No. 24-304

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND AMERICAN COUNCIL OF THE BLIND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF TECHNET AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE*

TechNet is a national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet. Those companies represent more than 4.5 million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet's members have first-hand experience with the harmful effects of aggregating claims of uninjured people through class actions that violate Article III and Rule 23.

SUMMARY OF ARGUMENT

I. The certification of classes with uninjured members presents an enormous problem for all companies, but especially those in the innovation economy.

A. Class-certification orders create immense pressure on defendants to settle, even when the order is erroneous and the plaintiffs' claims are weak. *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 29 (2017). Those pressures reach unacceptable levels when plaintiffs are allowed to include members who suffered no Article III injury in their proposed classes. Particularly where plaintiffs seek statutory penalties or punitive damages, the potential monetary exposure in overinflated multi-million-member classes will all too often force

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* Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

defendants to give up the game early—no matter how weak the aggregated claims—rather than face the long, expensive slog of class litigation, high-stakes trials, and complex appeals.

For tech companies at the forefront of innovation and growth, these problems are especially acute. The digital economy has thrived by bringing massive numbers of people together on platforms featuring all manner of commerce and speech. But the size of those platforms provides an alluring target for class-action plaintiffs, who often rely on general allegations about the tech companies to lump millions of differently situated users into massive classes. And given the complexity of the platforms, courts too often are tempted to skip the difficult task of separating injured from uninjured users, or at least to defer that essential work until after classes are certified. But class certification typically forces an *in terrorem* settlement—so in practice, waiting until after certification to decide whether a class sweeps in people who lack any actual injury means there will never be an adjudication of whether class members have Article III standing.

B. The Ninth Circuit has looked the other way when it comes to uninjured class members, approving certification so long as the number of uninjured members is not too "'great.'" *Olean Wholesale Grocery Cooperative, Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc) (citation omitted). In recent years, the Ninth Circuit has seen the certification of staggeringly broad class actions against tech companies that seek billions of dollars on behalf of millions of class members whose claims the district court may have no jurisdiction to adjudicate. The track record under the Ninth Circuit's rule shows the

mischief invited by a permissive approach to Article III at class certification.

II. The Ninth Circuit's permissive approach and the decisions it has produced are an affront to Article III and Rule 23(b)(3) alike.

A. The Constitution limits the "judicial Power" to "Cases" and "Controversies," Art. III, § 2, requiring all plaintiffs in federal court to show an injury in fact that's traceable to the defendant's conduct and likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). That mandate isn't limited to the end of the case; the plaintiff must comply at each "successive stag[e] of the litigation." *Ibid.* And when a party seeking relief joins a case that's already underway, he "must establish [his] own Article III standing." *Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433, 442 (2017).

Nothing about those constitutional requirements changes when it comes to a class action, which is simply a procedural device for aggregating and resolving the claims of absent class members all at once. *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 291 (2008). This Court has already held that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 431 (2021) (citation omitted). It should now clarify that "no class may be certified that contains members lacking Article III standing." *E.g.*, *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). Because standing "is not dispensed in gross," plaintiffs must show an Article III basis for "each claim" in the case, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352-353 (2006) (citation omitted)—including claims of absent class members brought into the action through a certification

order. Any other view would allow a procedural rule to subvert Article III and permit federal courts to exercise purely "'hypothetical jurisdiction'" over the claims of people who suffered no injury in fact. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

B. It's not enough to ensure, at class certification, that the class is defined to include only injured members. To recover, the named plaintiff ultimately will have to be able to prove, by final judgment, that each member of a Rule 23(b)(3) class in fact has Article III standing. *TransUnion*, 594 U.S. at 431. And that in turn raises serious questions, at class certification, about whether the plaintiff can show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That especially "demanding" predominance requirement is often what precludes certification. *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013).

The Ninth Circuit's approach sidesteps those issues. In its view, everything comes down to numbers: It's no bother if a class includes more than a "de minimis" number of uninjured members, so long as that number doesn't become "great" (whatever that means). *Olean*, 31 F.4th at 669 & n.14 (citation omitted). But what matters for Rule 23(b)(3) isn't the number of uninjured class members, but whether it is possible to "'segregate the uninjured from the truly injured'"—and if that's going to require "full-blown, individual trials," then no class proceeding should go forward. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 625 (D.C. Cir. 2019) (citation omitted). Unless plaintiffs offer a compelling plan to resolve the question of Article III standing on a classwide basis,

they should not be permitted to invoke the exception of class litigation, with all the pressures and constitutional concerns it raises.

ARGUMENT

I. Certifying classes with uninjured members creates immense settlement pressure and threatens innovation in the tech industry.

This Court has long recognized that "certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 29 (2017) (brackets omitted) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978)). Permitting plaintiffs to swell the ranks of their proposed classes with members who suffered no injury, and to seek statutory penalties and punitive damages on behalf of such uninjured people, ratchets up that settlement pressure to crushing levels. Nowhere are those effects more gravely felt than in the tech industry, where digital platforms have led to stunning growth—but where, given the expanse of the platforms and the volume of e-commerce, defendants' potential exposure quickly becomes astronomical.

A. Tech companies are all-too tempting targets for oversized class actions.

The American story can be told through the lens of technological innovation. And over the last decade, a revolutionary advance in "online structures that enable a wide range of human activities" has produced "radical changes in how we work, socialize, create value in the economy, and compete for the resulting profits." Kenney & Zysman, *The Rise of the Platform Economy*, Issues in Science & Technology (Spring 2016),

https://tinyurl.com/mr3ss3mz. Tech companies increasingly offer online platforms where millions of people communicate and do business. As those platforms have grown, so too have their usefulness: "They benefit from the network effect, so providing greater value" the more users take part. Colback, *The Rise of the Platform Economy*, Financial Times (Mar. 13, 2023), https://tinyurl.com/5xryrkna.

"Digital transformation is now affecting every business sector," "every industry," and "every aspect of our life." Minevich, *20 Leading Social Impact Platforms Making a Difference with Digital Potential*, Forbes (Aug. 3, 2021), https://tinyurl.com/mvxuapjh. The companies offering digital platforms for people to meet, trade, and work range from tiny startups to some of the world's largest companies. And the platforms, through their network effects, offer new opportunities for innovation each year. *E.g.*, Persistence Market Research, *Digital Experience Platform Market to Hit USD 19.3 Billion by 2030 Due to Digital Transformation Initiatives and E-commerce Growth*, Yahoo! Finance (Jan. 11, 2024), https://tinyurl.com/mv9xun3h.

The sheer reach of these digital platforms is unprecedented. For instance, Facebook, YouTube, Instagram, and WhatsApp each have more than 2 billion active users each month. *Most Popular Social Networks Worldwide as of April 2024*, Statista, https://tinyurl.com/2s3jmdzy (visited Mar. 10, 2025). Over 90% of Americans now own a smartphone and thus take advantage of an array of mobile apps and platforms. *Mobile Fact Sheet*, Pew Research Center (Nov. 13, 2024), https://tinyurl.com/3b4p5x55. Nearly 95% of companies worldwide now rely on cloud computing. *How Many Companies Use Cloud Computing in 2024?*, Edge Delta (May 17, 2024), https://tinyurl.com/5chzmzu8.

And so on. The more people and businesses turn to digital platforms, the more value they generate; by 2028, the digital economy is slated to reach $16.5 trillion. Ang, *Global Digital Economy Will Hit US$16.5 Trillion by 2028*, Business Times (Aug. 19, 2024), https://tinyurl.com/237earzc.

Digital platforms are also a great equalizer, offering even small startups the chance to put their digital products or services in front of millions of potential customers in a span of weeks. Most of the digital economy is driven not by a few massive companies, but by smaller apps and websites. For example, while Instagram may have more than 2 billion active users each month, Instagram's nearly 640 million app downloads in 2024 is dwarfed by the nearly 110 billion downloads across all consumer mobile apps that year, with more than 85% of consumer mobile app revenue coming from mobile apps outside the largest ten. Perez, *App Downloads Decline 2.3% in 2024, but Consumer Spending Grows to $127B*, TechCrunch (Dec. 18, 2024), https://tinyurl.com/4bup4nr3.

For plaintiffs interested in bringing Rule 23(b)(3) damages class actions, the size of even nascent digital platforms and the potential for easy recovery via an inflated class offer an irresistible opportunity. Often with little more than vague allegations about a tech company's practices or a platform's policies, plaintiffs can quickly arrive at proposed classes numbering well into the millions. The exposure associated with those proposed classes can be staggering, too. As uninjured members increase the estimated class size, so increases the money being demanded and the starting point for any settlement negotiations—especially where the plaintiffs argue that every member of an enormous class, even those who weren't actually in-

jured by the challenged practice, should be entitled to statutory penalties and punitive damages. See, *e.g.*, *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 421-422 (2021) (involving verdict that stacked statutory and punitive damages for uninjured class members). Plus, given the complexity and scale of digital platforms, it can often be difficult to determine which particular users, if any, were affected by a challenged practice. So plaintiffs have every incentive to load up their classes with everyone who may have encountered the platform or viewed products or services online, and to ask the court to disregard the problem of uninjured members—or at least kick the injury can down the road to some later stage of the proceedings.

These sorts of overinflated class actions have serious, harmful consequences. Even an erroneous class-certification order "may force a defendant to settle rather than run the risk of potentially ruinous liability." *Baker*, 582 U.S. at 41-42 (ellipsis omitted) (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment). That's in part because the prospect of winning at trial or reversing class certification in an eventual appeal doesn't erase the "extensive discovery and the potential for uncertainty and disruption" that force class-action defendants to settle in the first place. *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Such "'in terrorem' settlements" are an open secret by now. *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011); see Pet. Br. 32-33. The unprecedented expanse of class actions against tech companies makes those pressures all but unbearable.

If left unchecked, these sorts of sweeping class actions will harm innovation. The digital economy has been so successful, and so beneficial to consumers,

precisely because tech companies have engineered ways to reduce barriers to entry and to facilitate communication and e-commerce on a massive scale. But if plaintiffs are permitted to bring class actions, secure class certification, and make demands based on every user of those platforms—no matter whether the users were actually injured by the challenged conduct—then companies will be pressured to restrict usage of the platforms or else face potentially ruinous liability. That would have untold consequences for the economy, for society, for speech, and more.

Those consequences wouldn't be confined to massive companies with the coffers to ward them off. In fact, the harmful effects of an overly permissive approach to classes with uninjured members could be felt most acutely among the highly innovative small and midsize businesses and startups that have limited resources, but that nonetheless are pioneering technological breakthroughs that will define tomorrow's tech industry. Those companies may be able, thanks to low barriers to entry in the modern digital economy, to reach millions of consumers at once. But they wouldn't have the resources to face down an extortionate class action loaded with people who suffered no injury. For those companies, the only choice would be to settle early or close up shop. In either case, looking the other way while plaintiffs flout Article III and funnel the claims of uninjured people into federal court leaves those companies less likely to bring their innovations to market, threatening the progress and prosperity that the digital economy promises.

B. The Ninth Circuit's rule has greenlit inflated class actions against tech companies.

The Ninth Circuit has disregarded the coercive effects of overinflated classes and instead adopted a permissive approach to assessing Article III standing at class certification. It holds that district courts can overlook "the possible presence of uninjured class members," so long as the number is not too "'great.'" *Olean Wholesale Grocery Cooperative, Inc.* v. *Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc) (citation omitted). In *Olean*, for example, the Ninth Circuit held that the district court could defer resolving all issues of class member standing until trial even though expert evidence suggested that 28% of class members suffered no injury. *Id.* at 680-681; *id.* at 686 (Lee, J., dissenting).

The Ninth Circuit's hands-off approach to Article III standing at class certification has unleashed oversized class actions—especially against tech companies. The facts of this case illustrate the concerns with allowing named plaintiffs to shoot for the moon in their class definitions. Pet. Br. 43-44. But other cases shine an even harsher light on the inconsistency of the Ninth Circuit's rule with Article III's limit on the cases and controversies fit for federal court.

A prime example is what happened after this Court's decision in *Apple Inc.* v. *Pepper*, 587 U.S. 273 (2019). There, this Court held that antitrust claims could go forward on the theory that the plaintiffs "pa[id] [an] alleged overcharge directly to Apple" when they bought apps in the App Store. *Id.* at 281. The plaintiffs on remand sought to certify a class of anyone in the United States who paid Apple more than $10 for an app or in-app purchase, which amounted to

around 125 million App Store accounts. *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-6714, Dkt. 789 at 2 (N.D. Cal. Feb. 2, 2024). The plaintiffs' own expert estimated that almost 8% of the proposed class (more than 10 million accounts) would not have paid any overcharge—the critical element from this Court's decision. *Id.* at 25. The district court even professed its "concer[n]" about the number of "uninjured accounts"—but using the 28% figure from *Olean* as a benchmark, it accepted the plaintiffs' "surmise" that they'd later be able to identify uninjured class members by refining their model and certified the class anyway. *Id.* at 25-26. That certify-first, analyze-standing-later approach resulted in a massively oversized class action in which the district court took jurisdiction over the claims of millions of class members who were concededly uninjured.

There was more of the same in *Rodriguez* v. *Google LLC*, 2024 WL 38302 (N.D. Cal. Jan. 3, 2024). The plaintiffs claimed that Google improperly collected data from users who had opted out of certain settings. *Id.* at *1. In response, Google argued that "the 'vast majority' of class members' data" was collected only for routine record-keeping—not to be monetized for ad revenues. *Id.* at *6 (citation omitted). The class members couldn't prove an injury from mere data collection without something more like monetization, *ibid.*, just as the class members in *TransUnion* couldn't rely on mere inaccuracies in the defendant's records for standing absent disclosure to a third party, 594 U.S. at 437. Yet the district court in *Rodriguez* chose to defer addressing that issue until later in the case and certified a class of "'100 million privacy plaintiffs'" seeking more than half a billion dollars. 2024 WL 38302, at *6; see *id.* at *11. If a district court has permitted a massively inflated class to burst through the class-certification

gate, the opportunity to knock out the vast majority of the class under Article III at an eventual class trial is cold comfort even when the defendant has ample resources, let alone when a startup faces potential bet-the-company liability.

Even before *Olean*, district courts in the Ninth Circuit had often turned a blind eye to uninjured class members at certification. The plaintiffs in one case, for instance, sought to certify a class of 250 million people seeking around $5 billion in damages against Qualcomm. *In re Qualcomm Antitrust Litigation*, 328 F.R.D. 280, 294, 304 (N.D. Cal. 2018). Qualcomm argued that the class "include[d] a large number of members" who could not have suffered any injury and pointed out that the plaintiffs had carved out buyers of iPhones from their expert report on the purported overcharge. *Id.* at 310-311. But the district court effectively flipped the burden, certifying the class on the theory that Qualcomm had not "definitively" established that those class members lacked an injury sufficient to give them standing. *Id.* at 311. Although the Ninth Circuit ultimately vacated class certification on other grounds, *Stromberg* v. *Qualcomm Inc.*, 14 F.4th 1059, 1067 (9th Cir. 2021), the district court's order illustrates how a lenient approach to standing at class certification permits extreme aggregation of damages claims—especially against tech companies, for which scale of platform, depth of pocket, and value created by cutting-edge innovation provide an all-too-enticing target.

II. The Ninth Circuit's rule undermines bedrock standing requirements.

Article III establishes the foundations of, and imposes the limits on, federal judicial power. And at every stage, "[t]he party invoking federal jurisdiction

bears the burden of establishing" standing under the burdens applicable to "successive stages of the litigation." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). That ironclad rule has consequences for class certification: The named plaintiff must make a threshold showing *before* certification that the district court can exercise jurisdiction over the claims of all absent class members. And even then, the plaintiff also must demonstrate his ultimate ability to prove standing for all the claims without having individualized issues overwhelm a potential class trial. The Ninth Circuit wrongly rejects the first requirement and dilutes the second.

A. The named plaintiff must define the class within Article III's limits.

The Constitution limits the "judicial Power" to "Cases" and "Controversies." Art. III, § 2. The "irreducible constitutional minimum" for any case or controversy comprises the three elements of standing, each of which the plaintiff must establish: (1) an injury in fact that is (2) fairly traceable to the defendant's conduct and (3) likely to be redressed by the exercise of federal judicial power. *Defenders of Wildlife*, 504 U.S. at 560-561. Together, the elements of standing confine federal courts to resolving "real controvers[ies] with real impact on real persons." *TransUnion*, 594 U.S. at 424 (citation omitted). And no one can seek relief in federal court unless he can "sufficiently answer the question: 'What's it to you?'" *Id.* at 423 (citation omitted).

Article III's most vital requirement isn't limited to the end of the case. Quite the opposite: Any plaintiff seeking any form of relief must demonstrate Article III standing *when entering the case*. In *Town of Chester* v. *Laroe Estates, Inc.*, 581 U.S. 433 (2017), for

example, the Second Circuit sidestepped the "threshold issue" of Article III standing when allowing an intervenor to enter the case. *Id.* at 435. This Court vacated, stressing that the requirements of Article III apply "whether [a] litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Id.* at 439. When a person seeks damages, he "must establish [his] own Article III standing *in order to intervene*." *Id.* at 442 (emphasis added). That rule has deep roots in Article III: A court that allowed intervention while promising to address standing down the road would be assuming a form of "'hypothetical jurisdiction'" that has always exceeded federal courts' proper role under the Constitution. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

Those principles don't fall by the wayside in class actions. True, a class action is "an exception" of sorts—not to Article III, but "to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). The named plaintiff in a class action instead conducts the litigation on behalf of himself and the absent class members. See *id.* at 348-349. This claim-aggregating procedure functions as a sort of "traditional joinder" that "enables a federal court to adjudicate claims of multiple parties at once," *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion); see *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U.S. 269, 291 (2008), even though the absent class members are not full-fledged parties in the same way a named plaintiff or intervenor would be, see *Devlin* v. *Scardelletti*, 536 U.S. 1, 9-10 (2002).

Because a class action is simply a device for aggregating claims of unnamed parties, it cannot be used to circumvent constitutional constraints. That a case is brought as a class action "adds nothing to the question of standing." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (citation omitted). In fact, this Court has warned that, in this "era" of "class actions," "courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian School Tuition Organization* v. *Winn*, 563 U.S. 125, 146 (2011). *TransUnion* left no doubt on that score: "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." 594 U.S. at 431 (citation omitted). The upshot is that the named plaintiff must establish standing for "each claim" that he seeks to aggregate. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006). After all, "standing is not dispensed in gross," meaning that a constitutional basis must undergird a federal court's exercise of judicial power over each claim in the class. *TransUnion*, 594 U.S. at 431.

This Court therefore should hold that, under Rule 23(b)(3), "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); see, *e.g.*, *Halvorson* v. *Auto-Owners Insurance Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); see also Pet. Br. 25. Here, as with other constitutionally grounded procedures, "'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards." *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008) (citation omitted).

Certifying classes containing uninjured members on the promise to weed them out later defies the principle that the exercise of judicial power "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Railway Co.* v. *Wellman*, 143 U.S. 339, 345 (1892)); see Pet. Br. 30. Yet the Ninth Circuit has allowed district courts to cast their jurisdiction far and wide as a first resort before resolving the "threshold issue" of standing. *Town of Chester*, 581 U.S. at 435; see pp. 10-12, *supra*.

Kicking the Article III can down the road also has intolerable consequences for defendants. Pet. Br. 32-34. Any settlement discussions will be framed by the "potential damages liability" for the entire certified class. *Coopers & Lybrand*, 437 U.S. at 476; see p. 8, *supra*. The certification of "grossly oversized classes" thus allows plaintiffs "to extract a settlement, even if the merits of their claims are questionable." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). For defendants facing the Hobson's choice to settle or risk ruinous liability, the abstract prospect of late-stage analysis of each class member's standing is "a phantom solution." *Id.* at 691. The federal judiciary should be the last to sign off on mass violations of Article III that will predictably coerce excessive settlements.

B. The named plaintiff must establish an ability to prove every class member's standing without individualized issues predominating.

Limiting the class definition to injured class members is necessary but not sufficient to keep a case within the bounds of Article III. The named plaintiff

also must ultimately prove, by final judgment, that each member of a damages class has standing. *TransUnion*, 594 U.S. at 431. That showing has the potential to lead to endless mini-trials over absent class members' standing—and that concern cannot be swept under the rug when deciding whether to certify a class.

Rule 23(b)(3) makes clear that district courts cannot ignore individualized standing questions at class certification. Any attempt to certify a damages class triggers an additional "safeguar[d]": the "demanding" predominance requirement. *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013). Class certification is improper 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 inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 809-810 (2011). And standing is "an indispensable part of the plaintiff's case" that, again, "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"—that is, "with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561.

Putting two and two together: The plaintiff must show that common questions will predominate over any Article III standing issues "affecting only individual members." Fed. R. Civ. P. 23(b)(3). To its credit, the Ninth Circuit has recognized that the predominance requirement applies to standing. *Olean*, 31 F.4th at 668 n.12. But the Ninth Circuit pays lip service to this constraint. In its view, a certification order survives its version of predominance unless the

class is "defined so broadly as to include a *great* number of members" who were uninjured. *Id.* at 669 n.14 (emphasis added; citation omitted). That rule could almost have been reverse-engineered in a lab to certify class actions despite serious standing issues.

The Ninth Circuit has sought to justify its "great number" standard by portraying its competitor as the "de minimis" test. *Olean*, 31 F.4th at 669. The insinuation is that courts must adopt an arbitrary numerical or percentage cutoff for uninjured class members, and the debate is simply over which threshold suffices. But that's a false choice. The "de minimis" cases rest less on the absolute number or percentage of uninjured class members than on the plaintiff's anticipated ability to "'segregate the uninjured from the truly injured'" without "full-blown, individual trials." *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 625 (D.C. Cir. 2019) (citation omitted); see *In re Asacol Antitrust Litigation*, 907 F.3d 42, 53-54 (1st Cir. 2018).

The Ninth Circuit's focus on whether a great or small number of class members likely suffered an injury thus misses the point. Uninjured class members aren't supposed to be participating in the case, via the class-action mechanism or otherwise, at all. So if the defendant or the court would be forced to go to great lengths to weed them out one by one, that's a sign that things have already taken a wrong turn at class certification. And even when the number or percentage of uninjured class members may be small, the process of locating them can overwhelm the case with individualized inquiries. The task of finding all the needles in the haystack doesn't get easier when there are fewer needles. Instead, it gets easier when there's less hay to sift through, or when a person steps forward with a

manageable plan for accurately finding every last needle. Yet the Ninth Circuit errs in favor of both larger classes and weaker predominance review, turning a check on individualized issues into a permission slip to stuff the class full of uninjured members who shouldn't be in federal court in the first place.

Were there any doubt, principles of constitutional avoidance would foreclose the Ninth Circuit's lax treatment of standing concerns under the predominance test. This Court has long explained that "serious constitutional concerns" "counsel against adventurous application[s]" of Rule 23. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). The Court also has been "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints." *Id.* at 831 (brackets in original) (quoting *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997)); see Fed. R. Civ. P. 82 ("These rules do not extend * * * the jurisdiction of the district courts."); see also Pet. Br. 21. Unless the plaintiff can demonstrate a concrete plan to prove every absent class member's standing in a manageable class proceeding, courts should deny class certification—even if the standing concerns raised by the defendant do not affect a "great number" of class members. *Olean*, 31 F.4th at 669 n.14. Article III shouldn't be an afterthought—it's an indispensable feature of our "separation of powers." *TransUnion*, 594 U.S. at 422 (citation omitted).

The predominance requirement thus should foreclose class certification in cases, like this one, in which the plaintiffs allege that a legal violation occurred when class members were "exposed" to a device that allegedly violated some law. Pet. App. 35a. Because "an injury in law is not an injury in fact," the plaintiff must establish that each class member suffered some

real-world harm beyond proximity to the defendant's device. *TransUnion*, 594 U.S. at 427. But often the only way to know whether a bare legal violation caused some harm is to put on individualized testimony—here, for example, whether class members tried or even wanted to use the allegedly non-ADA-compliant kiosks. See Pet. Br. 22-23. Because respondents haven't identified any common evidence that could prove such an injury in fact on a classwide basis, the Ninth Circuit erred in holding that they satisfied the predominance requirement. See *Comcast*, 569 U.S. at 34.

CONCLUSION

The judgment should be reversed for either or both of the reasons that the class definition sweeps in uninjured class members and individualized standing questions will predominate over common issues.

Respectfully submitted.

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