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 NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

SUMMARY OF ARGUMENT

This case presents an uncomplex question: Are individuals in a class action required to demonstrate the same threshold requirements at class certification that every other individual plaintiff who seeks redress in an Article III court must show at the outset of litigation? Contrary to the special exemption that the Ninth Circuit read into Federal Rule of Civil Procedure 23 (Rule 23), this Court should make clear that individuals seeking class action certification are held to the same rigid demands imposed on any normal litigant—no more, no less.

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[1] No part of this brief was written by counsel for any party. No party, or any other person or entity other than amicus or their counsel, monetarily contributed to the preparation or submission of this brief.

The George Washington University takes no position on this case.

In addition to those arguments made by Petitioner, this Court should answer the question in the affirmative for three main reasons.

First, the Ninth Circuit's reading of Rule 23 is inconsistent with the Rules Enabling Act (REA) of 1934, 28 U.S.C. §§ 2071–2077. The REA provides an underlying grant of authority to this Court to create rules of civil procedure governing the federal courts. In doing so, no rule created can abridge, enlarge, or modify any substantive right. But that is exactly what the Ninth Circuit's interpretation does—it gives individuals who suffered no injury the substantive right to access an Article III court where they otherwise could not. Not only does this violate the REA, but it conflicts with Article III standing and due process. When a court certifies a class action with uninjured members, it exceeds the jurisdictional limits of Article III's "case" or "controversy" requirement and expands a defendant's potential liability beyond the adverse parties that Article III contemplates.

The inclusion of uninjured individuals also creates downstream Seventh Amendment concerns. When courts certify a class with uninjured members, deferring the question of standing until post-trial, they remove from the civil jury the crucial determination of whether the defendant is liable in fact to each plaintiff. Even though the class action mechanism is designed to create efficiency and prevent inconsistent verdicts in similar actions, the Seventh Amendment's right to a civil jury must be strictly guarded. Thus, the convenience or expediency of a certify-first, remove-later process cannot be maintained given the impact it poses on a defendant's Seventh Amendment rights.

Second, construing Rule 23 as the Ninth Circuit does creates significant typicality problems. Rule 23's typicality requirement means that the class representative must share the same interest as members of the proposed class. However, that is not the case when the representative has an Article III injury while others within the class do not.

Third, a lenient reading of Rule 23 will significantly harm defendants such as small businesses. As many commentators and courts have recognized, certification of a class is often the ballgame in a class action suit, creating pressure for defendants to settle in the face of enormous litigation and liability costs. When courts allow uninjured individuals to permeate the class at certification, this artificially inflates liability for those defendants, like small businesses, who especially lack the resources to litigate against large classes or face significant liability judgments.

Moreover, some states, such as California, impose minimum liability damage amounts for violations of the Americans with Disabilities Act or state anti-discrimination laws. In these states, a certify-first, remove-later process artificially inflates the liability faced by small businesses, further deepening the asymmetrical bargaining power in settlement negotiations. In these states where each violation, and thus each class member, may automatically increase the liability of a small business regardless of the merits of the underlying claim, the inclusion of uninjured individuals within a class could be the difference between a small business surviving or shuttering its doors.

The Court should reverse the judgment below.

ARGUMENT

I. Rule 23 Should Be Interpreted Consistent with the Constraints Imposed by Article III and the Rules Enabling Act

The Rules Enabling Act (REA) authorizes the Supreme Court to prescribe general rules of procedure for cases in the United States district courts, but "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)–(b). Consequently, § 2072(b) ensures that procedural rules do not override congressional intent or extend liability beyond statutory limits. Rule 23 is intended to aid in the "just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1, specifically by imposing procedural requirements for class certification. Fed. R. Civ. P. 23.

Interpreting Rule 23(b)(3) to require an Article III "injury-in-fact" for each putative member at the class certification stage is consistent with the REA's mandate that procedural rules align with constitutional principles. First set forth in *Amchem Products, Inc. v. Windsor*, this Court has repeatedly affirmed the requirement. 521 U.S. 591, 613 (1997) ("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.'" (citing 28 U.S.C. § 2072(b))); *see, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right[.]"'" (quoting *Amchem*, 521 U.S. at 613)); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("[T]he Rules

Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right[.]'" (quoting 28 U.S.C. § 2072(b))); *see also Amchem*, 521 U.S. at 613 (quoting Fed. R. Civ. P. 82's mandate that "rules shall not be construed to extend . . . the [subject-matter] jurisdiction of the United States district courts." (alterations in original)).

Thus, a court cannot use Rule 23 to create substantive rights where none exist—including conferring Article III standing on plaintiffs who lack a sufficient injury. Yet that is exactly what the Ninth Circuit's interpretation of Rule 23 purports to do. Certifying a class that includes uninjured members not only expands defendants' substantive liability but also alters plaintiffs' fundamental substantive rights in violation of the REA. *See* Theane Evangelis and Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 Emory L.J. 383, 392–93 (2014).

Article III confines federal court jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. A case or controversy exists only when the plaintiff has "a 'personal stake' in the case." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).[2] This "personal stake" requirement, or Article III standing, is necessary to uphold the Constitution's separation of powers.

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[2] While this Court in *TransUnion* addressed Article III standing for members of a class action post-certification, it naturally follows from the rationale of that decision that courts should require Article III standing at the certification stage. *See TransUnion*, 594 U.S. at 421, 442 (noting that the district court had certified the class and a trial was held, but remanding with instructions for the "Ninth Circuit [to] consider in the first instance whether class certification is appropriate in light of our conclusion about standing.").

Raines, 521 U.S. at 819–20. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983). Consequently, the REA instructs courts to verify that every claimant in a class has a legitimate, colorable claim, such that every class member can plausibly argue they have standing. *See In re Deepwater Horizon*, 732 F.3d 326, 341 (5th Cir. 2013) ("By including claimants in the class definition that lack colorable claims, a court disregards [the REA's] warning. It ignores the standing requirement of Article III and creates a substantive right where none existed before.").

Despite clear directives about Article III standing, the Ninth Circuit's interpretation of Rule 23(b)(3) impermissibly expands substantive rights in violation of the REA and leads to due process and Seventh Amendment violations. Moreover, an interest in judicial economy cannot justify such an improper encroachment on the substantive rights of class-action defendants.

A. The Ninth Circuit's Interpretation Expands Federal Court Jurisdiction Beyond Article III, Violating the Rules Enabling Act and Due Process

The right to pursue private claims in federal court is limited only to "those plaintiffs who have been *concretely harmed* by a defendant's statutory violation[.]" *TransUnion LLC*, 594 U.S. at 427 (emphasis in original). The Ninth Circuit's decision[3] improperly

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[3] Like the Ninth Circuit, other circuits have failed to enforce Article III's standing requirement at the class certification stage. S*ee, e.g., Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (finding that Rule 23(b)(3) only limits the number of uninjured class members to a "great many"); *Cordoba v.*

grants uninjured plaintiffs an exemption to this rule, which would otherwise strictly apply if they pursued their claims individually. In essence, the Ninth Circuit has installed a back door entrance into federal court. Where an individual plaintiff must enter through the front door and pass through the Article III standing security checkpoint, the Ninth Circuit treats those in class actions as VIPs, handing them the keys to sneak into federal court through the unguarded back door. In doing so, it ignored this Court's directive that Rule 23 must conform to Article III's limits and must not "abridge, enlarge or modify any substantive right." *Amchem*, 521 U.S. at 613 (citing 28 U.S.C. § 2072(b)). This overly permissive class certification standard violates due process by expanding defendants' liability beyond Article III's limits and denying them the opportunity to challenge claims by plaintiffs who lacked standing to sue in federal court. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense." (citation omitted)).

Because Article III standing is an "irreducible constitutional minimum," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), lack of standing is a defense that defendants are entitled to challenge at all stages of litigation. Simply put, standing is a "threshold" requirement that cannot be waived or ignored. *Linda*

DIRECTV, LLC, 942 F.3d 1259, 1273–77 (11th Cir. 2019) (recognizing that standing of uninjured members is "exceedingly relevant to the class certification analysis," but finding that a class fails predominance only where a "large portion" of members lack injury). Because the Ninth Circuit is not alone in failing to uphold the demand of Article III standing in the face of class action certification, this Court should provide the utmost clarity in its ultimate holding.

R.S. v. Richard D., 410 U.S. 614, 616 (1973); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("In an era of frequent . . . class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so."); *id.* at 146–47 (Scalia, J. concurring) (advocating for a stricter application of Article III standing); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) ("A plaintiff must always have suffered a distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted." (cleaned up)).

In this case, the California Damages Subclass includes *any* legally blind person who "visited a Labcorp patient service center in California." J. App. 370. Due to the Ninth Circuit's overly lenient interpretation of Rule 23(b)(3), these individuals were permitted to join the class—even if they did not use, had no intention to use, nor were aware of the Labcorp kiosk. *Id.* at 359–63. This lenient interpretation tramples due process principles by permitting uninjured class members to access federal court through Rule 23(b)(3)'s class action mechanism. The uninjured Labcorp customers circumnavigated Article III standing, while Labcorp was unjustly barred from raising the individualized defenses it was entitled to. *See, e.g.*, *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 920, 934 (Cal. 2014) (invoking due process concerns because the trial court "improperly extrapolated liability findings from a small, skewed sample group," thus preventing the defendant "from showing that some class members were exempt and entitled to no recovery"); *see also id.* at 935 ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." (alteration in original)); *cf. Wal-Mart Stores*, 564 U.S. at 367 (explaining that where

individual injuries in a proposed class overwhelm common questions, defendants are entitled to address and defend against each claim on the merits).

There is no reason to conclude that the drafters of Rule 23 intended to expand the substantive right to bring a claim in federal court for uninjured class members who would otherwise lack standing. The original Rule 23 was meant to be a substantial restatement of previous rules, including Equity Rule 38 ("Representatives of Class"), Equity Rule 27, and Equity Rule 94. *See* Fed. R. Civ. P. 23 notes of advisory committee on 1937 rules. Much like the modern Rule, the original Rule 23 required "[t]he representative [to] have an interest, which is co-extensive and wholly compatible with the interests of those whom he would represent." James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 312 (1937); *cf. id.* ("Thus, . . . [o]ne who is not a shareholder at the time suit is instituted may not prosecute a derivative action."). Although the 1966 Amendments modified the rule in significant ways, the core principle that representatives and class members must share the same interests, and consequently the same injury, survived.

By ignoring Article III's limits and allowing uninjured members to join the class, courts improperly confer a substantive right for litigants to seek relief in federal court without a concrete injury—a result that directly violates the REA. A proper exercise of Rule 23's gatekeeping function, which would prevent uninjured putative members from infiltrating the class at the certification stage, conforms with Article III and the REA.

B. Unanticipated Seventh Amendment Implications Further Reinforce the Need to Interpret Rule 23 in Accordance with the Rules Enabling Act

The Seventh Amendment guarantees the right to a jury trial in civil cases. U.S. Const. amend. VII. This guarantee is "of such importance . . . that any seeming curtailment of the right" must be "scrutinized with the utmost care." *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). The framers deliberately enshrined this right in the Bill of Rights to shield it from "the passing demands of expediency or convenience[,]" mandating that "every encroachment upon it [be] watched with great jealousy." *Jarkesy*, 603 U.S. at 122 (first quoting *Reid v. Covert*, 354 U.S. 1, 10 (1957); and then quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830)).

By giving slack to the Court's standing doctrine, the Ninth Circuit opens the door for uninjured plaintiffs to evade the most essential fact-finding body in the federal court system: the jury. Interpreting Rule 23(b)(3) to allow class certification when some members of the proposed class lack an Article III injury poses significant and unintended consequences for the Seventh Amendment's guarantee of a trial by jury.

While courts must decide the legal question of whether Article III standing exists, questions of fact are the jury's province. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996) ("An essential characteristic of [the federal court] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." (quoting *Byrd v. Blue*

Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958))). Under this rubric, the judge decides whether a plaintiff has suffered an injury sufficient to satisfy Article III standing, whereas the jury must determine whether the defendant is *actually* liable to the individual plaintiffs.

When injury requirements are postponed until after class certification and liability determinations, the court is often left to decide which plaintiffs were *actually* injured. In such instances, liability is determined collectively by the jury, but the question of injury is ultimately determined by the judge—a process that conflicts with the Seventh Amendment. For example, in *TransUnion LLC*, the class of 8,185 members was awarded over $60M in damages, yet, post-trial, nearly one third of the class was determined to lack a concrete injury, thus lacking Article III standing and unable to recover. 594 U.S. at 442. This shift of fact-finding responsibility from the hands of the jury to the bench of an Article III judge presents grave issues for the sanctity of the Seventh Amendment. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) ("[T]he right to trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved inviolate." (citation omitted)).

Any argument that this shift in fact-finding power is inherent to the class action mechanism is unavailing. This is so because a class consisting of solely injured members presents no Seventh Amendment problem. When every class member has Article III standing, factual disputes regarding injury and damages are presented to the jury as common questions. However, when uninjured members are included, the factual issue of whether a defendant is liable to each individual plaintiff is removed from the jury's purview.

Postponing the exclusion of uninjured members until *after* the jury abstractly determines a class action defendant's liability undermines their Seventh Amendment right to have a jury resolve factual issues in civil cases.

The Seventh Amendment's guarantee was designed to guard against precisely the type of expediency and convenience that underlies such a lenient interpretation of Rule 23. *Jarkesy*, 603 U.S. at 122 ("The Framers . . . 'embedded' the [Seventh Amendment right to trial by jury in civil cases] in the Constitution, securing it 'against the passing demands of expediency or convenience.'" (citation omitted)). *But see Gunnels v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (noting that courts should "give Rule 23 a liberal . . . construction, adopting a standard of flexibility" to help "promote judicial efficiency" (citation omitted)). Moreover, because the jury's role under the Seventh Amendment is to serve as the fact-finding body in civil cases, "any seeming curtailment of the right . . . should be scrutinized with the utmost care." *Jarkesy*, 603 U.S. at 121 (quoting *Dimick*, 293 U.S. at 486) (internal quotations removed); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) ("In actions at law, issues that are proper for the jury must be submitted to it 'to preserve the right to a jury's resolution of the ultimate dispute,' as guaranteed by the Seventh Amendment." (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996))); *Beacon Theatres*, 359 U.S. at 510 ("In the Federal courts this (jury) right cannot be dispensed with, except by the assent of the parties entitled to it[.]" (quoting *Scott v. Neely*, 140 U.S. 106, 109–110 (1891)) (alteration in original)).

Courts of appeals have recognized the Seventh Amendment concerns with lenient standing inquiries at certification.

For example, in *In re Asacol Antitrust Litigation*, the First Circuit reversed a class certification in part because determining injury for each class member would require individualized inquiries. 907 F.3d 42, 53–54 (1st Cir. 2018). In *Asacol*, the district court certified a class with uninjured class members, deciding that removal of such members in a later proceeding by a claims administrator would be sufficient. *Id.* at 45. The First Circuit rejected this proposed solution, concluding that the district court's specific certify-first, remove-later process failed to be "protective of defendants' Seventh Amendment and due process rights." *Id.* at 53 (citing *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015)). Similar to this case, *Asacol* included a situation where "apparently thousands [of class members] suffered no injury." *Id.*

Likewise, the D.C. Circuit invoked Seventh Amendment concerns to uphold the lower court's denial of class certification in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019). The court underscored potential Seventh Amendment and due process ramifications created by including uninjured class members, stating that "any winnowing mechanism must be truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Id.* at 625 (citing *Asacol*, 907 F.3d at 51–54).

Certifying classes that include uninjured members often shifts the jury's core decision-making function to a judge, threatening to undermine the jury's

constitutionally reserved role. Under the Ninth Circuit's interpretation, all an uninjured putative member must do is survive class certification—after that, any and all opportunities for class action defendants to put forth individualized defenses are off the table. Despite the well-established function of the jury to decide factual issues, a jury in cases like this will never be presented with the question of whether the class defendant is actually liable to that uninjured individual included in the class.

Therefore, to avoid the usurpation of the jury's core function, Rule 23(b)(3) should be interpreted in a way that requires each putative member to have an Article III injury at class certification.

C. Judicial Economy Cannot Justify Overriding Constitutional Limits

The Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." Fed. R. Civ. P. 82. As such, Rule 82 establishes that procedural rules, such as Rule 23, cannot be used to expand federal court authority beyond the constitutional limits of Article III (in addition to the REA). Nonetheless, the Ninth Circuit's interpretation of Rule 23 expands defendants' liability beyond congressional intent and effectively enlarges plaintiffs' ability to access federal court.

Rule 23 aimed to increase judicial efficiency and efficacy in adjudicating large numbers of claims of the same nature. *See Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively

paltry potential recoveries into something worth someone's (usually an attorney's) labor." (citation omitted)); *Schaffner v. Chem. Bank*, 339 F. Supp. 329, 334 (S.D.N.Y. 1972) ("The class action is a sophisticated joinder device which Rule 23 states is justified under certain circumstances to avoid multiplicity of litigation, to avoid the risk of separate litigations producing inconsistent results for or against persons having the same relationship to their adversary, and to provide a mechanism for the efficient litigation of related claims.").

However, judicial economy and the desire for swift action do not justify overriding constitutional limits. *See Jarkesy*, 603 U.S. at 122 ("The Framers . . . 'embedded' the [Seventh Amendment] right in the Constitution, securing it 'against the passing demands of expediency or convenience.'" (citation omitted)). In order to justify a departure from the rule that "litigation is conducted by and on behalf of the individual named parties only[,] . . . a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores*, 564 U.S. at 348–49 (cleaned up).

This is especially true in cases where the damages sought include statutory damages for each alleged violation. It is important at the class certification stage for *each* putative member to be eligible for damages such that they fall within the ambit of the statute—*i.e.*, each member must have a viable injury. Furthermore, including uninjured plaintiffs within a class could undermine judicial economy entirely. Judges may face insurmountable challenges in ensuring that only those who have suffered injuries are awarded damages. This situation was evident in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016).

Although this Court affirmed the class certification, in his concurrence, Chief Justice Roberts expressed concern about the difficulty of ensuring only those who were *actually* injured received damages, raising questions about whether the district court could manage this task. *Id.* at 462 (Roberts, C.J., concurring) ("I write separately . . . to express my concern that the District Court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury.").

Lest there be any doubt about the proper interpretation of Rule 23(b), the canon of constitutional avoidance proves helpful. This Court has long recognized that "when deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005). Here, where Rule 23 can be interpreted to mean either (A) uninjured members should not be included in a class at the certification stage or (B) uninjured members can be included in the class at the certification stage, the former interpretation should prevail because interpreting Rule 23 to include only injured members in the class at certification avoids due process or Seventh Amendment constitutional implications. *Cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979))).

While Rule 23 is not a statute, "[t]he need to avoid serious constitutional problems is doubly strong where a Rule of Civil Procedure is at issue." Brief of Chamber of Commerce of the United States of America, et. al. as Amicus Curiae in Support of Petitioner at 8, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016) (No. 14-1146). And, as always, "where Congress does seek to push constitutional boundaries, it should be expected to express its intent clearly and unmistakably." *Id.* (internal quotations omitted).

For these reasons, this Court should interpret Rule 23 to balance the need to empower individuals to sue with the need to protect the rights of defendants. That balance is best struck by requiring class members to show the same injury-in-fact at class certification that is required of any other plaintiff in litigation.

II. Inclusion of Uninjured Individuals in a Class Destroys the Typicality Required by Rule 23

Even if the Court finds Article III standing at the certification stage, there remains the issue of typicality. Rule 23(a) lays out four threshold requirements applicable to all class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See Amchem*, 521 U.S. at 613; *see also* Fed. R. Civ. P. 23(a). Typicality requires that "the claims or defenses of the representative parties are *typical* of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3) (emphasis added). The typicality requirement aims to ensure that the interest of the named class representative aligns with the interests of the entire class, *see Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982), and its analysis asks how much variance between the class representatives' cases and those of the rest of the class members is permissible.

Courts have allowed class certification where all legal issues and relevant evidence are identical, apart from some minor variations. *See Tyson Foods*, 577 U.S. 442 (class certification allowed where exact damages owed to injured class members varied but where all members were injured in a similar way). However, where there are clear, significant differences between the class representatives and other members—especially in the ways they were allegedly harmed—typicality cannot be satisfied. For example, in *Falcon*, a Mexican-American employee alleged discrimination by his employer for continuously overlooking him for promotion. 457 U.S. at 149–50. He filed a class action for all Mexican-Americans who were victims of discriminatory practices in *both* hiring and promotion scenarios. *Id.* at 150–51.

The district court granted certification, and the circuit court affirmed, but this Court reversed, holding that to be a class representative, Falcon needed to possess the same interest and suffer the same injury as the class members. *Id.* at 160–61. Thus, he could not represent *both* the prospective employees and the current ones who were not promoted. *Id.* at 155–157, 160; *see also, e.g.*, *Small v. Allianz Life Ins. Co. of N. Am.*, 122 F.4th 1182, 1203 (9th Cir. 2024) (holding that, because the class representative alleged her insurance policy lapsed inadvertently, she "does not have typical questions of members whose policies lapsed intentionally because they do not 'have the same or similar injury,' the action is 'based on conduct which is [ ] unique to the named plaintiff [ ],' and 'other class members have [not] been injured by the same course of conduct.'" (alterations in original)).

Precedent dictates that a class representative must "possess the same interest and suffer the same injury"

as class members. *See Falcon*, 457 U.S. at 156 (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). Rule 23(a)(3) requires the court to examine the specific claims, defenses, and evidence of the class representatives to ensure there is an alignment of interests such that pursuing their own claims will also advance the interests of all. *See Small*, 122 F.4th at 1201–02 ("Typicality focuses on the class representative's claim . . . and ensures that the interest of the class representative aligns with the interests of the class." (citation omitted)). At the very least, there must be a congruence between the evidence to be proffered by the class representatives and the expected evidence on behalf of absent class members. But where uninjured class members are allowed to gain entry into a proposed class, typicality cannot survive as the class representative's evidence will most certainly differ from those of plaintiffs who lack any colorable injury. As such, the class representative no longer serves the best interests of the entire class, and the class should not be certified.

III. Lax Class Action Certification Imposes Significant Harms on Small Businesses

Beyond the legal issues presented, certification of a class that includes uninjured members imposes significant real-world consequences for small businesses.

Certification can be the ballgame in class action lawsuits. Once a class is certified, it is often financially unfeasible to proceed to the merits, effectively eliminating the possibility of going to trial. This reality was emphasized in the 1998 Amendment committee notes to the Federal Rules of Civil Procedure. The committee acknowledged that courts of appeals are granted greater leverage in class certification interlocutory appeals, recognizing that certification is arguably the

most important step in class actions and often dispositive of the litigation's outcome. Fed. R. Civ. P. 23 committee notes on 1998 Amendment ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement . . . . [C]lass settlements can be quite significant, potentially involving dollar sums in the hundreds of millions or requiring substantial restricting of the defendant's operations."); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002) ("[A]lmost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision.").

Given the potentially coercive effect that certification can have on a defendant, it is unsurprising that several courts of appeals have acknowledged this phenomenon. *See, e.g.*, *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020) ("It is no secret that certification 'can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit.'" (quoting *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011))); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001) ("Irrespective of the merits, certification decisions may have a decisive effect on litigation."); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("Judge Friendly . . . called settlements induced by a small probability of an immense judgement in a class action 'blackmail settlements.'" (quoting Henry J.

Friendly, *Federal Jurisdiction: A General View* 120 (1973))).

Even judges in the Ninth Circuit have noted the conclusive nature of certification and the significant pressure defendants feel to settle when faced with class action lawsuits. *See, e.g.*, *Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F.4th 1249, 1258 (9th Cir. 2024) ("[Class actions] are also onerous and costly for defendants, who may feel 'pressured into settling questionable claims' to avoid even a 'small chance of a devastating loss.' This cost only increases once the class is certified, as the price the defendant will pay to avoid the 'risk of a catastrophic judgment' at trial skyrockets, even if the claims themselves may not be meritorious." (internal citations omitted)); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (Lee & Kleinfeld, JJ., dissenting) ("[S]ettlement sums are staggering because class action cases rarely go to trial. If trials these days are rare, class action trials are almost extinct. And it is no wonder why class actions settle so often: If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses." (internal footnote omitted)).

The coercive and settlement-forcing effect of certification is especially problematic for small businesses. Small businesses rely on the ability to put forth individualized defenses in order to challenge meritless claims in court and have little money to spare for litigation costs. Because certification is often the ballgame in class actions, lenient certification standards allowing uninjured members to permeate a class are inherently unfair to small businesses. The inclusion of

uninjured members removes a small business' ability to put forth individualized defenses and creates enormous financial pressure to settle, even in the face of questionable claims.

According to data collected by the Small Business Administration, in 2018 the median income for self-employed people at their own incorporated business was $51,816 and $26,084 for self-employed individuals at their own unincorporated firms. U.S. Small Business Administration Office of Advocacy, *2020 Small Business Profile* 2 (2020), https://tinyurl.com/448dk4k8. However, as scholars have noted, "[e]ven in relatively routine cases, class attorneys earn hundreds of thousands, and frequently millions, of dollars in fees." Bone & Evans, *supra*, at 1262. When attorneys' fees reach these levels, the overall cost of fully litigating even frivolous class action lawsuits becomes a near-impossible financial undertaking for most small business owners.

Because certification often determines the outcome of the litigation, allowing uninjured plaintiffs to join a class prevents most small businesses from invoking individualized defenses and, therefore, "weeding out" uninjured members further down the line because these businesses are often financially unable to sustain long-term litigation. The situation is exacerbated in circumstances like in this case where a class action lawsuit is coupled with a state-specific statute that can manifest in a minimum damages amount.

California's Unruh Civil Rights Act (Unruh Act) states that any violation under the federal Americans with Disabilities Act (ADA) constitutes a *per se* violation of the state's statute. Cal. Civ. Code. § 51(f). This creates a high risk of significant costs for a defendant as each individual violation of the ADA

(and, in turn, the Unruh Act) may result in damages of at least $4,000. Cal. Civ. Code § 52(a). This does not include attorney's fees, which may also be added. *Id.* The potential liability attached to any singular ADA violation under California's Unruh Act is sizable in an individual case, but in the class action context, a singular class action lawsuit can bankrupt a small business.

Suppose a class consisting of 100 members sue a small business in California for an alleged ADA violation. Assuming an amount of $4,000 per violation, the small business may be liable for $400,000 in Unruh Act damages. Even assuming $4,000 in damages per violation, this is a conservative estimate because the statute explicitly allows "up to a maximum of three times the amount of actual damage." Cal. Civ. Code § 52(a). In this hypothetical, $400,000 in Unruh Act damages could be a best-case-scenario for a small business under this statutory scheme, especially as this amount does not reflect the attorney's fees a business may pay in addition to class damages. In this situation, if 50 members of the class suffered no injury but were included in certification under the Ninth Circuit's lenient Rule 23(b)(3) interpretation, that is a difference of a minimum $400,000 liability versus a $200,000 liability. While $200,000 is still significant for a small business, weeding out these uninjured members could be the deciding factor between surviving or shuttering their doors. Not only do small businesses generally lack adequate funding to cover such massive damage awards—which is worsened by inflated classes—but they also lack the legal resources to fully litigate frivolous claims, making an already unfair situation much worse.

While small businesses in states with similar statutes to the Unruh Act face the same potential class

action challenges,[4] these problems are perhaps especially magnified in California. As of 2023, California had 4.1 million small businesses, comprising 99.8% of all California businesses. U.S. Small Business Administration Office of Advocacy, *2023 Small Business Profile: California* 1 (2023), https://tinyurl.com/54anud2a. Additionally, these businesses employ 7.5 million people, which is 47.6% of California employees. *Id.* California has more small businesses and small business employees than any other state in the country. Thus, small businesses in California will be especially harmed if the Ninth Circuit's lenient interpretation of Rule 23(b)(3) is affirmed.

In California and across the Nation, small businesses play a vital economic role. As discussed above, certification is often the ballgame in class action lawsuits. Because of this, a strict interpretation of Rule 23 to exclude uninjured members at the certification stage is imperative. Not only does a strict interpretation of Rule 23 conform to Article III standing, the Rules Enabling Act, and avoid constitutional questions, but the future of many small businesses may depend on it.

[4] *See, e.g.*, 775 Ill. Comp. Stat. Ann. 60/20 (stating that "[w]hoever injures another by a violation of [the Illinois Human Rights Act] is liable for each and every offense for all remedies available at law," including damages of no less than $4,000); *see also* D.C. Code § 2-1403.16; Haw. Rev. Stat. Ann. § 489-7.5 (both providing a right of action and award of some sum of civil penalties under civil rights provisions similar to the Unruh Act).

CONCLUSION

This Court should reverse the judgment below and require all unnamed plaintiffs in a class action suit to have Article III standing at certification.

Respectfully submitted,

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