No. 24-304

IN THE

Supreme Court of the United States

LABORATORY CORPORATION OF AMERICA HOLDINGS, DBA 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 PROFESSORS WILLIAM B. RUBENSTEIN AND ARTHUR R. MILLER AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

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Amicus Arthur R. Miller is a University Professor and Warren E. Burger Professor of Constitutional Law and Courts at New York University Law School. From 1986–2007, Professor Miller was the Bruce Bromley Professor of Law at Harvard Law School. Professor Miller assisted in the drafting of the 1966 amendments to the Federal Rules of Civil Procedure, which introduced the modern version of Rule 23. For more than half a century, Professor Miller has been the co-author of Wright & Miller's *Federal Practice and Procedure*, the leading treatise on civil procedure, criminal procedure, and evidence, in the United States.

Amici respectfully submit this brief to identify several issues missing from consideration in the lower court decisions and present party submissions to date, specifically: (1) the history underlying the joinder-based nature of the question presented; (2) the proper focus of the predominance inquiry; and (3) a broader understanding of how defendants' interests in the specificity of class definitions may vary from certification to settlement. The

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

brief is meant solely to assist the Court in its consideration of the issue presented and *amici* take no position on the outcome of this particular case.

Amici submit this brief in their individual capacities as scholars and teachers and not on behalf of The Presidents and Fellows of Harvard College or New York University.

SUMMARY OF ARGUMENT

Amici make three points in this brief.

1. This Court has long held that a named plaintiff must have Article III standing and that Rule 23 does not enable the named plaintiff to *borrow* standing from the other class members. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976) ("That a suit may be a class action . . . adds nothing to the question of standing . . . ."). But, as a joinder device, Rule 23 also cannot *destroy* standing. If the claims of some but not all members of a proposed class meet the requirements of Article III, the presence of non-justiciable claims within the class does not destroy the justiciability of the live claims, *cf.* 28 U.S.C. § 2072(b) (procedural rules cannot "abridge, enlarge or modify any substantive right"), and should not artificially impede the capacity of those claims to proceed.

Courts are routinely faced with the proposed joinder of live and non-justiciable claims or parties under other joinder rules. A party may propose the joinder of live and non-justiciable *claims* under Rule 18 and/or the joinder of *parties* with and without standing under Rule 20. In both situations, upon a proper motion (or on its own initiative), the court dismisses the non-justiciable claims and/or parties lacking standing – and the remaining joined

claims or parties proceed without them. Fed. R. Civ. P. 21 ("Misjoinder of parties is not a ground for dismissing an action."). Equity developed this approach to temper the disproportionate consequences of misjoinder at the common law – where misjoinder, regardless of the extent of the defect or merit of the underlying claim, required dismissal – and this approach has been embedded in the Federal Rules of Civil Procedure since their inception in 1938.

This point supports the conclusion that the question presented is a question of joinder, not justiciability, and is best resolved using the many tools of Rule 23, not the blunt force of Article III. The only reason the question presented would speak to Article III itself is if standing were analyzed on a class basis. But it is not: this Court's holdings have interpreted Rule 23(b)(3) classes to consist of a bundle of individual claims, not a single classwide claim. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (describing a Rule 23(b)(3) class as consisting of "each class member's individualized claim for money"). As such, the presence of the non-justiciable claims in the bundle calls for their excision – as in the misjoinder situations noted above – but does not lead to the conclusion that the "class lacks standing." That statement is inapposite to the bundle of sticks conception of the class.

2. The Rule 23 issue that is raised is whether identification and excision of the non-justiciable claims is, in a given case, such an individualized undertaking that it trumps the efficiency gains of proceeding in the aggregate. This is another application of the predominance and superiority prongs of Rule 23, no different in kind than their application to affirmative defenses, counterclaims, statutes of limitations, etc. *See* William B. Rubenstein,

2 *Newberg and Rubenstein on Class Action*s §§ 4:55 to 4:57 (6th ed. 2022) (hereinafter *Newberg and Rubenstein on Class Actions*). The fact that a court would be applying the predominance and superiority prongs to standing does not transform that Rule 23 analysis into an Article III question.

The Rule 23 analysis might merge into the Article III analysis if, in all circumstances, excision of the non-justiciable claims would be so onerous as to render common issues non-predominant. Petitioner asserts that this will "inevitably" be the case in the presence of "appreciable numbers" of individualized inquiries. Pet'r Br. 48 ("Rule 23(b)(3) does not allow a court to certify a class where individual questions predominate, which will *inevitably* be the case when appreciable numbers of individualized inquiries into standing are required.") (emphasis added). The lower courts have similarly used the *quantity* of problematic claims within the class as a proxy for whether common issues predominate.

But that proxy is imperfect: the issue for predominance purposes is the *ease of excision*, not the number to be excised. Often the class can be re-defined, and even a large tranche of claims may be removable with a simple edit. In other cases, identification and excision may be mechanistically accomplished. The variations are many, and the district courts are best suited to work out breaking points in actual cases.

3. Petitioner frames the question presented in terms of the – again – supposedly *inevitable* adverse consequences to defendants when a court certifies a large class before trial. *Id.* at 3 ("Once a class has been certified, the next step is usually settlement, not trial. And that

likelihood becomes a near *inevitability* where a massive class hazards colossal liability.") (emphasis added). This framing implies that overly large classes always harm defendants, but in fact defendants may well prefer overly large classes when class certification is sought in conjunction with a welcomed settlement.

Defendants often take advantage of the class action device as a litigation closure mechanism when facing lawsuits in which liability is widespread and virtually unavoidable – crashes, derailments, environmental spills. The goal is to terminate all potential litigation, and defendants accordingly support enormous settlement classes encompassing significant numbers of potentially non-justiciable claims. Indeed, it is not immediately obvious whether plaintiffs seeking pre-settlement certification, or defendants seeking a closure of their liability, are more likely to propose bloated classes.

If the Court remains committed to the principle that the class certification requirements are no different at settlement than before, except for the issue of trial manageability, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997), a broad Article III ruling in this matter would have negative consequences for defendants seeking the safety of a class action settlement embodied in a final judgment, as it would curtail the breadth of releases permissible for that purpose.

* * *

In sum, the question presented is distinct from related questions the Court addressed in prior cases. In *TransUnion LLC v. Ramirez,* the Court held that, "Every class member must have Article III standing

in order to recover individual damages," 594 U.S. 413, 431 (2021), explaining that, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring)). In so concluding, the Court also noted that it was not addressing "the distinct question whether every class member must demonstrate standing *before* a court certifies a class." *Id.* at 431 n.4. Both the holding and footnote in *TransUnion* focused directly on Article III, while the question presented in this case – "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." – focuses directly on the joinder device. It accordingly frames a question addressed by nearly a millennium of joinder jurisprudence.

ARGUMENT

I. Class Members Can Neither Borrow Standing From One Another Nor Destroy One Another's Standing.

The modern version of Rule 23 went into effect in 1966. Shortly thereafter, this Court held that, in general, plaintiffs must have individual standing in order to bring claims that might also redound to the benefit of a larger group. *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). Two years later, in the class context, the Court held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member

of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). And the following year, the Court rounded out this trilogy by holding that putative class representatives "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Warth v. Seldin*, 422 U.S. 490, 502 (1975).

Summarizing this body of law nearly 50 years ago, the Court wrote, "That a suit may be a class action . . . adds nothing to the question of standing . . . ." *Simon*, 426 U.S. at 40 n.20; *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016). The law is therefore clear that a joinder device – such as Rule 23 – cannot generate standing that does not exist.

What has received less attention in the present debate, but is equally pertinent, is that a joinder device also cannot destroy a live claim. Federal courts deploy this principle in applying other joinder rules (Rule 13 (counterclaims and crossclaims), Rule 14 (third party claims), Rule 18 (claim joinder), and Rule 20 (party joinder)). If a non-justiciable claim or a party lacking standing is joined with a live claim or party, the former is dismissed and the latter proceeds without it; so too, a claim or party that would destroy diversity jurisdiction is simply dismissed so as to enable a case to proceed in federal court. This approach is captured in Rule 21's edict that "[m]isjoinder of parties is not a ground for dismissing an action," Fed. R. Civ. P. 21; rather, the Rule elegantly commands that the court simply "drop" misjoined parties, *id.*

At common law, misjoinder was a "fatal defect" authorizing dismissal, regardless of the strength of the underlying claims or the extent of the misjoinder problem.

7 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Howard M. Erichson, *Federal Practice and Procedure* § 1681 (3d ed. 2024) ("Except in cases involving joinder of defendants in tort actions, misjoinder and nonjoinder of parties were fatal defects in actions at common law; a pleading that revealed a joinder defect was subject to attack by general demurrer, motion in arrest of judgment, writ of error, nonsuit, or plea in abatement."); *see also* Henry Greening & J. C. Perkins, *Chitty's Treatise on Pleading and Parties to Actions, with a Second Volume Containing Modern Precedents of Pleadings, and Practical Notes* 228 (Springfield, G. & C. Merriam 1882) ("The consequences of a misjoinder are more important than the circumstance of a particular count being defective; for in the case of misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on a general demurrer, or in arrest of judgment, or upon error . . . .") (footnote omitted).

Capturing the gravity of the common law approach, Professor Sunderland noted that, "The perils of misjoinder were inherent risks which had to be patiently endured by the people, like the perils of war and contagious disease." Edson R. Sunderland, *Joinder of Actions*, 18 Mich. L. Rev. 571, 575 (1920). Of course, "the severity of the penalties for these mistakes naturally suggested the question, whether they were not too heavy." *Id.* at 573.

As was so often the case, equity came to the rescue. It did so by developing rules that "generally allowed [a] plaintiff to amend the complaint to correct a defect in parties [such that] an action could proceed on its merits despite an initial misjoinder or nonjoinder whenever the error could be corrected without adversely affecting the

parties to the action." Wright, Miller, Kane, & Erichson, *supra*, § 1681 (citing Fed. R. Eq. 43–44).

The party joinder issue in group litigation generally concerned *nonjoinder* given that a decree might impact the interests of missing parties. *See generally* Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987). The recurring question was whether equity could proceed in the absence of these parties, with related inquiries into whether missing parties were "necessary" or "indispensable." Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Original of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1254–55 (1961). These concerns haunted equity for centuries, but they were effectively ushered offstage for money damage class actions in 1966, when Rule 23(b)(3) became an opt-out, rather than an opt-in, mechanism. That change transformed problems of nonjoinder into questions of misjoinder, with equity's apprehensions about crafting careful decrees giving way to contemporary concerns about drafting careful class definitions. Thus, although the question presented in this matter arises in the context of group litigation, its over-inclusion concern finds more resonance in the history of misjoinder at common law than in the history of group litigation in the equity courts.

With the merger of law and equity in 1938, all of these issues found new homes in the federal rules: indispensable parties and group litigation in Rules 19 and 23 and equity's approach to misjoinder in Rule 21. *See* Fed. R. Civ. P. 21 advisory committee's note ("See also [former] Equity Rules 43 (Defect of Parties–Resisting Objection) and 44 (Defect of Parties–Tardy Objection)"); Wright, Miller, Kane, & Erichson, *supra*, § 1681 ("Federal Rule of Civil

Procedure 21 was derived from the federal equity rules and the English rules of practice existing at the time the Federal Rules of Civil Procedure were adopted.").

Rule 21's goal was precisely to avoid inflexible and formalistic approaches to party joinder. *Soc'y of Eur. Stage Authors & Composers v. WCAU Broad. Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940) ("Rules 17, 19, 20 and 21, relating to Parties, evidence the general purpose of the new Rules to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided."). "By providing for the dropping and adding of parties on terms that are just, Rule 21 furthers the policy of the federal rules to continue and to determine an action on its merits whenever that can be done without prejudice to the parties." Wright, Miller, Kane, & Erichson, *supra*, § 1681.

The letter of Rule 21 is applicable to class actions, *id.* at § 1682 ("The scope of application of Federal Rule of Civil Procedure 21 is extremely broad and covers any civil action in the federal courts."), but the Rule itself is rarely referenced in this context, for its spirit is captured directly by Rule 23(c)(1)(C). That provision states:

> An order that grants or denies class certification may be altered or amended before final judgment.

Fed. R. Civ. P. 23(c)(1)(C). As such, it is a direct descendent of the English equity courts' approach to misjoinder:

> Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

Fed. R. Eq. 43 (1912) (repealed 1938), *reprinted in* James Love Hopkins, *The New Federal Equity Rules* 248 (8th ed. 1933) (editor's note quoting Order XVI, Rule 12).

In fact, Rule 23 is even more liberal than equity had been: [1] it does not require an "application" for the court to alter the class, and [2] it expands the time frame for correcting misjoinder all the way to final judgment. What this lineage – and the clear texts of Rule 21 and Rule 23 – teaches is that a court may pare down a class that is proposed for certification, or even one that has been certified, so as to "drop" any class members who lack standing should non-justiciable claims find their way into the mix. *See* 3 *Newberg and Rubenstein on Class Actions* § 7:27 ("[C]ourts in every circuit have held, when a class definition is not acceptable, judicial discretion can be utilized to save the lawsuit from dismissal. Indeed, several circuits have held that a court should alter the class definition in lieu of rejecting class certification, if possible. This discretion extends to creating sub-classes, as well as to modifying an approved class.") (footnotes omitted). In short, neither dismissal, nor rejection of class certification, are proper consequences of misjoinder – nor have they been since before the Civil War.

That conclusion is not altered by the fact that the joinder problem in this matter is one of justiciability. This Court itself has employed Rule 21 to fix a standing problem – through substitution of a real party in interest

for its agent – in a case pending before it. *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (Frankfurter, J.). The Court did so because "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.* The Court noted that "Rule 21 will rarely come into play at this stage of a litigation," *id.*, but lower federal courts regularly employ Rule 21 to drop joined parties who lack standing, *see, e.g.*, *Charlatan v. Clayton Cnty. Gov't*, No. 19-CV-00199, 2020 WL 9598956, at *1 (M.D. Ga. Nov. 23, 2020) (recommending that plaintiff who "failed to establish that she has standing to prosecute this action" be dropped), *report and recommendation adopted*, No. 19-CV-00199, 2021 WL 1976631 (M.D. Ga. Apr. 20, 2021); *Uniloc 2017, LLC v. Google LLC*, No. 18-cv-00496, 2019 WL 6006228, at *1 (E.D. Tex. Aug. 16, 2019) (same), *report and recommendation adopted*, No. 18-cv-00496, 2019 WL 6002210 (E.D. Tex. Sept. 10, 2019); *Boyd v. Seterus, Inc.*, No. CV-17-76-GW, 2017 WL 8110070, at *3 (C.D. Cal. Mar. 30, 2017) (adopting tentative ruling that plaintiff who lacked standing would be dismissed under Rule 21); *Alexander v. C.R. Bard, Inc.*, No. 12-cv-5187, 2014 WL 12602871, at *8 (N.D. Tex. Feb. 26, 2014) (employing Rule 21 to substitute real party in interest for plaintiff who lacked standing rather than granting summary judgment).

Rule 21 performs the same function in the area of subject matter jurisdiction, enabling a court to reject claims or parties that would destroy diversity without requiring dismissal of the entire action. Wright, Miller, Kane, & Erichson, *supra*, § 1685 ("Courts frequently employ Federal Rule of Civil Procedure 21 to preserve diversity jurisdiction over a case by dropping a nondiverse party if the party's presence in the action is not required under Federal Rule of Civil Procedure 19.").

Rule 23(c)(1)(C) enables federal courts to approach standing-related misjoinder in class actions in precisely the same manner, "dropping" the non-justiciable claims of absent class members who lack standing, while permitting the justiciable claims to proceed in the class form assuming the other requirements of certification are met. Claims found to be nonjusticiable as the case progresses can also be dropped after certification, as the assessment of both justiciability and the contours of the class are dynamic, not static, processes.

The federal courts' approach to misjoinder accordingly belies the Petitioner's argument that, "ARTICLE III PROHIBITS CERTIFICATION OF A PROPOSED RULE 23(B)(3) CLASS THAT CONTAINS UNINJURED MEMBERS." Pet'r Br. 15. The only way that statement would make sense would be if standing in a class suit were dispensed in bulk, rather than class member by class member, such that the presence of a single non-justiciable claim spoiled the whole bunch. But this Court has repeatedly held the opposite, noting both that "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), and that Rule 23(b)(3) claims are "individualized monetary claims," *Dukes*, 564 U.S. at 362. It follows that there is no such thing as "class standing," only the standing of each individual claimant within the class. Accordingly, a court can survey the Rule 23(b)(3) class just as it would a multi-party joinder situation under Rule 21, identifying the justiciability of claims and "dropping" the non-justiciable ones from the class.

In sum, given that joinder rules cannot create or *destroy* standing, a class action court can no more assert jurisdiction over non-justiciable claims than a non-class

court can. But the remedy for the misjoinder of such claims and parties is, as in the non-class context, the dismissal *of those claims and/or parties*, not a refusal to let the live claims proceed. A bloated class definition should neither cause an *in terrorem* effect on defendants nor occasion for plaintiffs the death knell of an otherwise viable class suit. *Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017) (noting relationship between the death knell and *in terrorem* problems).

To permit trial courts to work out the Article III implications of class definitions using the tools of certification, and Rule 23(c)(1)(C) thereafter, is consistent with the Court's prior holdings. *Amchem* held that capturing the proper contours of a class may not be a single fixed decision, stating that "when a case is litigated, [the trial court can] adjust the class [definition], informed by the proceedings as they unfold." *Amchem,* 521 U.S. at 620 (citing Fed. R. Civ. P. 23(c)–(d)). In turn, *TransUnion* and *Tyson* safeguard Article III at judgment. Together, the Court's precedents support the conclusion that judgment is the appropriate time to require final assessments of standing; while some such assessments may be clear and executable at certification, not all standing questions should be prematurely force-fit into the class certification analysis, when much may still remain unknown about the merits of each stick within the bundle.

II. The Predominance Issue Is Not One of Quantity but Ease of Removal.

Once the standing issue is properly viewed as a problem of misjoinder, with the remedy being to drop the misjoined, the issue a court faces is whether the process of

removing non-justiciable claims/class members is feasible within the mechanics of Rule 23. If the excision of the bad claims/parties will entail myriad individual assessments, non-common issues will predominate, and the efficiency gains of the class suit will be lost. Fed. R. Civ. P. 23(b)(3) (demanding that common issues predominate and that the class mechanism be a superior means of adjudication).

Petitioner asserts that the predominance inquiry should turn on *number*, arguing that if an "appreciable number" of putative class members plausibly lack standing, the quantity of individual inquiries will necessarily render common issues non-predominant. Pet'r Br. 37–48. Lower court decisions have similarly used the *number* of plausible class members lacking *antitrust injury* as a proxy for when common issues will not predominate in that context. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 627 (D.C. Cir. 2019) (finding that "the need . . . for at least 2,037 individual determinations of [antitrust] injury" for the uninjured class members justifies "denying class certification on the ground that common issues do not predominate"); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53–54 (1st Cir. 2018) (reversing the district court's class certification in which "thousands . . . suffered no [antitrust] injury," as "[t]he need to identify those individuals will predominate"); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) ("We do not think the need for individual determinations or inquiry [of antitrust injury] for a de minimus number of uninjured members at later stages of the litigation defeats class certification.").[2]

[2] Petitioner relies on some of these antitrust injury cases in its predominance argument about Article III injury. Pet'r Br. 41 (citing *Asacol*, 907 F.3d 42, and *Rail Freight*, 934 F.3d 619). The predominance question may be similar across the domains, but

But this presumption that the number of uninjured class members determines the predominance question is not quite right. The question for predominance is not quantity but the method for excising the uninjured. Even if many putative class members have non-justiciable claims, so long as the *method* of removing them from the class is straightforward, that excision will be mechanical and common issues may still predominate. There are numerous mechanisms for excision: the court or class proponents could redefine the class to encompass only live claims; the inquiry that would be needed to separate the wheat from the chaff could be so mechanistic that even applying it to a large class would not be inefficient; or, as some lower courts presume, the quantity of non-live claims might be so small that even individualized inquiries would not overwhelm the efficiencies of the class suit.

This means that if the Court were to adopt the paring approach of Rule 21, it should direct lower courts to focus on whether the *process* of excluding non-justiciable claims will overwhelm the efficiencies of proceeding in the aggregate – and not to use the sheer number of plausibly non-justiciable claims as a proxy for that consideration. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140–41 (2d Cir. 2001) (Sotomayor, J.) (holding that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule" and identifying "a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1)

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the issues are not fully transposable since Article III injury is a jurisdictional question, while antitrust injury is a merits inquiry.

bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class") (cleaned up) (quoting *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La. 1980)).

III. Defendants' Interests Are More Mixed Than Petitioner Portrays.

Petitioner proposes that certifying a class encompassing both live and non-justiciable claims artificially bloats the class size, pressuring settlements out of proportion to harm. Pet'r Br. 3, 32-33. Although that portrayal of these dynamics may or may not be accurate – scholars have challenged the argument, *see, e.g.*, Charles Silver, "*We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1385–1429 (2003) – the proposition is focused on contested class certification motions decided before trial.

When liability is more likely – crashes, derailments, environmental spills, diesel emissions fraud – defendants often embrace the class mechanism because (short of bankruptcy) only a class action judgment can provide near total closure. *See* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175, 2187–88 (2017) ("A class action settlement increases closure by shifting from an opt-in model to an opt-out model. Instead of individual claimants needing to affirmatively sign on to the settlement, all claimants *within the class definition*

are automatically bound by the settlement unless they opt out.") (emphasis added). But, in seeking that closure, frequently characterized as "global peace," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 159 (2010) (noting goal of class action settlement was "to achieve a global peace in the publishing industry") (quoting *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 119 (2d Cir. 2007)), settling defendants have an interest in maximizing the breadth of the class, lest future litigation seep through the seams of the settlement.

The Federal Judicial Center, in advising federal judges what to look for when reviewing a proposed class action settlement, goes so far as to state that, "*A natural impulse* on the part of settling parties is to attempt to expand the class and release claims of those on the periphery of the class . . . ." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 22 (3d ed. 2010) (emphasis added). Similarly, the U.S. District Court for the Northern District of California's *Procedural Guidance for Class Action Settlements* (an influential guidepost for judges throughout the country) directs litigants as to what information to provide in conjunction with a motion seeking preliminary approval of a settlement; the first such direction requires the motion to identify "[a]ny differences between the settlement class and the class proposed in the operative complaint (or, if a class has been certified, the certified class) and an explanation as to why the differences are appropriate." *Procedural Guidance for Class Action Settlements*, U.S. Dist. Ct., N. Dist. of Cal. (last modified Sept. 5, 2024), https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/.

In their "natural" expansion toward "global" peace, settlement classes may exceed the bounds of actual harm. In the cases arising out of the 2010 BP oil spill in the Gulf of Mexico, for instance, the defendants negotiated a settlement class definition that encompassed all of the citizens of three states and many of the citizens of two other states – or nearly one in five Americans – if impacted by the spill. *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 965–68 (E.D. La. 2012) (appendix B), *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014). Not surprisingly, questions subsequently arose about whether the claims administrator was paying out monies to uninjured parties, *see In re Deepwater Horizon*, 744 F.3d 370, 373 (5th Cir. 2014), with the Fifth Circuit chiding the defendants in concluding that, "There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not," *id.* at 377.

This Court itself recognized the "natural" expansion of settlement classes 15 years before the BP settlement – and warned courts to guard against this problem. Specifically, in holding that that the requirements for certifying a class in conjunction with a settlement are the same as the requirements of pre-settlement class certification (except manageability). *Amchem*, 521 U.S. at 620–21, the Court focused on definitional overbreadth, writing:

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of

> the Rule—*those designed to protect absentees by blocking unwarranted or overbroad class definitions*—demand undiluted, even heightened, attention in the settlement context.

Id. at 620 (emphasis added).

The Court expressed concern about overbroad settlement class definitions because, as noted above, "a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id.* (citing Fed. R. Civ. P. 23(c)–(d)); *see also In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) ("The adversarial nature of a trial ensures that class definitions will be tested and allows the district court 'to adjust the class, informed by the proceedings as they unfold.' A settlement lacks these safeguards.") (citation omitted) (quoting *Amchem*, 521 U.S. at 620).

If the Court were to hold that classes cannot, as a constitutional matter, be certified if they contain non-justiciable claims – and if the lower courts actually followed the *Amchem* principle[3] – settlement classes would

[3] Morris A. Ratner, *Class Conflicts*, 92 Wash. L. Rev. 785, 860 (2017) ("If judges are confident they have helped to achieve a just class settlement that they view as their only viable endgame, and if a strict reading of *Amchem* disrupts that settlement, odds are that judges will read the strictness out of the decision. And so they have."); *cf.* 2 *Newberg and Rubenstein on Class Actions* § 4:63 ("[M] any courts have held that individualized issues may bar certification for adjudication because of predominance-related manageability concerns but that these same problems do not bar certification for settlement. Courts therefore regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns.") (footnote omitted).

have to be narrower than is common, and the closure that the defendants would obtain would be more modest than their desires at that point.

Amici are indifferent to these dynamics, and perhaps the Court should be as well. But Petitioner presents its case in terms of fairness to defendants. When the full range of situations and dynamics in which overly broad classes might be proposed and approved are brought into focus, however, it becomes far less clear that a broad Article III–based decision would *inevitably* be defendant-friendly.

CONCLUSION

The Court's decision in this matter may benefit from consideration of (1) the history underlying the joinder-based nature of the question presented; (2) the fact that ease, rather than quantity *per se*, is the proper focus of the predominance inquiry; and (3) the shifting interests of defendants with respect to certification of broad classes.

Respectfully submitted,

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