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 THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council (PLAC) is a non-profit association of corporate members that constitute a broad cross-section of product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain.

PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including this Court, on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC has a significant interest in the issue presented in this case because its members routinely face putative class-action lawsuits filed by purchasers of a product that they allege contains a defect that *could* cause the product to malfunction, and who argue that

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[1] Pursuant to Rule 37.6, PLAC affirms that no counsel for a party authored this brief in whole or in part and that no person other than PLAC, its members, and its counsel made a monetary contribution to its preparation or submission.

[2] PLAC's corporate members are identified on its website. See https://plac.com/PLAC/PLAC/Membership/Corporate_Membership.aspx.

individual issues of injury and damages do not preclude class certification.

The Ninth Circuit's approach to Rule 23(b)(3)'s predominance and superiority requirements would permit a court to certify a damages class even though the named plaintiffs propose no practical method of determining which class members have been injured and which have not that preserves the defendant's due process and Seventh Amendment rights—an inquiry required by the Rules Enabling Act.

PLAC therefore has a strong interest in this case and in reversal of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article III limits the power of a federal court to adjudicate a claim, requiring that a plaintiff prove that he or she suffered concrete harm. The Federal Rules of Civil Procedure, including Rule 23, cannot be used to circumvent that constitutional limit. As this Court held in *TransUnion LLC* v. *Ramirez*, each member of a Rule 23(b)(3) damages class must establish Article III standing (including by demonstrating concrete harm) to be eligible to recover damages. 594 U.S. 413, 423 (2021).

Because *TransUnion* reached the Court after a rare class-wide trial and final judgment, the Court expressly reserved the question of how courts should address putative class members' standing at the class certification stage. 594 U.S. at 431 n.4 (citing *Cordoba* v. *DIRECTV*, 942 F.3d 1259, 1277 (11th Cir. 2019)).

This case now presents that question. The Court should reject the Ninth Circuit's impermissible ap-

proach to certification of damages classes—an approach that all but guarantees that uninjured class members will be able to recover money damages in actions in federal courts because trials under that rubric will fail to eliminate uninjured class members, a dynamic that also will lead to coerced class settlements.

When the named plaintiff cannot prove concrete injury on a class-wide basis, courts almost always should deny certification of damages classes containing uninjured class members. That is true regardless of whether the issue is characterized as one of standing or one of predominance and superiority. And the same problem arises in contexts where ascertaining the amount of damages to be recovered by each class member requires individualized determinations. The nature of the individualized proof required, and the corresponding burdens on the parties and the court, means that in most cases the putative class cannot satisfy Rule 23(b)(3)'s predominance and superiority requirements—as the facts here demonstrate.

After Labcorp introduced the option of checking in for appointments at its centers via a self-service kiosk (in addition to the pre-existing front-desk and online options), a group of plaintiffs who are legally blind brought a putative class action. The plaintiffs asserted that Labcorp's offer of those kiosks discriminated against them in violation of the Americans with Disabilities Act (ADA), and, as relevant here, sought certification of a California damages class for a claim under California's Unruh Act, which provides for statutory damages of $4,000 per ADA violation.

The putative damages class, however, was not limited to patients who suffered a concrete, real-world harm caused by the inability to use those kiosks. Rather, plaintiffs sought to represent a class of all blind

patients who visited a Labcorp patient service center with such a kiosk, regardless of whether the patient knew about the kiosk or wished to use it. For the California damages class, that definition encompassed over 100,000 patients each year, which, when combined with the Unruh Act's minimum statutory damages of $4,000 per violation, adds up to nearly half a billion dollars in statutory damages for each year that the kiosks were in place.

The district court certified that broad damages class under Rule 23(b)(3), and the Ninth Circuit affirmed. Yet neither court meaningfully addressed how class members would prove that they suffered concrete injury, treating the presence of uninjured class members as largely irrelevant to class certification.

That disregard for Article III standing was error. As Labcorp persuasively explains (Br. 15-36), Article III prohibits federal courts from certifying proposed classes containing uninjured individuals.

PLAC writes separately to address Rule 23(b)(3)'s related, but separate, limitation on certifying classes when concrete injury cannot be determined on a class-wide basis.

When that inquiry is individualized, a putative damages class should not be certified unless the uninjured class members can easily be identified and excluded from the class in a manner consistent with the Rules Enabling Act and a defendant's due process rights. This rarely will be the case, particularly when highly individualized and fact-dependent inquiries are multiplied across a large class. Absent a simple test for identifying and excluding the uninjured class members, common issues do not predominate and

class treatment is not superior to other methods for fairly and efficiently adjudicating the controversy.

Plaintiffs here made no showing that uninjured class members could be easily identified and excluded from the class. Nor could they. It is undisputed that the damages class contains a significant number of uninjured persons. And because of the nature of the claims and the asserted injuries, there is no easy way to separate the injured from the uninjured without the proceedings devolving into tens of thousands of individual district court trials regarding each class member's own experiences at a particular Labcorp service center, including whether they wanted or tried to use a kiosk.

The decision below rests on the Ninth Circuit's impermissibly loose approach to Rule 23(b)(3)'s predominance and superiority requirements—one that will result in the routine certification of improperly-constituted damages classes. But certification is the main event in damages class actions. And the hydraulic settlement pressure that class actions place on defendants will encourage enterprising lawyers to propose inflated classes full of uninjured members—maximizing the potential award of statutory damages and corresponding settlement leverage—regardless of how many class members suffered real-world harm and would be eligible to recover damages at final judgment. The Court should make clear that Rule 23 bars that manipulation of the class action device.

ARGUMENT

I. Rule 23(b)(3) Prohibits Certification If A Putative Damages Class Contains Uninjured Members Who Cannot Easily Be Identified And Excluded From The Class.

This Court's decision in *TransUnion* makes clear that *each* member of a certified damages class "must have Article III standing in order to recover individual damages." 594 U.S. at 431. That is because "'Article III does not give federal courts the power to order relief to *any* uninjured plaintiff, class action or not.'" *Ibid.* (emphasis added) (quoting *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)).

When a named plaintiff has Article III standing and injury for all class members can be determined on a class-wide basis, Article III and Rule 23 concerns do not necessarily present an obstacle to class certification.

But in many cases invoking Rule 23(b)(3), it is apparent at the class-certification stage—based on the nature of the claims, the proposed class definition, and the undisputed class-certification evidence—that the putative class includes uninjured members who could not pursue their claims in federal court on an individual basis.

Labcorp's brief (at 15-36) explains that allowing uninjured class members to pursue their claims on the merits in federal court raises serious constitutional concerns. Before certifying a class, and thereby exercising jurisdiction over the merits of the claims of absent class members, the district court must ensure that it has a basis to do so. After all, "[c]lass certification is the thing that gives an Article III court the

power to 'render dispositive judgments' affecting unnamed class members." *Flecha* v. *Medicredit, Inc.*, 946 F.3d 762, 770 (5th Cir. 2020) (Oldham, J., concurring) (quoting *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)). It turns absent class members into parties who can invoke and are subject to the court's judicial power. *Cf. Devlin* v. *Scardelletti*, 536 U.S. 1, 10-11 (2002) (holding that absent class members are considered parties for purposes of appeal because they are bound by the judgment). Individuals who could not pursue their claims in federal court on an individual basis should not be permitted to assert their claims through the expedient of the class device.

Separately, Rule 23(b)(3) by itself significantly limits a court's ability to certify a damages class when injury cannot be determined on a class-wide basis and the proposed class includes uninjured individuals.

Under those circumstances, a putative damages class should not be certified unless the uninjured class members can easily be identified and excluded from the class in a manner consistent with the Rules Enabling Act and a defendant's due process rights. The size of the class and the nature of the individualized inquiry necessary to establish each class member's injury must be taken into account in determining whether the proposed class satisfies the requirements that common issues "predominate" and class treatment is "superior" to other methods for "fairly and efficiently" adjudicating the controversy. In many cases, those standards will not be satisfied and certification must be denied.

Although the issue is not presented here, the very same problems arise in contexts where determining the amount of damages for class members is individualized: "Questions of individual damage calculations

will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

These conclusions rest on three basic principles. *First*, courts must rigorously assess whether a plaintiff has satisfied Rule 23(b)(3)'s predominance and superiority requirements before certifying a damages class. *Second*, a class cannot be certified in violation of the defendant's due process rights and the Rules Enabling Act. And *third*, for that reason, the process of weeding out uninjured members of a putative damages class cannot be outsourced to claims administrators or other non-Article III entities; like any other determination in the case, those issues must be resolved by the court.

Courts applying the predominance and superiority tests therefore must take into account the nature and extent of the judicial processes necessary to identify and exclude uninjured class members in determining whether class certification is permissible.

A. Rule 23(b)(3) requires rigorous analysis before certifying a damages class.

Class actions are an "'exception to the usual rule'" that cases are litigated individually; it therefore is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348, 351 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). Moreover, this Court has repeatedly recognized that Rule 23 should be interpreted to guard against the potential for abuse of the class-action device. *E.g.*, *Comcast*, 569 U.S. at 33; *Dukes*, 564 U.S. at

367; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997).

The proponent of a damages class—in addition to satisfying the four requirements of Rule 23(a)—must satisfy Rule 23(b)(3). Rule 23(b)(3)'s predominance requirement mandates 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). The superiority inquiry, in turn, asks whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). District courts assessing compliance with Rule 23(b)(3) must consider, among other factors, "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D).

Because Rule 23(b)(3) is an "adventuresome invocation" that is "designed for situations in which class-action treatment is not as clearly called for," courts have a "duty to take a close look at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (quotation marks and citations omitted).

These Rule 23(b)(3) inquiries cannot be satisfied by a mechanical tallying up of common and individualized issues. Rather, they require "more of a qualitative than quantitative analysis." *Cordoba*, 942 F.3d at 1274 (quotation marks omitted). And they require courts to "consider how a trial on the alleged causes of action would be tried," to ensure that the case will not "degenerat[e] into a series of individual trials" that are incompatible with class treatment. *Gene & Gene LLC* v. *BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008) (quotation marks omitted). As the First Circuit put it, the "aim of the predominance inquiry is to test whether any dissimilarity among the claims of class

members can be dealt with in a manner that is not inefficient or unfair"—which requires that "adjudication" of the individualized issues must be "both administratively feasible and protective of defendants' Seventh Amendment and due process rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 51-52 (1st Cir. 2018) (quotation marks omitted).

B. A court's Rule 23(b)(3) analysis must recognize the defendant's right to identify and exclude uninjured absent class members.

The Rules Enabling Act and due process principles—and, where applicable, the Seventh Amendment—require courts to recognize that a defendant in a class action has the right to a judicial determination of whether absent class members have experienced real-world harm caused by the defendant's conduct.

Due process does not just require that a plaintiff in federal court prove both Article III standing and every element of his claim to recover damages, but also that a defendant be given "'an opportunity to present every available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *American Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); see also, *e.g.*, *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (recognizing that the "right to litigate the issues raised" in a case is "guaranteed * * * by the Due Process Clause").

These due process rights do not change when a lawsuit is brought as a class action. The class action is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins.*, 559

U.S. 393, 408 (2010) (plurality opinion) (a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged").

Because due process precludes use of the class action mechanism to alter the substantive rights of the parties to the litigation, Rule 23's requirements must be interpreted to honor that principle. As this Court put it, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its * * * defenses to individual claims." *Dukes*, 564 U.S. at 367.

A contrary approach to class certification would also violate the Rules Enabling Act, which embodies the due process principle that procedural rules cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); see *Dukes*, 564 U.S. at 367. The Rules Enabling Act's "pellucid instruction that use of the class device cannot abridge any substantive right" bars courts from "giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 577 U.S. at 455, 458 (quotation marks and alterations omitted); see also *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("[N]o reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.") (quotation marks omitted); *Amchem*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with * * * the Rules Enabling Act.").

In short, because the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" *Dukes*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b)), any proposal by the proponent of a damages class must establish that uninjured class members can be weeded out prior to final judgment in a manner consistent with the defendant's due process

and Seventh Amendment rights and Rule 23(b)(3)'s standards. If the proponent of a damages class cannot make that showing, then the class should not be certified.[3]

Moreover, allowing a class to be certified without considering the need to prove absent class members' real-world injury will—in nearly all cases—mean that disputed issues of injury are never resolved at all. That is because, after a district court reaches a final decision certifying a class, the case is highly likely to settle—not reach a trial on the merits. See page 25, *infra*. An approach that would delay until after trial how to address absent class members' lack of concrete harm will in many cases force defendants to settle even if they have valid objections to many putative class members' claims, effectively negating their due process right to raise "every available defense." *Lindsey*, 405 U.S. at 66 (quotation marks omitted).

C. The Rule 23(b)(3) determination must take account of the defendant's right to resolution by the district court of challenges to absent class members' injury claims.

The district court, pointing to Ninth Circuit authority, brushed aside any need to consider individualized inquiries into absent class members' standing at the class-certification stage by asserting that a

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[3] Nothing in *Dukes* limits its logic to a defendants' right to raise "*statutory* defenses to individual claims." 564 U.S. at 367 (emphasis added). The same rationale applies equally to constitutional and other defenses, including the defense that a class member has not suffered a concrete injury fairly traceable to the defendant's conduct, has failed to satisfy the elements of his or her claims, or is seeking an unjustified damages amount.

court can "create a claims process by which to validate individualized claim determinations" on the back end. Pet. App. 37a. That approach is fundamentally inconsistent with due process and the Rules Enabling Act.

Administrative determinations by an outside third party are not an adequate substitute for a defendant's rights, guaranteed by due process and the Seventh Amendment, to cross-examine its accusers and to "litigate its * * * defenses to individual claims" in the same manner as in an individual action in federal court, including by trials on those issues. *Dukes*, 564 U.S. at 367.

Nor can defendants be forced to accept at face value self-serving affidavits from class members asserting an injury without the opportunity to test the veracity of those assertions. As a leading treatise has summarized, "[c]ourts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs" because such submissions "are, most importantly, not subject to cross-examination." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (13th ed. 2016).

Moreover, a defendant cannot be deprived of the right to have the relevant determinations made as the Constitution guarantees—by the Article III judge or, when required, a jury pursuant to the Seventh Amendment. This Court has recognized that no matter how complex the case or numerous the parties, a district court's reliance on a non-Article III entity to adjudicate fundamental issues without party consent amounts to "an abdication of the judicial function depriving the parties of a trial before the court on basic issues involved in the litigation." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957) (concluding that

writ of mandamus was appropriate where district court had referred case to a special master for trial).

A defendant's right to have its individualized defenses resolved by a court or jury is a substantive one protected by the Rules Enabling Act. Thus, this Court in *Dukes* rejected the "novel project" of replacing individual proceedings regarding the relief, if any, owed to class members with a "Trial by Formula" that would have extrapolated determinations regarding a sample of class members to the entire class. 564 U.S. at 367. Such a result is forbidden by "the Rules Enabling Act," and neither the class device nor other procedural mechanisms can avoid "the necessity of that litigation" over whether each class member is entitled to relief. *Ibid.*

Other courts have similarly recognized that defendants have "Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019) (*Rail Freight*); see *Asacol*, 907 F.3d at 53 (similar).

Indeed, because Article III's standing requirement governs the court's very power to award damages, it would be especially inappropriate to outsource standing determinations to third parties.

Protecting defendants' rights in connection with challenges to absent class members' claims regarding the concrete injury required to establish standing, and sometimes also liability, is particularly important. To begin with, as this case illustrates, the percentage of putative class actions in which at least some absent class members lack injury is high. That is illustrated by the number of decisions addressing the issue cited

in the parties' cert-stage filings. Pet. 13-19; BIO 20-30; Pet. Reply 3-7.

In addition, evidence from the class-settlement context indicates that the number of fraudulent claims has exploded in recent years, with the emergence of new software and artificial-intelligence tools making it easier for sophisticated bad actors to submit large numbers of fraudulent claims.

For example, one recent settlement of false-advertising claims against the maker of child car booster seats was halted because the claims process resulted in millions more claims for payment being filed *than car seats were ever sold*. See Diana Novak Jones, *Scammers flood US class action settlements with fraudulent claims*, Reuters (May 7, 2024), https://bit.ly/4hW2JGx. Sometimes even the lawyers submitting the claims admit that they have been duped into submitting fraudulent claims. See Mike Scarcella, *Law firm says fake claims were submitted in $5.6 bln credit card settlement*, Reuters (May 28, 2024), https://bit.ly/4i6H3Yc. And a digital payment processor that works with claims administrators recently reported that more than *80 million* claims submitted in 2023 showed "significant" signs of fraud—an increase of over *19,000%* in just the two years since 2021. See Western Alliance Bank, *2024 Digital Payments Report*, https://bit.ly/3QN2OAq.

In sum, the Rule 23(b)(3) inquiry must respect the defendant's right to have its challenges to absent class members' concrete harm resolved by the court or jury, not outsourced to third parties.

D. Proper application of the predominance and superiority requirements will make it difficult to certify classes that include uninjured individuals.

As discussed (see pages 9-10, *supra*), Rule 23(b)(3) requires consideration of the nature of the individualized inquiries; assessing predominance is not a mere issue-counting exercise. In most cases where injury cannot be determined on a class-wide basis, the individualized inquiries required will overwhelm any common questions, making clear that common issues do not predominate—and thereby precluding class certification. There is rarely a simple test to identify and exclude uninjured class members, and the inquiry becomes even more difficult as the size of the class grows.[4]

In this case, for example, the estimated size of the damages class is more than 100,000 individuals. Labcorp Br. 9. And the proof of injury is inherently individualized and highly fact specific; each class member would have to testify about his or her own experience with Labcorp kiosks, and Labcorp would be entitled to challenge that showing, including through cross-ex-

[4] *TransUnion* is an example of the uncommon case where class members' standing could be subject to relatively simple proof. Based on the evidence developed in advance of trial, the parties stipulated that there were 8,185 total class members and that only 1,853 of those class members had their credit reports disseminated to third parties. 594 U.S. at 421. That stipulation, along with the nature of the asserted injury, created a clear dividing line among the class members for Article III purposes: those whose credit reports were disseminated to third parties had standing, and the remaining class members whose reports were not disseminated did not. See *id.* at 432-39.

amination. Accordingly, while surveys and other evidence already indicate that a substantial portion of the class is uninjured (see *id.* at 43-44), even more salient is that the size of the class and the individualized nature of the proof together would require over 100,000 trials to locate and exclude the uninjured class members. That prospect alone should have foreclosed certification of the class.

Denying class certification when uninjured class members cannot be easily identified and excluded also is compelled by Rule 23(b)(3)'s superiority requirement—particularly Rule 23(b)(3)(D)'s directive to assess whether the class action will be manageable. It ensures that defendants who do not succumb to settlement pressure are not forced to needlessly expend time and money litigating a certified class action through trial only for a court to conclude at final judgment that significant portions of the certified class lack standing.

Indeed, forcing a defendant to face the threat of gigantic damages liability and bear the burden of litigating through trial the claims of numerous uninjured class members is neither a "fair[]" nor "efficient[]" mechanism for "adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The uninjured class members do not have an Article III case or controversy that belongs in federal court in the first place, so a federal class action cannot be a superior method to resolve their claims. And the need for tens of thousands of individual mini-trials on each class member's standing presents overwhelming and insuperable "difficulties in managing [the] class action." Fed. R. Civ. P. 23(b)(3)(D).

Moreover, and more broadly, the same reasons why individualized inquiries into injury (and, where

applicable, the amount of damages) pose a predominance problem also undermine the superiority of the class device. The "predominance analysis has a tremendous impact on the superiority analysis," because the more that individualized issues overwhelm common ones, the less desirable class treatment will be, including "in absolute terms of manageability." *Sacred Heart Health Sys.* v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1184 (11th Cir. 2010) (quotation marks omitted).

Both predominance and superiority "require envisioning what a class trial would look like." *Crutchfield* v. *Sewerage & Water Bd.*, 829 F.3d 370, 375 (5th Cir. 2016). For a damages class to satisfy Rule 23(b)(3) superiority, a "*fair* administration of the class claims" must "'save the resources of both the court and the parties.'" *Sacred Heart*, 601 F.3d at 1184 (quoting *General Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 155 (1982)) (alterations omitted). That requirement is not satisfied when, as in this case, weeding out uninjured class members consistent with defendants' due process and Seventh Amendment rights would be enormously burdensome and time consuming.

E. Courts of appeals have recognized that Rule 23(b)(3) precludes certification of proposed damages classes containing uninjured members who cannot easily be identified and excluded.

Given the settled principles discussed above, it is not surprising that multiple courts of appeals already recognize that "whether absent class members can establish standing" is "exceedingly relevant to the class certification analysis required by" Rule 23. *Cordoba* v. *DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019).

The Eleventh Circuit's decision in *Cordoba*—which this Court cited in *TransUnion* when reserving the question presented here, 594 U.S. at 431 n.4—vacated certification of a damages class for lack of adequate demonstration of predominance when "each plaintiff will likely have to provide some individualized proof that they have standing," creating a key "*individualized issue*." *Cordoba*, 942 F.3d at 1275, 1277 (emphasis added). As the Eleventh Circuit explained, district courts "must consider under Rule 23(b)(3) before certification whether the individualized issue of standing will predominate over the common issues in the case." *Id*. at 1277.

The Eleventh Circuit recently reaffirmed that holding, explaining that "[t]he predominance inquiry is especially important in light of *TransUnion*'s (and *Cordoba*'s) reminder that every class member must have Article III standing in order to recover individual damages because *a district court must ultimately weed out plaintiffs who do not have Article III standing* before damages are awarded to a class." *Green-Cooper* v. *Brinker Int'l, Inc.*, 73 F.4th 883, 891 (11th Cir. 2023) (emphasis added; quotation marks omitted).

The Third Circuit expressly followed *Cordoba* in vacating certification of a damages class. See *Huber* v. *Simon's Agency, Inc.*, 84 F.4th 132, 155-58 (3d Cir. 2023). The court emphasized that "predominance concerns can arise when unnamed class members must submit individualized evidence to satisfy standing and recover damages." *Id.* at 156. And the court instructed the district court to "evaluate the feasibility of receiving individualized evidence on class members' standing" and "how burdensome" the standing determinations "will be for both the District Court and the parties." *Id.* at 157.

The Fourth Circuit, too, recently affirmed the denial of class certification because "the high share of class members with no demonstrable injury presented a predominance problem." *Mr. Dee's Inc.* v. *Inmar, Inc.*, 127 F.4th 925, 933 (4th Cir. 2025). The record showed that nearly a third of the putative class members were uninjured, and "even among the class members that arguably did show injury," the circumstances surrounding their asserted injuries "varied substantially" and thus were not susceptible of classwide resolution. *Ibid.*

Or, as the First Circuit explained in a case where there were "apparently thousands" of putative class members "who in fact suffered no injury": "The need to identify those individuals will predominate and render an adjudication unmanageable absent * * * [a] mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights." *Asacol*, 907 F.3d at 53-54.

The D.C. Circuit has similarly affirmed the denial of class certification when there were over 2,000 potentially uninjured putative class members, "all of whom would need individualized adjudications of causation and injury." *Rail Freight*, 934 F.3d at 625. The "absence of a winnowing mechanism," "short of full-blown, individual trials," made class treatment wholly unworkable. *Ibid.* As the court noted, there has never been "even a single case 'allowing, under Rule 23, a trial in which thousands of class members testify.'" *Id.* at 627 (quoting *Asacol*, 907 F.3d at 57-58).

These decisions are correct: When concrete injury is an individualized issue, plaintiffs will almost never be able to satisfy Rule 23(b)(3) predominance. Without a "reliable means of proving classwide injury in fact," it is usually the case that "[c]ommon questions of fact

cannot predominate." *Rail Freight*, 725 F.3d at 252-53.

II. The Damages Class In This Case Should Never Have Been Certified Because It Contains Uninjured Members And There Is No Easy Way For A Court To Identify And Exclude Them.

Proper application of Rule 23 at the class-certification stage should have precluded certification of the damages class in this case.

There is no class-wide basis for absent class members to establish that they were injured by Labcorp's failure to offer an accessible self-serve kiosk. Resolving that issue would instead devolve into tens of thousands of highly individualized inquiries—meaning that any questions common to the class could not predominate—and therefore render any class-wide trial unworkable.

As relevant here, plaintiffs allege they suffered discrimination prohibited by the ADA and hence California's Unruh Act. Pet. App. 13a. "'In general, a person suffers discrimination under the [Unruh] Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services.'" Pet. App. 33a (quoting *White* v. *Square, Inc.*, 446 P.3d 276, 277 (2019)). Plaintiffs allege that Labcorp has adopted such an "exclusionary" practice because it installed check-in kiosks in its patient service centers that are inaccessible to the visually impaired. Pet. App. 14a. And based on that theory, plaintiffs sought certification of a damages class of "[a]ll legally blind individuals in California who visited a Labcorp patient service

center in California" with a check-in kiosk—regardless of whether the patient knew of the kiosk's presence or wanted to use it. Pet. App. 16a.

But as Labcorp's brief explains (at 8-9), the record evidence showed that many blind patients were either unaware of the kiosks or uninterested in using them, because they were served well by other options. Labcorp provides other mechanisms for checking in, such as using the Labcorp website or going to the service center's front desk, where staff use the same technology in the kiosks.

If a class member did not even experience wanting to use the check-in kiosk and being unable to do so, then he or she could not establish a concrete injury. See *TransUnion*, 594 U.S. at 431. Just as the "mere presence of an inaccuracy in an internal credit file" "cause[d] no concrete harm" to the majority of the class members in *TransUnion* because that inaccuracy was not disclosed, the mere presence of a check-in kiosk in the same room as a legally blind Labcorp patient, without more, did not cause a cognizable injury to that patient. *Id*. at 434.

Yet neither the Ninth Circuit nor the district court held plaintiffs to the proper burden of demonstrating that common issues predominated, and class resolution was superior, even though the district court would have to differentiate between legally blind Labcorp patients who allegedly experienced a harm and those who did not. The Ninth Circuit instead merely counted up the issues that it believed were common, such as whether the kiosks were accessible to the blind, while ignoring the fact-intensive nature of the tens of thousands of individualized trials that would be required to determine whether each class member

experienced a concrete injury and is eligible to recover damages. Pet. App. 5a.

The Ninth Circuit also stated that "the relevant inquiry is whether class members were subject to the same injuring behavior," Pet. App. 5a—namely, the presence of the kiosks. But that analysis assumes that simply being in the presence of a kiosk is sufficient injury to confer standing—which is plainly wrong under *TransUnion* and *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 342 (2016).

Instead, this Court's precedents make clear that, before recovering damages, each class member would have to present evidence that he or she was aware of the kiosk and wished to use it, rather than preferring the alternatives. That determination can only be made on an individualized basis (such as through the testimony of each class member). And in response, Labcorp would be entitled to present its defenses to the contentions of each allegedly injured class member, including by cross-examination. The need for these procedures—which, again, would have required tens of thousands of trials—should have been front and center in the lower courts' "rigorous analysis" of predominance and superiority required by this Court's precedents. *E.g.*, *Comcast*, 569 U.S. at 33-34; *Dukes*, 564 U.S. at 348, 351. Had the Ninth Circuit engaged in that analysis, it would have been apparent that a damages class could never be certified.

III. An Impermissibly Lax Approach To The Issue Of Uninjured Class Members At Class Certification Harms Businesses And The Judicial System.

The Ninth Circuit's unlawful approach to the problem of uninjured class members at the class-certification stage invites problems far beyond this case.

The statute invoked by the members of the proposed damages class—the Unruh Act—is only one of many state and federal statutes that authorize statutory damages. Many other statutes also authorize minimum statutory damages for each violation, which "can add up quickly in a class action." *Barr* v. *American Ass'n of Pol. Consultants*, 591 U.S. 610, 616 (2020) (plurality op.) (discussing the Telephone Consumer Protection Act). As Judge Wilkinson put it in assessing a different federal statute, "the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned." *Stillmock* v. *Weis Markets, Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially).

Deferring the issues associated with weeding out uninjured members of a damages class, as the Ninth Circuit did here, gives enterprising class-action plaintiffs' lawyers a clear roadmap: Allege a technical statutory violation and bring a challenge based on that violation on behalf of the broadest possible class, regardless of how many class members suffered any real-world harm. Permitting that approach inevitably will result in a flood of shakedown class actions.

Class-action litigation costs in the United States are huge. They hit a record high in 2024, totaling a staggering $3.9 billion and continuing a rising trend

that started in 2015. See *2024 Carlton Fields Class Action Survey*, at 6-7 (2024), https://ClassActionSurvey.com.

Moreover, defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). This Court has long recognized the power of class-action lawsuits to coerce settlement. As the Court explained nearly 50 years ago, "[c]ertification 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." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); see also *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *Shady Grove*, 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

That undue pressure is amplified further still in statutory damages class actions like this one, where potential liability—and the corresponding pressure to settle—is based on the overall number of class members rather than how many class members were actually injured by the defendant's conduct.

Plaintiffs' lawyers seeking to maximize their class-wide payday, however unwarranted, therefore have a strong incentive to seek statutory damages on behalf of the broadest possible class. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of

individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Indeed, this case—in which plaintiffs seek half a billion dollars per year in minimum statutory damages—amply demonstrates that combining minimum statutory damages with the class-action mechanism can create potential liability wildly disproportionate to the actual harm allegedly caused by the defendant's conduct. As the Second Circuit has noted, "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Parker* v. *Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). "Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims." *Ibid.* And these troubling consequences are even more pronounced when a proposed class is packed full of class members who experienced no real-world harm.

Businesses already expend enormous resources defending and settling lawsuits designed to extract lucrative settlements. But the due process concerns raised by cases like this one—and the burdens to defendants of defending and settling claims that should never have been asserted by individuals who suffered no concrete harm—can be ameliorated if federal courts rigorously scrutinize whether Rule 23(b)(3)'s predominance and superiority requirements have

been met, including with respect to absent class members' standing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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