No. 24-304

In the Supreme Court of the United States

LABORATORY CORPORATION OF AMERICA HOLDINGS, D/B/A LABCORP,

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND AMERICAN COUNCIL OF THE BLIND, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

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

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INTRODUCTION

The question presented is whether a federal court may certify a damages class that includes uninjured members. Labcorp asks the Court to answer that question through one of two alternative paths—either by interpreting Rule 23(b)(3)'s predominance requirement or by holding that Article III imposes a freestanding barrier to certifying any damages class if it includes even a single uninjured member. The first path presents a recurring procedural issue on which the lower courts largely agree—although none has adopted Labcorp's proposed categorical answer to this inherently case-specific inquiry. The second path proposes a novel constitutional rule that no circuit has adopted, that the Solicitor General does not embrace, and that would prove profoundly disruptive in practice.

At the threshold, however, Labcorp faces more fundamental problems. For one, the question presented is not actually presented. It presumes a scenario in which "some members of the proposed class lack any Article III injury." But neither court below determined that there are *any* uninjured class members here. To the contrary, the court of appeals found that "*all* class members were injured" in the same way. JA397, 399 (emphasis added).

For another, Labcorp's contrary position relies entirely (at 2, 8, 22, 43) on a class definition that the Ninth Circuit held was beyond "the bounds of its jurisdiction" and so was "not properly before th[e] court" on appeal—a holding on which Labcorp did not seek certiorari. JA400. Because that separate class definition falls outside the "case[] in the court of appeals," it also falls outside this Court's certiorari jurisdiction. 28 U.S.C. § 1254. The Court may therefore wish to dismiss the writ of certiorari as improvidently granted.

If this Court nevertheless reaches the question presented, it should conclude that Labcorp is wrong on the merits. Labcorp interprets Rule 23(b)(3) to impose two requirements. On its reading, not only must courts ask whether there is an administratively feasible way to identify uninjured class members and ensure that they receive no damages, but courts must go further—categorically denying certification of any damages class that contains more than what Labcorp calls an "appreciable number" of uninjured members.

Labcorp's amorphous new "appreciable number" standard has no basis in Rule 23(b)(3)'s text and would be unworkable in practice. Rule 23(b)(3) requires that common questions "predominate over any questions affecting only individual members." This text necessitates an inquiry into the existence of individualized issues, but it creates no special rule for questions of injury. It doesn't require those (and only those) questions to be perfectly uniform in every case. Nor does it impose some arbitrary cap on the percentage of the class that may be uninjured.

Instead, when a class is credibly shown to contain uninjured members, predominance turns on whether there is an administratively feasible way to identify them before they receive relief. This assessment necessarily requires courts to "undertake a case-specific inquiry into whether [the] class issues predominate." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011). Sometimes, the presence of uninjured members will not defeat predominance because they can be identified through administratively feasible procedures. Other times, the process of separating injured from uninjured class members will be sufficiently individualized that it will overwhelm common issues and defeat certification.

Reading Rule 23 in this way is consistent with this Court's decision, and Chief Justice Roberts's concurrence, in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016). And it is consistent with the Ninth Circuit's controlling approach to the issue, set forth in Judge Ikuta's en banc opinion in *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668 n.12 (9th Cir. 2022).

As Labcorp recognizes (at 37 n.3), resolving the Rule 23 question may make it unnecessary to reach the constitutional one: whether, *if* a court were to find that Rule 23 authorizes certification of a class with uninjured members, Article III would then impose its own barrier to certification. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 612 (1997) (explaining that "any Article III issues" created by class certification should be addressed only after the application of Rule 23, because those issues "would not exist but for the [class-action] certification").

In any event, if it does reach the issue, the Court should hold that Article III does not require all absent members to have standing for the class to be certified. Historically, representative actions followed a bifurcated procedure: first establishing the "general right" through a representative party, *Mayor of York v. Pilkington* (1737) 25 Eng. Rep. 946, 947 (Ch.), and only later requiring individual claimants to "come in under the decree" to prove their entitlement to relief. Story, *Commentaries on Equity Pleadings* § 99 (2d ed. 1840). Both Rule 23 and this Court's precedents adhere to this bifurcated approach. They distinguish between named plaintiffs, who must establish standing to invoke federal jurisdiction, and absent class members, who need not do so until the court acts on them as individuals.

This approach coheres with two core principles of Article III standing. The first is that standing is necessary "to justify [the] exercise of the court's remedial powers." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976). The second is that standing is necessary to keep a court from "deciding issues [that it] would not otherwise be authorized to decide." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). Under these principles, if a class member invokes the court's remedial powers as to her own claim—for example, by requesting relief—she must show standing. And if a court is asked to decide an issue that is not one of the common issues—for example, a question peculiar to one class member—that member must have standing for the court to address it. But neither of these principles is implicated at the certification stage

Labcorp's contrary view would cause chaos. It would threaten global peace via settlements that resolve some of the largest mass controversies today, splintering them into thousands of individual cases. The Court shouldn't open that Pandora's box. If it does, neither Congress nor the Rules Committee can put the lid back on.

Nothing about this case justifies Labcorp's quest for sweeping constitutional change. If there's a problem here, it isn't the result of some plot to "inflate" classes to "extort" innocent corporations. Pet. Br. 3. It is instead a problem of Labcorp's making. It was *Labcorp's* attack on the original class definition as *too* tethered to class members' injuries that led to the definition on which Labcorp now pegs its arguments. The hitch, though, is that the new definition wasn't within the scope of the appeal below. So it's not before this Court either. This rickety vessel simply cannot take Labcorp where it wants to go. The better course, for now, is restraint.

STATEMENT

A. Legal background

1. "[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999). As early as the 12th century, representative cases were heard in the court of the Archbishop of Canterbury. *See* Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 688 (1997). While the shape of representative litigation evolved in the ensuing centuries, it was alive and well at the time of the founding. *See* Yeazell, *From Medieval Group Litigation to the Modern Class Action* 176-94 (1987).

A common feature of representative litigation in that period was the bifurcation of proceedings. "In the first stage"—the classwide stage—the chancellor entered a decree determining the class's entitlement to the common right asserted. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. Rev. 213, 253 (1990). "Assuming entry of an interlocutory decree favorable" to the class, a second stage was then overseen by a master, at which point those being represented would "come in and litigate their individual claims." *Id.*

This equitable tradition carried over to America and was well established by the early 1800s. *See, e.g.*, *West v. Randall*, 29 F. Cas. 718 (D.R.I. 1821) (Story, J.); *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829). Justice Story, for instance, discussed the bifurcated process in his classic equity treatise. *See* Story, *Commentaries on Equity Pleadings* §§ 96, 99 (2d ed. 1840). And in *Swith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853), this Court allowed a representative action to proceed, awarded relief

to the class, and ordered the case referred "to a master" on remand for proceedings about the "distribution" of the fund among the class. *Id.* at 303, 309.

2. "From these roots, modern class action practice emerged in the 1966 revision of Rule 23." *Ortiz*, 527 U.S. at 833. Like its forebearers, a Rule 23 class action has two phases: (1) a representative phase, when the named plaintiff pursues a class claim on behalf of absent members, and (2) a phase when the court acts on class members as individuals (by, for example, issuing relief).

This is clear from the rule's text. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010). It says that a plaintiff who is part of a proposed class may act as a "representative part[y] on behalf of all members" only if four prerequisites are met. Fed. R. Civ. P. 23(a). Each reinforces the action's representative nature: (1) joinder of class members must be "impracticable"; (2) there must be a common legal or factual question such that answering it for the named plaintiff will answer it for the class; (3) the "representative parties" must have claims typical of the class; and (4) they must adequately represent the class. *Id.*

Rule 23 also requires the named plaintiff to satisfy one of Rule 23(b)'s subsections. Relevant here is (b)(3), which requires that common questions "predominate over any questions affecting only individual members." This subsection further reinforces the representative nature of the proceeding. It requires courts to consider, as part of the analysis, "class members' interests in individually controlling the prosecution … of separate actions,"

thereby making clear that absent members do *not* control the prosecution of the class claim. *Id.* 23(b)(3)(A).

If a named plaintiff satisfies Rule 23(a) and (b)(3), the court must certify a class action and "define the class and the class claims." *Id.* 23(c)(1)(B). The court then directs notice to absent members informing them of their right to opt out. *Id.* 23(c)(2)(B). Those who do not opt out become part of the class, and the named plaintiff pursues his claim as a class claim on their behalf. The absent class members may monitor the proceedings and seek "to intervene and present [their] claims" or "to otherwise come into the action." *Id.* 23(d)(1)(B)(iii). But they will "come into the action" only with court permission. *Id.* It is only in the final judgment—which the rule calls a "class judgment"—that the court must "specify or describe those … whom [it] finds to be class members." *Id.* 23(c)(2)(B)(vii), (3)(B).

In many cases—both litigated judgments and class settlements approved by the district court under Rule 23(e)—the court will also establish and oversee a post-judgment claims process. Fed. Jud. Ctr., *Managing Class Action Litigation: A Pocket Guide for Judges* 30 (3d ed. 2010). During this process, class members may come forward to request relief on their individual claims. Claims-administration firms and special masters are often tapped to aid the court in implementing this process and ensuring that only valid claims are paid. *Id.*

B. Factual background

Labcorp is a diagnostic-testing company that earns over $11 billion annually providing patients with medical tests like blood and urine screenings. JA205, 605. It operates around 2,000 patient service centers nationwide, including 280 in California. JA574-75, 605.

In 2016, Labcorp replaced traditional patient check-in at its service centers with self-service kiosks. JA573. The new system—for which it registered the new service mark "Labcorp Express"—allows patients to register and check themselves in, and to perform other tasks like making appointments, tracking test results, and paying bills. JA579-80. Labcorp predicted that, by reducing staff and increasing the number of patients served, Labcorp Express would save $14 million per year—paying for itself in under four years. JA575, 578.

Internal documents, however, show that Labcorp recognized a "risk" to its plan: Blind patients would be "unable to check in" at the kiosks. JA168, 576; *see* 4-ER-909. Labcorp could have easily addressed this problem. At the time, a "number of companies provide[d] kiosks … for healthcare check-in" that were "fully accessible." JA238. As the plaintiffs' expert explained, accessible kiosks were thus a readily available and cost-effective option that would not have interfered with functionality. JA236. Indeed, the first vendor proposal that Labcorp received was for such a device—an ADA-compliant kiosk with accessibility features. JA477, 582; *see* 5-ER-1185-88.

Yet Labcorp declined that option, instead selecting kiosks that are "not accessible to blind users." JA235-36, 582. Although these kiosks are built around iPads, which come equipped with various accessibility features, Labcorp left their screen-reading software disabled and covered up their built-in headphone jacks. JA237-38, 575, 582-83. And although Labcorp considered offering "a braille option," JA64, it took no action to do so, nor to implement an accessible alternative. JA596-98.

There is thus "no way for a blind user" to "interact with this kiosk." JA236. Labcorp "explicitly recognized"

as much, noting internally that its "device could not service a blind person." JA207. It nevertheless chose to implement "identical" inaccessible kiosks in nearly 2,000 waiting rooms nationwide. 1-ER-37.

Making matters worse, Labcorp trained its staff to instruct patients that kiosks were "mandatory" for check-in. JA382, 584-85. That left blind patients with no choice but to ask for help navigating the touchscreen devices—usually from a stranger—forcing them to divulge personal medical information in public. *See* 6-ER-1484-86; 7-ER-1507, 1510. Blind patients were thus not only denied the benefits of express check-in, but were forced to endure longer waits and less privacy than before. That is especially problematic in a medical office, where patients are often sick, elderly, or weak from fasting for blood tests, and where spending time in the waiting room risks exposure to disease. JA573; *see* 6-ER-1366-67.

Although Labcorp now claims (at 1) that blind patients have "zero interest" in kiosks, it presented "no evidence" below to back this up. JA382, 584-85. It asserts (at 9) that "[u]nrebutted record evidence shows that over a third of all Labcorp patients prefer not to use a kiosk." That is false. The only evidence it cites shows that, during a limited time period, a third of patients didn't use the kiosks. 3-ER-509. That says nothing about the *preferences* of those patients, let alone of blind patients. For that, Labcorp relies on the testimony of a single class member (at 9) who, because he is blind, was never informed that the kiosks existed and was therefore, as the Ninth Circuit recognized, denied "the ability to make [the] choice" to use them. JA399; *see* 3-ER-452.[1] In any

[1] Labcorp also suggests (at 9) that the record has "indication[s]" that a "higher" percentage of blind patients prefer not to use kiosks.

event, subjective preferences are irrelevant here. Labcorp does not dispute that using Labcorp Express was "not optional" for patients. JA382, 591.

C. Procedural background

1. After Labcorp ignored their complaints, the plaintiffs—two blind patients unable to access Labcorp Express—sued Labcorp under the ADA and California's Unruh Civil Rights Act. Their complaint alleges that Labcorp violated these statutes by denying them (1) equal access to Labcorp's services and (2) auxiliary aids and services, such as qualified screen-reading software or braille alternatives, necessary "to ensure effective communication." *See* 42 U.S.C. § 12182(b)(1)(A)(ii), (b)(2)(A)(ii); 28 C.F.R. § 36.303(b)(2), (c)(1); *see also* Cal. Civ. Code § 51(f) (incorporating same).

The plaintiffs sought certification of a Rule 23(b)(3) class of California plaintiffs seeking damages under the Unruh Act. JA358-59, 370-71, 394; 1-ER-65. They argued that common questions predominate because all plaintiffs are entitled to statutory damages. JA357. But "should the need arise for class members to confirm eligibility to recover statutory damages," they explained, the "issue may properly be addressed by way of a claim form after class wide liability has been determined." JA357-58.

The district court agreed. It found that Labcorp's kiosks are "identical" and that it could, if needed, "create a claims process by which to validate individualized claim determinations." JA360. The district court defined the damages class as: "All legally blind individuals who

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But the testimony it relies on establishes only that having "a staff member [] available" at check-in is, for privacy reasons, preferable to forcing patients to rely on a stranger's help. JA328-29.

visited a LabCorp patient service center in California during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to Labcorp's failure to make its e-check-in kiosks accessible to legally blind individuals." App.33. The district court issued that order in May 2022, and Labcorp promptly filed a Rule 23(f) petition in the Ninth Circuit. JA394.

Soon thereafter, in June, the district court issued an amended class-certification order (the only amendment was the inclusion of a footnote noting Labcorp's waiver of an argument). JA 335, 341 n.4. A few days later, the plaintiffs moved to amend the class definition. 2-ER-123. Because Labcorp had complained that the prior definition was "fail-safe"—meaning only people who prevailed in proving their claims would be in the class—the plaintiffs sought to refine the definition. 2-ER-130. In August, the district court granted the motion and adopted the new class definition. JA372-87. That definition defined the class to include those "who, due to their disability, were unable to use the LabCorp Express" kiosk. JA387. Labcorp never appealed the June 13 or August 4 orders, and "never attempted to amend or refile" its appeal of the May 23 order. JA 400.

Because the dates of the orders are important, we recap them briefly here:

- May 23: District court grants class certification. This order—and only this order—is appealed.
- June 13: District court issues amended class certification order (adding one footnote).
- August 4: District court grants motion adopting the new class definition.

Contrary to Labcorp's claim (at 2), at no point in any of these orders did the district court suggest that "the class contained a sizable number of members who lacked any Article III injuries." The district court's limited discussion of standing on which Labcorp relies came entirely in the August 4 order. *See* Pet. Br. 10 (citing JA379-87). The order ruled that Labcorp had "provide[d] no evidence or citation to the record" showing that any class member is uninjured. JA379. When discussing the class definition that is before this Court, the district court explained that *all* class members are blind patients "who attempted to or were discouraged from using LabCorp's kiosks." JA358.

2. The Ninth Circuit granted Labcorp's Rule 23(f) petition for interlocutory review of the district court's original May 23 class certification order. JA393-400. On appeal, Labcorp argued that certification was improper because some class members were uninjured and hence lacked standing. The Ninth Circuit disagreed, noting that "all class members maintain that their injury resulted from the inaccessibility of a LabCorp kiosk." JA397; *see also* JA399. Regardless, the court noted in a footnote, Labcorp's bare "allegation that some potential class members may not have been injured does not defeat commonality at this time." JA397 n.1 (citing *Olean*, 31 F.4th at 668-69). The Ninth Circuit expressly refused to consider Labcorp's challenges to class definitions found in later district-court orders, noting the importance of "polic[ing] the bounds of [its] jurisdiction." JA400.

SUMMARY OF ARGUMENT

I. Although the question presented presumes that "some members of the proposed class lack any Article III injury," neither court below found that *any* members lack

injury here. To the contrary, the Ninth Circuit explicitly found that "all class members were injured." JA397, 399. Because there's nothing to reverse, this Court should either dismiss as improvidently granted or affirm.

In addition, the Court cannot reach the question presented without first addressing a series of logically antecedent jurisdictional and prudential barriers. Among others, Labcorp's entire argument about uninjured class members is based on a *subsequent* class definition that the Ninth Circuit held was outside its appellate jurisdiction—a holding from which Labcorp did not seek certiorari.

II. If the Court nevertheless reaches the question, it should hold that Rule 23(b)(3) requires courts to ask whether there is an administratively feasible way to identify uninjured members and bar them from recovery.

The parties agree that Rule 23(b)(3) neither requires a class entirely free of uninjured members nor permits certification when individual inquiries into standing would overwhelm common questions. Where we diverge is Labcorp's invented "appreciable number" standard, which has no basis in Rule 23's text. The correct analysis is not quantitative (how many?) but qualitative (how difficult will it be to identify them?). The difference, in other words, is not whether there is an "appreciable number" of uninjured class members. It is whether there is an "administratively feasible" "mechanism for distinguishing the injured from the uninjured class members" before the recovery phase. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

III. Article III poses no freestanding barrier to certifying a class containing uninjured members. At certification, only the named plaintiff, as the party invoking federal jurisdiction, must show standing. Absent

members take no action to invoke judicial power at this stage—indeed, this Court has rejected as "surely erroneous" the "argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (quoting *Devlin v. Scardelleti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). Text, history, and precedent confirms this understanding. From early English privateer suits to American creditor actions, representative litigation had two phases: first determining class rights, then adjudicating individual claims. As Justice Story described, first "the decree is made for the benefit of all," then individuals "come in under the decree" and "prove their debts." Story, *Commentaries* § 99. Rule 23's text and this Court's precedents follow this bifurcated approach.

Labcorp's theory of Article III is not only contrary to history and precedent but would also greatly disrupt class-action practice and deprive defendants of global peace. Settling complex mass claims would become difficult or impossible, and courts would be flooded with individual suits that could have been efficiently aggregated and resolved through class proceedings. Adopting Labcorp's novel constitutional barrier would upset decades of settled practice, with sweeping real-world consequences for the American legal system that neither Congress nor the Rules Committee could undo.

ARGUMENT

I. This Court should either dismiss the writ as improvidently granted or affirm the judgment.

A. Labcorp contends (at 37 n.3) that this Court could reverse the judgment below based on the Ninth Circuit's supposed failure to apply its "appreciable number" test.

But even assuming that test had some basis in Rule 23, it is hard to see how this Court could do that here. For a simple reason: There is nothing to reverse. Neither the district court nor the Ninth Circuit had any occasion to decide the question presented *at all* because neither found that there were any uninjured members to begin with.[2]

B. This is not just a barrier to reversal—it is a basic vehicle problem that should lead the Court to dismiss the writ as improvidently granted. The question presented assumes a premise—that "some members of the proposed class lack any Article III injury"—that was never established below. Again, no court below determined that there are any uninjured members here. The district court thus did not certify a class on that basis, and the Ninth Circuit did not affirm on that basis.

The Ninth Circuit, in fact, did the opposite. It held that "all class members" suffered an "injury [that] resulted from the complete inaccessibility of a Labcorp kiosk." JA397; *see also* JA 399. One reason it did so is because the class definition that the district court initially adopted—and the only one that Labcorp properly appealed—limited the class to those blind patients who "were denied full and equal enjoyment" of Labcorp's services. App.33. It is *that* definition that the Ninth Circuit addressed and that is now before this Court. Yet Labcorp makes no attempt to show how anyone who meets that definition could be uninjured. And this would be a tough sell for it to make: In its Rule 23(f) petition, Labcorp complained that the only people in

[2] In the district court, Labcorp made only a "skimp[y]" "one-sentence" argument about standing. JA385. But that was in briefing on a *different* motion leading to a *different* order that Labcorp did not separately appeal. The district court therefore ruled that Labcorp "provide[d] no evidence or citation to the record" on this issue. JA379.

that definition were those who were "denied access" and therefore were injured. No. 22-80053, ECF1-2 at 18.

So Labcorp instead tries to rewrite the procedural history and change the terms of the debate based on a different, revised class definition that was not before the Ninth Circuit. *Compare* Pet. Br. 8 (citing class definition adopted in August 4 order modifying class), *with* App.33 (class definition in May 23 order that Labcorp appealed). Based on that subsequent definition, Labcorp argues (at 2) that the class at issue here "include[s] all blind patients who had merely been exposed to the kiosks in California"—which, in Labcorp's view, covers anyone who "walked into a Labcorp facility with a kiosk, regardless of whether they knew about or wanted to use it."

But the Ninth Circuit did not "bless the certification" of this class. *Contra* Pet. Br. 22. Rather, it expressly declined to consider *any* class definition issued after the original order—including the one Labcorp now relies on—because "Labcorp never attempted to amend or refile its interlocutory appeal." JA399-400. Accordingly, that class definition is outside the "[c]ase[] in the courts of appeals" for purposes of this Court's certiorari jurisdiction under 28 U.S.C § 1254. And, in any event, Labcorp did not seek certiorari on the Ninth Circuit's jurisdictional holding, so this Court should not disturb it. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 104 n.3 (2007).

Where, as here, a "mare's nest" of issues "stand[s] in the way of" reaching the question presented, the prudent course is to dismiss the writ as improvidently granted. *Arizona v. City & Cnty. of S.F.*, 596 U.S. 763, 766 (2022) (Roberts, C.J., concurring); *see also Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S 81, 97 (2014) (Scalia, J., dissenting) (same for jurisdictional issues).

And there is no way around the thicket here: Before this Court could review the August order that contains the operative class definition (and the only one that Labcorp complains about here), it would have to address two threshold issues—one jurisdictional and one prudential:

- What is the scope of the Rule 23(f) appeal, and thus this Court's certiorari jurisdiction?
- Should Labcorp be permitted to make this argument given that it didn't seek certiorari on the Ninth Circuit's jurisdictional holding?

Conversely, if the Court were to limit its review to the May order, it would *still* have to address two threshold issues—again, one jurisdictional issue and one prudential:

- Is the appeal moot because the order has been supplanted by a subsequent order, and it's only that order that gives rise to Labcorp's concerns?
- Given Labcorp's contrary position and failure to include any separate challenge to the May order in its brief to this Court, has Labcorp forfeited any argument premised on that class definition?

Should the Court surmount these hurdles, it would then have to address yet another threshold issue—this one factual. Labcorp asks this Court to pass for the first time on what it calls "[u]ndisputed record evidence," arguing (at 1) that blind patients have "zero interest" in kiosks. And it claims (at 8) that this evidence "shows that over a third of all Labcorp patients prefer not to use a kiosk." Neither statement is true or relevant. The documents that Labcorp cites show, at best, that, during a limited period, a third of patients simply didn't use the kiosks—with no data about blind patients. 3-ER-509. At any rate, this Court does not sit to referee disputes about the facts in the first instance.

Even aside from its scanty evidentiary presentation, the lack of any decision, or even a record, on the question presented means that this Court could not resolve how the predominance requirement works when "some members" are uninjured, let alone apply it to the class here (whatever it may be). Pet. Br. i. That is especially problematic given that predominance is inherently "case-specific." *Dukes*, 564 U.S. at 362-63. A proper vehicle would include evidence identifying which members might be uninjured; expert testimony on methods to identify these members; a developed record on the administrative feasibility of separating injured from uninjured members; and reasoned decisions by lower courts applying legal standards to the facts. This case has none of that.

C. If the Court does not dismiss the writ, it should affirm because Labcorp has identified no legal error in the judgment below. Labcorp contends (at 48) that the Ninth Circuit "upheld the certification of a class that contains uninjured members, and a significant number of them at that." But, as noted, the class definition that was before the Ninth Circuit included only those who "were denied full and equal enjoyment" of Labcorp's services because of their disability, which is why the Ninth Circuit saw no merit to Labcorp's unsupported "allegation" about uninjured class members. JA397 n.1, 399-400. And having rejected that argument, the Ninth Circuit affirmed an order issued by a district court that engaged in a rigorous application of Rule 23. The many case-specific rulings that the district court made in applying Rule 23 are reviewed for an abuse of discretion. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). Labcorp has challenged none.

The Court could also affirm because all of the class members, regardless of which class definition one

considers, suffered injury. Labcorp knowingly chose to implement identical inaccessible kiosks in all locations, despite recognizing the risk that blind patients would be unable to use them; deliberately declined accessible options that were readily available; and told patients that kiosk use "mandatory." Labcorp's sighted patients can and do check in privately, and quickly, via Labcorp Express. Its blind patients cannot.

D. Finally, if the Court has any doubts about the factual premise, it would at minimum need to vacate and remand for a determination on the existence of uninjured class members. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not [] first view."). That disposition would be necessary were the Court to resolve the case based on either Rule 23 *or* Labcorp's much bolder Article III argument, both of which only matter in this case if there *are* uninjured class members.

II. Common issues can predominate under Rule 23 notwithstanding that some members—or even an "appreciable number" of them—are uninjured.

If this Court somehow reaches the merits, several important points of agreement between the parties should guide its analysis. As Labcorp acknowledges (at 37 n.3), this Court can begin with Rule 23. And, depending on how that question is resolved, the Court can end there too. At certification, Article III requires that the named plaintiff have standing before a court may address the Rule 23 issues. But when the Article III concern\s are said to arise only from *granting* certification, this Court has repeatedly held that the Rule 23 issues are "logically antecedent to Article III concerns" and "thus should be treated first." *Ortiz*, 527 U.S. at 831; *see Amchem*, 521 U.S. at 612. That approach comports with principles of constitutional

avoidance and judicial restraint, and this Court should follow it here.

The parties further agree on two points as to Rule 23(b)(3). On the one hand, Rule 23(b)(3) does "not require a class unsullied by *any* uninjured member." Pet. Br. 42. On the other hand, the presence of uninjured members can, depending on the circumstances, defeat certification under Rule 23(b)(3). Because "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021), a court must assess "whether individualized inquiries into [] standing" will "predominate over common questions," *Olean*, 31 F.4th at 668 n.12.

Where the agreement ends is on Labcorp's attempt to read Rule 23(b)(3) to contain an arbitrary (yet undefined) limit on the number of uninjured members. Labcorp says (at 13) that predominance—the only part of Rule 23(b)(3) it invokes—cannot possibly be satisfied if the class "contains an appreciable number of uninjured members." But this "appreciable number" test is wholly untethered from Rule 23(b)(3)'s text, and this Court should reject it. Instead, the Court should apply the rule as written.

The rule's text makes two things clear:

First, the rule subjects all questions to the same test: The common questions must "predominate over *any* questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added). "Any" relevant questions—whether injury, causation, or something else—must be assessed under this rule. *Contra* Pet. Br. 46; U.S. Br. 11.

Second, the rule requires district courts to "undertake a case-specific inquiry into whether [the] class issues predominate." *Dukes*, 564 U.S. at 362-63. The text of Rule 23 is thus not susceptible to judge-made, categorical rules

of the kind Labcorp advocates, which is why this Court has rejected "across-the-board rule[s]" before. *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

No more is needed to reject Labcorp's proposal. As with any other certification issue, the correct outcome will depend on the particulars of the case. If identifying uninjured members will "overwhelm" the resolution of the common questions, predominance will not be met. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). If, by contrast, the named plaintiff shows that no such inquiry (or any individual question) will swamp the resolution of common issues—because, for example, there is a feasible way to excise uninjured members before distributing damages—predominance is satisfied.

A. Rule 23(b)(3) treats all questions alike.

1. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398. If the criteria are met, certification follows. *See id.* at 406.

As the text of Rule 23(b)(3) makes clear, no *particular* issue—injury included—need be common to the class. All that (b)(3) demands is that the common questions "predominate over any [individualized] questions." That requirement is met if "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 577 U.S. at 453.

Nor does the rule license courts to treat any type of individualized question differently than others. The comparative analysis requires weighing the common questions against "*any* questions affecting only individual members." Fed. R. Civ. P. 23(b)(3) (emphasis added).

"[A]ny has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). In other words, the rule treats *all* kinds of individualized questions the same. It does not prize injury above all else, insisting that the answer to this question—and only this question—be perfectly uniform.

2. Despite the rule's text, Labcorp insists (at 46) that "questions of member standing are different in kind from other questions of law or fact because they go to the *size* of the class and, in turn, the *specter* of liability." This policy argument makes little sense even on its own terms.

Standing questions are not unique in their ability to affect the class "size" or "specter of liability." *Any* individual question affecting the viability of a claim does so. Affirmative defenses are an example. Yet courts are "reluctant to deny [certification] under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016); *see Tyson Foods*, 577 U.S. at 453 (common questions can predominate even when "damages or some affirmative defenses" "will have to be tried separately"). Courts regularly certify classes, for instance, despite individualized statute-of-limitations questions. *See* Rubenstein, 2 *Newberg and Rubenstein on Class Actions* § 4:57 (5th ed. 2011).

3. Like Labcorp, the government thinks that standing questions merit special treatment. It argues that, if injury is not perfectly common, "it is hard to see how some *other* common question could predominate." U.S. Br. 11; *see id.* at 23-24. That conclusory assertion leads the government to propose a rule (at 7, 12) that goes beyond what even

Labcorp advocates: that Rule 23(b)(3) does not permit a class to contain *any* uninjured members.

That view stands in stark contrast to the position it took before this Court in *Tyson Foods*. There, it repeatedly emphasized that, under Rule 23(b)(3), the "inclusion of some" uninjured class members "neither preclude[s] certification of the class … at the outset nor require[s] decertification following a jury verdict" so long as a mechanism exists to "ensure" that uninjured individuals will "not be granted relief." U.S. Br., *Tyson Foods*, 2015 WL 5719741 at *13, 25, 31-35.

Without so much as acknowledging the fundamental change in its position (or citing *Tyson Foods*), the government now says (at 2) that its categorical rule is justified by a single "all but dispositive" sentence from *Dukes*. But the sentence that it plucks out of context says nothing about the question presented here.

Dukes addressed Rule 23(a)(2)'s commonality requirement. The Court explained that common questions are questions that are capable of "generat[ing] common *answers* apt to drive the resolution of the litigation," which requires the class's claims to "depend upon a common contention." 564 U.S. at 350. So when this Court said that "[c]ommonality requires the plaintiff to demonstrate that the class members have suffered the same injury," it was addressing *that* problem—where, as in *Dukes*, a class presses heterogeneous legal claims. *See id.* at 350-51.

But some variation in whether class members suffered an injury—rather than the *kind* of injury suffered—does not invariably defeat the existence of common questions or the conclusion that they predominate. This Court has twice said as much. In *Tyson Foods*, the Court affirmed certification of a class that undoubtedly contained

uninjured members. 577 U.S. at 451, 454, 461. And in *Halliburton*, this Court held that a securities class may be certified even where the defendant could "pick off" class members through "individualized" evidence showing that they were uninjured. 573 U.S. at 277. Such individual inquiries, the Court stressed, do not defeat predominance.

B. Whether a Rule 23(b)(3) class may be certified requires a qualitative assessment of the difficulty of identifying uninjured members, not a quantitative one about their number.

Unlike the government, Labcorp does not argue for a categorical reading of Rule 23 that would bar certification of any class with uninjured members. It does, however, ask this Court to adopt a different categorical rule (at 37): that "Rule 23(b)(3) prohibits certification of a proposed class with an appreciable number of uninjured members."

This novel, atextual rule—apparently coined by Labcorp in its merits brief—is grounded in Labcorp's predictive judgment (at 48) that individual questions will "inevitably" predominate in cases involving appreciable numbers of uninjured class members.[3] The text of Rule 23(b)(3) does not lend itself to such sweeping judgments, though, and Labcorp's prediction is inaccurate regardless. The right approach—which lower courts have coalesced around, albeit with a range of verbal formulations—requires asking if there is a credible reason to believe that some members are uninjured, and if so, whether there is an administratively feasible mechanism for identifying them and excluding them before damages are distributed.

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[3] A Westlaw search of all cases, briefs, and sources using the phrase "appreciable number" in the same sentence as "uninjured," "class," and "members" yields only one hit: Labcorp's merits brief.

1. Rule 23(b)(3) requires courts to "undertake a case-specific inquiry" into predominance, *Dukes*, 564 U.S. at 362-63, and provides "a nonexhaustive list of factors" bearing on that case-specific determination, *Amchem*, 521 U.S. at 615-16. The rule introduces those factors as "matters pertinent to" predominance and delineates four specific examples that are "include[d]" among those to be considered. Fed. R. Civ. P. 23(b)(3)(A)-(D).

Provisions like this—which use "the term[] 'including'" to indicate the "illustrative and not limitative function" of enumerated factors—are "not to be simplified with bright-line rules." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). They call for "case-by-case analysis," *id.* at 577, not an "across-the-board rule," *Falcon*, 457 U.S. at 160.

2. The presence of uninjured members, of course, affects that case-by-case analysis. Because only injured people may recover damages, there must be "some way to segregate the uninjured from the [] injured." *In re Rail Freight Fuel Surcharge Antitrust Litig.* (*Rail Freight II*), 934 F.3d 619, 625 (D.C. Cir. 2019).

But the driving consideration for predominance is not the *number* of uninjured class members; rather, it is the ease with which they can be identified and excluded. *See* Br. of Rubenstein & Miller 4. ("[T]he issue for predominance purposes is the *ease of excision*, not the number to be excised."). At bottom, "predominance is a qualitative rather than a quantitative concept. It is not determined simply by counting noses." *Brown*, 817 F.3d at 1239 (William Pryor, J).

Some examples help make the point. On one end of the spectrum: A class could contain a large group of members who are uninjured, but that group is readily identifiable.

That's *TransUnion*. The evidence there allowed for easy identification of which class-member records were given to third parties and which were not—and thus who could recover after the verdict and who could not. *See* 594 U.S. at 439. That case thus disproves the idea that the *number* of uninjured members is what matters: Over 75% of class members were uninjured (6,332 out of 8,815) but excising them was simple.

Conversely, a class might contain only a relatively small number of uninjured members. But if they will be impossible to identify, the class definition would likely require modification to ensure their exclusion. If that, too, is impossible, certification would be inappropriate.

The difference, then, is not whether there is an "appreciable number" of uninjured members. Pet. Br. 37. It is whether there is an "administratively feasible" "mechanism for distinguishing the injured from the uninjured class members" before the recovery phase. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *see* Pet. Br., *Tyson Foods*, 2015 WL 4720265, at *49-51 (arguing same).

This case doesn't afford an opportunity for this Court to concretely expound on what it means for a mechanism to be administratively feasible, given that no court below addressed this issue. But the federal courts have a great deal of experience sorting out what is, and isn't, workable. They have, for instance, considered the permissibility of using expert witnesses, sworn class-member affidavits, or the defendants' own records. *See, e.g., Hargrove v. Sleepy's LLC*, 974 F.3d 467, 479-81 (3d Cir. 2020) (relying on a combination of evidence). If, using these mechanisms, "there is no reason to think that [individualized] questions will overwhelm common ones and render class

certification inappropriate," class treatment is permissible. *Halliburton*, 573 U.S. at 276.

3. Labcorp's principal support (at 44) for its sweeping prediction, and resulting rule, is this Court's statement in *Comcast Corp. v. Behrend* that—*in that specific case*—"individual damage calculations [would] inevitably overwhelm [common] questions." 569 U.S. 27, 34 (2013). That case-specific holding is not anything close to the broad rule that Labcorp says it is.

Comcast was describing the specific flaw with the class there. The plaintiffs alleged four antitrust-injury theories, only one capable of classwide proof. 569 U.S. at 31. So the plaintiffs had to show "that the damages resulting from that injury" could be measured with a "common methodology." *Id.* at 30. Their damages model, however, "failed to measure damages resulting from the particular antitrust injury on which" liability was premised. *Id.* at 36. It instead "assum[ed] the validity of all four theories of antitrust impact." *Id.* Because this model "identifie[d] damages that [were] not the result of the wrong," Rule 23 was not satisfied. *Id.* at 37-38.

Comcast did not hold that, even where there *is* a single liability theory and damages are tied to it, damage calculations may not be individualized or depend on individual proof to satisfy Rule 23(b)(3). That is why, even after *Comcast*, the "black letter rule recognized in every circuit is that individual damage calculations generally do not defeat a finding that common issues predominate." *Brown*, 817 F.3d at 1239. This Court has expressly said as much. *See Tyson Foods*, 577 U.S. at 453 (reiterating post-*Comcast* that a Rule 23(b)(3) class may be certified despite individualized "damages").

4. Not only is Labcorp's "appreciable number" rule without any basis in Rule 23's text or this Court's cases, it also lacks the benefits of a purportedly bright-line rule. The virtue of bright-line rules is in their "clarity" and the "certainty" of their application. *Maryland v. Shatzer*, 559 U.S. 98, 111 (2010). Labcorp's rule achieves neither.

Just what is an appreciable number? Is it an absolute number? Or is it defined in relation to the class size? Does it depend on the type of case? Does it depend on the substantive law at issue? Labcorp answers none of these questions. But the lower courts have grappled with some of them. Their answers reveal the folly of Labcorp's rule.

The First Circuit, for example, has used the words "de minimis" (which sounds like a numerical inquiry). But that court "define[s] de minimis in functional terms." *Nexium*, 777 F.3d at 30. Rather than count heads, it asks if there's a "mechanism that can manageably remove uninjured persons from the class in a manner that protects the parties' rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 54 (1st Cir. 2018). The D.C. Circuit requires a similar "winnowing mechanism." *Rail Freight II*, 934 F.3d at 92.

If these cases are any guide, Labcorp's appreciable-number rule cannot actually be applied based on numbers. And if the inquiry is "functional" and turns on the realities of each individual case, *Nexium*, 777 F.3d at 30, then the purportedly bright-line rule turns out to be no rule at all.

C. Rule 23 already addresses the policy concerns raised by Labcorp and the Solicitor General.

With the text against them, Labcorp and the Solicitor General raise policy concerns about settlement pressure. *See* Pet. Br. 3, 13, 32-36; U.S. Br. 8, 19-21. This Court has rejected such arguments before. *See Amgen Inc. v. Conn.*

Ret. Plans & Tr. Funds, 568 U.S. 455, 474-77 (2013) (dismissing policy arguments about "in terrorem settlements"). And here, the arguments ignore the many ways in which these concerns are already addressed.

As noted, Rule 23(b)(3) ensures that a class is certified only if uninjured members can be barred from recovery. If that cannot be done, certification is improper. Labcorp's parade-of-horribles cases (at 41-42) only prove this point. In each, the court of appeals either affirmed the denial of certification or remanded for a closer look.

District courts also have many tools to ensure that the uninjured don't recover. They can "(1) bifurcat[e] liability and damage trials"; "(2) appoint[] a magistrate judge or special master to preside over individual damages proceedings; (3) decertify[] the class after the liability trial" and notify class members how to "proceed to prove damages; (4) creat[e] subclasses; or (5) alter[] or amend[] the class." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayor, J.), *abrogated on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 70 (2d Cir. 2007). And quite often, a defendant's *own* records and information will readily permit the removal of uninjured members. *See supra* 26; Br. of Claims Administrators 7–10.

Labcorp ignores these realities, arguing (at 13) that "the promise of back-end review [] is illusory given the in terrorem effect … of certifying inflated classes." The premise seems to be that the existence of uninjured class members induces *incremental* settlement pressure above and beyond the mere fact of certification. But that doesn't make sense. After *TransUnion*, everybody knows that the uninjured can't recover. They likewise know that, if a class has been certified, there is a mechanism for ensuring that

will not happen. So it is difficult to see why a rational defendant would account for the presence of uninjured members in deciding whether to settle, and for how much. *See* U.S. Br., *Tyson Foods*, 2015 WL 5719741 at *34 (explaining that "the presence" of some uninjured class members will have "no effect" on a defendant's "liability to the class" and "is relevant only to allocation of the award among the class members").[4]

In short, Labcorp's proposed rule conflicts with the text of Rule 23 and with this Court's precedents, would be unworkable in practice, and is not needed to advance any legitimate policy goals. It should be rejected.

III. A court does not lack Article III jurisdiction to grant a named plaintiff's motion to certify a Rule 23(b)(3) class simply because some putative absent class members are uninjured.

Labcorp's constitutional argument is ambitious: Even if a class satisfies Rule 23(b)(3), it argues (at 15-16), Article III imposes a freestanding jurisdictional barrier to certification if the class contains uninjured members. Not even the Solicitor General embraces this theory. And this Court need not address it should the Court elect to decide the Rule 23(b)(3) question in the abstract and vacate the Ninth Circuit's judgment. The Article III question would arise only if, on remand, the courts below held that the proposed class contains uninjured members and certified

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[4] Labcorp also exaggerates the damages in this case. The top-line conclusion of the report on which Labcorp relies (at 9) in fact states that the California class had "at least 8,861 legally blind members" and estimates annual damages of $35 million. JA246. In any event, various other limitations prevent the imposition of massive statutory damages in class actions. *See* 2 *Newberg and Rubenstein on Class Actions* § 4:83.

it. *See Amchem*, 521 U.S. at 612. Normal principles of constitutional avoidance and judicial restraint caution against going any further. But should the Court reach Labcorp's constitutional argument, it should reject it.

A federal court has Article III jurisdiction to grant a named plaintiff's class-certification motion so long as the named plaintiff has standing. If the named plaintiff has standing and Rule 23(b)(3) is met, the court has the power to certify the class notwithstanding "any subsequent jurisdictional question" as to particular absent members. *Waetzig v. Halliburton Energy Servs., Inc.*, 145 S. Ct. 690, 696 (2025). Simply put: The existence of uninjured class members is not a jurisdictional problem at certification.

Nor does it become a jurisdictional problem just after certification. Text, history, and precedent confirm that litigated class actions have two phases: (1) a *representative* phase, when the named plaintiff pursues the litigation on behalf of the class, the class definition is subject to change, and absent class members do not invoke the power of the court; and (2) a phase when the court acts on class members as *individuals*, typically when it orders relief to them. In the first phase, whether each absent class member has standing is irrelevant to the court's jurisdiction over the class claim. In the second phase, by contrast, each member must have standing for the court to order relief as to their own individual claim.

A. If a court has jurisdiction over the named plaintiffs' claims and Rule 23(b)(3) is satisfied, the court may—and indeed, must—certify the class despite "any subsequent jurisdictional question" as to absent class members' claims.

1. "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion*,

594 U.S. at 423. This Court has "long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties." *Carney v. Adams*, 592 U.S. 53, 58 (2020). "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).

As the "party invoking federal jurisdiction," a named plaintiff quite obviously "bears the burden of establishing" standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). But the named plaintiff is the *only* "person invoking the power of [the] federal court" when the case is filed, *Hollingsworth*, 570 U.S. at 704—even if the complaint is styled as a proposed class action. So, unless someone else seeks to "become[] a party by intervention, substitution, or third-party practice," *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011), the named plaintiff is the only one whose standing matters at the start.

That remains true at the certification stage. A putative absent class member—that is, "an unnamed member of a proposed but uncertified class," *id.*—does nothing to invoke the power of the court, and her claim will not even arguably be a part of the case until a class is certified and the opt-out period has passed. Putative class members, therefore, are jurisdictional non-entities. They are not parties to the underlying case, nor are they parties to the motion to certify a class. Stated differently, they are not invoking "the court's remedial powers," *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976), nor are they asking the court to "decid[e] issues [that it] would not otherwise be authorized to decide" or to expound on the merits, *DaimlerChrysler*, 547 U.S. at 353. So long as the named plaintiff has standing, then, the court has Article

III jurisdiction over the case and may rule on the named plaintiff's motion to certify the class. Whether that motion should be granted is a question for Rule 23.

Labcorp, but not the government, disagrees. It argues (at 18) that Article III erects a freestanding requirement that absent members "demonstrate standing *before* a court certifies a class." *TransUnion*, 594 U.S. at 431 n.4. But this Court has already rejected the "surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified*." *Smith*, 564 U.S. at 313 (quoting *Devlin v. Scardelleti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). Any jurisdictional concerns raised by uninjured members exist *downstream* of class certification; they are not a jurisdictional *bar* to it.

This Court's recent decision in *Waetzig* supports this understanding. There, the plaintiff voluntarily dismissed his claims after they were sent to arbitration and then, upon losing in arbitration, sought to reopen the case and vacate the arbitral award. 145 S. Ct. at 694. The question presented was whether the district court had the power to reopen the case under Rule 60(b). This Court held that it did. The Court so held even though the defendant argued that the district court "lacked jurisdiction" to do the only thing Waetzig was asking it to do *after* reopening the case: "vacate the arbitration award." *Id.* The district court's power to grant the Rule 60(b) motion, the Court explained, was "separate from, and antecedent to," its jurisdiction to later grant the motion to vacate. *Id.* at 695. Whether the federal rules gave the district court the "power" to do the former (reopen the case) "must be addressed before any subsequent jurisdictional question" arises about its power to do the latter (vacate the award). *Id.* at 696.

Similarly, here, whether a court may certify a class under Rule 23 is "separate from, and antecedent to," any question about a court's power over, and ability to award relief to, absent class members. As in *Waetzig*, that is "confirm[ed]" by the fact that a district court issues at least "two separate orders," *id.*, over the course of a class action: one certifying the class, and another for the "class judgment." Fed. R. Civ. P. 23(c)(1), (3).

Amchem and *Ortiz* further reinforce this point. The question in those cases was whether the district court had properly certified a class containing potentially uninjured members. In both, the Court considered that question in the context of a settlement class, where the certification and judgment phases were collapsed into one. Even so, the Court made clear in both cases that "the class certification issues" are "logically antecedent to Article III concerns" and "should be treated first." *Ortiz*, 527 U.S. at 831; *see Amchem*, 521 U.S. at 612. If the certification issues are logically antecedent for a settlement class, the same would have to be true for a litigation class like this one. In that context—this context—the certification issues are not just logically antecedent to any subsequent Article III issues, but temporally distinct as well.

2. Labcorp seeks to avoid this conclusion by comparing class certification to intervention. Because a proposed intervenor "may not join a case through intervention to pursue his own damages claim unless he establishes Article III standing in his own right," Labcorp contends that putative absent class members should be held to the "same rules." Pet. Br. 17-20 (relying on *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433 (2017)).

This conclusion does not follow. A person who seeks to intervene in a lawsuit to assert her own damages claim is

seeking to "become a party"—namely, a plaintiff. *Karcher v. May*, 484 U.S. 72, 77 (1987). She must attach a complaint setting forth her claims as if she were a plaintiff. Fed. R. Civ. P. 24(c). And that complaint must satisfy Article III. If the court grants intervention, she becomes a party to the case, no different than a named plaintiff. She can file her own motions, conduct discovery, present evidence and argument at trial, and control the litigation. At the same time, she must comply with procedural rules and court orders and is subject to crossclaims, discovery, and costs. Thus, this Court has made clear that "intervention is the requisite method for a nonparty to become a party to a lawsuit" and thereby "assume the rights and burdens attendant to full party status." *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933-34 (2009). A proposed intervenor, in other words, is both "a party (obviously, as the movant) to the motion he filed," *Devlin*, 536 U.S. at 17 (Scalia, J., dissenting), and a would-be party to the case. It thus makes sense to require proposed intervenors to meet the same standing requirements as named plaintiffs.

Putative absent class members are different in both respects. They did not file, and so are not parties to, the named plaintiff's motion for class certification. Nor is that motion asking that they be joined as "parties to the case" in the same way as intervenors. *Contra* U.S. Br. 3, 12; *see Smith*, 564 U.S. at 314 (noting that "unnamed members of a class action," even once certified, are "not parties to the suit"). Certification of any class presupposes that joinder of class members is "impracticable." Fed. R. Civ. P. 23(a)(1). And the rule itself leaves no doubt that absent class members are *not* intervenors, do *not* "come into the action" at the certification, *id.* 23(d)(1)(B)(iii), do *not* "control[]" the litigation, *id.* 23(b)(3)(A), and have none of the burdens of a party, *see Phillips Petroleum Co. v.*

Shutts, 472 U.S. 797, 810 (1985). They can only have a lawyer enter an appearance to receive notifications—which even an *amicus* may do—and object to a settlement. Fed. R. Civ. P. 23(c)(2)(B)(iv) & (e)(5)(A). Accordingly, a named plaintiff who seeks certification is not seeking to join the absent members as parties or have them intervene, but to pursue a "class claim[]" as a "representative part[y]" on their "behalf." *Id.* 23(a) & (c)(1)(B).

B. Text, history, and precedent make clear that absent class members need not demonstrate their standing until the court acts on them as individuals, typically at the relief phase.

Because the question presented focuses exclusively on the propriety of certifying a *proposed* class that contains uninjured members, this Court need not, and should not, address the separate question of when the members of a *certified* class must establish standing as a jurisdictional matter. But the answer to that question can be found in the text of Rule 23, history, and this Court's precedents: Article III does not require absent class members to establish their standing until the court acts on them as individuals, which usually occurs when it orders relief to them on their individual claims. That is when absent members are invoking the power of the court over their individual claims and must "justify [the] exercise of the court's remedial powers." *Simon*, 426 U.S. at 38.

Text. Article III limits the power of the federal courts to "Cases" and "Controversies." U.S. Const. Art. III. This phrase requires "a plaintiff [to] demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester*, 581 U.S. at 439. Applying that requirement to a class action means determining who

is the plaintiff, what claim he is pressing, and what relief he is seeking. Rule 23's text provides the answer to these questions. It shows that class actions have two phases: (1) a *representative* phase, when the named plaintiff is pursuing a class claim seeking classwide relief on behalf of the absent class members (and class-member standing is *not* required by Article III), and (2) a phase when the court acts on the class members as *individuals* (when class-member standing *is* required by Article III).

This is clear from the very first sentence of Rule 23. It says that named plaintiffs may act as "representative parties on behalf of all members" only if four prerequisites are met, all of which reinforce the representative nature of the action. Fed. R. Civ. P. 23(a). The rest of the rule does the same. It confirms that the named plaintiffs are the only ones who "control[]" the litigation, and that absent members do not "come into the action" simply because the class is certified. *Id.* 23(b)(3)(A), (d)(1)(B)(iii). (That, after all, is why they are *absent*.) When the court grants a class-certification motion, it "must define" not only the class but also the "class claims" pursued by the named plaintiff. *Id.* 23(c)(1)(B). In other words, as Judge Sutton has observed, class actions "present a unitary, coherent claim that moves through litigation at the named plaintiff's direction and pace." *Canaday v. Anthem Cos.*, 9 F.4th 392, 403 (6th Cir. 2021); *see also United States v. Cammarata*, 129 F.4th 193, 216-17 (3d Cir. 2025).

A certified class is also "inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978). After certifying a class action and defining the class and class claims, the court directs appropriate notice to the class, which informs class members of their right to opt out. Fed. R. Civ. P. 23(c)(2). Even after the opt-out period passes,

the certification order "may be altered or amended before final judgment." *Id.* 23(c)(1)(C). And it often is: Because "courts must be vigilant to ensure that a certified class is properly constituted" at all times, they have an "obligation to make appropriate adjustments to the class definition as the litigation progresse[s]." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.2d 592, 619 (6th Cir. 2007). It is only at the judgment phase that the class definition is set, and the court must "specify or describe"—as part of the "class judgment"—those whom it "finds to be class members." Fed. R. Civ. P. 23(c)(2)(B)(vii), (3)(B). Up until that point, class members who have not "come into the action"—either to have their "individual" issues resolved or to "intervene," *id.* 23(b)(3), (d)(1)(B)(iii)—are being represented entirely by the named plaintiff's prosecution of the class claim on their behalf.

This procedure shapes the Article III inquiry. During the representative phase, absent class members are not "parties to the case." *Contra* U.S. Br. 3, 12; *see Smith*, 564 U.S. at 314 ("[The] unnamed members of a class action" are "not parties to the suit."). They might not even be *class members* by the end of the litigation, depending on how it unfolds. They have done nothing to "pursue relief" on their own behalf. *Town of Chester*, 581 U.S. at 435. Nor have they done anything to "invok[e] the power" of the court. *Hollingsworth*, 570 U.S. at 704. They are simply part of an abstract and subject-to-change entity (the class) on whose behalf the named plaintiff is pursuing a claim (the class claim). So they need not establish their own standing to be part of the class during that phase. It is only during the second phase of the class action, when the court acts on them as individuals, that they must establish standing to recover on their individual claim.

History. The historical tradition of representative actions confirms that the class representative pursues one claim—the class claim—until the final phase of the case, when the absentees come into the case and the court acts on them as individuals. That is reflected in the bifurcation of representative proceedings in the 18th and early 19th century. Representative litigation was typically conducted in two phases. The representative first sought a "decree … for the benefit of all." Story, *Commentaries* § 99. Only after that did individual absentees "come in under the decree" to recover damages. *Id.*

1. Bifurcation was a recurring feature of founding-era representative litigation. Take the privateer suits, to which the government alludes (at 16). Beginning in 1751, the English courts instructed individual crewmembers to bring claims about their entitlement to prize money on "behalf of the whole crew," rather than in individual actions. *Leigh v. Thomas* (1751) 28 Eng. Rep. 201, 202 (Ch.). This was some of the most common representative litigation in the 18th century. *See* Yeazell, *From Medieval Group Litigation to the Modern Class Action* 182.

These suits were "normally handled in two stages." Bone, *History of Adjudicative Representation*, 70 B.U. L. Rev. at 253. First, the chancellor entered a decree "establishing the [entire] crew's entitlement and declaring the total amount of the fund." *Id.* "[T]he chancellor then referred the case to a master to conduct the second stage." *Id.* In the second stage, the master "identified all crew members with claims to the fund, gave notice to all inviting them to come in and litigate their individual claims, and determined the proper distribution of the fund according to the proven claims." *Id.*

So, too, with the "bill of peace"—"an equitable device" from which the class action evolved. *Ortiz*, 527 U.S. at 832. Chancery used a bill to establish a "general right." *Mayor of York v. Pilkington* (1737) 25 Eng. Rep. 946, 947 (Ch.). "[T]he presence of independent questions" did not "deprive equity of jurisdiction over the bill of peace so long as there [were] substantial common questions." Chafee, *Some Problems of Equity* 161 (1950). Instead, the "flexibility of equity procedure [made] it possible to segregate the common questions from the independent questions, and to consider the latter in separate hearings." *Id.* at 155-56.

These bifurcated proceedings were not anomalous. It was settled practice that representative litigation could proceed where "the Court can by arrangement afterwards introduce the persons." *Cockburn v. Thompson* (1809) 33 Eng. Rep. 1005, 1007 (Ch.). Justice Story, for instance, described the use of bifurcated proceedings in representative litigation on behalf of creditors, noting that, after "the decree is made for the benefit of all the creditors" in the first stage, "other creditors may come in under the decree" and "prove their debts before the Master[] to whom the cause is referred." Story, *Commentaries* § 99. But, he explained, if they "decline so to come in" or fail to "prove" their entitlement, "they will be excluded from the benefit of the decree" yet bound by it. *Id.*

2. This history offers three important lessons. First, it shows the changing nature of the absentees' relationship to the litigation. In the first phase, the case proceeded without the absentees' involvement. They then were "introduce[d]" to the case in the second phase, at which point they became "*Quasi* parties." *Cockburn*, 33 Eng.

Rep. at 1007; *see also* Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* 65 (2d ed. 1847); Story, *Commentaries* § 140, 139 n.1. That introduction, though, only took place if the absentees elected to "come in under the decree." Story, *Commentaries* § 99 & 99 n.2, 100 n.1.

Second, when the absentees did "come in under the decree," they had to "prove" their entitlement to recover. *Id.* § 99. That's because, in the first stage, all that was proved was the representative's classwide claim that "benefit[ed] [] all" of the absentees. *Id.* These two aspects of founding-era representative litigation are consistent with how class litigation works today: First, the court resolves the class claim that is pursued on behalf of all, and then, acts on the individuals by awarding individual relief.

The third lesson proceeds from the first two. When the absentees came in under the decree to "prove the[ir] claims," they could not deprive the court of its "jurisdiction" to have entered the classwide decree in the first place. *Stewart v. Dunham*, 115 U.S. 61, 64 (1885) (a non-diverse claimant who comes in "before a master, under a decree" in representative litigation, does not deprive the court of diversity jurisdiction). Stated another way, issues that might arise at the final stage of the representative action—like class-member standing—do not strip the court of jurisdiction in the earlier phase.

Precedent. This Court's precedents accord with the text and history. They draw the same dividing line: Absent members need not establish their standing during the representative phase, when the named plaintiff pursues "the claim [] brought on behalf of [the] class," *Tyson Foods*, 577 U.S. at 455, and must "prove the class claim[]" at trial, *Falcon*, 457 U.S. at 159. But before a court acts on

class members as individuals—typically by ordering monetary relief on their individual claims—it must assure itself that they have standing.

Chief among these precedents is *Tyson Foods*. The Court there upheld a classwide damages award and rejected the defendant's argument that the class should not have been certified. The Court did so even though "it [was] undisputed that hundreds of class members suffered no injury." 577 U.S. at 463 (Roberts, C.J., concurring). In its opinion, the Court acknowledged that "the question whether uninjured class members may recover is one of great importance." *Id.* at 461. But it held that this question was not "yet fairly presented by th[e] case, because the damages award ha[d] not yet been disbursed, nor [did] the record indicate how it [would] be disbursed." *Id.* The Court could therefore wait until the distribution phase to address the Article III question. Although this Court has since resolved the question left open in *Tyson Foods*, the analysis in the opinion remains relevant here: If Article III erected a freestanding barrier to maintaining any class action that includes uninjured class members, *Tyson Foods* would have come out the other way.

If there were such a barrier, it would not have escaped the Court's attention. Chief Justice Roberts—who joined the Court's opinion in full—wrote separately to express his view that "Article III does not give federal courts the power to order relief to any uninjured plaintiff," so there must be "a way to ensure that the jury's damages award goes only to injured class members." *Id.* at 466. He explained that, on remand, the district court would have to "fashion a method for awarding damages only to those class members who suffered an actual injury" to comply with this constitutional limitation. *Id.* at 462. But like the

opinion of the Court that he joined, he did not see any Article III barrier to affirming the lower court's judgment.

This Court's decision in *TransUnion* provides a useful contrast with *Tyson Foods*. Like *Tyson Foods*, that case involved a classwide damages award. Unlike *Tyson Foods*, however, the jury awarded a specific amount to each class member (nearly $7,000 in total damages per member). 594 U.S. at 421. That made all the difference. Because the district court ordered the defendant to pay damages to each class member on their individual claim, it had acted on them as individuals with their own claims, triggering Article III's limitations.

Other cases support the same distinction. *Halliburton*, for example, held that securities classes may be certified even though the defendant can "pick off" individual class members by showing they did not suffer an injury caused by the defendant's conduct. 573 U.S. at 276. That anticipated "individualized rebuttal" poses no jurisdictional barrier to certification. *Id.*; *see also, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 402-03, 403 n.22 (1982) ("declin[ing] to address" a plaintiff's standing even though the plaintiff "sought attorney's fees in its own right," because that inquiry could wait until the plaintiff moved for fees).

C. Adopting Labcorp's understanding of Article III would make it difficult or impossible for defendants to settle mass claims and flood the courts with individual cases.

Labcorp's understanding of how Article III interacts with class actions ignores the nature of class litigation, the history of representative actions, and this Court's cases. It also invites chaos. Rule 23 screens out cases where

standing issues defeat predominance, while allowing cases that merit class treatment to proceed. Labcorp's Article III rule, by contrast, creates an inflexible new barrier.

Labcorp's rigid rule would eviscerate the operation of the class device in a wide range of contexts. Rule 23(c)(1)(A) requires certification at an "early practicable time." Yet, "at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen v. Pac. Inv. Mgmt Co.*, 571 F.3d 672, 677 (7th Cir. 2009). To "entirely separate the injured from the uninjured at the class certification stage" would—at least "[w]ithout the benefit of further proceedings"—be "almost impossible in many cases." *Nexium*, 777 F.3d at 22.

The upshot of Labcorp's Article III argument, then, would not be a more narrowly drawn class, but no class at all. That wouldn't just harm plaintiffs; it would also make it difficult or impossible for defendants to achieve "global peace" in cases where their wrongful conduct has harmed many people. Lahav, *The Continuum of Aggregation*, 53 Ga. L. Rev. 1393, 1395-97 (2019). Defendants "often take advantage of the class action device as a litigation closure mechanism" in cases where "liability is widespread and virtually unavoidable." Br. of Rubenstein & Miller 5.

After the BP oil spill, for example, "hundreds of cases with thousands of individual claimants" were filed. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex.*, 910 F. Supp. 2d 891, 900 (E.D. La. 2012). The parties negotiated a settlement, and the district court certified a settlement class that included citizens of five states. *See id.* at 910. But if the parties needed to "plausibly establish" that every class member suffered injury before certification, Pet. Br. 25, it would have been impossible to

craft a sufficiently broad release to ensure global peace for BP. *See In re Deepwater Horizon*, 739 F.3d 790, 805 (5th Cir. 2014) ("application of a stricter evidentiary standard might reveal persons or entities" in the class who "suffered no loss"). The same is true of other recent large class settlements. *See, e.g.*, *In re Nat'l Football League Players Concussion Inj. Litig.*, 821 F.3d 410, 425 (3d Cir. 2016) (class included NFL players with "no currently known injuries"); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (class included a "half million" members).

Labcorp's constitutional rule wouldn't just make it harder for defendants to settle. Requiring a class "unsullied by any uninjured member," Pet. Br. 42, would force plaintiffs to adopt definitions that closely track the elements of a successful claim. That raises concerns of fail-safe classes, which are defined such that "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 170 n.4 (3d Cir. 2023).

Despite Labcorp's insistence (at 25 n.2) that class definitions cannot be "fail-safe," its own flip-flopping *in this case* demonstrates the pressure its proposed rule would put on plaintiffs. Labcorp complained that the class definition in the May 23 order was fail-safe, so the plaintiffs revised the definition. 2-ER-130. But now, Labcorp says the revised definition is faulty because it includes uninjured class members.

Finally, when certification is denied, plaintiffs are forced to file separate lawsuits, flooding the system with individual claims and imposing an enormous "burden on the courts." *In re Visa Check*, 280 F.3d at 146 (Sotomayor, J.). More cases would be filed in state courts, too, where

Article III does not apply. That would undo Congress's decision in passing the Class Action Fairness Act to pull more class actions into federal court.

CONCLUSION

If the Court does not dismiss the writ as improvidently granted, it should affirm the judgment below.

March 31, 2025

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LUKE DAVIS, JULIAN VARGAS, et al., Plaintiffs, v. LABORATORY CORPORATION OF AMERICA HOLDINGS, Defendant.	Case No. 20-0893 FMO (KSx) **ORDER RE: MOTION FOR CLASS CERTIFICATION**

Having reviewed and considered all the briefing filed with respect to plaintiffs' Motion for Class Certification, (Dkt. 66, "Motion"), the court finds that oral argument is not necessary to resolve the Motion, see Fed. R. Civ. P. 78(b); Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND[1]

On January 28, 2020, Luke Davis ("Davis") and Julian Vargas ("Vargas" and together with Davis, "plaintiffs") filed this putative class action. (See Dkt. 1, Class Action Complaint). On September 3, 2020, plaintiffs and the

[1] Capitalization, quotation marks, punctuation, and emphasis in record citations may be altered without notation.

American Council of the Blind ("ACB") filed the operative First Amended Class Action Complaint ("FAC"), (Dkt. 40), against Laboratory Corporation of America Holdings ("defendant" or "LabCorp"), asserting claims for violations of: (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq.; (2) California's Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51, et seq.; (3) California's Disabled Persons Act ("CDPA"), Cal.Civ. Code §§ 54, et seq.;[2] (4) Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794(a); and (5) Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 8116. (Dkt. 40, FAC at ¶¶ 41-95). The Unruh Act and CDPA claims are brought by Vargas on behalf of himself and a putative California class, (see id. at ¶¶ 60-73), while the remaining federal claims are brought by plaintiffs on behalf of the Nationwide Injunctive Class. (See id. at ¶¶ 41-59, 74-95). Plaintiffs seek declaratory and injunctive relief, statutory damages, and attorney's fees. (See id. at Prayer for Relief). Plaintiffs do "not seek class recovery for actual damages, personal injuries or emotional distress that may have been caused by defendant's conduct[.]" (Id. at ¶ 36).

Plaintiffs allege that LabCorp discriminates against them and other visually impaired individuals, "by refusing and failing to provide auxiliary aids and services to Plaintiffs, and by requiring [them] to rely upon other means of communication that are inadequate to provide

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[2] Plaintiffs concede that their claim under the CDPA cannot be maintained, and request that the court dismiss it pursuant to Federal Rule of Civil Procedure 41(a)(2). (See Dkt. 84, Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Summary Judgment [] at 5 n. 2). Accordingly, the court will not address any arguments regarding the CDPA claim.

equal opportunity to participate in and benefit from Defendant's health care services free from discrimination." (Dkt. 40, FAC at ¶¶ 1-2). Plaintiffs allege that they visited LabCorp's patient services centers ("PSCs") "and were denied full and equal access as a result of defendant's inaccessible touchscreen kiosks for self-service check-in." (See id. at ¶¶ 4, 21-22). According to plaintiffs, the touchscreen kiosks "do not contain the necessary technology that would enable a person with a visual impairment to [a] enter any personal information necessary to process a transaction in a manner that ensures the same degree of personal privacy afforded to those without visual impairments; or [b] use the device independently and without the assistance of others in the same manner afforded to those without visual impairments." (Id. at ¶ 5). Indeed, "Plaintiffs were informed by staff of defendant that the kiosks are not accessible to the blind." (Id.). As a result, "plaintiffs, members of [] ACB, [a national membership organization of approximately 20,000 blind and visually impaired persons,] and all other visually impaired individuals are forced to seek the assistance of a sighted person, and thereafter divulge their personal medical information to that sighted person in a nonconfidential setting in order to register." (Id. at ¶¶ 5, 16).

LabCorp has approximately 2,000 PSCs throughout the country, 299 of which are located in California. (Dkt. 82, Exh. 32 (Deposition of Joseph Sinning) ("Sinning Depo") at JA1062). In October 2017, LabCorp launched "Project Horizon" to roll out check-in kiosks at its PSCs. (Id. at JA1071). In preparation for Project Horizon, LabCorp considered proposals from two companies for the kiosks. (Dkt. 80, Exh. 18 (Wright Depo) at JA477); (Dkt. 80, Exh. 26 at JA711-714). Although one of the

companies proposed to provide kiosks that were ADA compliant, LabCorp selected the company, Alia, that did not provide ADA compliant kiosks. (Dkt. 80, Exh. 18, Deposition of Mark Wright ("Wright Depo") at JA464, JA477).

Approximately 1,853 PSCs nationwide have check-in kiosks, 280 of which are in California. (Dkt. 82, Exh. 32 (Sinning Depo) at JA1064). According to LabCorp, the "kiosks are only available for use during normal business hours, when there is also at least one employee present at each PSC who can operate front desk check ins as needed." (Id. at JA1065-66).

With respect to the instant Motion, plaintiffs seek an order certifying the following class and subclass pursuant to Rules 23(b)(2) and (3) of the Federal Rules of Civil Procedure:[3]

> All legally blind individuals in the United States who visited a LabCorp patient service center in the United States and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals. ["Nationwide Injunctive Class" or "Rule 23(b)(2) Class"]
>
> All legally blind individuals in California who visited a LabCorp patient service center in California and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due

[3] All "Rule" references are to the Federal Rules of Civil Procedure unless otherwise indicated.

> to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals. ["California Class" or "Rule 23(b)(3) Class"].

(Dkt. 66, Motion at 2); (Dkt. 66-1, Joint Brief Concerning Plaintiff's Motion for Class Certification ("Joint Br.") at 30).

LEGAL STANDARD

Rule 23 permits a plaintiff to sue as a representative of a class if:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions or law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Courts refer to these requirements by the following shorthand: "numerosity, commonality, typicality and adequacy of representation[.]" Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012). In addition to fulfilling the four prongs of Rule 23(a), the proposed class must meet at least one of the three requirements listed in Rule 23(b). See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).

"Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and" the applicable Rule 23(b) provision have been satisfied. Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods L.L.C., 31 F.4th 651, 664 (9th Cir. 2022) (en banc) (internal quotation marks omitted). A plaintiff "must prove the facts

necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." Id. at 665.

On occasion, the Rule 23 analysis "will entail some overlap with the merits of the plaintiff's underlying claim[,]" and "sometimes it may be necessary for the court to probe behind the pleadings[.]" Dukes, 564 U.S. at 350-51, 131 S.Ct. at 2551 (internal quotation marks omitted). However, courts must remember that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 466, 133 S.Ct. 1184, 1194-95 (2013); see id., 133 S.Ct. at 1195 ("Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied."); Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n. 8 (9th Cir. 2011) (The court examines the merits of the underlying claim "only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims. . . . To hold otherwise would turn class certification into a mini-trial.") (citations omitted). Finally, a court has "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. ConocoPhillips Co., 593 F.3d 802, 810 (9th Cir. 2010) (internal quotation marks omitted); see also Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1092 (9th Cir. 2010) (The decision to certify a class and "any particular underlying Rule 23 determination involving a discretionary determination" is reviewed for abuse of discretion.).

DISCUSSION

I. RULE 23(a) REQUIREMENTS.

A. Numerosity.

A putative class may be certified only if it "is so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "Although the size of the class is not the sole determining factor, . . . where a class is large in numbers, joinder will usually be impracticable." A.B. v. Hawaii State Department of Education, 30 F.4th 828, 835 (9th Cir. 2022) (internal quotation marks omitted); see Jordan v. Cty. of Los Angeles, 669 F.2d 1311, 1319 (9th Cir.), vacated on other grounds by Cty. of Los Angeles v. Jordan, 459 U.S. 810, 103 S.Ct. 35 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members[.]" Slaven v. BP Am., Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000); see Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 473-74 (C.D. Cal. 2012) (same).

Based on plaintiffs' expert's analysis, plaintiffs contend that "there are at least 87,500 legally blind class members nationwide" and "at least 8,861 legally blind class members in California." (Dkt. 66-1, Joint Br. at 33); (Dkt. 81, Exh. 27 (Sean Chasworth Report) at JA722). In addition, plaintiffs rely on LabCorp's survey responses, which indicate that LabCorp received over 60 complaints from persons with low or no vision having difficulty using the kiosks. (See Dkt. 66-1, Joint Br. at 33). Additionally, according to plaintiffs, LabCorp has records showing that there were more than 130 complaints nationwide from individuals with low or no vision who claimed they could not use the kiosks. (See id. at 33-34).

With respect to the California Class, LabCorp contends that the "survey responses . . . cannot satisfy the

numerosity requirement" because of the 23 responses, four praised the kiosks, "leav[ing] only 19 potential California class members identified in those responses, not all of which may be legally blind[.]"[4] (Dkt. 66-1, Joint Br. at 35). However, given the number of complaints, and "[b]ecause not every patient will lodge a complaint[,] . . . it is highly unlikely that the[] complaints [and survey responses] reflect every individual who encountered" accessibility issues with the kiosks. See Vargas v. Quest Diagnostic Clinical Labs., 2021 WL 5989958, *5 (C.D. Cal. 2021) ("Quest"). Thus, the court finds that plaintiffs have met the numerosity requirement as to the California Class.

With respect to the Nationwide Injunctive Class, LabCorp does "not dispute that there is a likelihood of at least 40 instances nationwide of some legally blind individuals who might claim that they have had difficulty

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[4] LabCorp also claims, without any supporting argument, that the responses to its own survey are "inadmissible and unsworn[.]" (Dkt. 66-1, Joint Br. at 35). As an initial matter, defendant's reference to "inadmissible and unsworn" survey responses "is too cursory and undeveloped for the Court to fully understand and consider[.]" See Wyles v. Sussman, 2019 WL 3249590, *3 (C.D. Cal. 2019); see also Beasley v. Astrue, 2011 WL 1327130, *2 (W.D. Wash. 2011) ("It is not enough merely to present an argument in the skimpiest way, and leave the Court to do counsel's work – framing the argument, and putting flesh on its bones through a discussion of the applicable law and facts."). Further, putting aside the fact that LabCorp itself relies on its own survey responses in support of its own argument, (see Dkt. 66-1, Joint Br. at 35), LabCorp's argument is unpersuasive because "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." Sali v. Corona Regional Medical Center, 909 F.3d 996, 1004 (9th Cir. 2018); see Vargas v. Quest Diagnostic Clinical Labs., 2021 WL 5989958, *4 n. 3 (C.D. Cal. 2021) (The "Ninth Circuit does not require that evidence submitted in connection with a class certification motion be admissible.").

using a kiosk for check-in[.]" (Dkt. 66-1, Joint Br. at 34). Instead, it takes issue with whether the individuals actually fall within the class definition since they were "not denied service – the medical testing services PSCs provide[.]" (Id.). However, this is a merits question which the court declines to address here. As such, the court finds that plaintiffs have met the numerosity requirement as to the Nationwide Injunctive Class.

B. Commonality.

Commonality is satisfied if "there are common questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). It requires plaintiffs to demonstrate that their claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350, 131 S.Ct. at 2551; see also Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (explaining that the commonality requirement demands that "class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief") (internal quotation marks omitted). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." Mazza, 666 F.3d at 588 (internal quotation marks omitted). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis and internal quotation marks omitted); see Mazza, 666 F.3d at 589. Proof of commonality under Rule 23(a) is "less rigorous" than the related preponderance standard under Rule

23(b)(3). See Mazza, 666 F.3d at 589 (characterizing commonality as a "limited burden[,]" stating that it "only requires a single significant question of law or fact[,]" and concluding that it remains a distinct inquiry from the predominance issues raised under Rule 23(b)(3)). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

Here, plaintiffs contend there are several common questions, including whether: (1) "LabCorp's kiosks are independently accessible to legally blind individuals"; (2) "LabCorp has implemented the inaccessible check-in kiosks system across its national network of more than 1,800 PSCs"; (3) "LabCorp trained its employees that use of the kiosks to check-in was mandatory"; (4) "use of the kiosk is a good or service LabCorp offers its customers"; (5) "LabCorp offers a qualified aid or auxiliary service to allow legally blind individuals to access the check-in kiosk service"; and (6) "LabCorp has remedied the inaccessible check-in kiosk across its system." (Dkt. 66-1, Joint Br. at 37). LabCorp "does not dispute that there is at least one common question of law at issue here."[5] (Id.). The court agrees. See, e.g., Quest, 2021 WL 5989958, at *5 (finding plaintiff satisfied commonality based on similar questions).

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[5] LabCorp contends that as to the Nationwide Injunctive Class, there is no single injunction or declaration that will provide relief to the class as a whole. (See Dkt. 66-1, Joint Br. at 37-38). However, as LabCorp appears to recognize, that issue should be addressed as part of assessing the Rule 23(b)(2) factors. (See id. at 38). Similarly, with respect to the California Class, LabCorp contends only that common issues do not predominate. (Id.).

C. Typicality.[6]

Typicality requires a showing that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). The purpose of this requirement "is to assure that the interest of the named representative aligns with the interests of the class." Wolin, 617 F.3d at 1175 (internal quotation marks omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." Just Film, Inc. v. Buono, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." Wolin, 617 F.3d at 1175 (internal quotation marks omitted). The typicality requirement is "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1019 (9th Cir. 2011), abrogated on other grounds in Comcast Corp. v. Behrend, 569 U.S. 27, 133 S.Ct. 1426 (2013) (internal quotation marks omitted).

Here, Davis and Vargas have the same claims as the absent class members. (See Dkt. 40, FAC at ¶¶ 41-95).

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[6] Because the Supreme Court has noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge[,]" General Tel. Co. of the SW v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2371 n. 13 (1982), the court hereby incorporates the Rule 23(a) commonality discussion set forth above. See supra at § I.B.

Both are legally blind and seek to represent classes of other legally blind individuals who, like them, encountered allegedly inaccessible kiosks at LabCorp's PSCs. (See Dkt. 79, Exh. 13 (Deposition of Vargas) ("Vargas Depo") at JA150); (Dkt. 79, Exh. 14 (Deposition of Luke Davis ("Davis Depo") at JA228); (Dkt.66-1, Joint Br. at 30) (class definitions). As such, their claims are typical of the claims of the class. See Fed. R. Civ. P. 23(a)(3); Stearns, 655 F.3d at 1019 ("[E]ach class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.").

Nonetheless, LabCorp contends that plaintiffs "failed to provide sufficient evidence that their own preference is typical for all the legally blind individuals they seek to represent, or that proposed class members suffered any injury related to inability to check-in on the kiosk." (Dkt. 66-1, Joint Br. at 39). However, LabCorp ignores typicality's permissive standard, see Parsons v. Ryan, 754 F.3d 657, 685 (9th Cir. 2014) ("Under the rule's permissive standards, representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (internal quotation marks omitted), and the Ninth Circuit's admonition that courts may "not insist that the named plaintiffs' injuries be identical with those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct." Id. (citation and internal quotation marks omitted); see, e.g., id. at 686 ("It does not matter that the named plaintiffs may have in the past suffered varying injuries or that they may currently have different health care needs; Rule 23(a)(3) requires only

that their claims be 'typical' of the class, not that they be identically positioned to each []other or to every class member.").

Moreover, the scope and extent of any proposed injunction has yet to be litigated, and thus, there is no basis to conclude that plaintiffs will seek an injunction covering only their "own preference[s.]" In any event, the court is confident that, assuming liability is established, it can, after obtaining the parties' input, fashion an appropriate injunction.

D. Adequacy.

Rule 23(a)(4) permits certification of a class action if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A two-prong test is used to determine adequacy of representation: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Ellis, 657 F.3d at 985 (internal quotation marks omitted). "Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." Id. The adequacy of counsel is also considered under Rule 23(g).

Here, LabCorp challenges only the adequacy of plaintiffs, as it relates to the Rule 23(b)(2) class. (See Dkt. 66-1, Joint Br. at 42-43) (contending plaintiffs are inadequate "where a single injunction could not resolve all issues"). Because LabCorp "incorporates its challenges to Plaintiffs' typicality[,]" (id. at 42), the court rejects it for the reasons set forth above. See supra at § I.C.

In any event, the court finds this factor is satisfied. There are no known conflicts between the absent class

members and plaintiffs and their counsel. (See Dkt. 66-1, Joint Br. at 42). Plaintiffs have vigorously pursued this action on behalf of the two classes, participated in discovery, including by each submitting to deposition, and will appear and testify at trial if necessary. (Dkt. 79, Exh. 13 (Vargas Depo) at JA203-206) (testifying regarding his role in this litigation and the reasons for pursuing the claims asserted); (Dkt. 79, Exh. 14 (Davis Depo) at JA336-40) (same as to the Nationwide Injunctive Class). Further, plaintiffs' counsel are experienced, (Dkt. 79, Exh. 2 (Declaration of Jonathan D. Miller) ("Miller Decl.") at ¶¶ 15-19) (outlining counsel's experience); (Dkt. 17, Exh. 3 (Declaration of Matthew K. Handley) ("Handley Decl.") at ¶¶ 10-13) (outlining counsel's experience), and have prosecuted this action vigorously.

II. RULE 23(b) REQUIREMENTS

A "proposed class or subclass must also satisfy the requirements of one of the sub-sections of Rule 23(b), which defines three different types of classes." Parsons, 754 F.3d at 674 (9th Cir. 2014) (internal quotation marks omitted). Here, plaintiffs seek certification under Rule 23(b)(2) and (b)(3). (Dkt. 66-1, Joint Br. at 30) (class definitions)

A. Rule 23(b)(2) Requirements—Nationwide Injunctive Class.

A class may be maintained under Rule 23(b)(2) if "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[.]" Dukes, 564 U.S. at 360, 131 S.Ct. at 2557. This provision applies "only when a single injunction or declaratory judgment would provide relief to each member of the class." Id. "It does not authorize class certification when each individual class

member would be entitled to a different injunction or declaratory judgment against the defendant." Id. "Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." Id. at 360-61, 131 S.Ct. at 2557. "Thus, 23(b)(2) sets forth two basic requirements. First, the party opposing the class must have acted, refused to act, or failed to perform a legal duty on grounds generally applicable to all class members. Second, final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, [must be] appropriate." 2 Newberg on Class Actions § 4:26 (5th ed. 2014) (internal quotation marks omitted).

Plaintiffs seek to certify a Rule 23(b)(2) class with respect to their federal claims, particularly the ADA claim. (See Dkt. 66, Motion at 2). LabCorp does not dispute that it "has acted or refused to act on grounds that apply generally to the class[.]" Fed. R. Civ. P. 23(b)(2); (see, generally, Dkt. 66-1, Joint Br. at 43-45). Instead, it challenges only the second Rule 23(b)(2) requirement, arguing that a single injunction will not provide relief to each member of the class. (See Dkt. 66-1, Joint Br. at 43-45). LabCorp claims that ACB's Rule 30(b)(6) witness, Claire Stanely, "acknowledge[d] that the injunction Plaintiffs seek would not provide relief to each member of the class."[7] (Id. at 44). Stanley, however, did not testify that a single injunction or remedy would not render the kiosks accessible. (See, generally, Dkt. 82, Exh. 35 (Stanley Depo at JA1099-1100). Rather, when asked

[7] LabCorp makes a similar argument regarding plaintiffs' accessibility expert, Rachael Bradley Montgomery. (See Dkt. 66-1, Joint Br. at 44).

whether providing "speech output" would "resolve the accessibility concerns of everyone that is blind or visually impaired[,]" Stanley testified that "[n]o one accommodation is going to accommodate every person everywhere." (Id. at JA1099). In other words, Stanley's testimony does not mean that an injunction cannot be crafted that will be generally applicable to the class as a whole. See Parsons, 754 F.3d at 688 (The Rule 23(b)(2) indivisibility requirement is "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole.")

LabCorp appears to be "exaggerate[ing] what is required under Rule 23(b)(2)[,]" Nightingale v. U.S. Citizenship and Immigration Services, 333 F.R.D. 449, 463 (N.D. Cal. 2019), because LabCorp's conduct need not have injured all class members in exactly the same way. In other words, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010); see Parsons, 754 F.3d at 688 (The Rule 23(b)(2) "inquiry does not require an examination of the viability or bases of the class members' claims for relief, . . . and does not require a finding that all members of the class have suffered identical injuries."). "[I]t is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." Rodriguez, 591 F.3d at 1125 (internal quotation marks omitted).

Moreover, as the Ninth Circuit has made clear, "the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions." Parsons, 754

F.3d at 686. In a civil rights action, the fact that the discriminatory conduct may have affected different members of the class in different ways does not prevent certification under Rule 23(b)(2). See, e.g., Gibson v. Local 40, Supercargoes and Checkers, 543 F.2d 1259, 1264 (9th Cir. 1976) ("A class action may be maintained under [Rule] 23(b)(2) alleging a general course of racial discrimination by an employer or union, though the discrimination may have . . . affect[ed] different members of the class in different ways."). Here, there is no dispute that this case constitutes a typical civil rights class action. As one court in this District stated, in addressing nearly identical class claims against another company that provides diagnostic testing services, this case is "a civil rights action against a party charged with unlawful, class-based discrimination based on the use of a specific auxiliary aid or service, and is a prime candidate for 23(b)(2) certification." Quest, 2021 WL 5989958, at *7. In short, the court finds that certification of the Nationwide Injunctive Class is appropriate under Rule 23(b)(2). See id.

B. Rule 23(b)(3) Requirements—California Class

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." Hanlon, 150 F.3d at 1022 (internal quotation marks omitted). Fed. R. Civ. P. 23(b)(3) requires two different inquiries, specifically a determination as to whether: (1) "questions of law or fact common to class members predominate over any questions affecting only individual members[;]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

1. Predominance.

"Though there is substantial overlap between [the Rule 23(a)(2) commonality test and the Rule 23(b)(3) predominance test], the 23(b)(3) test is far more demanding[.]"[8] Wolin, 617 F.3d at 1172 (internal quotation marks omitted). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 2249 (1997). "This calls upon courts to give careful scrutiny to the relations between common and individual questions in a case." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453, 136 S.Ct. 1036, 1045 (2016). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." Id. (citations and internal quotation marks omitted); see Wang v. Chinese Daily News, Inc., 737 F.3d 538, 545 (9th Cir. 2013) ("The predominance analysis under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case and tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.") (internal quotation marks omitted). The

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[8] Given the substantial overlap between Rule 23(a) and Rule 23(b)(3), and to minimize repetitiveness, the court hereby incorporates the Rule 23(a) discussion set forth above. See supra at § I.B.

class members' claims do not need to be identical. See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1163 (9th Cir. 2001) (allowing "some variation" between class members); Abdullah, 731 F.3d at 963 (explaining that "there may be some variation among individual plaintiffs' claims") (internal quotation marks omitted). The focus is on whether the "variation [in the class member's claims] is enough to defeat predominance under Rule 23(b)(3)." Local Joint Exec. Bd. of Culinary/Bartender Trust Fund, 244 F.3d at 1163; see Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975) ("[C]ourts have taken the common sense approach that the class is united by a common interest in determining whether defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions[.]").

Where, as here, a plaintiff's claims arise under state law, the court "looks to state law to determine whether the plaintiffs' claims – and [defendant's] affirmative defenses – can yield a common answer that is 'apt to drive the resolution of the litigation.'" Abdullah, 731 F.3d at 957 (quoting Dukes, 564 U.S. at 350, 131 S.Ct. at 2551); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S.Ct. 2179, 2184 (2011) ("Considering whether questions of law or fact common to class members predominate begins . . . with the elements of the underlying cause of action.") (internal quotation marks omitted).

The Unruh Act provides that "[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their . . . disability . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). The

California Supreme Court has stated that the purpose of the Unruh "Act is to create and preserve a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments." White v. Square, Inc., 7 Cal.5th 1019, 1025 (2019) (internal quotation marks omitted). "In enforcing the [Unruh] Act, courts must consider its broad remedial purpose and overarching goal of deterring discriminatory practices by businesses" and construe it "liberally in order to carry out its purpose." Id. (citations and internal quotation marks omitted).

"In general, a person suffers discrimination under the [Unruh] Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services." White, 7 Cal.5th at 1023; Thurston v. Omni Hotels Mgmt. Corp., 69 Cal.App.5th 299, 307-08 (2021) (holding that plaintiff, who was blind, "had to show a 'bona fide intent'" to use defendant's services) (quoting White, 7 Cal.5th at 1032). "While . . . an Unruh Act claimant need not be a client or customer of the covered public accommodation, and . . . he or she need not prove intentional discrimination upon establishing an ADA violation," a "claimant's intent or motivation for visiting the covered public accommodation is []relevant to a determination of the merits of his or her claim." Thurston, 69 Cal.App.5th at 309.

"As part of the 1992 reformation of state disability law, the [California] Legislature amended the Unruh [] Act to incorporate by reference the ADA, making violations of the ADA per se violations of the Unruh [] Act." Jankey v. Lee, 55 Cal.4th 1038, 1044 (2012). "To prevail on a discrimination claim under Title III [of the ADA], a

plaintiff must show that: (1) he is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability." Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc., 603 F.3d 666, 670 (9th Cir. 2010).

Under the Unruh Act, "[w]hoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 . . . is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000)[.]" "The litigant need not prove she suffered actual damages to recover the [Unruh Act's] independent statutory damages of $4,000." Molski v. M.J. Cable, Inc., 481 F.3d 724, 731 (9th Cir. 2007). Plaintiffs contend that common questions predominate because they seek only statutory damages under the Unruh Act which are directly attributable to their theory of harm and can be determined without complicated calculations.[9] (Dkt. 66-1, Joint Br. at 46). They add that "should the need arise for class members to confirm eligibility to recover statutory damages under the Unruh Act, it is well-settled that this issue may properly be addressed by way of a claim form after class wide liability has been determined." (Id. at 46-47).

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[9] LabCorp does not challenge predominance under Comcast, 569 U.S. 27, 133 S.Ct. 1426. (See, generally, Dkt. 66-1, Joint Br. at 47-50). Nor could it since plaintiffs are merely seeking statutory damages under the Unruh Act.

LabCorp contends that individualized issues abound, (Dkt. 66-1, Joint Br. at 48), because "[t]o recover statutory damages under the Unruh Act, a class member must show they 'personally encountered' an Unruh Act violation that caused them difficulty, discomfort, or embarrassment." (Id. at 47). According to LabCorp, "even if Vargas argued that checking in at the front desk caused him difficulty, discomfort, or embarrassment, his own experience cannot be imputed to other California residents who are legally blind[,]" (id. at 47-48), because "not all California PSC's [] have kiosks and for those that do, staffing varies widely[.]" (Id.). LabCorp's contentions are unpersuasive.

LabCorp's argument boils down to determining whether each class member used or was exposed to a kiosk at one of LabCorp's PSCs. But predominance is not concerned with determining who may be entitled to class membership, i.e., identifying legally blind class members who attempted to or were discouraged from using LabCorp's kiosks. Rather, the superiority prong is where that issue is considered. See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1126 (9th Cir. 2017) (declining to impose a separate administrability requirement to assess the difficulty of identifying class members, in part, because the superiority criterion already mandates considering "the likely difficulties in managing a class action") (internal quotation marks omitted).[10] Here, defendant's concern as to whether a particular class

[10] To the extent that LabCorp may be arguing that predominance is lacking due to a lack of ascertainability, (see Dkt. 66-1, Joint Br. at 47-50), it is without merit. See Briseno, 844 F.3d at 1133 ("[T]he language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification[.]").

member "personally encountered" a check-in kiosk – i.e., identifying those who are entitled to class membership – will not predominate over the more important common questions of fact and law such as whether: (1) "LabCorp's kiosks are independently accessible to legally blind individuals"; (2) "LabCorp has implemented the inaccessible check-in kiosks system across its national network of more than 1,800 PSCs"; (3) "LabCorp trained its employees that use of the kiosks to check-in was mandatory"; (4) "use of the kiosk is a good or service LabCorp offers its customers"; (5) "LabCorp offers a qualified aid or auxiliary service to allow legally blind individuals to access the check-in kiosk service"; and (6) "LabCorp has remedied the inaccessible check-in kiosk across its system." See supra at § I.B.

In addition, although Vargas "need not prove [that] []he suffered actual damages," Molski, 481 F.3d at 731, to prevail on his Unruh disability discrimination claim, LabCorp argues that predominance cannot be established because eligibility for statutory damages cannot "be addressed by way of a claim form after class wide liability has been determined[.]" (See Dkt. 66-1, Joint Br. at 49) (internal quotation marks omitted). In effect, LabCorp argues that predominance cannot be established because the entitlement to statutory damages will have to be done on an individual basis after liability is established. (See id.). However, it is well-settled that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013). In other words, "the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979,

989 (9th Cir. 2015) (internal quotation marks omitted); see also Comcast, 569 U.S. at 35, 133 S.Ct. at 1433 (noting that damages "[c]alculations need not be exact" at the class-certification stage). As the Ninth Circuit recently reiterated, "a district court is not precluded from certifying a class even if plaintiffs may have to prove individualized damages at trial, a conclusion implicitly based on the determination that such individualized issues do not predominate over common ones." Olean Wholesale Grocery Cooperative, Inc., 31 F.4th at 669. Here, the court can bifurcate the case into a liability and damages phase and, assuming there is a liability determination, create a claims process by which to validate individualized claim determinations. See, e.g., Briseno, 844 F.3d at 1131 ("Defendant[] will have . . . opportunities to individually challenge the claims of absent class members if and when they file claims for damages. At the claims administration stage, parties have long relied on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to validate claims. Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability.") (citation and internal quotation marks omitted); Mullins v. Direct Digital LLC, 795 F.3d 654, 667 (7th Cir. 2015) (parties regularly rely on "claims administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court" to validate claims); Nevarez v. Forty Niners Football Co., LLC, 326 F.R.D. 562, 577 (N.D. Cal. 2018) ("Class members can certify whether they were present at the Stadium and whether they encountered an actionable Unruh Act violation.") (citing Cal. Civ. Code §

55.56); see also Tyson Foods, 577 U.S. at 461, 136 S.Ct. at 1050 (recognizing that bifurcation could resolve problems regarding uninjured class members); 4 Newberg on Class Actions, § 11:6, at 21 (5th ed. 2014) ("Courts have employed either issue certification (certifying only the question of liability for class treatment) or bifurcation (separating liability from damages and trying liability first, then damages) as the means to effectuate the goal of aggregated treatment.") (footnote omitted).

Further, even assuming it was proper to consider, under the predominance prong, the issue of identifying class members, the court is not persuaded that the "personally encountered" and "difficulty, discomfort, or embarrassment" standard upon which LabCorp relies, (see Dkt. 66-1, Joint Br. at 47), has application to the specific Unruh Act disability discrimination claim in this action.[11] That standard, which is set forth in California Civil Code § 55.56[12] of the Construction Related Accessibility Standards Compliance Act ("CRAS"), see Cal. Civ. Code §§ 55.51–55.57, provides in relevant part that statutory damages under § 52(a) may "be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation or violations of one or more construction-related

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[11] With respect to the intent to use LabCorp's services, see White, 7 Cal.5th at 1023, LabCorp does not challenge that requirement. (See, generally, Dkt 66-1, Joint Br. at 47-50). In any event, that requirement would not defeat a finding of predominance. See Quest, 2021 WL 5989958 at *8 (noting that "there is no real question that the putative class members had a bona fide intent to use [defendant's] services" because plaintiff proposed to use defendant's records to identify class members).

[12] Unless otherwise indicated, all section references are to the California Civil Code.

accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion. A violation personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation." Cal. Civ. Code § 55.56(a)-(c) (emphasis added); see Mundy v. Pro-Thro Enterprises, 192 Cal.App.4th Supp. 1, 5 (2011) ("Section 55.56 is part of a comprehensive statutory scheme that was enacted in 2008 with the intent of increasing voluntary compliance with equal access standards while protecting businesses from abusive access litigation. The provisions in [§§] 55.51 through 55.57 apply only to a construction-related accessibility claim, which is defined as a violation of a construction-related accessibility standard under federal or state law[.]") (citations and internal quotation marks omitted); Hernandez v. Polanco Enterprises, Inc., 624 F.Appx. 964, 965 (9th Cir. 2015) ("Under California law, [plaintiff] must prove – in addition to the ADA violation – that she 'personally encountered the violation [of a construction-related accessibility standard] on a particular occasion' and that it caused her 'difficulty, discomfort, or embarrassment,' thus denying her full and equal access to a place of public accommodation.") (quoting Cal. Civ. Code § 55.56(a)-(c)) (first alteration added).

The two cases cited by LabCorp for the proposition that it is necessary for a class member to establish that he or she personally encountered an Unruh Act violation that caused difficulty, discomfort or embarrassment, (see Dkt. 66-1, Joint Br. at 47), are both construction-related accessibility cases. See Doran v. 7 Eleven, Inc., 2011 WL 13143622, *1 (C.D. Cal. 2011) ("Doran I"), aff'd, 509 F.Appx. 647 (9th Cir. 2013) (noting that plaintiff was a

"paraplegic" and that defendant had previously "remov[ed] all barriers related to his disability"); Botosan v. Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000) (plaintiff was a paraplegic asserting claims based on "lack of a designated parking space for disabled persons").[13] Similarly, the three ADA cases LabCorp relies on as examples of where class certification was denied, (see Dkt. 66-1, Joint Br. at 47-49) – Vondersaar v. Starbucks Corp., 2015 WL 629437, *4 (C.D. Cal. 2015), aff'd, 719 F.Appx. 657 (9th Cir. 2018); Moeller v. Taco Bell, 2012 WL 3070863, *14 (N.D. Cal. 2012); Antoninetti v. Chipotle Mexican Grill, Inc., 2012 WL 3762440, *5-*6 & n. 1 (S.D. Cal. 2012) – do not compel the conclusion that predominance is lacking here because, unlike those cases, this case does not involve construction-related accessibility claims. See Quest, 2021 WL 5989958, at *8 (noting that these cases "have certain notable similarities: all three involved disabled plaintiffs who alleged that counter heights and other physical barriers to access in

[13] Although the court in Quest recognized that § 55.56 "applies specifically to construction-related accessibility claims[,]" 2021 WL 5989958, at *8, it also appeared to accept defendant's argument that "both federal and California courts have [] articulated the same standard without reference to section 55.56." (Id.). LabCorp has not cited, nor has the court found a California published case that has addressed this standard outside of the construction-related accessibility context. On the contrary, the cases suggest otherwise. See, e.g., Mundy, 192 Cal.App.4th Supp. at 5 ("The provisions in [§§] 55.51 through 55.57 apply only to a construction-related accessibility claim, which is defined as a violation of a construction-related accessibility standard under federal or state law[.]") (citations and internal quotation marks omitted); Munson v. Del Taco, Inc., 46 Cal.4th 661, 677-78 (2009) (noting that §§ 55.53-55.57 were enacted to "protect[] businesses from abusive access litigation" arising from construction-related accessibility claims).

fast food establishments violated the ADA and the Unruh Act").[14] The cases relied upon by LabCorp involved various accessibility issues at different restaurants while Vargas's Unruh Act claim is based on LabCorp's kiosks, which are identical. While LabCorp maintains that "[n]ot all California PSC's [sic] even have kiosks[,]" and "for those that do, staffing varies widely depending on location and a PSC's size: some locations have a dedicated patient intake representative ('PIR') who sits full time at the front desk to check in patients; others have phlebotomists to conduct both check in and testing; and some PSCs are located inside Walgreens stores where there is always a dedicated Walgreens staff member to assist patients," (Dkt. 66-1, Joint Br. at 48), the variations are not as significant as LabCorp makes them out to be. First, of the 299 PSCs in California, (Dkt. 82, Exh. 32 (Sinning Depo) at JA1064), only 19 do not have kiosks. (Id.). Second, with respect to PIRs, there is evidence that LabCorp has "very few PIRs" and instead, "[t]he vast majority of the people working in [the PSCs] doing patient care and intake are

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[14] These cases are also distinguishable because, as the court in Nevarez observed, Moeller and Antoninetti are procedurally distinct in that the class certification motions were decided "after the defendants' liability had been adjudicated, which meant that the most important common question had already been resolved." Nevarez, 326 F.R.D. at 586 (emphasis omitted). The same holds true with respect to Quest, where the court had already resolved a motion for summary judgment. See Vargas v. Quest Diagnostics Clinical Laboratories, Inc., 2021 WL 5989961, *11 (C.D. Cal. 2021). Here, the court has not yet ruled on a summary judgment motion. Further, unlike the instant case, the kiosks in Quest were not identical because at some point, defendant "began to roll out a change to its kiosks that allow[ed] visually-impaired patients to swipe the touchscreen using three fingers, which checks the patient in and alerts a phlebotomist that the patient has arrived." Quest, 2021 WL 5989958, at *1.

phlebotomists." (Id. at JA1067-68). In other words, LabCorp is aware of which PSCs in California have kiosks, when they were installed and made operational, and how each PSC is staffed.

Finally, even if the standard set forth in § 55.56 applied in this case, it would not defeat a finding of predominance. In Nevarez, the plaintiffs, who required the use of wheelchairs, 326 F.R.D. at 569, sued several defendants, including the owners and operators of Levi's Stadium, asserting claims under the ADA and the Unruh Act. See id. at 568-71. The plaintiffs alleged that they faced barriers in accessing the stadium, including a lack of accessible seating, narrow security checkpoints, heavy doors, and inaccessible counters. See id. at 569-70, 578. The plaintiffs sought to certify a Rule 23(b)(3) class of persons who use wheelchairs, scooters or other mobility aids who "purchased, attempted to purchase, or for whom third parties purchased accessible seating," and who were denied equal access to the stadium. Id. at 572. The plaintiffs sought "statutory minimum damages of $4,000 per actionable violation of the Unruh Act[.]" Id. at 571.

With respect to the predominance requirement, the defendants made the same argument LabCorp makes here – namely that "individual questions predominate because each class member will have to prove that they 'personally encountered' an Unruh Act violation that caused 'difficulty, discomfort, or embarrassment' to the class member." Nevarez, 326 F.R.D. at 585 (quoting Cal. Civ. Code §§ 55.56(b)-(c)). Then-district Judge Koh rejected the defendants' contention that application of § 55.56 defeated predominance, noting that defendants kept "records of class members' purchases of accessible seating that include[d] names and contact information." Id. at 586. Similar to Nevarez and, as discussed below, see

infra at § II.B.2., there should be minimal logistical difficulties to identifying class members given the uniformity of the kiosks, and the fact that LabCorp "knows how many patients checked in, and has information on those patients from their provided ID and insurance[.]" (Dkt. 66-1, Joint Br. at 21 n. 4).

In short, the court finds that plaintiff has established that common questions of fact and law predominate over individualized questions.

2. **Superiority.**

"[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." Wolin, 617 F.3d at 1175 (internal quotation marks omitted). To determine superiority, the court must look at

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Of the four superiority factors, LabCorp appears to dispute only the fourth factor regarding whether the case is manageable as a class action.[15] (See Dkt. 66-1, Joint Br.

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[15] Given the substantial overlap between LabCorp's predominance argument, which appears to primarily challenge the

at 51-53). First, LabCorp relies on "[t]wo of the decisions[, Antoninetti and Moeller,] already discussed in Labcorp's predominance section" to argue that "class procedures" are "not superior for adjudicating" plaintiffs' Unruh Act claim, "considering the individualized issues involved in assessing damages and the hefty per-claimant minimum statutory damages amounts incentivizing lawsuits." (Id. at 51). LabCorp's argument and the cases it relies on were addressed and rejected in the previous section. See supra at § II.B.1. Further, it should be noted that LabCorp provides no explanation or authority as to why the statutory minimum damages amount under the Unruh Act qualifies as "hefty" and, even assuming it did qualify as a "hefty" damages amount, LabCorp does not explain why that matters in terms of assessing whether a class action is manageable. (See, generally, Dkt. 66-1, Joint Br. at 51). In any event, the $4,000 statutory damages amount is a minimal sum that "would be dwarfed by the cost of litigating on an individual basis[.]" Wolin, 617 F.3d at 1175; see Local Joint Exec. Bd. of Culinary/Bartender Trust Fund, 244 F.3d at 1163 (stating that "[i]f plaintiffs cannot proceed as a class, some – perhaps most – will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover"). In other words, the superiority requirement strongly "weighs in favor of class certification." Wolin, 617 F.3d at 1175 (discussing Rule 23(b)(3)(A) superiority factor). As the Nevarez court stated, "[a]lthough class members are entitled to $4,000 in damages per Unruh Act violation that sum pales in comparison with the cost of

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feasibility of maintaining a Rule 23(b)(3) class, the court hereby incorporates the predominance discussion set forth above. See supra at § II.B.1.

pursuing litigation. Consequently, this factor points towards certification." 326 F.R.D. at 589; see Local Joint Exec. Bd. of Culinary/Bartender Trust Fund, 244 F.3d at 1163 (In cases where a number of individuals seek only to recover relatively small sums, "[c]lass actions may permit the plaintiffs to pool claims which would be uneconomical to bring individually.").

Second, with respect to LabCorp's contention that the class would not be manageable given that plaintiffs "have not indicated how they would locate [] class members[,]" (Dkt. 66-1, Joint Br. at 51-52), it is a "well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns." Briseno, 844 F.3d at 1128 (internal quotation marks omitted); Nevarez, 326 F.R.D. at 590 (same). Moreover, "[t]here is no requirement that the identity of class members . . . be known at the time of certification." Ries v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 535 (N.D. Cal. 2016); see id. ("If there were [an identification requirement], there would be no such thing as a consumer class action."). In any event, identifying 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[.]" (Dkt. 66-1, Joint Br. at 21 n. 4). While it may not know at this point "which persons would fall into the category of legally blind[,]" (id.), making that determination at a later stage of the proceedings would not be an unduly burdensome task. Indeed, LabCorp was able to determine that Davis was mistaken with respect to the dates of one of his visits to a LabCorp PSC. (See Dkt. 266-1, Joint Br. at 23); (Dkt. 79, Exh. 14 (Davis Depo) at JA268-69). Certainly a similar undertaking could be done at the appropriate juncture.

Based on the foregoing, IT IS ORDERED THAT:

1. The Motion (**Document No. 66**) is **granted** as set forth in this Order. The court certifies the following classes:

> Nationwide Injunctive Class: All legally blind individuals in the United States who visited a LabCorp patient service center in the United States during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.
>
> California Class: All legally blind individuals in California who visited a LabCorp patient service center in California during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp's failure to make its e-check-in kiosks accessible to legally blind individuals.[16]

2. The court hereby appoints Luke Davis and Julian Vargas as the representatives of the Nationwide

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[16] Since the class definitions discussed by the parties did not address the temporal scope of the two classes, the court added the language "during the applicable limitations period" to the definition. See Torres v. Mercer Canyons, Inc., 835 F.3d 1125, 1139 (9th Cir. 2016) (acknowledging that "the district court may . . . adjust the scope of the class definition, if it later finds that the inclusiveness of the class exceeds the limits of [the defendant'] legal liability").

Class and Vargas as the representative of the California Class.

3. The court hereby appoints the law firms of Nye, Stirling, Hale & Miller, LLP and Handley, Farah & Anderson, PLLC as class counsel.

Dated this 23rd day of May, 2022.

_____/s/_____
Fernando M. Olgiun
United States District Judge

APPENDIX B

CHART FROM LABCORP'S EXCERPTS OF RECORD (C.A.App.509), Case No. 22-55873, Docket Entry 21

CONFIDENTIAL

Exhibit 4
Patient Service Center Check-in Metrics
August 23, 2020 to Feburary 19, 2021

	[a]	[b]=[a]/[g]	[c]	[d]=[c]/[g]	[e]	[f]=[e]/[g]	[g]
Date Range	Kiosk Check-ins (count)	Kiosk Check-ins (%)	Mobile Check-ins (count)	Mobile Check-ins (%)	Front Desk Check-ins (count)	Front Desk Check-ins (%)	Total Check-ins (count)
8/23/2020 - 8/31/2020	426,118	66.0%	53,668	8.3%	165,590	25.7%	645,376
9/1/2020 - 9/30/2020	1,581,064	67.2%	183,968	7.8%	587,139	25.0%	2,352,171
10/1/2020 - 10/31/2020	1,686,211	67.7%	190,179	7.6%	613,273	24.6%	2,489,663
11/1/2020 - 11/30/2021	1,444,755	65.9%	223,981	10.2%	524,515	23.9%	2,193,251
12/1/2020 - 12/31/2020	1,484,034	65.1%	272,722	12.0%	523,731	23.0%	2,280,487
1/1/2021 - 1/31/2021	1,502,923	65.2%	267,584	11.6%	535,249	23.2%	2,305,756
2/1/2021 - 2/19/2021	686,691	56.6%	168,131	13.9%	358,749	29.6%	1,213,571
Total	**8,811,796**	**65.4%**	**1,360,233**	**10.1%**	**3,308,246**	**24.5%**	**13,480,275**

Note:
Data was reported on a rolling 180 day basis as of February 19, 2021, over the time period August 23, 2020 to Feburary 19, 2021.

Source:
Davis-LabCorp00004753-00004754.