JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, DC 20001.2113

TELEPHONE: +1.202.879.3939 • JONESDAY.COM

DIRECT NUMBER: (202) 879-5485
NJFRANCISCO@JONESDAY.COM

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By Overnight Mail and Electronic Filing

The Honorable Scott S. Harris
Clerk of the Court
United States Supreme Court
One First Street, NE
Washington, DC 20543

Re: *Laboratory Corporation of America Holdings v. Davis*, No. 24-304

Dear Mr. Harris:

I write in response to plaintiffs' April 23, 2025 letter. While plaintiffs purport to address jurisdictional "developments," the only new thing they identify—apart from a dissenting opinion in an unrelated case—is "Labcorp's reply," confirming that their letter is nothing more than an improper surreply. 4/23/25 Letter 1 (Surreply). In all events, plaintiffs' latest arguments are meritless.

1. Plaintiffs principally object that even though "this Court's jurisdiction extends only to the original May definition" of the class—and not "the August definition"—Labcorp failed to "challenge" the May definition in its opening merits brief. Surreply 1. But that is of no "jurisdictional significance." *Id.* Labcorp is challenging the Ninth Circuit's *judgment*, not a particular *definition* discussed in the lower court's opinion. *See Amgen Inc. v. Sanofi*, 598 U.S. 594, 615 (2023) ("[W]e review judgments of the lower courts, not statements in their opinions."). And in the course of issuing that judgment, the Ninth Circuit resolved the question presented against Labcorp, holding that the company's concern "that some potential class members may not have been injured" was irrelevant because "Rule 23 permits 'certification of a class that potentially includes more than a de minimis number of uninjured class members.'" JA.397 n.1. Labcorp is therefore "asking for typical appellate relief"—that this Court resolve the question presented in its favor, "reverse" the decision below, and "undo what it has done." *Chafin v. Chafin*, 568 U.S. 165, 173 (2013); *see* Reply 18-21. Plaintiffs identify no "jurisdictional hurdles" to providing that remedy. Surreply 1.

2. At most, plaintiffs suggest that the August refinements to the class definition were a "material difference" that "'superseded'" the May definition. Surreply 2. Both the district court and plaintiffs, however, said the exact opposite. In the district court's words, "in refining the class definition, this Order does *not materially alter* the composition of the class *or materially change in any manner*" the original certification order. JA.386 n.10 (emphases added); *see* Reply 18. And the court issued that ruling based on plaintiffs' representation that the "refined classes are intended to be identical in every way to the certified classes." D. Ct. Dkt. 107-1 at 3. In plaintiffs' words, the point of their request "to slightly refine the existing Class definitions to remove any potentially fail-safe language" was merely to "remove any doubt on an issue that amounts to classic 'form over substance.'" *Id.* at 7. Having secured their requested refinement on that basis, it is clear that *plaintiffs* are the ones who are "now estopped from arguing the opposite." Surreply 2; *see* Reply 19.

It is equally clear that both the May and August definitions swept in uninjured members. Reply 19. As the district court explained in its May order, "identifying class members here would not be difficult" because it would only have to consult Labcorp records for "'how many patients checked in'" at facilities with kiosks and then use their information to determine which ones qualified as "'blind.'" D. Ct. Dkt. 97 at 24. In other words, there was no need to ask whether blind patients wanted to use the kiosks; merely being "exposed to" one was enough under the May definition. *Id.* at 16. And that is exactly what plaintiffs told the Ninth Circuit, explaining that "certified Class members" under the May definition consisted of "all legally blind Californians who *visited* one of the 280 [patient service centers] that featured LabCorp [kiosks] during the applicable limitations period." Rule 23(f) Opp. 23 (emphasis added).[1]

Labcorp therefore *could not* have appealed the August order, as that order's "minor clarifications" were not "a material change" to the "class definition." *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 173 (3d Cir. 2023); *see* Reply 20. Even under plaintiffs' formulation—in which "materiality hinges on 'what the defendant wants to challenge'"—Labcorp wanted to challenge the inclusion of uninjured members in the class, and on that issue, the May and August orders were the same. Surreply 2.

3. Faced with all this, plaintiffs insist (Surreply 2) that Labcorp is estopped from treating the May and August definitions as materially indistinguishable based on a

[1] Accordingly, plaintiffs' expert estimated the class size under the May order to range from "8,861 people to as many as 112,140 people in a particular year" based on predictions of the number of "people who are legally blind and would be potential users of LabCorp services in California." JA.252-53.

"fail-safe" argument it advanced in its Rule 23(f) petition. But as plaintiffs concede, Labcorp *also* made the *alternative* argument that "a substantial portion of the [Rule 23(b)(3)] subclass lacks Article III … standing." Rule 23(f) Pet. 3; *see* Reply 20. Labcorp is obviously not estopped from pressing the very alternative argument it advanced below, that plaintiffs opposed, and that the Ninth Circuit rejected. If it were, most lawyers would soon find themselves out of a job. *See In re Exxon Valdez*, 484 F.3d 1098, 1102 (9th Cir. 2007) ("Arguing in the alternative does not invoke judicial estoppel—it is good lawyering.").[2]

Plaintiffs attempt to avoid this inescapable conclusion by asserting that Labcorp's "alternative argument" only "objected to the *named plaintiff's* standing." Surreply 2. But that is demonstrably false. The "questions presented" in Labcorp's Rule 23(f) petition included: "Did the District Court manifestly err in certifying Plaintiff Vargas's California sub-class … when there is no evidence that *even a majority of class members would have standing* to proceed." Rule 23(f) Pet. 9 (emphasis added). The section heading for that argument likewise asserted, in bolded letters: "**The District Court manifestly erred in failing to consider evidence that many Rule 23(b)(3) damages class members would lack standing to proceed**." *Id.* at 14. And lest there be any doubt, the petition specifically argued:

> [T]here is no evidence that the certified class contains a majority of persons (or even a substantial number of persons) with Article III standing. On the other hand, there is undisputed record evidence that around 25% of all Labcorp [patient service center] visitors choose to check-in at the front desk, and thus could not have suffered injury required to assert Unruh Act claims tied to the kiosk. And Plaintiffs have adduced no evidence to indicate how that 25% overall percentage of desk check-ins may be affected (and perhaps increase) among legally blind patients.

Id. at 16. That is why plaintiffs' opposition argued that "lack of standing for some class members is no bar to class certification," as Ninth Circuit precedent held that a class that "includes even a non-*de-minimis* number of uninjured plaintiffs … does not

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[2] In any event, Labcorp did not convince the district court to refine the definition based on its fail-safe argument. Rather, it was *plaintiffs* who persuaded the district court to do so in an attempt "to 'remove any doubt'" as to whether the class was "arguably a fail-safe" one. JA.377. And in the Ninth Circuit, Labcorp likewise did *not* "succeed[] in persuading a court to accept" its fail-safe argument, as the court of appeals declined to consider it. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001); *see* JA.399-400. Given the fail-safe argument's *lack* of success, Labcorp has raised "no 'risk of inconsistent court determinations.'" *New Hampshire*, 532 U.S. at 751.

warrant decertification." Rule 23(f) Opp. 22 (capitalization omitted). And why the Ninth Circuit—while limiting its review to "the district court's May 23 order"—addressed and rejected Labcorp's argument that "plaintiffs lack Article III standing … because class representative Vargas, *along with class members*, did not experience a cognizable injury." JA.394, 399 (emphasis added); *see* Reply 20-21. In all events, "a live controversy persists here" because the Ninth Circuit's judgment continues to harm Labcorp, as it upheld the certification of a damages class action against the company. Surreply 2; *see ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (holding that Article III permits this Court to review a lower court's "judgment" that caused the petitioners "direct injury" even when the plaintiffs who had secured that judgment themselves lacked "standing").[3]

In short, Labcorp raised the question presented in the Ninth Circuit and the Ninth Circuit addressed it. It just got it wrong. And in doing so, the Ninth Circuit affirmed the certification of a class that seeks half a billion dollars per year from Labcorp, if not more. JA.252-53. This Court plainly has jurisdiction to correct that error.

We would appreciate it if you would circulate this letter to the Court.

Sincerely,

/s/ Noel J. Francisco
Noel J. Francisco

Counsel of Record for Petitioner

cc: Counsel of Record

[3] Plaintiffs' arguments therefore are, at most, prudential "vehicle" objections masquerading as jurisdictional ones—and weak ones at that. Surreply 2. It is far too late for plaintiffs to raise them, for the first time, in an (improper) surreply on the eve of argument. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) ("Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived."); Sup. Ct. R. 15.2 (similar).