NO. 24-304

In the Supreme Court of the United States

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

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND THE 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 AMICI CURIAE LIONEL HARPER, DANIEL SINCLAIR, HASSAN TURNER, AND LUIS VAZQUEZ IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

LIONEL HARPER, DANIEL SINCLAIR, HASSAN TURNER, and LUIS VAZQUEZ (collectively the "Amici") are employees and consumers who have class action claims pending in federal court against their former employer. *Harper et al. v. Charter Commc'ns, LLC*, Case No. 2:19-cv-00902 (E.D. Cal.). They allege that certain sales positions are misclassified as "exempt" during a new hire training period (*i.e.*, the first few weeks of their employment when trainees are not required or expected to spend more than half of their time outside the office attempting to make sales). They also allege that wage statements that identify employees' monthly commission wages are inaccurate, incomplete, and misleading. They are seeking damages and penalties for themselves and thousands of other employees. Due to the small potential individual recoveries ranging from under $100 to a few thousand dollars, many employees will not pursue their claims or get any relief if the case is not resolved on a class action basis.

Amici's employer opposed class certification by pressing many of the same arguments Petitioner is pressing in this appeal. Their employer argued that *some* employees *might* not have been injured because they *might* not have worked any unpaid overtime despite schedules that required and expected 45–55 hours of work each training week. Their employer also argued

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[1] No party's counsel or party authored any part of this brief. No person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

that *some* employees *might* not have been injured because they *might* not have been misled or confused by inaccurate and incomplete information on their commission wage statements. Amici have an interest in this appeal because the Court's resolution of the Question Presented will impact their pending class action against their employer.

Amici direct the Court's attention to several matters and considerations that are not the specific focus of the parties' briefing, including:

- that the burden to prove an Article III injury slowly increases at each of the successive stages of the litigation, and that Article III does not impose a summary judgment or trial burden of proof at the class certification stage.
- that Article III does not require courts to decide at the class certification stage whether all, some, or no potential class members actually suffered an injury;
- that Petitioner's proposed rule will make pre-certification class discovery more expensive and contentious than it already is, encourage more discovery misconduct; and incentivize unreliable "happy camper" declarations; and
- that Petitioner's complaints about in terrorem settlement pressure based on certified classes that are inflated with uninjured members are unsupported.

Amici support Respondents' arguments in full, and they ask the Court to affirm the lower court decisions. They also ask the Court to consider these matters when addressing the Question Presented.

INTRODUCTION

Rule 23 instructs courts to decide certification at an "early practicable time." Fed. R. Civ. P. 23(c)(2). In a typical class action, the certification decision comes after the pleading stage and before the summary judgment stage, when some discovery has occurred but most of it remains incomplete. There is a proposed class definition but every potential class member has not yet been identified. Unless the defendant files a motion to dismiss or a preemptive motion for summary judgment against the named plaintiffs, the court has not yet addressed the merits of any claim, defense, or theory of liability.

This is a typical class action. Some discovery has occurred but it is far from complete. Every potential class member has not yet been identified. The court has not yet addressed the merits of the parties' contentions, including the central question that looms large in this appeal: what does Article III require to prove an injury in these circumstances?

On the Article III question, Respondents contend that every legally blind patient who visits a California location that uses a kiosk is denied access to services on equal terms with non-disabled patients and suffers a concrete injury. Petitioner contends that Article III requires more: every patient must also intend to use the kiosks. The Article III injury question is common and can (and should) be answered *post-certification* for all class members in one stroke. The answer to this common question will drive the resolution of this case. If Respondents are right, they likely can prove every

member's injury at summary judgment or trial. If Petitioner is right, it may have a basis to seek decertification.

Article III does not require—or even allow—courts to answer the injury question for *potential* class members at or before the class certification stage. Class certification is a procedural step that comes after the pleading stage and before the summary judgment stage. Plaintiffs' evidentiary burden under Rule 23 is heavier than at the pleading stage but lighter than at the summary judgment stage. Plaintiffs need to "affirmatively demonstrate" that Rule 23's procedural safeguards are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). They also need to show that their common contentions are "capable" of proof at trial. *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013). They do not need to show, however, that their contentions will prevail. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013). They certainly do not need to prove their contentions, which is reserved for summary judgment or trial. *Id.* at 482.

Article III does not impose an additional or different evidentiary burden on plaintiffs at the class certification stage beyond what Rule 23 requires. Article III does not require courts to analyze classwide evidence and decide at class certification whether all, some, or no potential class members actually suffered an injury. Answering Article III injury questions at class certification will create advisory opinions and one-way intervention problems, and will make pre-certification class discovery even more expensive and contentious.

The Court should reject Petitioner's proposed rule requiring courts to police potential class members'

injuries, and to preemptively identify and exclude every potential class member who does not prove an injury at the class certification stage. The Court instead should adopt the following rule:

> Courts may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when the class definition ensures that each potential class member *could have suffered* the alleged injury. If later events or discoveries show that some class members *could not have suffered* or *did not suffer* the alleged injury, then courts should alter or amend the class definition or take other action to ensure that uninjured class members do not recover individual damages.

This proposed rule is consistent with the Court's Rule 23 and Article III precedents. It prevents courts from certifying classes with members who could not bring a valid claim and recover individual damages in federal court even if all of plaintiffs' contentions prevail. And it does not create advisory opinions or one-way intervention problems, or make pre-certification class discovery even more expensive and contentious than it already is.

The certified class in this case only includes legally blind plaintiffs who *could have suffered* the alleged injury. Whether Respondents' theories of liability and injury—including what is required to prove an Article III injury in these circumstances—will prevail on the merits remains to be seen. Those common questions can and should be answered post-certification. Because the class certification order is consistent with Rule 23 and Article III, the lower courts' decisions should be affirmed.

SUMMARY OF ARGUMENT

I. The burden to establish an Article III injury depends on the successive stages of the litigation. Class certification is an intermediate procedural step between the pleading stage and the summary judgment stage. Rule 23 sets the burden for class certification, and that burden applies equally to common Article III questions.

A. Article III does not require proof of every—or any—potential class member's injury at the class certification stage. Plaintiffs eventually must prove that class members suffered Article III injuries before they can recover individual damages, but Article III does not impose a summary judgment or trial burden at the class certification stage.

B. Petitioner's proposed rule will create advisory opinions and one-way intervention problems because *potential* class members are not yet before the court when class certification is granted or denied. Petitioner's proposed rule also conflates potential class members with intervenors, and imposes a greater Article III burden on potential class members than it does on intervenors.

C. Ultimately, class member injury questions can and should be resolved post-certification. The fact that later events or discoveries may show that some or no class members actually suffered an injury does not make an initial grant of class certification incorrect or an

abuse of discretion. There are many post-certification procedures and tools that courts and parties can use to ensure that any uninjured class members do not recover individual damages.

II. Petitioner's proposed rule will make pre-certification class discovery far more expensive and contentious. The tension between defendants' desire to limit pre-certification class discovery, and plaintiffs' need to obtain sufficient pre-certification class discovery to satisfy their evidentiary burden, will explode if courts must police every potential class member's injury before they can grant certification.

A. Petitioner's proposed rule will force plaintiffs to demand every potential class member's records and information, and to invest more in pre-certification classwide expert analysis and reports. It also will force defendants to expend more resources on pre-certification class discovery and experts. The class and expert discovery that typically occurs post-certification will need to occur pre-certification.

B. Petitioner's proposed rule will tempt and encourage defendants to manipulate, conceal, or destroy potential class members' records. From defendants' perspective, the risks associated with record-keeping violations and discovery sanctions will be outweighed by the risks of class certification.

C. Petitioner's proposed rule will incentivize defendants to conduct more declaration blitzes to try to get potential class members to dis-

claim their injuries using unreliable, pre-written "happy camper" declarations.

III. There is no evidence of *in terrorem* settlements or extortion based on certified classes that are inflated with undisputedly uninjured class members. Even if there was, limiting certified classes to members who *could have suffered* the alleged injury mitigates these alleged problems.

ARGUMENT

I. THE BURDEN TO ESTABLISH AN ARTICLE III INJURY DEPENDS ON THE STAGE OF THE LITIGATION.

To commence a class action, like any other action, plaintiffs "must 'clearly . . . allege facts demonstrating' each element" of standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Their allegations, taken as true, must plausibly suggest that they suffered injuries that are fairly traceable to the challenged conduct and are likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Thereafter, plaintiffs must support each element of Article III standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. The successive stages of a class action are: pleading; pre-certification class discovery and motion practice; class certification; post-certification class discovery and motion practice; trial;

post-trial motion practice; and administering a claims process (if any) and distributing a damages award (if any). In class actions, like other actions, plaintiffs establish standing at the pleading stage by pleading plausible factual allegations of injury. *Id.* They establish standing at the summary judgment stage by presenting some evidence setting forth specific facts which, taken as true, show injury.[2] *Id.* And they establish standing at trial by actually adducing admissible evidence of injury. *Id.* This appeal involves an intermediate procedural step in litigation—class certification—that requires more than allegations but less than specific facts.

Under Rule 23, plaintiffs' burden is to "affirmatively demonstrate" and be "prepared to prove" that Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements are satisfied. *Dukes*, 564 U.S. at 350. They also must "satisfy through evidentiary proof" Rule 23(b)(3)'s predominance and superiority requirements. *Comcast*, 569 U.S. at 33. Whether they satisfy these requirements is committed to the court's discretion. *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

Neither Rule 23 nor Article III requires plaintiffs to marshal classwide evidence and affirmatively prove

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[2] Plaintiffs only need to show a "genuine dispute" of material fact to survive a summary judgment motion challenging their own or class members' injuries. Fed. R. Civ. P. 56(c). They do not need to affirmatively prove their own or class members' injuries at the summary judgment stage, which typically is after the close of discovery. Fed. R. Civ. P. 56(b). If a court raises a class member standing question *sua sponte*, plaintiffs are entitled to "notice and a reasonable time to respond," which requires access to the essential facts and discovery for each class member. Fed. R. Civ. P. 56(d).

at the class certification stage that every—or any—potential class member actually suffered an injury. "'Proof of that sort is a matter for trial' (and presumably also for a summary-judgment motion under Federal Rule of Civil Procedure 56)." *Amgen*, 568 U.S. at 482 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 249 n.29 (1988)). It is not until classwide fact and expert discovery is complete and the action "proceeds to trial" that plaintiffs' and class members' alleged injuries "'must be supported adequately by the evidence adduced at trial.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (quoting *Lujan*, 504 U.S. at 561).

A. Article III Does Not Require Proof of Any Class Member's Injury at the Class Certification Stage.

Article III does not require plaintiffs to prove every—or any—potential class member's injury as a pre-condition for class certification. Plaintiffs' burden to establish Article III standing slowly increases at each successive stage of the litigation. *Lujan*, 504 U.S. at 561. Plaintiffs' burden does not increase faster simply because the litigation is a class action.

Rule 23 requires plaintiffs to show that common evidence makes their own and class member injuries "capable" of proof at summary judgment or trial. *Comcast*, 569 U.S. at 30. The Rule 23 burden applies equally to class member injury questions. This makes sense because class certification typically is decided before fact and expert discovery is completed, and before plaintiffs have access to all of the facts and discovery that are essential to proving their contentions—including their contentions concerning class member injuries—at summary judgment or trial. Fed. R. Civ.

P. 56(d) (courts may defer or deny summary judgment when essential facts or discovery are not yet available to the nonmovant). Plaintiffs eventually must prove at summary judgment or trial that class members suffered an Article III injury before they can recover individual damages in federal court. *TransUnion*, 594 U.S. at 431. But Article III does not impose a summary judgment or trial burden on plaintiffs at the class certification stage.

The reason orders granting or denying class certification "may be altered or amended" at any time before "final judgment" is that "later events or discoveries may mandate a different result." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 n.14 (1983); Fed. R. Civ. P. 23(c)(1)(C). That is what happened for a few thousand consumer class members in *TransUnion* and what arguably should have happened for a few hundred employee class members in *Tyson Foods*.

Under Rule 23, courts also have power to certify "subclasses," certify classes "with respect to particular issues," and issue orders that "determine the course of proceedings." Fed. R. Civ. P. 23(c)(4)-(5) & 23(d)(1)(A). These powers let courts focus on and even prioritize specific questions and issues during post-certification proceedings. In some cases, it may be appropriate for a court to address common Article III questions or issues promptly after certification, through a certified interlocutory appeal under 28 U.S.C. § 1292(b), through bifurcation under Federal Rule of Civil Procedure 42(b), or by using a claims process or similar procedural tools.

B. Deciding Potential Class Members' Injuries at the Class Certification Stage Will Create Advisory Opinions and One-Way Intervention Problems.

Whether all, some, or no potential class members have actually suffered an Article III injury is not a question that federal courts should answer—or can answer—at the class certification stage.

Requiring courts to decide at or before the class certification stage whether all, some, or no potential class members actually suffered an injury will violate Article III because even a persuasive explanation of the rights and interests of persons not yet before the court is an advisory opinion. *Haaland v. Brackeen*, 599 U.S. 255, 293-94 (2023). Until a class is certified and the individuals who fit within the class definition have an opportunity to opt out, there are only *potential* class members who are not yet before the court. Even a persuasive explanation of their rights and interests is an advisory opinion.

Requiring courts to decide at or before the class certification stage whether all, some, or no potential class members have suffered an Article III injury also will create one-way intervention problems because *potential* class members will not be bound by unfavorable rulings but will benefit from favorable ones if they do not opt out. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 547 (1974).

Requiring courts to decide at or before the class certification stage whether all, some, or no potential class members have suffered an Article III injury also will inundate the courts of appeals with more interlocutory appeals that focus on the merits of Article III

injury questions rather than on whether Rule 23's requirements were satisfied. Fed. R. Civ. P. 23(f). The party on the losing side of a class certification order will contend that the court got the Article III analysis wrong on the merits, and the courts of appeals will be asked to resolve the merits of Article III questions when the individuals whose injuries are at issue are not yet before the court, when the certification order still may be altered or amended, and when there is no final judgment.

There is no reason that Article III questions that can be answered in one stroke for all class members should be subject to a different analysis and different manner or burden of proof than other common questions. A "failure of proof" on a common Article III injury question—like a failure of proof on many common questions—"would end the case" for all or part of a certified class. *Amgen,* 568 U.S. at 460; *TransUnion*, 594 U.S. at 437-41 (failure to prove injury ends the case for 77% of certified class).

Courts do not "punt" questions of potential class member injuries or "hand" plaintiffs unearned victories when they grant class certification. They confirm that plaintiffs have met their burden of proof under Rule 23, and that one or more common questions predominates and can be answered in one stroke based on common evidence and contentions.

C. Reliance on *Laroe Estates* Is Misplaced Because Class Members Are Not Intervenors, Co-Plaintiffs, or Parties.

Petitioner's reliance on *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433 (2017) is misplaced. In *Laroe Estates*, the Court observed that plaintiffs must "allege" a "personal stake in the outcome of the controversy." *Id.* at 438-39. The Court held that the "same principle applies to intervenors of right" who "seek[] additional relief beyond that which the plaintiff requests." *Id.* at 439.

Potential class members are not intervenors, co-plaintiffs, or parties. If a court certifies a class, and if individuals who fit within the class definition do not opt out, they still are not intervenors, co-plaintiffs, or parties.[3] They are each a "nonparty" whose rights and interests are being represented by one or more court-appointed plaintiffs who already have satisfied each of Rule 23's procedural safeguards. *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008). At most, they are each a "nonnamed class member" who *may* be treated as a party for *some* purposes but not others. *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002).

Even if there were similarities between potential class members and proposed intervenors, Petitioner

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[3] Members of a certified class may, but are not required to, "enter an appearance through an attorney," Fed. R. Civ. P. 23(c)(2)(B)(iv), and may, but are not required to, "intervene and present claims or defenses, or to otherwise come into the action," subject to any court-imposed "conditions." Fed. R. Civ. P. 23(d)(1)(B)(iii) & 23(d)(1)(C). If potential class members were the same as intervenors, co-plaintiffs, or named parties there would be no need for Rule 23 to grant members of a certified class the right to enter an appearance through an attorney or to seek intervention.

misses a crucial point. Proposed intervenors only need to plausibly *allege* an Article III injury in the *pleading* that accompanies their motions to intervene. Fed. R. Civ. P. 24(c). They do not have to satisfy a summary judgment or trial burden that requires the submission of evidence that affirmatively proves their injuries *before* the court can grant their motion intervene. A plausible allegation of injury in the accompanying pleading suffices. *Lujan*, 504 U.S. at 561.

Just as courts are not required to determine if proposed intervenors actually suffered an injury before granting a motion to intervene, courts are not required to determine if every potential class member actually suffered an injury before granting a motion for class certification.

D. Class Member Injury Questions and Issues can and Should Be Resolved Post-Certification.

Class member injury questions and issues can and should be resolved after class certification is decided in accordance with Rule 23. This approach has long been the Court's expectation and practice. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (certification issues are "logically antecedent to" class member standing issues, and it is "appropriate to reach them first" because the Article III issues would not exist but for the certification).

Take *TransUnion*. The Article III injury question was common for all 8,185 members of the certified class, disputed on the merits, and properly addressed post-certification by the district court, Ninth Circuit, and this Court. 594 U.S. at 417-18. The plaintiff contended that each member suffered an injury, and

the defendant contended that no member suffered an injury. *Id.* Post-certification class discovery was needed before the injury question could be answered for each member. The Court partially agreed with both sides' arguments, holding that 6,332 class members (77% of the certified class) had not suffered an injury and could not recover individual damages. *Id.* at 437-41. The fact that a supermajority of class members did not suffer an Article III injury did not make the initial grant of class certification incorrect or an abuse of discretion because the plaintiff "need not, at that threshold, prove that the predominating question will be answered in their favor." *Amgen*, 568 U.S. at 468.

The initial certification order in *TransUnion* would have been proper under Rule 23 and Article III if *every* class member had suffered an injury (as the plaintiff argued) or if *no* class member had suffered an injury (as the defendant argued). The class action procedure and the right of appeal worked just as they should. If the case had not settled shortly after remand to the Ninth Circuit, the class certification order easily could have been altered or amended, or the lower courts could have taken other appropriate action, to ensure that uninjured members did not recover any individual damages.

Also take *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016). During post-certification fact and expert discovery, the plaintiffs obtained evidence showing that thousands of class members worked some unpaid overtime, but several hundred class members did not. 577 U.S. at 448-50. The classwide records and breakdown of members were not known or available to the plaintiffs or the court at the class certification stage. The fact that post-certification discovery showed that

around 5-10% of class members did not work any unpaid overtime and thus did not suffer an Article III injury—even when the plaintiffs prevailed on the merits of their class claims—did not make the court's initial grant of class certification incorrect or an abuse of discretion.

The uninjured class member and damages allocation problems in *Tyson Foods* could have been solved in any number of ways, including but not limited to: partial decertification for the undisputedly uninjured members; an altered or amended class definition or partial decertification tied to the amount of work each member needed to perform to result in unpaid overtime; bifurcation of liability and damages; certification of subclasses; and detailed verdict forms. The initial class certification order was proper under Rule 23 and Article III even if the parties and the court could have—perhaps should have—taken other steps post-certification to ensure that uninjured members did not recover individual damages.

Now take this case. The lower court anticipates using various tools and methods to determine the course of the post-certification proceedings, to hold Respondents to their burden to establish class member injuries consistent with the successive stages of the litigation, and to ensure that any class members who did not suffer an injury will not recover individual damages. JA360-61, 369-70, 398-99. Petitioner's belief that it has the better argument on the merits of the Article III question is not a reason to depart from established precedent that articulates the slowly increasing burden of proof at each successive stage of the litigation. Petitioner cannot preempt class certification by speculating that post-certification class discovery and motion practice

might show that *some* class members *might* not have suffered an injury if it is right on what Article III requires to prove injury in these circumstances.

II. PETITIONER'S PROPOSED RULE WILL MAKE PRE-CERTIFICATION CLASS DISCOVERY FAR MORE EXPENSIVE AND CONTENTIOUS.

There already is significant tension between defendants' desire and efforts to limit pre-certification class discovery or avoid it altogether, and plaintiffs' desire and need to obtain pre-certification class discovery to affirmatively establish Rule 23's requirements.

Defendants complain that pre-certification class discovery is too speculative, overbroad, and disproportionate, and courts regularly exercise their discretion to limit pre-certification class discovery. *See Trujillo v. Chef's Warehouse W. Coast LLC*, 2020 WL 7315346, at *29 (C.D. Cal. Oct. 19, 2020) (50% sampling); *Aldapa v. Fowler Packing Co. Inc.*, 310 F.R.D. 583, 592 (E.D. Cal. 2015) (25% sampling); *Salgado v. O'Lakes*, 2014 WL 7272784, at *14 (E.D. Cal. Dec. 18, 2014) (20% sampling); *Roberts v. C.R. England, Inc.*, 2013 WL 3893987, at *4 (D. Utah July 26, 2013) (8% sampling).

But plaintiffs are entitled to pre-certification class discovery that is sufficient to satisfy their evidentiary burden at the class certification stage. *Tracy v. Dean Witter Reynolds, Inc.*, 185 F.R.D. 303, 304-05 (D. Colo. 1998) ("Obviously, some discovery is necessary prior to a determination of class certification. . . . The discovery which is permitted should be sufficiently broad that the plaintiffs have a fair and realistic opportunity to obtain evidence which will meet the requirements of Rule 23, yet not so broad that the discovery efforts present an undue burden to the

defendant."); *Melnick v. TAMKO Bldg. Prods. LLC*, 2022 WL 1211122, at *3 (D. Kan. Apr. 25, 2022) (defendant's arguments against pre-certification class discovery because certification might be denied is "circular and illogical").

The tension between these competing interests will explode if courts are required to police every potential class member's injury and confirm through evidentiary proof that every potential class member has actually suffered an Article III injury before granting a motion for class certification.

A. Plaintiffs Will Need More Pre-Certification Class Discovery and Both Sides Will Incur More Costs.

If plaintiffs are required to submit evidence with their motions for class certification that affirmatively demonstrates that every potential class member has actually suffered an Article III injury, then plaintiffs will need even more expansive pre-certification class discovery to satisfy this new, heightened evidentiary burden.

Pre-certification class discovery will become even more contentious than it already is with little room for compromise because defendants will argue that "no proof of injury" at the class certification stage is the equivalent of "proof of no injury" on the merits. Defendants will challenge every class definition that *might* include one or more individuals who *might* not have suffered an injury. But plaintiffs will be unwilling to lose their motions for class certification due to a lack of class member records and information, so they will go "all in" on pre-certification class discovery and

demand every potential class members' records and information.

Plaintiffs will not let defendants defeat class certification by speculating the existence and number of uninjured class members, or by attempting to "pick off" class members by identifying a few potential class members who allegedly did not suffer an injury. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). Plaintiffs will invest *more resources* in pre-certification class discovery. They will engage more experts to analyze classwide records and data and prepare more pre-certification studies, surveys, and reports. Defendants likewise will expend *more resources* in pre-certification class discovery and experts, collecting and producing all classwide records while trying to thwart certification by trying to identifying more than a *de minimis* number of allegedly uninjured class members. Petitioner's own amici agree this will happen. *See* ALF Brief at 19-24 (while "inquiry into whether each member was injured entails significant burdens," those burdens are manageable via classwide discovery, expert reports, representative evidence, and "more affidavits," including "affidavits from every member at the certification stage").

The class and expert discovery that typically is scheduled and expected to occur post-certification will need to be completed before the deadline to move for class certification. It will be nearly impossible for courts to decide class certification at an "early practicable time" without prejudicing plaintiffs' right to meet their evidentiary burden, and without prejudicing defendants' right to rebut plaintiffs' classwide evidence and pre-certification expert reports. Fed. R. Civ. P. 23(c)(1).

In *TransUnion*, all 8,185 consumers' credit report records and personal information would have needed to be produced and analyzed by experts before certification. 594 U.S. at 437-41. In *Tyson Foods*, all 3,344 employees' records would have needed to be produced and the time study and expert reports would have needed to be completed before certification. 577 U.S. at 449-50. In Amici's case, all 20,000+ employees' records would have needed to be produced and experts would have needed to prepare detailed reports before certification. *Harper v. Charter Commc'ns, LLC*, 2020 WL 6158239, at *7 (E.D. Cal. Nov. 2, 2020) (10% sampling). And in this case, each California location's staffing and kiosk records and all patient contact information and service records would have needed to be produced, and Respondents would have needed to contact and survey thousands of patients and complete more expert reports, before certification.

Article III does not require plaintiffs to marshal classwide evidence and affirmatively prove at the class certification stage that every potential class member actually suffered an injury. But even if it did, plaintiffs will not sit back and lose class certification motions simply because defendants advance "no proof of injury" arguments at the class certification stage. Plaintiffs will demand—and they will be entitled to obtain—every potential class member's records and information that could help to establish an injury *before* they move for class certification. Both sides will conduct more discovery and pay more experts. Gone will be the days of stipulated or court-ordered samplings of potential class member's records and phased class discovery, because parties and courts cannot sidestep Article III's requirements by making stipulations and court-

approved discovery compromises such as sampling class member records and contact information.

Petitioner's rule will usher in a new regime where plaintiffs who secure class certification effectively will have already obtained classwide evidence and established every class member's injury, and will have little incentive to settle for less than 100 cents on the dollar. And defendants who defeat class certification on Article III grounds, or are able narrow a proposed class definition, will have narrowed a potential classwide settlement or judgment without having proved anything on the merits or securing the benefits of *res judicata*. Petitioner's rule will increase the expense of pre-certification proceedings, and will likely result in pyrrhic victories because potential class members can simply file separate actions in federal court or choose to proceed in state court.

B. Defendants Will Be Tempted and Encouraged to Manipulate, Conceal, or Destroy Class Member Records.

Requiring plaintiffs to affirmatively prove at the class certification stage that every potential class member has actually suffered an Article III injury will tempt and encourage defendants to engage in discovery manipulation and misconduct.

One temptation will be to commit record-keeping violations to try to avoid what defendants perceive as a greater risk: class certification. This is already a common practice. *See, e.g.*, *Tyson Foods*, 577 U.S. at 450, 456 (employer breached record-keeping obligations by not keeping accurate time records); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1271-72 (11th Cir. 2019) (company breached record-keeping obligations

by failing to keep do-not-call opt-out records). Defendants, including Amici's employer, will be even more likely to commit and try to exploit record-keeping violations as a way to avoid class certification and a classwide damages award.

Another temptation will be to conceal and withhold potential class members' records. *Harper v. Charter Commc'ns, LLC*, 2021 WL 1783535, at *16 (E.D. Cal. May 5, 2021) (employer repeatedly violated pre-certification class discovery stipulations and orders); *Harper v. Charter Commc'ns, LLC*, 2021 WL 12190372, at *2 (E.D. Cal. Aug. 30, 2021) (modest monetary sanctions of $13,333). Defendants will be more likely to risk discovery sanctions knowing that the potential benefits of concealing or withholding class member records (thwarting class certification on Article III grounds) outweigh the likely consequences (modest monetary sanctions).

A third temptation will be to delete or destroy potential class members' records. *Harper v. Charter Commc'ns, LLC*, 2024 WL 689593, at *19-20 (E.D. Cal. Feb. 20, 2024) (employer deleted and destroyed thousands of class member training schedules, training checklists, and video recordings of training sessions). Defendants will be incentivized to disregard preservation obligations and create gaps in classwide evidence to try to frustrate plaintiffs' ability to prove at the class certification stage that each potential class member suffered an injury. From defendants' perspective, the potential benefits of such conduct will outweigh the likely consequences.

C. Defendants Will Be Incentivized to Solicit More Unreliable "Happy Camper" Declarations

Defendants and their counsel already conduct pre-certification declaration "blitzes" to try to get potential class members to disclaim their injuries. *See Sjoblom v. Charter Commc'ns, LLC*, 2007 WL 5314916, at *3 (W.D. Wis. Dec. 26, 2007) (striking 62 declarations solicited in defendant's "blitz campaign of affidavit gathering"); *Longcrier v. HL-A Co.*, 595 F.Supp.2d 1218, 1230 (S.D. Ala. 2008) (striking 245 declarations solicited in defendant's "declaration-gathering campaign"). These blitzes are an "attempt to pick off the occasional class member" to try to spoil plaintiffs' efforts to satisfy commonality, typicality, and predominance. *Halliburton*, 573 U.S. at 276.

The declaration blitz tactic is rarely successful in defeating class certification under Rule 23. *Id.* This is because happy camper declarations are notoriously unreliable. *Nash v. Horizon Freight Systems, Inc.*, 2020 WL 7640878, at *1-2 (N.D. Cal. Dec. 23, 2020) ("Many courts have expressed skepticism about the use of these 'happy camper' declarations to defeat a motion for class certification in wage and hour cases" because they "are submitted by companies with potentially significant influence over the workers who sign them, . . . [and] a further concern that the declarants are relying on incomplete, or even false, information."); *Avilez v. Pinkerton Gov't Servs.*, 286 F.R.D. 450, 458-59 (C.D. Cal. Oct. 9, 2012) ("An employee has every incentive to answer 'yes' when her employer's attorney asks if she likes her employer's current practices . . . [and] [t]he incentives to answer untruthfully are even more skewed where, as here, the employer's question

concerns a practice *currently being litigated in a putative class action as an illegal practice*.") (emphasis in original). They often are the result of coercion, misinformation, or both, and they often are pre-written by defense counsel and signed in their presence. Many alleged happy campers late recant their declarations or have their statements refuted by objective evidence obtained through additional discovery.

A new rule that requires courts to police potential class member injuries at the class certification stage, and to preemptively exclude any potential member who has not affirmatively proved an injury, will supercharge this pick-off tactic and encourage more declaration blitzes. Defendants and their counsel will round up as many alleged "happy campers" as possible and get them to disclaim their injuries. The new goal will be to use happy camper declarations to support the argument that a class has uninjured potential class members, and to defeat class certification on Article III grounds instead of Rule 23 grounds.

In Amici's case, their employer summoned several dozen current employees to its corporate offices during work hours and obtained declarations from the employees without showing them the complaint or any relevant documents. The pre-written declarations stated that the employees were not injured by the challenged employment practices. The declarations were filed in opposition to class certification, and their employer argued that the declarations prove that the class has some members who never suffered an injury. Additional discovery obtained later in the proceedings refuted many of the statements, yet their employer continues to rely on these happy camper declarations as purported "proof" of uninjured class members.

Requiring plaintiffs to affirmatively prove at the class certification stage that every potential class member—or all but a "de minimis" number of potential class members—has actually suffered an injury will incentivize even more declaration blitzes that result in even more unreliable happy camper declarations. This will create even more pre-certification class discovery disputes.

III. COMPLAINTS OF IN TERROREM SETTLEMENTS AND EXTORTION ARE UNSUPPORTED

Petitioner and its amici emphasize the "supposed in terrorem effect of class actions," but their opinions on these matters "are supported by highly inconclusive, or no, empirical evidence." *Blackie v. Barrack*, 524 F.2d 891, 899-900 (9th Cir. 1975). Their opinions are "founded on speculation, primarily dictated by the writer's personal experience and feelings." *Id.* In fact, "a relatively high proportion of class actions are not settled, but disposed of in defendant's favor on preliminary motions." *Id.* (noting "the class action was not a particularly effective vehicle for coercing settlements"); 2023 Carlton Fields Class Action Survey, at 16 ("Bet-the-company matters are becoming rare in class actions"), available at www.carltonfields.com/insights/class-action-survey, last visited March 28, 2025.

Most defendants file motions to dismiss or early motions for summary judgment to cut-down class actions with weak or meritless claims. 2024 Carlton Fields Class Action Survey, at 29, available at www.carltonfields.com/insights/class-action-survey, last visited March 28, 2025. Many use arbitration agreements and class waivers to avoid class actions. *Id.* at 30. Nearly half of all class actions that are not compelled to arbitration are dismissed or settled on an

individual basis. *Id.* at 26-27. And most class settlements use a "claims-made" process and require class members to provide some proof of injury before they recover individual damages. *Id.* at 28.

Class certification does not force or coerce defendants to settle class claims. Defendants enter into settlements for any number of reasons, class action or not. They may think discovery is too expensive. They may think courts are too permissive. They may want to avoid the distraction of litigation. They may underestimate the strength of their defenses. They may want to avoid the publicity of a trial or judgment. They may want to avoid creating adverse judicial precedent. Their counsel may be skilled at research and briefing but unskilled in trial. For every defendant that believes it overpaid in a class settlement, there is a plaintiff who believes the defendant paid too little. The only way to conclusively determine who is right is for the parties to actually try the case and exhaust their rights of appeal. Even then one side will believe the courts and/or the jury reached the wrong result. *TransUnion* is a good example of such a case.

The notion that class settlements are inflated or artificially swelled with uninjured class members is unsupported. Article III already prevents courts from approving class settlements "if no named plaintiff has standing." *Frank v. Gaos*, 586 U.S. 485, 492 (2019). And Rule 23 imposes numerous procedural safeguards that take into account the settlement pressures and incentives on both sides while ensuring that the class certified for settlement purposes still satisfies Rule 23's requirements for certification. Fed. R. Civ. P. 23(e); *Amchem*, 521 U.S. at 620 (instructing courts to give Rule 23's requirements "attention in the settlement context"). Petitioner does not point to any examples of certified classes with members who *could not have suffered* the alleged injury. To the extent it is a real problem, Amici's rule solves it.

In truth, defendants often negotiate class settlements that result in huge discounts from their maximum potential exposure, and plaintiffs and their counsel often are criticized for accepting too little. *See In re Facebook, Inc. Internet Tracking Litig.*, 2024 WL 700985, at *1 (9th Cir. Feb. 21, 2024) (rejecting $1.24 trillion as an unreasonable statutory damages exposure baseline and approving $90 million class settlement that represented 10% of an estimated "best-day-in-court" verdict and 0.007% of maximum potential exposure); *In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 762 (2d Cir. 2020) (6.1% of maximum potential damages); *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1264 (10th Cir. 2023) (noting the average class settlement is less than 10% of the maximum potential recovery).

In this case, Petitioner suggests its maximum potential exposure is nearly half-a-billion dollars. This exaggerated amount is more than 12 times what Respondents' expert's actual estimates, which are around 8,861 potential class members and around $35,444,000 in statutory damages per year. JA246. Ultimately, the total of any statutory damages award would present a potential due process issue, not a Rule 23 issue or an Article III issue. *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1120-23 (9th Cir. 2022). The availability of a claims-made process—either during the damages phase of the litigation or in connection with a class settlement—substantially mitigates the risk that any allegedly uninjured class members would recover individual damages.

At bottom, the concept of "in terrorem" settlement pressure and extortion settlements stems from the unsupported idea that too many district courts and juries get it wrong, and too many appellate courts do not correct all of the alleged errors. But the risk of error runs both ways.[4] Both sides often believe they got the short end of the stick, even when they reach a class settlement.

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[4] When the Court noted the "risk of 'in terrorem' settlements," it was observing that a defendant had determined that "the risk of an error" in a class *arbitration* was "unacceptable" because the parties had bargained away the procedural rigor and appellate review of the judicial system in favor of speedy and informal individual arbitrations. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). The risk of error is very different when class certification orders, trials, and judgments are subject to judicial review and precedent.

CONCLUSION

At the class certification stage, courts should examine Article III questions the same way they examine every other question: through the lens and subject to the requirements of Rule 23. The Court should reject Petitioner's proposed rule and hold that Article III does not impose an additional or different evidentiary burden on plaintiffs than Rule 23.

Respectfully submitted,

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