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 CIVIL PROCEDURE AND COMPLEX LITIGATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Ave.
Seattle, WA 98101

Shana E. Scarlett
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Ave., Suite 300
Berkeley, CA 94710

Hyland Hunt
Counsel of Record
Dana Kaersvang*
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 300
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

**Licensed in Colorado*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors with expertise in the Federal Rules of Civil Procedure, including the requirements for class certification under Rule 23(b)(3). Together, we share an interest in ensuring that the Federal Rules of Civil Procedure are construed "to secure the just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Amici include:[2]

- Maureen Carroll, Professor of Law, University of Michigan
- Christine Pedigo Bartholomew, Professor of Law, University at Buffalo School of Law
- Sergio J. Campos, Professor of Law, Boston College Law School
- Brooke D. Coleman, Fredric C. Tausend Professor of Law, Seattle University School of Law
- Robin Effron, Professor of Law, Brooklyn Law School
- Myriam Gilles, Paul R. Verkuil Professor of Public Law, Cardozo Law School

---

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] *Amici* listed herein file in their individual capacity as scholars. *Amici* provide their institutional affiliation solely for purposes of identification.

- Helen Hershkoff, Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law
- Luke Norris, Professor of Law, University of Richmond Law School
- Elizabeth G. Porter, James W. Mifflin Professor Law, University of Washington School of Law
- D. Theodore Rave, Bernard J. Ward Centennial Professor of Law, University of Texas School of Law
- Elizabeth M. Schneider, Rose L. Hoffer Professor of Law, Brooklyn Law School
- Jay Tidmarsh, Judge James J. Clynes, Jr., Professor of Law, Notre Dame Law School
- Adam Zimmerman, Robert Kingsley Professor of Law, USC Gould School of Law

SUMMARY OF ARGUMENT

As law professors interested in the fairness and efficacy of the Federal Rules of Civil Procedure, *amici* write to make two main points regarding the question presented.

First, the rules governing class actions are fully consistent with other rules of civil procedure that permit courts to gather potentially injured persons into a single litigation at the outset, and sort through which are injured and uninjured at a later stage. The procedural regime governing federal courts accepts that the fair and efficient resolution of a case or controversy will sometimes involve the inclusion of

uninjured persons. Some procedural devices–such as interpleader and compulsory joinder–specifically contemplate proceedings moving forward despite certainty that only one of the named parties will turn out to have been injured. Other procedural mechanisms, like intervention, require the court to assess whether a litigant has adequately demonstrated injury at the point that the litigant becomes a party and their distinct claim for relief has been put before the court. This does not necessarily occur at the outset.

All these options yield comprehensive proceedings that may properly include the universe of those who are possibly injured, so that the court—at the appropriate stage—can identify the injured party (or parties), award that party damages, and generate preclusive effect as to all of the others. Such inclusive proceedings further "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Temple v. Synthes Corp.*, 498 U.S. 5, 6 (1990) (quoting *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968)).

Rule 23(b)(3) fits squarely within this same flexible, pragmatic approach, allowing courts to focus on the particular facts and circumstances of each case to promote interests in efficiency and finality. Rule 23(b)(3) thus requires the court first to identify the questions that must be answered to fully resolve the plaintiffs' particular claims, and then weigh those questions that can be answered for the class as a whole against those requiring individualized inquiries. This fact-bound process does not lend itself to per se rules. The presence of uninjured class

members will sometimes cause individualized inquiries to predominate, but sometimes it will not. And the court has ample means in the class context for addressing such questions as the litigation progresses, just as it does under other joinder rules.

Second, requiring a representative to show, at the class certification stage, that all class members have necessarily suffered an Article III injury would render unworkable other crucial aspects of class action doctrine that enable finality and global peace. Courts generally agree that a class definition must be clear and objective, with good reason. Only an objective definition permits the parties—including defendants—to know who is bound. For similar reasons, courts tend to avoid "fail-safe" classes, where only members with valid claims are bound by the judgment, and anyone whose claim fails is free to re-litigate the issues. Petitioner embraces these rules but ignores the irreconcilable tension between its position here and the need for clear definitions that promote final, comprehensive dispute resolution. For example, an individual's standing sometimes depends on their intent or state of mind. If Petitioner's view prevails, such subjective criteria would have to be imported into class definitions, obscuring the binding scope of the class judgment and impairing all parties' interests, including defendants', in finality.

The requirement of a clear and objective class definition would not be the only area of doctrine affected by a per se rule about the certification of Rule 23(b)(3) classes that include uninjured class members. Similar questions would arise for a host of other

doctrines, questions to which Petitioner has offered no answers.

There is no need to destabilize the class-action mechanism with atextual per se rules. As in other proceedings governed by other procedural rules, federal courts can make the procedural calls case-by-case. And they can do so in the interest of efficiency and justice as required by the Federal Rules of Civil Procedure. Courts can ably determine—based on the facts and circumstances of each case—the propriety of certifying a class containing potentially uninjured class members. They can then ensure—at the appropriate stage—that only those class members who are in fact injured can recover.

ARGUMENT

I. The Federal Rules of Civil Procedure Encourage the Broad Use of Joinder to Promote Finality and Efficiency.

Under the Federal Rules of Civil Procedure, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966). Among its other benefits, this approach serves the public interest in "settling disputes by wholes, whenever possible." *Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) (quoting *Provident Tradesmens Bank*, 390 U.S. at 111).

Two aspects of this pragmatic joinder regime have particular relevance to the question before this Court. First, courts routinely conduct multiparty

litigation in which they determine which parties are injured and which are not. Second, as with other provisions governing multiparty litigation, Rule 23(b)(3) takes a flexible, pragmatic approach that does not lend itself to per se rules.

A. The Fair and Efficient Resolution of a Case or Controversy Will Sometimes Involve the Inclusion of Uninjured Persons.

At bottom, Petitioner objects to the idea that a court would allow the joinder of multiple parties seeking damages, then hold proceedings to determine which of those parties are injured and which are not. *See* Pet. Br. 3, 30. But this structure is not some unprecedented class-action innovation. Courts routinely engage in the task of bringing in multiple persons and sorting the injured from the uninjured only as the litigation progresses, with the showing required to become or stay a party shifting with the stage of the litigation and the circumstances of the case. Rule 23(b)(3) is hardly the only procedural device courts employ for that purpose.

1. When the modern version of Rule 23 was enacted in 1966, it was part of a set of reforms designed to allow district courts to take a more flexible and pragmatic approach to cases that implicate the interests of multiple parties. *See generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356 (1967). In addition to the class action rule, this package included revisions to Rule 19, which governs compulsory joinder, and Rule 24, which

governs intervention. *Id.* at 366-75, 400-07. And, although the authors of these revisions did not propose changes to the interpleader rule or statute, they deemed interpleader to be part of the same "web" of interconnected provisions. *Id.* at 407 n.190.

These provisions work together to encourage the joinder of all those who might allege an injury, seek relief, or suffer impaired interests related to a common dispute, so that the court can comprehensively resolve the dispute in a fair and efficient manner. As the Fifth Circuit put it, the 1966 amendments reflected "the great public interest, especially in these explosive days of ever-increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process." *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 824 (5th Cir. 1967).

To serve this important public interest, under several mechanisms besides Rule 23, the Federal Rules of Civil Procedure permit courts to proceed with a group of claimants despite knowing with certainty that some of them will turn out to be uninjured (interpleader and compulsory joinder) and to include parties who might never seek distinct relief and allege an injury (intervention). This flexible approach applies even though the persons and entities joined under these rules are "parties" from the outset, with the full rights attendant to that status. Absent class

members, in contrast, "are not parties to the suit." *See Smith v. Bayer Corp.*, 564 U.S. 299, 314 (2011).[3]

Starting with interpleader, the court will often know to a near-certainty that one or more of the parties has suffered no injury. Consider a dispute about the proper beneficiary of a life insurance policy. To resolve the dispute without exposing itself to multiple liability, the insurance company can initiate an interpleader action that names all potential beneficiaries as defendants, even though some of them will turn out not to be entitled to damages. *See, e.g., Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002).

Alternatively, if only one potential beneficiary brings suit against the life insurance company, it can move to dismiss the action for failure to join the other potential beneficiaries as required parties, or the court may *sua sponte* require the other potential beneficiaries to be joined.[4] *See, e.g., Belcher ex rel.*

---

[3] In *Smith*, eight members of this Court explicitly recognized that "unnamed members of a class action . . . are not parties to the suit." 564 U.S. at 314. (Justice Thomas did not join that portion of that opinion, though he also did not write separately.) Similarly, in *Devlin v. Scardelletti*, this Court unanimously rejected the proposition that absent class members have the same status as named parties. 536 U.S. 1, 14-16 (2002). The majority held that, for purposes of appeal from settlement approval, an absent class member is not a party unless he timely objected at the fairness hearing. *Id.* at 14. The dissent posited that unnamed class members are not parties to the class judgment at all. *Id.* at 15-16 (Scalia, J., dissenting).

[4] When a court orders compulsory joinder, "the preferred method is to designate and serve involuntary parties as

Belcher v. Prudential Ins. Co. of Am., 158 F. Supp. 2d 777, 778 (S.D. Ohio 2001). Under either option, the court will determine who is injured, award damages to that party, and preclude all of the others.

If other potential beneficiaries are not joined under Rule 19, they may intervene under Rule 24. *See, e.g., Reynolds v. Am.-Amicable Life Ins. Co.*, 591 F.2d 343, 344 (5th Cir. 1979); *Thomas v. Metro. Life Ins. Co.*, 921 F. Supp. 810, 811 (D.D.C. 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). Intervention of right is available in a wide variety of circumstances when a putative intervenor "claims an interest relating to the property or transaction that is the subject of the action" and the action's disposition "may …. impair or impede the movant's ability to protect its interest," unless adequately represented by existing parties. Fed. R. Civ. P. 24(a). As Petitioner notes (Br. 19), an intervenor—who, unlike an absent class member, becomes a full party to the litigation—must demonstrate standing "to pursue relief that is different from that which is sought by a party with standing." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 440 (2017).

But the important parallel is not *whether* an intervenor must demonstrate standing, but *when*: at the time the distinctness of the intervenor's claim for relief emerges. *See Town of Chester*, 581 U.S. at 439; U.S. Br., *Town of Chester*, 2017 U.S. S. Ct. Briefs

---

defendants, regardless of their appropriate interest alignment"—that is, even if the plaintiff has no claim against the new defendant. *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 962 (5th Cir. 1973).

LEXIS 803, at *27 (acknowledging that courts could evaluate intervenor standing "only if and when the intervenor seeks to take some particular step for which standing is constitutionally required" but arguing for an earlier assessment under Rule 24). This means assessment of an intervenor's standing may sometimes be postponed until even the appeal stage. *See, e.g.*, *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Louisiana v. Haaland*, 86 F.4th 663, 666 (5th Cir. 2023) (assessing intervenors' standing for the first time on appeal because that was the point at which it became clear they sought appellate relief that differed from the relief sought by the original party-appellant). Intervention and full party status may thus be granted to a party whose claim appears to be the same as the existing plaintiff's without a standing assessment. But the intervenor's standing must be demonstrated if, after he is already a party, his claim to divergent relief becomes clear.

2. Certifying a Rule 23(b)(3) class that includes potentially uninjured class members, subject to later dropping or denying the claims of those who are uninjured, is fully consistent with these other approaches to comprehensive dispute resolution and serves the same public interest: fair and efficient resolution of the entire case or controversy. The class representative alleges, on behalf of the absent class members, that the absent class members are entitled to damages. If, as the litigation progresses, the court determines that some subset of claims is non-justiciable, the court can amend the class definition to excise those claims or even decertify the class at any time. Fed. R. Civ. P. 23(c)(1)(C); *Amchem Prods., Inc.*

v. Windsor, 521 U.S. 591, 620 (1997). The court also has a variety of means to ensure recovery is limited to class members with valid individual claims, including by mechanisms as simple as consulting company records. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). Regardless of the outcome, the judgment will bind the entire class as defined at final judgment.

A court thus may ultimately find that some of the absent class members cannot recover damages because they lack injury. But that can be assessed after the class-wide questions have been resolved, if their resolution makes it necessary to reach the validity of a particular class member's claim to individualized relief. [5] *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016) (reasoning that "the question whether uninjured class members may recover is one of great importance" but is not "yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed"). *TransUnion* exemplifies this dynamic, because the Court was able to determine that some class members lacked

[5] This timing helps to explain why questions about individual class members' injuries have less salience to classes certified under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Because such classes cannot seek individualized relief, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360-61 (2011), the proceedings never reach a stage at which distinct individual claims emerge and absent class members must establish their entitlement to individualized relief.

standing on review of a damages award. 594 U.S. at 418.

It has long been understood that a class action may be appropriate "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." Advisory Committee's 1966 Notes on Fed. R. Civ. P. 23; *see also* Kaplan, 81 Harv. L. Rev. at 393 (noting that "after determination of common questions," "follow-up proceedings" where "the individual claimants might have to come in and prove their damages . . . will occur in various (b)(3) actions"). That some members are found to be uninjured at that stage does not render the proceedings invalid, any more than an interpleader proceeding is rendered invalid when a court awards a disputed asset to only one of the potential claimants.[6]

B. Rule 23(b)(3) Represents a Flexible, Pragmatic Approach that Does Not Lend Itself to Per Se Rules.

The authors of the 1966 amendments were "unsatisfied" with rules governing multiparty litigation "in terms of rigid legal concepts such as

---

[6] Although Rule 23(b)(3) was in some respects an "adventuresome innovation" of the 1966 amendments, *Amchem Prods.*, 521 U.S. at 614, there is nothing new about proceedings in which courts sort the injured from the uninjured. Not only does the class action device itself have deep historical roots, *see* Resp. Br. 39-41, but a court's authority to use an interpleader proceeding for that purpose "is a recognized subject of the equity procedure which we have inherited from England." *Texas v. Florida*, 306 U.S. 398, 407 (1939).

joint, common ownership, res judicata, or the like." *Atlantis Dev. Corp.*, 379 F.2d at 824-25. Instead, they "deliberately set out on a more pragmatic course," *id.*, "describ[ing] in more practical terms the occasions for maintaining class actions," Advisory Committee's 1966 Notes on Fed. R. Civ. P. 23. Consistent with that pragmatic approach, Rule 23(b)(3) gives courts the tools to conduct a fair and efficient proceeding based on the particular needs of each case. It does so through the adaptable requirements of predominance and superiority, rather than a set of per se rules.

This Court has repeatedly recognized that Rule 23(b)(3) requires courts to "undertake a case-specific inquiry into whether class issues predominate." *Wal-Mart*, 564 U.S. at 362. The contours of that analysis depend on factors such as "the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

Mass torts provide an example of this case-by-case analysis. The Advisory Committee note to the 1966 amendments stated that "mass accident" cases are "ordinarily not appropriate for class treatment," but as this Court recognized in *Amchem Products*, "the text of the Rule does not categorically exclude mass tort cases from class certification." 521 U.S. at 624-25. Rather than impose such a categorical exclusion, the Court noted that proposed mass tort class actions "may, *depending upon the circumstances*, satisfy the predominance requirement." *Id.* at 625 (emphasis added). The Court ultimately determined that the "sprawling" class of asbestos claimants certified by the district court failed to satisfy the predominance standard, *id.*, but its conclusion rested

not on a per se rule, but on an analysis of the particular circumstances of those class members and their claims. *See id.* at 624-25.

Similarly, in *Tyson Foods*, this Court declined to adopt a per se rule for predominance. There, the "petitioner and various of its *amici* maintain[ed] that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence." 577 U.S. at 454. But the Court concluded that it "would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases." *Id.* at 455. The Court determined that the plaintiffs' particular use of statistical evidence in support of predominance was permissible, and it noted that "[t]he fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases." *Id.* at 460.

Comcast v. Behrend, 569 U.S. 27 (2013), on which Petitioner relies, *see, e.g.,* Pet. Br. 44, only underscores the case-specific nature of these determinations. There, the district court had held that *on the facts of that case* the plaintiffs could not meet the predominance requirement unless they could show that damages "were measurable 'on a class-wide basis' through use of a 'common methodology.'" *Id.* at 30 (quoting *Behrend v. Comcast Corp.*, 264 F.R.D. 150, 154 (E.D. Pa. 2010)). When the case reached this Court, the district court's determination on that point was "uncontested." *Id.*; *see also id.* at 42 (Ginsburg, J., dissenting) (noting the "oddity of this case, in which the need to prove damages on a classwide basis

through a common methodology was never challenged by respondents" and so the "Court's ruling is good for this day and case only").

The Court in *Comcast* thus had no occasion to address the general question of whether predominance requires a showing that damages are capable of measurement on a class-wide basis. Instead, the Court addressed the case-specific question of whether the plaintiffs had, in fact, made that showing. *Id.* at 34 (majority opinion). Resolution of that case-specific question properly focused on case-specific issues, such as the evidence presented by the parties and the legal theory supporting the plaintiffs' claims. *Id.* at 34-38. Courts must "probe behind the pleadings," the Court emphasized, and undertake a "rigorous analysis." *Id.* at 33.

The need for individualized damages awards will sometimes defeat predominance, but not always. Statistical evidence will sometimes support a finding of predominance, but not always. And individualized questions about class members' injuries will sometimes prevent a finding of predominance, but not always. Courts can properly determine the impact of these individualized inquiries on a case-by-case basis, just as they do with other questions that bear on the predominance standard.

II. Barring Class Certification if a Class May Contain Uninjured Members Would Render Key Aspects of Rule 23 Unworkable.

Petitioner argues alternatively that a class cannot be certified if it contains a single uninjured member (under Article III) or an "appreciable number" of them (under Rule 23). Either approach would upend the operation of other doctrines governing class certification and settlement, destabilize the class-action landscape, and impair the efficacy of class actions for achieving global peace via clear, binding final judgments.

A. A Rule that Classes Cannot Be Certified if They Might Contain Uninjured Members Is Inconsistent with the Objective Class Definition Requirement, Opens the Door to Fail-Safe Classes, and Undermines the Finality of Class Resolutions.

Defendants' interests in finality are advanced by objective class definitions that make it clear at the outset who is a member of the class bound by the judgment, no matter the result. But by insisting that any class definition is invalid if it sweeps in potentially uninjured class members, Petitioner's rule makes it harder—if not impossible in some cases—to define the class without incorporating legal injury in the definition, thus raising the possibility of fail-safe classes (to which Petitioner also objects) or classes defined by vague, subjective criteria.

1. There is a long-standing consensus in the lower courts that a class must be clearly and objectively defined. *See, e.g., Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) ("We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind."); *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012) (approving class defined by "an objective criterion").

Courts apply this constraint because a vague and subjective class definition can make it "impossible for future parties and courts to determine the scope and preclusive effect of any judgment." *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n*, 70 F.4th 914, 936 (5th Cir. 2023). This clear and objective class definition requirement thus protects both defendants and absent class members, while also serving broader institutional interests in efficiency and finality.

Because classes should be defined objectively, "courts avoid certifying classes where the class definition depends on the class members' state of mind because this state is generally a subjective factor." *Id.* at 935 (quoting William B. Rubenstein, 1 *Newberg and Rubenstein on Class Actions* § 3.5 (5th ed. 2021) (alterations omitted)). Currently, "[p]laintiffs can generally avoid the subjectivity problem by defining the class in terms of conduct (an objective fact) rather than a state of mind." *Mullins*, 795 F.3d at 660. For a litigation class, if the plaintiffs propose a class definition that turns on state of mind, the court can modify it so that it instead turns on

conduct. *See, e.g., Chiang v. Veneman*, 385 F.3d 256, 262 (3d Cir. 2004) (modifying a class definition "to eliminate the reference to the class members' 'belief' in discrimination, thereby removing such a subjective criterion from the class definition").

2. To promote similar finality interests, several circuits have held that a "fail-safe" class—that is, one that "is defined to include only those individuals who were injured by the allegedly unlawful conduct"—should not be certified. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022); *see also Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 624 (8th Cir. 2021); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015); *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *Randleman v. Fid. Nat. Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011).

These courts reason that such classes "shield[] the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Randleman*, 646 F.3d at 352.

As other courts of appeals have held, there is no need—or textual warrant—for a standalone prohibition on fail-safe classes, because the express Rule 23 factors sufficiently address the concerns the extratextual fail-safe rule is designed to address. *In re White*, 64 F.4th 302, 313 (D.C. Cir.), *cert. denied sub nom. Hilton Hotels Ret. Plan v. White*, 144 S. Ct. 487 (2023) (holding that the district court "abused its discretion by denying the amended class certification motion based on a stand-alone and extra-textual rule

against 'fail-safe' classes, rather than applying the factors prescribed by Federal Rule of Civil Procedure 23(a)"); *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) (noting that the court has "rejected a rule against fail-safe classes"). But Petitioner (Br. 25 n.2) and the United States (Br. 21) fully embrace such a standalone rule—while ignoring the effect of their positions here on this and other rules designed to advance defendants' interest in finality.

3. A rule that classes cannot be certified if they might contain uninjured members would frequently drive district courts to a Hobson's choice. They could either define classes objectively (but, in Petitioner's view, impermissibly including potentially uninjured parties) or define classes to guarantee that any member suffered injury and risk running headlong into the problems generated by subjective criteria or fail-safe definitions.

This rock-and-a-hard-place problem occurs because an individual's standing sometimes depends on subjective factors like their state of mind. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 261 (2003) ("It is well established that intent may be relevant to standing in an equal protection challenge."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."); *Laird v. Tatum*, 408 U.S. 1, 14 n.7 (1972) (deeming standing to be absent when the plaintiffs "themselves are not chilled [in the exercise of their First Amendment rights], but seek only to represent those 'millions' whom they believe are so chilled").

A class defined by reference to such state-of-mind criteria, however, would generate the precise finality problems that the objective-criteria rule is designed to avoid—impeding the ability to determine the scope and preclusive effect of any judgment. And it would go a long way down the road toward a fail-safe definition, whereby only successful plaintiffs are bound by the judgment. *See* Resp. Br. 45.

This tension has not escaped courts' notice. The Eleventh Circuit highlighted this issue in declining to hold "that a court is required to ensure that the class definition does not include any individuals who do not have standing before certifying a class." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276–77 (11th Cir. 2019). The court wrote that a requirement of class-wide injury "would run the risk of promoting so-called 'fail-safe' classes, whose membership can only be determined after the entire case has been litigated and the court can determine who actually suffered an injury." *Id.* at 1277; *see also, e.g., In re Nexium Antitrust Litig.*, 777 F.3d at 22 ("[E]xcluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury.").

Yet Petitioner's rule—no certification if the class could possibly contain any (or an appreciable number) of uninjured members—would bring about just such subjective, potentially fail-safe, and unworkable class definitions.

Indeed, the purported absence of proof of state of mind for every absent class member is what Petitioner

now claims is missing here. The class is currently defined in terms of objective criteria—conduct, rather than state of mind: "All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk." This definition evolved from the original certification definition— "All legally blind individuals in California who visited a LabCorp patient service center in California and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals." *Davis v. Lab'y Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 920 (C.D. Cal. 2022)—in part because of Petitioner's objection that the original definition was impermissibly fail-safe. *See* Order re: Motion to Refine Class Definition at 2-3, *Davis v. Lab'y Corp. of Am. Holdings*, No. 2:20-cv-00893 (C.D. Cal. Jan 28, 2020) (dkt. 114).[7]

Yet Petitioner is still not satisfied and argues that this class definition is impermissible because a legally blind class member has an injury-in-fact only if he "wanted" to use an inaccessible kiosk, speculating that there will be some class members who preferred not to use one. *See* Pet. Br. 26, 44. Petitioner does not hazard a class definition that

[7] As Respondents note, the Ninth Circuit's decision under review addressed the original class definition, and not the operative class definition that Petitioner now seeks to put before the Court. *See* JA399-400; Resp. Br. 15-16 (arguing that the Court should dismiss the writ as improvidently granted).

would meet its rule, but presumably it would add "wanted to use the kiosk" as a criterion for class membership, calling into question decades of case law that sensibly eschews subjective class definitions.

A per se rule requiring plaintiffs to demonstrate injury for every class member at the start of litigation—including injuries that have subjective components—could create confusion regarding objective rules used to clearly define the scope of the class at the outset of litigation. The upshot would be vague or unclear class definitions that make it impossible for the parties (including defendants) to know who is bound by a judgment, prompt more opt-outs, and impede the shared goals of achieving global peace through class-wide resolution of common issues.

B. Petitioner's Approach Would Upend Other Aspects of Class-Action Doctrine.

The foregoing discussion does not nearly exhaust the upheaval that would be created by a per se rule barring the certification of a Rule 23(b)(3) class unless the definition eliminates any possibility that a single absent class member might be uninjured. Consider just one example: As Respondents explain, Br. 32-33, Petitioner's Article III argument depends upon the unfounded proposition that putative absent class members are "parties." If so, are they also "parties" who must expressly consent to have their claims adjudicated by a magistrate judge? *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1076 (9th Cir. 2017) (collecting cases holding that absent class members' consent is unnecessary). As the Seventh Circuit noted,

classifying absent class members as "parties" for that purpose "would virtually eliminate [28 U.S.C.] § 636(c) referrals to magistrate judges in all potential class actions, because it would de facto transform all such cases into 'opt-in' style actions and fundamentally change the capacity of the judgment (whether the result of full-blown litigation or settlement) to bind both sides in the absence of express consents." *Williams v. Gen. Elec. Cap. Auto Lease, Inc.*, 159 F.3d 266, 269 (7th Cir. 1998). Petitioner has no response to this, or any of the many other questions raised by its implicit position that absent class members are "parties."

* * * * *

The potential doctrinal disruption from a per se rule about class-wide injury is far-reaching, yet hard to predict. It is also unnecessary. District courts can and should consider whether to certify a class that contains potentially uninjured class members based on the facts and circumstances presented in each case. And appellate courts can and should police those decisions to ensure they reflect the "rigorous analysis" this Court has required. *Wal-Mart*, 564 U.S. at 350-51.

CONCLUSION

If the Court does not dismiss the writ as improvidently granted, the judgment should be affirmed.

Respectfully submitted.

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Second Ave.
Seattle, WA 98101

Shana E. Scarlett
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Ave., Suite 300
Berkeley, CA 94710

Hyland Hunt
Counsel of Record
Dana Kaersvang*
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 300
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

**Licensed in Colorado*

April 7, 2025