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 FEDERAL JURISDICTION SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND DISMISSAL OF THE WRIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars with expertise in federal courts, federal jurisdiction, and the jurisdiction and procedure of this Court. *Amici* thus have an interest in the proper interpretation and application of this Court's procedure when jurisdictional problems arise after a case is granted. They offer this brief to assist the Court in evaluating the scope of its certiorari jurisdiction, the exercise of its discretion to dismiss improvidently granted petitions, and its unflagging obligation to assure itself that there exists a live controversy before it.

Amici take no position on how the Court should answer the question presented if it were to reach it. They file this brief solely as individuals, and institutional affiliations are given for identification purpose only.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made any monetary contribution to the preparation and submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

There is only one way for the Court to avoid issuing an advisory opinion in this case: dismiss the writ of certiorari as improvidently granted or for lack of

jurisdiction. The root of the problem is that Labcorp appealed the wrong class certification order. That created a tangle of jurisdictional, prudential, and factual issues that leave no viable path to the question presented. *See Arizona v. City & Cnty. of S.F.*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring).

In May 2022, the district court certified a damages class of "legally blind individuals" who were "denied full and equal enjoyment" of Labcorp's facilities in California. Resp. Br. App. 33 (the "May Order"). Labcorp filed a Rule 23(f) petition from that order in the Ninth Circuit, arguing that the district court had impermissibly certified a fail-safe class that "jettison[ed] all 'uninjured' persons from proposed class membership." Rule 23(f) Pet. at 3, No. 22-80053 (9th Cir. June 6, 2022), Dkt. 1-2. In other words, according to Labcorp, the class "exclude[d] all legally blind persons who did not attempt to, or did not want to, check in with a kiosk[.]" *Id.* at 2.

In response to Labcorp's arguments, the district court issued an updated class certification order in June 2022 (the "June Order"), clarifying that Labcorp had waived its fail-safe arguments. Then, in further response to Labcorp's arguments, the plaintiffs moved to modify the class definition. The district court obliged, and in August 2022, it certified a *modified* class of individuals "who, due to their disability, were unable to use" Labcorp kiosks in California. JA387 (the "August Order"). Labcorp then began arguing, in its Rule 23(f) briefing, that the problem with the *new* class was the opposite of the problem with the old one: While (from Labcorp's perspective), the old class had *no* uninjured class members, the new one had too many.

Crucially, however, Labcorp never filed a new Rule 23(f) petition, nor moved to amend its existing petition, to challenge either the June Order or the August Order. As a result, the Ninth Circuit granted Labcorp's Rule 23(f) petition from the district court's May class certification order and held that it had jurisdiction to consider *only* that order. JA399-400. Labcorp never sought certiorari on the Ninth Circuit's jurisdictional holding.

That creates a problem for Labcorp. If the Ninth Circuit's jurisdiction was confined to the May Order, then this Court's certiorari jurisdiction is confined to that order as well. But that order is no longer in effect, and, given Labcorp's briefing in this appeal, there is no live controversy with respect to that order. Labcorp makes no argument that the May class definition fails Rule 23, much less that it presents the question this Court granted certiorari to resolve. To the contrary, Labcorp argued below that the May class definition does not implicate the question presented because it includes only individuals who were injured. In Labcorp's own view, then, answering the question presented here would be a purely advisory exercise.

Because this Court lacks jurisdiction to issue such advisory opinions, it should dismiss the writ of certiorari. *See The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("Examination of a case on the merits . . . may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident. While this Court decides questions of public importance, it decides them in the context of meaningful litigation." (internal citation omitted)).

ARGUMENT

I. The Court Should Dismiss the Writ of Certiorari as Improvidently Granted or for Lack of Jurisdiction.

There are a small handful of recurring problems that sometimes lead this Court to dismiss a writ of certiorari as improvidently granted. They include situations where (1) a "hitherto unsuspected jurisdictional defect [has] become apparent"; (2) the Court "cannot reach the question accepted for review without reaching a threshold question not presented in the petition"; and (3) "[a]n important issue [is] found not to be presented by the record." Stephen M. Shapiro et al., *Supreme Court Practice* ch. 5, § 15 (11th ed. 2019). This is the rare case that presents all three types of problems at once.

First, jurisdictional defects have become apparent. As noted above, the Ninth Circuit held that the June and August Orders were outside its jurisdiction and therefore were not properly before the court. *See* JA399-400; *see infra* at 10 n.4. That puts the orders likely outside this Court's jurisdiction too. *See* 28 U.S.C. § 1254(1). And if this Court is limited to addressing the May class definition, the appeal is moot: There is no longer a class defined by that order. Moreover, by Labcorp's own admission—indeed, insistence—that order does not include any uninjured class members at all.

Second, if the Court instead were to attempt to avoid this mootness problem by considering the August Order, it would first have to address a "threshold question not presented in the petition," Shapiro, *Supreme Court Practice* ch. 5, § 15: Was that order a "[c]ase[] in the court[] of appeals"? 28 U.S.C.

§ 1254. That question raises its own thorny set of issues about the scope of a Rule 23(f) appeal. This Court should not resolve them here. Labcorp never petitioned for review of the Ninth Circuit's jurisdictional holding that the May Order was the only order within the scope of Labcorp's appeal. Consequently, the parties have not briefed that issue, and the Court is without the adversarial presentation necessary to decide it.

Finally, even if the Court somehow got past these problems, the record is devoid of any of the factual findings necessary to resolve the question presented. No court below held that there were *any* uninjured class members. Hence, no court below decided the question presented. To the extent that any uninjured class members exist, no court below addressed how feasible it would be to identify and excise them from the class. And there are unresolved disputes between the parties about the significance of certain evidence.

Because of these fundamental, unavoidable, and intractable problems, the Court should dismiss the writ as improvidently granted or for lack of jurisdiction.

A. Labcorp's Petition for Certiorari Failed to Challenge the Ninth Circuit's Jurisdictional Holding.

Rather than petitioning for review of the Ninth Circuit's case-specific jurisdictional holding, Labcorp sought certiorari only on a merits question. In so doing, Labcorp attempted to rewrite the procedural history of this case, eliding five crucial facts:

(1) the district court first certified a damages class in May 2022 (the "May Class");

(2) Labcorp filed a Rule 23(f) petition from that order, asserting that the May Class "jettison[ed] all 'uninjured' persons from proposed class membership" and therefore was "fail-safe";

(3) to address Labcorp's complaints about the *absence* of uninjured class members, the district court modified the class definition;

(4) Labcorp did not file a new Rule 23(f) petition (or amend its existing Rule 23(f) petition) to seek interlocutory review of the *modified* class definition; and

(5) Labcorp did not seek certiorari on the Ninth Circuit's holding that only the May Order was part of this appeal; instead, its petition for certiorari suggested (incorrectly) that the modified class definition in fact had been the class definition all along and asserted (again incorrectly) that there was "undisputed record evidence" that the modified class was "stuffed" with uninjured people.

As explained in more detail below, these facts create an insurmountable jurisdictional barrier to review.[2]

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[2] Consideration of these facts—which go directly to the propriety of this Court's exercise of certiorari jurisdiction, *see infra* Sections I.B-C—cannot be waived. *See* S. Ct. Rule 15 ("Any objection to consideration of a question presented based on what occurred in the proceedings below, *if the objection does not go to jurisdiction*, may be deemed waived unless called to the Court's attention in the brief in opposition." (emphasis added)). Moreover, to the extent that Labcorp's complete reliance on the new class definition became apparent only when it filed its merits brief, the objections could not have been fully anticipated at the time of the brief in opposition to the petition.

1. In the district court, the plaintiffs sought to certify a nationwide injunctive relief class under Rule 23(b)(2) and a California damages class under Rule 23(b)(3). On May 23, 2022, the court certified both classes. As is relevant here, the certified damages class encompassed:

> All legally blind individuals in California who visited a LabCorp patient service center in California during the applicable limitations period 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*.

Resp. Br. App. 33 (emphasis added).

2. On June 6, 2022, Labcorp filed a Rule 23(f) petition in the Ninth Circuit, arguing (for the first time) that the injunctive relief class *and* the damages class were impermissibly fail-safe, in part because they *excluded* all uninjured class members. As Labcorp put it, the classes "exclude[d] all legally blind persons who did not attempt to, or did not want to, check in with a kiosk[.]" Rule 23(f) Pet. at 2, No. 22-80053 (9th Cir. June 6, 2022), Dkt. 1-2.

Labcorp urged the Ninth Circuit to grant the Rule 23(f) petition to teach district courts how to "recognize fail-safe classes that jettison all '*uninjured*' persons from proposed class membership, and then claim that the class meets Rule 23's commonality requirements through commonly alleged injury." *Id.* at 3 (emphasis added).

On June 13, 2022, the district court issued an amended class certification order that clarified that

Labcorp had not preserved the fail-safe argument raised in its Rule 23(f) petition (the "June Order"). The June Order explained:

> To the extent LabCorp may be challenging the nationwide [injunctive relief] class on the ground that it is a fail-safe class, the court rejects the challenge, as defendant merely referenced a 'fail-safe class' in its 'Introductory Statement,' it provided no argument or authority to support its challenge.

JA341 n.4 (internal citation omitted).

3. In response to Labcorp's complaint that the injunctive relief and damages classes were fail-safe classes, the plaintiffs moved to modify the class definitions. On August 4, 2022, the district court granted the plaintiffs' motion. As relevant here, the court certified a modified damages class encompassing:

> 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*.

JA381 (the "August Class") (emphasis added). Thus, the August Class is the operative class definition—not the May Class, which it supplanted. Although the district court stated in a footnote that, in refining the class definition, it did not "materially alter the composition of the class or materially change in any manner" the amended June Order, JA386 n.10, that unexplained statement is hard to square with the

change in language between the May Order and the August Order (and with Labcorp's own arguments).[3]

4. While Labcorp notified the Ninth Circuit of the June Order and the August Order, it sought neither to file a new Rule 23(f) petition nor to amend its existing petition to challenge the June Order or the modified August Class.

As a result, the Ninth Circuit held that the only order properly before it was the May Order.[4] JA399-400. Evaluating that order, the Ninth Circuit concluded that the district court did not abuse its discretion in certifying the May Class. The court determined that common questions predominated and explained that "all class members were injured by the complete inaccessibility of LabCorp kiosks for blind individuals." JA399.

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[3] On appeal, the plaintiffs disagreed with the district court's no-material-change analysis. They argued that the August class definition was not within the scope of the Rule 23(f) appeal. *See* Pls.' Answering Br. at 58-59, No. 22-55873 (9th Cir. June 14, 2023), Dkt. 32 (arguing that Labcorp filed a Rule 23(f) petition to appeal only the May 23, 2022 class certification order and that, "[a]lthough LabCorp provided notice of the subsequent decisions, it did not file a subsequent Rule 23(f) petition challenging the refined Class definitions and, as such, the District Court's August 4, 2022, order is not properly before this Court"). The Ninth Circuit agreed with plaintiffs, expressly holding that only the May Order was properly before it. *See* JA399-400. Labcorp did not seek certiorari of that jurisdictional holding.

[4] In reaching this conclusion, the Ninth Circuit referenced the June Order when it may have intended to reference the August Order (which modified the class definition). What is crystal clear, however, is that the Ninth Circuit held it had jurisdiction to consider *only* the May Order. That holding precludes review of both the June Order and the August Order.

5. Labcorp sought certiorari from this Court, challenging the August Class on one ground: it supposedly contains uninjured members. In making this argument, LabCorp glossed over (at least) two critical points: (a) the district court approved two distinct damages class definitions—one in May and one in August; and (b) the Ninth Circuit made a jurisdictional determination that it could review only the May Class challenged in Labcorp's Rule 23(f) petition. *See* Cert. Pet. at 8, 10-11 (reciting the procedural history of the May Order but describing the August Class as the class "ultimately approved by the district court" and "at issue here").

Labcorp did not seek certiorari on the Ninth Circuit's jurisdictional holding nor raise it in its petition for rehearing en banc. Instead, Labcorp suggested to this Court that the Ninth Circuit "affirmed both of the district court's class-certification decisions[,]" referring to the Rule 23(b)(2) and 23(b)(3) classes. *Id.* at 11.[5] But the Ninth Circuit was explicit that it did not consider the modified August Class that Labcorp now challenges.

Thus, as discussed further below, this case presents insuperable jurisdictional problems that prevent resolution of the question presented.

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[5] Labcorp takes a similar approach in its merits brief, suggesting (incorrectly) that the Ninth Circuit "affirmed" the district court's certification of the operative August Class challenged before this Court. Pet. Br. at 11.

B. Because the Court Has Jurisdiction to Review Only the May Order, It Cannot Properly Reach the Question Presented.

If the Court confines its review to the Ninth Circuit's affirmance of the May Order, as it must, then it cannot properly reach the 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. Crucially, neither the district court nor the Ninth Circuit found that *any* members of the May Class lack Article III injury—the key factual predicate of the question presented.

This makes sense because, in its Rule 23(f) petition, Labcorp *affirmatively argued* that the district court certified a class that "include[d] only those individuals who were injured by the allegedly unlawful conduct." Rule 23(f) Pet. at 2-3, No. 22-80053 (9th Cir. June 6, 2022), Dkt. 1-2 (quoting *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022)). In other words, the class "exclude[d] all legally blind persons who did not attempt to, or did not want to, check in with a kiosk[.]" *Id.* at 2. Consistent with Labcorp's concession that the May Class was narrowly drawn, the Ninth Circuit concluded that "all class members" complained of injuries "result[ing] from the inaccessibility of a LabCorp kiosk." JA397.

Thus, based on Labcorp's own admission, the May Order created no occasion to consider the propriety of certifying a class when some class members are known to lack Article III injury. *See Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J.,

concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented."); *Boyer v. Louisiana*, 569 U.S. 238, 241 (2013) (Alito, J., concurring) ("Having taken up this case on the basis of a mistaken factual premise, I agree with the Court's decision to dismiss the writ as improvidently granted.").

Furthermore, the May Order was superseded by the August Order, creating a dilemma for Labcorp. If (as the district court suggested) the May Class and the August Class are essentially the same, *see* JA386 n.10, then the August Order does not implicate the question presented for precisely the same reason that the May Order does not implicate the question presented: No court has found that any class members lack Article III injury, and Labcorp took the position below that no such members of the May Class exist.

If, on the other hand, there *is* a material difference between the scope of the May Class and the scope of the August Class—and the Ninth Circuit's jurisdictional holding seems to be predicated on such a conclusion—then arguments about the May Class are moot because they do not address the operative class definition. Any decision by the Court regarding the May Order would therefore amount to an "advisory opinion[] which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943) (per curiam); *see also Unite Here Loc. 355 v. Mulhall*, 571 U.S. 83, 85 (2013) (Breyer, J., dissenting) (explaining that the Court dismissed the writ of certiorari as improvidently granted where it was "possible that the case [wa]s moot"); *see also Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the

issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.").[6]

Finally, as a prudential matter, Labcorp has forfeited any arguments based on the May Order by failing to address the language of that order—or make any argument that the May Order implicated the question presented—either in its petition for certiorari or in its merits brief. Both Labcorp's certiorari petition and its merits brief exclusively address the August Class, leaving the Court to guess whether those arguments are equally applicable to the May Class. The Court need not—and should not—engage in that exercise. *See CRST Van Expedited, Inc. v. E.E.O.C.*, 578 U.S. 419, 435 (2016) ("It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance.").

C. This Court Cannot Review the August Order Without Resolving Antecedent Jurisdictional Issues That Are Not Fairly Included Within the Question Presented.

By contrast, if the August Order is the one under review, the Court must wade through another equally complex set of jurisdictional and prudential issues before reaching the question presented.

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[6] To be sure, there remains a live Article III controversy between the parties in the district court. And there may have been a live Article III controversy in the Ninth Circuit, concerning a different set of issues in the ongoing class action. But, as the case is now framed in *this Court*, there is no live controversy here. Indeed, the parties would be free to disregard any opinion concerning the no-longer-operative class definition—a sure sign that any opinion based on the May Order would be purely advisory.

First and foremost, this Court likely lacks jurisdiction to hear challenges to the August Order. Labcorp petitioned for, and the Court granted, a writ of certiorari under 28 U.S.C. § 1254(1). And the Court's exercise of certiorari jurisdiction under section 1254(1) is expressly "confine[d] . . . to '[c]ases in' the courts of appeals." *Hohn v. United States*, 524 U.S. 236, 241 (1998) (second alteration in original) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 741-42 (1982)). Thus, the key question here is whether the August Order was a part of this "[c]ase in the court[] of appeals." If the August Order was not, then this Court lacks jurisdiction to hear challenges to it. *See* Shapiro, *Supreme Court Practice* ch. 2, § 2 ("If there were a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, that defect likewise would prevent the Supreme Court from resolving the merits upon the grant of certiorari before judgment.").

So, what was the scope of the case in the court of appeals from which Labcorp sought a writ of certiorari? According to the Ninth Circuit, the scope was limited to challenges to the May Order. As the Ninth Circuit explained, "LabCorp appeals only the district court's May 23 order," and "only the May 23 order was attached to LabCorp's interlocutory appeal, as is required by Federal Rule of Appellate Procedure 5." JA399-400. In addition, "LabCorp never attempted to amend or refile its interlocutory appeal to include the June 13 order" (let alone the August Order). JA400. Noting the importance of "polic[ing] the bounds of [its] jurisdiction" under Rule 23(f), the Ninth Circuit concluded that arguments regarding the district court's post-May orders were "not properly before [it]." *Id.*

Re-evaluating the Ninth Circuit's jurisdictional analysis—even though Labcorp did not seek certiorari on that question—would raise a host of complicated issues that have not been fully briefed, including:

- Did Labcorp need to amend or refile its petition for an interlocutory appeal after the district court issued the August Order (to give the Ninth Circuit jurisdiction to consider challenges to the August Order)? *See* Fed. R. Civ. P. 23(f).[7]

- Did Labcorp miss the deadline—a deadline that this Court has noted is "purposefully unforgiving" in light of the "benefits of deferring appeal until litigation concludes"—to amend or refile its interlocutory appeal? *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 193, 196 (2019) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)) (holding that a court may not invoke equitable tolling to forgive a party's failure to adhere to Rule 23(f)'s 14-day filing deadline).

- Do the answers to these questions turn on whether the August Order "materially alter[ed]" the May Order? *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1076 (7th Cir. 2014) (quoting *Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th

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[7] *See also* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3931.1 (3d ed. 2024) (noting Rule 23(f) was promulgated pursuant to "the Supreme Court's [express] authority under 28 U.S.C.A. § 1292(e) to prescribe rules that provide for appeal of an interlocutory order not otherwise appealable"); *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 48 (1995) (noting that "Congress' designation of the rulemaking process as the way to define or refine . . . when an interlocutory order is appealable warrants the Judiciary's full respect").

Cir. 2012)); *see Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 636 (9th Cir. 2020) (formally "adopt[ing] the material-change/status-quo test" for determining when a party can appeal a decision affecting a prior class-certification order).

- Did the August Order materially alter the May Order, given the significantly different language between the two? What, if any, consideration should this Court afford the district court's interpretation that the August Order did not materially alter the May Order, given the Ninth Circuit's contrary view? *Compare* JA386 n.10, *with* JA399-400.

- If the August Order did not materially alter the May Order, what is the effect of Labcorp taking contradictory positions on the corollary question of whether the class definition sweeps in uninjured class members? *Compare* Rule 23(f) Pet. at 3, No. 22-80053 (9th Cir. June 6, 2022), Dkt. 1-2 (suggesting the class "jettison[ed] all 'uninjured' persons from proposed class membership"), *with* Pet. Br. at 3 (asserting the class is "saturated with uninjured members").

This "mare's nest" of issues is not one that this Court should enter lightly or without the benefit of briefing. *City & Cnty. of S.F.*, 596 U.S. at 766 (Roberts, C.J., concurring); *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view." (internal quotation omitted)).

But even if this Court were inclined to do so, it would also have to clear a prudential hurdle: Labcorp's "petition for certiorari nowhere disputed the [Ninth Circuit's] explicit holding that" it had jurisdiction over only the May Order. *Mineta*, 534 U.S. at 109-10. Labcorp could not cure that defect even if it

were to belatedly contest the Ninth Circuit's holding in its forthcoming reply brief. *See id.* at 109 (dismissing case as improvidently granted in part because petitioner's attempt to make a threshold showing of standing in its reply brief came too late).

Nor is any question about the scope of Labcorp's Rule 23(f) appeal "fairly included" within the question on which this Court granted certiorari. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1993) (discussing S. Ct. Rule 14.1). Rather, such a question is a "threshold" question falling outside the question presented that this Court considers "only in the most exceptional cases." *Id.* at 32. This is not such a case. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 104 n.3 (2007) (declining to reach issues on which the petitioner did not seek certiorari).

D. Even Setting Aside the Jurisdictional Issues, the Factual Record Is Inadequate for Review of the Question Presented.

Finally, even if this Court waded its way through the significant jurisdictional and prudential problems discussed above to reach the question presented, it would still have to interpret Rule 23(b)(3)'s context-specific, case-specific predominance requirement on a grossly inadequate record and resolve factual disputes that were not presented to the district court or the Ninth Circuit. But it is "not the Court's usual practice to adjudicate . . . predicate factual questions in the first instance." *CRST Van Expedited*, 578 U.S. at 435.

As Respondents correctly note, *see* Resp. Br. at 18, there is no developed factual record in this case on questions critical to the predominance analysis,

including questions regarding which, if any, class members might be uninjured; the number of uninjured members; the mechanisms for identifying uninjured members; and whether uninjured members could be feasibly separated out of the class. This is unsurprising given that Labcorp argued below that the May Class—the only class appealed to the Ninth Circuit and therefore the only class properly before this Court—removed "all 'uninjured' persons from proposed class membership." Rule 23(f) Pet. at 3, No. 22-80053 (9th Cir. June 6, 2022), Dkt. 1-2. Without a robust factual record on these questions, the district court could not engage in the "rigorous analysis" required to assess predominance. William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 7:19 (6th ed. 2024).[8]

Labcorp now asserts before this Court that the August Class is saturated with uninjured people. But that claim is supported by scant evidence that is clearly the subject of dispute between the parties. *See* Pet. Br. at 8-9; Resp. Br. at 9, 17. Labcorp insists that "many blind patients have zero interest" in using the kiosks. Pet. Br. at 1. To support that point, Labcorp cites statistics about kiosk utilization rates across all patients—not a survey of patient preferences, much

[8] *See also* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778 (3d ed. 2024) (noting "the court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3)"); J. Alex Grimsley, *Annotated Manual for Complex Litigation* § 21.142 (4th ed. 2024) ("To analyze predominance, the judge must determine whether there are individualized issues of fact and how they relate to the common issues, and then examine how the class action process compares to available alternatives[.]").

less blind patients' preferences for using an accessible kiosk. *See* Cert. Pet. at 3; Pet. Br. at 8 ("Unrebutted record evidence shows that *over a third* of all Labcorp patients prefer not to use a kiosk[.]").[9] Although Labcorp referenced these kiosk utilization rates below, Labcorp now asks this Court for the first time to decide how and whether they apply to legally blind patients (a point that is clearly contested by Respondents). This Court is not well positioned to make such a factual determination in the first instance. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view[.]").

Even if this Court were to credit Labcorp's claim, it is not clear how that evidence should be weighed against other evidence cited (and disputed) in the lower courts. *See, e.g.*, Joint Br. Concerning Pls.' Mot. for Class Cert. at 21, 43, No. 2:20-cv-00893 (C.D. Cal. Apr. 26, 2021), Dkt. 66-1. For example, it is not clear how evidence of blind patients' kiosk preferences should be weighed against evidence that Labcorp trained its employees to direct patients to use kiosks, or whether that weighing can occur on a class-wide basis. But those questions could be dispositive under the complex, case-specific analysis Rule 23(b)(3)'s predominance requirement demands. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (noting

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[9] The record citation Labcorp relies on here, *see* Pet. Br. at 8-9 (citing C.A.App.509), makes no mention of its general patient population's preferences for checking in using a kiosk. *See* Resp. Br. App. at 36. It simply provides data from August 23, 2020, to February 19, 2021, on the number of Labcorp patients who checked in using a kiosk, mobile device, or with the front desk. *See* Excerpts of R. at 509, No. 22-55873 (9th Cir. Mar. 31, 2023), Dkt. 21-4.

that the predominance analysis requires undertaking "a case-specific inquiry").[10]

The Ninth Circuit's recent decision in a highly similar case, *Vargas v. Quest Diagnostics Clinical Laboratories, Inc.*, makes this point clear. Like this case, *Quest* involved a challenge to check-in kiosks at medical laboratories that were inaccessible to blind patients. Small differences between the factual record in this case and the factual record in *Quest* led the *Quest* court to conclude that class certification was *not* appropriate there. Nos. 23-2189, 23-3436, 2025 WL 636709, at *3 (9th Cir. Feb. 27, 2025) (affirming the district court's decision to deny certifying the Rule 23(b)(3) class where individualized damages inquiries overcame common issues).

It is appropriate for the district court, which is closest to the facts, to conduct the predominance analysis on an appropriately developed factual record in the first instance. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 641 (1997) (Breyer, J., concurring in part and dissenting in part) (noting that this Court should not "be in the business of trying to make these fact-based determinations" inherent in the class certification analysis, as "[t]hat is a job suited to the district courts in the first instance, and the courts of appeals on review"). By the same token,

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[10] *See also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982) (reiterating that class actions "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule [23] have been satisfied"); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000) (noting, when considering whether to grant an interlocutory appeal under Rule 23(f), "a limited or insufficient record may adversely affect the appellate court's ability to evaluate fully and fairly the class certification decision").

it would be inappropriate for this Court to resolve such questions—developed on a bare appellate record—for the first time. *See Mineta*, 534 U.S. at 110.

* * *

In sum, Labcorp's failure to seek certiorari on the Ninth Circuit's fact-bound jurisdictional holding creates cascading jurisdictional and prudential problems. The only order within the bounds of this Court's jurisdiction is the superseded May Order, which, by Labcorp's admission, contained no uninjured class members. Thus, there is no live controversy with respect to the May Order in this Court, and resolving the question presented on this record would result in an impermissible advisory opinion. *See Flast v. Cohen*, 392 U.S. 83, 96 & n.14 (1968) ("[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions."); *Uzuegbunam v. Preczewski*, 592 U.S. 279, 295 (2021) (Roberts, C.J., dissenting) ("To decide a moot case would be to give an advisory opinion.").

Attempting to reach the August Order likewise would invite a raft of additional issues, including difficult and unbriefed questions about the scope of appellate jurisdiction in a Rule 23(f) appeal.

This is a hopelessly flawed vehicle. The only way out of this thicket is to dismiss the writ of certiorari as improvidently granted or as moot.

CONCLUSION

For the foregoing reasons, the Court should dismiss the writ of certiorari as improvidently granted or as moot.

Respectfully submitted,

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