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 Mortgage Bankers Association, American Bankers Association, America's Credit Unions, Consumer Data Industry Association, and Independent Community Bankers of America as *Amici Curiae* Supporting Petitioner

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INTEREST OF THE AMICI[1]

The Mortgage Bankers Association is the national association representing the real-estate finance industry, an industry that employs more than 275,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real-estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,000 companies includes all elements of real-estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life-insurance companies, credit unions, and others in the mortgage-lending field. For additional information, visit MBA's website: *www.mba.org*.

The American Bankers Association is the voice of the nation's $24.1 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $19.2 trillion in deposits and extend $12.7 trillion in loans. ABA members—located in each of the fifty states and the District of Columbia—include

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[1] No counsel for any party authored any portion of this brief, and no one other than the *amici curiae*, their members, and their counsel provided any monetary contribution intended to fund its preparation or submission.

financial institutions of all sizes and types. ABA advocates for banks before Congress, regulatory agencies, and the courts to drive pro-growth policies that help customers, clients, and communities thrive.

America's Credit Unions represents our nation's nearly 5,000 federally and state-chartered credit unions that collectively serve over 142 million consumers with personal and small-business financial-service products. America's Credit Unions delivers strong advocacy, resources, and services to protect, empower, and advance credit unions and the people they serve. The organization advocates for responsible legislative policies and regulations so credit unions can efficiently meet the needs of their members and communities.

The Consumer Data Industry Association is a national trade association representing consumer-reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background-check companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs.

The Independent Community Bankers of America has one mission: to create and promote an environment where community banks flourish. ICBA is a national trade association that powers the potential of the nation's community banks through

effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business models and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams.

Amici's members are affected by the issues in this case—not just the legal rules themselves, but the practical significance of a rule like the one the Ninth Circuit currently follows. Under that rule, federal courts may certify a class that includes many unnamed plaintiffs who could not sue in their own right because they lack standing, and who may not recover damages in federal court even as unnamed class members. Courts following this approach essentially kick the can down the road, saying that they will revisit the standing of individual unnamed class members sometime before a final judgment would award them damages—which would be unconstitutional. But as experience demonstrates, courts often simply do not keep that promise after certifying a class. This error is self-reinforcing: certifying a class containing uninjured plaintiffs pads the class, boosts the potential recovery and the *in terrorem* effect of the certification, and increases the likelihood that the case will settle without the standing defect ever being addressed.

SUMMARY OF ARGUMENT

1. The answer to the question presented in this case is straightforward. This Court's precedents make clear that uninjured plaintiffs are not allowed through the courthouse door. Because the Rules Enabling Act prohibits the Federal Rules of Civil Procedure from abridging, enlarging, or modifying

any substantive right, people who would not be allowed through the courthouse door as individuals are not allowed through the courthouse door as members of a plaintiff class, either.

2. The rule followed in the Ninth Circuit encouraging courts to certify classes that contain uninjured members is not just legally wrong: it has proven unworkable in practice and unfair to litigants. Even those courts that follow this rule acknowledge that after certifying a class with uninjured members, they are still obliged to winnow those members out of the class later on. But *later on* usually never comes. Courts struggle to devise a mechanism to identify uninjured class members that is administratively feasible and that preserves defendants' right to litigate individual standing defenses. And the mechanism seldom, if ever, proceeds from theory to reality. Defendants can even find themselves going to trial with no way to challenge uninjured class members' lack of standing. And the *in terrorem* value of class actions regularly forces defendants into multimillion dollar settlements of cases they would have *won* if the standing problem had been addressed at the class-certification stage. Simply "kick[ing] the can down the road" is unworkable. *AstraZeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 33 (1st Cir. 2015) (Kayatta, J., dissenting).

ARGUMENT

Nobody can come to federal court asking for an award of damages if he has no actual injury. A concrete injury is a basic requirement for getting in the courthouse door. But in several circuits, people with no actual injury (in the case at bar, vast numbers of them) are allowed to come into court to

seek a monetary recovery by following along behind a named plaintiff who seeks damages for an actual injury. Because Article III does not let anyone who lacks an injury sue for damages in an individual federal action, the Rules Enabling Act does not and could not allow such an uninjured person to pursue damages through certification of a class action. Nor would the proper operation of Rule 23 permit certification before the court and the parties exclude from any defined class those who have no injury.

The contrary rule followed by the Ninth Circuit here, and by some other courts, is not just wrong—it is harmful. Certifying a class with uninjured members does not resolve their standing problem—it just saves it for later, because this Court has made clear (most recently in *TransUnion*) that uninjured class members cannot *recover* damages in a class action. But certifying a class while deferring the standing analysis necessarily means certifying classes that are unlawfully large—and requiring defendants to litigate against those classes, with the attendant pressure to settle that class size creates. Punting the hunt for the uninjured has proven both unworkable and unfair in practice.

I. Article III, the Rules Enabling Act, and Rule 23 forbid certifying classes containing people who have not been injured.

This Court has repeatedly affirmed that a concrete injury is among the "irreducible constitutional minimum" requirements to sue in federal court. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Or as the Court put it most recently: "No concrete harm, no standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021). And without

standing, a plaintiff cannot "get in the federal courthouse door." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024).

The question presented here is whether people without standing may get in the federal courthouse door as class members when they could not enter as individuals. The Ninth Circuit says that despite the limits on federal-court authority, courts may nonetheless "permits 'certification of a class that potentially includes more than a de minimis number of uninjured class members.'" Pet. App. 5a n.1 (quoting *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (en banc)). As petitioner persuasively explains, that is wrong under a straightforward application of Article III and the Rules Enabling Act. The Federal Rules of Civil Procedure cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Allowing Rule 23 to be used to let people in the courthouse door as class members when they could not get in as individuals would "enlarge" their substantive rights.

Sieving out injured members from a class that embraces the injured and uninjured alike often requires individual inquiries. Courts have an obligation at the class-certification stage to perform a "rigorous analysis" into whether these individual inquiries will predominate over common ones. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). But they do not discharge this obligation when they put off that analysis to a later stage of proceedings. And they do not discharge this obligation when they perform that analysis on a class of people defined differently from the class of people who can eventually recover. Courts should not be

allowed to certify first and ask the predominance question later.

II. The standard followed by the Ninth Circuit is not just wrong, but harmful.

Even in transgressing Article III, courts like the Ninth Circuit tend to recognize the Article III problem. They acknowledge that a classwide judgment cannot award money damages to uninjured plaintiffs—and that a certified class containing uninjured plaintiffs will produce exactly that result if something is not done about it (if the class wins on the merits). *See, e.g.*, *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), *rev'd*, 594 U.S. 413 (2021). So these courts say they will do something about it *later*, even while certifying the class *now*. In other words, even though they know that uninjured class members must be ejected from the courthouse at some point, they do not consider that an obstacle. Instead, the courts order these people to become members of a case of which they cannot legally be a part, give them class notice and a false choice between opting out or seeking a recovery, and then keep them around through discovery, dispositive motion practice, and trial. In the class-certification context, the acknowledgment that the uninjured will eventually need to be found and excluded is the tribute vice pays to virtue.

But it is insufficient, because *later* usually never comes, and the individual harm assessments usually never happen. This is true for several reasons. First, experience teaches that courts presiding over class actions usually refuse to allow defendants access to the discovery and other mechanisms necessary to find and eject the uninjured class members.

Second, the certification of an inflated class *itself* reduces the likelihood that anyone will ever assess the individual class members' standing. Every circuit acknowledges the "*in terrorem* character of a class action." *E.g.*, *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009). "Even if a class's claim is weak, the sheer number of class members and the potential payout that could be required if all members prove liability might force a defendant to settle a meritless claim in order to avoid breaking the company." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (citing *Kohen*).[2] This concern is especially salient when a class contains "members who were not harmed": the "effect can be magnified unfairly if it results from a class defined so broadly as to include many members who could not bring a valid claim even under the best of circumstances." *Id.* That is why, as petitioner correctly observed at the *certiorari* stage, "With class actions, certification is often the ballgame. Once a class has been certified, the typical next step is settlement, not trial." Pet. 4.

For both reasons, waiting until later in the litigation to deal with class members who never should have been allowed through the courthouse door in the first place is itself both harmful and wasteful. This Court should reject any reading of Article III, the Rules Enabling Act, and Rule 23 that

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[2] *See also*, *e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (recognizing that class certification incentivizes defendants "to settle and to abandon a meritorious defense"); Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment (justifying Rule 23(f)'s expansion of appellate rights on the ground that "granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

is premised on keeping uninjured members in the class "for now," because the promised winnowing often never comes.

A. Ignoring the Article III problem until final judgment is unworkable.

This Court ruled, in one of its seminal decisions on the class-certification standard, that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 564 U.S. at 367. It follows that a class cannot be certified on the premise that a defendant will not be entitled to litigate its Article III *standing* defenses to individual claims, either. But that is, quite often, exactly what happens when courts certify a class on the premise that uninjured class members can be handled at some later date.

The problem is that litigating defenses to individual claims requires *discovery* into individual claims.[3] But courts almost never let defendants take discovery from thousands (much less millions) of absent class members. *See*, *e.g.*, *On the House Syndication, Inc. v. Fed. Express Corp.*, 203 F.R.D. 452, 455 (S.D. Cal. 2001) ("discovery of absent class members is ordinarily not permitted"). Defendants are lucky to be allowed a handful of them. *See*, *e.g.*, *Transamerican Refin. Corp. v. Dravo Corp.*, 139 F.R.D. 619, 622 (S.D. Tex. 1991) (granting leave to serve interrogatories on 50 absent class members out of 6,000); *Waldrup v. Countrywide Fin. Corp.*, No. 13-

[3] *See*, *e.g.*, *TransUnion*, 594 U.S. at 439 (suggesting that "[t]he plaintiffs' attorneys … presumably could have sought the names and addresses of [over six thousand] individuals, and they could have contacted them" to "show that some or all of the[m] … were injured").

8833 *et al.*, 2019 WL 6317767, at *3 (C.D. Cal. July 12, 2019) (allowing depositions of five absent class members out of 2.4 million).

But usually, courts just declare discovery into absent class members "unduly burdensome" and deny it. *E.g.*, *Kang v. Credit Bureau Connection, Inc.*, No. 18-1359, 2022 WL 16748698, at *5 (E.D. Cal. Nov. 4, 2022).[4] And they are probably right to do so. Discovery from any meaningful portion of a class will *always* be burdensome, for both sides. This negates the perceived value in class treatment and is precisely why no class should be certified in any case likely to need such broad discovery. *See*, *e.g.*, *On the House*, 203 F.R.D. at 456 ("allowing defendants to subject absent class members to discovery may defeat the purpose of certifying the class in the first place"); *McCarthy v. Paine Webber Grp., Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) ("to permit extensive discovery would defeat the purpose of class actions which is to prevent massive joinder of small claims").

Even when discovery is allowed from some small portion of the absent class, and even when it *succeeds* in revealing absent class members who lack a concrete injury, lead plaintiffs can still triumphantly declare that those shown uninjured are just a handful of people, not the "great number" of uninjured members necessary to mandate the denial or revocation of class certification under the standard (erroneously) followed by the Seventh and Ninth Circuits. *Olean*, 31 F.4th at 669 n.14 (quoting *Messner*, 669 F.3d at 824). And that may in fact be

[4] *See also*, *e.g.*, *Indergit v. Rite Aid Corp.*, No. 08-9361, 2015 WL 7736533, at *1 (S.D.N.Y. Nov. 30, 2015) ("particularly heavy" burden to justify depositions of absent class members).

true of the defendant's showing, if only because discovery was limited and the true number could never be explored. But since the *plaintiff* has the burden of proof under Rule 23, it should never be the defendant's burden to prove the uninjured are a "great number"—it should, at the very minimum, be the plaintiff's burden to show that they are *not*.

Judges determined to certify a class notwithstanding this problem tend to rely on the principle animating the *dissent* (not the majority) in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), to the effect that "individual damages calculations"—and therefore individual inquiries into the fact of injury—"do not preclude class certification under Rule 23(b)(3)." *Id.* at 42 (Ginsburg, J., dissenting); *see*, *e.g.*, *Nexium*, 777 F.3d at 21; *Olean*, 31 F.4th at 668–69; *id.* at 690 (Lee, J., dissenting) ("The majority seemingly waves away this [issue] by relying on our oft-quoted language that the 'need for individualized findings as to amount of damages does not defeat class certification.' I believe our court has misconstrued that often-quoted language to create a sweeping rule that gives a free pass to the intractable problem of highly individualized damages analyses.") (citations omitted).[5] But it is easy to say,

[5] It is not quite accurate to say that individual damages inquiries "do not" bar class certification. The most that can be said is that they do not *necessarily* bar certification. But every circuit agrees that that they can and do preclude certification when those inquiries would predominate over common issues. *See Olean*, 31 F.4th at 668; *see also, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (holding that a case "must satisfy the predominance requirement" "as a whole," and rejecting argument that a court can certify a class just for liability determinations and make class members litigate damages individually, because "allowing a court to

at the certification stage, that individual damages hearings can solve the problem at some indefinite point in the future. It is much more difficult *actually to hold them*.

Since the entire point of the class-action device is to *avoid* the need for individualized discovery and factfinding (*see On the House*, 203 F.R.D. at 456), in most cases, the individualized damages inquiries never happen. As Judge McKeown related in dissenting from the Ninth Circuit decision this Court reversed in *TransUnion*, the aspirational principle that "each member of a class certified under Rule 23 must satisfy the bare minimum of Article III standing at the final-judgment stage … does not square with what happened at trial":

> "[T]he trial … opened with class counsel telling jurors that they would learn 'the story of Mr. Ramirez.' And indeed they did. Jurors learned that a car dealership refused to grant Ramirez financing … and that he was frightened, humiliated, and confused.…
>
> "The story of the absent class members, in contrast, went largely untold.… There was no evidence that absent class members were denied credit, or expended any time or energy attempting to clear their name. It's possible that other class members—perhaps many others—had these experiences. But the hallmark of the trial was the absence of evidence about absent class members, or any evidence that they were in the same boat as

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sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement").

> Ramirez. The jury was left to assume that the absent class members suffered the same injury." 951 F.3d at 1039 (McKeown, J., concurring in part, dissenting in part).

The result was a $60 million jury verdict for a mostly uninjured class—more than $7,000 per class member. *See Ramirez*, 951 F.3d at 1017. TransUnion never got individualized hearings into who was in the "same boat" as Ramirez.

TransUnion nonetheless managed to develop a record that permitted precise identification of the portion of the class lacking an Article III injury, leading to this Court's reversing class certification on the ground that those 6,332 people could not belong to the class. 594 U.S. at 442. But *TransUnion* was an unusual case, in that it was unusually easy to identify the uninjured (and it reached this Court at an unusual posture). The only cognizable injury arose from disseminating a credit report, and it was feasible for the credit bureau to identify which class members' reports were disseminated.

Far more often, questions of injury turn on more complicated facts that can't be deduced from a single binary variable in the defendant's computer systems. Sometimes they require extensive discovery and expert analysis. *E.g.*, *Olean*, 31 F.4th at 680 (competing expert models). Other times, they require testimony from many—or even every—class member. *E.g.*, *Nexium*, 777 F.3d at 19–20 ("distinguishing the injured from the uninjured class members" required "testimony by the consumer that, given the choice, he or she would have purchased the generic" drug).

In *Nexium*, the First Circuit decided that this "distinguishing" exercise could occur at any time

"prior to judgment" and did not preclude certification. *Id.* at 19. The "mechanism" the court deemed satisfactory was "testimony in the form of an affidavit or declaration" from every class member. *Id.* at 20. In dissent, Judge Kayatta criticized the majority for "kick[ing] the can down the road by noting that the court preserved the Defendants' right to challenge individual damage claims at trial," without the requisite "rigorous[] analy[sis]" into whether that mechanism was "feasible." *Id.* at 33 (cleaned up). But multiple courts and commentators have remarked on the *in*feasibility of the mechanism proposed in *Nexium*. *See*, *e.g.*, 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8.6 (21st ed. 2024) ("Courts have rejected proposals to employ class member affidavits and sworn questionnaires as substitutes for traditional individualized proofs which are, most importantly, not subject to cross-examination."). And the dissent identified several more problems besides:

> "How exactly will defendants exercise their acknowledged right to 'challenge individual damage claims at trial'? Will the defendants seek to depose everyone who has returned an affidavit, effectively challenging plaintiffs' counsel to a discovery game of chicken? … [I]f the district court does not identify a culling method to ensure that the class, by judgment, includes only members who were actually injured, this court has no business simply hoping that one will work." *Nexium*, 777 F.3d at 33–35) (Kayatta, J., dissenting).

The district court's hope never got tested, because the defendants won the case "and, having won, … chose not to challenge the inclusion of any class

members, by that point presumably enjoying the breadth of their win." *United Food & Com. Workers Unions & Emps. Midwest Health Benefits Fund v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.)*, 907 F.3d 42, 52 (1st Cir. 2018).

Asacol put the First Circuit on a better path, reversing class certification due to "the presence of uninjured class members" in the defined class with no mechanism for finding them that comported both with Rule 23's predominance requirement and with the defendants' due-process rights. *Id*. at 46, 53–54. The *Asacol* court summed up the problem nicely:

> "The aim of the predominance inquiry is to test whether any dissimilarity among the claims of class members can be dealt with in a manner that is not 'inefficient or unfair.' Inefficiency can be pictured as a line of thousands of class members waiting their turn to offer testimony and evidence on individual issues. Unfairness is equally well pictured as an attempt to eliminate inefficiency by presuming to do away with the rights a party would customarily have to raise plausible individual challenges on those issues." *Id*. at 51–52 (citation omitted).

That is the customary scenario faced by district courts at the certification stage when a defendant challenges Article III standing within the class. Unlike in *TransUnion*, the court has a record sufficient to establish that *some* portion of the class will be proven uninjured, but seldom sufficient to determine precisely *who they are*. *See id*. at 46–47 (citing expert market-data analysis indicating "approximately ten percent of class members had not been injured"). The choice the court faces at this

stage is not simply whether the uninjured people must be removed from the class—*TransUnion* answered that question affirmatively—but whether there is any *method* for removing them from the class that comports with Rule 23. That is, by its nature, a question to resolve as part of the class-certification analysis, not later.

Even *Olean* recognizes this. *See* 31 F.4th at 668 ("When individualized questions relate to the injury status of class members, Rule 23(b)(3) requires that the court determine whether individualized inquiries about such matters would predominate over common questions.") (citing *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1277 (11th Cir. 2019)). *Cordoba* ruled—correctly—that the "individualized inquiry" needed "to sort out those plaintiffs who were actually injured from those who were not" must be analyzed for compliance with Rule 23 "*before* granting class certification," not delayed "until a later stage in the proceedings." 942 F.3d at 1264, 1276–77. That is well-aligned with this Court's precedents. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014) (burden of satisfying Rule 23 predominance must be met "before class certification"); *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 831 (1999) ("[A]ny [] Article III court must be sure of its own jurisdiction before getting to the merits.").

But to ask the predominance question is often to answer it. In "a case in which any class member may be uninjured," "[t]he need to identify those individuals will predominate and render an adjudication unmanageable absent evidence such as the unrebutted affidavits assumed in *Nexium*, or some other mechanism that can manageably remove uninjured persons from the class in a manner that

protects the parties' rights." *Asacol*, 907 F.3d at 53–54. This is unsurprising. *Individual* claims of Article III standing often require a fully developed summary-judgment record to resolve, as seen in cases where the named plaintiffs were shown to have no standing based on facts unique to them. *E.g.*, *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 255–56 (4th Cir. 2020). Any case where the representative plaintiffs need individualized evidence to establish their own standing is likely to require individualized evidence to establish everyone else's standing, too. That courts struggle so futilely to imagine feasible ways of resolving such issues—and never manage to reach the spot in the road to where they've "kicked the can" (*Nexium*, 777 F.3d at 33 (Kayatta, J., dissenting))—suggests the predominance requirement is not so easily surmounted.

B. Ignoring the Article III problem until final judgment is unfair and abusive.

Even if defendants *can* develop the record to challenge Article III injury at the final-judgment stage, most *don't*. TransUnion was the rare defendant to have taken a high-stakes class action to trial. Most settle. *See Messner*, 669 F.3d at 825; *Olean*, 31 F.4th at 685–86 (Lee, J., dissenting) ("The district court acknowledged the dueling experts' differing opinions on this crucial [standing] question but held that it would leave that issue for another day—at trial—because it involves a merits issue that a jury should decide. But as a practical matter, that day will likely never come to pass….") (citation omitted); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward

resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

The undersigned *amici* represent just some of the many businesses that operate in highly regulated industries, where an array of statutory schemes invite class actions that threaten ruinous liability over technical violations that cause little to no harm. Thus, while a "bare procedural violation, divorced from any concrete harm," does not satisfy Article III on an individual basis, *Spokeo*, 578 U.S. at 341, such a claim can still threaten ruinous liability on a classwide basis and regularly coerces defendants into costly settlements in cases they would have *won* if the Article III problem were addressed at the certification stage.

This is exacerbated when the main driver of liability is not compensatory damages—there often being no real harm to remedy—but statutory penalties never intended to have the *in terrorem* effect they have in the class context. Especially where statutory damages are set with an individual plaintiff in mind, *classwide* statutory damages reach astronomical sums.

Judge Wilkinson's concerns on this front are pertinent:

> "I worry that the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer that Congress has not sanctioned. To certify in cases where no plaintiff has suffered any actual harm … and where innocent employees may suffer the catastrophic fallout could not have been Congress's intent. Indeed, the relatively modest range of statutory damages

> chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring) (citing *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 26–27 (2d Cir. 2003) (Newman, J., concurring) ("I do not believe that in specifying a $1,000 minimum payment for [] violations, Congress intended to expose [a defendant] to liability for billions of dollars.")).

But this unintended consequence is a regular occurrence. And it is an especially abusive occurrence when the exposure results from a class swelled by uninjured members.

Stillmock is illustrative. The case involved the Fair and Accurate Credit Transaction Act's imposition of $100 to $1,000 penalties for printing credit-card numbers on receipts. 15 U.S.C. §§ 1681c(g)(1), 1681n(a)(1)(A). The Fourth Circuit authorized certification of a class encompassing almost 15 million receipts printed by the defendant's grocery chain over a year-and-a-half period—*i.e.*, a $15 billion litigation risk for a regional business in an industry with notoriously thin profit margins.[6] The "violations" perhaps presented some speculative risk of identity theft for some unknown (and unknowable) minority of consumers who failed to avail themselves of a secure-enough trash receptacle. But as is now clear thanks to *TransUnion*, a "mere risk" of harm is not an Article III injury, 594 U.S. at

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[6] *See* Food Indus. Ass'n, *Grocery Store Chains Net Profit*, *https://www.fmi.org/our-research/food-industry-facts/grocery-store-chains-net-profit* (data on 1.6% profit margin).

436–37, and there was no evidence the class experienced identity theft (or any other injury). Nonetheless, the Fourth Circuit's ruling forced the defendant into a $2.5 million settlement. *See Stillmock v. Weis Mkts., Inc.*, No. 07-1342, ECF No. 120-1, at 3 (D. Md. Mar. 31, 2011). It was a textbook abusive settlement that benefited nobody except attorneys, with the affected consumers receiving a $7.50 grocery voucher, the plaintiff's attorneys collecting half a million dollars in fees, and the defendant forced to incur more than four years of legal expenses defending itself. *Id*.

It would have been even more costly to the parties and wasteful of judicial resources had *Stillmock* not reached the Fourth Circuit on a Rule 23(f) appeal but instead as a regular-course appeal from final judgment—the only path available under a rule that punts Article III issues to the final-judgment stage. But defendants forced to follow that path often have no appellate path at all. The Rule 23(f) opportunity to petition for appellate review of a class-certification decision presupposes that all the analysis relevant to class treatment *is in fact done* at the certification stage, not put off for later. Putting it off for later thus makes the appellate right illusory. The defendant may be "force[d] … to settle" rather than "run the risk" of litigating through final judgment. Fed. R. Civ. P. 23 advisory committee's note.

And indeed defendants regularly find themselves making settlement payments to uninjured class members who could never have sued individually, and who would not have been part of the class if the Article III problem had been addressed at the certification stage. *See*, *e.g.*, *In re Prograf Antitrust Litig.*, No. 11-2242, 2014 WL 4745954, at *3 n.5, &

ECF No. 690-2 at 8 (D. Mass. June 10, 2014) (certifying class despite recognizing "that significant numbers of class members may not have been harmed," followed by a $13.25 million class settlement); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-2785, 2020 WL 1873989, at *35, & ECF 2613 at 8 (D. Kan. Feb. 27, 2020) (certifying class despite recognizing that "the factual record eventually may … show that the number of uninjured class members is [] 'significant,'" followed by a $264 million class settlement).

Of course, not every defendant's standing challenges would necessarily have prevailed, but the prospect of their prevailing is not wholly speculative. This is amply demonstrated by cases where individual plaintiffs are ejected from the courthouse for lack of standing on the same legal theories *other* plaintiffs use as the basis for class claims, notwithstanding evidence that numerous class members have the same standing defect. For example:

(i) In *Baehr*, *supra*, the Fourth Circuit granted summary judgment against putative class representatives who accused their real-estate agents of referring them to title companies in violation of the Real Estate Settlement Procedures Act. 953 F.3d at 247–48. The Fourth Circuit ruled that the plaintiffs had no Article III injury because the alleged RESPA violation caused them no harm: the fees they paid were "reasonable," they "were admittedly satisfied with the settlement services that they received," and they had no desire to shop around for other providers. *Id*. at 255–56.

(ii) Presently pending in the District of Maryland

is a certified class action based on the same theory. *See Wilson v. Eagle Nat'l Bank*, No. 20-1344, 2023 WL 2478933 (D. Md. Mar. 13, 2023). The representative plaintiffs pled around *Baehr* by alleging they were injured by being "overcharged." *Id.* at *6. The defendants argued in opposition to class certification that "the court may not infer that other class members paid increased settlement costs just because the named Plaintiffs did," citing *TransUnion* and producing evidence in the form of 52 class member HUD-1 settlement statements "demonstrat[ing] an absence of overcharge." *Id.* at *9, 18. The court found *TransUnion* "procedurally distinct" because it "addressed Article III standing in the context of a case that proceed[ed] to trial," and ruled that here, "the named Plaintiffs are only required to satisfy the pleading-stage burden at the class certification stage." *Id.* at *9. The court recognized it was the plaintiff's burden to show that "the inclusion of uninjured individuals" does not present "differences between class members as to standing" that "run[] afoul of Rule 23," but did no analysis of how this was likely to play out.[7] *See id.* at *18. Instead, the district court just encouraged the defendants to "continue to raise arguments regarding Article III standing as the case progresses." *Id.*

In this case, the Ninth Circuit did not even do that much. It just declared, based on *Olean*, that Rule 23 permits certification of a class containing

[7] Most circuits have cases recognizing that "a district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate." *E.g.*, *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 190 (3d Cir. 2020).

uninjured members. App. 397 n.1. The closest it came to acknowledging that they will need to be removed later was its aside that the uninjured do not defeat certification "at this time." *Id.* It did not address whether there was any process for dealing with them that would satisfy Rule 23 predominance, and did not say at *what* time it might address it.

The correct time is the certification stage. With this case, the Court should reaffirm its class-certification precedents and clarify that the principles it set forth in *TransUnion* are not limited to cases that have gone to trial. The class-certification stage is not just "the ballgame." It is the stage at which courts decide whether the class, as defined, gets through the courthouse door. Letting a class with members lacking standing through the courthouse door does not comport with Article III or the Rules Enabling Act, and proves unworkable and unfair in practice. This Court should thus put an end to the practice of "kick[ing] the can." *Nexium*, 777 F.3d at 33 (Kayatta, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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