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 FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN TORT REFORM ASSOCIATION, AND PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents around 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The Alliance for Automotive Innovation ("Auto Innovators") is a collective trade organization representing the voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators

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[1] Pursuant to this Court's Rule 37.6, Amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from Amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

represents the manufacturers producing nearly 90 percent of cars and light trucks sold in the United States. Auto Innovators is directly involved in regulatory and policy matters affecting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, and technology and other automotive-related companies.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading innovative biopharmaceutical research companies, which are laser focused on developing innovative medicines that transform lives and create a healthier world. Together, we are fighting for solutions to ensure patients can access and afford medicines that prevent, treat and cure disease. Over the last decade, PhRMA member companies have invested more than $800 billion in the search for new treatments and cures, and they support nearly five million jobs in the United States.

Amici's members and their subsidiaries are frequent targets of class actions. Amici thus are familiar with class-action litigation, both from the perspective of individual defendants and from a more global perspective. Amici have a significant interest in this case because the proper application of Article III and Rule 23 raise issues of immense significance not only for their members, but also for the customers, employees, and other businesses that depend on them.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an increasingly common tactic in the class-action world: bootstrapping claims from a minuscule number of dissatisfied customers into billion-dollar class actions on behalf of largely uninjured classes. Courts that bless that tactic thus encourage wasteful litigation and bloated blackmail settlements. This Court should put a stop to it by making clear that Rule 23(b)(3) does not circumvent fundamental limitations on federal jurisdiction in class actions. To the contrary: "In an era of frequent litigation"—and especially in "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

Amici agree with the Petitioner's arguments, but offer an additional reason for endorsing the traditional standing requirement for putative class members at the class certification phase: Allowing a class to be certified without that showing raises serious questions about whether a court is actually exercising "judicial power." Although there were ancestral analogues to some other types of class actions, Rule 23(b)(3) was an "adventuresome innovation" in representative litigation. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997) (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It was created in the 1960s, and although some have sought to justify Rule 23(b)(3) as a species of joinder, it does not fit the traditional requirements for that concept because absent class members are not truly made parties to the litigation.

If federal courts have the judicial power to resolve damages claims of absent class members, then, it would seem to be as a cousin of joinder. Viewed through that lens, certification under Rule 23(b)(3) brings all the individual claims before the court just as they would be if they were parties' individual claims. And if joinder is the right way to think about Rule 23(b)(3), then it follows that the joining of absent class members through class certification requires that those members have Article III standing. Otherwise, the federal courts would be acting beyond the judicial power in adjudicating those claims.

This historical backdrop underscores why it is never permissible to certify a class known to contain uninjured members. Certification is a defining moment in a class action, bringing the absent class members' claims before the court for adjudication. Named plaintiffs without standing cannot join themselves to a case—neither can absent class members. It is not enough to weed out those known uninjured class members before judgment, *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021); their claims cannot be joined in the first place.

Class certification is also inappropriate when the class likely includes a material number of uninjured class members and plaintiffs offer no plan for winnowing out those uninjured individuals before final judgment without burdensome individualized inquiries. That rule comes directly from Rule 23(b)(3), under which plaintiffs must show that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). That is plaintiffs' burden of *proof*, not just a "pleading

standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). As a practical matter, this means that a putative class containing more than a *de minimis* number of hypothetically uninjured class members is unlikely to satisfy the requirements of Rule 23(b)(3).

The class certified here presents an excellent opportunity to illustrate these standards. The class contains class members *known* to lack standing. And it likely contains many more who lack standing, with no plausible classwide method of winnowing those uninjured members out. The class certification order must accordingly be reversed under both Article III and Rule 23.

ARGUMENT

I. Damages classes containing members without Article III standing stretch Article III past the breaking point.

For much the same reason that a plaintiff must establish standing at the outset of a suit, absent class members must establish standing at the class certification phase. Indeed, a court may not, consistent with Article III, certify any Rule 23(b)(3) classes *known* to contain members without standing. And if some putative absent class members *may* lack standing, courts must ensure that the certified class can be purged of uninjured members without burdensome individualized inquiries.

A. Damages classes must be defined to exclude class members known to lack Article III standing.

Standing is one of the most basic requirements for plaintiffs seeking to avail themselves of federal court. And it applies equally to named plaintiffs and absent class members. This Court's decision in *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017), proves this point.

Town of Chester addressed another form of entering the lawsuit—intervention by right—but the principle that resolves that case applies equally to Rule 23(b)(3). The Court started with the axiom that standing is *personal* to each party seeking relief: "Our standing doctrine accomplishes this by requiring plaintiffs to 'alleg[e] such a personal stake in the outcome of the controversy as to . . . justify [the] exercise of the court's remedial powers on [their] behalf.'" 581 U.S. at 438 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). Thus, "standing is not dispensed in gross." 581 U.S. at 439 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). Rather, "a plaintiff must demonstrate standing separately for each form of relief sought." 581 U.S. at 439 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)).

That "same principle applies when there are *multiple plaintiffs*." 581 U.S. at 439 (emphasis added). Thus, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Id.* And "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins

the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." *Id.* This principle "includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names." *Id.* at 440. So when an intervenor seeks "separate monetary relief," that intervenor "must establish its own Article III standing in order to intervene." *Id.* at 440, 442.

So too with damages class members. Each seeks "separate monetary relief." *Id.* at 440. So those class members "must establish [their] own Article III standing in order to [join]." *Id*. at 442. And even if certification does not fully join absent class members as parties in their own right, *see* part II *infra*, certification at least expands the number of *claims* for "separate monetary relief." *Id.* A class member lacking the constitutional minimum of standing thus must be defined out of the class.

B. Damages classes must be defined such that class members who may lack Article III standing can be winnowed out without predominant individual inquiries.

A proposed class definition that avoids members *known* to lack standing at the time of certification is not sufficient. If some class members *may ultimately* lack standing, then Rule 23(b)(3) forbids certification unless there is a means of winnowing such members out before final judgment without individual issues predominating. This is because "[e]very class member must have Article III standing in order to *recover* individual damages." *TransUnion*, 594 U.S. at 431 (emphasis added).

1. Class certification is such a momentous event—with such significant implications for defendants—that courts must apply a "rigorous analysis" to the requirements of Rule 23. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). That includes a "'close look' at whether common questions predominate over individual ones" under Rule 23(b)(3). *Id.* at 34. That rigorous analysis of predominance is especially important when, as here, a defendant shows that it has valid individualized defenses—such as a lack of Article III standing—to some class members' claims. In that circumstance, a district court cannot certify a class without a plan to winnow out claims of absent class members without standing.

Rule 23 creates an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). But class actions still raise "important due process concerns" for both defendants and absent class members. *Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005). So district courts must "conduct a 'rigorous analysis' to determine whether" a proposed class satisfies Rule 23, "even when that requires inquiry into the merits of the claim." *Comcast*, 569 U.S. at 35 (citing *Wal-Mart*, 564 U.S. at 351).

2. Chief among Rule 23's safeguards is the requirement that a named plaintiff "affirmatively demonstrate" that common questions predominate over individual ones. *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart*, 564 U.S. at 350); *id.* at 34 (quoting *Amchem*, 521 U.S. at 615) (noting "the court's duty to take a 'close look' at whether common questions

predominate over individual ones"); *see* Fed. R. Civ. P. 23(b)(3). This "demanding" predominance requirement ensures that "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623–24. That cohesion exists only when all class members "possess the same interest and suffer the same injury." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Merely pleading "a violation of the same provision of law" and labeling it a common question is not enough. *Wal-Mart*, 564 U.S. at 349–50. The need to prove predominance by establishing a common, classwide injury ensures "sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620–21.

To satisfy the predominance requirement, plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Comcast*, 569 U.S. at 37. Otherwise, a liability finding about a named plaintiff cannot determine "in one stroke" whether defendants are liable to the entire class, and liability cannot be a "common" issue. *Wal-Mart*, 564 U.S. at 350. So dissimilarities within the proposed class often defeat class certification even when some commonality exists. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009).

Rigorous analysis requires holding Plaintiff to the burden of *proving*—not just alleging—that the claims "in fact" can be litigated on a classwide basis without the need for individualized mini-trials. *Comcast*, 569 U.S. at 33–34. Nor is it a burden that plaintiffs can

satisfy with mere allegations; "evidentiary proof" is required. *Id.*

3. That rigorous analysis has special force when some class members may lack meritorious claims, including for a lack of Article III standing, thus summoning the "spectre of class-member-by-class-member adjudication." *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2019) (for class members who "cannot prevail on the merits," their "claims must be winnowed away as part of the liability determination"). In that scenario, "the district court must determine . . . whether a class-member-by-class-member assessment of the individualized issue will be unnecessary or workable." *Van*, 61 F.4th at 1069. That determination requires a "winnowing mechanism" to cull those meritless claims, and the process must be "robust enough to preserve the defendants' Seventh Amendment and due process rights to contest every element of liability and to present every colorable defense." *Rail Freight*, 934 F.3d at 625.

And that winnowing plan must be in place *before* class certification:

> [T]o determine whether a class certified for litigation will be manageable, the district court must *at the time of certification* offer a reasonable and workable plan for how that opportunity will be provided in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues.

In re Asacol Antitrust Litig., 907 F.3d 42, 58 (1st Cir. 2018) (emphasis added). Without that plan in place, plaintiffs cannot "'affirmatively demonstrate' that the commonality and predominance requirements are satisfied." *Rail Freight*, 934 F.3d at 622 (quoting *Wal-Mart*, 564 U.S. at 350); *accord Asacol*, 907 F.3d at 61 (Barron, J., concurring) (without a viable winnowing plan, "the plaintiffs have not yet shown that common rather than individual issues would predominate if this class were certified").

C. This damages class is rife with uninjured members.

This damages class cannot be certified for two reasons. It contains class members (like named Plaintiff Vargas) *known* to lack Article III standing. *See* part II.A. And the class is also likely to contain many other class members without standing who cannot be winnowed out except by burdensome individualized inquiries. *See* part I.B. In both respects, those uninjured members doom this damages class.

"Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016); *see also TransUnion*, 594 U.S. at 427 ("[U]nder Article III, an injury in law is not an injury in fact."). In the context of Title III of the ADA, the lower courts have found standing when "a disabled individual has encountered or become aware of alleged ADA violations that deter his patronage of or otherwise interfere with his access to a place of public accommodation." *See, e.g.*, *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 947 (9th Cir. 2011).

The broadly defined damages class here is not remotely limited to those with Article III standing, *i.e.*, those who have experienced a concrete injury. The District Court made clear that nothing in its class definition would exclude uninjured class members because class identification hinges on LabCorp's records—not the class members' experiences:

> [I]dentifying class members here would not be difficult. LabCorp knows how many patients checked in, and has information on those patients from their provided ID and insurance. While it may not know at this point which persons would fall into the category of legally blind, making that determination at a later stage of the proceedings would not be an unduly burdensome task.

Davis v. Lab'y Corp. of Am. Holdings, 604 F. Supp. 3d 913, 934 (C.D. Cal. 2022). Indeed, the District Court confirmed that the class is *not* limited to those who "personally encountered" an alleged ADA violation "that caused them difficulty, discomfort or embarrassment." *Id.* at 929–30.

As explained in Petitioner's Brief (at 8–9), this record establishes that there are many uninjured class members, with no expeditious way to sort them out. For starters, many class members did not use a kiosk and so would not even have been *aware* of—let alone injured by—any impediment to their access. The data shows that roughly a quarter of LabCorp visitors checked in at the front desk with an employee, and another tenth checked in online before setting

foot in a patient service center.[2] *Id.* Indeed, *Plaintiff Vargas himself*—the only damages class representative—did not even try to use the kiosk, and instead checked in at the desk.[3] *Id.* at 7. There is nothing to establish that all class members *were even aware of the kiosk option.* Thus, many class members did not and would not have personally encountered the kiosk in any event. The mere presence of an unused kiosk caused no concrete injury to them. And of the class members who did not successfully complete check-in at a kiosk, many would have completed the process (again without complaint) at a staffed desk. *Id.* at 8–9. Article III does not countenance such "satisfied customer standing."

Even if *any* class member had Article III standing—a conclusion not supported by this record—*many* experienced no difficulty, discomfort, or embarrassment and thus faced no impediment to their equal access. Yet the Ninth Circuit shirked its obligation to evaluate each class member's injury-in-fact, denying that "it [is] required that each plaintiff suffer identical harm; rather, the relevant inquiry is

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[2] These same facts confirm that there is no consistent nationwide practice regarding the use of a kiosk—let alone an *unlawful* classwide practice—as required for a nationwide injunctive class under Rule 23(b)(2) and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–55 (2011). This Court's remand should instruct the Ninth Circuit to reconsider that Rule 23(b)(2) class in light of what Article III requires.

[3] The fact that a named plaintiff brought his claims as part of a putative class action "adds nothing to the question of standing" because that plaintiff still must show his own concrete and particularized injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976)).

whether class members were subject to the same injuring behavior." Pet. App. 5a. But being subject to the same behavior is no substitute for Article III injury-in-fact. Indeed, the court acknowledged that the certified class may contain "more than a *de minimis* number of uninjured class members." Pet. App. 5a n.1. Yet it identified no plan to winnow out those uninjured class members. The court's single perfunctory paragraph contains hardly *any* analysis—let alone the rigorous analysis required under Rule 23(b)(3).

Thus, the presence of uninjured class members precludes a damages class, and in any event the individualized efforts needed to separate them from any affected class members would destroy predominance under Rule 23(b)(3).

II. Declining to enforce standing requirements at the class certification phase would raise significant concerns under the Article III "judicial Power."

While this Court has most frequently focused on standing in the context of Article III's case or controversy requirement, it is useful to also consider Rule 23(b)(3) from the perspective of judicial power. "To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society," this Court has repeatedly counseled that courts must "exercise power that is judicial in nature." *Gill v. Whitford*, 585 U.S. 48, 65 (2018) (internal quotation marks omitted). That requirement imposes limitations on the types of matters upon which it is appropriate for a court to act. *Cf. Murray's Lessee v. Hoboken Land & Improvement*

Co., 59 U.S. 272, 284 (1855) ("[W]e do not consider Congress … can [] bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."). And in establishing the metes and bounds for such matters, the Court has looked to history as its guide. *See, e.g.*, *Grupo Mexicano de Desarrollo, S. A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999); *see also Honig v. Doe*, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting) ("[C]ourts simply choose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition."). That history raises difficult questions here.

This Court has already acknowledged that Rule 23(b)(3) was an "adventuresome innovation" in federal practice, framed for situations "in which class-action treatment is not as clearly called for." *Amchem*, 521 U.S. at 614–15 (quoting Advisory Committee's Notes, 28 U.S.C.App., p. 697 (1994 ed.)). It allows courts to conclusively resolve the legal claims of absent class members not formally *joined as parties*. The equitable precursors to class actions justify some forms of such litigation under Rule 23(b), but they provide little basis for the key 1966 innovation that allowed the aggregation of severable damages claims into a single case. And that equitable lacuna only highlights the need to show at the class-certification phase that absent class members have standing.

A. Rule 23(b)(3) damages class actions differ in significant ways from traditional joinder litigation.

Article III courts certainly have authority, under the right circumstances, to join claims of multiple parties together. And at first glance, damages class actions may resemble a mere "species" of "traditional joinder." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 408 (2010) (plurality). So said the *Shady Grove* plurality in a parenthetical aside. That opinion described class actions as "merely enabl[ing] a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Id.* Thus, the plurality said, Rule 23(b)(3) is valid like other "rules allowing multiple claims (and claims by or against multiple parties) to be litigated together," *id.* (citing Fed. R. Civ. P. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions)), "at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action," *id.*

But Rule 23(b)(3) differs in significant ways from traditional joinder. Joinder requires an unnamed class member to be made a *party* to the litigation. Yet absent class members are *not* currently made true parties for at least four reasons.

First, absent class members are not brought before the Court in the way that parties traditionally are. A "party to the action" is traditionally "[a] person who is named as a party to an action and subjected to the jurisdiction of the court." Restatement (Second) of Judgments § 34(1) (1982). For plaintiffs, that means choosing at the outset to bring their claims and then

having complete control over them. But absent class members are not so named, and may not even be aware of the action until some later phase of the litigation in which they receive court-ordered notice.

Second, absent class members are not considered for purposes of traditional statutory diversity jurisdiction or venue. *See, e.g.*, *Snyder v. Harris*, 394 U.S. 332, 340 (1969) ("[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.").

Third, absent class members cannot participate in discovery by taking depositions, serving interrogatories or requests for admission, or requesting subpoenas. *See* Fed. R. Civ. P. 30(a)(1), 31(a), 33(a)(1), 45(a)(3). Nor can they move for summary judgment as named plaintiffs could. Fed. R. Civ. P. 56(a).

Fourth, absent class members are bound by a judgment in a Rule 23(b)(3) class action not because they are parties to the judgment, but rather "because they are represented by class members who are parties." *Devlin v. Scardelletti*, 536 U.S. 1, 18 (2002) (Scalia, J., dissenting) (citing Restatement (Second) of Judgments §§ 41, 75, Comment *a* (1982)).[4]

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[4] The opinion for the Court in *Devlin* recognized that absent class members are not parties for all purposes, but held them to be

Rule 23(b)(3) thus provides a species of *representative litigation*—not of traditional joinder. Representative litigation—the forerunner to class actions—was an *exception* to traditional joinder rules, allowing the adjudication of rights *without* making an individual a party. So the next question is whether the equitable forebears of representative litigation would have allowed this sort of adjudication.

B. No traditional exception to joinder justifies Rule 23(b)(3) damages class actions.

The answer is no: the traditional equitable forms of representative litigation do not support the Rule 23(b)(3) damages class action.

1. In general, equity demanded that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." *West v. Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (Story, J.). But "equity developed exceptions" to that necessary parties rule. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999).

The hallmark of those exceptions for representative—or class-based litigation—at equity was the assertion of a right held in common, or in some cases, rights held in a common fund or property. Justice Story's 1840 treatise categorized those exceptions for representative litigation as follows:

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sufficiently like parties to appeal the denial of their objections. 536 U.S. at 9.

> (1) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole;
>
> (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; [and]
>
> (3) 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*, ch. IV, § 97 (2d ed. 1840). But that third category "appl[ied] only where the rights of the parties are in common with each other so that the benefit of the judgment inure[d] to the whole class and not to individual members thereof." Joseph J. Simeone Jr., *Class Suits under the Codes*, 7 Case W. Res. L. Rev. 1, 14 (1955); *see also* Story, *Commentaries on Equity Pleadings* § 120 ("[I]n all of [these cases] there always exists a common interest or common right, which the Bill seeks to establish and enforce, or a general claim or privilege, which it seeks to establish, or to narrow, or take away.").

A brief illustration of that traditional understanding of common rights may be useful. For the first category, Justice Story described a suit by some crew members of a privateer seeking their "proportion of the prize money"—the crew would have had a common interest in obtaining that money. *Id.* § 98. For the second, Justice Story described a case

brought by partners of a works project against its treasurers and managers for alleged embezzlement of the partnership funds—the partners had formed the voluntary partnership and their interests were aligned in opposing embezzlement. *Id.* § 108. In the third category, Justice Story cited a suit by tenants against a lord to establish some right, such as "a right to cut turf"—the tenants might have distinct interests in their right to cut turf, but any right to do so would have inured to the tenants in common. *Id.* § 121.

That emphasis on rights held in common made the class action device infrequently used for much of American history. But when it was, the Supreme Court approved the device under this equitable tradition. In *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853), the Court endorsed a representative suit by some traveling preachers against other traveling preachers over access to a common fund known as the "Book Concern," which had been created and funded before the preachers' church divided in two. Recognizing that there were many more traveling preachers not made parties to the suit, the Supreme Court stated 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." *Id.* The court then described and endorsed the rules of equity on this subject set forth in Justice Story's treatise. *Id.*

2. In promoting the merger of law and equity, Professor James William Moore both refined and expanded on those traditional forms of representative litigation. He took Justice Story's three categories and grouped them primarily into the first category of

the new Rule 23, which authorized a class action "when the character of the rights sought to be enforced for or against the class is … joint, or common, or derivative in the sense that an owner of a primary right neglects or refuses to enforce such right and the class thereby obtains a right to enforce the primary right." James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L. J. 551, 571 (1937) (hereinafter "*Some Problems*"). He then placed the so-called "common fund" cases—those where plaintiffs were seeking money from a fund to which others had rights—into a second category, "when the character of rights sought to be enforced for or against the class is … several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action." *Id.* Finally, he proposed a third category for cases "when the character of the rights sought to be enforced for or against the class is … several, and there is a common question of law or fact" affecting the "several rights" and a common relief is sought. *Id.* These categories were known as "true," "hybrid," and "spurious," respectively. *Id.* at 572–76.

The roots of the first two categories can be seen in Justice Story's summary of equitable practice. But Professor Moore admitted that "[t]he spurious class action ha[d] not been recognized in … England" or even all American jurisdictions. *Id.* at 575. Instead, he thought it justifiable in the federal courts because, unlike in England where injured parties might join as plaintiffs, the complete-diversity and amount-in-controversy requirements might serve as a roadblock to traditional joinder. *Id.*

At first blush, "spurious" class actions might seem the forerunner of today's damages actions. But there was a key difference: although judgments in "true" class actions bound the class and judgments in "hybrid" class actions bound persons having claims affecting specific property, judgments in "spurious" class actions were conclusive only on parties and privies (and intervenors) to the proceedings. *Id.*; 3 J. Moore, *Federal Practice* ¶ 23.11, at 3468-69 (2d ed. 1967); *see also* Fed. R. Civ. P. 23 (1966 adv. comm. note) ("[T]he judgment in a 'spurious' class action would extend only to the parties including intervenors.").

Thus, "spurious" actions weren't really class actions at all, at least not as that term is used today. Instead, they were "in essence merely a form of permissive joinder in which parties with separate and distinct claims were allowed to litigate those claims in a single suit simply because the different claims involved common questions of law or fact." *Snyder*, 394 U.S. at 335; *see also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 384 n.112 (1967) (The spurious class action was "often denigrated as a mere permissive joinder device adding little to rule 20; adequacy of representation was thought of small importance because the judgment had limited extent."). It is true that there was the possibility for broader application of rulings—plaintiffs would wait to see if a favorable ruling was reached, then intervene to try to exploit that ruling without having to show an independent basis for federal jurisdiction or satisfy the statute of limitations. Moore, 25 Geo. L.

J. at 575. That practice posed its own problems for judicial power. But there was also no notice provision and plaintiffs accordingly bore the burden of learning of their claim and bringing it forward as a party, rather than simply being brought in by a named class member. The "spurious" class action thus was a limited tool.

3. In 1966 the Federal Rules Committee departed from a focus on the "common" nature of the right at issue and shifted its focus to potential remedies. As in the 1938 Rules, the first category (in Rule 23(b)(1)) encompassed most of the traditional categories of representative litigation, namely those in which:

> [T]he prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests.

Fed. R. Civ. P. 23(b)(1) (1966 ed.). If rights held in common were adjudicated piecemeal, the decision would effectively decide the interests of nonparties. Likewise, if rights to a common fund were adjudicated in an individual suit, it would, as a practical matter, impede the ability of others with rights in the common fund to protect their interests.

The second category in Rule 23(b)(2) was new, though also at least partially supported by the

separate equitable tradition of injunctions. That category includes cases when 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. The Advisory Committee gave civil rights cases as a good example of the category, and indeed Pomeroy's Equitable Jurisprudence noted that "the illegal, unlawful, or improper acts of public officers may be restrained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits." John N. Pomeroy, *Pomeroy's Equitable Jurisprudence & Equitable Remedies*, vol. iv, § 1345 (1905).

But Rule 23(b)(3) lacks grounding in any of those traditional forms of representative litigation. For the first time, the Federal Rules gave courts a tool to amass and resolve—in a binding fashion—damages claims through representative litigation not involving common rights or common funds. No doubt, the one-way intervention promoted by the Professor Moore's "spurious" class action was problematic. Yet Rule 23(b)(3) gave courts a far greater power than they had possessed under either law or equity—the power to resolve the claims of individuals who were not truly "parties" to the suit and whose rights were distinct from those who were parties to the case.

* * *

Rule 23(b)(3) class actions are thus neither fish nor fowl. They lack some of the hallmarks of traditional joinder because absent class members are not true parties. And they do not qualify as any of the

traditional species of representative litigation. Yet as this Court has already recognized, "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *TransUnion*, 594 U.S. at 427. Requiring putative class members to establish their standing at the class-certification phase is thus one critical way in which courts can bring Rule 23(b)(3) class actions more in line with constitutional requirements.

III. Extending class certification to the uninjured harms American businesses and the economy as a whole.

The rigorous analysis required under Article III and Rule 23 is badly needed to combat the ills that burdensome class action litigation on behalf of uninjured class members imposes on the business community and the public. Those ills are especially severe in the context of litigation under Title III of the ADA, particularly as plaintiffs seek to leverage those claims to support additional claims for massive statutory damages under California's Unruh Act.

1. Class action litigation costs in the United States are enormous and growing. Those costs surged to $3.9 billion in 2023, continuing a long-running rise. *See* 2024 Carlton Fields Class Action Survey, at 6–7, https://ClassActionSurvey.com. Defending *even one* class action can cost a business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And those class actions can persist for years, accruing legal fees, with no resolution of class certification—let alone the dispute as a whole. *See*

U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), http://bit.ly/3rrHd29 ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

The extraordinary exposure opened up by a court's certification of a class also creates immense pressure on defendants to settle even cases that ought to be resolved in their favor on the merits. Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). As the Supreme Court explained, "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail").

Rigorous enforcement of both Article III and Rule 23 at the class-certification stage would be much-needed progress. This enforcement would ensure that parties do not waste time and money—and defendants do not face undue settlement pressure—litigating a certified class action through trial only for a court to conclude at final judgment that the class includes uninjured class members. If the Ninth Circuit's ostrich approach to uninjured class members is affirmed as the law, however, then businesses will

continue to face immense pressure to settle improperly brought class actions regardless of whether class members have suffered any actual harm. That coercion hurts the entire economy, because the attorney's fees and costs accrued in defending and settling overbroad class actions are ultimately absorbed by consumers and employees through higher prices and lower wages.

2. Those deleterious effects are magnified in the burgeoning context of litigation under Title III of the ADA and the Unruh Act.

Federal lawsuits invoking Title III of the ADA have mushroomed recently. In 2013, there were fewer than 3,000 such lawsuits. *See* Minh Vu, Kristina Launey & Susan Ryan, *ADA Title III Federal Lawsuit Filings Hit An All Time High*, Seyfarth Shaw LLP (Feb. 17, 2022), https://tinyurl.com/2021-ADA. But over the last seven years, ADA claims have exploded on average to nearly 10,000 per year. Minh Vu, Kristina Launey & Susan Ryan, *Plaintiffs Filed More Than 8,200 ADA Title III Federal Lawsuits in 2023* (Jan. 29, 2024), https://tinyurl.com/2023-ADA.

California has been a dominant venue for those ADA Title III lawsuits. *Id.* No-injury ADA lawsuits are particularly problematic in California, where (as here) plaintiffs seek to leverage alleged technical ADA violations into Unruh Act claims for statutory damages of $4,000 *per* class member, injured or not. *See* 604 F. Supp. 3d at 928–29. Thus, the failure to exclude uninjured class members at certification has a force-multiplier effect far beyond the merits of any claim. That unjustifiable effect is all the more reason to reverse here with instructions to enforce the

requirements of Article III and Rule 23 with the requisite rigor.

CONCLUSION

For these reasons and those in Labcorp's brief, the judgment should be reversed.

Respectfully submitted,

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