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 OF THE AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[2]

AAI submits this brief because Petitioner, Labcorp, makes overbroad claims that, if credited, would have harmful unintended consequences and substantially undermine the efficacy of private antitrust enforcement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner, Labcorp, makes two categories of arguments against certification of classes under Rule 23(b)(3) that contain uninjured members. The first is that they necessarily violate Article III. The second is that such classes can never satisfy the predominance requirement of Rule 23(b)(3). Both are incorrect.

As to the first point, Labcorp is wrong in part because Article III injury itself may be a common issue that supports certification. If so, the class device may

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[1] No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than *amicus curiae* or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

be appropriate—even mandatory—in assessing Article III injury.

As to the second point, Labcorp's analysis relies on four propositions, each of which is often untrue:

(1) there is no difference between injury on the merits and Article III injury;

(2) certifying classes containing uninjured members necessarily inflates aggregate damages;

(3) identifying any uninjured class members necessarily requires individualized inquiries; and

(4) certification of a class forces antitrust defendants to settle.

None of these claims are true of antitrust litigation. This Court thus should be careful not to rule in a way that fails to account for the realities of antitrust class actions. It should write an opinion that avoids unintended and undesirable consequences.

ARGUMENT

I. Antitrust Class Actions Serve a Valuable Purpose.

Antitrust enforcement plays a crucial role in our economic system. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

This Court has long emphasized the importance of private actions in enforcing the antitrust laws.

California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition."); *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 388 (2015) (noting States' "'long history of' providing 'common-law and statutory remedies against monopolies and unfair business practices'" (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989))).

The Court has also emphasized the important role that class actions play in ensuring the efficacy of private enforcement. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hawaii v. Standard Oil*, 405 U.S. 251, 266 (1972) (class actions "may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture").

Class actions are responsible for much of the antitrust laws' deterrence value. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (recognizing that class actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). As the bipartisan Antitrust Modernization Commission concluded, "The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs." Antitrust Modernization Commission, *Report and Recommendations* 241 (2007).

Without class actions, certain antitrust violations would not be pursued. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974). Cartels in particular, which are the subject of universal and worldwide condemna-

tion, would have little to fear without class actions because individual treble damages actions by customers are not common. II Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 311 (3d ed. 2007 and Supp. 2012) (noting the "relative simplicity of class action treatment of simple price-fixing cases and the strong policy, now held worldwide, of condemning naked price fixing"). Private antitrust actions are extremely expensive to pursue because they involve "complicated question[s] of fact" and the application of "equally complex" law to those facts. *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006). Attorney's fees and expert witness fees, even in garden-variety price-fixing cases, typically will be in the millions of dollars. *See, e.g., In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 401, 409–10 (D.N.J. 2006) (fees and expenses exceeded $6 million in case that settled before class certification; approximately $400 million of purchases at issue).

Given the expense of litigation, individual antitrust cases challenging cartel behavior are often negative-value cases, i.e., cases "in which the stakes to each member are too slight to repay the cost of the suit." Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions* § 4:33, at 290 (4th ed. 2002). "Economic reality dictates" that such actions "proceed as a class action or not at all." *Eisen*, 417 U.S. at 161; *see Amchem*, 521 U.S. at 617.

Broadly embracing Petitioner's position would pose a grave threat to antitrust class actions. This Court should write narrowly to avoid harmful unintended consequences for a critical antitrust enforcement mechanism.

II. Courts May Certify Classes Containing Members Lacking Article III Injury Without Exceeding their Constitutional Powers or Violating Rule 23(b)(3).

A. Courts May—and at Times Must—Certify Classes Containing Members Lacking Any Article III Injury.

Labcorp's brief makes two fundamental arguments against courts certifying classes under Rule 23(b)(3) if they contain members lacking any Article III injury. The first is that doing so would necessarily and impermissibly enable some class members to obtain an assessment of their claims on the merits that they could not obtain through individual litigation. *See, e.g.*, Pet'r Br. 2. The result, according to Labcorp, is that federal trial courts would exceed their constitutional powers. *Id*.

Labcorp's second major argument is that classes containing some—or many—members lacking Article III injury would necessarily result in individual issues—not common issues—predominating in litigation. Pet'r Br. 3. That, according to Labcorp, would violate Rule 23(b)(3)'s requirement that common issues predominate over individual ones. *Id*. Both points are incorrect.

Labcorp's arguments rely on two false assumptions. It is not true that class certification necessarily enables absent class members to obtain an assessment of their claims that a federal court lacks power to provide. Nor is it true that assessing Article III injury necessarily requires an individualized inquiry.

Contrary to Labcorp's assumption, federal courts have the power to assess whether absent class members have suffered an Article III injury, just as

they have the power to make that assessment for plaintiffs in individual litigation. *Compare* Pet'r Br. 2 ("a federal court has no power to assess [an uninjured litigant's] claim, full stop") *with Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 481 (2013). A federal court may be able to make that assessment for an entire class or for large portions of the class in one fell swoop. So the question of Article III injury itself can be a common issue that binds a class together, contributing to common issues predominating. *See Amgen*, 568 U.S. at 481.

That could occur, for example, under *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). There, this Court reached two relevant conclusions. First, it held that plaintiffs can lack any Article III injury even if Congress has passed legislation conferring on them a right to recover. *Id.* at 426. Second, it held that the standard for assessing Article III injury can vary with the stage of litigation. *Id.* at 431. Further, whether the members of the proposed class suffered Article III injury may depend on legal and factual issues that should be decided in the same way for all class members. *Id.* at 434.

An essential issue in a proposed class action may be whether any of the members suffered an Article III injury. The litigation may focus on resolving the common legal and evidentiary disputes necessary to decide that question. As a result, common issues may predominate in part *because* of the Article III question.

Consider in this regard a proposed class action based on the claim that a credit reporting agency violated class members' legal rights by posting false information about them on a third-party website, "Badcredit.com." The website may have shared that it contains information about all the members of the

class—and identified those individuals—but it may not have said what that information is to any third party.

A key dispute—maybe *the* key dispute—in the litigation may be whether Badcredit.com's conduct qualifies as dissemination of information to a third party. *Id.* at 432. The plaintiffs may claim that their information was disseminated because third parties know their identities and the website claims to have "bad" information about them. The defendant may contend that Badcredit.com does not divulge sufficiently specific information to cause Article III injuries. These evidentiary and legal disputes likely do not vary by class member. The issue of the existence of Article III injury, then, would be common to all class members. It thus would help ensure that class certification under Rule 23(b)(3) is appropriate.

Indeed, certification may be mandatory. *Shady Grove* held that courts must certify classes if plaintiffs satisfy the requirements of Rule 23. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."). So plaintiffs in the above scenario may be *entitled* to certification. Rule 23 does not draw a distinction between some issues in litigation—such as whether the class members should win at trial—and others—such as whether class members' claims should be dismissed for lack of Article III injury. Fed. R. Civ. P. 23(a)(2) (referring generally to "questions of law or fact common to the class"). As the Court held in *Amgen*, an issue is common to class members whether it causes them to win *or lose*. 568 U.S. at 481.

In arguing to the contrary, Labcorp *assumes* that certification of a class containing uninjured members

necessarily would require a trial court to treat the alleged victims of Badcredit.com differently in class litigation than it would in individual litigation. Pet'r Br. 40. But that is not true. The trial court might address Article III injury at the same stage and in the same manner in a class action as it would in an individual action. In a series of individual actions, plaintiffs would still be entitled to proceed in federal court until the court determines that they did not adequately prove their claims. This determination could happen at summary judgment or even after trial. The relevant law and evidence might be entirely common to the class—if, for example, Badcredit.com treated all the class members in the same manner.

Labcorp also *assumes* that the inquiry into Article III injury is necessarily individualized. Pet'r Br. 14, 37, 41, 42, 44 (discussing "mini-trials"). But it is not. Article III injury may depend on factual or legal determinations that should be resolved in the same way for all class members. *Transunion*, 594 U.S. at 426.

In this regard, Labcorp's analysis of the Rules Enabling Act is backwards. Pet'r Br. 20. It claims that certifying a class containing members lacking Article III injury is improper because doing so would "abridg[e], modif[y], or enlarg[e]" their substantive rights. *Id.* (citing 28 U.S.C. § 2072(b)) (alterations added). The Rules Enabling Act bars the Federal Rules of Civil Procedure from having that effect. But Labcorp asks this Court to treat absent class members' rights *differently* in the class context than in individual litigation—depriving absent class members of their substantive rights just because they are absent class members. If a court can address whether absent class members have Article III injury on a classwide basis, and if the plaintiffs satisfy Rule 23(a) and Rule

23(b)(3), then a federal court is required to grant class certification. *Shady Grove*, 559 U.S. at 398. Federal courts should be permitted to address Article III injury through the class device just as they may do so in individual litigation, as the Rules Enabling Act *requires*. Labcorp improperly asks this Court not to allow federal courts to do so.

B. Labcorp's Position Could Have Harmful Unintended Consequences.

Labcorp's position is not only legally incorrect, but it also could have various harmful consequences, including ones that it might not intend. One of them is making it more difficult for the parties to settle a proposed class action. Another is to create an implicit conflict between Article III injury as it applies to Rule 23(b)(3) and to other provisions of Rule 23(b).

i. Labcorp's Position Raises Difficult Issues in the Settlement Context.

Labcorp's position—that courts cannot certify classes containing members lacking Article III injury—could have unfortunate and inappropriate implications for class certification in the settlement context.

This Court has held that the requirements for class certification under Rule 23(b)(3) apply similarly to settlement as they do to ongoing litigation. *Amchem*, 521 U.S. at 619. That could lead lower courts to extend any rule this Court adopts here to the settlement context. So, for example, if this Court were to rule that a class cannot be certified if it contains members lacking any Article III injury, lower courts might believe they have to assess that issue for every absent class member in deciding class certification for

settlement purposes.[3] Adopting Petitioner's rule could cause serious harm to all parties.

One form that harm could take is a violation of the Rules Enabling Act. As noted above, that Act provides that the Federal Rules of Civil Procedure shall "not abridge, modify, or enlarge any substantive right." 28 U.S.C. § 2072(b). But legal disputants are ordinarily free to settle claims for which the plaintiffs may lack Article III injury, especially if that issue is itself contested. If this Court were to adopt a rule that categorically prevented resolution of those claims through the class device—or if lower courts were to so interpret whatever rule this Court adopts—a consequence could be a violation of the Rules Enabling Act. Participants in a legal dispute could be deprived of the right to settle claims in the class context that they could resolve by agreement outside of the class context. The standard for court approval of a settlement under Rule 23(b)(3) would not justify this result.

The Badcredit.com example frames these points. As noted above, this Court has held that plaintiffs' burden regarding their Article III injuries can vary with the stage of litigation. *TransUnion*, 594 U.S. at 431. A trial court might conclude that plaintiffs have carried their burden for purposes of their complaint. The defendant may then seek to challenge plaintiffs' allegations regarding their Article III injuries with evidence. The

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[3] This is meaningfully distinct from this Court's opinion in *Frank v. Gaos*, where the Court remanded because, as a result of its clarification of the law, the face of the complaint may have established that no named plaintiff had Article III standing. *Frank v. Gaos*, 586 U.S. 485, 492–93 (2019). That decision should not prevent participants in a legal dispute from settling if development of an evidentiary record would be necessary to resolve the Article III injury issue.

parties then may settle—in part to avoid the costs and risks of litigating the Article III issue.

Yet the rule that Labcorp proposes—and the U.S. government endorses—could be interpreted to prevent settlement. It could deprive the legal disputants of their substantive rights. Outside of the class context, legal disputants would be free to settle rather than obtain a judicial ruling on the issue of Article III injury. There is a strong argument that they should be permitted to do so in the class context, at least if significant litigation—especially discovery—would be required to determine whether the named plaintiffs have suffered an Article III injury. *Gaos*, 586 U.S. at 492.

Further, in the settlement context, the proposed class may satisfy the requirements of Rule 23, including Rule 23(b)(3)'s predominance requirement, without determining Article III injury for all class members. Rule 23(e)(2) directs district courts to assess whether a settlement that binds class members is "fair, reasonable, and adequate." It may well be that the court can assess whether a settlement is fair, reasonable, and adequate without getting bogged down in *any* individual issues that would defeat predominance.

Common issues may also predominate—even dominate—in settling on a class basis. A court may appropriately conclude that it can assess the fairness, reasonableness, and adequacy of the relief the class members receive in one fell swoop. Further, whether that settlement is fair, reasonable, and adequate could then involve the very same judgment for all class members. If so, that would contribute to common issues predominating. Yet a ruling that a federal court cannot certify a class without determining Article III injury for all class members could impede the settlement.

The focus of a court's inquiry is on whether the settlement provides class members sufficient relief. *See* Fed. R. Civ. P. 23(e)(2)(C) (court should assess whether "the relief provided for the class is adequate"). The proposed settlement could well do so. Indeed, it might provide an eminently reasonable compromise for all parties—given uncertainties in the law and evidence, including about the requirements of Article III. So a court could act properly in approving a settlement under Rule 23(e) with absent class members who may lack Article III injuries. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) (en banc) (affirming approval of settlement on class basis involving members who allegedly lacked Article III injuries).

This point is not merely technical. Far from it. It has great practical significance. Without the prospect of a classwide settlement, the parties—and the court—may be forced to suffer the very costs and risks that they sought to avoid. Litigation is burdensome. It consumes time and money and imposes uncertainty. Plaintiffs and defendants generally benefit—and promote judicial efficiency—when they come to a mutually acceptable resolution of a legal dispute. "The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010). Much of those gains could be lost if a court and the parties were to expend resources investigating, analyzing and deciding whether members of a proposed class lack any Article III injury—especially when one of the benefits of settlement is to avoid that very investigation, analysis, and decision.

If plaintiffs can satisfy Rule 23(a) and Rule 23(b)(3) in the settlement context, a trial court should—again, it must—certify a class. *Shady Grove*, 559 U.S. at 398. That is true regardless of whether some class members lack any Article III injury. The Badcredit.com litigation provides a potential example. How that litigation should be resolved may depend largely—even *entirely*—on common issues. If so, the court in that case should grant class certification.

At the least, the record here provides a poor vehicle for assessing the interplay between Article III injury and settlement in the class context. That weighs heavily against this Court adopting Labcorp's proposed sweeping rule that could impose great costs on plaintiffs, defendants, and courts.

ii. Labcorp's Position Conflicts with Precedents Governing Injunctive Relief.

Labcorp acknowledges that this Court has repeatedly held that a federal court may certify a class that includes members lacking any Article III injuries when adjudicating injunctive relief. Pet'r Br. 27–28. Labcorp further acknowledges that the relief the court imposes can affect the legal rights of third parties, even ones that lack any Article III injury. *Id*. Labcorp claims, however, that the same rule does not apply to proposed class actions that seek damages. Pet'r Br. 28. In so doing it conflates two actions: *certifying a Rule 23(b)(3) class* containing absent class members lacking Article III injury with *awarding individual damages* to those absent class members. Pet'r Br. 28. The two do not always travel together.

As noted above, a trial court may use the class device to decide the issue of Article III injury. Indeed, that

issue can bind the class together, supporting class certification. *Amgen*, 568 U.S. at 481. It does not follow, however, that the Court will award damages to absent class members lacking any Article III injury. To the contrary, at an appropriate stage in the proceedings, the Court may dismiss the claims of the class precisely because its members lack any Article III injury. *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 250–51, (4th Cir. 2020) (describing district court's determination that class lacked Article III injury at the summary judgment stage—after class certification had been granted).

Similarly, a trial court may use the class device to approve a classwide settlement. That would not involve the court awarding damages at all, much less granting them to absent class members lacking any Article III injury. Instead, the court is charged with overseeing a private resolution of a legal dispute to ensure that absent class members receive a fair, reasonable, and adequate result. In that setting, the court's conduct in approving a settlement is much like its conduct in granting an injunction. And, as Labcorp acknowledges, a trial court may certify a class seeking injunctive relief without assessing whether all its members suffered Article III injuries. Pet'r Br. 27–28.

These examples provide a sufficient reason for this Court to reject Labcorp's proposed rule against federal courts certifying classes containing any absent class members that lack Article III injuries. That sweeping rule would conflict with this Court's precedents holding that a federal court may certify a class in other contexts that contain such absent class members.

At most, Labcorp's argument pertains to a much narrower issue. It is whether a federal court may *award individual damages* to absent class members

that have not suffered Article III injuries. Pet'r Br. 17. That issue is not properly before the Court on the current facts. Nor are numerous other issues, such as the role Article III injury should play in the predominance analysis under Rule 23(b)(3). The Court should not attempt to address those sorts of issues on this record. Doing so would require undue speculation and could cause unintended, harmful consequences.

III. Labcorp Makes Arguments that (1) Threaten Antitrust Enforcement, (2) Do Not Fit Antitrust Cases, (3) Implicate Injury on the Merits, Not Article III Injury, and (4) Rely on Legal and Factual Errors.

Labcorp goes beyond addressing Article III injury in the case before the Court. Pet'r Br. 41–42. It makes sweeping claims about class certification in other cases, including antitrust litigation. *Id.* It contends that a court cannot certify a class that contains uninjured members. *Id.* at 15. The implication is that a trial court must not only assess whether the members of a class suffered an Article III injury—whether their claims give rise to a case or controversy—but whether they should prevail on the merits in proving injury in the litigation. *Id*.

That position threatens antitrust class actions and thus the congressional plan for protecting competition. It also elides a crucial distinction between statutory damages and antitrust damages, fails to distinguish Article III Injury from proof of injury on the merits, and mischaracterizes how courts and parties address injury and class certification in antitrust cases. AAI asks this Court to proceed with caution, and not to address these issues as they pertain to antitrust law without an adequate factual record in an antitrust case before it.

As explained below, antitrust damages are unlike statutory damages. In proposed class actions, antitrust plaintiffs almost always claim that they paid too much or that they were paid too little. There is no dispute that such monetary injuries suffice under Article III. *Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 286 (1997). The relevant issue, if there is one, is whether the class members can present adequate *proof* of their injury, not whether they assert an adequate *type* of injury.

A crucial implication is that in antitrust cases, the burden for establishing Article III injury cannot be the same as the standard of *proof* that otherwise applies in litigation. Otherwise, a defendant could never win a binding judgment at trial. A jury's finding that the defendant did not cause any injury to the plaintiffs would mean that the trial court lacks jurisdiction and thus the power to enter an order for the defendant. Analogous reasoning applies to summary judgment and class certification. The same may not be true when the evidence shows plaintiffs lack an adequate *type* of injury.

Labcorp is similarly mistaken in its description of how Rule 23 applies in antitrust cases. It is not true, as Labcorp asserts, that the presence of uninjured members in an antitrust class generally inflates plaintiffs' aggregate damages. Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 972 (2010). Nor is it true, as Labcorp claims, that identifying uninjured class members in an antitrust case generally requires individual inquiries. Nor yet is it true, as Labcorp declares, that class certification generally coerces defendants to settle antitrust cases.

The Ninth Circuit's en banc decision in *Olean* illustrates these points. Foreign manufacturers of tuna conspired to commit a billion-dollar Sherman Act violation that resulted in criminal charges and guilty pleas. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 675 (9th Cir. 2022). American tuna purchasers were forced to pay artificially inflated prices—even buyers with great market power, such as Walmart. *Id.* at 678.

Five points are important about *Olean* for present purposes:

(1) At issue was the adequacy of *proof* of Article III injury, not adequacy of *type* of Article III injury, as more often arises in statutory damages cases. *Id.*

(2) It would not have made sense for the plaintiff's burden of proving Article III injury to match its burden of proving injury on the merits based on the stage of the litigation. *Id*. at 678, 672 n.16.

(3) The presence of potential uninjured class members did not risk inflating classwide damages. *Id.* at 671.

(4) Determining which class members were injured did not require individualized inquiries but rather depended on issues that should be resolved in the same way for all class members. *Id*. at 671–72.

(5) Class certification did not end the litigation.

A. Antitrust Claims Almost Always Assert the Right Kind of Injury Under Article III.

For purposes of Article III injury, courts treat two issues very differently. The first is whether plaintiffs have asserted an adequate *type* of injury. The second is whether plaintiffs have offered adequate *proof* of injury.

A key issue in some litigation is whether plaintiffs have suffered an adequate *type* of injury under Article III. 594 U.S. at 437–38. In *TransUnion*, for example, most of the class members claimed injury from inaccurate credit reports even though the defendant had not disseminated those reports to third parties. *Id.* The Court did not reject as inadequate plaintiffs' *proof* of injury—that the credit reports were in fact inaccurate. The Court instead rejected as inadequate plaintiffs' *type* of injury—it held that an inaccurate report does not cause constitutionally sufficient injury if it was not disseminated to third parties. *Id.*

In contrast, plaintiffs in antitrust class actions virtually always assert injuries of the right *type* under Article III: that they paid more money (or received less money) than they otherwise would have because of an alleged antitrust violation. *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 751 (7th Cir. 2011) ("A financial injury creates standing.").

The issue is whether they have made adequate allegations, or provided adequate proof, of their injuries to proceed in litigation and ultimately prevail.

Olean was typical in this regard. There, all the members of the proposed classes bought tuna and alleged that the antitrust conspiracy caused them to pay inflated prices for it. 31 F.4th at 678. There was no meaningful dispute that they alleged—and sought to

prove—the right *type* of injury to satisfy Article III. The relevant issue, if any, regarding Article III injury was whether they had sufficient *proof* of their injuries. *Id.*

B. Courts Should Treat Adequacy of *Type* Differently from Adequacy of *Proof* as Litigation Progresses.

Courts should take different approaches in assessing Article III injury depending on whether the issue concerns plaintiffs suffering the adequate *type* of injury or whether it concerns plaintiffs offering adequate *proof* of injury.

This Court has indicated that the burden on plaintiffs to establish that they have suffered an adequate *type* of injury can increase over the course of the litigation. *TransUnion,* 594 U.S. at 431. (The Court has not, however, indicated how high the plaintiffs' burden may become.) In *TransUnion*, for example, the parties stipulated after trial that only 1,853 of the 8,185 class members had their misleading credit reports disseminated to third parties. As a result, the remainder of the class lacked Article III injuries. *Id.* at 417, 433. This Court did not clarify how it would have ruled if faced with contested evidence that the majority of class members' credit reports had been disseminated to third parties. It is at least conceivable that a court could dismiss these plaintiffs' claims for lack of standing based on an adverse jury finding or an adverse ruling at summary judgment on *type* of injury.

The same cannot be true for adequate *proof* of injury. Consider a jury finding that a plaintiff loses at trial for lack of evidence that the defendant caused the plaintiff's injury—an injury that, if proven, would suffice under Article III. If the court were to dismiss

for lack of Article III injury, it could not enter a judgment for the defendant. It would lack subject matter jurisdiction and hence the power to extinguish the plaintiff's legal rights. As a result, the plaintiff could pursue the same claims again—perhaps in state court. The defendant would be deprived of the spoils of its victory.

Similar reasoning applies at summary judgment. A plaintiff's inadequate proof of injury should lead to a judgment in favor of the defendant with prejudice, not to dismissal for lack of Article III injury. Otherwise, a plaintiff who loses on proof of injury at summary judgment may bring its claims again in a different forum. So the standard for adequate *proof* of injury under Article III should be more forgiving than the standard for a plaintiff to survive summary judgment.

Indeed, if the inquiry under Article III into the adequacy of the plaintiff's proof of injury were anything more than preliminary—that is, if the inquiry into the adequacy of *proof* of injury increases over the course of the litigation in the same manner as the inquiry into the adequacy of the *type* of injury—then perverse results could follow. Consider a motion for summary judgment based on insufficient evidence of injury. If the plaintiff has evidence that is too weak to survive summary judgment, but not so weak as to fail under Article III, the court can dismiss the plaintiff's claims with prejudice. But, under Labcorp's approach, if the plaintiff's claims are even weaker, the court must dismiss the lawsuit for lack of Article III injury without ruling on the merits. It would have to do so for lack of subject matter jurisdiction. The plaintiff could then file the same case elsewhere, if only in state court. That result is backwards—courts would treat weaker claims more favorably than

stronger claims. Similar points apply at class certification.

Given this context, AAI respectfully submits that the Court should address only the issue before it—whether the plaintiffs in this case have asserted an adequate *type* of injury. *See Transunion*, 594 U.S. at 441. That question is wholly distinct from an inquiry into the right standard for assessing *proof* of injury under Article III. That question is far thornier and arises far more often in antitrust cases. That topic is best considered in the context of an antitrust case or, at least, in a case addressing adequacy of *proof* of Article III injury rather than adequacy of *type* of Article III injury. This is not that case.

C. Uninjured Class Members Do Not Generally Inflate Damages in Antitrust Cases.

Labcorp also makes the unsubstantiated assertion that defining a class to include uninjured members necessarily inflates aggregate damages. Pet. Br. 3, 32. In antitrust class actions, that is generally untrue. That is because in "antitrust cases, standard economic methods can provide an accurate calculation of damages to the class as a whole such that the presence of uninjured members in the class does not affect the total recovery." Davis, *supra*, at 972. The econometric analysis on which plaintiffs rely establishes total damages. As a result, the presence of uninjured class members does not "expose the defendant to a single dollar of excessive damages." *Id.* The contested issue is whether those damages are classwide or whether, instead, the damages were spread unevenly across the class and some class members somehow avoided injury despite the antitrust violation's anticompetitive effects.

Plaintiffs in antitrust class cases generally rely on a regression analysis—or a similar econometric technique—to calculate the aggregate damages to the class as a whole. As this Court has repeatedly recognized, it is the defendants' actions that create the need for these sorts of analyses. Their allegedly culpable conduct has distorted the free market, requiring an economic analysis of what would have happened if competition had not been restrained. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Their interference with market forces "itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty." *Id.*

On the other hand, defendants tend to argue, first, that they did not engage in the alleged conduct; second, that, if they did, it was not unlawful; and, third, that if it was, it did not cause any damages at all. That gives rise to several common issues—what defendants did, whether their conduct was illegal, and whether it caused any harm whatsoever.

At class certification in antitrust cases, then, defendants generally deny they caused any injuries at all. They often do not offer an alternative—lesser—calculation of damages. Instead, if they concede the possibility of damages at all—if only for purposes of argument—they deny that such damages would have been distributed widely across class members.

The plaintiffs, for their part, generally provide evidence that all class members suffered some antitrust injury. *Olean*, 31 F.4th at 671. The form of that antitrust injury is usually an overcharge in cases alleging the exercise of seller market power.

What matters about this disagreement for present purposes is that it has no implications for whether plaintiffs' calculation of aggregate damages is accurate. If plaintiffs are right, all class members paid overcharges, and the regression summed up their injuries. Davis, *supra*, at 986 ("[B]ecause the baseline is higher, all of them pay inflated prices due to the challenged conduct."). If the defendants are right, some class members—maybe many of them—did not pay an overcharge, but that does not imply that the presence of uninjured members in the class affected aggregate damages.

Again, *Olean* is typical. The plaintiffs relied on a regression analysis to calculate aggregate damages. *Olean*, 31 F.4th at 671. The defendants attacked that analysis because, they claimed, it produced only an average, and could mask differences in the distribution of those damages across class members. *Id.* at 677. Some class members, defendants argued, might not have suffered any injury at all. *Id.* at 680. That argument, however, did not cast doubt on the total damages plaintiffs claimed that they suffered. *Id*.

Antitrust cases, then, are different from statutory damages cases. In statutory damages cases, the presence of uninjured members in a class may well inflate aggregate damages. In antitrust cases, that generally is not true. Davis, *supra*, at 972. Again, this difference provides a reason to proceed with caution. Factual context matters. AAI asks this Court not to reach conclusions that do not fit antitrust class actions but that could affect them.

D. Identifying Uninjured Class Members in Antitrust Cases Often Does Not Involve Individualized Inquiries.

Labcorp assumes that identifying uninjured class members requires an individualized analysis. Pet'r Br. 14, 37, 41, 42, 44. Again, in antitrust cases that is often incorrect. To the contrary, the disagreement between the parties often gives rise to issues that can and should be resolved in the same way for all class members.

The reason that is so follows again from the underlying econometrics. Plaintiffs in antitrust cases not only offer evidence that the challenged conduct artificially inflated prices generally but also that the effect was classwide. It often is. *See, e.g.*, *Sullivan*, 667 F.3d 273, 300 ("This conduct resulted in a common injury as to all class members—inflated diamond prices—in violation of federal antitrust law.").

Plaintiffs' evidence of classwide injury can take many forms. It often includes analyses showing that in general prices move together across class members so that a significant general price increase would inflate prices to all class members. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) ("Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.").

Another form the evidence can take is a comparison on a class member by class member basis between the prices they actually paid and the prices that they would have paid in the absence of the conspiracy. Often this form of proof is not possible for every class member. The smallest purchasers in a class regularly do not have sufficient purchases to allow for this

analysis to yield statistically significant results. On the other hand, the smallest purchasers have the *least* bargaining leverage and so they are the *least* likely to avoid the anticompetitive effects of an antitrust violation. If the evidence is that all other class members paid overcharges—and that prices in general move together—the natural inference is that the small class members paid overcharges too.

Defendants often challenge plaintiffs' proof of classwide impact as too infirm to show injury to any class members. They frequently point to various asserted flaws in the regression analysis that provides a foundation for plaintiffs' position and claim that it is too unreliable to support a finding in their favor. Which side is right will depend on the facts of the case. A court may reject plaintiffs' showing and deny class certification. Or it may decide plaintiffs' showing is strong enough to support certification. But under these circumstances a trial court would not undertake individual analyses. The plaintiffs' method of proving classwide impact—and the defendants' attacks on it—should be resolved in the same way for all class members.

Another strategy that defense economists often use is to insist that the analysis of injury should be based not on patterns that emerge from sales data for the class as a whole, but only on defendants' sales transactions with each individual class member in assessing injury to *that* class member. The latter technique is questionable.[4] Assuming it is legitimate,

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[4] This method is sometimes called "slicing and dicing." Martin A. Asher et al., *Losing the Forest for the Trees: On the Loss of Economic Efficiency and Equity in Federal Price-Fixing Class Actions*, 16 Va. L. & Bus. Rev. 293, 319 (2022). Statisticians recognize that, all else equal, the more data a statistician uses, the more reliable the results. Indeed, part of why defense

however, the key point is that it does not necessarily lead to individualized inquiries. Economists using the technique apply a common method to the data and often can identify those class members that appear to be uninjured.

These points are technical. But they are important. Labcorp's argument assumes that identifying uninjured class members in class actions—including antitrust class actions—requires individual inquiries. Pet'r Br. 14, 37, 41, 42, 44. That provides an important premise for its claim that courts should not certify classes under Rule 23(b)(3) if they contain any significant number of uninjured class members. *Id.* at 13–14. But Labcorp is wrong. At the least, this Court should have a factual record that allows an exploration of these issues in assessing Labcorp's position. Otherwise, it may adopt a legal standard based on factually incorrect premises.

Olean illustrates both the complexity of these issues and the errors in Labcorp's assertions. 31 F.4th at 672. There, the plaintiffs relied on multiple methods to prove that the conspiracy to inflate tuna prices harmed all class members. Those methods included a regression analysis establishing that the conspiracy generally inflated prices, as well as other analyses showing injuries to various groups and that prices in the market moved together. *Id.*

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economists like to "slice and dice" is that doing so usually cannot produce statistically significant results for a significant proportion of class members—particularly the ones with the smallest number of transactions. *Id.* The defendant economists then treat these class members as "uninjured" when, in fact, they have merely applied a methodology that makes it impossible to determine whether they are uninjured—arguably by design. *Id.*

In addition, the direct-purchaser plaintiffs offered an econometric analysis that assessed impact on a class member by class member basis, that produced meaningful results for 94.5% of the class, and that showed that all those class members paid an overcharge. Importantly, plaintiffs' economist did not conclude that *any* of the class members were uninjured. *Id.* n.18. Instead, he acknowledged that this one econometric technique did not provide statistically meaningful results for 5.5% of the class.

The defendants in *Olean* made two relevant arguments against class certification. The first was that the trial court should treat 5.5% of the class as uninjured. *Id.* at 672–80. Those were the class members for which one of plaintiffs' methodologies could not prove injury. Plaintiffs responded that their other evidence supported a finding that the 5.5% paid overcharges. They also noted that it is implausible that the smallest purchasers—who comprised the 5.5%—avoided overcharges while the evidence showed that larger purchasers—such as Walmart—did not. *Id.* If large-volume purchasers cannot get a discount below the cartel overcharge, we may safely infer that mom-and-pop stores cannot do so either.

The defendants' second argument against class certification was based on a methodology that analyzed the data for each class member separately rather than analyzing it all and applying it to each class member. *Id.* Using this methodology, the defendant economist found no evidence of injury to 28% of the class.[5]

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[5] As explained *supra* in note 4 and accompanying text, this argument was suspect. It implied that the largest class members—again, including Walmart—paid overcharges while

Even accepting the defendants' position, however, need not give rise to individualized issues. If the plaintiffs were entirely right, all the class members paid an overcharge. If the plaintiffs were largely right but not about the 5.5%, then a common econometric analysis could be applied to the data to identify the uninjured class members and exclude them from the class or ensure they did not recover any compensation after trial. Finally, if the defendant's economist was right, his econometric analysis could identify the 28% of the class that he claimed was uninjured, enabling the court to exclude them or avoid compensating them. No inquiry into the individual circumstances of class members was necessary or, indeed, appropriate. Labcorp's assertion to the contrary fails to address how class certification actually works in many antitrust cases. *Urethane*, 768 F.3d at 1254.

E. Class Certification Is Not Routinely a Death Knell in Antitrust Cases.

Finally, Labcorp implies that courts should hesitate to grant class certification—apparently, even if plaintiffs satisfy Rule 23—because doing so forces defendants to settle even meritless cases. Pet'r Br. 13–14. But Labcorp offers no evidence for its position. And there is a good reason to think it is wrong, at least in antitrust cases.

In antitrust cases, defendants routinely continue to litigate cases after class certification is granted. Some lose. *See Urethane*, 768 F.3d at 1249 ("The action went

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the smallest class members somehow had the negotiating leverage to avoid injury. Far more plausible is that the limited number of sales transactions with the smallest class members explains why a statistical analysis isolating their purchases could not prove injury.

to trial, and the jury returned a verdict against Dow."). Some win at trial. *In re Nexium (Esomeprazole) Antitrust Litig.*, 842 F.3d 34, 39 (1st Cir. 2016) ("The jury found that although the plaintiffs had proved an antitrust violation in the form of a large and unjustified reverse payment [], plaintiffs had not shown that they had suffered an antitrust injury that entitled them to damages."). Some win at summary judgment. *Simon and Simon, PC v. Align Tech., Inc.*, No. 20-CV-03754-VC, 2024 WL 710623, at *1 (N.D. Cal. 2024) ("Although it's a close case, Align's motions for summary judgment are granted.") (appeal pending). And some settle only after summary judgment on the eve of trial, Final Judgment and Order Approving Class Action Settlement, *Le v. Zuffa, LLC*, No. 2:15-cv-01045, Dkt. 1064 (D. Nev. Mar. 3, 2025), or after trial has begun, even in cases with criminal guilty pleas. Settlement, *In re Capacitors Antitrust Litig.*, No. 3:14-cv-03624, Dkt. 2923 (N.D. Cal. Mar. 31, 2022). It is not generally true in antitrust cases that class certification is a death knell for defendants.

CONCLUSION

Without an antitrust case at bar, this Court should write narrowly and refrain from adopting a rule that could inject uncertainty, confusion, and enormous inefficiencies into antitrust class action litigation—to the detriment of all parties, the judicial system, and competitive markets.

Respectfully submitted,

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