No. 25-677

IN THE
Supreme Court of the United States

CITY OF CLEVELAND, OHIO,

Petitioner,

v.

ALBERT PICKETT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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The decision below held that a federal court may certify a damages class that includes members who lack any tangible injury so long as they assert claims for disparate impact. That holding deepens two circuit conflicts this Court recently granted review to address but ultimately was unable to resolve: one over whether a damages class may be certified if it contains members who suffered no Article III injury-in-fact, *Laboratory Corporation of America Holdings* v. *Davis*, 605 U.S. 327 (2025) (*LabCorp*), and another over whether a violation of an equal-access statute alone constitutes Article III injury, *Acheson Hotels, LLC* v. *Laufer*, 601 U.S. 1 (2023). Respondents never dispute that both splits are real and warrant review. And they have no answer to the importance of the question presented or the untenable position in which the decision below puts water systems, as amici confirm.

Instead, respondents argue (Br. in Opp. 12-31) that this case is not the right vehicle to resolve those conflicts, but their vehicle objections come up empty. Respondents assert that the decision below reserved the *LabCorp* question—whether each member of a damages class must suffer Article III injury—because it concluded that every class member here did. But the Sixth Circuit reached that result only by holding that disparate-impact plaintiffs *automatically* have an injury-in-fact and can be class members without any real-world harm. That is an *answer* to the *LabCorp* question for a swath of suits that compounds the existing split. And that particular answer amplifies the need for review because it flouts *TransUnion LLC* v. *Ramirez*, 594 U.S. 413 (2021), and deepens the separate split on standing left open in *Acheson*. Respondents offer no way to square the Sixth Circuit's new disparate-impact exception to Article III injury with this Court's and other circuits' precedent and simply repeat the court of appeals' errors.

Respondents now offer an entirely new theory to argue all class members were injured: that water liens inherently injure property rights. But respondents cannot evade the question presented by rewriting the proceedings below. Their new backup theory was never advanced or adopted below, and it is wrong. And it is not a reason to withhold this Court's review but an issue to be considered (if at all) on remand.

Respondents' other purported vehicle problems are makeweights. They attempt to inject a factual dispute by airbrushing their expert's own estimate of how *many* class members have no economic injury. But the Sixth Circuit acknowledged not every member will have damages; it simply dismissed "questions of eco-

nomic harm" as "irrelevant." Pet. App. 18a. Respondents assert that an injunctive-relief class will remain, but eliminating the damages class would be transformative. And respondents deride the case's Rule 23(f) posture, but that is a virtue, not a vice: It means the Court can answer the purely legal, threshold question of what Article III and Rule 23 require for class certification *before* later phases of litigation complicate the landscape or subject the defendant to outsized settlement pressure.

The petition should be granted.

I. THE DECISION BELOW COMPOUNDS TWO CIRCUIT CONFLICTS CONCERNING ARTICLE III STANDING

Respondents never dispute that the two circuit splits left unresolved in *LabCorp* and *Acheson* each warrant review. They argue instead that neither is implicated here, but their contentions are incorrect and largely assume their own view of the merits.

A. The decision below exacerbates the entrenched split that the Court sought to resolve in *LabCorp* on whether a court can certify a damages class with uninjured members. Five circuits say no; three say yes. Pet. 14-18. The Sixth Circuit compounded that conflict by adopting a third answer—"sometimes," depending on the claim. *Id.* at 18-19. That now *three*-way split even more urgently warrants review.*

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* Since the petition was filed, a fourth court that had joined the "yes" camp after *LabCorp*—the Fifth Circuit—withdrew and replaced its relevant opinion when denying a petition for rehearing en banc, illustrating the ongoing lower-court confusion. *Wilson* v. *Centene Management Co.*, 168 F.4th 217 (5th Cir. 2026).

Respondents' contentions that the case nevertheless does not implicate the *LabCorp* conflict lack merit. They first cite a footnote where the Sixth Circuit said that it was not resolving the broad *LabCorp* question. Br. in Opp. 13 (citing Pet. App. 19a n.9). But the court's holding directly answers that question for a whole category of cases: disparate-impact suits. The result of its ruling that disparate-impact plaintiffs have an automatic, per se injury is the same for disparate-impact suits as in circuits that do not require every class member to suffer an injury. That new advance-to-go option means that one type of class actions with uninjured members can be certified in the Sixth Circuit, but cannot proceed in five others.

Respondents argue at length that the *LabCorp* question—whether every class member *needs* an Article III injury—would not affect the outcome because the Sixth Circuit held "that every class member *was* injured" here. Br. in Opp. 2 (emphasis added); see *id.* at 3, 12-28. But the court reached that result only by *exempting* disparate-impact suits from the settled Article III requirements that apply to other cases. It deemed a statutory disparate-impact violation as automatically establishing injury-in-fact and excused disparate-impact plaintiffs from showing any tangible or other traditional concrete harm. Pet. App. 16a-20a. That holding does not avoid but only begs the question presented. Respondents embrace the Sixth Circuit's disparate-impact exception to Article III (Br. in Opp. 15-20), but they cannot wish away review of the merits with their subjective view that they should prevail.

Respondents also offer an entirely new, and entirely different, theory that all class members were harmed, asserting the mere existence of a water lien inherently injures property rights. Br. in Opp. 20-22. That

thirteenth-hour theory is unpreserved and incorrect, see Part II.B, *infra*, and it does nothing to obviate the lower-court conflict. The Sixth Circuit did not hold that water liens necessarily cause economic harm to property owners; it held that "questions of economic harm are *irrelevant*" for disparate-impact claims. Pet. App. 18a (emphasis added). That contradicts other circuits' decisions that damages classes cannot be certified, even though all class members were subject to the same challenged *action*, if some were not concretely *injured* as a result. *E.g.*, *Freeman* v. *Progressive Direct Insurance Co.*, 149 F.4th 461, 468-469 (4th Cir. 2025) (no class certification where all members suffered breached contracts but not all members lost money from the breaches); *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 624-626 (D.C. Cir. 2019) (same where all class members paid wrongful surcharges but not all surcharges increased their payments). Respondents' retreat to a newly minted theory of harm does nothing to sidestep the split or diminish the need for this Court to resolve it.

B. Respondents' effort to elide the "*Acheson* Split" (Br. in Opp. 25) is even more circular and meets the same fate. They contend that the *Acheson* conflict is not implicated here "because all class members have personally experienced" the asserted "injuries." *Ibid.* (capitalization altered). But whether that purported injury *satisfies* Article III is central to the question presented and runs straight into the *Acheson* split. Three circuits have held that a mere "statutory violation" that results in "unequal treatment" is *not* sufficient "for standing purposes." *Harty* v. *West Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (quotation marks omitted); Pet. 20-21. The First Circuit has held that "unequal footing" *is* sufficient without a showing

of concrete harm or discriminatory intent. *Laufer* v. *Acheson Hotels, LLC*, 50 F.4th 259, 274-275 (1st Cir. 2022), vacated as moot, 601 U.S. 1; Pet. 21-22. The Sixth Circuit similarly held here that the mere disparate impact of a policy *is* sufficient for standing. Pet. App. 16a. The conflict left open in *Acheson* is thus directly implicated.

Respondents again argue that the conflict is not implicated based on their own view of the merits. They contend that the cases in the *Acheson* split involved plaintiffs who were not themselves injured—there, because the plaintiffs visited websites that allegedly denied them equal access but suffered no real-world harm. Br. in Opp. 26-27. But the same is true here *unless* the Sixth Circuit was right that a policy that produces a disparate impact but no concrete harm automatically confers standing. Respondents' effort to sidestep the *Acheson* split assumes that the decision under review is correct.

II. THE SIXTH CIRCUIT'S DECISION IS WRONG

Despite urging the Sixth Circuit to hold that unnamed class members' standing is "immaterial for class certification," Resp. C.A. Br. 31 (capitalization altered), in this Court respondents have nothing to say in defense of that view. Cf. Pet. 23-26; WLF Br. 15-19. Their merits arguments concern only the court of appeals' conclusion that "every class member is injured" here. Br. in Opp. 12 (capitalization altered). But respondents replay the Sixth Circuit's errors in equating disparate-impact claims with traditional harms addressed in the Constitution. And their new fallback theory that water liens injure property rights is off-limits and unavailing in any event.

A. Respondents endorse the Sixth Circuit's central premise that disparate-impact plaintiffs automatically suffer "cognizable dignitary harms" that are "sufficient for standing," but they repeat the court of appeals' missteps. Br. in Opp. 16; see *id.* at 16-20. As *TransUnion* makes clear, "intangible harms" are not "concrete" unless they bear a "close relationship to harms traditionally recognized" at common law or are "specified by the Constitution itself." 594 U.S. at 425. Like the Sixth Circuit, respondents do not try to trace disparate-impact liability to common law, where it was unknown. Pet. 27; WLF Br. 9. Instead, they adopt its analogy to constitutionally proscribed racial discrimination but have no answer to that comparison's fatal problems.

Respondents invoke "dignitary harms" of racial discrimination, *e.g.*, Br. in Opp. 16, but (like the decision below) they conflate disparate *impact* with disparate *treatment*. This Court has made clear that the Equal Protection Clause proscribes only the latter. Pet. 27-28. It "guarantees equal *laws*, not equal *results*." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979) (emphases added). All of respondents' cases concerned laws that explicitly distinguished between protected classes or else were animated by discriminatory intent. *E.g.*, *Haaland* v. *Brackeen*, 599 U.S. 255, 292 (2023); *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72 (2017); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984). None held that the Clause barred a race-neutral policy due to its effect.

It follows under *TransUnion* that racially disparate treatment necessarily causes injury-in-fact, but a disparate-impact violation alone does not. Disparate treatment is squarely forbidden by the Constitution. And it injures individuals by branding them as

"innately inferior," perpetuating "stereotypic notions," and "stigmatizing members of the disfavored group." *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984) (quotation marks omitted). The same is not true of racially neutral policies that unintentionally produce a disparate impact. As the Court has explained, "regard[ing]" mere "disparate effect[s]" as "a form of stigma so severe as to violate the [Constitution] would trivialize the great purpose of that charter of freedom." *City of Memphis* v. *Greene*, 451 U.S. 100, 128 (1981) (Thirteenth Amendment). Disparate-impact plaintiffs have standing only if the challenged practice causes them a concrete injury.

That is dispositive here because Cleveland's water-lien policy is undisputedly race-neutral. Respondents have never argued that it is tainted by racial animus. The Sixth Circuit's analogy to constitutionally proscribed discrimination thus does not help them.

Respondents' rejoinders lack merit. They argue (Br. in Opp. 19) that disparate-impact liability requires "more than a mere disproportionate impact." But nothing they identify—causation, the defendant's justification, and "less-discriminatory" alternatives, *ibid.*—bears on the *injury* a disparate-impact plaintiff faces. They caricature the City's position (*ibid.*) as disputing whether disparate-impact claims are justiciable, but Cleveland has made clear that disparate-impact claims *can* proceed "[i]f a race-neutral policy causes tangible or other traditionally recognized harms." Pet. 4 n.*. And respondents contend that cases where the Court rejected disparate-impact claims based on the constitutional merits did not address Article III. Br. in Opp. 20. But the Sixth Circuit grounded its holding that respondents have standing in its view that disparate-impact violations

are a harm "specified by the Constitution itself," *TransUnion*, 594 U.S. at 425; see Pet. App. 17a, 19a. Respondents offer no valid defense of the Sixth Circuit's conclusion that disparate-impact plaintiffs automatically possess an Article III injury-in-fact.

B. Respondents now offer a wholly new theory of purportedly classwide harm—that water liens cause per se *property* injury—but that out-of-left-field theory comes far too late and fails in any event. Respondents never presented a property-injury theory or developed any factual basis for it below, and it formed no part of the Sixth Circuit's decision. They instead urged that court to hold that the "standing of unnamed class members * * * is immaterial." Resp. C.A. Br. 31 (capitalization altered). Their new theory is forfeited.

In any event, respondents' new theory fails on its own terms. A "water lien" in Ohio is merely a notation of unpaid water bills on the county tax list upon which third parties (not Cleveland) can take action. Ohio Rev. Code § 743.04(A)(1)(a); Pet. App. 4a, 60a. Courts have rejected respondents' premise that the mere record of an intangible encumbrance on property is sufficient for standing absent allegations that anyone "lost money," "credit," or suffered some other injury. *Nicklaw* v. *CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016); see *Maddox* v. *Bank of New York Mellon Trust Co., N.A.*, 19 F.4th 58, 64-65 (2d Cir. 2021). Respondents hypothesize (Br. in Opp. 21-22) various ways third parties (not Cleveland) *might* use water liens and affect class members—*e.g.*, selling liened property "to satisfy the secured debt," taking "priority" over other interests, or "cloud[ing]" homeowners' title. That conjecture about downstream possibilities does not create classwide standing. Moreover, under Ohio law, a lien must be "released immediately upon

payment," Ohio Rev. Code § 743.04(A)(1)(a), so those possibilities disappear when the overdue water bill is paid.

III. THE QUESTION PRESENTED IS IMPORTANT

Respondents make no effort to refute the practical significance of the question presented, either in the context of water systems or beyond. The Sixth Circuit's decision raises profound constitutional problems with real-world implications. See *LabCorp*, 605 U.S. at 333 (Kavanaugh, J., dissenting). As amici that represent 4,300 water systems and 2,500 local governments explain, the decision below "fundamentally jeopardizes" water liens, a critical tool for water utilities across the country. AWWA Br. 4-12, 17; see OML Br. 8-12. The decision below all but ensures copycat class actions; no showing of economic harm is needed at all. The specter of likely class certification will almost certainly coerce cash-strapped utilities into costly settlements. See AWWA Br. 17; *LabCorp*, 605 U.S. at 333. Respondents offer no reason to discount amici's concerns.

Nor do respondents deny that, if water utilities cannot employ water liens, they will be forced to undertake other more costly and punitive measures to collect unpaid bills—such as enforcement actions—that all disprefer. AWWA Br. 12-20; OML Br. 4-6. Given the tight budget constraints utilities face, the practical result may be increasing utility bills for everyone. AWWA Br. 15; OML Br. 11.

Water utilities are only the tip of the iceberg. Class actions have exploded in recent years, with businesses spending over $4.5 billion merely *defending* against the 10,000 class actions filed annually. Pet. 30-31. Yet the Sixth Circuit's decision will embolden

plaintiffs to attempt all manner of disparate-impact class actions on behalf of absent class members who have no real injury. *Id.* at 30.

IV. THIS CASE IS AN EXCELLENT VEHICLE

The decision below cleanly presents the legal question whether a court can certify a damages class that includes members with no concrete injury if their claim sounds in disparate impact. Answering that question will allow the Court to resolve the *LabCorp* and *Acheson* splits in one stroke. The Court should seize the opportunity.

Respondents float three final vehicle problems, but each fails. First, respondents attempt to inject a factual dispute by contesting the petition's account of their expert's estimate that up to 20% of the class has no damages. Br. in Opp. 4, 7-8, 29. They quibble that the 20% statistic refers to one of five named plaintiffs. *Id.* at 7. But they admit that their expert's *own* model selected those plaintiffs as its sample. *Id.* at 7, 29. Respondents cannot evade review by disavowing their own expert. More fundamentally, nothing in the City's petition "hinges" on respondents' expert's estimate that 20% of the class had no concrete injury. *Id.* at 28. The critical point, which the Sixth Circuit accepted, is that *some* portion of the putative class suffered no economic injury. Pet. App. 16a. The court wrote off the lack of "economic harm" as "irrelevant." *Id.* at 18a. This case is a perfect vehicle to correct that error.

Second, respondents say (Br. in Opp. 4) reversing certification of the Rule 23(b)(3) damages class would merely "modify the class definition" and leave the Rule 23(b)(2) injunctive-relief class unaffected. That use of "'[m]odify' * * * might be good English * * * only because there is a figure of speech called under-

statement and a literary device known as sarcasm." *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994). And even assuming the Rule 23(b)(2) class survives, the difference between defending a massive damages class action and a suit seeking only changes in the City's practices is fundamental.

Third, respondents suggest (Br. in Opp. 28-31) that the appeal's "interlocutory posture" poses a problem, but they have things backward. Rule 23(f) exists to facilitate prompt appellate review of class-certification orders. And here it means the Court can weigh in on the Sixth Circuit's view on the *LabCorp* and *Acheson* splits before class litigation proceeds. Addressing those issues now will ensure that later phases of litigation do not get in the way of resolving those important threshold legal questions and that settlement pressures frequently witnessed once a class is certified do not preclude review altogether.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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