unless "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This Court interprets such federal rules based on the ordinary meaning of their plain language. *See*, *e.g.*, *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951).

The word "common" from Rule 23(b)(3) ordinarily means "belonging to or shared . . . by all members of a group." *Common*, Merriam-Webster's Collegiate Dictionary (11th ed. 2007). And the word "predominate" ordinarily means "to hold advantage in numbers or quantity." *Predominate*, Merriam-Webster's Collegiate Dictionary (11th ed. 2007).

Consequently, as a panel of the Ninth Circuit correctly explained before the court erroneously reached a different conclusion en banc, "Rule 23(b)(3) requires that questions of law be shared by substantially all class members, and these common questions must be superior in strength or pervasiveness to individual questions within the class." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC* (*Olean I*), 993 F.3d 774, 792 (9th Cir. 2021), *vacated for reh'g en banc*, 5 F.4th 950 (9th Cir. 2021) (mem.); *accord*, *Olean II*, 31 F.4th at 687 (Lee, J., dissenting).

Given the plain meaning of these words and the inherently individualized nature of the standing inquiry mandated by due process and the Rules Enabling Act, Rule 23 cannot permit the certification of a class with more than a *de minimis* number of uninjured members. *See Olean II*, 31 F.4th at 692 (Lee, J., dissenting); *Olean I*, 993 F.3d at 792–93. Unless the class "include[s] only (or mostly only) people who have suffered an injury," "it follows that 'common' issues would not 'predominate,' as required under the text of Rule 23." *Olean II*, 31 F.4th at 692 (Lee, J., dissenting); *see Rail Freight I*, 725 F.3d at 252–53 (holding that, unless there is a "reliable means

of proving classwide injury in fact," the case "turns on individualized proof of injury" and thus "separate trials are in order").

Some courts nonetheless maintain that Rule 23(b)(3) permits class certification as long as the class does not include "a great many persons who have suffered no injury at the hands of the defendant." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *accord, e.g., Olean II*, 31 F.4th at 669 & n.14 (allowing certification where the class does not include "a great number of members who for some reason could not have been harmed" even if this "includes more than a de minimis number of uninjured class members" (citation omitted)); J.A. 397 n.1 (applying *Olean II* here).

This mistaken approach shows why Rule 23(b)(3) does not permit the certification of a class where the number of uninjured members is more than *de minimis*. The amorphous standard endorsed by decisions like *Messner*, *Olean II*, and the Ninth Circuit's opinion here tends to result in certified classes with enormous numbers of potentially uninjured members. *See*, *e.g., In re EpiPen (Epinephrine Injection USP) Mktg. Sales Prac. & Antitrust Litig.*, No. 17-md-2785, 2020 WL 1180550, at *13, *32, *34–37 (D. Kan. Mar. 10, 2020) (certifying damages class consisting of at least hundreds of thousands of consumers, of whom up to 5% suffered no injury); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 32–33 & n.29 (1st Cir. 2015) (Kayatta, J., dissenting) (criticizing majority opinion for allowing the

certification of a class that could include as many as 24,000 uninjured consumers).

This cannot be squared with Rule 23's text permitting a damages class only where "common" issues "predominate" over individualized issues. Where hundreds or thousands of mini-trials are necessary to assess whether particular class members were injured, common issues necessarily cannot be found to predominate over individualized issues. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*Rail Freight III*), 934 F.3d 619, 620, 623–24 (D.C. Cir. 2019) (holding that the need to determine which of thousands of class members were injured meant common issues did not predominate); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46–47, 51–58 (1st Cir. 2018) (refusing to permit certification of a damages class in which thousands of class members would need to testify about whether they were injured).

Hence, if the Constitution, the Rules Enabling Act, and Rule 23's text authorize the certification of a class that includes *any* percentage of uninjured members (they do not), the number of such members "must," at the very least, "be *de minimis*." *Olean I*, 993 F.3d at 792.

B. Named plaintiffs must comply with stringent criteria before they can demonstrate class certification is warranted under this *de minimis* standard.

This *de minimis* standard cannot be satisfied unless named plaintiffs first comply with the following criteria.

1. Named plaintiffs must demonstrate "how many class members (or what proportion of them)" were injured. *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1275 (11th Cir. 2019). "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431. Unless the district court is informed how many members are injured and how many are not, the court cannot determine whether individualized inquiries into each member's standing will eventually predominate when the time comes to decide if each member has the standing necessary to receive relief. *See Cordoba*, 942 F.3d at 1274–75.

2. Named plaintiffs must also demonstrate "there is a plausible straightforward method" to determine which class members were injured. *Id.* at 1275. This is so because "a class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges to allegations of injury-in-fact." *Asacol*, 907 F.3d at 58; *see id.* at 53 (holding that the mechanism proposed by named plaintiffs cannot "jettison[] the rules of evidence and procedure, the Seventh Amendment, or the dictate of the Rules Enabling Act"). And since a

damages class action must *also* be manageable, *see* Fed.R.Civ.P. 23(b)(3)(D); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164 (1974), the method proposed by named plaintiffs must be "*both* 'administratively feasible' *and* 'protective of defendants' Seventh Amendment and due process rights." *Asacol*, 907 F.3d at 51–52 (emphasis added; citation omitted).

In other words, named plaintiffs must enable the district court, "at the time of certification," to provide "a reasonable and workable plan" for affording defendants an opportunity to challenge whether individual class members suffered an injury-in-fact, and this plan must be "protective of the defendant's constitutional rights" while not "caus[ing] individual inquiries to overwhelm common issues." *Id.* at 58.

3. The *de minimis* standard could be satisfied only where a tiny fraction of the class (certainly less than 1% in any case with a few hundred members or more) consists of uninjured members.

Some lower courts "suggest that 5% to 6%" of a class "constitutes the outer limits of a *de minimis* number of uninjured class members." *Rail Freight II*, 292 F.Supp.3d at 137 (collecting cases). Still others consider even higher percentages of uninjured members to be *de minimis*. *See, e.g.*, *In re HIV Antitrust Litig.*, No. 19-cv-02573, 2022 WL 22609107, at *5, *24–25 (N.D. Cal. Sept. 27, 2022) (deeming 11% uninjured class members to be *de minimis* where the class consisted of several thousand members). But that cannot be correct.

If 5% of a damages class could consist of uninjured members, many classes would have hundreds, thousands, or even hundreds of thousands of uninjured members. For example, in *Rail Freight III*, had 5% of the proposed class (totaling 16,065 members) been uninjured, the class would have included roughly 803 uninjured members. *See* 934 F.3d at 623–24.

Worse yet, in *this* case, applying a 5% threshold to the roughly 112,140 members of the damages class, *see* Pet. Br. 43, would result in approximately 5,607 uninjured class members. A higher percentage—such as the 11% condoned by the district court in *HIV Antitrust Litigation*—would only increase the number of uninjured members here.

None of these numbers can properly be considered *de minimis*. *De minimis* means "something that is 'very small or trifling.'" *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (citation omitted). Any suggestion that hundreds or thousands of uninjured members can be considered a very small or trifling number beggars belief. If anything, allowing even 1% of a class to consist of uninjured members—which, here, amounts to approximately 1,121 members—would often fall outside the scope of the *de minimis* standard. *See, e.g.*, *Wis. Dept. of Rev. v. Wrigley*, 505 U.S. 214, 236 (1992) (refusing to conclude "several thousand dollars" could be considered *de minimis*, since this was a "nontrivial" amount).

CONCLUSION

This Court should reverse the Ninth Circuit's decision and hold that district courts cannot certify a damages class action where the class includes *any* uninjured members, or, alternatively, more than a *de minimis* number of uninjured members.

Respectfully submitted,

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