No. 24-304

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LUKE DAVIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF BEVERLY HILLS AND THE CITY OF LOS ANGELES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The City of Beverly Hills and the City of Los Angeles ("the Cities") are municipalities in southern California that are home to 35,000 and 3.8 million residents, respectively, and host millions of visitors from around the world every year. Both sit within Los Angeles County and operate their own police and fire departments, schools, recreational facilities, and public services.

The Cities support legislation and seek to actively prevent and reduce crime throughout their city limits, primarily related to violent crime, property crimes, cyber crime, drugs, gang violence, mental illness, and pedestrian safety. The Beverly Hills Police Department ("BHPD") and Los Angeles Police Department ("LAPD") aim to provide professional and proactive services in partnership with their communities. Both the BHPD and LAPD are at the forefront of implementing new and emerging public safety programs.

Notwithstanding their proactive efforts to provide cutting-edge services and safety to all of their constituents, the Cities are currently named as defendants in a number of active federal class action lawsuits in the Central District of California, which relate to community policing efforts. These suits define putative classes with high numbers of uninjured class members. Thus, many of the pending class action suits filed against the Cities will be directly impacted by this Court's resolution of the question presented for review.

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1. No party's counsel authored this amicus brief in whole or in part. No one other than the City of Beverly Hills, the City of Los Angeles, or its counsel contributed money to prepare or submit this brief.

The Cities understand the serious harm presented when class actions include uninjured plaintiffs. This Court's reinforcement of Article III standing requirements is important to both private and public entities alike. The Cities have an interest in the proper interpretation and application of constitutional standing requirements governing class action lawsuits.

SUMMARY OF ARGUMENT

Municipalities like the Cities are uniquely impacted by the lack of enforcement of Article III standing requirements for absent class members. Cities, counties, and other public agencies throughout California and the nation are increasingly beset by class action suits which seek to represent large, poorly defined classes. These involve, for example, groups of individuals who claim to have been targeted by task forces or community policing efforts over the course of several *years*. But such cases are particularly ill-suited to class treatment. Usually, they include uninjured class members whose interactions with public officials do not rise to the level of a constitutional, Article III injury.

Despite this glaring deficiency, California district courts certify these overbroad classes under Ninth Circuit precedent, which has inexplicably declined to adopt a classwide injury requirement. The lack of injury requirement is exacerbated by lower courts' misapplication of Federal Rule of Civil Procedure 23's "rigorous" analysis for claims filed under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978).

Under *Monell*, a plaintiff cannot recover from a municipality unless they can show that they were injured

by the municipality's "policy or custom." *Id.* Although the "policy or custom" requirement does not include proof of an individual's underlying injury, courts often conflate the two principles when deciding whether individual injury issues predominate at the class certification stage. The result is that differences in class member injuries are tabled and left for another day while the class is certified. But a recent Ninth Circuit decision that *did* rigorously apply Rule 23 to identify individual injury issues demonstrates the benefits of enforcing a classwide injury requirement for *Monell* (and potentially other complex) claims at the class certification stage. *See Black Lives Matter L.A. v. City of Los Angeles*, 113 F.4th 1249 (9th Cir. 2024) [hereinafter *BLM*].

Requiring injury determinations at the class certification stage is important to municipalities because it will deter overbroad and unjustified settlement payouts. In practice, defendants are often forced to settle class actions *after they are certified* to avoid protracted litigation costs and the potentially catastrophic risks of losing at trial, even when they have viable standing arguments. This is particularly troublesome for municipalities, which finance their own settlements using taxpayer money that could otherwise be spent on community development. Worse still, high value settlements can lead to cuts in essential services or tax increases to help balance future city budgets.

When settlement figures are artificially inflated by the presence of uninjured class members, local communities suffer. Even if uninjured members are eventually weeded out, the settlement funds are not returned—they instead go to third-party *cy pres* recipients. These parties are also

uninjured, and may not represent a cause that benefits citizens as the tax dollars were intended.

To avoid these deleterious consequences for public and private defendants alike, this Court should expressly require a showing of Article III standing for all class members at the time of class certification.

ARGUMENT

I. Current law is split over how to address the need for Article III standing for all class members in damages classes.

Rule 23(b)(3) is the "'the most adventuresome' innovation" in class-action law. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). It "added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Id.* at 614–15.

Along with the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy, a Rule 23(b)(3) class may be certified only if "questions of law or fact common to class members predominate over any questions affecting only individual members," and the "class action is superior to other available methods" of resolution. Fed. R. Civ. P. 23(a), (b)(3). Named plaintiffs must also have Article III standing. *Frank v. Gaos*, 586 U.S. 485, 492 (2019).

For absent class members, this Court has held that "[e]very class member must have Article III standing in order to recover individual damages." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021); *see Tyson Foods,*

Inc. v. Bouaphakeo, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."). But it has expressly reserved judgment regarding "whether every class member must demonstrate standing *before* a court certifies a class." *TransUnion*, 594 U.S. at 431 n.4. That is the question presented by the instant appeal.

As discussed in Labcorp's Petition for Writ of Certiorari, Circuit courts have taken differing approaches when confronted with a putative class that includes individuals who have suffered no injury. *See generally* Pet.

The Second and Eighth Circuits (as well as some judges in the Fifth and Sixth Circuits) consider the presence of uninjured class members an Article III standing problem. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264–65 (2d Cir. 2006); *see also* Pet. 15–16 (discussing relevant opinions in the Fifth and Sixth Circuits). These courts hold that "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264.

Meanwhile, the First, Third, and D.C. Circuits couch the issue under Rule 23(b)(3)'s predominance requirement, refusing to certify a class with more than a "*de minimis*" number of uninjured members. *See Dakota Granite Co. v. BNSF Ry. Co. (In re Rail Freight Fuel Surcharge Antitrust Litig.)*, 934 F.3d 619, 624–26 (D.C. Cir. 2019); *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Funds v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42, 53–54 (1st Cir.

2018); *see also In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020) (similar); Pet. 16–18. As with the previous group, this necessarily entails a determination of how many uninjured class members are present at the time of certification. *In re Rail Freight*, 934 F.3d at 624–25. If the class definition encompasses more than a *de minimis* number of uninjured members, common questions do not predominate. *Id.*

Yet a third group—the Seventh, Ninth, and Eleventh Circuits—has waffled and declined to adopt either position. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) [hereinafter *Olean II*] (en banc); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267, 1277 (11th Cir. 2019); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *see also* Pet. 18–19. These courts reserve injury questions for post-certification, weeding out uninjured class members only at the damages allocation phase, post-trial or settlement. *See Olean II*, 31 F.4th at 668–69, 681–82; *infra* Part III.

Of this final group, the Ninth Circuit has taken the most strident, albeit inconsistent, position. At different points in time, the Ninth Circuit has avowed versions of *both* the Article III approach and the *de minimis* predominance approach, causing needless interpretational confusion for lower courts. Worse yet, it has recently backpedaled on both, resulting in uneven and often muddled treatment of threshold injury questions. *See*, *e.g.*, *Olean II*, 31 F.4th at 669 & n.14, 682 & n.32; *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016).

As to the Article III approach—in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), the Ninth Circuit cited the Second Circuit's decision in *Denney*

for the proposition that "no class may be certified that contains members lacking Article III standing." *Id.* at 594 (quoting *Denney*, 443 F.3d at 264). Applying that rule, it denied certification of a class that was "overbroad" because it contained members who had not seen the allegedly misleading statements at issue. *Id.* at 596. Only a California subclass could be certified, it concluded, because "California class members have Article III standing." *Id.* at 594.

A few years later, the Ninth Circuit seemingly retreated, stating that at class certification it need only be "*possible* that class members have suffered injury." *Ruiz Torres*, 835 F.3d at 1137 n.6 (emphasis added). Then *Mazza*'s holding was expressly overruled in a footnote of the *Olean* en banc decision. *Olean II*, 31 F.4th at 682 n.32. Officially, the court limited its overruling to injunctive relief classes. *Id.* But that limitation is called into doubt by the same court's affirmance of certification of a damages class where nearly one-third of the class might have been uninjured. *Id.* at 680–82 (discussing competing expert evidence); *see id.* at 686 (Lee, J., dissenting) (summarizing expert conflict). Subsequent decisions by the Ninth Circuit have strongly suggested there is no Article III requirement for absent class members at class certification. *See, e.g.*, *DZ Reserve v. Meta Platforms, Inc.*, 96 F.4th 1223, 1239 (9th Cir. 2024) (citation omitted) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements.").

And as to the *de minimis* predominance approach—the original panel decision in *Olean* expressly adopted that rule, holding that anything more than a "*de minimis*" number of "uninjured class members would be enough to defeat predominance." *Olean Wholesale Grocery Coop.*,

Inc. v. Bumble Bee Foods LLC, 993 F.3d 774, 792 (9th Cir. 2021), *overruled on reh'g en banc*, 31 F.4th 651 (9th Cir. 2022). The panel even concluded that "[t]he district court's gloss over the number of uninjured class members was an abuse of discretion" under Rule 23(b)(3). *Id.* at 793.

In a jarring reversal, the *Olean* en banc majority retracted that holding, calling the *de minimis* rule "inconsistent with Rule 23(b)(3)." *Olean II*, 31 F.4th at 669. The court equated individual injury determinations with individual damages determinations that need not be resolved at the certification phase. *Id.* at 668–69; *but see Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) ("Questions of individual damage calculations" can "overwhelm questions common to the class."). Judge Lee authored a forceful dissent, rejecting the majority's sudden change of tune and calling for a more "rigorous" Rule 23 analysis under this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Olean II*, 31 F.4th at 685, 687–88 (Lee, J., dissenting).

The Ninth Circuit's high level of interpretational inconsistency—and ultimate refusal to apply any rule that absent class members have standing—has created immense confusion for lower courts. This Court should eliminate any uncertainty by articulating an Article III injury requirement for absent class members that can be reliably applied at the class certification stage.

II. Overbroad damages class actions against municipalities highlight the need for a clear Article III standing requirement for all class members.

A. Municipalities are uniquely burdened by overbroad class action claims involving high numbers of class members who lack Article III injury.

Class action civil rights claims against municipalities are increasingly common. Local governments across California deal with these suits every day.[2] And not only

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2. *See*, *e.g.*, *BLM*, 113 F.4th 1249; *Puente v. City of Phoenix*, 123 F.4th 1035 (9th Cir. 2024); *Buffin v. California*, 23 F.4th 951 (9th Cir. 2022); *Sandoval v. County of Sonoma*, 912 F.3d 509 (9th Cir. 2018); *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017); *Cavanagh v. Humboldt County*, 1 F. App'x 686 (9th Cir. 2001); Complaint, *Greene v. City of Beverly Hills*, No. 24-cv-05916 (C.D. Cal. July 15, 2024); Complaint, *Berg v. County of Los Angeles*, No. CV 20-7870 (C.D. Cal. Apr. 3, 2024), 2024 WL 2106724; Complaint, *Astorga v. County of Los Angeles*, No. 20-cv-09805 (C.D. Cal. May 28, 2024), 2024 WL 3313747; Complaint, *NAACP of San Jose/Silicon Valley v. City of San Jose*, No. 21-cv-01705 (N.D. Cal. Apr. 7, 2023), 2023 WL 2823506; Complaint, *Maya v. County of San Bernardino*, No. EDCV 19-1871 (C.D. Cal. June 1, 2023), 2023 WL 4383344; Complaint, *Rupan v. City of Oakland*, No. 20-cv-03866 (N.D. Cal. Oct. 24, 2023), 2023 WL 7026937; Complaint, *Garza v. City of Sacramento*, No. 20-cv-01229 (E.D. Cal. July 14, 2022), 2022 WL 2757600; Complaint, *Shorter v. County of Los Angeles*, No. CV 21-3347 (C.D. Cal. July 12, 2022), 2022 WL 3636687; Complaint, *Anti Police-Terror Project v. City of Oakland*, No. 20-CV-03866 (N.D. Cal. Oct. 18, 2021), 2021 WL 4846958; Complaint, *Gaffett v. City of Oakland*, No. 21-cv-02881 (N.D. Cal. Oct. 1, 2021), 2021 WL 4503456; Complaint, *S.G. v. City of Los Angeles*, No. LA CV17-09003 (C.D. Cal. Feb. 4, 2021), 2021 WL 911254; Complaint,

is the sheer number of suits staggering, but many propose extremely broad classes—implicating alleged misconduct that occurred "at different times, and in different places." *BLM*, 113 F.4th at 1263 (reversing grant of class

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Williams v. City of Beverly Hills, No. 21-cv-08698 (C.D. Cal. Nov. 3, 2021); Complaint, *Coburn v. City of Sacramento*, No. 19-cv-00888 (E.D. Cal. Dec. 18, 2020), 2020 WL 7425345; Complaint, *Martinez v. City of Santa Rosa*, 482 F. Supp. 3d 941 (N.D. Cal. 2020) (No. 20-cv-04135-VC); Complaint, *Astorga v. County of Los Angeles*, No. 20-cv-09805 (C.D. Cal. Nov. 11, 2020), 2020 WL 13584509; Complaint, *Lacambra v. City of Orange*, No. 18-cv-00960 (C.D. Cal. Aug. 16, 2019), 2019 WL 6799108; Complaint, *Sullivan v. City of Berkeley*, 383 F. Supp. 3d 976 (N.D. Cal. 2019) (No. C 17-06051); Complaint, *Brewster v. City of Los Angeles*, No. EDCV 14-2257 (C.D. Cal. July 29, 2019), 2019 WL 7707886; Complaint, *Garcia v. County of Riverside*, No. EDCV 13-616 (C.D. Cal. Mar. 8, 2018), 2018 WL 3740528; Complaint, *Chua v. City of Los Angeles*, No. LA CV16-00237 (C.D. Cal. May 25, 2017), 2017 WL 10776036; Complaint, *Buffin v. City & County of San Francisco*, No. 15-cv-04959 (N.D. Cal. Oct. 14, 2016), 2016 WL 6025486; Complaint, *Cangress v. City of Los Angeles*, No. 14-CV-1743 (C.D. Cal. Mar. 22, 2016), 2016 WL 5946878; Complaint, *Henneberry v. City of Newark*, No. 13-cv-05238 (N.D. Cal. Oct. 6, 2014), 2014 WL 4978576; Complaint, *Aichele v. City of Los Angeles*, 314 F.R.D. 478 (C.D. Cal. 2013) (No. CV 12-10863); Complaint, *Valdez v. City of San Jose*, No. C 09-0176 (N.D. Cal. Feb. 27, 2013), 2013 WL 752498; Complaint, *Khalif v. City of Union City*, No. C 09-2723 (N.D. Cal. May 8, 2012), 2012 WL 13048876; Complaint, *Campbell v. City of Oakland*, No. C 11-05498 (N.D. Cal. Dec. 12, 2011), 2011 WL 13376906; Complaint, *Kincaid v. City of Fresno*, No. CV-F-06-1445 (E.D. Cal. May 12, 2008), 2008 WL 2038390; Complaint, *Multi-Ethnic Immigrant Workers Org. Network v. City of Los Angeles*, 246 F.R.D. 621 (C.D. Cal. 2007) (No. CV 07-3072); Complaint, *Henderson v. City & County of San Francisco*, No. C-05-234 (N.D. Cal. Dec. 1, 2006), 2006 WL 3507944; Complaint, *Bull v. City & County of San Francisco*, No. C 03-01840 (N.D. Cal. Sept. 22, 2005), 2005 WL 8162537.

certification for "sprawling classes alleg[ing] a broad range of injuries based on a medley of LAPD conduct and policies").[3]

These broadly defined classes rarely make sense as a way of recouping damages for alleged civil rights violations: determinations about injury for each individual are inherently fact-specific and raise serious Article III considerations. For example, many civil rights claims against municipalities center on interactions with law enforcement—*e.g.*, allegations of excessive force, improper detention, or unlawful arrest—which require close scrutiny of the facts surrounding each individual violation, including the legitimate law enforcement objectives that justify an encounter. *See*, *e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989) (the reasonableness of an officer's behavior under the Fourth Amendment "requires careful attention

3. *See*, *e.g.*, Complaint at ¶ 3, *Greene v. City of Beverly Hills* (No. 24-cv-05916), Dkt. 36 (class of "[a]ll Black people who were detained or arrested without being convicted of any crime by the City of Beverly Hills Police Department ('BHPD') from July 15, 2022 forward"); Complaint at ¶ 2, *Williams v. City of Beverly Hills* (No. 21-cv-08698), Dkt. 179 (class of "[a]ll Black people who were detained or arrested by the City of Beverly Hills Police Department ('BHPD') from August 30, 2019 through August 30, 2021 without being convicted of any crime"); Complaint at ¶ 25, *Henneberry*, 2014 WL 4978576 (No. 13–CV–05238) (class of "persons arrested in the City of Newark, for misdemeanors, who instead of being cited and released, were instead detained, arrested, and imprisoned for unreasonable and lengthy periods of time"); *Kincaid*, 2008 WL 2038390 (No. CV-F-06-1445), at *1 (E.D. Cal. May 12, 2008) (class of "[a]ll persons in the City of Fresno who were or are homeless, without residence, . . . and whose personal belongings have been unlawfully taken and destroyed in a sweep, raid, or clean up by any of the Defendants" during a nearly 5-year period).

to the facts and circumstances of each particular case"), *overruled on another ground by Saucier v. Katz*, 533 U.S. 194 (2001). Indeed, not every use of force or arrest without conviction rises to the level of a "constitutional injury." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

An individual who has suffered no injury has no claim against the officer *or* the municipality. *See id.* (where "officer inflicted no constitutional harm," plaintiff could not recover against municipality under *Monell*); *BLM*, 113 F.4th at 1259 (decertifying *Monell* classes where it was unclear whether named plaintiff's injury was caused by police or by tripping on sidewalk, which is "not a constitutional injury"). And for claims against a municipality in particular, a plaintiff may recover only if she can demonstrate that her injury was caused by a "policy or custom" of the municipal entity. *Monell*, 436 U.S. at 694 ("policy or custom" creates liability when it "inflicts the injury"); *accord Los Angeles County v. Humphries*, 562 U.S. 29, 36 (2010).

These complex merits determinations dovetail with Article III concerns. While Article III "standing in no way depends on the merits of the plaintiff's contention[s]," the "standing question" in constitutional cases is "whether the constitutional . . . provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *id.* at 505 (plaintiff must show that they suffered a "harm that a constitutional provision or statute was intended to prevent"); *see also TransUnion*, 594 U.S. at 425 (concrete injuries for Article III purposes may be "specified by the Constitution"). Thus, any individual class member who lacks a constitutional injury may very well lack standing.

Likewise, an individual who cannot demonstrate causality under *Monell* may fall short of Article III's prerequisites. Under Article III, an injury must be traceable to the defendant. *TransUnion*, 594 U.S. at 423 (plaintiff must "demonstrate a concrete and particularized injury caused by the defendant"); *Warth*, 422 U.S. at 505 (for constitutional claim, plaintiff must show "injury was the consequence of the defendants' actions"). So, if an individual's injury does not relate back to the municipality's policy, they lack standing to sue the municipality. *See*, *e.g.*, *Zherka v. DiFiore*, 412 F. App'x 345, 348 (2d Cir. 2011) (finding plaintiffs lacked standing to pursue their First Amendment claim, and for that reason "no municipal liability attaches"); *Doe ex rel. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 609–10 (8th Cir. 2003) (plaintiff lacked standing to sue school district because he did not "suffer[] an 'injury in fact' *as a result of* the policy" at issue (emphasis added)); *see also Daves v. Dallas County*, 22 F.4th 522, 532 (5th Cir. 2022) (if alleged violations were not committed by officials acting on behalf of the county, "there is no case or controversy with, and no Article III jurisdiction over, Dallas County").

Yet district courts within the Ninth Circuit proceed with class certification without any regard for the Article III injury (or lack thereof) of absent class members. *See supra* Part I. Given the sheer number of broadly defined *Monell* classes, this is a problematic position for municipalities across the United States, not simply Beverly Hills and Los Angeles. *See infra* Part II.B.

Even worse, the Courts of Appeals seldom grant Rule 23(f) petitions. *See* Stephen B. Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A*

Longitudinal Study, 84 L. & Contemp. Probs. 73, 79–80 (2021) (grant rates of Rule 23(f) petitions fell to 22.9% from 2006 to 2013, with only 23 out of 157 petitions in the Ninth Circuit being granted during that period). The Ninth Circuit, for example, reconsiders only a handful of class certification decisions each year. *See U.S. Court of Appeals—Judicial Caseload Profile*, Ninth Circuit & National Caseload Profiles (2022), https://tinyurl.com/9thcircuitprofiles (noting between three and five interlocutory appeals were considered each year between 2017 and 2022).

Even when interlocutory review is granted, it is increasingly uncommon for the Courts of Appeals to overturn a district court's decision to grant class certification. *See* Burbank & Farhang, *supra*, at 91 ("[T]he estimated probability of reversal of a district court grant of certification. . . . declined precipitously by 39 percentage points to 32% in 2017."); *id.* at 99 ("[I]n the post-[*Dukes*] and *Comcast* period defendants achieved lower rates of reversal of certification."). Therefore, once certification is granted by the trial court, the fate of the case is largely sealed. *See infra* Part III.

The problem of overbroad class certification is not counteracted by pro-defense determinations at other stages of litigation, either. Defendants rarely win dismissal of putative civil rights class actions at the pleading stage. *See* Timothy Zick, *Public Protest and Governmental Immunities*, 97 S. Cal. L. Rev. 1583, 1583, 1610–11 (2024).

It is more feasible for defendants to prevail on the merits at summary judgment. *Id.*; *see also id.* at 1639

(*Monell* claims resolved at summary judgment where plaintiff cannot show a "policy or custom"). But summary judgment motions are often filed or considered only *after* class certification. *See* Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1208–09 (2010) (noting reluctance of some courts to rule on summary judgment pre-certification despite discretion to do so).

As a result, public entities with viable merits-based arguments—including injury arguments—face the daunting class certification process and the attendant specter of a high value settlement. *See*, *e.g.*, *Puente*, 123 F.4th at 1042 (affirming summary judgment for defendants as to all class claims under *Monell* after damages class and injunctive relief class were already certified); *Sullivan*, 383 F. Supp. 3d at 981 (similar); *see also* Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. Rev. 637, 640 (2006); 3 Newberg and Rubenstein on Class Actions § 9:52 (6th ed. 2024) ("[M]ost class actions today are settlement class actions in any case."); *infra* Part III.

Because of their frequent exposure to class claims involving potentially high numbers of individuals who have suffered no Article III injury, municipalities like the City are uniquely affected by the pending issue before this Court.

B. Requiring Article III injury for all class members will align civil rights class actions with the rigorous analysis required for class certification.

Without limitations or guidelines regarding the presence of uninjured class members, courts in the Ninth Circuit erroneously certify *Monell* claims for class treatment despite the presence of class members who suffered no constitutional harm. This is borne out by an examination of lower court certification decisions, and the Ninth Circuit's recent effort to correct course in *BLM*.

As has been repeated by this Court, class certification requires a "rigorous" analysis of the Rule 23 requirements. *See Dukes*, 564 U.S. at 350–52 (referring to Rule 23(a) showing); *see also Comcast*, 569 U.S. at 33 (applying the same to Rule 23(b) showing). This analysis often calls on courts to "'probe behind the pleadings'" to the "merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 350–52 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). Indeed, "[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 351 (quoting *Falcon*, 457 U.S. at 160).

As relevant here, the Rule 23(a) commonality requirement asks whether the class's claims "depend upon a common contention." *Dukes*, 564 U.S. at 350. This means that the case must be capable of "classwide resolution" through "common *answers*" to liability questions. *Id.* (citation omitted). The presence of "common 'questions'—even in droves" is insufficient. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

For damages classes, a plaintiff must also satisfy Rule 23(b)(3)'s predominance requirement, which asks courts to "take a 'close look' at whether common questions predominate over individual ones." *Comcast*, 569 U.S. at 34 (quoting *Amchem*, 521 U.S. at 615). It demands "careful scrutiny to the relation between common and individual questions in a case. An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Tyson Foods*, 577 U.S. at 453 (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–97 (5th ed. 2012)).

Although commonality and predominance both require at least a "rigorous" analysis, "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)" because of the limited safeguards for absent class members. *Comcast*, 569 U.S. at 34.

One of the issues that must be considered through both a commonality and predominance lens is whether the putative "class members 'have suffered the same injury'" as their representative. *Dukes*, 564 U.S. at 350 (quoting *Falcon*, 457 U.S. at 157–58); *accord Comcast*, 569 U.S. at 30 ("individual injury" of class members must be "capable of proof at trial through evidence that [is] common to the class rather than individual to its members"). The "mere claim" that all class members have suffered an injury "gives no cause to believe that all their claims can productively be litigated at once." *Dukes*, 564 U.S. at 350. The existence and cause of class member injuries therefore present "crucial question[s]" that must resolved by "common answer[s]." *Id.* at 352.

Rule 23, like most of the Federal Rules, is designed to be applied equally to all cases, regardless of subject

matter. *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 75–76 (2003) (referring to the "transsubstantive" nature of Rule 23). But some courts confronted with *Monell* claims have failed to rigorously apply Rule 23's commonality and predominance requirements—especially as they relate to injury and causation.

As discussed above, *Monell* plaintiffs must show that a common "policy or custom" caused their injury. 436 U.S. at 694; *accord Humphries*, 562 U.S. at 36. But the existence of a common policy alone does not prove injury—the "inquiry into the question of municipal responsibility and the question whether a constitutional violation occurred" are "separate." *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992); *accord Connick v. Thompson*, 563 U.S. 51, 60–61 (2011); *Heller*, 475 U.S. at 799 ("the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point" if "no constitutional injury" actually occurred). Yet courts within the Ninth Circuit (and elsewhere) seem to conflate the presence of an alleged "policy or custom" with a showing of classwide injury that would satisfy the commonality and predominance requirements of Rule 23.

For example, in two recent decisions, courts in the Central District of California certified Rule 23(b)(3) damages classes against the city and county of Los Angeles over credible objections that individual injury determinations would predominate. *See Berg v. County of Los Angeles*, No. CV 20-7870, 2024 WL 2106724, at *7 (C.D. Cal. Apr. 3, 2024), *vacated and remanded*, No. 24-3959, 2025 WL 310660 (9th Cir. Jan. 23, 2025); *Black Lives*

Matter L.A. v. City of Los Angeles, No. 20-CV-05027, 2022 WL 16888576, at *3 (C.D. Cal. Oct. 3, 2022), *vacated and remanded*, 113 F.4th 1249 (9th Cir. 2024).[4]

In *Berg*, the court declined to consider the effect of individual injury questions on predominance, reasoning that the "focal point" of the predominance inquiry for plaintiffs' *Monell* claims was "whether Defendants have a custom or practice of arresting peaceful protesters and subjecting them to unconstitutional conditions, whatever they may be." 2024 WL 2106724, at *7. The *Black Lives Matter* court likewise found that individual differences between plaintiffs regarding their own behavior and the responses of police officers during a protest—which both relate back to injury—did not preclude certification. 2022 WL 16888576, at *3. It concluded that certification was proper because the "*Monell* claims concern a common question about the LAPD's ratification of the individual officers'" actions. *Id.* at *4.

This is not a new phenomenon, either. A number of older decisions from lower courts in the Ninth Circuit have employed the same reasoning. *See Aichele*, 314 F.R.D. at 489–90, 495 (finding commonality and predominance were satisfied because of a "common question . . . as to the lawfulness of Plaintiffs' arrests to the extent they were based upon an overarching policy"); *Multi-Ethnic Immigrant Workers*, 246 F.R.D. at 635 (certifying Rule 23(b)(3) class over objection that "the conduct of individual officers in the field may present individual issues of reasonableness" because "the individual issues share a

4. Both orders were vacated and remanded due to the Ninth Circuit's later decision in *BLM*, discussed further below.

common source: the command decisions to disperse the crowd and to authorize the use of less-lethal munitions if the crowd's behavior warranted it"); *Bull v. City & County of San Francisco*, No. C 03-01840, 2004 WL 6068315, at *8 (N.D. Cal. June 10, 2004) (finding there was a policy in place, so "any potential individualized issues [regarding injury] can be addressed later in the litigation and do not defeat class certification").

The Ninth Circuit finally addressed this repeated error last year in *BLM*, 113 F.4th 1249, which arose from one of the recent Central District decisions discussed above. Plaintiffs participated in protests in Los Angeles following the killing of George Floyd, during which they claimed they were wrongfully arrested or injured by LAPD officers. *Id.* at 1253. They soon filed a class action suit against the City of Los Angeles and its police chief for constitutional and state law violations, and sought damages under *Monell*. *Id.* at 1253, 1257. The named plaintiffs' alleged injuries, the protest and arrest conditions they experienced, and the responses of police officers all differed. *Id.* at 1255–56. Still, the district court certified three different Rule 23(b)(3) classes under the logic that "because the damages classes bring *Monell* claims, there [a]re common questions about whether LAPD customs or policies injured protestors." *Id.* at 1257.

On appeal, Judge Lee authored the decision reversing certification across the board. *Id.* at 1254, 1266. He rejected both the district court's conclusion and plaintiffs' argument that "*Monell* classes necessarily satisfy Rule 23(a)'s commonality and Rule 23(b)(3)'s predominance requirements." *Id.* at 1263. The court held that "*Monell* is not a magic word that allows a plaintiff to cast aside

all the Rule 23 requirements for class certification." *Id.* "Plaintiffs seeking class certification based on challenges to a defendant's policies must show that the policies caused *every class member's injury*." *Id.* (emphasis added). Because of the disparate treatment and experiences of class members, "[t]he plaintiffs here have not shown the existence of common evidence that can resolve in 'one stroke' the class members' claims that hinge on a wide array of facts and circumstances." *Id.* at 1260 (quoting *Dukes*, 564 U.S. at 350).

Thus, despite the Ninth Circuit's rejection of any injury requirement for absent class members in *Olean II*—over Judge Lee's dissent—Judge Lee functionally *enforced* such a requirement in *BLM*. *Id.* at 1263. He applied a "rigorous" Rule 23 analysis that took injury questions seriously and declined to certify a class with uninjured members. *See id.* at 1258–60, 1264. The *BLM* decision therefore demonstrates that imposition of a classwide injury requirement protects against certification of overbroad classes with uninjured members.

Perhaps unsurprisingly, the other Circuits that are aligned with *BLM* in rejecting over-inclusive *Monell* classes also impose an injury requirement for absent class members. *See Cody v. City of St. Louis ex rel. Medium Sec. Inst.*, 103 F.4th 523, 531 (8th Cir. 2024) (reversing certification of *Monell* claims under Rule 23(b)(3) because "Plaintiffs' conditions claims—concerning plumbing, mold, and pests—will turn on both the severity of the conditions each plaintiff faced, and the length of exposure to those conditions"); *Woodall v. Wayne County*, No. 20-1705, 2021 WL 5298537, at *7 (6th Cir. Nov. 15, 2021) (reversing grant of class certification for *Monell* claims under

Rule 23(b)(3) and reasoning that "just because a policy exists does not mean it caused the particular class member's harm"); *supra* Part I (discussing injury requirement in different Circuit courts). Meanwhile, the Seventh Circuit, which does not require any classwide injury showing, *supra* Part I, recently took the opposite stance, *see Scott v. Dart*, 99 F.4th 1076, 1092 (7th Cir. 2024) (reversing denial of certification of Rule 23(b)(3) class under *Monell* where common policy was involved, although "class members would need to proceed in individualized trials to prove causation and to seek damages").

To ease review of *Monell* claims and other complex issues at class certification, this Court should expressly recognize an Article III injury requirement for absent class members. Such a requirement will help to harmonize treatment of *Monell* claims (and all other class claims) with the Court's other class certification decisions and the rigorous analysis demanded by Rule 23(b)(3).

III. Deferring adjudication of Article III standing until after class certification hurts municipalities by forcing settlements and draining public funds that will never be returned.

The alternative to resolving Article III standing at class certification is to defer standing determinations to the merits stage. But at that point the financial damage has been done, and cities are worse for the wear. As a practical matter, the size of the class *as certified* determines the value of the case.

That is because certified class actions rarely make it to trial. *See* Charles B. Casper, *The Class Action Fairness*

Act's Impact on Settlements, 20 Antitrust 26, 26 (2005). As this Court has recognized, the "in terrorem" effect of massive aggregate class action judgments forces settlement post-certification. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "Faced with even a small chance of devastating loss, defendants [are] pressured into settling questionable claims." *Id.*; *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high.").

And the settlement payouts are not small. In the last twenty years, municipalities around the country have paid more than $2 billion in settlements, including for class action claims.[5] The median annual total cost for payouts, legal defense, and settlements in cases involving police officers was $12 million per city for twenty major American cities during fiscal years 2014–2016.[6]

Nowadays, larger communities are paying far more than that. Los Angeles County paid more than $250 million in civil judgments and settlements in 2022–2023, and nearly $125 million in 2023–2024.[7] The City of Los

5. *See* National Police Funding Database, Settlements, https://tinyurl.com/npfdsettlements (cataloguing settlement payouts by municipalities around the country).

6. Michael Maciag, *City Lawsuit Costs Report*, Governing (Oct. 27, 2016), https://tinyurl.com/y69ymfwz.

7. Office of the County Counsel, Annual Litigation Cost Report FY 2023–2024, https://tinyurl.com/countycounsel2324; Office of the County Counsel, Annual Litigation Cost Report FY 2022–2023 (Feb. 6, 2024), https://tinyurl.com/countycounsel2223.

Angeles spent $137 million on the same costs during a two-year period.[8] And the City of Santa Monica recently spent $230 million on a single settlement.[9] In some cases, municipalities have been forced to take drastic fiscal relief measures to cover these costs, including borrowing large sums of money at high interest rates.[10]

This sobering reality is made particularly acute when litigants are aware that a high number of uninjured class members could have been eliminated had the claims been evaluated and adjudicated on the merits. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (certification will often "place[] pressure on the defendant to settle even unmeritorious claims"); *Olean II*, 31 F.4th at 685 (Lee, J., dissenting) ("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."). "When courts do not reach the issue of standing in cases which clearly call for an analysis of the issue . . . the courts, by essentially

8. Daily News, *City's legal costs: $137M over past 2 years*, Los Angeles Daily News (Aug. 28, 2017), https://tinyurl.com/ydb2djkv.

9. Matthew Hall, *Cratering customer levels and ballooning legal costs blast a $33.2M hole in the city budget*, Santa Monica Daily Press (Mar. 6, 2025), https://tinyurl.com/4xxpx583.

10. Dakota Smith & David Zahniser, *L.A. city leaders look to borrow money to cover soaring legal payouts*, Los Angeles Times (Nov. 2, 2024), https://tinyurl.com/38mw8z5s; see also Keely Webster, *Newsom vetoes California judgment obligation bond disclosure bill*, The Bond Buyer (Oct. 13, 2021), https://tinyurl.com/mr47vj8m.

assuming standing, lend an aura of acceptability to the notion that these plaintiffs actually have standing, whether they do or do not." Jeremy Gaston, *Standing On Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215, 232–33 (1998). Therefore, in the shadow of a large certified class, defendants are more likely to agree to inflated settlement figures that account for the presence of uninjured class members.

Rule 23 also offers little guidance to courts about how to administer class action judgments after settlement or trial. Fed. R. Civ. P. 23(e). This again leaves open the possibility that uninjured class members will recover because district courts have no choice but to fashion ad hoc remedies to weed them out. *See Tyson Foods*, 577 U.S. at 464 (Roberts, C.J., concurring) (writing separately to emphasize that he was "not convinced that the District Court will be able to devise a means of distributing the aggregate award only to injured class members"). Some courts devise creative methods of eliminating fraudulent claims by uninjured class members, while others are less careful. *See* N. Chethana Perera, *Back to School: A Lesson on the Dual Standards for Class Ascertainability*, 14 U. St. Thomas L.J. 249, 280–81 (2018) (discussing several examples).

And even when stricter weed-out processes are in place, defendants are usually still on the hook for whatever settlement amount they agreed to (which may be a lump sum that assumes a much larger class size, inflated by uninjured class members). Indeed, it is rare for a defendant to get back any money they allocated to a settlement fund. *See* 4 Newberg and Rubenstein on Class Actions § 12:29 (6th ed. 2024) (noting that reversion of

funds to defendants is "disfavored"). If there is money left over after all injured class members have been paid, the most common resolution is for courts to allocate the remaining funds to a *cy pres* recipient. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 620–21 (2010).

Courts have broad discretion to allocate *cy pres* awards, and often the recipients provide no benefit to the injured class members. Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1025 (2009). So even if the *cy pres* cause is worthy, the result is still that an uninjured party receives a payout from the defendant. Redish, *supra*, at 641–42, 646. And as with most other things in the world of class certification, these determinations are rarely overturned on appeal. Yospe, *supra*, at 1037.

In the case of local government, overlarge settlement payments to uninjured parties are especially harmful because they direct public funds away from their intended purposes. Distribution of public money to plaintiffs' attorneys and *cy pres* awards is unlikely to reflect community needs or voters' wishes. And although litigation budgets may be only a small part of a city's overall expenditures, they still harmfully decrease a municipality's remaining budget for other important line items that more broadly support all city residents, and may contribute to increased local taxes.[11]

11. *See* Smith & Zahniser, *supra* note 10; Maciag, *supra* note 6.

Most municipalities (including in California) are self-insured and pay their own settlements. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1212 (2016) (listing departments that are self-insured). This means that local budgets are harmed when settlement payouts are made. *Id.* at 1174. Even municipalities that maintain separate litigation budgets may have to dip into other funds to cover large settlements, again depleting public funds set aside for other purposes. *Id.* at 1178–80.

Other towns and cities pay for private insurance, but those policies are also funded by taxpayer money. *Id.*; *see* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 Buff. L. Rev. 757, 781–82 (2004) ("Civil judgments come out of city or county funds, or perhaps from insurance policies that the local government purchases—i.e., from taxpayers."). Jurisdictions that rely on private insurance end up paying substantially more in settlement costs, which may also require the municipality to dip into their general funds. *See* Schwartz, *supra*, at 1165 n.75. This money comes directly out of the taxpayer's pocket too, of course.

Thus, regardless of the method of payment, the funds used to cover municipal settlements are being taken away from other local causes, including basic social services, health care, homeless shelters, etc. *Id.* at 1174 ("[S]ettlements and judgments decrease the jurisdiction's budget as a whole, and the money to satisfy those increased costs must be taken from somewhere."); *id.* at 1181 ("[L]awsuit payouts necessarily take money away from other needs.").

And because local government funds are derived from various community resources—"including property taxes; sales taxes; income tax; utilities; charges for parking, parks, and other services; fines; interest; and federal and state grants"—high settlement payments can also cause an increase in local taxes to offset past judgments or expand future litigation budgets. *Id.* at 1161. For example, in a Michigan town of 25,000 people, citizens paid, on average, an additional $178 in property taxes per household to cover a $1.37 million settlement. *Id.* at 1174. On average, every person in the United States is likely paying more than $800 per year in "lawsuit taxes."[12]

Larger communities are not immune either, as they may have to recoup a far larger amount of money. In fall 2024, for example, the City of Los Angeles announced a plan to borrow at least $80 million for a "judgment obligation bond" that will be used to pay for settlements and judgments.[13] With interest, Los Angeles may end up paying an additional $20 million just to borrow those funds.[14] And this is on the heels of a similar $53 million bond the city secured in 2010 to cover the costs of protest-related settlements.[15]

When comparing these figures to the costs of other line items for municipalities, it puts into perspective just how damaging over-inflated settlements can be. In Los

12. Daily News, *supra* note 8.

13. Smith & Zahniser, *supra* note 10.

14. *Id.*

15. *Id.*

Angeles, the Cultural Affairs Department budget is $18.6 million,[16] and the city's litigation costs for two years would be enough to hire nearly 1,300 police officers and cover most of the public works budget.[17] Similarly, $65 million (which was the Los Angeles litigation budget for 2007–2008) would cover the city's annual infrastructure improvements, including upgrades to storm drains and streets.[18] In Austin, Texas, the average yearly cost of litigation related to police misconduct was roughly equal to the combined budgets for the city's mental health response first initiative and enhanced police training to avoid the misconduct at issue.[19]

Certification of artificially inflated classes with high numbers of uninjured class members therefore hurts municipalities because it drives up the likelihood—and cost of—settlement for non-meritorious claims. Evaluating absent class members' Article III standing as part of the Rule 23 analysis will help to ensure greater transparency and efficiency for municipal agencies by reducing the risk that public funds will be spent on premature and overbroad settlements.

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16. *Id.*

17. Daily News, *supra* note 8.

18. *Id.*

19. Paulette Blanc et al., *The Costs of Police Violence: Measuring Misconduct*, Measure (Feb. 2021), https://tinyurl.com/yk3wfc7c.

CONCLUSION

For these reasons, the Court should hold that Article III standing is a requirement for all absent class members at the class certification stage.

Respectfully submitted,

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