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

AMICUS BRIEF OF LEGAL HISTORIANS AND SCHOLARS OF REPRESENTATIVE LITIGATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury.

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INTEREST OF AMICI CURIAE[1]

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Daniel Wilf-Townsend is an Associate Professor of Law at Georgetown University Law Center. He studies and writes on aggregate litigation, and his scholarship has examined the relationship between the historical roots of modern class actions and contemporary jurisdictional issues.

Amici submit this brief to provide historical context demonstrating that courts have historically allowed representative suits to bind absentees on common issues before identifying every individual who benefits. Amici offer this history to show that today's class actions follow this centuries-old tradition—resolving shared questions first, then figuring out who is entitled to what second.

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[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.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner argues that class certification was improper because an "appreciable number" of class members may not have redressable injuries, and the Solicitor General argues that the federal rules prohibit certifying a damages class if even one absent member might be uninjured; arguments that conflict with the historical record, as well as the text, purpose, and history of Rule 23 itself. But Petitioner goes further, claiming a constitutional defect in the class procedure based on modern concepts of Article III standing. The Court should reject Petitioner's revolutionary theory, which the Solicitor General does not embrace, as inconsistent with centuries of historical practice and this Court's precedent.

Representative litigation has been an established feature of Anglo-American jurisprudence since long before the Founding. *Infra* I.A. Equity courts in England developed a sophisticated bifurcated approach to representative litigation that strikingly resembles modern class action procedure. In the first stage, these equity courts would determine "general rights" or "common questions" shared by a class through a representative proceeding. In the second stage, the court would refer the case to a special master to address individualized issues. These courts did not require jurisdiction over every absentee in the first phase; if the representative party was properly before it, an equity court would resolve the common issues. Even for common questions affecting personally held rights, courts sitting in equity did not scrutinize absent individuals' right to recover until the second phase. *Infra* I.B.

This practice continued unbroken from the Founding through the adoption of modern Rule 23. *Infra* I.C. Justice Story's influential *Commentaries on Equity Pleadings* recognized representative litigation here and in England as an "exception" to ordinary jurisdictional requirements. And in cases like *Smith v. Swormstedt*, 57 U.S. 288 (1853), and *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), this Court confirmed that representative litigation enabled courts to resolve disputes beyond their ordinary jurisdictional reach, so long as the party bringing suit "on behalf of" similarly situated others was properly before the court. When Rule 23 was amended in 1966, it codified this longstanding practice, particularly through the addition of Rule 23(b)(3), which was designed to facilitate suits vindicating the rights of people who would not on their own have the strength to bring their opponents into court.

Petitioner's and the Solicitor General's competing theories would upend centuries of practice and strip Rule 23 of its essential function. Nothing in the historical record supports Petitioner's radical position that Article III requires every absent class member to establish a redressable injury from the beginning. *Infra* II.A. And nothing in the text, history, or purpose of the federal rules supports either Petitioner's or the Solicitor General's interpretation of Rule 23(b)(3). In fact, the rule's drafters and Congress have both considered and rejected proposals to add "no injury" constraints to (b)(3) classes. *Infra* II.B. Accepting either competing, contrary argument would not only contravene historical practice; it would force this Court to rewrite Rule 23 in ways repeatedly rejected by those charged with its development.

History answers "Yes" to the Question Presented: A federal court may certify a class action under Rule 23(b)(3) in the early stages of the litigation if its requisites (numerosity, commonality, typicality, adequacy of representation, predominance, and superiority) are met, even if some members of the proposed class might ultimately lack any redressable injury. As our historical traditions and this Court's precedent teach, those concerns may be properly dealt with at a later stage.

ARGUMENT

I. EQUITY COURTS EMPLOYED A TWO-STAGE APPROACH THAT PARALLELS MODERN CLASS ACTIONS.

The concept of representative litigation has deep historical roots in equity practice, dating back to before the framing of our Constitution. Far from being a modern procedural innovation, class actions are firmly grounded in that traditional equity practice, which was well-established in our courts by the time of the Founding. This historical practice—which Petitioner's groundbreaking Article III theory would upend—consistently recognized equity courts' authority to hear cases in which absentees were represented without requiring individualized proof of injury in the initial stages of the case, even if absent individuals would have to prove their claims thereafter to benefit from the common decree.

A. Equity courts permitted bifurcated representative suits as a practical exception to the "necessary parties" rule when joining all affected persons would be impracticable.

The origins of the class action lie in the equity courts' pragmatic response to the formal limitations of the "necessary parties" rule, which required joinder of all persons whose interests might be affected by a judgment. *See* Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213, 246-48 (1990) (under "necessary party law: equity held that all persons with an 'interest in the subject of the suit' had to be joined") (citation omitted).

This joinder requirement presented a significant procedural obstacle when disputes involved numerous potential claimants, as it could render litigation practically impossible when the number of individuals with a potential interest was large or when interested individuals could not be located or brought within the court's jurisdiction. The rigid application of the rule threatened to bar relief entirely in multiparty disputes, creating a tension between procedural formalism and substantive justice. Thus, when faced with disputes that could affect the interests of numerous non-parties, equity courts developed "representative suits" as a practical alternative. *See* Bone, *supra*, at 232-45 (discussing representative suits as an exception to the necessary party rule in early Anglo-American equity cases). This approach allowed courts to adjudicate common questions in a single proceeding while preserving fairness to the absentees through adequate representation.

Equity courts' developed a sophisticated two-stage approach to representative litigation that strikingly resembles our modern class action procedure. In the first stage, equity courts would determine "general rights" shared by a class of persons through a representative proceeding. *See* Bone, *supra*, at 234-42. This early form of collective adjudication arose because common-law courts could only resolve individual claims, which would have necessitated a cumbersome and wasteful multiplicity of suits to resolve what was fundamentally a common dispute. *See ibid.* (discussing equity's jurisdiction to prevent multiplicity of suits through declarations of general rights); *see also* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1297-98 (1932) (explaining that bills of peace helped settle questions "which would otherwise be tried over and over"). Following this first-stage declaration of general rights, the second stage of equity's bifurcated approach addressed the individual rights and obligations of the represented absentees. *See* Bone, *supra*, at 250-56 (describing how courts separated common rights determination from individual relief).

Thus, when the first-stage determination was complete, equity courts would go on to resolve at the second stage whether any individual absentee was so situated as to be entitled to share in the rights declared during the first stage—in modern terms, whether the absent class member was entitled to any relief under the collective judgment. *See* Chafee, *supra*, at 1302 (discussing how courts would need to "take up the independent questions one by one" after common questions were settled in the initial phase of the litigation). This second-stage process frequently

operated through reference to a master or intervention mechanisms that allowed class members to assert their individual claims within the framework established in the representative phase of the proceeding. For example, in privateer suits, discussed *infra* pp. 10-11, the chancellor would resolve the common questions concerning the ship crewmembers' total share of any prize-money, then refer the case to a special master to sort out who was (or was not) entitled to recover, and if so, how much. *See* Bone, *supra*, at 253-54.

B. Equity courts distinguished between "impersonal" and "personal" litigation yet, critically, maintained this two-stage structure even in "personal" cases.

The equity device that accomplished representative suits was the "Bill of Peace," an essential device for courts of equity to adjudicate controversies involving numerous parties sharing common questions. As Professor Chafee explained, the bill of peace served as "a potent device" that enabled courts to determine questions of law or fact "once for all in a single proceeding," thereby avoiding the "needless expense and vexation" of multiple suits. Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1297 (1932). The avoidance of multiplicity alone provided sufficient ground for equity jurisdiction.

In *Mayor of York v. Pilkington*, 26 Eng. Rep. 180 (Ch. 1737), the Chancery court decisively established that even where disparate parties with no privity among themselves were involved, equity jurisdiction was proper to prevent multiplicity of suits through a

bill of peace. *Id.* at 180-81. Where a "general right" was involved—such as the Town's right to a fishery in that case, implicating rights that were not personal to any potentially affected absentee—the court could determine that right for all affected individuals in one proceeding. *Ibid. Pilkington* recognized that even where multiple defendants might raise "distinct" defenses with varying legal impacts, the equity court could properly adjudicate the common questions while preserving the defendants' ability to "take advantage of their several exemptions, or distinct rights" in later stages. *Id.* at 181.

"Because the property right bound strangers and relations alike, it had the form of a general right without privity." Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213, 239 (1990). As Professor Bone's research reveals, "when disputes over the existence, ownership or scope of a property right arose, equity courts sometimes took jurisdiction to declare the right effective against the world-at-large or an indefinite class." *Id.* at 239 & n.55 (citing *Pilkington*, 26 Eng. Rep. at 181-82). This established the foundational two-stage approach that would characterize representative litigation: first determining the common or "general right," then addressing individualized claims or defenses.

This equitable jurisdiction was not limited to cases involving impersonal general rights or a res. *See infra* pp. 13-24 & nn.3-4 (discussing Justice Story's *Commentaries on Equity Pleadings* and this Court's early precedent). Rather, as Professor Chafee demonstrated, some of the foundational early bill-of-peace cases established a broader principle that

"multiplicity alone is a reason for getting into equity." *See* Chafee, *supra*, at 1320. In early cases like *How v. Tenants of Bromsgrove*, 23 Eng. Rep. 277 (Ch. 1681), he explained, "the only reason given ... for the assumption of jurisdiction was the prevention of multiplicity of suits in the determination of the two common questions of law and fact." *Id.* at 1305-06. By 1701, English Chancery courts fully recognized that where multiplicity made resolving a general question practically impossible, the represented absentees "to [the] bill" of peace "all were bound, ... else where there are such numbers, no right could be done, if all must be parties, for there would be perpetual abatements." *See id.* at 1307 & n.29.[2]

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[2] Quoting *Brown v. Howard*, (1701) Mich. (Ch.), 1 Eq. Cas. Abr. 162, 163-64 (when only some tenants are parties to a bill concerning customs affecting all tenants, all tenants would still be bound by the decree, not just those who participated in the lawsuit); citing as in accordance *Pilkington*, 26 Eng. Rep. at 180; *Brown v. Vermuden*, 22 Eng. Rep. 802, 802 (Ch. 1676) (when certain miners and mine owners defended an earlier suit regarding tithes and a decree was issued, all miners and owners in the area were bound by that judgment, even if they were not individually named in the original suit); citing as further support *Phillips v. Hudson*, L.R. 2 Ch. App. 243, 243 (1867) (one tenant permitted to pursue claims on behalf of all tenants to establish common rights); *Robertson v. Hartopp*, 43 Ch. D. 484, 486 (1889) (tenants of manor permitted to sue on behalf of themselves and other commoners to protect rights of common over waste lands); *Smith v. Earl Brownlow*, L.R. 9 Eq. 241, 256 (Ch. 1870) (named commoners could properly represent all who held similar rights to use common land against enclosure); *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1008 (Ch. 1809) (representative creditors could pursue claims on behalf of all creditors, holding that where numerous parties share an interest, the court would "do all, that can be done for the purposes of justice; rather than hold, that no justice shall subsist among persons").

The evolution of representative litigation continued with "privateer" suits in the eighteenth and early nineteenth centuries, which further refined the two-stage approach to adjudication in cases implicating rights held personally by absentees—as opposed to the impersonal "general rights" and property cases that affected absentees based solely on their status. These privateer cases involved crew members of privateer ships seeking their share of prize money captured during naval expeditions. *See* Bone, *supra*, at 250-51 & nn.90-92. In cases such as *Leigh v. Thomas*, 28 Eng. Rep. 201, 201-02 (Ch. 1751), and *Good v. Blewitt*, 33 Eng. Rep. 343, 345 (Ch. 1807); *see Good v. Blewitt*, 34 Eng. Rep. 542, 543 (Ch. 1815), the equity court would in the first stage determine the total crew share—the common issue binding all crew members. Then, in the second stage, the court would address the individual entitlements of each crew member who came forward to claim their portion. *See* Bone, *supra*, at 253-54.

This bifurcated procedure reflected equity's ability to accommodate both the impersonal elements of litigation (the common determination of the total prize) and the personal elements (each crew member's individual entitlement, if any). As Professor Bone explains, the second-stage proceedings in the privateer cases employed a participation-based approach, in which a "master" appointed by the equity court "identified all crew members with claims to the fund, gave notice to all inviting them to come in and litigate their individual claims, and determined the proper distribution of the fund according to the proven claims." Bone, *supra*, at 253.

To be sure, the contrast between "impersonal" and "personal" rights significantly influenced the binding effect of any first-stage determinations on the absent representees. In the "impersonal" litigation involving "general rights" that affected a class of persons as a matter of law (like the Town's right to a fishery in *Pilkington*), equity courts were more willing to bind absentees because "litigant autonomy was simply not an important concern." *See* Bone, *supra*, at 264. In representative litigation over "personal" rights and duties like the privateer cases, equity courts placed greater emphasis on actual participation, though they still maintained the two-stage structure to efficiently resolve common issues in the first stage, at which point individual absentees' right to recovery had not yet been scrutinized. *See id.* at 263-68.

Critically, the resolution of the common question and any procedures set forth for participating in the second phase were binding on the absentees even if they didn't come in under the decree, and equity courts readily resolved the common issues for all the represented absentees based on jurisdiction over the representative alone—without examining whether the absent represented individuals might have any redressable harm over which to litigate thereafter. *See* Bone, *supra*, at 267. "Notwithstanding the solicitous attitude toward crew member participation," Professor Bone explains, the court's decree could still bind absentees: "Nonparticipating crew members were not allowed to challenge the final decree's determination of the total crewshare fund or the proportion to which fellow crew members were entitled." *Ibid.*

The historical evidence demonstrates that equity courts developed a nuanced approach to representative litigation that accommodated both common questions affecting numerous parties and individualized issues requiring more particularized treatment. Their solution—a bifurcated process separating general from individual determinations—reflects the same practical wisdom that informs modern class action procedure, refuting any suggestion that class treatment of common issues followed by individualized proceedings for damages is somehow novel or inconsistent with traditional practice. The careful balance historically struck by courts sitting in equity is reflected in Rule 23(b)(3), which also embodies the "solicitous attitude" that equity courts had towards absentees in the second stage by requiring notice and an opportunity to opt out—which is not required under Rule 23(b)(2).

C. This practice continued unbroken from the Founding Era through the adoption of Rule 23.

The bifurcated approach to representative litigation established in English equity courts found a welcoming home in American jurisprudence from the earliest days of the Republic. This was no accident, as American courts consciously adopted the equity tradition that permitted representative suits when joining all affected parties would prove impracticable. This practice—allowing representative litigation with jurisdiction over only the representative party, not all represented parties—continued unbroken through the adoption of modern Rule 23 in 1966.

Justice Story's influential *Commentaries on Equity Pleadings* systematized the American understanding of representative suits. Story explicitly recognized the representative suit as a necessary "exception" to the necessary-parties rule "where the parties are very numerous, and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the court." Joseph Story, Commentaries on Equity Pleadings, and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America § 97, at 97-98 & n.1 (2d ed. 1840) (collecting cases). Justice Story also explained that in such cases, equity courts would "generally require the Bill [of Peace] to be filed not only in behalf of the plaintiff, but also in behalf of all other persons interested, who are not directly made parties (although in a sense they are thus made so), so that they may come in under the decree, and take the benefit of it"—and be bound by it either way. *See id.* § 96, at 95-96 & n.1 (collecting cases); *id.* § 99, at 99-100 & n.2 (if absentees "decline[d] so to come in before the Master" in the second stage, "they w[ould] be excluded from the benefit of the decree; and yet they w[ould] from necessity be considered as bound by the acts done under the authority of the Court").

Drawing from a wide range of early Anglo-American equity cases, Justice Story explained that "the same general principle pervades the whole course of Equity proceedings." Story, *supra*, § 96, at 95. "It has been well observed" in such cases, he agreed, "that the [necessary-parties] rule, being established for the convenient administration of justice, ought not to be adhered to in cases, in which, consistently with practical convenience, it is incapable of application;

for then it would destroy the very purpose, for which it was established." *Id.* § 96, at 95 & n.2;[3] *see also id.* §§ 98-99, at 98-99 & footnotes.[4]

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[3] Citing *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1008 (Ch. 1809) (named creditors could sue committee members on behalf of all creditors to recover misappropriated company assets); *Adair v. New River Co.*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (named shareholders could sue company directors for self-dealing in water supply contracts on behalf of all shareholders); *Good v. Blewitt*, 33 Eng. Rep. 343, 345 (Ch. 1807) (privateer case); *Wendell v. Van Rensselaer*, 1 Johns Ch. 344, 354-55 (N.Y. Ch. 1816) (named plaintiffs could proceed without joining all interested persons when bringing parties before the court would be "impracticable, or very inconvenient"); *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (Story, J.) (discussed *infra* pp. 16-17); *Wood v. Dummer*, 30 F. Cas. 435, 439 (C.C.D. Me. 1824) (Story, J.) (named bank noteholders could sue stockholders who received dividends from bank capital stock on behalf of all noteholders); *Taylor v. Salmon*, 41 Eng. Rep. 53, 56 (Ch. 1838) (minority shareholder could seek to enjoin directors on behalf of all shareholders to prevent actions that would violate the corporate charter); *Mare v. Malachy*, 40 Eng. Rep. 490, 490 (Ch. 1836) (plaintiff could sue former co-partners of mining venture who sold and transferred the mine to trustees of a joint stock company without joining trustees).

[4] Further citing *Leigh v. Thomas*, 28 Eng. Rep. 201, 201-02 (Ch. 1751) (privateer case); *Chancey v. May*, 24 Eng. Rep. 265, 265 (Ch. 1722) (corporate officers could sue on behalf of themselves and others to recover misappropriated funds); *Pearson v. Belchier*, 31 Eng. Rep. 323, 323 (Ch. 1799) (privateer case); *Cullen v. Duke of Queensbury*, 28 Eng. Rep. 1011, 1011 (Ch. 1781) (committee members could represent voluntary society without joining all members); *Lloyd v. Loaring*, 31 Eng. Rep. 1302, 1302 (Ch. 1802) (some members of voluntary society could litigate over society's property and rights in representative capacity); *Hendricks v. Robinson*, 2 Johns. Ch. 283, 296-97 (N.Y. Ch. 1816) (discusses when "one creditor may file a bill in behalf of himself and all the other creditors").

Justice Story applied these principles on the bench in *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820), where he comprehensively reviewed English precedent on representative litigation. *Id.* at 722-24. Writing as Circuit Justice, Story concluded that "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole," in "these an analogous cases," representative litigation may be appropriate. *Id.* at 722. Justice Story made clear that such a suit could proceed without joining all interested individuals as formal parties to the case—the entire point was to avoid that necessity. He also explained that the "same doctrine is applied ... to cases, where a material party is beyond the jurisdiction of the court." *Id.* at 723.

Justice Story's formulation never suggested that courts sitting in equity required jurisdiction over every absentee and, in fact, his explanation proved otherwise. While the necessary-parties rule had long required "that all persons materially interested, either as plaintiffs or defendants, are to be made parties," the "exceptions" were "just as old and as well founded, as the rule itself." *See* Story, *supra*, § 96, at 95-96 n.3 (quoting *Wood v. Dummer*, 30 F. Cas. at 438 (Story, J.)). First among them: "Where the parties are beyond the jurisdiction, or are so numerous, that it is impossible to join them all, a Court of Chancery will make such a decree, as it can, without them." *See ibid.* (quoting same). So long as the representative was properly before the court, the court could exercise jurisdiction over the entire controversy, including the interests of non-parties. *See id.* § 98, at 98 (true of

privateer cases); *id.* § 99, at 99-102 (true "in another class of cases, where the suit is brought on behalf of many persons in the same interest, and all the persons answering that description cannot easily be discovered or ascertained").

"In such a case," Story explained, "to require such persons to be made parties, would be equivalent to a dismissal of the suit, and amount to a denial of justice." Story, *supra*, § 78, at 79. And he expressly accepted that this reasoning applied to subject-matter jurisdiction, not just personal jurisdiction, "peculiarly applicable to suits in Equity in the courts of the United States," where introducing a non-diverse party to a litigation would defeat diversity jurisdiction and thus destroy the suit. *Id.* § 79, at 80 ("If, therefore, the [necessary-parties rule] were of universal operation, many suits in those courts would be incapable of being sustained therein, because all the proper or necessary parties might not be citizens of different States; so that the jurisdiction of the Court would be ousted by any attempt to join them."). Again, so long as the court had jurisdiction over the representative, absentees' interests could be adjudicated in the initial stages without requiring jurisdiction to be established over each absent representee individually. *See ibid.* ("On this account it is a general rule in the courts of the United States to dispense, if consistently with the merits of a case it can possibly be done, with all parties, over whom the Court would not possess jurisdiction."). As Justice Story put it, "if the suits be fairly conducted," the absent individuals in such cases "need not be made parties" to be "bound to allow the demands, admitted in those suits by the Court" in their absence. *Id.* § 140, at 138-39 & n.1.

This Court readily adopted the representative litigation approach soon after Justice Story published the second edition of his *Commentaries on Equity Pleadings*. In *Smith v. Swormstedt*, 57 U.S. 288 (1853), the Court confronted a dispute over a publishing fund between the northern and southern branches of the Methodist Episcopal Church. The Court expressly endorsed representative litigation to resolve the dispute. *Id.* at 302 ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others ... .") (citing Story, *supra*, §§ 97-99, 103, 107, 110-11, 116, 120). Such "bill may also be maintained against a portion of a numerous body of defendants, representing a common interest." *Ibid.* "For convenience, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Id.* at 303. "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." *Ibid.*

Indeed, *Smith v. Swormstedt* did not only adopt the representative litigation approach; it enshrined the bifurcated procedure deployed by courts in equity to resolve common questions. *See* 57 U.S. at 309, 312-13. In *Swormstedt*, after this Court resolved the common question as to the rights in the Methodist trust, it then directed that the case would be remanded for appointment of a special master to take

evidence and state an account of the individual ministers' actual injuries and entitlements. *Ibid.* The two-stage proceeding this Court required in *Swormstedt* is no different from the bifurcated procedure deployed in privateer suits, in which the Chancery court would first establish the crew's entitlement in an interlocutory decree and then refer the case to a master to handle the individual claims, allowing crew members to come forward and establish their shares, while binding them to the commonly resolved questions regardless. *See supra* pp. 10-11.

The Court made its ruling in *Swormstedt* despite the obvious impossibility of establishing personal jurisdiction over every potentially interested minister scattered across the country. *See* Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1899-900 (1998). As discussed in the work of amicus Professor Wilf-Townsend, this Court thus affirmed, at least implicitly, "that class actions enabled courts to resolve the claims of individuals who not only had not been served with process but also could not be served with process because they were outside the court's territorial jurisdiction." Daniel Wilf-Townsend, *Class Action Boundaries*, 90 Fordham L. Rev. 1611, 1641 (2022).

The Court's practice continued through the early twentieth century. In a series of cases involving fraternal benefit associations, this Court repeatedly confirmed that representative litigation could validly bind absent parties despite their lack of direct connection to the forum. These organizations—a distinctive kind of mutual life insurance company that operated on an assessment plan—became the testing

ground for class suit doctrine when they faced financial difficulties and litigation from members challenging reorganization plans. *See* Hazard, *supra*, at 1926-37. In *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915), the Court held that a class decree upholding increased assessments bound absent members despite the fact that the absentees did not participate in the earlier litigation. *See id.* at 1930 & n.370 (citing *Green*, 237 U.S. at 543-44). And in *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), this Court held that absent insurance plan members were bound by an earlier class decree, relying on the theory of representation. *See ibid.* (citing *Ibs*, 237 U.S. at 672) Indeed, in *Ibs*, "the members of the company's mutual assessment plan were not actually members of the corporation." *See id.* at 1931. "The *Ibs* court, citing *Swormstedt*, held that the plaintiff was bound by the prior class suit judgment because the class representatives 'had an interest that was, in fact, similar to that of the other members of the class, and that it was impracticable for all concerned to be made parties.'" *See id.* at 1932 & n.377 (quoting *Ibs*, 237 U.S. at 672).

In *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), this pattern culminated in a confrontation with the jurisdictional limits of class litigation. The case arose when Indiana citizens sought to relitigate claims previously resolved in a federal diversity class action brought by non-Indiana plaintiffs against an Indiana-based fraternal benefit association; this Court held that the earlier federal judgment bound the non-diverse Indiana citizens too, even though including them as parties in the original suit would have destroyed diversity jurisdiction. *Id.* at 366-67.

This Court's reasoning was straightforward: "Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree." *Ben Hur*, 255 U.S. at 366. The Court's conclusion rested not on having jurisdiction over every affected person, but on the adequacy of the original representation. *See id.* at 367 (concluding that named plaintiffs "truly represented the interested class"); *see also* Wilf-Townsend, *supra*, at 1642; Hazard, *supra*, at 1926-37. This Court's decision in *Ben Hur* reflects the principle that "class actions' status as representative litigation" allowed courts to exercise jurisdiction over a defendant with respect to the claims of absent class members without requiring those claims to satisfy the same jurisdictional test applied in individual litigation. *See* Wilf-Townsend, *supra*, at 1633-35.

Between *Ben Hur* and the adoption of modern Rule 23 in 1966, American courts continued to recognize the distinctive nature of representative litigation. For example, in cases involving unions and unincorporated associations, courts acknowledged the value of representative litigation when "it is not possible for the plaintiff to serve process on [an] association within a convenient jurisdiction." *See* Wilf-Townsend, *supra*, at 1643 & n.180 (quoting *Tunstall v. Bhd. of Locomotive Firemen & Enginemen*, 148 F.2d 403, 405 (4th Cir. 1945)). Courts reasoned that without representative litigation, "'[t]he dead hand of the common law'" would have given "'virtual immunity' to unincorporated associations." *See id.* at 1643 & n.181 (quoting *Calagaz v. Calhoon*, 309 F.2d 248, 251-52 (5th Cir. 1962)). The class device thus became an essential tool for courts to "advance goals not only of efficiency and efficacy but also of

accountability and law enforcement—permitting the substantive law to reach entities that might not otherwise be accountable in court." *See id.* at 1643.

When Rule 23 was amended in 1966, it codified this longstanding practice of representative litigation. The framers of the modern Rule 23 understood it as enabling courts to provide a remedy for "groups of people who individually would be without effective strength to bring their opponents into court at all." *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497, 497 (1969); *Amendments to Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, Rules of Criminal Procedure*, 39 F.R.D. 69, 102-04 (1966) (Advisory Committee's Notes to 1966 Amendment to Rule 23 explaining that it was intended to reach cases in which individual "interests may be theoretic rather than practical," such as when "the amounts at stake for individuals may be so small that separate suits would be impracticable") (citing Chafee, *supra*, at 273-75, among others). As equity had long permitted, Rule 23(b)(3) provides for class treatment when "questions of law or fact common to class members predominate" and class resolution is "superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). Nothing in Rule 23(b)(3) suggests that it is more jurisdictionally restricted than equity courts resolving representative suits brought under bills of peace. The new provision deliberately extended the historical functions of representative litigation, allowing courts to provide meaningful remedies for widespread but individually small injuries that could not practically be adjudicated separately.

II. Petitioner's And The Solicitor General's Competing Arguments Conflict With This Historical Practice.

Petitioner and the Solicitor General present different procedural and constitutional theories for reversal. If this Court reaches the merits, it should reject every one of their competing theories for colliding with our legal heritage.

Most radically, Petitioner contends that Article III forbids certification of a proposed damages class if the class might include a single uninjured member, even when Rule 23(b)(3)'s requirements are otherwise met. Pet'r Br. 15-17. The Solicitor General was conspicuously silent on this revolutionary claim. This Court should reject Petitioner's novel theory as inconsistent with the original understanding of Article III and the founding generation's endorsement of bifurcated representative suits in equity.

The Solicitor General, meanwhile, proposes a radical interpretation of Rule 23(b)(3), which would impose a bright-line prohibition on courts from certifying any proposed damages class if it is possible that a single putative member would ultimately lack a redressable harm. U.S. Br. 7, 12. Petitioner does not go so far, only reading Rule 23(b)(3) to forbid courts from certifying a proposed damages class that would include an undefined "appreciable number" of uninjured members. Pet'r Br. 37. Both Petitioner's and the Solicitor General's arguments neglect the text, history, and historical practice of Rule 23, which embraces the bifurcated approach to representative litigation that has been the cornerstone of equity practice since before the Founding.

A. Courts adjudicated common questions in representative suits based on jurisdiction over the named parties.

For centuries, courts have recognized that representative litigation can proceed so long as the court has jurisdiction over the representative. Petitioner's novel theory—that Article III requires each absent class member to establish a redressable injury to initially certify a class, a position the Government does not argue—finds no support in historical practice or this Court's precedents and would upend the very reason for the class device.

As previously discussed, Justice Story, a key architect of American equity jurisprudence, explicitly recognized that courts could resolve the interests of absent parties without treating them as ordinary litigants. *Supra* pp. 13-16. So too, this Court has consistently acknowledged that absent class members may be bound even if they would not have been within the court's jurisdiction in the original proceeding. *See supra* pp. 17-20 (discussing *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853), and *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921)). In these cases, the Court upheld the binding effect of a class judgment on absent members who resided beyond the court's ordinary territorial reach. *See ibid.* This Court rejected the notion that it lacked power over absent yet represented non-parties, determining instead that adequate representation enabled courts to adjudicate claims that "might not otherwise" be brought. *See* Daniel Wilf-Townsend, *Class Action Boundaries*, 90 Fordham L. Rev. 1611, 1643, 1654 (2022).

As discussed *supra* pp. 13-20, the historical evidence reveals that courts applied jurisdictional requirements only to named representatives, not the represented absentees, and this was true for personal as well as subject-matter jurisdiction. Drawing on cases like *Swormstedt* and *Supreme Tribe of Ben Hur*, amicus Professor Wilf-Townsend demonstrates that before Congress mandated otherwise in the Class Action Fairness Act, "absent class members' citizenship was not considered when assessing whether a federal court had diversity jurisdiction—and, indeed, the citizenship of absent class members did not even need to be known when establishing jurisdiction over the named plaintiffs and the class as a whole." Wilf-Townsend, *supra*, at 1635-36.

This approach makes sense. The named plaintiff's standing ensures a live case or controversy in the original sense of Article III, after which "the question becomes whether the absent class members' interests are sufficiently similar to the named party's interests for the named party to adequately represent the absent class members in court." *See* Wilf-Townsend, *supra*, at 1636. Petitioner's radical interpretation of Article III would strip Rule 23 of its essential function as a mechanism for efficient resolution of widespread but similar claims, a purpose that has animated representative litigation since its inception.

B. Nothing in the federal rules supports either Petitioner's or the Solicitor General's reading of Rule 23.

Rule 23's text, history, and purpose all contravene Petitioner's and the Government's competing interpretations of the federal rules. The rule's drafters

deliberately designed Rule 23's opt-out damages class device based on historical equity practice—they did not, based on modern doctrine that did not yet exist, impose heightened standing requirements on absent class members beyond what was required in equity.

The architecture of modern Rule 23 reflects its deep roots in equity practice. As this Court has already recognized, Rule 23's drafters deliberately rooted the modern class action in equity's long tradition of representative litigation. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 836 (1999) (explaining that Advisory Committee grounded modern class actions in representative suits in "equity" that "required absent parties to be represented, joinder being impractical"). As the principal architect of the 1966 amendments explained, the Advisory Committee recognized that equity had long permitted courts to "allow a consolidation of the expected actions and clear up the entire situation through a bill of peace" when "numerous persons stood in the same position toward an adversary." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i)*, 81 Harv. L. Rev. 356, 376 (1967). The Advisory Committee specifically designed Rule 23(b)(3) to capture these "important advantages of economy of effort and uniformity of result" without sacrificing procedural fairness, as equity had long permitted. *Id.* at 390.

Indeed, the Committee expressly noted that the original Rule 23 was an attempt to codify and refine Justice Story's foundational examination of representative suits, which recognized that class treatment was appropriate regardless of whether a

formal "privity of interest" existed. *See* Kaplan, *Continuing Work of the Civil Committee*, *supra*, at 377 & n.72 (quoting Joseph Story, Commentaries on Equity Pleadings and The Incidents Thereof, According to the Practice of the Courts of Equity of England and America § 120 (2d ed. 1840); citing James Wm. Moore, Moore's Federal Practice § 23.03, at 3418 n.9 (1st ed. 1938)). Story's approach, which Rule 23's drafters expressly embraced, held that a decree would "ordinarily be held binding upon all other persons standing in the same predicament," so long as "sufficient persons are before [the court], honestly, fairly, and fully to ascertain and try the general right in contest." *Ibid.* (quoting Story, *supra*, § 120). Rule 23 was always intended to sensibly fit centuries of equity practice within the Federal Rules of Civil Procedure.

The fact that Rule 23 was always founded on historical equity and representative-suit practice is acknowledged even by those who view the introduction of the Rule 23(b)(3) damages class in 1966 as "the most radical act of rulemaking since" the Federal Rules of Civil Procedure merged "law and equity" into "'one form of action.'" *See, e.g.*, Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. Rev. 903, 905 & n.1 (2018) (quoting John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 325 n.10 (2005)). Nothing in the adoption of the opt-out damages class procedure suggests that the drafters intended to impose modern standing requirements on absent class members. *See id.* at 908-11, 915-16.

On the contrary, throughout the evolution of Rule 23, the drafters have repeatedly declined to impose

the distinct limitations Petitioner and the Solicitor General now advocate. When amending Rule 23 in the 1990s, for example, the Advisory Committee considered but rejected adding a fifth factor "23(b)(3)(F)" that would have authorized courts to deny class certification unless "the probable relief to individual class members justifies the costs and burdens of class litigation." *See* Marcus, *supra*, at 919 & n.83 (quoting *Proposed Rules*, 167 F.R.D. 523, 559 (1996)). This proposal generated intense opposition precisely because it would have undermined the reason Rule 23 was adopted. *See id.* at 919 & n.85 (quoting letter from 144 law professors opposing "[p]roposed Rule 23(b)(3)(F)" because it "ignores the importance of deterring wrongful conduct that injures each individual slightly but in the aggregate costs society a good deal," *see* Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, Vol. 2, at 1-9 (1997)). After extensively weighing the "philosophical questions as to the proper role of Rule 23" and "cosmic choices about public law regulation through Rule 23," the Advisory Committee abandoned this proposal. *See id.* at 920 & nn.87-88 (quoting Minutes, Advisory Committee On Civil Rules 9, 19 (May 1-2, 1997)).

More recently, the Advisory Committee rebuffed longstanding calls to add a "no injury" limitation to Rule 23 in 2016. *See* Marcus, *supra*, at 930-33. The Committee declined "to revise Rule 23 to put an end to the 'no injury' class action." *See id.* at 931 & n.149 (quoting Letter from Lawyers from Civil Justice, to Advisory Comm. on Civil Rules & Rule 23 Subcomm. 5 (Mar. 14, 2016)). Shortly thereafter, Congress itself declined to adopt legislation that would amend the

rule to require that "each proposed class member suffered the same type and scope of injury as the named class representative or representatives"—akin to the very requirement the Solicitor General now asserts is mandated (but again, Petitioner does not agree that Rule 23(b)(3) requires *every* putative class member to have suffered a redressable harm). *See id.* 938-39 & nn.188-93 (quoting *Fairness in Class Action Litigation Act of 2017*, H.R. 985, Part I § 103, 115th Cong. (proposing new 28 U.S.C. § 1418(b)(2) as passed by House, Mar. 9, 2017)). The rulemaking process is available to address any policy concerns Petitioner or the Solicitor General still have. Consequently, the Court should not short-circuit that process by revising Rule 23 judicially, especially when Congress and the drafters have considered and rejected such pleas.

Indeed, Petitioner's and the Government's positions squarely conflict with the core rationale behind Rule 23(b)(3), which this Court recognizes was designed precisely to enable class treatment where numerous small, individual harms would otherwise go unaddressed. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. L. Rev. 497, 497 (1969)). The historical understanding of Rule 23 and the repeated, deliberate choices by the rule-makers make clear that nothing in Rule 23(b)(3) supports either Petitioner's or the Government's interpretation.

CONCLUSION

If it reaches the merits, this Court should decide this case in a way that is informed by the history of representative litigation.

Respectfully submitted,

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