No. 24-304

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND AMERICAN COUNCIL OF THE BLIND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF FOR NATIONAL COMMUNITY PHARMACISTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

Founded in 1898, the National Community Pharmacists Association ("NCPA") is a 501(c)(6) organization that promotes the interests of over 18,900 community pharmacies that employ over 205,000 individuals nationwide. A strictly non-partisan organization, the NCPA represents small business owners providing critical health care services to millions of patients across the United States. *See* http://www.ncpa.org/about.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Labcorp's position on appeal could effect a radical revision in the standards for class certification. It suggests that a court cannot certify a class under Rule 23(b)(3) if it contains any members that lack Article III injury. At the same time, Labcorp elides the distinction between proof of injury for purposes of Article III and proof of injury for purposes of class certification, summary judgment, or trial. If this Court were to adopt Labcorp's position as it frames it, that could lead lower courts to resolve merits issues, including damages, in deciding whether to certify a class. Prosecuting class litigation could become unworkably burdensome and cumbersome.

That could prove disastrous for private enforcement of the antitrust laws. Small businesses—including community pharmacies—depend on antitrust class actions to protect free markets. The American economy

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[1] Amicus affirms that no counsel for a party authored this brief in whole or in part, and no one other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

suffers when dominant market actors use anticompetitive techniques to entrench and exploit their market power. Some of these dominant market actors are well known, such as Apple, Amazon, Alphabet, and Meta. Others are less obvious, including the Pharmacy Benefit Managers ("PBMs") that have done so much harm to community pharmacies and the patients they serve.

The NCPA submits this brief to request that this Court act with caution—that it decline Labcorp's invitation to write a sweeping opinion that could affect cases and contexts that are not currently before this Court. The survival of many small businesses that are the lifeblood of American commerce hangs in the balance.

ARGUMENT

I. LabCorp seeks radical changes to class certification doctrine that could undermine antitrust enforcement, including by pharmacies and other small businesses.

The Court's decision in this matter could have far-reaching harmful and unintended consequences for antitrust class actions, including those that protect small businesses like independent community pharmacies.

For example, Labcorp takes the position that a court cannot certify a class under Rule 23(b)(3) if it contains any members that lack Article III injury. Brief for Petitioner at 2–3. Yet Labcorp draws no clear line between assessing injury for purposes of Article III and assessing it for purposes of class certification, summary judgment, or at trial. A potential implication is that a trial court must not certify a class unless it conducts a searching inquiry not only into the merits of antitrust and other claims, but also into damages.

An approach along those lines could transform class certification doctrine. It could convert a procedural device designed to make litigation more efficient into one that is impractically cumbersome and burdensome. Small businesses—including pharmacies—might no longer be able to protect free markets and the communities they serve through class litigation.

That would have real-world consequences. In January 2024, for example, a group of independent community pharmacies filed an antitrust class action in the Western District of Washington against Express Scripts, Inc., a Pharmacy Benefit Manager. *See Osterhaus Pharmacy, Inc. v. Express Scripts, Inc.*, No. 2:24-cv-00039-RAJ (W.D. Wash.). Plaintiffs allege that Express Scripts has conspired with three direct competitors—Prime Therapeutics LLC, Magellan Rx Management, LLC, and Benecard Services, LLC—to fix pharmaceutical reimbursement rates and fees. Plaintiffs allege that these price-fixing agreements eliminate normal market forces and allow the Pharmacy Benefit Managers to enjoy excess revenues at the expense of pharmacies. The trial court agreed that the plaintiffs state a *per se* price-fixing claim in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See Osterhaus Pharmacy, Inc. v. Express Scripts, Inc.*, 2025 WL 486195, at *7 (W.D. Wash. Feb. 13, 2025).

The point, of course, is not to ask this Court to prejudge the merits of the pharmacies' claims in the above case or any other one. It is instead that the pharmacies should have the opportunity to pursue those claims through a class action if they can meet the requirements of Rule 23(a) and 23(b)(3). That has never meant that plaintiffs must show at certification that *no* members of a proposed class are uninjured. That would put the cart before the proverbial horse—

requiring plaintiffs to prove their claims on the merits, including damages, to obtain use of the class device to prove their claims on the merits.

Labcorp's proposed approach would conflict with the Rule 23 framework. For an issue to be common under Rule 23(b)(3), it need not be resolved in plaintiffs' favor—it need merely be subject to resolution in the same way for class members. *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 460 (2013) (class certification is appropriate when claims "will prevail or fail in unison."). Further, under the plain language of Rule 23(b)(3), common issues merely must *predominate* in litigation. Fed. R. Civ. P. 23(b)(3). The issues need not be *uniformly* common. *Id*. And common issues need only predominate in a case *as a whole*, not as to every issue, including damages. *Amgen*, 568 U.S. at 469. It follows that if the key issues in litigation are predominantly common, the predominance requirement of Rule 23(b)(3) may be satisfied, even if some class members' claims may not succeed, including because they have suffered no damages. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–62 (2016).

Labcorp does not adequately address these points. Instead, it treats the issue of injury as if it depended only on legal analysis and should be resolved the same way in making the preliminary judgment appropriate for Article III as it is for later stages of litigation.

Labcorp's approach may—or may not—work in some settings, but it would not be appropriate in antitrust. As a result, the NCPA respectfully submits that the Court should take care to avoid sweeping language that would not fit circumstances not before the Court and that could have harmful unintended consequences. Too broad a ruling could compromise the legal rights of small businesses, including

independent community pharmacies, that play a crucial role in America's economy and in meeting the healthcare needs of Americans.

II. Independent community pharmacies play a vital role in the nation's healthcare system.

Independent community pharmacists deliver critical health care services to millions of patients across the United States each day. Often considered America's most accessible health care providers, community pharmacists offer innovative services beyond prescription dispensing, including immunizations, point-of-care health screenings, diabetes care, patient education, and medication therapy management.[2] The 18,900 community pharmacists represented by the NCPA are small business owners in rural, micropolitan, and metropolitan communities across the country. Despite the valuable services they provide, independent community pharmacies are closing at an alarming rate, due in large part to the conduct of large market participants in the pharmaceutical industry.[3] Rigorous antitrust enforcement has become increasingly important for their survival.

Community pharmacies served as essential health providers during the COVID-19 pandemic and continue to provide critical access to care for many patients—particularly in rural communities where there are few

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[2] Lucas A. Berenbrok et al., *Access to community pharmacies: A nationwide geographic information systems cross-sectional analysis*, 62 J. Am. Pharmacists Ass'n 1816 (2022).

[3] Off. of Pol'y Plan., Fed. Trade Comm'n, Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies 1 (July 2024) ("2024 F.T.C. Rep."), available at https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.

accessible health clinics and hospitals.[4] Rural community pharmacists are often the only point of healthcare delivery for a community. They build relationships with patients, provide customized care, and address health needs in areas that lack adequate numbers of health care workers.

Like many small business owners today, independent community pharmacies face an existential threat. Pharmacy closures have become an epidemic across the country, with independent rural pharmacies shutting their doors in record numbers.[5] This has led to the emergence of "pharmacy deserts"—geographic areas with no convenient access to a pharmacy.[6] Between 2003 and 2018, the number of independent community pharmacies in rural areas fell by over sixteen percent, leaving 630 rural communities with no retail pharmacy.[7]

Over forty million Americans today live in pharmacy deserts and suffer elevated rates of disease and mortality.[8] Pharmacy deserts have devastated red and blue states alike—and are most likely to exist in counties with older populations who require more prescription medications, have less access to trans-

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[4] Amie M. Ashcraft et al., *The [underutilized] power of independent pharmacies to promote public health in rural communities: A call to action.*, 62 J. Am. Pharm. Ass'n 38 (2022).

[5] Christopher R. Leslie, *Pharmacy Deserts and Antitrust Law*, 104 B.U.L. Rev. 1593, 1593 (2024).

[6] *Id*. at 1597.

[7] *Id*. at 1599.

[8] *Id*. at 1593.

portation, and have more limited financial resources than most Americans.[9]

The closure of independent community pharmacies across the United States is a growing public health concern. And it is not the inevitable result of market forces. Rather, it is the product of market consolidation and restraints on competition. Independent pharmacies, like many small businesses, are vulnerable to unlawful conduct by large market participants, and depend on rigorous enforcement of the antitrust laws for their continued survival.

Independent pharmacies have been hit particularly hard by the market consolidation of PBMs. PBMs are powerful corporate entities that sit at the center of the pharmaceutical industry, acting as intermediaries between pharmacies, health plans, and drug manufacturers. Through their relationships with health plans, they control access to patients— "insured lives"—for pharmacies. Typically, health plans own or hire PBMs to negotiate drug pricing with manufacturers, to set the prices a patient pays at the pharmacy counter, and to determine the amount pharmacies will be reimbursed for dispensing those drugs. PBMs also create and manage lists of prescription drugs covered by health plans ("drug formularies"). In short, PBMs decide which pharmacies will dispense drugs in health plan networks, which drugs those pharmacies will dispense, and the prices, discounts, and other terms of sale applicable to these pharmacies' reimbursements. And they profit at nearly every stage of the pharmaceutical

[9] *Id*. at 1618.

distribution chain from manufacturing to filling prescriptions and dispensing drugs to patients. [10]

Today, the three largest PBMs (the "Big Three")—CVS Caremark, Express Scripts, and OptumRx—control over eighty percent of the market.[11] The six largest PBMs manage more than ninety percent of all prescription drugs filled in the United States.[12] They are also vertically integrated. Each of the Big Three is now affiliated with a dominant health insurer: CVS Caremark (PBM) is affiliated with Aetna (health insurer), Express Scripts (PBM) is affiliated with Cigna (health insurer), and OptumRx (PBM) is affiliated with United Healthcare (health insurer).

PBMs leverage their market power to impose unfair, arbitrary, and unlawful contract terms on independent pharmacies, pushing them out of business and driving patients to the PBMs' own affiliated pharmacies.[13] As described in Section III below, PBMs have engaged in wide-ranging anticompetitive practices in the pharmaceutical industry that have been the subject of bipartisan condemnation. These practices have resulted in higher drug prices for patients and the widespread closure of independent community pharmacies that make up the NCPA's membership.[14]

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[10] 2024 F.T.C. Rep. at 1 ("PBMs are at the center of the complex pharmaceutical distribution chain that delivers a wide variety of medicines from manufacturers to patients. PBMs serve as middlemen, negotiating the terms and conditions for access to prescription drugs for hundreds of millions of Americans.").

[11] *Id*.

[12] *Id*. at 2.

[13] *Id*. at 1, 16 n.70.

[14] Berenbrok, *supra*.

In this context, the NCPA advocates for rigorous enforcement of the antitrust laws to enable independent community pharmacists to compete in a free and fair marketplace. Antitrust enforcement—the fight for open markets, transparency, and healthy small businesses—has become increasingly important for the survival of independent community pharmacies across the country.

III. Antitrust enforcement is critical for small businesses like independent pharmacies.

Small businesses are particularly vulnerable to anticompetitive threats in the marketplace. This is true in a variety of contexts. One notable example today is the technology sector, in which companies such as Apple, Amazon, Alphabet, and Meta exercise extraordinary influence. For example, many small businesses depend on Big Tech for digital advertising. Collectively, Amazon, Alphabet, or Meta dominate the digital platforms in the advertising marketplace, with Alphabet (through Google) largely controlling the market for buying and selling advertising online. Small businesses have no practical alternative but to use the advertising services of Big Tech to participate in the online economy—and suffer the abuses that come from market dominance. Many dominant technology firms are currently the subject of antitrust lawsuits related to their monopolization of online markets.

In the pharmaceutical sector, small businesses like independent pharmacies are similarly vulnerable to the conduct of PBMs. While PBMs may not be as well-known as Big Tech, they are attracting widespread scrutiny from political actors across party lines because of the dangers they pose to competition and free markets.

A. PBMs have engaged in wide-ranging anticompetitive practices that have been the subject of bipartisan condemnation.

PBMs have been the subject of intense bipartisan scrutiny in recent years arising from the rapid horizontal consolidation and vertical integration in the PBM marketplace, a lack of transparency in PBM contracting practices, and the self-benefitting pricing tactics that drive patients to PBMs' own affiliated pharmacies, while pushing independent community pharmacies out of business.[15] Antitrust legal scholars have described PBMs as "the middlem[e]n with the most market power" that take the lion's share of profits despite playing "no role in actually making or distributing medications or providing insurance coverage."[16]

i. The Federal Trade Commission

The U.S. Federal Trade Commission ("FTC") launched an inquiry in 2022 into the country's six largest PBMs. In June 2024, after a bipartisan group of Senators called on the FTC to complete their investigation,[17] the FTC issued an interim report entitled "Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies."[18] The report details the ways in which PBMs profit at the expense of patients by inflating drug costs, while

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[15] 2024 F.T.C. Rep. at 1, 3.

[16] Leslie, *supra*, at 1625.

[17] Press Release, Senate Comm. on Com., Sci., & Transp., Cantwell, Grassley Lead Renewed PBM Accountability Push (Jan. 23, 2024), https://www.commerce.senate.gov/2024/1/cantwell-grassley-lead-renewed-pbm-accountability-push.

[18] 2024 F.T.C. Rep.

driving community pharmacies out of business through unfair, arbitrary, and harmful contractual terms.[19]

The FTC report explained that over the last twenty years, the six largest PBMs—which control more than ninety percent of prescription drug claims in the U.S.—have consolidated market power through uncontested mergers and vertical integration with affiliated health plans. This market concentration leaves pharmacists, health insurers, and drug manufactures with no alternative but to contract with the largest PBMs. That control gives PBMs leverage to steer patients to their own affiliated pharmacies. PBMs also adjust drug formularies in ways that require patients to use PBM-owned specialty pharmacies to fill expensive specialty medications.

In September 2024, the FTC filed a lawsuit accusing the Big Three PBMs—CVS Caremark, Express Scripts, and OptumRx—of artificially increasing their profits by excluding low-cost insulin drugs from their formularies to increase rebates they receive from drug manufacturers. The PBMs steer patients to insulin products with higher list prices and higher rebates, according to the FTC, unfairly shifting costs toward patients and violating Section 5 of the FTC Act.[20]

Finally, in January 2025, the FTC published a second interim staff report entitled "Specialty Generic Drugs: A Growing Profit Center for Vertically

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[19] *Id*. at 1.

[20] Compl. 41–43, *In re: Caremark Rx, LLC; Zinc Health Servs, LLC; Express Scripts, Inc; Evernorth Health, Inc.; Medco Health Srvs., Inc.; Ascent Health Srvs. LLC; OptumRx, Inc.; OptumRx Holdings, LLC; and Emisar Pharma Srvs LLC*, No. 9437 (F.T.C. Sept. 20, 2024).

Integrated Pharmacy Benefit Managers."[21] The report focuses on PBM influence over specialty generic drugs, including significant price mark-ups for cancer, HIV, and other critical medications.[22] The report found that the Big Three PBMs mark up numerous specialty drugs dispensed at their own affiliated pharmacies—sometimes by thousands of percent—generating more than $7.3 billion in revenue between 2017–2022 by dispensing drugs in excess of the acquisition cost.[23]

ii. The House Committee on Oversight and Accountability

In July 2024, the House Committee on Oversight and Accountability published a report entitled, "The Role of Pharmacy Benefit Managers in Prescription Drug Markets."[24] The report details the ways in which the Big Three PBMs share patient data for the purpose of steering patients toward PBM-affiliated pharmacies, leverage drug formulary placement to extract excessive rebates from drug manufacturers, and create foreign corporate entities to move certain operations abroad to avoid transparency and proposed reforms. House Chairman James Comer (R-Ky.) stated that "the three largest pharmacy benefit managers colluded to line

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[21] Off. of Pol'y Plan., Fed. Trade Comm'n, Specialty Generic Drugs: A Growing Profit Center for Vertically Integrated Pharmacy Benefit Managers (Jan. 2025) ("2025 F.T.C. Rep."), available at https://www.ftc.gov/system/files/ftc_gov/pdf/PBM-6b-Second-Interim-Staff-Report.pdf.

[22] 2025 F.T.C. Rep. at 2–3.

[23] *Id*.

[24] House Comm. on Oversight and Accountability Staff, The Role of Pharmacy Benefit Managers in Prescription Drug Markets (July 2024), available at https://oversight.house.gov/wp-content/uploads/2024/07/PBM-Report-FINAL-with-Redactions.pdf.

their own pockets" through "self-benefiting pricing tactics [that] jeopardize patient care, undermine local pharmacies, and raise prescription drug prices."[25]

iii. The Current Administration

Most recently, President Trump denounced the PBM industry, accusing PBMs of raising prescription drug prices in the United States. President Trump has vowed to address abusive conduct in the PBM industry: "The horrible middleman that makes more money, frankly, than the drug companies. . . We're going to knock out the middleman. We're going to get drug costs down. . ."[26]

B. Antitrust Class Actions

The efforts of independent community pharmacists to fight back against the anticompetitive conduct of PBMs provide an important example of the value of antitrust class actions. Despite all the Congressional and regulatory activity, class actions remain the most powerful tool available to rein in these bad actors. Independent community pharmacies lack the resources to challenge PBMs on their own. Provided the pharmacists can satisfy a straightforward application of Rule 23, they should be able to proceed in litigation

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[25] Press Release, House Comm. on Oversight and Accountability, Comer Releases Report on PBMs' Harmful Pricing Tactics and Role in Rising Health Care Costs (July 23, 2024), https://oversight.house.gov/release/comer-releases-report-on-pbms-harmful-pricing-tactics-and-role-in-rising-health-care-costs%EF%BF%BC/.

[26] Insurer stocks fall after Trump says 'we're going to knock out the middleman,' Reuters, Dec. 16, 2024, https://www.reuters.com/business/healthcare-pharmaceuticals/insurer-stocks-fall-after-trump-says-were-going-knock-out-middleman-2024-12-16/.

against the PBMs and other anticompetitive actors on a class basis.

That is why the NCPA has chosen to submit this brief. As noted above, Labcorp has argued for a sweeping ruling. The NCPA is deeply concerned about the effects such a ruling could have on class certification in antitrust litigation. Its focus is on the grave financial harm its members suffer from anticompetitive conduct. Too many community pharmacies are closing their doors. Too many patients are losing services that are essential to their health. Antitrust class actions provide one potentially effective means for pharmacies to protect their legal rights. The NCPA asks this Court not to rule in a way that could threaten that procedural mechanism.

CONCLUSION

For the foregoing reasons, the NCPA respectfully asks this Court not to rule in a way that could have unintended, adverse effects on litigation very different from the pending case.

Respectfully submitted,

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