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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court typically begins its analysis with Article III. Plaintiffs end with it. That is a tell, for they cannot explain how the Constitution permits an uninjured class member to *pursue* individual damages yet prohibits him from *collecting* them.

To square that circle, plaintiffs slice class actions into "two phases"—"litigation" and "relief"—and insist unnamed members need only show standing in the second. Resp. 31. But that makes no sense. After all, as this Court has explained, if the class *loses* on the merits, unnamed members are forever bound by that judgment. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 470 n.5 (2013). There is no later "relief" stage where a court sorts out which ones lacked standing at the outset. It necessarily follows that they all must have standing to press their claims in the first place. Otherwise, unnamed members could escape the preclusive effect of a merits loss by arguing they lacked standing from the start. Plaintiffs' position therefore assumes they either always win or, more likely, that certification coerces a settlement before standing is addressed. That is clearly incorrect.

Even if plaintiffs could cure this constitutional defect, they still could not satisfy Rule 23. Plaintiffs offer no defense of the Ninth Circuit's categorical rule that Article III injury is a trifle to be sorted out at the back end. Instead, they urge a case-by-case approach to determining whether culling the uninjured will overwhelm other questions. But they identify no mechanism to do so that is rigorous enough to protect a defendant's rights yet cursory enough to avoid thousands of mini-trials. Still less do they explain how

to thread that needle here, where Labcorp is entitled to test whether each class member—potentially 112,140 of them—even *wanted* to use its kiosks before a court can award relief.

With little defense on the merits, plaintiffs try to stave off review entirely, urging this Court to dismiss the case. But no new vehicle problem has surfaced in the three months since the Court granted review. Instead, the only thing that has changed between now and then is plaintiffs' account of the procedural history. Until their merits brief, they conceded the district court's "refinement" of the class definition was an immaterial tweak that left the class "identical in every way" to the one certified. D. Ct. Dkt. 107-1 at 3. And the district court agreed. The problem of uninjured members in this class therefore persists no matter what definition is used, which is why the court of appeals resolved the issue in reviewing the original certification order. Having secured an answer to the question presented from the Ninth Circuit, plaintiffs cannot change their story to avoid one from this Court.

ARGUMENT

I. PLAINTIFFS CANNOT RUN FROM ARTICLE III.

Plaintiffs admit "[e]very class member must have Article III standing in order to recover individual damages." Resp. 20 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). They nevertheless insist class-member standing is "irrelevant" until it comes time "to order relief." Resp. 31. But Article III does not work that way in any other context, and there is no class-action exception to the Constitution.

A. Article III is relevant at certification.

1. In claiming the Constitution may be ignored at certification, plaintiffs start by attacking a strawman, noting (Resp. 33) that unnamed class members are not parties to, and their claims not part of, the case "'*before the class is certified*'" (or if certification is denied). *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011). No one says otherwise. Nor does anybody maintain that the presence of an uninjured member "strip[s] the court of jurisdiction." Resp. 41.

But those are not the questions here. A would-be intervenor is likewise not a party to, and his claims not part of, the case before intervention. *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009). And even if an intervenor lacked standing, his presence would not destroy the court's jurisdiction over the rest of the case. But neither point eliminates his duty to show "standing in order to intervene." *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 442 (2017). That is because intervention, like certification, can add new parties and claims and hence involves the exercise of judicial power. Pet. Br. 17-20, 31; U.S. Br. 11-13. A court therefore must consider Article III before taking that step. *Laroe*, 581 U.S. at 441.

2. None of plaintiffs' cases suggest otherwise. *Waetzig v. Halliburton Energy Services, Inc.*, 145 S. Ct. 690 (2025), reasoned that whether a party could reopen his case under Rule 60(b) had no bearing on whether the district court would have jurisdiction to vacate an arbitral award after reopening. *Id.* at 696. Here, however, the Rule 23 certification motion *itself* raises the "jurisdictional questions," just as the Rule 24 intervention motion did in *Laroe*. *Id.*

As for *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), those decisions only prove Labcorp's point. In each, this Court *rejected* certification to *avoid* the Article III problems certification would cause. Faced with the risk that the classes included those without "standing to sue," the Court observed that the constitutional issue "'would not exist but for" certification and held certification improper for other reasons. *Amchem*, 521 U.S. at 612; *see Ortiz*, 527 U.S. at 831. If, as plaintiffs contend, the presence of the uninjured posed no "jurisdictional problem at certification," there would have been no Article III issue for this Court to avoid. Resp. 31. Plaintiffs cannot read these cases to both call for "constitutional avoidance" and prove there is no constitutional issue to begin with. Resp. 19-20.[1]

B. Article III bars certifying a damages class containing uninjured members.

1. With that distraction gone, plaintiffs do not deny that if unnamed class members are akin to intervenors, they must have standing to add damages claims to the case through certification. Resp. 34-37. Instead, plaintiffs resist the analogy on the assumption that unnamed members of a certified class are not "'parties.'" Resp. 35. The premise is incorrect and, regardless, the conclusion does not follow.

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[1] At any rate, constitutional avoidance gets plaintiffs nowhere, for even if they *win* on Rule 23, *but see infra* Pt. II, this Court must still resolve the Article III issue. Unlike Labcorp, plaintiffs must prevail on *both* issues for this class to proceed.

a. As to the premise, plaintiffs invoke (Resp. 35) *dicta* stating that "unnamed members of a class action … are not parties to the suit." *Smith*, 564 U.S. at 314. But they overlook that "[n]onnamed class members … may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002); *see United States v. Sanchez-Gomez*, 584 U.S. 381, 387 (2018) (unnamed members are "parties to the litigation in many important respects"). The question therefore is whether unnamed members are *"parties" insofar as they must satisfy Article III at certification*.

They are. A class action is a species of "traditional joinder" that merely "allows willing plaintiffs to join their separate claims against the same defendants" in a single action. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality); *see* Rubenstein & Miller Br. 2, 7. That is why Rule 23 complies with the Rules Enabling Act—"it leaves the parties' legal rights and duties intact." *Shady Grove*, 559 U.S. at 408. To ensure that remains true, courts can certify classes only where "[e]ach" member could have brought "a freestanding suit asserting his individual claim." *Id.* No one denies that if an unharmed member tried to bring his own suit, Article III would require dismissal at the outset. Yet plaintiffs' theory would let the same person pursue the same claim as part of a class without having to show "standing" until it comes time "to recover." Resp. 38. That cannot be right, as confirmed by plaintiffs' silence on this Rules Enabling Act problem. Pet. Br. 20-22; *see Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300 n.9 (1973) (declining to "exempt[]" "unnamed members" from "jurisdictional-amount requirement" applicable to "named plaintiffs joining in an action").

b. In any event, even if certification does not make unnamed class members *parties*, it plainly adds their *claims*—a point plaintiffs do not seriously dispute. Pet. Br. 19-20; *see* Resp. 32 (asserting only that an unnamed member's "claim will not even arguably be a part of the case *until a class is certified*") (emphasis added). That is why "when the claim of the named plaintiff becomes moot after class certification," "a 'live controversy may continue to exist' based on the ongoing interests of the remaining unnamed class members." *Sanchez-Gomez*, 584 U.S. at 388.

The addition of *claims*, not *parties*, is the key consideration under Article III, as *Laroe* confirms. There, this Court did not hold that a would-be intervenor must show standing just because he seeks "to 'become a party.'" Resp. 35. Indeed, if party status were the only basis for the Court's decision, it would have required *all* intervenors to satisfy Article III, as "intervention" is simply "the legal procedure by which a third party" can "become a party." *Eisenstein*, 556 U.S. at 933 (cleaned up). Instead, *Laroe* held that an intervenor must satisfy "Article III if the intervenor wishes to pursue relief not requested by a plaintiff." 581 U.S. at 435. And it did so because "[f]or all relief sought, there must be a litigant with standing," as a "'case or controversy as to one claim does not extend the judicial power to *different* claims or forms of relief.'" *Id.* at 439 & n.3. Yet under plaintiffs' theory, certification would let courts adjudicate the separate claims of those who lack Article III standing. That cannot be squared with the Constitution.

In an attempt to obscure this problem, plaintiffs divide class actions into "two phases"—"litigation" and "relief"—and insist a court acts on unnamed

members' "individual claims" only at phase two. Resp. 31, 36. But that convoluted theory assumes the class always *wins* at phase one. If the class *loses* at that point, the ruling "resolves all class members' claims once and for all, leaving no individual issues to be adjudicated." *Amgen*, 568 U.S. at 470 n.5. Courts do not then conduct an artificial "relief" analysis where they determine which unnamed members are bound by the merits judgment; instead, they *all* are. And that is so *only* because the court had jurisdiction over *all* of them in the first place. Otherwise, unnamed members could escape preclusion by showing they *lacked* standing. Plaintiffs make no effort to defend this cart-before-the-horse exercise, which confirms courts must have jurisdiction *before* they adjudicate the merits of unnamed members' claims.

Plaintiffs blow past all this because they know class actions rarely go to trial, as certification "typically" coerces a settlement. Resp. 31. But that only underscores why class-member standing must be resolved at certification, *before* the court tackles the merits. Only that approach will ensure courts do not end up wielding the judicial power on behalf of those who have no business invoking it. Pet. Br. 30-31.

2. Plaintiffs fare no better in invoking the history of "representative actions" to shore up their view of Article III. Resp. 39. In their telling, traditional representative suits followed a two-phase approach: (1) the court would first resolve the representative's "class claim," and (2) absentees would then come to court to recover. *Id.* But whether these historical cases generally proceeded in two phases is beside the point, for at *no stage* was the representative pursuing a claim on *behalf of the uninjured*.

Instead, in each of plaintiffs' examples, *all* absentees suffered an injury-in-fact. Indeed, that was the entire justification for representative suits. Under "the necessary parties rule in equity," litigants had to join to a suit "'all persons materially interested'"—by definition persons with standing. *Ortiz*, 527 U.S. at 832. "But because that rule would at times unfairly deny recovery to the party before the court," *id.*, equity developed the representative suit to account for the "rights and duties" of "necessary parties" without requiring their formal joinder, Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 243-44 (1990).

That is all plaintiffs' cases show: the creation of a procedural device that allowed courts to craft relief for all whose legal rights were implicated by a suit. *Id.* at 245, 248; *see* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS § 120 (1838) ("[I]n all of them there always exists a common interest or a common right"); Chamber Br. 18-20; U.S. Br. 16-17. None stand for the startling proposition that courts can resolve the claims of parties over whom they lack Article III jurisdiction. That rule would make no sense, as those persons would not share the requisite "common interest" that would allow them to take advantage of the representative suit to begin with. Bone, *supra*, at 245. History therefore provides no basis for plaintiffs' two-phase approach to class-member standing.

Plaintiffs nevertheless clutch at *Stewart v. Dunham*, 115 U.S. 61 (1885), to contend that issues of "class-member standing" arising at phase two would "not deprive the court of its 'jurisdiction'" at phase one. Resp. 41. But *Stewart* just used principles of ancillary

jurisdiction to permit the consideration of claims by parties whose appearance would have destroyed complete diversity under the jurisdictional *statute*. 115 U.S. at 63-64. It created no representative-action exception to *the Constitution*: the representative and the absentees there had all suffered an injury-in-fact and the constitutional requirement of minimal diversity was satisfied. *Id.* at 62-63. Indeed, had *Stewart* created such an exception to the Constitution, it would clash with precedents holding that Article III is not relaxed in the class-action context. Pet. Br. 18.

In short, plaintiffs' tour through history cannot justify the certification of a class that sweeps in plaintiffs and claims over which courts lack Article III jurisdiction. And regardless, plaintiffs' cases are the "antecedents of the mandatory class action" in Rule 23(b)(1)(B), *Ortiz*, 527 U.S. at 841, not the damages class action in Rule 23(b)(3). Unlike in the historical representative cases and Rule 23(b)(1)(B) actions, plaintiffs in a Rule 23(b)(3) class do not share a "common interest"—each can bring his own claim without affecting the others' rights. That is why this Court has described Rule 23(b)(3) as an "'adventuresome' innovation" that, for the first time, allowed "class actions for damages designed to secure judgments binding all class members" who did not opt out. *Amchem*, 521 U.S. at 614. Plaintiffs thus cannot claim the equitable jurisdiction of the federal courts at "'the adoption of the Constitution'" would have extended to damages class actions that contained uninjured individuals, and accordingly cannot justify allowing those suits today. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318 (1999); *see* Chamber Br. 14-25; U.S. Br. 16-17.

3. Plaintiffs likewise come up short on precedent. Contrary to their suggestion (Resp. 41-43), *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442 (2016), did not implicitly resolve the question presented here. Instead, the issue of uninjured class members in that case came to light only after the jury's verdict, and the Court explicitly declined to confront "whether a class may be certified if it contains 'members who were not injured'" because the petitioner had "abandon[ed]" that argument. *Id.* at 460; *see id.* at 460-61; *id.* at 463-66 (Roberts, C.J., concurring). Indeed, had *Tyson Foods* resolved that question, there would have been no need for *TransUnion* to continue to reserve it. 594 U.S. at 431 n.4.

Plaintiffs' other cases are even farther afield. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), had no occasion to address the existence of a "jurisdictional barrier to certification" because it had nothing to do with jurisdiction. Resp. 43. Rather, it discussed the possibility of "individualized rebuttal" to *Basic*'s "presumption of reliance," 573 U.S. at 276—a substantive "merits question" rather than a threshold issue of Article III standing. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 n.6 (2011). And in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), the Court just explained that because its "judgment has removed the basis for" a litigant's claim for "relief different from that sought by plaintiffs," it had no need to address that party's "standing" until the situation changed. *Id.* at 402 n.22.

While grasping at these straws, plaintiffs ignore precedents establishing that it is only "where the district court has jurisdiction over the claims of the

members of the class" that it "has the discretion under [Rule] 23 to certify a class action for the litigation of those claims." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); *see Zahn*, 414 U.S. at 300-01; Pet. Br. 21; U.S. Br. 18-19. Plaintiffs' silence here speaks volumes.

4. That leaves plaintiffs to appeal to policy, warning that Labcorp's approach would produce "chaos." Resp. 43. But as Labcorp explained, and as plaintiffs never refute, requiring parties to define classes to exclude the uninjured would hardly "eviscerate the operation of the class device." Resp. 44; *see* Pet. Br. 24-26; U.S. Br. 20. Nor do plaintiffs address the continued existence of class actions in the circuits that use this rule (the Second and Eighth), confirming it is not a "novel" one. Resp. 14; *see* Pet. Br. 25-26.

Plaintiffs are even less persuasive in contending that following the Constitution at certification would "make it harder for defendants to settle." Resp. 45. Article III cannot be distorted to benefit plaintiffs *or* defendants, Pet. Br. 27, and regardless, those most likely to be class-action defendants side with Labcorp, *see, e.g.*, Chamber Br. 1-2, 25-28. That should come as no surprise: Allowing plaintiffs to lard up classes with the uninjured serves only to coerce settlements. Pet. Br. 32-36. While plaintiffs claim (Resp. 29-30) *TransUnion* solves the problem, they ignore that the bar on recovery by uninjured members ordinarily does nothing to reduce the defendant's bottom line. Pet. Br. 34-35. Certification therefore remains the ballgame—hence why plaintiffs and their amici are fighting so hard to confine *TransUnion* to the end of the case.

C. Article III prevents certification here.

Plaintiffs also have no way around the fact that their class includes members without standing, such as those who had no interest in using the kiosks. Pet. Br. 22-23. They do not deny their class consists of thousands of blind patients who happened to walk into a Labcorp location with a kiosk; they just quibble over the exact number. Resp. 10-11, 30 n.4. But their own expert estimated the class to range between 8,861 to 112,140 people in a given year, JA.253, and plaintiffs offer no support for the remarkable suggestion that all of them—whatever the total—*uniformly* desired to use the kiosks, Resp. 9.

Instead, plaintiffs dismiss patient "preferences" as "irrelevant" because the blind cannot use the kiosks without assistance. Resp. 10. But a blind person who does not want to use a kiosk (with or without assistance) does not have standing to challenge how kiosks work—any more than a vegan has standing to challenge how a restaurant defines a "medium rare" steak. Pet. Br. 22-23; U.S. Br. 26.

II. PLAINTIFFS CANNOT HIDE FROM RULE 23.

A. Plaintiffs are equally unpersuasive when it comes to Rule 23. Their various debater's points cannot obscure the basic problem with their theory: Unless a class definition excludes the uninjured, the court will have to determine whether each member has standing before adjudicating the merits of their claims. And unless the court can weed out the unharmed on a class-wide basis while still protecting the defendant's rights, questions of standing will inevitably overwhelm other issues. It is therefore hard to see how any class with an appreciable number of

uninjured members could satisfy Rule 23(b)(3). Pet. Br. 39-43.[2]

Rather than confront this problem, plaintiffs accuse Labcorp of "'counting noses.'" Resp. 25. But the *de minimis* rule does not assign talismanic significance to "the *number* of uninjured class members." *Id.* Rather, the presence of an appreciable number of the unharmed is just a *proxy* for whether a court will be able to "manageably remove uninjured persons from the class in a manner that protects the parties' rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 54 (1st Cir. 2018); *see* Pet. Br. 42-43, 47. The parties therefore agree that the real question is whether the unharmed can be cut through a "winnowing mechanism … truncated enough to ensure that the common issues predominate, yet robust enough to preserve the defendants' Seventh Amendment and due process rights." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 625 (D.C. Cir. 2019) (Katsas, J.) (*Rail Freight II*); *see Asacol,* 907 F.3d at 51-54 (same); Resp. 28.

Where they part ways is whether that mechanism will be available. While plaintiffs claim there are ways to "identify" the uninjured, they never point to one that would sufficiently protect a defendant's rights. Resp. 26; *see* Pet. Br. 40-41. For instance, they suggest "class-member affidavits" will do the trick, Resp. 26, but if a defendant sought "to challenge any affidavits that might be gathered," they would "be inadmissible

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[2] Contrary to plaintiffs' assertion, this is not a "novel" rule. Resp. 24. While plaintiffs fault Labcorp for using "appreciable number" and "*de minimis*" as interchangeable terms, that only shows they prefer Latin over English. *E.g.*, Pet. Br. 14, 39.

hearsay at trial, leaving a fatal gap in the evidence for all but the few class members who testify," *Asacol*, 907 F.3d at 52-53; *see Rail Freight II*, 934 F.3d at 625 (similar). So even if it were correct to treat Article III like any other question (it is not), the presence of an appreciable number of uninjured members will cause individual issues to swamp the case. *See, e.g.*, *Halliburton*, 573 U.S. at 281-82 (If "[e]ach plaintiff" in a securities-fraud action had to "prove reliance individually," "common issues would not 'predominate'").

B. In any event, questions of class-member standing are different in kind from other issues in the predominance inquiry. Pet. Br. 46; U.S. Br. 10-11. Because "standing" is a "threshold question" going to the court's "*power*," it must be considered even when "'the parties make no contention concerning it.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89, 95 (1998). And to avoid issuing an advisory opinion, the court must resolve whether "[e]very class member … ha[s] Article III standing," *TransUnion*, 594 U.S. at 431, *before* "the merits," so this critical question cannot be deferred, *Rail Freight II*, 934 F.3d at 624. Given all that, it is difficult to see how any common question could possibly predominate over individualized Article III inquiries. Labcorp therefore agrees that "'predominance is a qualitative rather than a quantitative concept,'" and no issue is more qualitatively important than whether a court has

Article III jurisdiction to adjudicate each class member's claims. Resp. 25.[3]

Plaintiffs barely confront any of this. Instead, they contend that "*all* kinds of individualized questions" must receive "the same" treatment because Rule 23(b)(3) requires common questions to predominate over "'*any*'" individual issues. Resp. 21-22. But that misses the point. While the *meaning* of Rule 23(b)(3) remains the same in all cases, its *application* will depend on the type of individualized question at issue. For instance, this Court's rule that individualized "reliance" questions in securities-fraud cases will inevitably defeat predominance simply recognizes how resolving this kind of question will play out in practice. *Halliburton*, 573 U.S. at 281-82. Nothing in Rule 23(b)(3) prohibits this Court from taking a similar approach with respect to the foundational question of Article III injury.

Turning to precedent, plaintiffs assert that *Tyson Foods* and *Halliburton* prove the need to filter out the uninjured will not "invariably defeat" predominance. Resp. 23. But neither case even addressed Article III standing, much less resolved the question presented

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[3] By contrast, the parties do *not* "agree" that the presence of the uninjured will only sometimes bar certification "depending on the circumstances." Resp. 20. Labcorp has never advanced a reading of Rule 23(b)(3) that would permit an Article III violation in just some cases. *See supra* Pt. I. Rather, its position has always been that "if" this Court rejects its Article III arguments, Rule 23(b)(3) would still pose an independent bar to certification, and even then only "might" permit certification of a class with uninjured members in a few cases, "to the extent they exist." Pet. Br. 37, 42. Plaintiffs mistake Labcorp's fallback argument for an opening bid.

here. *Tyson Foods* declined to touch the issue, 577 U.S. at 460, and the securities-fraud class in *Halliburton* had alleged a clear pocketbook injury, 573 U.S. at 267. Both cases also relied on a "presumption," *id.* at 265, or "inference," in favor of all class members, *Tyson Foods*, 577 U.S. at 446. Here, by contrast, the presumption is *against* jurisdiction, meaning all class members "bear the burden of demonstrating that they have standing." *TransUnion*, 594 U.S. at 430-31; *see* Pet. Br. 42-43. Plaintiffs never address this distinction, let alone explain how they could overcome this presumption *en masse*.

Nor do plaintiffs have a good response to the fact that Labcorp's rule follows *a fortiori* from precedents holding that even a difference in the *kind* of injury among class members defeats certification. Pet. Br. 38-39, 44-46; U.S. Br. 9-10, 23-24. They wave away *Wal-Mart*'s holding that even "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" 564 U.S. at 349-50, by asserting that the class there advanced "heterogeneous legal claims," Resp. 23. Not so. The *Wal-Mart* class members all pressed the *same* claim—that their employer violated Title VII "by denying them equal pay or promotions"—but the allegation that they "all suffered a violation of the same provision of law" was not the same as the allegation that they all "'suffered the same injury.'" 564 U.S. at 343, 350. And plaintiffs simply ignore *Amchem*'s holding that a class of those exposed to asbestos could not satisfy predominance when only some had manifested injuries. 521 U.S. at 624. This case is *Amchem* in spades. Pet. Br. 39.

Plaintiffs likewise dismiss as a "case-specific holding" (Resp. 27) the rule that "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class" unless "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). But while the *dissenters* in *Comcast* shared plaintiffs' view that the decision was "good for this day and case only," *id.* at 42, the majority gave no suggestion that its rule was cabined to the "specific flaw" in the "damages model" there, Resp. 27. And even if *Comcast* could be limited to its facts, plaintiffs would still be left with the problem that damages questions go to how much relief is needed to redress a meritorious claim, whereas questions of class-member standing go to the court's power to adjudicate the merits of that claim in the first place.

C. In all events, *this* class should never have been certified. Even under plaintiffs' test, they did not prove that there exists an "'administratively feasible' 'mechanism for distinguishing the injured from the uninjured.'" Resp. 26. One will search their brief in vain for any suggestion as to how a court could manageably determine how many of the 8,861 to 112,140 class members at least wanted to use the kiosks while protecting Labcorp's rights. *See* Pet. Br. 43-44; *supra* Pt. I.C.

Instead, plaintiffs ask this Court to ignore this deficiency because "no court below addressed this issue." Resp. 26. But that is precisely the problem. The Ninth Circuit saw no need to resolve the question because it applied a brightline rule that "Rule 23 permits 'certification of a class that potentially includes more than a de minimis number of uninjured

class members.'" JA.397 n.1. Plaintiffs make no attempt to defend that approach, instead renouncing "categorical rules" altogether. Resp. 20. This Court should therefore reverse the decision below, or at least vacate it and confirm that Rule 23 requires far more.

III. PLAINTIFFS CANNOT EVADE THE QUESTION PRESENTED.

Given their weakness on the merits, plaintiffs urge this Court to toss this case from its docket on the theory that it does not implicate the question presented. But they raised the same meritless objection in opposing certiorari, and it is no more persuasive this time around.

A. In relitigating the Court's decision to take the case, plaintiffs emphasize (Resp. 15-18) that the district court refined the class definition after Labcorp filed its Rule 23(f) petition. But they flagged the same wrinkle in opposing certiorari, and it did not deter this Court from granting review. *See* BIO 7 (noting the district court granted plaintiffs' "motion to refine the class definitions" after "Labcorp filed a Rule 23(f) petition").

Rightly so. Everyone agrees the original May certification order—including its class definition—is "before this Court." Resp. 15. Everyone also agrees this Court has jurisdiction unless the district court's later refinements to that order rendered "the appeal moot." Resp. 17. And that question is easy: those changes could not have mooted the appeal because, as the district court explained, its decision to "refin[e] the class definition" did "not materially alter the composition of the class or materially change in any manner" the original certification order. JA.386 n.10.

Indeed, plaintiffs shared that understanding until they filed their merits brief. In urging the district court "to slightly refine" the definition "to remove any potentially fail-safe language," plaintiffs promised that the class would remain "identical in every way" under the new definition. D. Ct. Dkt. 107-1 at 3, 7. And under either definition, the class included uninjured members. As the district court explained, the original definition—which covered all blind patients who "visited a Labcorp patient service center in California" and "were denied full and equal enjoyment" of Labcorp's services, JA.370—included any blind patient who was merely "exposed to a kiosk," whether or not he had any desire to use it, JA.358. And plaintiffs agreed. As they told the Ninth Circuit, the original definition covered "all legally blind Californians who *visited*" a Labcorp with a kiosk. Rule 23(f) Opp. 23 (emphasis added); *see* C.A. Ans. Br. 41 (similar). That is why plaintiffs insisted that all that is needed "to identify[] class members" under either definition are "records of … patient visit[s]" and "methods to identify legally blind patients amongst [those] visits." C.A. Ans. Br. 47. And that is why they used the refined definition to describe the class in opposing this Court's review. *See* BIO 12.

It is therefore *plaintiffs* who seek "to rewrite the procedural history" by suggesting that the refined definition was meaningfully "different" all along. Resp. 16. But having "'prevail[ed] in one phase'" on the theory that the refinements to the definition were immaterial, they are estopped from taking a "'contradictory'" position now. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Plaintiffs further distort the record in claiming that Labcorp's Rule 23(f) petition argued that "only people in" the original definition (as opposed to the refined one) "were injured." Resp. 15-16. To be sure, Labcorp argued *in the alternative* that the class definition—in both its original and refined forms—created an improper "fail-safe" class. JA.399-400; *see* Rule 23(f) Pet. 13-14; C.A. Pet. Br. 48-49. But it *also* contended that the original order impermissibly included "many" class members who lacked Article III injury because they had no desire to use kiosks. Rule 23(f) Pet. 14-16. And that flaw persisted under the refined definition since it did not alter the composition of the class in any material way. *Supra* at 18. That is why LabCorp appealed the original certification order on Article III grounds. Rule 23(f) Pet. 14-16.

In short, the original certification order implicated the question presented, and the district court's later immaterial refinements did nothing to moot the appeal. *See Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("insignificant" revision to law does not moot case). In fact, the tweaks were so insignificant that Labcorp *could not* have appealed the August order, as only an order that "materially change[s] the original certification order" qualifies as "an order granting or denying class-action certification" appealable under Rule 23(f). *Walker v. Life Ins. Co.*, 953 F.3d 624, 636 (9th Cir. 2020). Orders making "minor changes in the class definition," by contrast, are not appealable. *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 173 (3d Cir. 2023).

All this explains why the Ninth Circuit expressly resolved the question presented. While that court refused to consider Labcorp's argument that the

refined definition created a "fail-safe" class on the ground that the August order was not "properly before" it, JA.399-400, it *did* address the fundamental objection that certification was inappropriate because some class members were not "injured," JA.397 n.1. And that was because Labcorp had argued that the original "May 23 class-certification order" violated "Article III," and the district court's later actions did nothing to address that problem. JA.394.

This history also disposes of plaintiffs' suggestion that Labcorp had to raise a "separate challenge to the May order" to avoid forfeiture. Resp. 17. Setting aside that "standing to litigate cannot be waived or forfeited," *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662-63 (2019), Labcorp's "consistent claim" has been that this class unlawfully includes the uninjured, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That claim is not limited to the refined definition and, in any event, Labcorp remains free to "make any argument in support of" it. *Id.* at 378-79 (petitioner could make argument "expressly disavowed" below). And "even if this *were* a claim not raised by petitioner below," this Court could still consider it, as "it was addressed by the court below." *Id.* at 379.

B. Plaintiffs continue their revisionist history when it comes to the Ninth Circuit's decision, claiming that court "found that 'all class members were injured.'" Resp. 13. But they tried the same maneuver in opposing certiorari, and the Court "necessarily considered and rejected" it, so it cannot be a reason to "dismiss" the writ now. *United States v. Williams*, 504 U.S. 36, 40 (1992); *see* BIO 11. At any rate, age has not improved the argument.

First, while plaintiffs assert that the Ninth Circuit "held that 'all class members' suffered an 'injury that resulted from the complete inaccessibility of a Labcorp kiosk," Resp. 15 (brackets omitted), what it actually said was that "[b]ecause all class members *maintain* that their injury resulted from the inaccessibility of a LabCorp kiosk, the commonality requirement is satisfied," JA.397 (emphasis added). In other words, the court thought it sufficient that all members *alleged* they had been injured by merely being exposed to an inaccessible kiosk, regardless of whether they *were* injured by such exposure. The Ninth Circuit therefore declined to address "LabCorp's allegation that some potential class members may not have been injured," because it (erroneously) thought class-member standing irrelevant. JA.397 n.1.

Second, in rejecting the objection that the *injunctive* class should not have been certified "because not all blind people prefer the same accommodations," the Ninth Circuit stated that "all class members were injured by the complete inaccessibility of LabCorp kiosks." JA.399. But in doing so, it was not resolving the Article III question, which, as just explained, it had already addressed. Instead, it merely said the injunction would uniformly address the class's injury by rendering kiosks accessible to blind patients if they wanted to use them. In all events, if the Ninth Circuit had actually held that "class members [who] … prefer not to use the kiosks" suffered an Article III "injury," that would only provide another reason to reverse, because it is obviously wrong. JA.399; *see supra* Pt. I.C.

CONCLUSION

The judgment below should be reversed or at least vacated.

April 21, 2025 Respectfully submitted,

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