No. 24-

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may certify a class action when some of its members lack any Article III injury.

PARTIES TO THE PROCEEDING

Petitioner Labcorp was the defendant in the district court and the appellant in the court of appeals. Respondents Luke Davis, Julian Vargas, and the American Council of the Blind were plaintiffs in the district court and the appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Laboratory Corporation of America Holdings is wholly-owned by Labcorp Holdings Inc., more than 10% of which is owned by Vanguard Group, Inc. The stock of Labcorp Holdings Inc. is traded on the New York Stock Exchange.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Davis v. Laboratory Corp. of America Holdings, No. 20-cv-893 (May 23, 2022) (certifying class), as amended on June 13, 2022, and refined Aug. 4, 2022.

United States Court of Appeals (9th Cir.):

Davis v. Laboratory Corp. of America Holdings, No. 22-80053 (September 22, 2022) (granting Rule 23(f) interlocutory appeal)

Davis v. Laboratory Corp. of America Holdings, No. 22-55873 (February 8, 2024) (affirming class certification)

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Pet.App.1a) is not reported, but is available at 2024 WL 489288. The amended opinion of the District Court for the Central District of California (Pet.App.12a) is available at 2022 WL 22855520.

JURISDICTION

The Ninth Circuit issued its judgment on February 8, 2024, and denied rehearing *en banc* on April 18, 2024. On May 25, 2024, Justice Kagan granted Labcorp's application to extend the time to file this petition for certiorari until September 13, 2024. *See* No. 23A1050. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, §§ 1-2 of the United States Constitution is reproduced at Pet.App.64a. Federal Rule of Civil Procedure 23 is reproduced at Pet.App.66a.

INTRODUCTION

This petition involves an acknowledged split, which implicates billions of dollars, and asks a question this Court has previously granted certiorari to answer: What to do when a putative class contains numerous members who lack any Article III injury? This issue has fractured the circuits: Some deny certification on Article III grounds; others do so under Rule 23(b)(3); and the rest see no problem at all, willing to certify first and resolve matters of individual standing later. But while the circuits disagree about how to answer this question, all agree on its importance—and also that only this Court can ultimately provide an answer. This petition presents an opportunity to finally do so.

This petition arises from a class action filed against Labcorp—one of the country's leading diagnostic labs. In 2017, Labcorp introduced a new way for patients to check-in for appointments. Along with the front desk and online, Labcorp added self-service kiosks—which are the subject of this case. While these kiosks are independently accessible to most patients, they are not accessible to the blind without assistance. To address this, Labcorp improved its front-desk services at the same time—incorporating the same "express" technology it uses in its kiosks—to ensure that blind patients have a similarly easy check-in option there.

Even so, in 2020, a group of legally blind plaintiffs brought this suit, alleging (among other things) that Labcorp's kiosks violated the ADA. They filed in California, and also brought a claim under its "Unruh Act." Notably, any violation of the ADA is a *per se* violation of the Unruh Act—which carries a minimum of $4,000 in state law statutory damages per violation.

A key difficulty for plaintiffs' class action, though, is that it is very hard to find blind patients actually harmed by the availability of Labcorp's new kiosks. Undisputed record evidence indicates that many blind patients either do not know these kiosks exist or, if they did, have zero interest in using them, preferring instead to use the front-desk option that has served them well for years. Even one of the named plaintiffs (who is also a named plaintiff in a similar suit against Quest Diagnostics) said his one experience at Labcorp was "respectful," "helpful," and that he was processed in "20 minutes or so." Nor did plaintiffs identify an example of anyone unable to access Labcorp's testing services because they could not use one of its kiosks.

Given this defect, plaintiffs defined their proposed classes around all blind patients who had been merely *exposed* to these allegedly unlawful kiosks—*i.e.*, blind patients who had walked into a PSC with a kiosk, regardless of whether they knew about or wanted to use it. So defined, plaintiffs estimated the classes at hundreds-of-thousands of people. And they pegged the statutory damages at *half a billion dollars* a year.

The district court certified the classes, and the Ninth Circuit affirmed. Neither court, however, disputed that each class contained a sizable number of members who lacked Article III injuries—which makes good sense, because a person simply *proximate* to an allegedly unlawful kiosk has not suffered any concrete injury. But applying binding Ninth Circuit precedent, both courts concluded that this simply did not matter for purposes of Article III or Rule 23(b)(3).

The Ninth Circuit's lax approach to certification—rejected one way or the other by about half the circuits, and adopted by the rest—is wrong twice over.

For one, Rule 23(b)(3) does not permit a putative class saturated with significant numbers of uninjured members. That rule authorizes a class only where common questions of law and fact *predominate* over individual questions. But when the class contains members lacking Article III injuries, it is necessary to separate the harmed from the unharmed. And those individualized inquiries will inevitably overwhelm any common questions—destroying predominance.

For another, Article III bars certification where the class includes any members lacking a concrete injury. Classes are simply procedural devices for aggregating claims. As such, an individual cannot obtain via a class what he cannot obtain on his own; and if a person would be unable to get through the front doors of a federal court independently, he cannot be smuggled in through the back via a class. A federal court has no power to assess his claim, full stop—even if bundled with the claims of those who have standing.

These are not academic issues. With class actions, certification is often the ballgame. Once a class has been certified, the typical next step is settlement, not trial. And that likelihood becomes an inevitability where the class is large and hazards colossal liability.

Accordingly, if a plaintiff can inflate the size of a class with *uninjured* persons, it can drive up potential liability, and thus manufacture leverage with which to extort a settlement. The result is that weak claims win, and tens-of-millions of dollars (if not more) are extracted from companies who have done nothing

wrong—but nonetheless cannot tolerate a massive litigation risk. And *even if* some of the uninjured members are filtered out on the back-end, that does little good. By that point, the company has already been forced into a settlement with the remaining class members, which should never have happened at all. And the lawyers will have already secured yet another bounty of fees for having found a new saber to rattle.

Whether federal law tolerates this gambit has fractured the circuits. And those answering yes have become hotbeds for these sorts of suits—the Ninth Circuit (and, in particular, California) chief among them. It is essential for this Court to resolve this dispute and determine which part of the circuit divide is correct. And this petition is an opportunity to do so.

STATEMENT OF THE CASE

A. Labcorp, PSCs, and Kiosks.

Labcorp is a leading clinical diagnostic laboratory. It conducts millions of tests every week, roughly 20% of which are performed on samples collected from one of Labcorp's 2,000 patient service centers (PSCs).

This case concerns the check-in process for patients visiting a Labcorp PSC. Tens of millions of patients visit PSCs every year. In 2017, Labcorp offered patients an additional way to check in. Along with being able to check in either in person at the front desk of a PSC, or ahead of time online, patients would also be able to check in through a new self-service kiosk: A touchscreen iPad (branded a "Labcorp Express" kiosk) that allowed patients to check in on their own on-site, without having to first go to the front desk. Kiosks have since been installed in over 90% of PSCs.

Labcorp understood that its kiosks would not be accessible to everyone. So at the same time, Labcorp improved its front desk check-in capabilities, ensuring that the same "express" technology (and experience) was present at both the desk and kiosk. *See* CA9.ER.367-68, 376; *see also id.* at 386-87.[1] Every PSC thus has at least one employee available who can check in patients at the front desk using the same technology employed by the kiosks. *See id.* at 369-72.

B. This Class Action.

1. In January 2020, Luke Davis and Julian Vargas—both legally blind—filed this class action against Labcorp based on their inability to use the self-service kiosks. That September, the American Council of the Blind (ACB)—a group representing 20,000 blind and visually impaired persons across the country—joined the suit with an amended complaint.

Plaintiffs asserted violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act, and the Patient Protection and Affordable Care Act, as well as California's "Unruh Act." Notably, violations of the ADA are "*per se* violations of the Unruh Civil Rights Act." *Jankey v. Lee*, 290 P.3d 187, 190 (Cal. 2012). And *each* Unruh Act violation triggers (at minimum) $4,000 in statutory damages—meaning, every time someone is exposed to an ADA-violation, that is an independent Unruh violation. Cal. Civ. Code § 52(a).

Plaintiffs pressed the same theory for all claims: On their view, Labcorp has discriminated against them and other similarly situated blind individuals because

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[1] "CA9.ER" refers to the Excerpts of Record filed with the court below and available at CA9 Dkt. No. 21.

it has not made its kiosks independently accessible to the blind. As they put it, Labcorp has "denied" blind patients "full and equal access" to their PSCs, in that the "touchscreen kiosks for self-service check-in" are "inaccessible" to them. D.Ct.Doc.40 ¶¶ 4, 21-22; *see also* Pet.App.13a-16a (describing allegations).

To be clear, none of the plaintiffs has alleged that Labcorp has denied a single patient testing or diagnostic services on account of a disability. Nor do they claim that a single patient was unable to access those services. Rather, plaintiffs' suit is based entirely on the fact that if they choose to check in at a PSC, they must use the front desk rather than a kiosk.

The experience of named-plaintiff Julian Vargas—the sole representative for the damages subclass—helps paint the picture. Fresh off deciding to join a similar class action against Quest Diagnostics (where Mr. Vargas is also a named plaintiff), he made his first ever visit to a Labcorp PSC to "familiarize" himself with the facility. CA9.ER.1379, 1366. There, a Labcorp attendant at the front desk told Mr. Vargas that the kiosk was not independently accessible for a blind person, but "assured" him someone would be available to assist him at the front desk. *Id.* at 1367.

And that is exactly what happened. Days later, Mr. Vargas made his second (and final) trip to a Labcorp, where he received front-desk assistance in "three to five minutes" and was processed within "20 minutes or so." *Id.* at 1374-75. To check in, Mr. Vargas was required only to give his identification material to the employee; he never needed to disclose any private information out loud. *Id.* at 1372. And on his telling,

Labcorp staff was "respectful," "helpful," and provided him all "services" that he requested. *Id.* at 1399-1400.

This suit was filed two weeks later.

2. The plaintiffs have proposed two putative classes: A nationwide injunctive class, premised on their federal claims; and a California damages subclass, premised on their Unruh Act claim. The class definitions that were ultimately approved by the district court—and are at issue here—are as follows:

> **The Nationwide Class:** All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in the United States during the applicable limitations period, and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.
>
> **The California Subclass:** All legally blind individuals who visited a LabCorp patient service center with a LabCorp Express Self-Service kiosk in California during the applicable limitations period and who, due to their disability, were unable to use the LabCorp Express Self-Service kiosk.

Pet.App.63a.

As the plaintiffs themselves explained, both of these classes are defined to cover any legally blind person who has been "exposed" to an allegedly ADA-violative kiosk—regardless of whether the patient *knew* about or *wanted* to use one. *See* 9th.Cir.Doc.32 at 35, 38, 41. Class membership instead turns on "(1) whether a LabCorp Express kiosk was in use on site on the date of [a patient's] visit and (2) whether [that patient] is legally blind." *Id.* at 39-40. Plaintiffs conceded their

classes did not "exclude uninjured members," and that they were defined to reach beyond those who have suffered a concrete "injury-in-fact"—*i.e.*, broader than those who have tried or wanted to use a kiosk. *Id.* at 60 (arguing any issues about "legal injury and injury-in-fact" should be resolved after certification).

And critically, that is not a small portion of either class. Unrebutted record evidence showed that nearly *one-fourth* of all Labcorp PSC visitors prefer to check in at the front desk; and another *tenth* preferred to do so online. CA9.ER.509. And there is every indication that for blind patients in particular, those figures are even higher. As the American Council of the Blind's corporate representative noted in her deposition, their preferred option was to have "a staff member be available to check in people" at the facility. *See id.* at 406. Indeed, the ACB surveyed 4,542 members about any experience with Labcorp's kiosks. Only *twelve* members offered any response. *Id.* at 398-99, 455.

The individual record evidence tells the same story. Take ACB member John Harden. Mr. Harden is a regular patient at Labcorp. *Id.* at 410-12. He stated that he did not even *know* there was a kiosk available, until being asked about it in the ACB survey. *Id.* at 452. Instead, his preferred mode of check-in is the front desk, which he has happily used for years. *Id.*; *id.* at 411-12. In his words: The ADA says a "business needs to make reasonable accommodations for the disabled," and Labcorp "certainly" does so. *Id.* at 413.

3. For all of this, plaintiffs seek injunctive relief as well as damages (plus, of course, attorneys' fees). As to the former, plaintiffs are demanding a nationwide injunction that requires Labcorp to make its kiosks

independently accessible to the blind. *Id.* at 683. As for the latter, plaintiffs do "not seek class recovery for actual damages, personal injuries or emotional distress," D.Ct.Doc.40 ¶ 36; they seek only statutory damages under the Unruh Act, which is $4,000 for each independent ADA violation, *see* Pet.App.34a.

According to the plaintiffs, their nationwide class is as many as 676,566 people per year. CA9.ER.557. And their damages subclass—which, again, is limited to the Unruh Act, and thus California—is as many as 112,140 people per year. *Id.* Given the Unruh Act's statutory damages, that could amount to nearly *half a billion* dollars of liability *per year*. *Id.* at 556-557.

C. The District Court Certifies the Classes.

In April 2021, following months of discovery, the plaintiffs moved to certify both of their classes under Rule 23. That rule requires plaintiffs to show two things: First, their putative class satisfies the general requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy); and second, their class fits within one of the three categories listed by Rule 23(b).

On May 23, 2022, the district court certified both of the proposed classes. It found that both classes satisfied Rule 23(a), and that each class qualified for one of the Rule 23(b) provisions. Pet.App.18a-43a.

As for the damages subclass, the district court held that the plaintiffs satisfied Rule 23(b)(3)—which authorizes a class where, among other things, "questions of law or fact common to the class members predominate over any questions affecting individual members." The court agreed it was unclear how many class members even "personally encountered" a kiosk—*i.e.*, even *potentially* suffered some injury-in-

fact. Pet.App.34a-36a. And it agreed individualized findings would be required to "confirm" who would ultimately be "eligib[le]" for relief. *Id.* But the court held this did not destroy predominance because the class still involved a range of common issues (*e.g.*, how the kiosks worked). And when it came to the actual size of the class and which class members were harmed, resolution of that critical issue could wait until "class wide liability has been determined." *Id.*

The court also certified the nationwide injunctive class under Rule 23(b)(2)—which allows a class where a "single injunction or declaratory judgment would provide relief to each member of the class." Pet.App.27a (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011)). The court reasoned that even though the plaintiffs did not offer a single way to "accommodate every person everywhere," it was still possible to tailor an injunction "generally applicable to the class as a whole." Pet.App.28a. And the court also held that it did not matter if "some class members may have suffered no injury" at all—that was an issue for later, and did not bar certification. Pet.App.29a.

On September 22, 2022, the Ninth Circuit granted Labcorp's Rule 23(f) motion to file an interlocutory appeal challenging the district court's certification decisions. The district court then stayed proceedings.

D. The Ninth Circuit Affirms.

On February 8, 2024, the Ninth Circuit affirmed both of the district court's class-certification decisions in an unpublished order dictated by circuit precedent.

As relevant, the Ninth Circuit first held that Article III posed no bar to certifying either class. Pet.App.2a-

4a.[2] Applying existing circuit case law, the court held that it did not matter if "some potential class members may not have been injured." Pet.App.2a-7a & n.1 (citing *Olean Wholesale Grocery Coop. Inc. v. Bumble Bee Foods*, 31 F.4th 651, 668-69 (9th Cir. 2022) (en banc)). A named plaintiff (Vargas) was injured, and that "convey[ed]" standing on the class. Pet.App.4a.

As for Rule 23(b)(3)'s predominance requirement—which applies only to the damages subclass—the court held that the fact the class might contain numerous uninjured persons did not destroy predominance. *See* Pet.App.4a-5a. Labcorp argued that filtering out these members may involve *many* "individualized" inquiries. *Id.* But under binding circuit law, this too did not matter: Rule 23(b) does not bar "certification of a class that potentially includes more than a *de minimis* number of uninjured class members." Pet.App.5a n.1 (quoting *Olean*, 31 F.4th at 668).

On April 18, 2024, the Ninth Circuit declined rehearing *en banc*. Pet.App.10a-11a.

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[2] The Ninth Circuit acknowledged the district court did not "directly address standing in either of its class-certification orders." Pet.App.3a. That is so even though Labcorp raised the issue—namely, regarding the damages subclass. CA9.ER.1614; *id.* at 262-63 (discussing and attaching *TransUnion*).

REASONS FOR GRANTING THE PETITION

This petition asks a question that sharply divides the circuits, implicates billions of dollars, and has already once captured this Court's attention. It is hard to imagine a better issue for this Court's review.

I. THE CIRCUITS ARE DEEPLY SPLIT OVER THE QUESTION PRESENTED.

Courts and commentators agree: The federal courts of appeals are divided over what to do about proposed classes where some class members lack any Article III injury. *See, e.g.*, *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46 (1st Cir. 2018) ("the presence of uninjured class members" is a "problem that has been the source of much debate among the circuits"); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 365-67 (3d Cir. 2015) (listing differing "sister courts"); *In re Deepwater Horizon*, 739 F.3d 790, 800-01 (5th Cir. 2014) (identifying "roughly even split of circuit authority").[3]

Broadly speaking, when faced with the question of how many uninjured people can be in a putative class,

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[3] *See also* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 2:3 (6th ed. 2024) (this issue is an "unresolved question that has generated differing approaches" across the circuits); 8 Julian O. von Kalinowski et al., *Antitrust Laws and Trade Regulation* § 166.03[4][b][ii] (2d ed. 2024) ("The Courts of Appeals have divided on whether certification must be denied where the proposed class includes persons who have suffered no injury."); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:28 (20th ed. 2023) ("[B]roadly speaking the circuits have followed two distinct approaches in evaluating standing for class certification purposes."); Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 Emory L.J. 383, 387 (2014) ("[T]he courts of appeals are divided on whether absent class members also must satisfy Article III.").

the circuits break into three camps. Some say none, holding that Article III bars certification where the class includes anyone who lacks standing; others say just a *de minimis* amount, holding that Rule 23(b)(3) permits nothing greater; and the rest say anything less than a really big number, holding that problems involving uninjured class members can usually be resolved down the road. In all events, there is a "deep split on this issue"—which will persist until this Court decides to "resolve this." *In re Deepwater Horizon*, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., dissental).

A. The Article III Circuits.

One circuit bloc views the question presented through a constitutional lens, and holds that a class may not be certified where it includes members who have suffered no Article III injury. On this view, a class is simply a tool for aggregating claims; and if a claim would fail on its own for lack of standing, then it cannot get before a federal court via a class device.

Second Circuit. The Second Circuit was the first court of appeals to squarely hold that "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). And for that reason, any "class must therefore be defined in such a way that anyone within it would have standing." *Id.* at 265; *see also, e.g.*, *In re Foreign Exchange Benchmark Antitrust Litig.*, 2022 WL 3971006, at *3-4 (S.D.N.Y. 2022) (applying *Denney* to analyze definition of class).

Eighth Circuit. The Eighth Circuit has followed suit, endorsing *Denney*. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("[A] named plaintiff cannot represent a class of persons who lack

the ability to bring a suit themselves."). And that court has since reaffirmed its position. *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 988 & n.3 (8th Cir. 2021) ("[A] class cannot be certified where it is defined in such a way to include individuals who lack standing."); *Halvorson v. Auto-Owners Life Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing.").

Other Circuits. While the Second and Eighth are the clearest adherents to the Article III position, others have lent support too. For instance, the Sixth Circuit endorsed this view in an unpublished opinion. *See In re Carpenter Co.*, 2014 WL 12809636, at *2 (6th Cir. 2014) (certification turns on "whether the definition of the class is sufficiently narrow to exclude uninjured parties") (citing *Denney* and *Halvorson*).

Likewise, while the Fifth Circuit has not squarely addressed whether the presence of uninjured class members presents an Article III problem, some of its judges have embraced this position. *See Flecha v. Medicredit, Inc.*, 946 F.3d 762, 770-71 (5th Cir. 2020) (Oldham, J., concurring) ("If anything, I'd think our standing analysis would be particularly rigorous at this stage, given the transformative nature of the class-certification decision."); *In re Deepwater Horizon*, 732 F.3d 326, 340-42 (5th Cir. 2013) (opinion of Clement, J.) ("A claimant must actually have a legal claim before getting in line for a legal recovery.").

Accordingly, at least in the Second and Eighth Circuits (and with certain panels in the Fifth and Sixth), plaintiffs' class action would never have been certified: Neither of the proposed classes was tailored

to exclude members lacking Article III injuries. That alone would have been fatal in these courts of appeals.

B. The *De Minimis* Circuits.

Another set of appellate courts has approached the issue through the lens of Rule 23(b)(3), not Article III. These circuits have strictly applied Rule 23(b)(3)'s predominance requirement to reject classes that contain more than a *de minimis* number of uninjured members. Of these circuits, some have reserved whether certifying a class with uninjured members raises a constitutional defect, while others have rejected this Article III argument. *Cf. Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) ("class certification issues" can be "logically antecedent to the existence of any Article III issues").

D.C. Circuit. The D.C. Circuit has come close to holding that a class must be defined in a way where everyone in it has Article III standing—but it has not expressly done so. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) ("The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy.").

In a recent opinion by Judge Katsas, though, the D.C. Circuit rejected on Rule 23(b)(3) grounds a class that was defined to reach uninjured members. As the court put it: "Uninjured class members cannot prevail on the merits, so their claims must be winnowed away as part of the liability determination. And that prospect raises [the question]—when does the need for individualized proof of injury and causation destroy predominance?" *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 624 (D.C. Cir. 2019).

Judge Katsas answered that question for the D.C. Circuit by holding that, at the least, a class cannot be certified if it contains more than a "de minimis" number of members lacking an Article III injury. *Id.* at 625. And because the class there plainly did so, the court held that certification was improper. *Id.* at 626.

First Circuit. By contrast, the First Circuit has expressly rejected the position that Article III bars class certification where the class is defined to include those lacking standing. *See In re Nexium Litig.*, 777 F.3d 9, 31-32 (1st Cir. 2015) (holding that only the named plaintiffs must have standing for certification).

Even so, the First Circuit has similarly taken a strict approach to class certification by insisting that a class cannot contain more than a *de minimis* number (in its words, a "very small absolute number") of uninjured persons if it wants to satisfy Rule 23(b)(3)'s predominance requirement. *See Asacol*, 907 F.3d at 53-54 (decertifying class exceeding this limit).[4]

Accordingly, just as above—at least with respect to their half-billion-dollar-per-year damages subclass—plaintiffs' suit would not have been able to get off the ground in either the D.C. or First Circuits. Neither court below even suggested that the damages subclass here contains only a *de minimis* number of uninjured persons. *See* Pet.App.34a-38a; Pet.App.4a-7a & n.1. Rather, as discussed next, that deficiency is simply

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[4] The Third Circuit appears to follow the same approach as the First, rejecting the Article III position, but strictly enforcing Rule 23(b)(3)'s predominance requirement. *Neale*, 794 F.3d at 362, 365 (rejecting Article III view); *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194-94 (3d Cir. 2020) (rejecting class with non-trivial number of uninjured members).

kkirrelevant under Ninth Circuit precedent. *See Olean*, 31 F.4th at 692 (Lee, J., dissenting) (explaining Ninth Circuit has split from at least D.C. and First Circuits).

C. The Back-End Circuits.

Breaking from the above, the remaining courts of appeals have held that the presence of uninjured class members should not ordinarily prevent certification: On this view, uninjured members present no Article III problem; and there is a Rule 23(b)(3) issue only if there is a *really* large number of uninjured members. For these courts, issues concerning member standing are addressed on the back-end, following certification.

Ninth Circuit. Principal among these circuits is the Ninth Circuit. As this case shows, that court does not believe there is any Article III impediment to certifying a class that includes members without any Article III injury. *See also, e.g.*, *Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 n.6 (9th Cir. 2016).

Moreover, unlike the D.C. and First Circuits, the Ninth Circuit has expressly *rejected* the notion that a class cannot "include[] more than a de minimis number of uninjured class members." *Olean*, 31 F.4th at 669; *see also id.* at 691-92 (Lee, J., dissenting). On that court's view, whether a class member has in fact been harmed is no different from any other question; and accordingly, it is possible for other questions of law and fact to predominate, even if "individualized inquiries" as to standing are needed later. *Id.* at 668.[5]

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[5] The Fourth Circuit has favorably cited *Olean*, and has held that only the named plaintiffs must have Article III standing in

Seventh Circuit. Likewise, the Seventh Circuit has rejected the Article III position. *See Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009). And it has also gone further than the *de minimis* courts, holding that the Rule 23(b)(3) predominance line is crossed only if a "great many" of the class members are unharmed. *Id.* at 677; *see Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) ("There is no precise measure for 'a great many.'").[6]

Eleventh Circuit. The Eleventh Circuit is of a piece. It holds that only the "named plaintiff must have standing" for a class to be certified. *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019). And while it has recognized that the standing of unnamed members is "exceedingly relevant to the class certification analysis" under Rule 23(b)(3), *id.* at 1273, it has said a class fails predominance only where a "large portion" of members lack injury, *id.* at 1277.

II. THE DECISION BELOW IS WRONG.

The Ninth Circuit's hyper-permissive approach to certification is wrong. In failing to require tailored classes from the start, that court razes the barriers to certification that are included within Rule 23(b)(3), which this Court has told the lower courts to guard "rigorous[ly]." *Wal-Mart*, 564 U.S. at 350-351. And in so doing, the Ninth Circuit begets a serious Article III

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order for a federal court to certify a proposed class. *See Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 779 (4th Cir. 2023).

[6] The Tenth Circuit has favorably cited *Kohen*. *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010). And district courts within that circuit have expressly adopted that decision's "great many" test for deciding predominance. *See, e.g.*, *In re EpiPen Litig.*, 2020 WL 1180550, at *30-32 (D. Kan. 2020).

infirmity, because a federal court has no power to adjudicate a class's claims, where some of those claims are from those without standing. Thus under both Rule 23(b)(3) and Article III, the Ninth Circuit's approach harbors fundamental defects. *See Amchem*, 521 U.S. at 612. This Court's review is badly needed.

Rule 23(b)(3). Rule 23(b)(3) says a class cannot be certified unless "common" questions "predominate" over "individual" ones. Questions regarding Article III standing are quintessentially individual—turning on a person's own experience and intent. So where a class is defined in a way where it is necessary to later parse members with standing from those without, the Rule 23(b)(3) question becomes "how many" of these "individualized adjudications" are "too many," before a putative class is no longer defined by common issues. *In re Rail Freight*, 934 F.3d at 624 (Katsas, J.).

The Ninth Circuit has set that number very high; and as this case shows, has tolerated proposed classes where *thousands* of individualized inquiries may be necessary. That is mistaken. Foremost, the Ninth Circuit's approach conflicts with Rule 23's text; after all, the plain meaning of "predominate" compels that "Rule 23 allows a *de minimis* number of uninjured members but no more." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). But more fundamental, the Ninth Circuit's lax approach conflicts with the principles and protections that animate Rule 23(b)(3).

As this Court has underscored, Rule 23(b)(3) classes were an "adventuresome innovation" that markedly expanded the "set of circumstances" where a class was available. *Wal-Mart*, 564 U.S. at 362. And with that innovation comes consequences: Certifying a Rule

23(b)(3) class is a "transformative" decision—one that "dramatically change[s]" the size, nature, and stakes of a particular suit. *Flecha*, 946 F.3d at 770 (Oldham, J., concurring). It can "change the number of plaintiffs from one to one million," and turn an individual action into bet-the-company litigation. *Id.*

Given these effects, Rule 23(b)(3) pairs its greater scope with "greater procedural protections." *Wal-Mart*, 564 U.S. at 362. The most important of these is its predominance requirement—which ensures a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Before a plaintiff can wield the sword of collective liability, it must come to federal court with a class made up of common claims by valid claimants.

This showing is not supposed to be easy. Instead, it is demanding by design. *Wal-Mart*, 564 U.S. at 350-51; *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). In particular, when reviewing a proposed Rule 23(b)(3) class, a court must ensure that certification would not undermine "procedural fairness," or hazard "other undesirable results." *Amchem*, 521 U.S. at 615.

As the D.C. and First Circuits have correctly held, these principles compel a *de minimis* rule—*i.e.*, a clear rule that if a proposed class may contain uninjured members at all, it cannot harbor more than a *de minimis* number of them. Anything looser vitiates the procedural safeguards placed within Rule 23(b)(3).

Most of all, rejecting the *de minimis* rule inevitably "invite[s] plaintiffs to concoct oversized classes stuffed with uninjured class members," which enables them to "inflate the potential liability (and ratchet up the attorney's fees based in part on that amount) to

extract a settlement, even if the merits of their claims are questionable." *Olean*, 31 F.4th at 692 (Lee, J., dissenting). In other words, it allows Rule 23(b)(3)'s procedural device for *aggregating* claims to be transformed into a tool for *manufacturing* them—all in service of extracting an "in terrorem" settlement, as soon as the proposed class has been certified. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

For everyone outside the plaintiffs' bar, that is not good—and brings about exactly what Rule 23(b)(3) is supposed to prevent. It is not procedurally "fair" for a plaintiff to be able to use a device like the class action to conjure settlement leverage. Nor is it "desirable" for the rule of law (or the economy) when a company sheathes an otherwise viable defense—and allows a losing claim to prevail—because the risks of litigating a sprawling class action are just too high to endure.

For its part, the Ninth Circuit has put little stock in all this. On its view, questions of member standing are no different from any other question of law or fact; and Rule 23(b)(3) can be satisfied, even in the face of potentially *thousands* of individualized standing inquiries, so long as *other* common questions predominate. *See Olean*, 31 F.4th at 669. But that is flawed even on its own terms. As the above lays bare, questions of member standing are different in kind from rote questions of law or fact (*e.g.*, how a kiosk works). This because they go to the *size* of the class and, in turn, the *specter* of liability. Excusing a class with uninjured members—even if there are *other* common questions—thus presents a distinct defect. It "tilts the playing field in favor of plaintiffs" by giving them leverage to "extract a settlement" upon certification. *Id.* at 692 (Lee, J., dissenting). And *that*

directly imperils the protections and principles underlying Rule 23(b)(3).

Accordingly, when it comes to proposed classes that harbor members lacking any Article III injury, the better course is to guard Rule 23(b)(3)'s predominance requirement jealously. If a class can have uninjured members at all, the number of members lacking Article III standing must be no more than *de minimis*, lest a procedural device for pooling common claims is transformed into a cudgel for extorting settlements.

Article III. The Ninth Circuit's approach to class certification fails for another threshold reason: Article III precludes a federal court from certifying a class whose members lack an Article III injury. Article III standing is a "bedrock constitutional requirement that this Court has applied to all manner of important disputes." *United States v. Texas*, 599 U.S. 670, 675 (2023). And class actions are no exception. *TransUnion LLC v. Ramirez*, 594 U.S. at 430-31. A class member thus must satisfy Article III—just like any other litigant.

Indeed, a class action is just a procedural device: It is simply a "method[] for bringing about aggregation of claims." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S 269, 291 (2008). It does not (and cannot) alter the substantive rights of litigants; and it leaves a class member with the same "rights and duties" he would have if he sued on his own. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010). In other words, a class member cannot obtain via a class device what he cannot get by going it alone.

That settles the standing question. This Court has already explained that "Article III does not give

federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431. But if a member cannot get *relief* at the end of the suit, he cannot get an adjudication on the *merits* of his claim beforehand—as would occur, for instance, in a class action where the liability phase is bifurcated from damages. *See California v. Texas*, 593 U.S. 659, 671-72 (2021). That would amount to an advisory opinion: A ruling on a party's legal question when it has no concrete stake in the dispute.

It does not matter that uninjured members happen to be pooled together with injured members. Again, a class action is just a device for aggregating individual claims; it does not change the nature of those claims, nor alter what they must show to get into federal court. Rather, it is akin to other procedural tools like joinder, consolidation, or intervention. *See Shady Grove*, 559 U.S. at 408. And as this Court has already held in the context of Rule 24 intervention—applying the very logic above—a litigant "must demonstrate Article III standing" to *participate* in a case when that litigant seeks independent relief, such as "separate monetary relief." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439-440 (2017).

The same rules apply here. Class members are not *amici* or bystanders. Once a class is certified and a putative member declines to opt-out, that member's claim becomes part of the case. *See Devlin v. Scardelletti*, 536 U.S. 1, 7-10 (2002). And because that claim seeks relief in the member's "own name[]," that member must have "standing." *Laroe Estates*, 581 U.S. at 440. That is, even though Rule 23 affords unnamed class members the luxury of having their claims adjudicated without their direct participation,

it does not reduce the Article III hurdles they must clear for their claims to be heard in the first place.

And that is true regardless of the form of relief sought—*i.e.*, whether it is an injunctive class (under Rule 23(b)(2)), or damages class (under Rule 23(b)(3)). Article III applies irrespective of remedy; a plaintiff must have standing for any relief—legal or equitable.

To be sure, this Court has at times allowed a case to proceed where at least one plaintiff can establish standing. But the rationale in those cases is that in awarding relief to *one* party, the incidental effect of that judgment would provide complete relief to the *other* parties—alleviating any need to render a "judgment" in their cases. *Baggett v. Bullitt*, 377 U.S. 360, 366 n.5 (1964). With a Rule 23(b)(2) injunctive class, by contrast, the court is adjudicating the claims of unnamed members, rendering a judgment in their case, and providing a legal remedy that formally runs from the defendant to those parties. *That* is different in kind, and presents a distinct Article III infirmity.

If anything, certifying a Rule 23(b)(2) class with members lacking Article III standing is *especially* problematic, because that rule authorizes a class only where "final injunctive relief … is appropriate respecting the class as a whole." But where (as here) a class is defined to encompass members *without* Article III standing, injunctive relief *cannot* be "appropriate" for the "whole" class because the whole class is not eligible to receive such relief.

Accordingly, in order for a class to be certified, the plaintiff must define its class in a way that all class members have Article III standing and offer common evidence to show that those members have indeed

suffered an injury-in-fact on a classwide basis. After all, certification is not a "mere pleading" exercise; a party seeking class certification must "affirmatively demonstrate" that its offered class really satisfies the requirements for one. *Wal-Mart*, 564 U.S. at 350-51. And that includes showing that class members—*i.e.*, the individual claimants who will also be part of the federal proceeding—have Article III standing. *See* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 17851.1 (3d ed. 2024) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered [an Article III] injury"); *see also*, *e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff bears the burden of showing standing at each "successive stage[] of the litigation").

The Ninth Circuit's decision to affirm certification of the two classes here thus cannot be squared with Article III's demands. Again, the classes here are not even *defined* in a way that excludes uninjured members. And undisputed record evidence makes plain those classes are stuffed with such persons. Neither court below disputed this; they just said it did not matter. That was marked error.

III. THIS QUESTION PRESENTED IS ONE OF "GREAT IMPORTANCE."

The deep division across the circuits over this issue does not concern some trifling matter. It is a question, in this Court's words, of "great importance." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 461 (2016). Indeed, in *Tyson Foods*, this Court agreed to answer the question presented—granting certiorari to settle "whether a class may be certified if it contains

members who were not injured and have no legal right to any [relief]." *Id.* at 460. But the *Tyson Foods* Court ultimately opted against doing so because the petitioner pressed an entirely "new argument" in its merits briefing—scrapping any focus on *certification*, and shifting its attention wholly to whether uninjured members may obtain *relief* post-judgment. *Id.* at 460-61; *see also TransUnion*, 594 U.S. at 431 n.4.

Nevertheless, if the question presented was worthy of this Court's review in 2016, it is even more so now. Indeed, the division among the circuits has only gotten worse. And the practical reasons for the Court to intervene have only proliferated in the last decade.

In fact, class actions have mushroomed in recent years, swelling to where "around 10,000" are filed annually. *Olean*, 31 F.4th at 686 (Lee, J., dissenting). The costs of these suits have exploded too. Simply *defending* class actions is set to top *$4 billion* for the first time this year. 2024 Carlton Fields Class Action Survey, at 7 (2024), https://perma.cc/U3TX-X84E. Single suits can cost tens of millions to litigate.

ADA actions like the one here are a prime example of this broader phenomenon. In 2013, fewer than 3,000 such suits a year were filed; now, it is closer to 10,000. Minh Vu, Kristina Launey, & Susan Ryan, *ADA Title III Federal Lawsuit Filings Hit An All Time High*, Seyfarth Shaw LLP (Feb 17, 2022), https://perma.cc/NJZ5-LK3Y. And of those, California is home to *half*—which makes sense, because the Unruh Act, as noted, makes ADA violations *per se*

Unruh Act violations, to the hefty tune of (at minimum) $4,000 per violation. *See id.*[7]

Moreover, as class actions get bigger and bigger (as well as more frequent), everything increasingly comes down to the class-certification decision. Once a class is certified, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). The "[c]ertification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting); *see also, e.g.*, *Olean*, 31 F.4th at 686 (Lee, J., dissenting) (similar).

Critically, this risk of "'in terrorem' settlements" is not something that can be alleviated on the back end. *Concepcion*, 563 U.S. at 350. That a federal court may separate injured from uninjured members before awarding individual relief does little to save a company from needing to settle in the first place. At bottom, it is the very *specter* of liability that forces a business to give up. Companies often must measure risk against the worst-case scenario—and where the plaintiffs can inflate the upper end of liability with an indeterminate number of uninjured members, even a remote possibility of loss becomes intolerable.

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[7] The ADA is by no means the only example. *See, e.g.*, Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 321-22 & n.71.

To make matters worse, *even if* courts are able to filter out uninjured members on the back end, that ordinarily does not affect the bottom-line liability that companies face. The common practice—adopted by treatises, the Federal Judicial Center, and a number of courts—is for a company to pay a lump sum, and if there is anything left over (either because those funds went unclaimed, or because claimants lacked a compensable injury), that money goes somewhere *besides* the company (such as a cy pres award, or a *pro rata* distribution). *See, e.g.*, *Newberg and Rubenstein on Class Actions*, *supra*, at § 13:7 ("If the class does not claim the full [settlement], the unclaimed funds do not necessarily go back (or 'revert') to the defendant."); Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 20 (3d ed. 2010) ("A reversion clause creates perverse incentives for a defendant"); *see also Marek v. Lane*, 571 U.S. 1003, 1006 (2013) (Roberts, C.J., respecting the denial of certiorari) (noting "[*c*]*y pres* remedies" are a "growing feature of class action settlements," and questioning "when, if ever, such relief should be considered").

The upshot is that if a plaintiff is able to augment a putative class with uninjured members, the benefits of that maneuver will vest *upon certification*—it will turbo-charge the plaintiff's ability to force a settlement and drive up that settlement's price. Whether that tack is available to plaintiffs under federal law is a question of tremendous import. And it is one where this Court's review is urgently needed.

IV. THIS PETITION IS A GOOD VEHICLE TO RESOLVE THIS ISSUE.

This petition presents an opportunity for this Court to finally answer the question it reserved in *Tyson Foods*—and that has plagued the circuit courts since. It is a good vehicle to do so for three principal reasons.

First, this case cleanly frames the legal issue because it involves *both* aspects of the split—the class includes individuals without Article III standing, and the size of that group is far from *de minimis*.

Both of the classes here are defined around people who have merely been "exposed" to an allegedly non-ADA-compliant kiosk—*i.e.*, legally blind people who walked into a Labcorp PSC that happened to include a kiosk. *Supra* at 8-9. As the plaintiffs *themselves* acknowledged, that class definition is not limited to those who have suffered an Article III injury. *Id.* at 9.

Nor is this disputable. Simply being proximate to a kiosk one is unable to use—without any knowledge of it, let alone a desire to use it—is not a "concrete" harm. *TransUnion*, 594 U.S. at 417. Someone who learned about the kiosks through this lawsuit has not been injured by them. *Id.* at 433-34, 438. So too someone with zero intention to use one—any more than a vegan could challenge how a restaurant processes and prepares its meat. Of course, when any individual genuinely suffers discrimination, that is an Article III injury. But such a person must be "personally" subject to the discriminatory treatment to incur an injury-in-fact. *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984). And here, neither certified class is limited to those who have incurred such a harm; nor did

plaintiffs attempt to proffer common evidence to show that all members suffered any such treatment.

Indeed, there is every indication in the record that plaintiffs' proposed classes are permeated by uninjured members—and contain far more than a *de minimis* number of individuals lacking an Article III injury. Recall, plaintiffs estimated their classes at hundreds-of-thousands of people. *Supra* at 10. But at the same time, the unrebutted record evidence revealed that nearly a *third* of all Labcorp patients prefer to check in at the front desk or online, rather than use a kiosk; and as for legally blind patients in particular, that figure is almost certainly much higher. *Id.* at 9. Again, when the ACB surveyed around 4,500 of its members about their experiences with Labcorp's kiosks, only *twelve* offered a relevant response. *Id.* And as the individual record evidence confirmed, that is not surprising: Many legally blind patients neither know about nor intend to use Labcorp's kiosks over other options. *Id.*

By the same lights, along with cleanly framing the legal issue, this case also cleanly frames the practical stakes. This suit typifies what plaintiffs are able to accomplish in circuits that do not police certification on the front end: pack an open-ended class with an indeterminate number of uninjured members. And then, plaintiffs can pair that swelled class with statutory damages to create the specter of business-crushing liability. Which is exactly what is happening here, as the plaintiffs have combined California's Unruh Act with an inflated class to ask for half-a-billion dollars per year in damages, thus assembling a *multi-billion dollar* claim. Whether *that* is allowed underscores the real-world import of this issue.

Second, this petition arises out of the Ninth Circuit, whose approach is most clearly in conflict with other courts of appeals. The Ninth Circuit has not only rejected the Article III position, *but has also* expressly rejected the *de minimis* rule by name. *Olean*, 31 F.4th at 669 (rejecting the proposition Rule 23 bars certification of "class that potentially includes more than a *de minimis* number of uninjured class members"); *see also id.* at 691-92 (Lee, J., dissenting) (flagging split). And the panel applied *Olean* to certify the damages subclass here. Pet.App.5a & n.1.

Reviewing a case from the Ninth Circuit is therefore perhaps the most straightforward way to address the legal dispute that this Court must one day resolve—namely, whether a federal court may certify a class that contains members lacking any Article III injury. The Ninth Circuit has rejected both views from the circuits that hold no. And it has done so directly, giving this Court a single position to review.

In addition, even *absent* a split, the Ninth Circuit's precedent would warrant review, given the national repercussions of its hyper-permissive approach to class certification. The Ninth Circuit is the country's largest judicial circuit. And it is home to California—which has become a "hotbed" for class actions, given the state's no-actual-injury statutory damages laws (like the Unruh Act), coupled with the Ninth Circuit's willingness to certify classes swelled by thousands of uninjured persons. *See* Seyfarth, *supra.* Whether the Ninth Circuit has class action law right is *alone* a multi-billion-dollar question—itself worthy of review.

Third, this case arises out of a grant of a Rule 23(f) interlocutory appeal, and thus allows the Court to

cleanly review a standalone class certification decision. The federal appellate courts deny the vast majority of Rule 23(f) petitions. *See* Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 283, 303 (2022). As a result, questions about class certification often come to this Court in a post-verdict posture, burdened by a host of other (outcome-determinative) issues. *Cf. Tyson Foods*, 577 U.S. at 465-66 (Roberts, C.J., concurring) (discussing whether practical problems alone might merit decertification). But here, the sole issue on review is the Ninth Circuit's decision to affirm class certification. This Court should take advantage of this clean opportunity to review the legal judgments that gave rise to that decision—just as it has done in other class-certification cases arising on a similar interlocutory posture. *See Comcast*, 569 U.S. at 32.

Nor should it matter the decision below is unpublished. If anything, it counsels further in favor of this Court's immediate review. The fact the Ninth Circuit could affirm *this* multi-billion-dollar class in a memorandum opinion only underscores just how well-settled the law is in that circuit. And in turn, it only underscores how desperately this Court's review is needed, lest the Ninth's rubber stamp keep printing.[8]

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[8] This Court is no stranger to granting cert with unpublished decisions, controlled by binding circuit precedent. *E.g.*, *Lora v. United States*, 599 U.S. 453 (2023); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *Stokeling v. United States*, 586 U.S. 73 (2019); *see also* Rachel Brown et al., *Is Unpublished Unequal?*, 107 Cornell L. Rev. 1, 139-45 (2021) (listing 75 others).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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