

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LABORATORY CORPORATION OF AMERICA)
HOLDINGS, D/B/A LABCORP,)
) Petitioner,)
) v.) No. 24-304
LUKE DAVIS, ET AL.,)
) Respondents.)

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HOLDINGS, D/B/A LABCORP,)

Petitioner,)

v.) No. 24-304

LUKE DAVIS, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, April 29, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 24-304, Laboratory Corporation of America versus Davis.

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO

ON BEHALF OF THE PETITIONER

MR. FRANCISCO: Mr. Chief Justice, and may it please the Court:

Two basic principles resolve this case. First, a class action is just a tool for aggregating claims. So, if an individual plaintiff doesn't have Article III standing to bring his own claim, he can't bring it as part of a class either. That's why Laroe held that an intervenor has to show Article III standing in order to intervene, and, as Justice Scalia said in Shady Grove, class actions are just another species of joinder.

Second, Rule 23(b)(3)'s predominance requirement leads to the same result. If a class is defined to include plaintiffs without Article III standing and, as a result, you need thousands of mini-trials to separate the wheat

1 from the chaff, the Article III issue
2 necessarily swamps any common ones.

3 This case is a perfect example.
4 Plaintiffs who don't want to use kiosks don't
5 have standing to challenge how kiosks work any
6 more than a vegan has standing to challenge how
7 a restaurant defines a medium rare steak.

8 As a result, the Court needs to assess
9 whether each of the 8,000 to 112,000 class
10 members actually want to use kiosks, and that
11 will necessarily swamp any common issues, as the
12 D.C. and First Circuits correctly held in the
13 Rail Freight and Asacol cases.

14 Plaintiff's only response is to say
15 that courts should assess the merits first and
16 jurisdiction second. But that makes no sense.
17 What if they lose on the merits? Either the
18 unnamed class members are bound by a judgment
19 regardless of whether the court had Article III
20 jurisdiction over it, or the court has to
21 determine if it had jurisdiction over each
22 plaintiff in the first place. And that's why
23 courts have to address the jurisdiction before
24 the merits, just like in every other case.

25 Plaintiff's rule, in contrast, assumes

1 either they win or coerce a settlement, but
2 there's no basis for that "heads I win, tails
3 you lose" approach to Article III.

4 I welcome your questions.

5 JUSTICE THOMAS: The -- in this case,
6 there have been a number of orders, and it seems
7 as though the one that we have before us is the
8 May order, which is inoperative. Would you
9 spend a minute on why we still -- we have
10 jurisdiction over the May order when there have
11 been subsequent orders?

12 MR. FRANCISCO: Sure, Your Honor. For
13 a variety of reasons. I think the simplest way
14 to understand it is that the Ninth Circuit
15 resolved the question presented in this case,
16 affirmed the certification of a class against
17 us. It just got it wrong. You have
18 jurisdiction to review that judgment.

19 Now I can unpack that a little bit
20 more. Everybody here agrees that the May order
21 is before the Court. The August order didn't
22 change the May order in any material way.
23 That's what the district court explicitly found.
24 That's what Plaintiffs argued to the district
25 court below.

1 That's why we couldn't have actually
2 appealed the August order even if we wanted to.
3 It would have been barred by 23(f)'s 14-day
4 statute of limitations.

5 And I think, more importantly, that is
6 precisely why the Ninth Circuit resolved the
7 question presented in the context of the May
8 order. It issued a judgment. That judgment
9 went against us. It had reasoning. We think
10 that reasoning is wrong.

11 This Court has the jurisdiction to
12 address that judgment, reverse it, and send it
13 back --

14 JUSTICE SOTOMAYOR: Counsel --

15 MR. FRANCISCO: -- to the Ninth
16 Circuit.

17 JUSTICE SOTOMAYOR: -- you're --
18 you're skipping a lot of steps in there. The
19 May order is before us, but it's inoperative.
20 The August order superseded it and replaced it.

21 That's what the Ninth Circuit said.
22 When it reached the May order, it said you
23 didn't move to amend your notice of appeal.
24 We're basing this on the May order. We're not
25 may -- basing it on the August order because you

1 didn't move to amend.

2 Isn't us looking at the May order --
3 that's not the operative language right now.
4 Isn't it an advisory opinion?

5 MR. FRANCISCO: Not at all,
6 Your Honor, for a couple of different reasons.

7 JUSTICE SOTOMAYOR: Well, you started
8 by saying they're identical. I don't see them
9 as identical. I see the two having very
10 distinct differences. The first one is someone
11 who's been denied the benefit of the existence
12 of the kiosk. The second one is someone who, in
13 my judgment, wanted to use the kiosk and
14 couldn't.

15 Now you say the district court said
16 they were identical. But the Ninth Circuit
17 didn't say that.

18 MR. FRANCISCO: Well -- well,
19 Your Honor, a couple of responses.

20 First, the district court explicitly
21 said twice in refining --

22 JUSTICE SOTOMAYOR: I just said it's
23 not -- we're -- we don't -- we're not looking at
24 what the district court said. We -- we have to
25 look at what the Ninth Circuit said, and it said

1 the August order is not before it.

2 MR. FRANCISCO: That's not true,
3 Your Honor. What the Ninth Circuit said was
4 that the August order isn't before it for
5 purposes of an argument that we made
6 specifically with respect to the August order on
7 failsafe classes.

8 The Ninth Circuit actually addressed
9 the question presented --

10 JUSTICE SOTOMAYOR: Ah, that's the --

11 MR. FRANCISCO: -- under the May
12 order, and it did so precisely because the
13 district court repeatedly said that the August
14 order did not materially change the May order.

15 JUSTICE SOTOMAYOR: That's not what --

16 MR. FRANCISCO: Oh, that's -- I think
17 that's quite clearly what it did.

18 JUSTICE SOTOMAYOR: Well --

19 MR. FRANCISCO: I think another way to
20 understand it, though, is that what the district
21 court technically did was that it amended the
22 May order. That's what the June order and the
23 August order say. We're amending the May --

24 JUSTICE SOTOMAYOR: And the Ninth
25 Circuit --

1 MR. FRANCISCO: -- order.

2 JUSTICE SOTOMAYOR: And the Ninth
3 Circuit said you should have amended your notice
4 of appeal.

5 MR. FRANCISCO: Only with respect to
6 the failsafe class issue --

7 JUSTICE SOTOMAYOR: Ah.

8 MR. FRANCISCO: -- specifically.

9 JUSTICE SOTOMAYOR: Counsel, you're --
10 I still don't see how this is not an advisory
11 opinion.

12 MR. FRANCISCO: Well, Your Honor, I
13 think it's --

14 JUSTICE SOTOMAYOR: If the August
15 order is not before us, whether the Ninth
16 Circuit was right or not in not granting you a
17 right to appeal when you didn't ask for it, it's
18 still not before us.

19 MR. FRANCISCO: Yeah, I just think I
20 fundamentally disagree with that, Your Honor.
21 The Ninth Circuit actually addressed the
22 question in the context of the May order
23 precisely because the August order didn't
24 materially change it, as the district court said
25 twice and as they agreed.

1 JUSTICE KAGAN: But, Mr. Francisco --

2 MR. FRANCISCO: And in it --

3 JUSTICE KAGAN: -- it -- I mean, it
4 does seem to have materially changed it, and it
5 seems to have materially changed it along the
6 lines of precisely what you're arguing about.
7 In other words, one order has more uninjured
8 class members in it than the other order because
9 the first order basically said everybody who's
10 injured by the ADA.

11 And your whole objection to the second
12 order is that it doesn't any longer say that.
13 It just says, like, anybody who came into an
14 office regardless whether that person wanted to
15 use --

16 MR. FRANCISCO: Right.

17 JUSTICE KAGAN: -- the kiosk or not.
18 So, in the very way that you're saying the
19 orders got problematically -- you know, that the
20 August order was problematically expansive, that
21 kind of shows you the difference between the May
22 order, which was confined to people who had ADA
23 injuries, and the August order.

24 So it's not just that we're kind of
25 staring at the wrong order. We're staring at

1 the wrong order which is different in exactly
2 the way that your arguments want to talk about.

3 MR. FRANCISCO: Well, I -- I very much
4 disagree with that, Your Honor, because
5 everybody understood that the May order, the
6 original order, actually included anybody who
7 simply walked into a kiosk, but it --

8 JUSTICE GORSUCH: Well, that's not
9 what it says. It -- it's got the failsafe
10 language, which you're not supposed to put in.
11 You pointed that out. The district court took
12 it out. But you're saying you can't have a
13 class with -- unless everybody's injured for
14 Article III purposes. But, by definition, the
15 May order, improperly, had just such language.

16 MR. FRANCISCO: Your Honor, the -- I
17 think that the May order and the August order
18 meant the same thing. If we start out with the
19 May --

20 JUSTICE GORSUCH: Well, they don't say
21 the same thing.

22 MR. FRANCISCO: Well, let's start out
23 with the May order.

24 JUSTICE GORSUCH: One -- one has a
25 failsafe and the other doesn't --

1 MR. FRANCISCO: Sure, Your Honor.

2 JUSTICE GORSUCH: -- right?

3 MR. FRANCISCO: But, when it comes to
4 defining what the scope of the class is, here's
5 what my friends told the district court with
6 respect to the May order, the original order:
7 Standing is -- is established for all legally
8 blind Californians who visited one of the 280
9 PSCs, one of the kiosks.

10 JUSTICE GORSUCH: That's nice that
11 they said that, but that's not the class that
12 the district court certified in May.

13 MR. FRANCISCO: Respectfully,
14 Your Honor, it is because the reason why they
15 said it included everybody that just walked into
16 a kiosk is because their understanding of that
17 definition, which the district court effectively
18 adopted, was that anybody who was a patient at
19 the facility and who happened to be blind was
20 within the class. That's why the district court
21 specifically said I think a couple of times it
22 would be very easy to figure out who was in this
23 class.

24 JUSTICE GORSUCH: So we just should
25 overlook the failsafe language in the May order

1 then? Is that what you're asking us to do?

2 MR. FRANCISCO: No, Your Honor. What
3 I'm saying is the failsafe issue is no longer
4 before the Court. That's the issue the Ninth
5 Circuit declined to resolve.

6 The issue that is before the Court is
7 the issue that the Ninth Circuit did resolve.
8 What the Ninth Circuit said is that it doesn't
9 matter on that issue whether the class includes
10 people who haven't been injured because, under
11 Ninth Circuit precedent, all you need is a named
12 plaintiff with an injury and it doesn't matter
13 if there are other people who aren't injured.

14 JUSTICE BARRETT: I --

15 JUSTICE KAGAN: I mean, even --

16 JUSTICE BARRETT: -- I understand --
17 oh -- I understand how that principle could
18 apply elsewhere, but why don't you give us the
19 framework for understanding this, because
20 Justice Gorsuch is right. The language in the
21 August order is different from that of the May
22 order. You know, there's a bigger difference
23 there than there is between May and June.

24 So how are we supposed to figure it
25 out? Are we supposed to look at it and say this

1 language is different? Are we looking at it and
2 saying, well, the principle that the Ninth
3 Circuit addresses in that footnote is the same?

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE BARRETT: I mean, how do you
6 decide which is the operative order?

7 MR. FRANCISCO: So I think you can
8 come at it in a couple of different ways. I
9 think the simplest way is to say that the Ninth
10 Circuit issued a judgment that certified a
11 class. It adopted a legal rule that said it
12 doesn't matter if there are any uninjured people
13 in that class. You can correct that error to
14 the extent you think it was wrong and send it
15 back for the Ninth Circuit to figure it out
16 after that.

17 I also think you can get into it in a
18 much more granular fashion. Here -- here, the
19 district court, which usually gets discretion
20 over the interpretation of the scope of its own
21 orders, the district court said that the August
22 order and the May order meant the exact same
23 thing when it --

24 JUSTICE KAGAN: So I think the
25 district court --

1 MR. FRANCISCO: -- comes to the scope
2 of the --

3 JUSTICE KAGAN: I think -- I'm sorry
4 if I interrupted you.

5 MR. FRANCISCO: Yeah, I -- I -- I was
6 just trying to finish my answer to just --

7 JUSTICE KAGAN: Go ahead.

8 MR. FRANCISCO: -- to Justice
9 Barrett's --

10 JUSTICE KAGAN: Sorry.

11 MR. FRANCISCO: -- question.

12 If the district court is right that
13 the August order and the May order actually
14 meant the same thing and if the district court
15 is right that all you had to do was -- to
16 establish the size of the class for either order
17 was to simply ask are these people patients of
18 Labcorp and are they blind, which is what the
19 district court said, then, at that granular
20 level, it's quite clear that, as the plaintiffs
21 repeatedly argue, the district court actually
22 adopted their view that anybody who had simply
23 walked into the kiosk was injured.

24 JUSTICE KAGAN: So I guess what,
25 though --

1 MR. FRANCISCO: That was also the
2 position that we took in our -- in our
3 alternative argument in --

4 JUSTICE KAGAN: I guess the reason I
5 keep on interrupting you is because you keep on
6 saying what the district court said. And I -- I
7 think it's at least -- I think the district
8 court said many things. I mean, it's -- it's --
9 I'll grant you that the district court was a
10 little bit unclear, but the district court also
11 took the opposite position. I mean, this is the
12 way the district court characterized the May
13 class, is "legally blind class members who
14 attempted to or were discouraged from using
15 Labcorp's kiosks." And that's a -- a quote.

16 And what the district court was
17 clearly saying there was people who wanted to
18 use the kiosk, who went up to the kiosk, who
19 couldn't use the kiosk. And, again, that's the
20 exact distinction that you are making, is as
21 between those people and people who walked into
22 the facilities but never wanted to use the
23 kiosk.

24 So I think that the district court
25 understood its own order at least sometimes as

1 going to a narrower set of people.

2 MR. FRANCISCO: Well, Your Honor, I
3 think that the district court and the Ninth
4 Circuit's opinions weren't models of clarity,
5 but one thing was crystal-clear in the Ninth
6 Circuit. The -- and the district court. It
7 certified a class based on a rule that it
8 doesn't matter if there are uninjured people in
9 the class. That's what the district court said.
10 That's what the Ninth Circuit specifically said
11 in affirming the district court's ruling.

12 At a bare minimum, that Ninth Circuit
13 judgment is before you and the rule that the
14 Ninth Circuit adopted. That's, I think, why you
15 granted --

16 JUSTICE SOTOMAYOR: But it's not an
17 operative judgment.

18 MR. FRANCISCO: -- certiorari in this
19 case.

20 JUSTICE JACKSON: Mr. --

21 JUSTICE SOTOMAYOR: But it's not an
22 operative judgment. You're asking us to opine
23 on the May 9 order that's been superseded by
24 another one.

25 JUSTICE JACKSON: And can I just point

1 out, Mr. Francisco, that I guess I'm trying to
2 understand your responsibility -- by "you," I
3 mean your -- your client's responsibility -- for
4 the confusion that we are in right now. This is
5 sort of what Justice Kagan is pointing to.

6 I -- I understood that your client
7 argued that the May class definition was too
8 narrow. You said it was improper because it was
9 a failsafe class. And, as a result, the
10 district court revisited it. And, today, you're
11 saying it's improper or problematic because it's
12 too broad. You know, it's too broad because it
13 now includes uninjured people, whereas, before,
14 it -- it contained only injured people.

15 And so I'm wondering if some element
16 of estoppel isn't working here in the sense that
17 you've taken opposite positions about what the
18 problem is with respect to this class.

19 MR. FRANCISCO: Not even close,
20 Your Honor. I think we addressed this fully in
21 the letter that we just filed. We made
22 alternative arguments in the Ninth Circuit. We
23 argued it was a failsafe, and then we
24 alternatively argued -- this is Section 3a
25 header -- District court manifestly erred in

1 failing to consider evidence that many Rule
2 23(b)(3) damages class members would lack
3 standing to proceed. We then explain that at
4 length in the brief, as we quote in our letter.

5 JUSTICE JACKSON: Would lack standing
6 because -- because the May class, which was only
7 injured people, was what?

8 MR. FRANCISCO: No, because the May
9 class -- this is what we said --

10 JUSTICE JACKSON: Yeah.

11 MR. FRANCISCO: -- with respect to the
12 May class.

13 JUSTICE JACKSON: Yeah.

14 MR. FRANCISCO: Page 16 --

15 JUSTICE JACKSON: Yeah.

16 MR. FRANCISCO: -- of our 23(f) brief.
17 There is no evidence that the certified class
18 contains a majority of persons or even a
19 substantial number of persons with Article III
20 standing.

21 On the other hand, there is undisputed
22 record evidence that around 25 percent of all
23 LabCorp visitors choose to check in at the front
24 desk and thus could not have suffered the injury
25 required, essentially, the same argument that

1 we're making here. It was an alternative
2 argument. We lay this out very carefully in the
3 letter that we just filed.

4 Their assertion that we only raised
5 issues with respect to the named plaintiff is
6 wrong. We specifically raised the argument that
7 we're presenting here. I think, more
8 importantly, that is the argument that the
9 district court rejected. That is the argument
10 that the Ninth Circuit rejected. And that is
11 the judgment that is before you today.

12 I don't think it matters whether it's
13 the May order or the August order because the
14 August order --

15 JUSTICE JACKSON: All right. So why
16 don't you tell us why -- why -- why are -- why
17 is this wrong? Why are they wrong about it? I
18 mean, just going to your Article III standing
19 point --

20 MR. FRANCISCO: Mm-hmm.

21 JUSTICE JACKSON: -- I appreciate the
22 assertion that class actions are a species of
23 joinder. But the absent class members are not
24 participating. That's why they're absent.
25 They're not parties in the traditional sense.

1 So it seems odd to me that in a class
2 situation where most of the time you don't even
3 know who these people are, that's why you have
4 the class mechanism operating, you would say
5 that there has to be some showing with respect
6 to individual injury at the threshold in this
7 way.

8 MR. FRANCISCO: Sure, and there are a
9 few responses, Your Honor. I think the first
10 one is that their claims are before the Court.
11 That's why, if the named plaintiff drops out
12 because his claim becomes moot, the class action
13 continues to proceed on the back of the live
14 claims that are brought into a class action.

15 JUSTICE JACKSON: But those claims are
16 supported by the standing of the -- the
17 plaintiff who is named, and that's --

18 MR. FRANCISCO: Not if the named
19 plaintiff's case becomes moot. Then --

20 JUSTICE JACKSON: No, but I'm not
21 talking --

22 MR. FRANCISCO: -- it's only the
23 underlying claims.

24 JUSTICE JACKSON: -- about mootness.
25 I'm just talking about standing principles.

1 Ordinarily, even if you had the names of every
2 person or you knew all of the participants, only
3 one person needs to satisfy the standing
4 criteria in order to invoke the jurisdiction of
5 the Court.

6 And so it seems a little at least
7 discordant to suggest that in a class action
8 situation, we have to figure out whether all of
9 the unnamed class people, class members, have
10 standing.

11 MR. FRANCISCO: I -- I think that's
12 wrong, and I think it's directly contrary to
13 Laroe.

14 But what I would also say is that I
15 think that they could actually solve the Article
16 III aspect of this relatively easily. They
17 could simply redefine this class so that it is
18 limited to people who say, at a minimum, want to
19 use the kiosk.

20 They might need more, but, at a
21 minimum, want to use the kiosk, but that would
22 just walk them straight into the Rule 23(b)(3)
23 issue because the only way to figure out the
24 answer to that question is by having tens of
25 thousands of mini-trials.

1 That's why their response really does
2 boil down to let's just deal with jurisdiction
3 at the end and we can deal with merits at the
4 beginning.

5 JUSTICE SOTOMAYOR: Counsel, in every
6 class action, what you're defining as a
7 mini-trial is what happens with respect to
8 getting damages, meaning, in every class action,
9 a legal principle of liability is found, and
10 then a mechanism is used to establish people
11 coming in with their proof of injury.

12 So it -- that can't -- doesn't defeat
13 class action. So I think the question is: Is
14 there an identifiable way to identify who's
15 going to be a member of this class? Is there a
16 mechanism that doesn't overwhelm the common
17 questions?

18 So, as I said, you're not going to
19 have a class action if your definition is are
20 you going to have a thousand mini-trials. Every
21 claim of damage is a thousand mini-trials.

22 Is the mechanism manageable? That's
23 the predominance question. And that's what they
24 have to prove, which is, in my mind -- and I'm
25 not sure the Court below did this -- will the --

1 is there an identifiable mechanism that can
2 identify who's part of this class.

3 MR. FRANCISCO: May I?

4 CHIEF JUSTICE ROBERTS: Certainly.

5 MR. FRANCISCO: And the mechanism has
6 to be one that protects the defendant's rights.

7 Also, the other thing I would point to
8 is that, unlike damages, which come at the end
9 of the case --

10 JUSTICE SOTOMAYOR: No, your right is
11 not to have uninjured class members paid, and we
12 still have --

13 MR. FRANCISCO: That -- that --

14 JUSTICE SOTOMAYOR: -- mechanisms that
15 decide whether they've proven their -- their
16 entitlement to a specific amount.

17 MR. FRANCISCO: That might be the
18 right of damages. That's not the right of
19 threshold --

20 JUSTICE SOTOMAYOR: Well, that's
21 how -- that's how --

22 MR. FRANCISCO: -- the threshold
23 question of jurisdiction.

24 JUSTICE SOTOMAYOR: -- that's how
25 Tyson Foods looked at this. It upheld the

1 class-wide damages award and rejected the
2 argument that the class should not have been
3 certified, notwithstanding the fact that it was
4 undisputed that the class contained hundreds of
5 uninjured individuals.

6 The Court recognized that the Article
7 III question of whether uninjured class members
8 may recover is one of great importance, but it's
9 not -- it wasn't -- didn't view it as fairly
10 presented by the case because the damage award
11 had not been disbursed, nor the record indicate
12 how it would be disbursed.

13 In other words, you go -- Article III
14 requires standing one -- by one plaintiff to get
15 the jurisdiction of the court. Rule 23 requires
16 that the common issues -- not all of them, just
17 some of them -- be sufficiently predominate, and
18 then the Court can break off whatever it needs
19 to break off.

20 MR. FRANCISCO: And I think that is
21 not a -- a proper reading of Tyson Foods. In
22 Tyson Foods, the issue didn't even arise until
23 the case went to the jury and it rejected part
24 of the damage expert of the plaintiff.

25 But, if you think about what

1 happens --

2 JUSTICE SOTOMAYOR: I'm quoting
3 Tyson --

4 MR. FRANCISCO: If you think about
5 what happens under a rule that says we do merits
6 first and jurisdiction second, again, ask
7 yourself, what if a court certifies an overly
8 broad class, then rules against that class on
9 the merits.

10 The ordinary rule is that that binds
11 the entire class. Well, that's not necessarily
12 true. I think it's clearly not true if the
13 class includes people over whom the court didn't
14 have jurisdiction in the first place.

15 So it basically means you're going to
16 have to adopt a rule that either binds a class
17 over whom you didn't have jurisdiction,
18 obviously wrong, or, after the fact, you're
19 going to have to go through each plaintiff and
20 decide whether or not you had jurisdiction over
21 them in the first place.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Is there wiggle room in your theory?
25 I mean, let's say you have a class that's

1 roughly 5,000 people. Is it the -- no good if
2 there -- there may be 10 people who don't
3 qualify or 20 people?

4 MR. FRANCISCO: I think --

5 CHIEF JUSTICE ROBERTS: What -- what's
6 the margin of error?

7 MR. FRANCISCO: Sure. I think it's
8 less of a numerical question and more what Judge
9 Katsas said in the Railway case and what Judge
10 Kayatta said in the Asacol case.

11 If they define the class at the front
12 end such that it doesn't distinguish between
13 whether or not people were injured and the only
14 way you can separate out the injured and the
15 uninjured consistent with protecting the
16 defendant's rights is by conducting, you know,
17 thousands of mini-trials, that's necessarily
18 going to swamp any common issues because that is
19 a threshold question that always has to be
20 resolved before you reach the merits.

21 I think this Court's decisions in
22 Halliburton and Amgen actually provide very good
23 illustrations of this. What you said in those
24 two cases was that if the fraud on the market
25 theory failed in a way that would have required

1 individual reliance determinations, that
2 necessarily would have precluded class
3 certification because it would have swamped any
4 common issues.

5 Well, this is that in spades. Here,
6 we're talking about a threshold jurisdictional
7 claim that is in federal court an element of
8 every cause of action that is brought before the
9 federal judiciary that has to be resolved before
10 the court reaches the merits, not afterwards.

11 And, here, if there isn't an
12 administrable way to separate the wheat from the
13 chaff consistent with protecting the defendant's
14 rights, it's necessarily going to devolve into
15 those mini-trials.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: You've probably
20 covered this at some point, but could you just
21 spend a minute on why the May class definition
22 includes so many uninjured --

23 MR. FRANCISCO: Sure. It's because --

24 JUSTICE THOMAS: -- participants?

25 MR. FRANCISCO: -- the way the May

1 class reads is it says anybody who -- you know,
2 it kind of parrots the language of the statute.

3 But their understanding of the
4 language of the statute that the district court
5 adopted was that that includes anybody who
6 walked into the facility. Again, this is what
7 they said, my friends said, in their brief to
8 the Ninth Circuit when we were all talking about
9 the May definition. They said that standing is
10 established for all legally blind Californians
11 who visited one of the 280 facilities that
12 featured a kiosk.

13 They then explained that the way that
14 you identify who's in that class is by simply
15 looking at LabCorp records that show who
16 visited, who were their patients, and you match
17 that up to other medical records that show who
18 was blind.

19 The district court adopted that, and
20 we know that for two reasons. We know that,
21 one, because the district court defied -- said
22 that that's exactly how it would resolve --
23 define who was in the class, and two, because it
24 adopted the August definition that clearly does
25 that and then told everybody that that August

1 definition meant the exact same thing as the May
2 definition. That's why, Your Honor, we actually
3 could not have appealed the August order if we
4 wanted to. The binding rule in the Ninth
5 Circuit is that if a subsequent certification
6 order makes immaterial changes to a prior
7 certification order, the 14-day statute of
8 limitations runs off of the prior order, not the
9 subsequent one. The district court, having
10 squarely held that the August order was not
11 materially different than the May order, it
12 would have precluded us from appealing the
13 August order and left us stuck with the May
14 order.

15 The reason none of this mattered is
16 because everybody that the two orders meant the
17 exact same thing. To the extent there was any
18 daylight, the district court went further and
19 said the August order is simply amending the
20 text of the May order. That's why, while the
21 Ninth Circuit said I'm not going to address any
22 issues that pertain only to the August order,
23 and that was failsafe issue, it argued -- it
24 claimed, I think erroneously, but it claimed
25 that our failsafe argument pertained only to the

1 August order, but the Ninth Circuit did address
2 the very question that we've asked this Court to
3 resolve. It just got it wrong. It resolved it
4 against us.

5 That's the decision that's before you.
6 You clearly have certiorari jurisdiction over
7 that decision for the reasons that my friend in
8 the previous case very well articulated when he
9 was standing up here.

10 JUSTICE THOMAS: At what point does
11 the uninjured -- having uninjured plaintiffs
12 in -- in the class present a problem for Rule 23
13 or for Article III?

14 MR. FRANCISCO: Sure. So I'll take
15 them in order.

16 I think, for Article III, if the class
17 on its face is defined such that it clearly
18 sweeps in uninjured people, I think that you
19 can't certify that class. You got to tell them
20 to redefine the class so that it's limited to
21 people over whom there's jurisdiction.

22 Again, I think that can be solved
23 relatively easily in a case like this by simply
24 redefining the class to include, you know, at a
25 minimum, people who wanted to use the kiosk.

1 The problem with that is it walks you straight
2 into the Rule 23(b)(3) issue where the question
3 is, when you've got an overly broad class
4 definition, is there a way that you can sever
5 out -- separate out the injured and uninjured in
6 an administrable way.

7 I can give you an example that
8 illustrates it. Take the TransUnion case. In
9 TransUnion, you had a couple of thousand out of
10 6,000 plaintiffs whose credit reports actually
11 were disseminated to third parties. If they had
12 come in as they originally did and said the
13 class includes everybody who's -- for whom there
14 was a violation, a class of 6,000 people, that
15 would be an overbroad class and I don't think
16 you could certify it.

17 But what you could say to them is you
18 need to redefine the class. Redefine the class
19 to include only those individuals whose credit
20 reports were disseminated to third parties.
21 Then you'd have a class that's defined to
22 include only people who suffered an Article III
23 injury. It would satisfy the Article III issue.

24 You then have to move to the 23(b)(3)
25 issue and ask is there an easy way to separate

1 the wheat from the chaff. In that case, there
2 probably would have been. You probably could
3 have just look at TransUnion's records to
4 separate the wheat from the chaff.

5 But, in lots of cases, there is no
6 easy way. That was Judge Katsas's opinion in
7 Railway, Judge Kayatta's opinion in Asacol and
8 this case because, in this case, the only way
9 that you can determine whether, at a minimum,
10 somebody even wanted to use one of those kiosks
11 is by putting that person on the stand. It's --
12 it's obviously -- it's, after all, quite obvious
13 that there are many people in this world who
14 don't like to use kiosks.

15 I happen to be one of them. If
16 Labcorp adopted a policy that said that
17 five-foot-eight overweight Filipino American men
18 have to use the front desk and not the kiosk, I
19 would say hallelujah. That might violate
20 somebody's rights. It doesn't violate my
21 rights. And the only way to figure out -- that
22 out in this case is through doing the thousands
23 of mini-trials.

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Alito, anything further?

3 JUSTICE ALITO: Yeah, a few questions.

4 I'm troubled by the Ninth Circuit's rule that a
5 new notice of appeal must be filed or a prior
6 notice of appeal must be amended if the district
7 court, while a class certification appeal is
8 pending in the court of appeals, makes a
9 material change in the class certification but,
10 presumably, not if the district court makes an
11 immaterial change.

12 And that's what we've been -- we've
13 spent most of the argument this morning on that
14 issue. But whether someone has to file a notice
15 of appeal is supposed to be clear, and that is
16 such an unclear rule.

17 I'm wondering whether that's the root
18 of the problem that we've been discussing. But
19 you -- you seem to accept the proposition that
20 we should view this matter through the lens of
21 this Ninth Circuit rule about what needs to be
22 done.

23 MR. FRANCISCO: Well, Your Honor, I --
24 I don't necessarily accept the premise, and I
25 think that might be another way to go about it.

1 But what I do think is that the -- two
2 things. One, the Ninth Circuit squarely
3 addressed this question, and the reason it
4 squarely addressed this question was because,
5 under the rules that the Ninth Circuit applies,
6 this issue was squarely before it. The May
7 order, the May order was before it. The Ninth
8 Circuit and the district court repeatedly made
9 clear the August order didn't materially change
10 anything. That meant both of them presented the
11 exact same issue. That again is why the Ninth
12 Circuit said I'm not going to address an issue
13 that pertains only to the August order, and it
14 didn't. It refused to address that.

15 But it did say I am going to address
16 an issue that relates to the May order because,
17 on that issue, there is no difference between
18 the May order and the August order. They
19 present the same thing.

20 I think, though, that the way you cut
21 through all of this is you recognize that this
22 Court is a court of review. It's reviewing the
23 Ninth Circuit's decision. The Ninth Circuit
24 entered a judgment against us in which it
25 adopted a legal rule. That legal rule in our

1 view is wrong. And you have jurisdiction under
2 the certiorari statute to say whether or not the
3 rule that the Ninth Circuit adopted is wrong.

4 JUSTICE ALITO: Well, the rule -- the
5 rule for filing a notice of appeal, when a
6 district court keeps changing its class
7 certifications, could be you always have to file
8 a new notice of appeal or you always have to
9 amend. All right --

10 MR. FRANCISCO: Mm-hmm.

11 JUSTICE ALITO: -- it's a pain, but
12 that's what you have to do. Everybody could --
13 would understand it, so everybody could comply.
14 The rule could be, no, you never have to do
15 that. Once there's a certification, the case is
16 in the court of appeals. If the district court
17 can't make up its mind or it gets worried about
18 the fact that -- about the possibility it's
19 going to be reversed on appeal, well, that's too
20 bad. The -- whatever the -- the latest
21 certification order is before the court of
22 appeals, unless the court of appeals chooses as
23 a matter of discretion to dismiss the appeal.

24 Either of those would be clear. But
25 what we have in the Ninth Circuit is something

1 that is utterly unclear, drawing a distinction
2 between a material change and an immaterial
3 change.

4 MR. FRANCISCO: I -- I think that is a
5 fair general criticism. I, though, think that
6 in the application of this case, it's quite easy
7 because, here, the rule is you can't appeal if
8 there is an immaterial change. You're stuck
9 with the original order. And, here, we have the
10 district court saying twice in the very orders
11 themselves this is not an immaterial change. It
12 could not have been clearer in stating that and
13 therefore making clear to us that the only
14 avenue was to challenge the May order.

15 I also think that that makes sense in
16 the context of this case because my friends on
17 the other side repeatedly told the court that
18 the May order encompassed anyone who had simply
19 walked into a kiosk. Then, when they sought to
20 amend -- add -- have the new August order
21 implemented -- we didn't ask for the August
22 order. They asked for the August order. When
23 they asked for the new August order, they again
24 told the district court this is just a
25 housekeeping function, it's not going to change

1 the scope of the class.

2 JUSTICE ALITO: All right. Thank --
3 Thank you. One --

4 MR. FRANCISCO: So everybody agreed
5 they were the same.

6 JUSTICE ALITO: One question on the
7 merits.

8 This Court has said that non-named
9 parties are parties for some purposes but not
10 for other purposes. And I know you want us to
11 hold that they must be parties for Article III
12 purposes. But, if you step back, do you have --
13 can you offer any sort of general rule for
14 determining when they must be regarded as
15 parties and when they --

16 MR. FRANCISCO: Sure.

17 JUSTICE ALITO: -- they need not?

18 MR. FRANCISCO: I think my basic
19 answer is I -- I don't think that it really
20 matters because what you're adding are claims to
21 the case. Whether you're adding parties or not,
22 their claims are clearly being added to the
23 case, and you're being asked to adjudicate those
24 claims. And I think that's really what you were
25 getting at in the Laroe case, Your Honor, when

1 you said that anytime you add a new claim to the
2 case, you have to have Article III jurisdiction
3 over that claim.

4 And it goes back to the exchange I was
5 having earlier where, if the named plaintiff's
6 case becomes moot and that plaintiff drops out
7 as a party, a class action continues to proceed
8 if there are claims from absent class members
9 over whom the court has Article III
10 jurisdiction.

11 JUSTICE ALITO: All right. Thank you.

12 MR. FRANCISCO: That's the critical
13 issue.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Anything
16 further, Justice Sotomayor?

17 JUSTICE SOTOMAYOR: Counsel, I -- I --
18 I'm having -- I'd like -- I want to follow up on
19 on your answer to Justice Alito. When does a
20 party become -- when does a party become a part
21 of a litigation.

22 I always thought it was at the time
23 the class was certified, which is not at the
24 time where -- where the judgment is entered. I
25 didn't think they became parties until the

1 judgment is entered in a class action.

2 MR. FRANCISCO: I think their claims
3 are clearly added the moment the class is
4 certified. That's why --

5 JUSTICE SOTOMAYOR: The claim -- the
6 claim, yes, but not them as parties.

7 MR. FRANCISCO: Well, I -- I -- I --

8 JUSTICE SOTOMAYOR: So I'm not quite
9 sure how you -- why they have to -- they have to
10 prove that they are injured or uninjured.

11 MR. FRANCISCO: So I'll give you two
12 answers.

13 The first is I think just as a
14 technical, formal matter, when the claims are
15 added at certification, you have to have
16 jurisdiction over those claims.

17 The practical answer is the one that I
18 think I -- I've already given, which is, what if
19 the class is certified, all the claims are
20 added, and the Court then rules against the
21 class?

22 JUSTICE SOTOMAYOR: All right. But
23 you said earlier --

24 MR. FRANCISCO: The rule is the whole
25 class is bound.

1 JUSTICE SOTOMAYOR: Counsel, you said
2 earlier -- yes, but it's not bound until the
3 class is certified. And between -- until
4 judgment is entered. The way class actions
5 happen, the -- they get amended constantly
6 during the proceeding.

7 MR. FRANCISCO: Sure.

8 JUSTICE SOTOMAYOR: Sometimes some
9 claims are dropped altogether. They're altered.
10 The whole process is fluid as problems
11 start arising. And it's not until the class --
12 until the judgment is entered that you have to
13 determine whether there's an administrable way
14 to identify -- I'm using your own words -- to
15 identify who's been injured or not.

16 MR. FRANCISCO: So say -- say the --

17 JUSTICE SOTOMAYOR: So you're saying,
18 instead, we've got to do it immediately.

19 MR. FRANCISCO: No --

20 JUSTICE SOTOMAYOR: They're saying it
21 has -- the Court below said it has to be done.

22 MR. FRANCISCO: What -- what -- what
23 I'm saying is that you need to always address
24 jurisdiction before you adjudicate the merits of
25 a claim. That's what this Court --

1 JUSTICE SOTOMAYOR: Well, but we have
2 jurisdiction. We have some people, the named
3 plaintiffs, who wanted to use this kiosk. They
4 are clearly a part of that class.

5 Now the question becomes, in naming
6 that class, will there be people who are blind
7 who didn't want to use it. And they have to
8 show that there's an administrable way to
9 identify the difference between those people and
10 themselves.

11 MR. FRANCISCO: So, Your Honor, let's
12 assume --

13 JUSTICE SOTOMAYOR: I think that's a
14 Rule 23 question.

15 MR. FRANCISCO: -- let's assume for
16 the sake of argument that people who don't want
17 to use kiosks don't have standing to challenge
18 kiosks. And let's further assume that we've got
19 a class here that includes both groups of
20 people.

21 JUSTICE SOTOMAYOR: Well, but that's
22 going to be the legal fight, by the way.

23 MR. FRANCISCO: No, I get that, which
24 is why I'm just stipulating --

25 JUSTICE SOTOMAYOR: And I'm asking why

1 do it immediately at class certification stage.

2 There is an argument that if I'm
3 blind, the benefit that the statute gives me is
4 like the standing question we faced with the ADA
5 person who was calling hotels. And all she said
6 is I want -- I want to walk in there. I may
7 want to use it. We didn't require her to use
8 it. All she had to say was I may want to use
9 it.

10 They're saying the same thing: If I'm
11 blind and I walk in, I'm being denied the
12 choice.

13 MR. FRANCISCO: And that's --

14 JUSTICE SOTOMAYOR: I don't know if
15 that will hold up for injury.

16 MR. FRANCISCO: Sure.

17 JUSTICE SOTOMAYOR: But the question
18 is: Why are we facing that question at class
19 certification?

20 MR. FRANCISCO: And that's the
21 question I want answered, because I think what
22 your question really is doing is joining the
23 issue --

24 JUSTICE SOTOMAYOR: No. I --

25 MR. FRANCISCO: -- and an issue that

1 needs to be --

2 JUSTICE SOTOMAYOR: -- think --

3 MR. FRANCISCO: -- resolved. And,

4 here --

5 JUSTICE SOTOMAYOR: I think -- I think

6 the question -- I think --

7 MR. FRANCISCO: -- if the class --

8 JUSTICE SOTOMAYOR: Mr. Francisco,

9 hear me out. I think the question only becomes

10 pertinent when you're trying to give a damage

11 award to anyone.

12 MR. FRANCISCO: And that's where I

13 fundamentally disagree with you, because that's

14 only true if they win.

15 If they lose, if the class is

16 certified and they lose, the entire class is

17 bound by that adverse judgment.

18 So, if you have certified --

19 JUSTICE SOTOMAYOR: Well, it depends

20 on what ground they lose.

21 MR. FRANCISCO: Let's say they just

22 lose across the board on the merits on a motion

23 to dismiss. That binds the entire class.

24 So, if you have certified a class that

25 includes uninjured people and the class loses

1 across the board, the general rule is the entire
2 class is bound. But that can't be the case if
3 you didn't have jurisdiction in the first place,
4 which is why jurisdiction always, in every case,
5 precedes the merits. It doesn't follow the
6 merits.

7 That's my -- that's one of our
8 principal objections to their position. Your
9 position, Your Honor, as you just very well
10 articulated --

11 JUSTICE SOTOMAYOR: Well, but I --
12 I -- I guess --

13 MR. FRANCISCO: -- makes perfect sense
14 when they win --

15 JUSTICE SOTOMAYOR: Yeah, but
16 you're --

17 MR. FRANCISCO: -- but makes no sense
18 when they lose.

19 JUSTICE SOTOMAYOR: But you're still
20 saying it's a question of predominance and that
21 that's what has to be addressed. If there's an
22 administrable way to do it, then the class gets
23 certified. If there's not, then you can't.

24 MR. FRANCISCO: So I'm saying two
25 things. Under Article III, they've got to

1 define the class properly at the front end.

2 Under 23(b)(3), I'm not sure I
3 necessarily disagree with you, but you've got to
4 have an administrable way to separate the wheat
5 from the chaff before you address the merits,
6 not after you address the merits.

7 And if the only way to do that
8 consistent with protecting the defendants'
9 rights is thousands of mini-trials, that is
10 necessarily going to defeat predominance, just
11 like if the fraud on the market theory fails in
12 a way that requires individual issues of
13 reliance.

14 Again, the rule that we're asking for
15 under 23(b)(3) is the one that Judge Katsas
16 adopted in the D.C. Circuit and Judge Kayatta
17 adopted in the First Circuit.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: So I want to pick up
20 there and also go back to the Chief Justice's
21 question and make sure I understand what you're
22 saying, which is that the Article III question,
23 you're saying, in a case like this is not so
24 hard to solve, that it -- it's merely a matter
25 of taking it from all the people who walked into

1 the facilities to the people -- the blind people
2 who walked into the facilities and wanted to use
3 the kiosk.

4 And that's the key move to get you to
5 a place where it's not the Article III question
6 that's important but rather the predominance.
7 Is that right?

8 MR. FRANCISCO: With one insignificant
9 tweak for purposes of this. I don't know that
10 we would concede -- in fact, I know we wouldn't
11 concede that merely wanting to is good enough.
12 There -- I think there has to be a further
13 injury. But it doesn't really affect the --
14 the -- the force of your question, Your Honor.

15 JUSTICE KAGAN: Okay. Wanting to,
16 tried to, something like that.

17 MR. FRANCISCO: And -- and was
18 hindered in their ability to -- to -- to check
19 in.

20 JUSTICE KAGAN: Yeah. Okay. So --
21 okay. Then we can go back to the procedural
22 question again, which I don't want to do, but,
23 you know, but that does raise the procedural
24 question, is like isn't that exactly what the
25 May order said, and the problem was really the

1 August order, which was way wider than that, but
2 the May order seems on its face and at least in
3 some of the district courts' comments to be
4 exactly that.

5 MR. FRANCISCO: Except for when the
6 district court specifically addressed it, it
7 explicitly told us there's not an iota worth of
8 difference between the two orders when it comes
9 to the size of the class.

10 JUSTICE KAGAN: I -- I totally can see
11 that it does say that at some times. And then
12 it says at other times: I'm just talking about
13 people who tried to use the kiosk. So that's a
14 little bit of a mystery.

15 MR. FRANCISCO: But the one time it
16 specifically did address it, twice it said the
17 two orders are materially identical. That's --

18 JUSTICE KAGAN: Yeah, on --

19 MR. FRANCISCO: -- a quote.

20 JUSTICE KAGAN: -- its face, they're
21 so obviously not materially identical, but okay.
22 I -- I actually was going someplace else.

23 MR. FRANCISCO: Sure.

24 JUSTICE KAGAN: We'll leave that as
25 a -- a -- a question to be asked.

1 Okay. But -- but -- but that's the
2 full range of the Article I question you see,
3 and everything else, you're saying, really is a
4 predominance inquiry and is a matter -- and --
5 and I think you said it's not how many people.
6 It's -- it's just you have a mechanism for
7 easily separating the wheat from the chaff. Is
8 that correct?

9 MR. FRANCISCO: While protecting the
10 defendant's rights.

11 JUSTICE KAGAN: Yeah. Well, that is
12 what protects the defendant's rights, isn't it?
13 Is there something else that I'm missing?

14 MR. FRANCISCO: Well, you know, I
15 mean, there have been suggestions that you could
16 just do everything through affidavits and
17 deprive the defendants their right of -- of
18 contesting those affidavits through the crucible
19 of cross-examination.

20 It's specifically what Judge Kayatta
21 addressed in the Asacol case, where he said,
22 look, when it comes to issues of preference, you
23 can't simply rely on affidavits because --
24 unless the defendants stand up and say we
25 concede that all of the affidavits are true.

1 Instead, a defendant, if it has a
2 good-faith basis to do so, has a right to
3 contest the veracity of affidavits.

4 Here, given how implausible it would
5 be if 112,000 people came forward and said we
6 all preferred to use the kiosks, given the
7 inherent implausibility of that, I think we
8 would have a very strong basis to say: No, we
9 want to test every one of those affidavits.
10 We're going to spend, you know, anywhere between
11 two and 10 years addressing the threshold
12 question of jurisdiction, necessarily going to
13 overwhelm any common issue.

14 JUSTICE KAGAN: So you're saying you
15 can't do it by, like, surveys or other
16 mechanisms that address the classes -- you know,
17 address -- address the class as a whole.

18 MR. FRANCISCO: Those only work if you
19 could also introduce them in an individual case.
20 That's what you held in Tyson's.

21 But take an individual case like this
22 one. If somebody came in and said I like
23 kiosks, I want to use the kiosks, you couldn't
24 put forward a survey that says 50 percent of
25 people like to use kiosks, therefore, you like

1 to use kiosks. That would be completely
2 inadmissible in an individual case, and so it
3 would be inadmissible in a class case.

4 So what they have to do is identify
5 something that they could do that's consistent
6 with our right to cross-examine and contest that
7 evidence. And in a case like this, there's
8 simply no way to do that short of putting these
9 people on the stand and testing whether their
10 assertions fail to survive the crucible of
11 cross-examination.

12 JUSTICE KAGAN: Okay. That -- that's
13 helpful to me, and I hope that Mr. Gupta
14 addresses the same question. I'm sure he will,
15 because what I hear you saying in your argument,
16 again, aside from the procedural matter as to
17 whether you have any right to object to the May
18 order, is, really, that the -- the crux of the
19 matter is something along the lines of there's
20 no procedure that we can think of that -- that
21 is easy enough to address the predominance
22 inquiry.

23 MR. FRANCISCO: Well, I -- again, it's
24 not just any procedure we can think of. It's a
25 procedure that exists and also is protective

1 of --

2 JUSTICE KAGAN: Yeah.

3 MR. FRANCISCO: -- the defendants'
4 rights. Again, this is an issue that I think
5 Judge Katsas and Kayatta both went through in --
6 in quite a bit of detail.

7 JUSTICE KAGAN: Yeah, I didn't mean to
8 take that out.

9 MR. FRANCISCO: Yeah, in their
10 opinions, yeah.

11 JUSTICE KAGAN: I meant to -- to,
12 like, you know, say, like, exactly how much
13 the -- does the defendant --

14 MR. FRANCISCO: Yeah.

15 JUSTICE KAGAN: -- need such that you
16 can have a mechanism that actually works to
17 separate people who are injured from people who
18 are uninjured.

19 MR. FRANCISCO: And the critical issue
20 I would add to that, Your Honor, is that that is
21 a procedure that also -- always has to be
22 capable of taking place before you reach the
23 merits. You can never kick the jurisdictional
24 question to after you resolve the merits. It's
25 also -- always got to be resolved before you

1 reach the merits.

2 JUSTICE KAGAN: And -- and this is
3 only because the -- because you're worried about
4 the -- the -- the -- the case if you -- if the
5 defendant loses?

6 MR. FRANCISCO: I think that just
7 illustrates the nature of the problem. I think
8 that just reflects the fundamental principles of
9 Article III jurisdiction. When a class action
10 is just an aggregation tool, so when you certify
11 a class, you're adding a bunch of claims to the
12 case. You're increasing the exposure to the
13 defendant. You cannot -- you don't have the
14 power to adjudicate the merits of those claims
15 either up or down unless you have jurisdiction
16 over those claims in the first place.

17 JUSTICE KAGAN: Yeah, I think this
18 one, I think we're going to have to agree to
19 disagree on this one because the court is not
20 doing anything with respect to those claims
21 until the court actually provides damages,
22 otherwise exercises remedial powers with respect
23 to those claims, and as long as the court
24 figures this question out before the court
25 actually does anything with respect to those

1 claims, that seems to me good enough.
2 Otherwise, they're just riding along. They're
3 not -- they're not -- they're not affecting the
4 litigation in any way.

5 MR. FRANCISCO: Sure. And I disagree
6 with that for a couple of reasons. One is that,
7 as this Court has said a couple of different
8 times, class actions are claims aggregation
9 tools. As Justice Scalia explained in Shady
10 Grove, it's just another joinder device.

11 And I think that the reason why I
12 point to what happens if there's a loss is
13 because it does illustrate that the claims
14 are -- it illustrates the basic principles that
15 I'm trying to articulate in other ways because
16 it shows that those claims actually do become
17 part of the case at the moment of certification
18 because they are capable of being resolved in an
19 adverse way against the defendant.

20 And I think that is why this Court has
21 always said that class actions are just joinder
22 devices no different from intervention. And
23 Laroe makes clear that if you're going to add
24 that new claim to a case by way of intervention,
25 you need to have jurisdiction over that new

1 claim. I don't think there's any different of a
2 rule that would apply in the class action
3 context.

4 JUSTICE KAGAN: Thank you.

5 MR. FRANCISCO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: I'm sorry to belabor
9 this, but I am -- I am struggling to understand
10 your argument.

11 I -- I -- I believe in response to the
12 Chief Justice, though you can correct me, that
13 you acknowledged that a court can certify a
14 class action with some noninjured people in it
15 and that in response to Justice Kagan, you said
16 basically that you have to do the predominance
17 and manageability inquiry early on. That's --
18 that's what I got out of it.

19 MR. FRANCISCO: That -- then -- then I
20 think I was --

21 JUSTICE GORSUCH: And then you
22 determine whether you can separate the wheat
23 from the chaff early on in order to ensure that
24 you can weed out people who aren't injured. And
25 if all that's true -- and you can tell me where

1 I'm wrong -- boy, that sure sounds like Rule 23
2 to me.

3 MR. FRANCISCO: So, Your Honor, I
4 think I wasn't clear if that's how you
5 understood my articulation of the rule. There
6 are sort of two steps. There's the Article III
7 step and the 23(b)(3) step.

8 JUSTICE GORSUCH: Yeah, in the Article
9 III step, you said that --

10 MR. FRANCISCO: You need to define the
11 class so that it's limited only -- only to
12 injured people.

13 JUSTICE GORSUCH: Only -- so you can
14 never have an uninjured person in a class
15 definition?

16 MR. FRANCISCO: At least not --

17 JUSTICE GORSUCH: Is -- is that --

18 MR. FRANCISCO: -- on the face of the
19 definition. But I think that in a case like
20 this and in most cases, that can be solved
21 pretty easily. You just define the class --

22 JUSTICE GORSUCH: So -- so --

23 MR. FRANCISCO: -- factually to
24 include --

25 JUSTICE GORSUCH: Okay, I -- I've

1 heard all that before. I don't mean to force
2 you to repeat it. So your position now is a
3 class definition can never have one uninjured
4 person in it?

5 MR. FRANCISCO: I --

6 JUSTICE GORSUCH: If I can imagine a
7 definition that -- that yields one uninjured
8 person, I can't certify it?

9 MR. FRANCISCO: Well, if you can
10 imagine a class definition that yields one
11 uninjured person, you can redefine the class to
12 eliminate that uninjured person.

13 JUSTICE GORSUCH: Well, maybe I can
14 and maybe I can't, but I know that common issues
15 predominate and I know that I can sort out those
16 things later, and I still can't certify it? Is
17 that your position?

18 MR. FRANCISCO: I think what you do,
19 what the proper approach there would be, to
20 simply redefine the class to eliminate the one
21 person.

22 JUSTICE GORSUCH: Well --

23 MR. FRANCISCO: You can say, okay, the
24 class includes everybody but that one person.

25 JUSTICE GORSUCH: So I think the

1 answer is -- I think the answer to the question
2 is yes.

3 MR. FRANCISCO: Yes. Yes.

4 JUSTICE GORSUCH: You cannot certify
5 that class at -- at all.

6 MR. FRANCISCO: Yes.

7 JUSTICE GORSUCH: Okay.

8 MR. FRANCISCO: But you can redefine.

9 JUSTICE GORSUCH: And if that's true,
10 is that protective of defendants' rights? I
11 mean, we've been talking about judgments in
12 class action litigation. My memory's a little
13 hazy, but I remember doing a little -- a little
14 bit of it back in the day. And these things
15 never go to judgment. They're always settled.

16 And often defendants like broad class
17 definitions because it gives them peace. And
18 the alternative, which I think your rule would
19 invite, is mass tort claims in which you're
20 litigating these -- you talk about piecemeal.
21 You're really going to be litigating it
22 piecemeal. Thoughts?

23 MR. FRANCISCO: So I guess my first
24 thought would be, if you look at, just as a
25 practical matter, are the positions that we're

1 articulating pro-defendant or anti-defendant, I
2 guess my first answer would be I don't think it
3 really matters. But my second answer would be
4 that to the extent it does, I'm pretty
5 comfortable with my position from a pro-defense
6 standpoint because, if you look who's lined up
7 in favor of our position, it's pretty much the
8 entire defense bar.

9 Then, to take it on more directly,
10 what I'd say is, if you can properly define the
11 class, the case can be easily settled. You just
12 have to figure out who's in that class and
13 settle it with respect to those people.

14 I think that the problem when you can
15 lard up a class not just with one, not just with
16 two uninjured members, but you can define a
17 class in a way like this one that maybe includes
18 as many as a majority of uninjured members out
19 of the 112,000 people --

20 JUSTICE GORSUCH: Well, now then --
21 then -- then you'd maybe have some predominance
22 issues and some manageability issues, and I -- I
23 take all that point. But that's what Rule 23
24 exists to sort out. And maybe it isn't
25 certifiable for that reason. But that's a Rule

1 23 inquiry, it seems to me.

2 MR. FRANCISCO: And that's the second
3 part of our argument, Your Honor. Even if you
4 completely disagree with me on my Article III
5 question --

6 JUSTICE GORSUCH: Yeah, I know you
7 have --

8 MR. FRANCISCO: -- on 23(b)(3), if
9 there isn't a way to separate them out before
10 you reach the merits, short of having all of the
11 mini-trials, it's going to fail under
12 23(b)(3)(ii).

13 JUSTICE GORSUCH: Okay. Yeah. Thank
14 you.

15 MR. FRANCISCO: Yeah.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: I thought one of
19 the problems with an overly broad class being
20 certified was that it would pressure defendants
21 into settlements that are coercive and unfair.
22 Isn't that one of the concerns you -- you have?

23 MR. FRANCISCO: Yes, Your Honor, and
24 that would have been fourth on my list had I had
25 a chance to get to that.

1 And the other point I'd like to --

2 JUSTICE KAVANAUGH: And do you want to
3 explain that, the real-world problem?

4 MR. FRANCISCO: Yeah. In the real
5 world, what drives settlement is the fact of
6 certification and the size of the class that's
7 certified because those are the two numbers that
8 really require defendants to roll the dice.
9 Maybe I can defeat everything at the end of the
10 day. If I don't, I'm looking at a massive
11 number times whatever damages there are per
12 person.

13 JUSTICE KAVANAUGH: So the flip side
14 of the peace from a larger class is the
15 disaster, from your perspective, of being
16 pressured into a settlement with an overly broad
17 class once it's certified.

18 MR. FRANCISCO: I think that's right.
19 We don't want to be pressured into those
20 settlements.

21 And the -- the other thing that I
22 would add is it's not like you need class
23 actions across the board in every manifestation
24 in order to make sure that plaintiffs are
25 protected and defendants are punished.

1 You also have federal and state law
2 enforcement authorities who are charged with
3 enforcing the federal and state consumer
4 protection and antidiscrimination laws. One of
5 the problems with an overly aggressive use of
6 class certification is that it interferes with
7 that law enforcement discretion by deputizing
8 literally thousands of plaintiffs lawyers to act
9 as private attorneys general.

10 I think this case is a pretty good
11 illustration of that. Here, about a year ago,
12 the Department of Health & Human Services
13 actually put forward a rule that suggested that
14 what we are doing is what we should be doing,
15 that is, providing a front desk alternative to
16 kiosks. Yet, notwithstanding that rule, we're
17 being subjected to a massive class action that
18 goes after us for doing precisely what the rule
19 appears to contemplate.

20 JUSTICE KAVANAUGH: And on the facts
21 here -- I think you've maybe covered this, but I
22 just want to be clear. On the facts, general
23 facts, here, could they permissibly define a
24 damages class consistent with Article III and
25 23(b)(3) and, if so, how?

1 MR. FRANCISCO: I think they could do
2 it here with respect to Article III. On these
3 facts, I don't think they could do it consistent
4 with Rule 23(b)(3). They could -- let's assume
5 that anyone who wants to use a kiosk has
6 standing. As I mentioned to Justice Kagan, we
7 dispute that. We think more is needed. But,
8 for purposes of this, I'll assume that's enough.
9 They could define the class as anybody who
10 wanted to use a kiosk and visited a Labcorp
11 facility and couldn't use the kiosk.

12 That then walks you straight into Rule
13 23(b)(3), and I don't see any way for them to
14 show -- to -- to meet Rule 23(b)(3), because
15 you'd have to have literally 112,000 mini-trials
16 to determine whether any particular unnamed
17 member actually wants to use that kiosk,
18 particularly given how many people in this
19 country -- I talked about myself; I imagine I'm
20 not alone in this room -- don't like using
21 kiosks and will avoid them whenever they can.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: I'm with you. I

1 like to avoid kiosks too.

2 Okay. So I want to figure out exactly
3 what would be open to you on remand. I mean,
4 there are different paths that we could take
5 here.

6 Let -- let's imagine that we say, oh,
7 this whole confusion about the order, we think
8 that the August order is operative and that's
9 not before us, so we send it back.

10 Given the Ninth Circuit's rules and
11 that you have, you know, a time, like you were
12 pointing out under 23(f), you had time and the
13 Ninth Circuit says that you can't -- you
14 can't -- you couldn't appeal the August order,
15 right, because they said it was the same?

16 You say the Ninth Circuit -- and --
17 and you're right, that the Ninth Circuit said
18 you couldn't appeal the August order because it
19 was the same.

20 So have you lost it? If -- if -- if
21 your friend on the other side is right and so
22 it's not properly before us, can you still
23 appeal that certification?

24 Do you follow me? Am I being clear?

25 MR. FRANCISCO: Yeah, I think so.

1 JUSTICE BARRETT: Okay.

2 MR. FRANCISCO: Yeah.

3 JUSTICE BARRETT: So, like, if -- if
4 it's the case that what we really have before us
5 is the May order or the May order as amended in
6 June, and if we said, no, no, no, no, really, it
7 was this August order. You know, Justice Kagan
8 was pointing out, no, I think the language is
9 materially different. Let's say that that's the
10 view that carries the day. What happens to you?
11 Are you still able to make these arguments with
12 respect to the August order?

13 MR. FRANCISCO: So, if the May order
14 was immaterially amended by the August order, as
15 the district order said and the Ninth Circuit
16 found, no, we cannot appeal the August order.
17 So --

18 JUSTICE BARRETT: What if -- but what
19 if Justice Kagan is right? You know, she said,
20 if you look at the August order -- Justice
21 Kagan's question to you was -- and I know you
22 disagree with this, so just -- just assume this.

23 Let's assume that we thought that the
24 August order did materially order -- alter the
25 May order.

1 MR. FRANCISCO: Okay.

2 JUSTICE BARRETT: What happens to you?
3 Do you still have the --

4 MR. FRANCISCO: All right. So the
5 assumption is that we're going to override the
6 district court's own interpretation of its own
7 orders --

8 JUSTICE BARRETT: Go with the
9 hypothetical.

10 MR. FRANCISCO: I get it. I get it.
11 And override their understanding of the orders.

12 JUSTICE BARRETT: Yeah. Yeah, yeah.

13 MR. FRANCISCO: I -- I -- I'll accept
14 that too. I would have to think through that
15 more, Your Honor, and I would be uncomfortable
16 making a definitive representation here given
17 how far we are away from all of the different
18 orders.

19 If you did that, I would certainly
20 probably do my best to come up with an argument
21 that we could appeal that August order
22 separately. I don't think that there's any
23 reason for you to do any of that because I think
24 the simplest route here is that you have a Ninth
25 Circuit judgment before you.

1 JUSTICE BARRETT: I -- I understand
2 that. But I think --

3 MR. FRANCISCO: Yeah.

4 JUSTICE BARRETT: -- you can tell from
5 some of the questions today that there's some
6 question about that on the bench, so I'm just --

7 MR. FRANCISCO: Yeah.

8 JUSTICE BARRETT: -- trying to figure
9 out what happens if that doesn't carry the day.

10 Justice Alito pointed out this is a
11 weird, not clear rule from the Ninth Circuit.
12 So I'm trying to figure out what the consequence
13 to your client would be if some of those
14 concerns carried the day.

15 I understand it's not your position
16 and there are other routes open.

17 MR. FRANCISCO: So the reason why I
18 think it's complicated is let's say you reversed
19 the Ninth Circuit's procedural ruling and you
20 said the August 8 order was the operative one.

21 Under Rule 23(f), we are way past the
22 14-day period to appeal the August order. So
23 there would have to be then some other -- some
24 kind of equitable tolling concept that gets
25 built into and on top of that.

1 And, as I said, if you were to do
2 that -- and -- and I would strongly urge you not
3 to -- I would be vigorously arguing for anything
4 I could think of to allow us to appeal that
5 August order well past the 14-day period of
6 limitations under 28(f), and I would do my best
7 to succeed. I just can't represent to you what
8 I think the answer is.

9 JUSTICE BARRETT: No, I agree, and
10 that's why I brought up the 23(f) timing.

11 MR. FRANCISCO: Yeah.

12 JUSTICE BARRETT: So it seems to me
13 that -- that maybe -- and tell me if you think
14 this is a description of your dilemma.

15 If we understood the August order to
16 materially -- despite the -- despite the
17 descriptions in the lower courts, if we
18 understood it as Justice Kagan was
19 hypothesizing, that there was a material
20 difference, we said, no, no, no, we've got to
21 look at the orders ahead of us -- in front of
22 us, that's wrong, the whole reason you would be
23 in this position is because of the weird rule
24 that Justice Alito was pointing out, this not
25 clear rule, we would be sending it back, and

1 then it would be kind of -- there would be a
2 risk of "too bad for you" because the 23(f)
3 timeline has run.

4 So another way to look at this would
5 be for you to say, okay, there might be some
6 procedural quirks, maybe they flow from the
7 Ninth Circuit's odd, you know, way of deciding
8 what orders are appealable, what orders are
9 operative, but that, here, you should just
10 decide the question presented on the facts as
11 they've come up to you because you do have a
12 judgment in front of you from the Ninth Circuit.

13 MR. FRANCISCO: A hundred percent.

14 JUSTICE BARRETT: Okay. How much of
15 this -- I mean, I -- I take it -- I just want to
16 clarify. In your comments to Justice Kavanaugh,
17 we -- we didn't take the case to decide whether,
18 in fact, under the class as certified by the
19 district court there would be standing.

20 Justice Sotomayor, I think I heard her
21 to say that we had decided that the woman who
22 called the hotels had standing even though she
23 didn't walk in. We actually didn't in Acheson
24 reach that question, and we didn't take this
25 case to decide that here. But that is still

1 open to you to argue on remand, correct?

2 MR. FRANCISCO: Yes, Your Honor. And
3 the only thing I'd add to that is I think that
4 the facts here provide a good, nice way to
5 illustrate the application of the rule because I
6 think the facts are relatively clean,
7 notwithstanding the procedural issues that we're
8 discussing.

9 But, yes, it would still be open to us
10 on remand because the rule that the Ninth
11 Circuit and the district court adopted was that
12 it just didn't matter.

13 JUSTICE BARRETT: Right.

14 MR. FRANCISCO: It didn't matter
15 whether the class included uninjured people
16 because, under the Ninth Circuit rule, is -- you
17 can certify a class as long as the named
18 plaintiff has standing, and -- and it doesn't
19 matter if there are lots of other people who
20 don't.

21 JUSTICE BARRETT: Gotcha. Yeah, I
22 agree. And I think that's why we --

23 MR. FRANCISCO: Yeah.

24 JUSTICE BARRETT: -- took the case, to
25 decide that issue and not -- I was just kind of

1 carving out that other issue --

2 MR. FRANCISCO: Mm-hmm.

3 JUSTICE BARRETT: -- saying that you
4 are not accepting that this class definition
5 would -- that everyone in this class could
6 satisfy Article III even if you collected a
7 hundred thousand affidavits that said: We
8 walked into the LabCorp, didn't matter if we
9 wanted to use the kiosk or not, but we couldn't
10 have used it if we wanted to because we were
11 blind, right?

12 MR. FRANCISCO: We would not accept
13 that as a valid class.

14 JUSTICE BARRETT: Yes. Yes. Yes.
15 Okay.

16 MR. FRANCISCO: Correct.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: So it seems to me
21 that the merits of your argument actually rests
22 on two premises that I am struggling with, so
23 maybe you can help me.

24 MR. FRANCISCO: Mm-hmm.

25 JUSTICE JACKSON: All right. I hear

1 you saying at bottom that it violates Article
2 III to include uninjured people in the class
3 definition and that it violates Rule 23 if there
4 are lots of uninjured people in the class
5 definition. And so if I can just ask you
6 questions about those two different basic
7 propositions that I think is really what is
8 underpinning your arguments here.

9 The problem that I keep coming back to
10 with your Article III point, that it violates
11 the Constitution to include uninjured people in
12 the class and so you would, therefore, need to
13 redefine it to be only injured people, is our
14 standard rules and principles with respect to
15 standing and when the jurisdiction of the Court
16 can be invoked.

17 My understanding is that you -- you
18 only need one plaintiff, one plaintiff, who
19 establishes standing, even if there are others
20 there who are making the same claim. I
21 appreciate that our law says if they're making
22 different claims by nature. I mean, obviously,
23 they're different because there are different
24 people there.

25 But what we say is, if there's a claim

1 that is being made and the claim is you violated
2 the law in this way and we have five people who
3 are saying that and they are named plaintiffs in
4 this action, only one of them has to establish
5 injury for standing purposes.

6 If that's true, I don't understand
7 your Article III argument.

8 MR. FRANCISCO: So I would push back
9 on whether or not that is true.

10 This Court has never applied the
11 one-plaintiff rule to a damages case, which I
12 think because, by definition, in a damages case,
13 every plaintiff is seeking his own form of
14 damages instead --

15 JUSTICE JACKSON: And we've done that
16 at the threshold? I mean, my understanding is
17 that at the --

18 MR. FRANCISCO: That's Laroe.

19 JUSTICE JACKSON: No, what -- what --
20 what I -- my understanding is that, yes, at the
21 end of the day, each person has to have been
22 injured in order to be entitled to damages.
23 But, for the invocation of the power of the
24 court, which is what Article III standing is
25 about, we don't go into the harm to each person

1 in order to take up the claim that is being
2 made.

3 MR. FRANCISCO: Sure. I -- I
4 respectfully disagree with that, and I think
5 it's --

6 JUSTICE JACKSON: All right.

7 MR. FRANCISCO: -- squarely foreclosed
8 by Laroe.

9 JUSTICE JACKSON: Okay.

10 MR. FRANCISCO: What Laroe
11 specifically said was that at the point of
12 intervention, you don't allow the intervenor to
13 add his new claim to the case unless he can show
14 an Article III injury --

15 JUSTICE JACKSON: But I'm not talking
16 about intervention. I'm talking about original
17 action. We have five plaintiffs. They are
18 making a claim. They have one count in their
19 complaint. And I understood that many, many
20 times we just say: One person, show us
21 your harm.

22 MR. FRANCISCO: Never in a damages
23 case have you ever done that, Your Honor.

24 JUSTICE JACKSON: Okay.

25 MR. FRANCISCO: Only in injunctions,

1 and even there, only where plaintiffs were
2 seeking --

3 JUSTICE JACKSON: All right. So --

4 MR. FRANCISCO: -- the same injunction
5 or declaratory relief.

6 JUSTICE JACKSON: -- I understand.

7 That's where I'm having the disconnect.

8 All right. The second problem is with
9 respect to the proposition that it violates Rule
10 23 if there are lots of uninjured people in the
11 class, and I got to tell you I'm struggling with
12 why it matters that there are uninjured people.

13 I hear you say that the reason is
14 because we have to have a bunch of mini-trials.
15 And I just want to put to you a quick
16 hypothetical --

17 MR. FRANCISCO: Mm-hmm.

18 JUSTICE JACKSON: -- which, to me,
19 demonstrates that that's not always the case,
20 and so, therefore, that might be a problem with
21 your argument.

22 So suppose we have a Verizon customer
23 who brings a class action against the company,
24 arguing that Verizon charged her and all
25 customers certain fees over a six-month time

1 period that she says were unlawful. And this is
2 a claim that does not have an element of harm in
3 it. She's just saying these fees, unlawful, you
4 weren't allowed to do it. And she seeks to
5 certify a class of all Verizon customers during
6 that six-month time frame.

7 Now imagine that Verizon says that it
8 only charged some of its customers during that
9 six-month time frame the relevant fee. So, in
10 actuality, only some of the members of the
11 defined class were injured. And Verizon says
12 that, over time, with some effort, it can
13 generate a list of those customers.

14 MR. FRANCISCO: Mm-hmm.

15 JUSTICE JACKSON: So, at the class
16 certification stage, everybody knows that we
17 will eventually be able to figure out which
18 customers were actually charged the fee. But we
19 have a class that's defined of everybody --

20 MR. FRANCISCO: Sure.

21 JUSTICE JACKSON: -- during this
22 six-month period.

23 I guess I don't understand why it
24 matters how many injured versus noninjured
25 members there are in this class as defined.

1 MR. FRANCISCO: Yeah. I think the way
2 that the resolution of that hypothetical would
3 proceed was, at the front end, if you know that
4 you've got a class that includes both people who
5 were charged the fee and people who were not
6 charged the fee, you define the class to include
7 only people who were charged the fee. That
8 solves the Article III problem.

9 JUSTICE JACKSON: Well, assuming --
10 assuming there is an Article III problem.

11 MR. FRANCISCO: And then -- and
12 then -- and then you get to the -- and then --

13 JUSTICE JACKSON: Okay.

14 MR. FRANCISCO: Yeah, right,
15 assuming it is an Article -- I totally -- I
16 totally agree with that.

17 JUSTICE JACKSON: Right. Okay.

18 MR. FRANCISCO: Then you get to the
19 second stage, and you do the Rule 23(b)(3)
20 analysis and you say -- and it's not really --
21 as I mentioned to the Chief Justice, it's not so
22 much a numbers game. The question is, is it
23 easy to figure out --

24 JUSTICE JACKSON: No, but I -- I
25 guess --

1 MR. FRANCISCO: -- who paid the fees
2 or not. And, in your hypothetical, it might
3 well be very easy to figure it out.

4 JUSTICE JACKSON: So we do certify
5 that class or we don't?

6 MR. FRANCISCO: I think that it would
7 turn on how easy it is to figure out --

8 JUSTICE JACKSON: But why? What
9 difference does it make?

10 MR. FRANCISCO: -- definitively who's
11 in the class.

12 JUSTICE JACKSON: What -- what
13 difference does it make when we're certifying
14 this class to establish the liability, there are
15 common issues with respect to that, and, really,
16 the only thing that figuring out who is harmed
17 and not matters to is who gets damages at the
18 end of the day?

19 MR. FRANCISCO: With --

20 JUSTICE JACKSON: I don't understand
21 why class certification would be held up or
22 evaluated with respect to, you know, the numbers
23 of people who were actually injured or not in
24 the class.

25 MR. FRANCISCO: Sure. And with

1 respect, Your Honor, I think it makes all the
2 difference in the world from both a practical
3 matter and a legal matter.

4 From a practical matter, these bloated
5 classes are what allow plaintiffs' lawyers to
6 extract massive settlements on weak claims.
7 From a legal matter, what you are doing are
8 adding claims to a case over whom the Court
9 doesn't have jurisdiction. Those claims
10 allow --

11 JUSTICE JACKSON: Assuming your
12 Article III question is correct. And let me
13 just --

14 MR. FRANCISCO: No, no, no, no. No.
15 Even assuming my Article III question is wrong,
16 Your Honor.

17 If you have a class that includes
18 people who have not been injured -- I'll assume
19 that you don't think that that is an Article III
20 problem. When it comes to Rule 23(b)(3), you
21 still at some point have to figure out whether
22 or not you have jurisdiction over those
23 individual claims. And you cannot proceed to
24 adjudicate the merits of those individual claims
25 unless you first assure yourself that you have

1 Article III --

2 JUSTICE JACKSON: All right. One
3 final question --

4 MR. FRANCISCO: -- jurisdiction over
5 the individual claims.

6 JUSTICE JACKSON: One final question
7 on the -- assuming the claim is different from
8 other claims, but -- but setting that aside,
9 with respect to the practicality of it, I
10 appreciate Justice Kavanaugh's point that many
11 of these settle and that, you know, it sort of
12 tilts the scales in some way for -- from the
13 defendants' perspective, but don't defendants
14 also have, in my case, for example, all of the
15 information that would be necessary for them to
16 say we know that only X number of people have
17 injure -- injury?

18 In other words, the defendants have
19 the best lawyers. They have a gajillion
20 dollars. They are being sued. And they have
21 some responsibility and understanding of the
22 claim and the population of people who were
23 injured, right?

24 MR. FRANCISCO: And -- and -- and I
25 think that's why, Your Honor, in your

1 hypothetical I said that it would be pretty easy
2 to define the class that met our Article III
3 rule, anybody who paid the fee.

4 And on the 23(b)(3) issue, in a case
5 that really is just looking at the company's
6 records to figure out who paid the fee, that
7 might well survive the 23(b)(3) inquiry as well.

8 It's essentially like TransUnion. If
9 TransUnion you had limited the class at the
10 front end to only people whose credit reports
11 had been disseminated to third parties, you
12 would have defined the class as the universe of
13 people who were injured under this Court's
14 ruling --

15 JUSTICE JACKSON: Thank you.

16 MR. FRANCISCO: -- then you probably
17 could have just looked at TransUnion's records
18 to figure out who was in or out. That is the
19 polar opposite of a class like the one before
20 you today.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Joshi.

24

25

1 ORAL ARGUMENT OF SOPAN JOSHI
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING NEITHER PARTY

4 MR. JOSHI: Mr. Chief Justice, and may
5 it please the Court:

6 This Court has frequently said that
7 Rule 23 requires all class members to share the
8 same injury. We think that includes an Article
9 III injury. So, if there are members of a class
10 that aren't even injured, they can't share the
11 same injury with the other class members.

12 Respondents accuse us of somehow
13 creating a special rule for Article III injury.
14 I guess I view it a little bit differently. I
15 view Respondents' rule as creating a special
16 rule for Article III injury because they would
17 pluck Article III injury out of the
18 certification context and either authorize or
19 require, I'm not quite sure, district courts to
20 delay and defer consideration of Article III and
21 only Article III until the end of the case,
22 after the merits, after the remedial stage, when
23 it comes time to dole out the actual relief.

24 Rule 23 doesn't support that kind of
25 rule. I don't think it's supported in practice,

1 as illustrated by cases in which the defense
2 wins. I've never heard of a court certifying a
3 class, ruling for the defense, and then figuring
4 out if the plaintiffs have Article III standing.
5 And I think it's inconsistent with the view of
6 Rule 23 as a purely procedural aggregation
7 device.

8 I think my light went off.

9 JUSTICE THOMAS: So what would you do
10 at the early stages of the litigation, say,
11 post-certification, and you find injured --
12 uninjured parties in the -- in the class?

13 MR. JOSHI: Yeah. So our view is
14 surprisingly maybe not that far from what
15 Respondents are saying. I think the way we
16 would approach it is what Rule 23 requires at
17 certification is that the class be defined in
18 such a way that, on its face, it includes only
19 injured members. And at that stage of the
20 litigation, you might not have much information
21 about them.

22 But then, as the litigation proceeds,
23 as -- as Amchem recognized, courts have a duty
24 to -- to continually reevaluate the class, and
25 if it comes to light that maybe there's a group

1 of absent class members who aren't injured or
2 don't share the same injury or really any other
3 issue that might go to Rule 23, the court should
4 reevaluate: Do I need to redefine this case to
5 carve out those plaintiffs that I now know are
6 uninjured?

7 And the question then is going to be:
8 Can I do it in a way that doesn't require a lot
9 of individualized analysis? And this is why I
10 say I think we're not that far away from
11 Respondents here, and I think Petitioner agrees
12 with us, that if there's some class-wide way or
13 easily administrable way or mechanical way of
14 identifying them, then that's what the court
15 should do, and you can keep on going.

16 If there's not, if you're going to
17 need, you know, a hundred thousand individual
18 mini-trials --

19 JUSTICE GORSUCH: Why would that be
20 the case, though? Because you have uninjured
21 people in the party that you've now found. Why
22 isn't that an Article III problem if it's an
23 Article III problem up front at certification?

24 MR. JOSHI: So we are not making the
25 Article III argument. We are saying Rule 23 is

1 what requires commonality, predominance --

2 JUSTICE GORSUCH: So you don't think
3 Article III requires injury?

4 MR. JOSHI: We have not taken a
5 position on Petitioner's Article III argument.
6 We're saying Rule 23 requires courts --

7 JUSTICE GORSUCH: Okay. And if
8 that's the case -- let's work with your -- your
9 view, which is different than Petitioner's view,
10 and I hear you not endorsing it.

11 MR. JOSHI: We haven't taken a
12 position on it.

13 JUSTICE GORSUCH: Yeah. Okay. What
14 do we do with historical practice where it was
15 very common to treat, in representative actions,
16 unnamed parties as not parties for purposes of
17 the proceeding until and unless relief was given
18 to them, and then you go through the injury
19 analysis?

20 MR. JOSHI: I was --

21 JUSTICE GORSUCH: I'm thinking here of
22 Justice Story's Commentaries, for example.

23 MR. JOSHI: I guess I view the history
24 a little bit differently. I think the
25 historical examples -- and, you know, we go

1 through some of that in our own brief. I think,
2 in every one of those cases, it was obvious that
3 everyone shared an Article III injury. Indeed,
4 the representative action stemmed from the
5 harshness of the rule in equity that all
6 necessary parties had to be joined to a case.

7 If you're a necessary party, you
8 definitely have suffered an injury. And the
9 representative action was meant to say it might
10 be difficult to get all of those injured people,
11 those necessary parties, joined, and so here's
12 an exception we can create.

13 So I read the history a little bit
14 differently. It -- it might be relevant to --
15 to, say, a 23(b)(1) class. That's sort of the
16 forerunner. But I think 23(b)(3) really is a
17 1966 innovation, and I think the further it
18 strays from those roots, the more we ought to be
19 careful about.

20 JUSTICE GORSUCH: Where do you --
21 where do you find in Rule 23 the rule that the
22 class must be limited to injured persons?

23 MR. JOSHI: We derive it from the
24 Court's repeated statements and the --

25 JUSTICE GORSUCH: How about Rule 23?

1 MR. JOSHI: Oh, from commonality, from
2 typicality, adequacy, predominance, we think all
3 of those tell us, as this Court has recognized,
4 that class members should share the same injury.
5 I don't see why that would exclude the Article
6 III injury at the core of the claim.

7 JUSTICE GORSUCH: But it's not an
8 Article III injury. You say it's not an Article
9 III requirement. It's a Rule 23 requirement.

10 MR. JOSHI: We're saying Rule 23
11 requires all class members to share the same
12 injury, including, therefore, the same Article
13 III injury. I am not --

14 JUSTICE GORSUCH: So it is an Article
15 III argument then? I'm just -- I'm really
16 confused now.

17 MR. JOSHI: I -- I'm -- I'm trying to
18 help you out, so let me try and explain.

19 We believe that under Rule 23, it
20 requires that a class cannot be certified unless
21 all class members share the same injury,
22 including an Article III injury, including --

23 JUSTICE GORSUCH: So an Article III
24 injury is required? It's a backdoor way of
25 getting to Petitioner's position, I think.

1 MR. JOSHI: I think our -- our
2 approaches land at the same spot. But what I'm
3 saying is that --

4 JUSTICE GORSUCH: So you think it's
5 not required by Article III, but Rule 23
6 requires Article III injury for all class
7 members?

8 MR. JOSHI: I am -- yes, I am saying
9 Rules 23 requires it. Whether Article III --

10 JUSTICE GORSUCH: What -- what --
11 where in the rule is that? I don't see Article
12 III mentioned in Rule 23.

13 MR. JOSHI: No, but -- but to -- but
14 to say a class satisfies commonality and
15 predominance is to say it has the same injury.
16 That's this Court's words, not mine.

17 JUSTICE GORSUCH: It's to say that
18 overall, looking at the whole thing, it's
19 manageable. There are at least some common
20 questions. The -- these named plaintiffs are
21 generally typical --

22 MR. JOSHI: I -- I just --

23 JUSTICE GORSUCH: -- and -- and -- and
24 common issues predominate. That's how I would
25 have -- maybe -- where does it -- I just don't

1 get -- everyone -- every single person must have
2 an Article III, I don't get that out of the
3 rule.

4 MR. JOSHI: The rule requires
5 commonality and predominance. This Court has
6 interpreted those terms in Rule 23 to require
7 all class members to share the same injury.

8 That's why, in Falcon, the -- the
9 applicants claiming discrimination couldn't be
10 certified in the same class with those claiming
11 a denial of promotion for the same
12 discrimination.

13 That's why, in Amchem, those exposed
14 to the asbestos products who were ill couldn't
15 be certified in the same class with those --

16 JUSTICE GORSUCH: It had some
17 predominance issues and commonality issues, for
18 sure, yeah.

19 MR. JOSHI: Yeah. And all we're
20 saying is that Article III -- an Article III
21 injury is the same kind of thing. If there are
22 members of the class that don't even have an
23 injury, how can they share the same injury with
24 other members of the class who do? How does
25 that satisfy commonality and predominance?

1 That is our view of what Rule 23
2 requires. In other words --

3 JUSTICE JACKSON: But you're saying,
4 Mr. --

5 MR. JOSHI: -- we're saying there's
6 nothing special about Article III injuries. It
7 should be treated just like any other element of
8 class certification. That's our only --

9 JUSTICE JACKSON: But, Mr. Joshi, when
10 we look at commonality and predominance, and the
11 treatises say this, they don't pick out a
12 particular issue and say you have to have that.
13 You don't have to have commonality with respect
14 to every issue.

15 So Justice Gorsuch's question is: If
16 you don't have commonality with respect to the
17 injury issue, what difference does it make? Why
18 is that fatal to the class? There's no rule
19 that says that particular issue you have to have
20 commonality with respect to.

21 MR. JOSHI: I take the --

22 JUSTICE KAGAN: Just to supplement
23 that, if you mostly have commonality with
24 respect to the injury issue but not with respect
25 to every single person, what does that have to

1 do with commonality and predominance?

2 MR. JOSHI: So let me take those in
3 turn.

4 JUSTICE KAGAN: I think that they're
5 both the same.

6 JUSTICE JACKSON: Same question.
7 That's fine.

8 MR. JOSHI: Sure. So I -- I think
9 this Court's cases in Walmart, in Halliburton,
10 in Amgen, and in Comcast illustrate that there
11 are some items on which, if there's variation
12 across the class, they're so fundamental to the
13 case that you really just aren't going to be
14 able to certify the class.

15 In Walmart, it was injury and
16 causation. In Amgen and Halliburton, it's
17 reliance in a securities claim. In Comcast, it
18 was damages.

19 And so the same argument could have
20 been made in Comcast, right, where we all had
21 the same antitrust theory of injury, but because
22 the damages were going to vary, that class
23 couldn't be certified. And I think we're just
24 saying the same thing.

25 If -- if you have a class in which

1 Article III injury is not present for some but
2 is -- is present for the others, that's just not
3 going to meet the commonality standard.

4 Now, Justice Kagan, you said: Well,
5 what if it's only a few? And I think my answer
6 is the same as Mr. Francisco's and, frankly, the
7 same that Respondents give in their brief or as
8 I read it, which is: If there is a class- wide,
9 manageable mechanical way to separate them as
10 in, for example, TransUnion there would have
11 been or as in Justice Jackson's Verizon
12 hypothetical there would be a manageable
13 class-wide way to do it, we think that's fine.
14 Rule 23 doesn't preclude that certification.

15 But what we are saying is that Rule 23
16 needs to be followed at certification and then
17 throughout the litigation. As the litigation
18 proceeds, if there's more information --

19 JUSTICE GORSUCH: Well, hold on. I --
20 I thought you said that commonality means -- I
21 had understood it as one issue has to be common
22 and that that has to be predominant, that has to
23 be the predominant. That's the way I understood
24 it. Okay. Fine.

25 Now you're telling me that, well,

1 Article III and Article III alone must be
2 satisfied by everyone at the outset, I thought.

3 MR. JOSHI: What -- what I'm saying is
4 Article III injury is no different from any
5 other requirement for class certification that
6 should be common to the class, like injury,
7 causation, reliance, damages. All of these must
8 be common. And I take the point that there
9 needs to be --

10 JUSTICE GORSUCH: No, they don't
11 all have -- they don't all have to be common.
12 There has to be a common question that
13 predominates over others. And if it -- and --
14 and -- and now a special rule that Article III
15 must exist for all class members?

16 MR. JOSHI: I am not asking for a
17 special rule any more than Comcast had a special
18 rule for damages or Walmart had a special rule
19 for causation or Halliburton and Amgen had a
20 special rule for reliance.

21 I'm just trying to say that Article
22 III injury is of that sort, important enough
23 that it's just unlikely you're ever going to be
24 able to -- to certify a class.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 I'm not sure I've been following the
3 bouncing ball. Does Article III in this context
4 require an injury? Now I don't know if you're
5 saying that not at the outset but at -- at the
6 back end, before any relief is granted, or -- or
7 what.

8 MR. JOSHI: Article III, of its own
9 force, of course, requires every class member to
10 have standing before he or she can collect a
11 damages award. That's TransUnion.

12 CHIEF JUSTICE ROBERTS: I'm happy to
13 stop there.

14 MR. JOSHI: Yeah. Well, so I -- I
15 take Petitioner's point to be that -- or
16 Petitioner's Article III argument, as I
17 understand it, is that Article III, of its own
18 force, also requires each class member to
19 demonstrate standing at certification.

20 And we're not taking a view on that.
21 What we're saying is that Rule 23's commonality
22 and predominance requirements requires that same
23 thing, and so there's no need to decide whether
24 Article III, of its own force, would require it
25 if, say, Rule 23 --

1 CHIEF JUSTICE ROBERTS: So Article III
2 is in the case. You just like to run it through
3 the certification process?

4 MR. JOSHI: That's right.

5 CHIEF JUSTICE ROBERTS: Okay.

6 Justice Thomas, anything further?

7 Justice Alito?

8 JUSTICE ALITO: Well, just to clarify
9 this last point, are -- are you saying that Rule
10 23 requires something that just happens to
11 correspond with what Article III requires? That
12 I would understand.

13 Or are you saying that Rule 23
14 requires compliance with Article III? Which
15 then doesn't seem to me to be any different from
16 Petitioner's argument.

17 MR. JOSHI: Yeah, we're saying the
18 first thing.

19 JUSTICE ALITO: Okay.

20 MR. JOSHI: And all we're saying is
21 that as an empirical matter, in practice, an
22 Article III injury is just so fundamental to the
23 claim that just like in Walmart or Halliburton
24 and Comcast, it's the kind of thing that if it's
25 not common, if it's individualized, then that's

1 probably going to predominate in -- in such a
2 class.

3 JUSTICE ALITO: Okay. So why do you
4 want to -- why do you approach this issue in
5 that way? Is this just sort of abstract respect
6 for constitutional avoidance, or does the
7 government think that there's some -- that there
8 are different consequences from taking your
9 approach and the Petitioner's approach?

10 MR. JOSHI: No. It really is from
11 constitutional avoidance. And -- and ruling on
12 this case narrowly, as the case presents itself,
13 we take -- we took the Court, when it reframed
14 the question presented to limit it to 23(b)(3),
15 as a signal that maybe it wanted us to talk
16 about Rule 23(b)(3), and that's what we think
17 you should do here.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: In TransUnion -- I
22 can go back and I'm relying on old memory, but I
23 think the class was defined as anyone who had
24 false statements in their credit reports. It
25 wasn't until the litigation came forward that we

1 found out that some people's false information
2 was not disseminated.

3 And we basically said you can't give
4 out the damages to the people who weren't
5 injured because there was no dissemination. But
6 that wasn't known until the end.

7 I think what Mr. Francisco is now
8 saying, and I'm not sure you are or aren't, that
9 now we have to have that fight at the class
10 certification stage, that we have to define a
11 class in a way that says only people who receive
12 the report instead of the way it was defined.

13 Do you agree with that?

14 MR. JOSHI: Now that we know, so
15 if they're --

16 JUSTICE SOTOMAYOR: No, but use
17 without -- we don't know at the beginning.

18 MR. JOSHI: Well, if you don't know --

19 JUSTICE SOTOMAYOR: But he's going to
20 put an affidavit in that says some weren't
21 disseminated, so this class shouldn't be
22 certified.

23 MR. JOSHI: If -- if we don't know,
24 then no. I mean, we're not asking for Rule 23
25 to be applied in a senseless way. We think it

1 should be applied sensibly, reasonably, with
2 reasonable inferences.

3 So in -- but now that we know, now
4 that we have TransUnion on the books, if there's
5 a future claim under FCRA for, you know, OFAC
6 warnings on credit reports, yeah, I think a
7 court there should say, well, I know in
8 TransUnion this class of plaintiffs wouldn't
9 have standing, so I'm going to certify a class
10 only of plaintiffs whose credit reports were
11 disseminated. That would be the responsible
12 thing to do now that we have TransUnion on the
13 books.

14 But our view is that, you know, in a
15 case like TransUnion or in a case like Tyson
16 Foods, which I would love to talk about --

17 JUSTICE SOTOMAYOR: We go back to, is
18 there an -- is there an administrable way --

19 MR. JOSHI: Exactly.

20 JUSTICE SOTOMAYOR: -- to identify the
21 injury?

22 MR. JOSHI: Exactly. Exactly.

23 JUSTICE SOTOMAYOR: Okay. And that's
24 what the 23(f) inquiry is.

25 MR. JOSHI: 23(b)(3). Yeah.

1 JUSTICE SOTOMAYOR: I'm sorry.

2 23(b)(3).

3 MR. JOSHI: Exactly. Exactly.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Do you think, Mr.
6 Joshi, that this is the way we've handled class
7 actions over the years? You know, I -- I -- if
8 you look back for the last 70 years of class
9 action or whatever Rule 23 is, you know, it
10 strikes me that if you look at all the classes
11 that have been certified by that point, you're
12 always going to be able to find people for
13 idiosyncratic reasons who don't share the same
14 injury, who don't have standing, and that that's
15 never been seen as kind of the end all and be
16 all, the whole -- like, okay, we have to explode
17 everything.

18 So it seems very inconsistent to me
19 with the way class actions have been practiced
20 for many decades.

21 MR. JOSHI: Yeah, so I disagree. I --
22 I have read every single one of this Court's
23 class action cases, you might imagine, in -- in
24 preparation for this case, and the one theme I
25 see consistently is that where there's a

1 difference in injuries or the type of relief or
2 even the type of remedy that, you know, the
3 defendant is requested to make, this Court has
4 said that those really can't be in the same
5 class together. And it just strikes me that
6 Article III injury is kind of --

7 JUSTICE KAGAN: But the rule that
8 you're suggesting is a rule that says to
9 district courts, you have to do this right up
10 front, you have to figure out whether everybody
11 has the exact same injury. If, like, there are
12 a few people who have a different kind of
13 injury, that's verboten. I -- I mean, that is
14 something that I don't think district courts
15 have ever thought that they needed to do.

16 Rather, what they've thought is, by
17 the time we get around to issuing remedial
18 orders and issuing damages, we better make sure
19 that we're not handing out money to people who
20 aren't injured. So that, I think, everybody has
21 understood is their obligation all -- but not
22 this, not like we have to do all the work the
23 moment the case comes in the door to figure out
24 exactly who is injured and how.

25 MR. JOSHI: I guess I have a few

1 responses to that. One is what I just said to
2 Justice Sotomayor, which is that we think Rule
3 23(b)(3) should be applied in a sensible,
4 reasonable manner.

5 So, for example, if there's, say, an
6 antitrust class and the allegation is
7 price-fixing and the class is defined as all
8 purchasers of the product during the period of
9 price-fixing where there were super-competitive
10 prices, we think that would be a valid class
11 definition even if there's some idiosyncratic
12 person that likes paying higher prices for
13 whatever reason.

14 Or, if it's a product liability, you
15 know, a defective product that injured people,
16 you know, all purchasers of the product who
17 suffered the injury would be a valid class in
18 our view, even if there's somebody who, because
19 of the injury, you know, missed a test and
20 then -- that he didn't study for but then did
21 the makeup test later on, got a better grade,
22 got a Supreme Court clerkship at the end of it,
23 and therefore wasn't injured, I -- you know,
24 those sorts of idiosyncratic things, we agree,
25 that's not what Rule 23 requires, but --

1 JUSTICE KAGAN: Okay. So this is
2 really not an Article III rule because, if it
3 were really an Article III rule, you couldn't
4 agree on all those things.

5 MR. JOSHI: That -- that's right. We
6 think this is a Rule 23 issue. It's just that
7 when we read the question presented as
8 reformulated, the Court was very careful to say
9 an Article III injury, and we read that as
10 saying how is that different from the kinds of
11 injuries in Falcon you said couldn't be --

12 JUSTICE KAGAN: Yeah.

13 MR. JOSHI: -- sort of like the
14 others --

15 JUSTICE KAGAN: I mean, but -- but
16 I'm -- I'm taking from your thing -- you know,
17 you went back and forth with Justice Gorsuch
18 about were you endorsing, were you not
19 endorsing, do you have a position. In fact, you
20 do have a position on Mr. Francisco's hard
21 Article III argument because you couldn't have
22 said that those classes should go forward if you
23 accepted Mr. Francisco's argument.

24 MR. JOSHI: We're saying those classes
25 could go forward under Rule 23. We are not

1 taking a position on whether Article III of its
2 independent force would prevent that -- would
3 preclude those sorts of classes --

4 JUSTICE KAGAN: Okay. Well, then
5 that's just --

6 MR. JOSHI: -- because we don't think
7 it's --

8 JUSTICE KAGAN: Come on. Okay.

9 MR. JOSHI: That -- that's our
10 position.

11 JUSTICE KAGAN: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 JUSTICE GORSUCH: Yeah, there are a
15 lot of price-fixing cases where the victim can
16 pass through the overcharge and suffers no
17 injury, but you let that go forward.

18 MR. JOSHI: That's a substantive rule
19 of antitrust law, I believe.

20 JUSTICE GORSUCH: Well, it's a fact in
21 the world too.

22 MR. JOSHI: Yeah.

23 JUSTICE GORSUCH: And they're not
24 injured, and you'd let that class go forward?

25 MR. JOSHI: As I said, my

1 understanding is that's a substantive rule of
2 antitrust law that only direct purchasers can
3 bring claims.

4 JUSTICE GORSUCH: Well, some places
5 yes and some places no, and after Apple, I don't
6 know. But you would allow that class to go
7 forward, no Article III problem?

8 MR. JOSHI: Under Rule 23 --

9 JUSTICE GORSUCH: Yes.

10 MR. JOSHI: -- there's no problem.

11 JUSTICE GORSUCH: Okay. All right. I
12 just want to make sure I understood it.

13 MR. JOSHI: Yeah.

14 JUSTICE GORSUCH: You've heard some of
15 the discussion about the procedural problems in
16 this case. The government didn't talk about
17 them in its brief. I wanted to give you an
18 opportunity to give us your thoughts on whether
19 we have the problem before us given that the May
20 order talks about only injured persons.

21 MR. JOSHI: Yeah. So we didn't talk
22 about it in our brief because our brief was
23 filed before the red brief was filed, so we
24 didn't know this issue was going to be raised.
25 It wasn't raised in the brief in opposition.

1 As an amicus, we're poorly situated to
2 take a strong view of matters, but, that said, I
3 think -- I think Petitioners have the better of
4 the argument, and what I would rely on are two
5 things. One, under cases like ASARCO against
6 Kadish, we know that the court of appeals issued
7 an adverse judgment to Petitioner. It's
8 jurisdictionally properly before this Court.
9 This Court has jurisdiction over the case. So I
10 don't think it's a matter of jurisdiction.

11 So then there's the question, well,
12 which order are you really looking at here? And
13 I guess I would place greater emphasis on
14 something that Mr. Francisco mentioned a couple
15 of times in his discussion, but for me, it's
16 very important, which is on page 63a of the
17 appendix. This is the August order.

18 The August order does not purport to
19 enter a new class or certify a new class and get
20 rid of the old one. What it says is page 24,
21 lines 13 to 23 of the earlier order, is replaced
22 with the following.

23 And so I view it as sort of nunc pro
24 tunc modifying the earlier order for which there
25 was a notice of appeal. And I know there's been

1 a lot of --

2 JUSTICE GORSUCH: I appreciate that.
3 What do we do about the fact that the only order
4 that the Ninth Circuit was reviewing was the
5 May 12 order, and it specifically said we can't
6 hear, we have no authority to -- no jurisdiction
7 over the August order that you're asking us to
8 rely on? You didn't -- you didn't address that
9 squirrely complication.

10 MR. JOSHI: Yeah. Again, you know,
11 there's an August order, but one of the terms of
12 the August order was to nunc pro tunc --

13 JUSTICE GORSUCH: I understand.

14 MR. JOSHI: -- amend the earlier one.

15 JUSTICE GORSUCH: I understand, but
16 the court of appeals didn't understand itself to
17 have jurisdiction over that order, and we're
18 only reviewing the court of appeals' resolution
19 of its view on the May 12 order.

20 MR. JOSHI: That's right. And -- and
21 that's why I would fall back on the fact that
22 you have jurisdiction to review the Ninth
23 Circuit's decision. We think it contains an
24 error of law. You could correct that error of
25 law.

1 And, you know, Justice Barrett asked
2 what's left on remand. I think, if you
3 corrected that error of law and sent it back,
4 even if the Ninth Circuit adheres to its view
5 that it had only the May class definition in
6 front of it, and even if the Ninth Circuit then
7 holds that the May definition doesn't run afoul
8 of the rule that by hypothesis you would adopt
9 in this case, then -- and even if, as
10 Mr. Francisco suggested, he's out of time to
11 appeal the August order, I would imagine that on
12 remand in the district court with that binding
13 precedent, Petitioner could move for
14 decertification or --

15 JUSTICE GORSUCH: Oh, I -- I accept
16 all of that, but that -- that really does start
17 to sound sort of like an advisory opinion to me
18 because the only binding force we would have is
19 to say that the May 12 order was fine because it
20 addressed only injured people, period. I mean,
21 that's our judgment.

22 MR. JOSHI: This -- this Court
23 frequently corrects errors of law in what court
24 of appeals say without analyzing whether the
25 prevailing party below could nevertheless still

1 prevail under the new rule. It does that all
2 the time, and I think you could take that case
3 here.

4 JUSTICE GORSUCH: All right. Okay.

5 MR. JOSHI: Take that approach here.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: When you said Rule
9 23 is narrower than Article III, I just want to
10 make sure I understand how you think it's
11 narrower. It's not narrower in the result that
12 would be reached in particular cases at least as
13 I understand your position. It's narrower, I
14 gather, in the sense that, theoretically, Rule
15 23 could be changed, and at that point, we would
16 have to confront, in your view, the Article III
17 issue.

18 Is that what you mean by narrower?

19 MR. JOSHI: That's exactly what I
20 mean, yeah.

21 JUSTICE KAVANAUGH: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: I guess I'm still

1 struggling with why isn't the sensible and
2 reasonable manner of applying Rule 23 the way
3 that, as Justice Kagan says, we always do, that
4 we look at commonality or the district courts
5 look at commonality and predominance sort of in
6 the aggregate with all of the issues on the
7 table, there aren't directed to one or another
8 to say that if this particular issue does not
9 have commonality, you can't certify the class.
10 And that seems to be what you are saying.

11 I appreciate that there are certain
12 other cases where the Court has picked out
13 various issues and said either you've gotten it
14 wrong or right on commonality and that you would
15 like for this to be one of them.

16 But it's unclear to me that the rule
17 is such that it requires that this particular
18 issue there has to be commonality with respect
19 to.

20 MR. JOSHI: I think the one thing --
21 I -- I read the cases differently. I think
22 there is a strong through line of this Court's
23 class action cases, Falcon, Amchem, Walmart,
24 Lewis against Casey, so many cases, East Texas
25 Motor Freight, in which the Court has said that

1 different injuries --

2 JUSTICE JACKSON: Yeah.

3 MR. JOSHI: -- cannot be certified in
4 the same class.

5 JUSTICE JACKSON: Let me ask you a
6 question. Do those cases talk about those
7 injuries in the context of the harm being an
8 element of the claim?

9 If I go back and look at them, are
10 those cases ones in which the harms that we're
11 talking about are just in the damages realm?
12 There are many claims in which harm is actually
13 an element of liability, and I totally
14 understand, in those worlds, you're thinking
15 about can this be proven by common proof or do
16 we have a bunch of individual actions here.

17 But it seems to me that when we're
18 talking about damages apart from liability, it's
19 very hard to see a world in which individual
20 proof with respect to damages can overwhelm from
21 the standpoint of predominance the kind of
22 consideration of whether or not you should have
23 a -- a -- a Rule 23 certification.

24 MR. JOSHI: So there are cases of both
25 types, and Comcast is the perfect example of the

1 case you just said. In Comcast, the plaintiffs
2 had an antitrust theory that was common to the
3 class that was common to the defendants that
4 would have established, you know, the injury,
5 causation, et cetera, but it was the variation
6 in damages that precluded certification of that
7 class because it's just so fundamental to the
8 kind of claim that was being brought that it was
9 just going to overwhelm even the common
10 antitrust liability theory, and we're saying
11 Article III injury is just as fundamental and --

12 JUSTICE JACKSON: Thank you.

13 MR. JOSHI: -- Rule 23 would preclude
14 certification in those circumstances.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Gupta.

18 ORAL ARGUMENT OF DEEPAK GUPTA
19 ON BEHALF OF THE RESPONDENTS

20 MR. GUPTA: Mr. Chief Justice, and may
21 it please the Court:

22 As this Court held in TransUnion and
23 as the Chief Justice recognized in Tyson Foods,
24 Article III doesn't give federal courts the
25 power to give relief to any uninjured plaintiff,

1 class action or not.

2 So, if the Court finds its way to
3 reaching the question presented and writes an
4 advisory opinion, and it's what we think it
5 would be, the advisory opinion should hold that
6 at the class certification stage, the proper
7 inquiry is whether there will be an
8 administratively feasible mechanism to weed out
9 the uninjured.

10 Consistent with centuries of
11 historical practice from the chancery courts at
12 the time of the Constitution's ratification to
13 now, it is the representative who is actually
14 before the court, not the absentees, who must
15 prove the existence of an Article III case or
16 controversy at the outset.

17 But, if we are here to police the
18 jurisdiction of the federal courts under Article
19 III, we should probably start with this case in
20 this Court.

21 LabCorp now concedes that any appeal
22 of the August order on which LabCorp's arguments
23 have exclusively relied was not actually in the
24 case in the court of appeals and, therefore,
25 isn't within this Court's certiorari

1 jurisdiction.

2 In its reply, LabCorp has shifted
3 gears and attempted to reorient its challenge to
4 the May order that is concededly no longer in
5 effect and that is not harming LabCorp.

6 But any appeal of that superseded
7 order is moot under the general rule that
8 interlocutory appeals from superseded orders are
9 moot. The traditional exceptions to mootness do
10 not apply.

11 And this Court should reject the
12 invitation to craft a new mootness exception on
13 the fly. It would make little sense for this
14 Court to reach broad pronouncements on Article
15 III's limits in a case that itself presents such
16 serious jurisdictional barriers to reaching the
17 question presented.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Did you raise that in
20 your brief in opposition?

21 MR. GUPTA: I'll acknowledge that the
22 brief in opposition did not raise this
23 jurisdictional problem. It did raise the -- the
24 fundamental problem that in -- in the
25 Respondents' view, the question presented is not

1 presented by this case and other preservation
2 issues.

3 But, as the amicus brief of the
4 federal jurisdiction professors indicates, there
5 were a number of ways in which the petition
6 obscured this jurisdictional problem. It became
7 apparent when the blue brief was filed that the
8 arguments rested entirely on this outdated order
9 and class definition, and we pointed it out in
10 the -- in the red briefing.

11 In hindsight, with the 20/20 of
12 hind -- view of hindsight, I wish these -- all
13 of these issues had been fleshed out at the --
14 at the cert stage and perhaps we wouldn't be
15 here, but I do think, even when wisdom comes
16 too -- comes late, we should acknowledge it, and
17 this Court's rules are clear that -- that the
18 failure to raise jurisdictional objections at
19 the certiorari stage doesn't deem them
20 forfeited.

21 JUSTICE BARRETT: What's your view of
22 what would happen on remand? I asked
23 Mr. Francisco what would happen given that the
24 23(f) time has expired. You heard the question.

25 What's your view of what would happen

1 and whether that August order remains something
2 that he could appeal or not?

3 MR. GUPTA: Right. And so we don't --
4 we don't think there should be a deem -- a
5 remand if you agree with us that the -- the
6 case, you know, is moot. You could dismiss as
7 improvidently granted or -- or perhaps a
8 revacatur, but either way --

9 JUSTICE BARRETT: Even if we did that
10 and then it goes back down --

11 MR. GUPTA: Set all that aside --

12 JUSTICE BARRETT: -- what happens
13 after this?

14 MR. GUPTA: Yeah, yeah. So I think
15 they have available to them the ability to move
16 to decertify the class. They have the ability
17 to move to dismiss for lack of standing the
18 named plaintiff. So they're not without rights.

19 And, you know, Rule 23(f) is a
20 discretionary appeal mechanism. And there was
21 some discussion earlier about what was described
22 to the Ninth Circuit, this material change
23 doctrine. It's actually not just the Ninth
24 Circuit.

25 I know you don't have briefing on

1 this, but all of the circuits have had to
2 confront this question. And I think their
3 approach is similar, which is it doesn't assign
4 dispositive significance to what the district
5 court said, whether the district court
6 characterizes there being a material change.

7 The -- the court of appeals has the
8 discretion under Rule 23(f) to have that
9 gatekeeping role and to decide whether there's
10 an appeal. So it's true that they failed to
11 take an appeal under 23(f) from that August
12 order, but it -- it would have been a mistake to
13 ascribe any significance to the district court's
14 determination on this.

15 And, actually --

16 JUSTICE ALITO: Well, why would it
17 be --

18 MR. GUPTA: -- in our opposition to
19 the -- in Rule 23(f) -- I just want to make sure
20 I point this out, Justice Alito -- that in our
21 opposition to the Rule 23(f) petition, we did
22 point out that there was a -- a fight in the
23 district court about the class definition, and
24 that could actually render the Rule 23(f)
25 petition moot. So we put, you know, the

1 defendant on notice of this.

2 They -- they had the ability to file a
3 second petition and they didn't, and they still
4 have the ability in the district court to --
5 because class certification is always a constant
6 moving target, they have the ability to -- to
7 seek relief even now in the district court and
8 then perhaps, if they don't like that, they can
9 appeal and maybe they would come back here.

10 Sorry, Justice Alito.

11 JUSTICE ALITO: Do you think this
12 material modification rule is required by
13 statute?

14 MR. GUPTA: By the -- by Rule 23(f)?
15 I -- I think Rule 23(f) --

16 JUSTICE ALITO: In other words, if a
17 different court of appeals said we don't want
18 any part of this rule, we think it's a silly
19 rule, we're going to adopt a different rule,
20 would that be wrong?

21 MR. GUPTA: I think that --

22 JUSTICE ALITO: Would it be contrary
23 to some statute?

24 MR. GUPTA: I think the best way to
25 understand what the lower courts are doing is

1 that they are interpreting Rule 23(f), and Rule
2 23(f) limits the interlocutory appeal
3 jurisdiction to an order granting or an order
4 denying class certification.

5 And so the courts are trying to figure
6 out do we have, you know, a new order granting
7 or denying certification. And, in this case, I
8 think it's quite clear -- and, actually, I
9 disagree with Mr. Joshi's characterization. I
10 think it's quite clear that the May order and
11 the August order are different orders with
12 respect to class certification.

13 In fact, the August order, it's true
14 that it -- it says it's modifying the previous
15 order. That was the June order, which the Ninth
16 Circuit also said was outside of its
17 jurisdiction.

18 JUSTICE ALITO: Well, suppose the
19 district court issues a -- a -- an order
20 certifying a class. There is an appeal. And,
21 after that, the district court makes some change
22 in the order, but the district court says, look,
23 this is not material. This is immaterial,
24 absolutely immaterial.

25 MR. GUPTA: Right.

1 JUSTICE ALITO: What -- what is the --
2 the party who's taken the earlier appeal
3 supposed to do? Is that party -- the party
4 would -- I would think, if your position is
5 correct, the party has to say, well, you know,
6 I -- I don't want to bet everything on this.
7 Even though the district court has said it's
8 immaterial, I'm going to have to take -- I'm
9 going to have to file a new notice of appeal
10 always.

11 MR. GUPTA: Right. So I think that's
12 exactly what this doctrine is intended to
13 address. And I think, you know, if -- if there
14 was a typographical error, for example, in a
15 class certification order, I think nobody would
16 reasonably insist that there needs to be a
17 second 23(f) petition. And I think Judge Posner
18 has a -- a decision on this in the Apple
19 Illinois case. I think that -- he explains
20 that's part of the reasoning for this.

21 But I just want to point out we're
22 here, you know, in -- in this case talking about
23 23(f) appealability jurisprudence in a case
24 where my friends didn't challenge the
25 jurisdictional holding of the court of appeals.

1 If they had taken -- if they had filed in their
2 cert petition -- if they had told you about this
3 problem and they said, look, there's a May order
4 and an August order, and our beef is really with
5 the August order, and -- and maybe we think the
6 jurisdictional holding of the court of appeals
7 was wrong, they could have challenged that. But
8 they didn't. They didn't do that here.

9 I think the reason we're talking about
10 it is, as I understand the reply brief and the
11 letters that were exchanged, I think the
12 suggestion -- Labcorp's suggestion is that the
13 case is not moot because you should import --
14 this is how I understand their argument -- that
15 you should import this material change doctrine
16 into the mootness exception and craft some kind
17 of exception for mootness on that basis.

18 And they cite in their reply brief the
19 Jacksonville case. That case is a case about an
20 exception for mootness, but it is about the
21 voluntary cessation and capable of repetition
22 exception, which is a recognized exception.

23 JUSTICE ALITO: If the -- I -- I don't
24 want to belabor this, but I will ask one more
25 question on it.

1 If the -- the Ninth Circuit's rule is
2 not required by statute, then why is there a
3 jurisdictional problem?

4 MR. GUPTA: Oh, I think that the --
5 the court of appeals have to have some way of
6 determining what is within their jurisdiction
7 and what is not. And remember it's
8 discretionary, so they have certiorari-like
9 discretion to determine their --

10 JUSTICE ALITO: Well, that's a
11 different question, but, surely --

12 MR. GUPTA: Right.

13 JUSTICE ALITO: -- the court of
14 appeals can by means of some -- by -- by means
15 of a decision say we -- we are defining our
16 jurisdiction in a particular way?

17 MR. GUPTA: Well, I think they -- they
18 exercised their discretion with respect to a
19 order granting or denying class certification.
20 They exercised that discretion with respect to
21 the order that they were asked to review that
22 was attached to the petition.

23 And then the question is, is --
24 should -- should some kind of exception be made
25 because there was a subsequent order that --

1 that wasn't appealed.

2 JUSTICE ALITO: All right. Thank you.

3 JUSTICE KAVANAUGH: I think you said
4 earlier, and I might have misunderstood, but I
5 think your position was that the Petitioner
6 should have disregarded the district court's
7 characterization of its own order, is that
8 correct?

9 MR. GUPTA: Well, yeah, I mean, that's
10 not quite how I'd put it because I think, as --
11 as Justice Kagan was saying --

12 JUSTICE KAVANAUGH: But I think that's
13 the -- I think that's what you mean -- that's
14 not what you said, but I think that's what you
15 mean, and I doubt many lawyers, you know, your
16 clients -- I doubt, you know, anyone really
17 wants to live under that rule, that a lawyer
18 should be disregarding how the district court
19 characterizes its own orders for purposes of
20 these timing rules. That strikes me as -- as
21 asking for a lot of chaos.

22 MR. GUPTA: I think there's an earlier
23 colloquy with Justice Kagan brought out there --
24 a lot of people said a lot of different things
25 about the differences between these orders, and

1 perhaps it would be worth pointing to what the
2 defendants said when there was a fight about
3 this order. And this is in the district court
4 at Document 110 on the first page of their brief
5 about the refinement. They said this is no
6 refinement at all. This proposed definition,
7 the August definition, is -- is broader than the
8 existing one and clearly includes those who have
9 no injury.

10 So they understood it to be a very big
11 change and -- and --

12 JUSTICE KAVANAUGH: The question was
13 about how the district court characterized it.

14 MR. GUPTA: Right. I don't think -- I
15 don't read that footnote --

16 JUSTICE KAVANAUGH: And there are at
17 least at times -- at least at times, the
18 district court characterized it in a way that
19 you said -- you say, oh, well, a reasonable
20 lawyer would have just ignored that. And I
21 just -- it strikes me as contrary to how lawyers
22 practice law and --

23 MR. GUPTA: Well, I --

24 JUSTICE KAVANAUGH: -- and -- and just
25 say, oh, well, the district court is clearly

1 wrong in how it's characterizing its own order,
2 so we should just ignore that and, you know,
3 file this and that. This is --

4 MR. GUPTA: Well, that one footnote
5 wasn't the only thing that was said, and I
6 think, if I were advising a client in this
7 circumstance, I would say, look, if what we
8 really want to challenge is the August order,
9 we'd better make darn sure that we challenge the
10 August order and we shouldn't rely on the fact
11 that an order that we regard as --

12 JUSTICE KAVANAUGH: Are you going to
13 be -- are you going to be held to that standard
14 always?

15 MR. GUPTA: Yeah, I mean, I -- I don't
16 think this is actually --

17 JUSTICE KAVANAUGH: Because that's
18 asking a lot.

19 MR. GUPTA: I don't think this is a
20 close question under the -- the lower court's
21 material change doctrine cases. And I think
22 another thing that Judge Posner said in that
23 case that I mentioned is that what the inquiry
24 turns on is what it is that the party seeking
25 the 23(f) appeal is actually seeking to

1 challenge. It was pretty clear that there was
2 a -- a fight over these definitions and that
3 Labcorp regarded this as a big change.

4 Recall that they sold -- they --
5 they -- they persuaded this Court to grant
6 certiorari on the idea that you've got
7 unscrupulous plaintiffs' lawyer -- lawyers that
8 are stuffing classes full of uninjured people,
9 right? But they regarded that first definition,
10 the problem with it is that it was actually too
11 tethered to the plaintiffs' injury, that it --
12 that it was failsafe because it only had
13 uninjured people. And then they regarded the
14 second definition as broader and -- and wanted
15 to challenge that definition.

16 So, under those circumstances, I do
17 not think it would be reasonable for somebody to
18 rely on the idea that the original 23(f)
19 petition didn't extend.

20 But -- but we're now here talking
21 about, you know, the appealability of that -- of
22 that order. And that jurisdictional holding
23 wasn't challenged. And I actually read the
24 reply and the letters that were exchanged as
25 acknowledging that Labcorp hasn't preserved and

1 isn't seeking to contest that jurisdictional
2 holding of the court of appeals.

3 So now what you're left with is an
4 appeal from an order that has been superseded.
5 And I alluded earlier to the general rule. The
6 general rule in this Court's cases -- and this
7 comes up when you have, for example, a
8 preliminary injunction that has been outstripped
9 and then you had an appeal from the preliminary
10 injunction. This Court has said those appeals
11 are moot. Or, if you have, for example, an
12 appeal with respect to a complaint, the
13 complaint has been amended, the interlocutory
14 appeal is rendered moot. You might have a -- a
15 case in a redistricting case where there's a
16 debate about a map, and then the map has been
17 changed. That appeal would be rendered moot.

18 And so that's the general rule. And
19 that's why I said earlier that what I regard
20 Labcorp as asking you to do is to craft an
21 exception from that general rule on mootness for
22 this circumstance.

23 And I think I regard them as relying
24 on this material change doctrine from the lower
25 courts as supplying a standard for that mootness

1 exception. Mr. Francisco can correct me if I'm
2 wrong, but that's how we read their reply brief
3 and the letter. And I think, you know, in our
4 view, that would be an ill-advised thing to do.
5 You don't have briefing on that.

6 And -- and, as the examples that I
7 recited, I think, tell you, this is not an
8 unimportant question. It is something that is
9 recurring. And even in class action practice, I
10 think this is a recurring issue about how the
11 courts of appeals police the boundaries of
12 their -- of their jurisdiction as class actions
13 are continuing to move through the district
14 courts. And it's important -- it is important
15 that jurisdictional rules be clear, to be sure.

16 It is also important that the court of
17 appeals be able to use their limited resources
18 to exercise their discretion to decide live
19 controversies with respect to actual, in effect
20 class certification orders, rather than have
21 appeals that are, you know, backwards-looking
22 and are about a target that has already moved.

23 JUSTICE SOTOMAYOR: In their opening
24 brief, Petitioner said: "The definition for the
25 damages class, the only class before this

1 Court" --

2 MR. GUPTA: Right.

3 JUSTICE SOTOMAYOR: -- "is as
4 follows."

5 MR. GUPTA: Right.

6 JUSTICE SOTOMAYOR: And it gave the
7 August definition, not the May definition.

8 MR. GUPTA: Right.

9 JUSTICE SOTOMAYOR: Mr. Francisco
10 relies on, and I think it was a question that
11 Justice Alito was referring to, that they
12 viewed, the district court, the class definition
13 as not meaningfully different between the May
14 and August. But it was meaningfully different
15 because of your change, correct? Your change
16 was in response to their claim that you had a
17 fail class definition that was the problem.

18 MR. GUPTA: Yeah. I mean, the reason
19 they're pointing -- they're pointing to
20 statements by the district court or by the
21 plaintiffs is, if you actually look at the --
22 the -- the -- Labcorp has been fairly consistent
23 that they regard this as a big change, and they
24 regarded the original definition, as I said
25 earlier, as too tethered to -- to injury --

1 JUSTICE SOTOMAYOR: All right. Can --

2 MR. GUPTA: -- because it was defined
3 in terms of who was denied a full and equal
4 enjoyment of services.

5 JUSTICE SOTOMAYOR: This is the hard
6 question. It may be unfair, and you can tell me
7 you want to think about it. But they claim that
8 you do not have an administrable way of
9 identifying the injured and uninjured.

10 MR. GUPTA: Right.

11 JUSTICE SOTOMAYOR: All right? So,
12 whether it's under Article III or it's under
13 Rule 23, according to the SG, that you can't
14 prove that. What's your point on that?

15 MR. GUPTA: Well, so, you know, I
16 can -- I'd be happy to talk about it in the
17 abstract, and I can talk about what all the
18 lower courts have said in cases where this
19 question has actually been presented.

20 The oddity of this case is that issue
21 was never presented in the district court, and
22 so the district court didn't have any battle
23 over this and didn't certify a class that was
24 premised on the idea that there was a contest
25 over whether there were uninjured people.

1 And, actually, our position has been
2 all along that the -- the -- everyone in this
3 class is injured, and that's what the lower
4 courts, I think, recognized. And the reason why
5 is, you know, similar to other cases where
6 there's discrimination alleged, this Court has
7 always said discrimination itself is an Article
8 III injury. And so one analogous case is a case
9 where you have people that are challenging an
10 affirmative action policy of a university.

11 JUSTICE BARRETT: Well, Mr. Gupta,
12 that -- that's the question that we didn't get
13 to in Acheson, right? There -- there are
14 arguments that racial discrimination and other
15 kinds of discrimination are different.

16 So I do think it's an -- I do think,
17 in fairness, that that's an open question,
18 whether there's a --

19 MR. GUPTA: Well, I mean, you don't
20 have a case directly on point, and I agree that
21 was teed up in Acheson. I think the case is
22 very, very different from Acheson because these
23 are not, you know, people who are in Maine
24 talking about something in Hawaii.

25 JUSTICE BARRETT: I -- I'm not saying

1 it's the same, and maybe you might win. All I'm
2 saying is I don't think it's as settled as
3 you're presenting it.

4 MR. GUPTA: Sure -- sure. And, I
5 mean -- and it -- it wasn't presented in the
6 lower courts, and so that's why I'm in the
7 position of just kind of, you know, making this
8 argument on the fly.

9 But -- but I'll say, if you set
10 aside -- and you're right, Justice Barrett, if
11 you set aside this question of whether
12 disability discrimination maps on to this
13 Court's precedents on discrimination -- and we
14 think it should -- I think, if you do that, this
15 is a case where all of the people are injured
16 for the same reason as in a case like Gratz
17 versus Bollinger, the -- the affirmative action
18 case, where what the Court said there was you
19 are -- you were confronted with this barrier on
20 the basis of the protected characteristic.

21 The fact that you didn't reach the
22 thing --

23 JUSTICE BARRETT: But I didn't mean to
24 lead you down this road --

25 MR. GUPTA: Okay.

1 JUSTICE BARRETT: -- because that's
2 not before us, right? We didn't take that.

3 MR. GUPTA: It is not. It is not.

4 JUSTICE BARRETT: And so the whole
5 point is that even if we assume that you're
6 right and that the class, as you defined it,
7 does include only people who are injured, that
8 doesn't take away Mr. Francisco's argument that
9 there would still have to be some sort of
10 process and certification to identify who --

11 MR. GUPTA: Oh.

12 JUSTICE BARRETT: -- was injured or
13 not, even if it was just who wanted to go to
14 LabCorp.

15 MR. GUPTA: Well, I think, Justice
16 Barrett, I mean, this points up the strangeness
17 of this vehicle, because this is a case -- this
18 is a question that arises with some frequency in
19 the lower courts.

20 But where it arises, there is an
21 understanding that there -- there's a real
22 question about whether there are uninjured
23 people and how they will be weeded out.

24 And it -- it principally arises in
25 cases -- it happens a lot in antitrust cases and

1 other kinds of cases where the plaintiffs'
2 method of proof relies on an economic model
3 about a counterfactual world.

4 And so, you know, in a price-fixing
5 case, for example, there's going to be a
6 question: Did everyone pay the super
7 competitive price? And it might not be possible
8 ex ante to determine who the people are.

9 JUSTICE BARRETT: But what -- but what
10 you're saying -- I mean, because I don't want to
11 take up your time, and you can divert it. Like,
12 just what you're saying is that it would be
13 impossible -- if -- if -- if we agree with you
14 on kind of the Acheson-esque point, you're
15 saying it would be impossible for everyone in
16 the class not to have standing, as you describe
17 it, so that this would just kind of be
18 irrelevant?

19 MR. GUPTA: Yeah. I mean, it's
20 another way in which writing an opinion here
21 would be an advisory opinion because you'd be --
22 you'd be --

23 JUSTICE BARRETT: Well, we'd have to
24 decide that we agreed with you on the question
25 that we don't want to answer, which is --

1 MR. GUPTA: Well, you'd be -- you'd
2 have to reach an antecedent question that really
3 wasn't presented below.

4 JUSTICE BARRETT: And we deliberately
5 excluded it from the question, so --

6 MR. GUPTA: Right. And, I mean, I
7 think you do that all the time. You grant cases
8 where there's an assumption built into the
9 question presented. But I think it does matter
10 whether that assumption is true or has been
11 established in the lower courts.

12 I don't want to fight on this because
13 it's outside the -- the -- the QP. But I would
14 just -- to continue what I was saying, I think
15 where the question arises, it tends to be where
16 there's a battle of the experts, as Justice
17 Gorsuch was talking about earlier in cases like,
18 you know, antitrust cases or in a case like
19 Tyson Foods.

20 Tyson Foods was a -- a case that came
21 here where you had a complex question about how
22 to weed out the uninjured people. And because
23 the defendant hadn't kept records, the
24 plaintiffs had to rely on expert testimony. And
25 there were 212 people at that pork processing

1 plant in Storm Lake, Iowa, who it turned out
2 were not injured.

3 It would have been really easy to have
4 a trial and weed them out if there had been a
5 special interrogatory form. Those were people
6 who were uninjured simply because, you know,
7 they didn't work over 40 hours and so they
8 weren't deprived of overtime.

9 But, if you -- you -- you accept
10 the -- the submission on the other side here
11 today, I think what should have happened, in
12 their view, is redefine -- you would have
13 redefined the class. And then you would have
14 had a failsafe problem perhaps, which is you
15 would have defined the class to be only those
16 people who worked 40 hours and were not paid
17 overtime. That's not really in the Defendants'
18 interest.

19 The Defendant -- as Justice Gorsuch
20 was describing earlier, the Defendant wants a
21 class definition that's ultimately going to
22 provide global peace when the -- when the case
23 is resolved.

24 CHIEF JUSTICE ROBERTS: What I -- what
25 I said in this short concurrence, which Justice

1 Alito and Justice Alito alone joined --

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: -- the -- the
4 answer, when you get to the point and realize
5 that these people had not worked 40 hours, is
6 not that you then go back and carve them out.
7 What -- what I suggested is that that would be a
8 good reason not to certify the class in the
9 first place.

10 MR. GUPTA: Yeah. I mean, I think the
11 problem in Tyson Foods, though, was -- you'll
12 recall the -- the -- the conundrum that the
13 parties faced there was because they hadn't done
14 a trial where there was a special interrogatory,
15 it was all one proceeding, and so you had this
16 weird aggregate judgment.

17 And then the question was: Could
18 you -- is there some way to reverse-engineer
19 what happened with that judgment to weed out the
20 uninjured, right?

21 But, if you had -- if you had to redo
22 the experiment of Tyson Foods, it's a pretty
23 standard kind of case except that the defendants
24 didn't have those records. And it would have
25 been easily possible to try that case in a way

1 where the -- the -- the case would have weeded
2 out those uninjured people and then, of course,
3 would comport with the defendants' Seventh
4 Amendment rights.

5 CHIEF JUSTICE ROBERTS: Well, right,
6 but, I mean, everybody knows the elephant in the
7 room, that once you get to trial you sort of --
8 I mean, the -- the possibility of facing the
9 damages that are at issue in many of these cases
10 is enough to prevent defendants, as a practical
11 matter, from going to trial.

12 MR. GUPTA: Well, I mean, I
13 acknowledge that, you know, many class action
14 cases don't go to trial. I'm not sure -- you
15 know, that's true of litigation in general.

16 But I think the suggestion on the
17 other side is that the in terrorem effect of
18 certification is magnified because of the
19 incremental difference in the class definition
20 that includes some uninjured people.

21 And the story is -- right, that's the
22 story on the other side. This case itself
23 belies that story, right? The -- the -- the
24 problem here was the Plaintiffs, in their view,
25 had defined the class in a way that was too

1 tethered to injury, and they wanted to change
2 that class definition to expand it.

3 And at the end stage of litigation, it
4 is the Defendants who want the broadest possible
5 definition --

6 CHIEF JUSTICE ROBERTS: I'm sure
7 there's a situation they should -- they should
8 do this because it's actually going to be good
9 for them. But, on the other hand, it's
10 reasonable to suspect that that's not always
11 going to be the case and that they may be the
12 best judge of whether it's good for them or not.

13 MR. GUPTA: I mean, look, I think, in
14 strategic -- in -- in litigation where there's
15 high stakes, the parties are going to behave
16 strategically in a way that maximizes their
17 interest. And as I'm suggesting, that interest
18 changes over -- over time.

19 But I just resist the -- the
20 suggestion that what's really happening in the
21 real world is that there's some incremental
22 marginal advantage that plaintiffs are seeking
23 to get by expanding the definition to include
24 the uninjured because that just creates --
25 the -- the goal is to try to eliminate those

1 manageability problems to the extent possible.

2 And in the settlement calculus, those
3 uninjured people, we know after TransUnion,
4 they're not going to recover. And so I -- you
5 know, I think the -- the policy argument -- I'm
6 not sure that, you know, this is the right body
7 to be considering those policy arguments, but I
8 also think the economic logic just doesn't hold
9 up.

10 JUSTICE KAVANAUGH: Do you think the
11 amicus briefs are wrong then? They're just not
12 understanding their own interest? The
13 interest -- the amicus briefs on the other side.

14 I guess I'm picking up on the Chief
15 Justice's question. I think they know their own
16 interests. I'm not saying they're right. I'm
17 just saying -- you're saying their interests are
18 just misguided entirely.

19 MR. GUPTA: Well, I actually think
20 some of the amicus briefs on the other side take
21 a more measured position that is -- is really
22 more consistent with the consensus view in the
23 lower courts on Rule 23.

24 The parties' positions have coalesced
25 quite a bit on the Rule 23 question. And -- and

1 I know you were persuaded to take this case on
2 the idea that there's some circuit split, but if
3 you actually look at the -- the circuit
4 decisions that are deciding this question on
5 Rule 23, I think the divergences are largely
6 explained just by the differences in the record
7 and the economic models, which are complex.

8 But they're all saying really the
9 same -- I think Judge Katsas and Judge Kayatta
10 and Judge Dyk in the First Circuit, they're all
11 saying the same thing, which is this has to be
12 administratively feasible, and we have to figure
13 out whether it's going to be possible --

14 JUSTICE KAVANAUGH: Do you agree with
15 Judge Katsas's opinion?

16 MR. GUPTA: Yeah. I -- I mean, I
17 think I might --

18 JUSTICE KAVANAUGH: And Judge
19 Kayatta's?

20 MR. GUPTA: Perhaps, if I were sitting
21 with Judge Katsas on that case, I might have
22 come out differently on those facts, but I think
23 the -- the legal framework for these cases,
24 they're just not very different.

25 And I think everyone recognizes,

1 especially after TransUnion, that the job is to
2 weed out the uninjured. And it's just a
3 question of whether on those records, whether
4 it's -- it's going to be manageable to do so.

5 I think the -- the Article III
6 argument on the other side here is much more
7 ambitious and would really be a departure from
8 the -- the way things work.

9 JUSTICE KAGAN: If -- if I could
10 just -- Mr. Francisco's understanding of this
11 case is you have sort of two groups of people,
12 the ones who wanted to use the kiosks, who tried
13 to use the kiosks, who couldn't use the kiosks,
14 and the ones who wanted no part of the kiosks.

15 MR. GUPTA: Right.

16 JUSTICE KAGAN: And, of course, that's
17 very different from your understanding, which is
18 discrimination is discrimination.

19 But just take for a moment -- and this
20 is a question that we're not going to decide one
21 way or the other in this case -- if you take for
22 a moment Mr. Francisco's understanding of who
23 has -- you know, what the wheat and what the
24 chaff is --

25 MR. GUPTA: Mm-hmm.

1 JUSTICE KAGAN: -- is he right that
2 you have no way of separating out those two
3 groups of people?

4 MR. GUPTA: No. I think -- I think it
5 would be a harder case than this one, but I
6 think it's not infrequently the case that, you
7 know, membership in a class turns on some
8 attribute of a person that can be tested through
9 a claims process.

10 And you have an amicus brief from the
11 claims administrators that explains how this
12 happens. It happens in a lot of different
13 contexts, products liability. And there can
14 be -- you know, there was discussion of
15 affidavits. There can be affidavits. That can
16 be one way it can be done. It can be done based
17 on an examination of records. The defendant
18 often has records that will confirm membership
19 in the class.

20 So I -- I -- I reject the suggestion
21 that that's impossible to do, but I think, you
22 know, as this Court said in Dukes, like, the
23 predominance inquiry is very case-specific and
24 it has to be a rigorous inquiry based on the
25 record.

1 And so what I -- I appreciate you're
2 not going to answer, you know, the specific
3 standing question in this case, but I would also
4 just caution the Court, because of the -- the
5 strangeness of this vehicle, where none of this
6 was teed up in the courts below, not to paint
7 with a broad brush and -- and address situations
8 that aren't before the Court, where, actually,
9 managerial district judges are able to do a very
10 good job of weeding out the uninjured under
11 existing practice.

12 JUSTICE SOTOMAYOR: Justice Alito,
13 going back to his point about the variation
14 among circuits as to when you should appeal --

15 MR. GUPTA: Mm-hmm.

16 JUSTICE SOTOMAYOR: -- an amended --
17 sorry, my throat -- a frog got into it. When
18 you should appeal a amended order.

19 MR. GUPTA: Right.

20 JUSTICE SOTOMAYOR: And he takes from
21 that that if there's no time -- if there's no
22 clarity to the rule, then you can do it at any
23 time. Do you think that's correct?

24 Meaning I read 23(f) and it says a
25 court of appeals may permit an appeal from an

1 order granting or denying class. A party must
2 file a petition with the circuit court within 14
3 days after the order is entered.

4 MR. GUPTA: Right.

5 JUSTICE SOTOMAYOR: All right? Here,
6 we have a Ninth Circuit ruling that the August 9
7 order was not properly appealed, correct?

8 MR. GUPTA: Correct.

9 JUSTICE SOTOMAYOR: Whatever its
10 reasons for not properly appealing it, it's
11 holding that that order is not operative,
12 correct?

13 MR. GUPTA: Correct.

14 JUSTICE SOTOMAYOR: And what they're
15 attacking here is an inoperative order by the
16 Ninth Circuit's ruling?

17 MR. GUPTA: Correct.

18 JUSTICE SOTOMAYOR: If they had come
19 to us and used the earlier version of the order,
20 which wasn't a failsafe class, it was only
21 people who were injured, you would have a
22 different set of arguments, correct?

23 MR. GUPTA: Absolutely.

24 JUSTICE SOTOMAYOR: All right. Thank
25 you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. GUPTA: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas?

6 Justice Alito?

7 JUSTICE ALITO: Well, to return to a
8 question that's a great favorite, do you think
9 that this Ninth Circuit rule about material
10 versus immaterial changes is jurisdictional, or
11 is it a claims-processing rule?

12 MR. GUPTA: I -- as I understand it --
13 and, again, you know, there's been no briefing
14 on it. I don't think the Ninth Circuit's
15 jurisprudence is any different from any of the
16 other circuits' and I think it's a
17 jurisdictional -- it's a body of jurisdictional
18 law -- the best way I can understand it is
19 they're interpreting --

20 JUSTICE ALITO: Okay. That's all I
21 wanted to know. It's -- you think it's --

22 MR. GUPTA: Jurisdictional.

23 JUSTICE ALITO: -- jurisdictional?

24 MR. GUPTA: Yes.

25 JUSTICE ALITO: And if I think that

1 it's not jurisdictional and the Ninth Circuit
2 erred in saying we lack jurisdiction to consider
3 this, what should I do?

4 MR. GUPTA: I think that you'd -- they
5 haven't asked -- they didn't file a cert
6 petition on that question, didn't ask you to
7 decide that, and so I don't think you should
8 decide that.

9 JUSTICE ALITO: Well, you -- you argue
10 that it's a jurisdictional question that we have
11 to decide.

12 MR. GUPTA: No. I -- I think what I'm
13 saying is that the -- the case, as it comes to
14 you, comes with that jurisdictional holding that
15 hasn't been challenged. They've now
16 acknowledged that the only order before you is
17 an order that isn't live. And then the question
18 is whether the case is moot.

19 JUSTICE ALITO: Well, so what? If the
20 district -- the court of appeals said there's a
21 lack of jurisdiction in a particular case and
22 the petitioner doesn't raise that, are we not
23 required to decide whether that's right?

24 MR. GUPTA: I think, as a prudential
25 matter, you -- you -- you shouldn't. I think

1 you can. It's within -- it's always, of course,
2 within your jurisdiction to decide your
3 jurisdiction.

4 But I think there's a reason they
5 didn't challenge -- if they had -- if they had
6 filed a cert petition that said, look, there are
7 two orders, we really want to challenge the one
8 that the Ninth Circuit said we don't have
9 jurisdiction over, and so we have this first
10 question presented that's this jurisdictional
11 question and there's really not a split on it,
12 but we'd like you to take it so you can get to
13 this other question, you would have denied that
14 petition, I think.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: One quick thing.

24 You say the job is to weed out the uninjured. I
25 think Mr. Francisco says you have to do that at

1 the start by virtue of Article III and Rule 23.
2 And the government joins him with respect to the
3 second point of that.

4 You seem to say it suffices just to
5 know that there is going to be a mechanism to do
6 that down the road eventually. Why is he wrong
7 about the timing of this?

8 MR. GUPTA: Yeah. I -- I do think
9 it's a question of timing. And I think, if
10 we're analyzing this from the perspective of
11 Article III, this Court has always said that the
12 case or controversy between the plaintiffs in a
13 class action and the defendants is between the
14 named plaintiff, the representative party.
15 That's the person that's the party.

16 So, if you think about this from the
17 perspective of what Justice Story said about how
18 representative litigation worked at equity
19 practice or how it works under modern Rule 23,
20 Justice Scalia's opinion in Devlin, the
21 understanding has always been that, pretty much
22 always, the absentees are not parties over whom
23 the court exercises jurisdiction unless and
24 until the court is doing one of two things:
25 exercising its remedial power with respect to an

1 absentee or deciding a question that it wouldn't
2 otherwise have to decide, like an individual
3 question.

4 At that point, we acknowledge that
5 those people who are absentees, they then have
6 to establish Article III standing. But why
7 should you --

8 JUSTICE JACKSON: What about Rule 23?

9 MR. GUPTA: But why should you do all
10 this before you have to? That's one of the
11 efficiencies of the class device. And I think
12 Rule 23 is designed to promote those
13 efficiencies through representative litigation
14 so long as you have a case or controversy with a
15 representative. The way it works now is really
16 the way it worked in Anglo-American courts at
17 the time of the -- the founding, is that you --
18 you decide the common questions with respect to
19 the person who is actually before the court, and
20 then, if and only if there's a -- they prevail,
21 then the people can come in under the decree.
22 That was the language that Justice Story used,
23 and it's the same language that Rule 23 uses.

24 But why would you decide all of that,
25 those individualized questions, if you don't

1 have to, because the defendant is actually going
2 to prevail.

3 And this brings me to one point
4 that -- that I just want to mention if I have
5 time, which is that there's a suggestion on the
6 first page of the reply brief that if you
7 adopted our rule, that -- that what's going to
8 happen is you're not going to have preclusive
9 class judgments.

10 And I actually think this is a big bug
11 with their approach and -- and a feature of
12 ours, which is right now a defendant can rest
13 easy knowing that they've prevailed in a class
14 action and someone isn't going to run into state
15 court and bring the exact same claim and say,
16 a-ha, we didn't -- we wouldn't have had Article
17 III standing in that first case. And that
18 disturbs the finality of class-wide judgments.

19 Class-wide judgments and their
20 finality and their preclusive effect under our
21 current law is predicated on adequate
22 representation and due process. And I think you
23 would be breaking the system if you were to
24 adopt their position that makes Article III a
25 necessary prerequisite and -- and invites

1 collateral attacks and retrospective inquiries
2 into the finality of class judgments.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 MR. GUPTA: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Francisco,
8 rebuttal?

9 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO
10 ON BEHALF OF THE PETITIONER

11 MR. FRANCISCO: Thank you, Mr. Chief
12 Justice.

13 To begin with the procedural issue,
14 here's what the district court said twice: In
15 refining the class definition, this order does
16 not materially alter the composition of the
17 class or materially change in any manner the
18 original definition of the class.

19 Here's what plaintiffs argued to the
20 district court when it urged the district court
21 to adopt the August definition. It moved to to
22 recline -- to refine the class definition, and
23 it assured the court that it was "identical in
24 every way to the original May definition." And
25 it assured it that it had not changed the

1 "substance" of the class. That's at page 107 of
2 the district court's docket, pages 3 and 7.

3 Now there is a reason for that. The
4 definition, the original May definition, was
5 defined to include any blind person who was
6 denied full and equal enjoyment of the goods,
7 services, facilities, privileges, advantages, or
8 accommodations due to Labcorp's failure to have
9 accessible kiosks.

10 Their position with respect to that
11 language was the position that my friend just
12 articulated. Every single person who walked
13 into a Labcorp facility had those rights denied
14 regardless of whether they wanted to use a kiosk
15 or not. That's what he just stood up and told
16 you was their understanding of who's injured,
17 and that fits within that definition.

18 That is why they took the position
19 that the August definition and the May
20 definition were the same. That is why the
21 district court took the position that the August
22 definition and the May definitions were the
23 same, because the district court agreed that
24 that was what the definition of the class and
25 the class of people who would have had standing,

1 and perhaps, most importantly, that is why the
2 Ninth Circuit resolved the question presented.

3 It acknowledged that it couldn't
4 address an issue that pertained solely to the
5 August order, but because, on the issue that it
6 did resolve, there was not a -- an iota of
7 difference between the May order and the August
8 order for the reasons my friend explained to you
9 when he was standing up here, it did resolve
10 that question.

11 That it reduced to a judgment. That
12 judgment is before you. You plainly have
13 jurisdiction to resolve that question presented.

14 Turning to the merits, I think that
15 the -- as we discussed, the Article III issue is
16 easy to solve, but it walks right into the
17 23(b)(3) question. My friend essentially
18 acknowledged that when it comes to a class loss,
19 the only consequence is that you're going to end
20 up binding a class even if it includes members
21 over whom the Court lacked jurisdiction.

22 That is a fairly shocking proposition.
23 To say that a court can say I know I am
24 adjudicating a whole group of people, many of
25 whom I don't have jurisdiction over, yet,

1 nonetheless, I am going to proceed to bind them
2 with that judgment, that is in the teeth of
3 Steel Company, we ask that you reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 The case is submitted.

7 (Whereupon, at 1:19 p.m., the case in
8 the above-entitled matter was submitted.)

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