No. 24-304

IN THE

Supreme Court of the United States

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

Petitioner,

v.

LUKE DAVIS, JULIAN VARGAS, AND AMERICAN COUNCIL OF THE BLIND, individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AARP ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

WILLIAM A. RIVERA
LOUIS LOPEZ
REBECCA RODGERS
AARP FOUNDATION
601 E Street NW
Washington, D.C. 20049
(202) 434-3392
warivera@aarp.org

(Additional Counsel Listed on Inside Cover)

JOHN PAUL SCHNAPPER-CASTERAS
Counsel of Record
RACHAEL R. YOCUM
SCHNAPPER-CASTERAS PLLC
1717 K Street NW, Suite 900
Washington, D.C. 20006
(202) 630-3644
jpsc@schnappercasteras.com

Counsel for Amici Curiae

LORI ANDRUS
JEFFREY R. WHITE
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, #200
Washington, D.C. 20001
(202) 617-5620
Jeffrey.White@justice.org

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INTEREST OF *AMICI CURIAE*[1]

Amici comprise national associations and non-profit organizations representing millions of older adults, as well as the interests of American consumers and workers. Collectively, they have been involved in hundreds of cases involving Rule 23 across a wide range of issues and courts. *Amici*'s longstanding litigation and advocacy relies upon the continuing application of Rule 23 in a reasonable, cost-effective, and even-handed manner, consistent with constitutional requirements.

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans age 50 and older to choose how they live as they age. With a nationwide presence, AARP strengthens communities and advocates for what matters most to the more than 100 million Americans 50-plus and their families: health and financial security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works for and with vulnerable people 50 and over to end senior poverty and reduce financial hardship by building economic opportunity. AARP and AARP Foundation believe that all Americans, including older adults, should be able to exercise their rights to seek redress for predatory and deceptive business practices by enforcing consumer protection and other statutes through class action lawsuits for money damages.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici*, their members, or their counsel made such a contribution.

The National Consumer Law Center ("NCLC") is a non-profit research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC has been a leading source of legal and public policy expertise on consumer issues for legislatures, agencies, courts, consumer advocates, journalists, and social service providers for over fifty years. NCLC's twenty-one volume Consumer Credit and Sales Legal Practices Series, including its seminal treatise and practice aid on *Consumer Class Actions* (11th ed. 2024), is widely recognized as one of the most comprehensive and authoritative resources on consumer law issues and is frequently referenced by courts and practitioners alike. The organization also has sponsored an annual Consumer Rights Litigation Conference for over thirty years and an annual Class Action Symposium for over twenty years.

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, and consumer cases, including class actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting abusive corporate power and predatory practices. As part of its mission, Public Justice seeks

to ensure that the civil court system remains an effective tool for workers, consumers, and other small-claims litigants to correct and deter corporate wrongdoing. Through its Access to Justice Project, Public Justice seeks both to preserve the availability of the class mechanism and prevent its abuse, such that it may serve its intended purpose: to hold accountable those who break the law and whose misconduct harms large numbers of people.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country focused on empowering workers' rights. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances workers' rights and serves lawyers who advocate for equality and justice in the American workplace, including representation of employees facing discrimination in the workplace.

The Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights class actions before this Court and the Courts of Appeals, including cases challenging employment discrimination, lack of access for people with disabilities, and limitations on access to justice.

Disability Rights Advocates ("DRA") is based in Berkeley, California with offices in New York City, New York and Chicago, Illinois. DRA is a national nonprofit public interest legal center recognized for its expertise on issues affecting people with disabilities. DRA is dedicated to ensuring dignity, equality, and

opportunity for people with all types of disabilities, and to securing their civil rights. To accomplish those aims, DRA represents clients with disabilities who face discrimination or other violations of federal or state civil rights or federal constitutional protections in complex, system changing class action and impact litigation. DRA is generally acknowledged to be one of the leading public interest disability rights litigation organizations in the country, taking on precedent-setting disability rights class actions across the nation.

Together, *amici* respectfully submit this brief to offer their expert perspective about the practical effects that Petitioner's arguments would have across different areas of federal law.

SUMMARY OF ARGUMENT

Petitioner advances a novel constitutional theory that no federal court has adopted and that the Ninth Circuit did not have the opportunity to pass upon. Petitioner would mandate that every putative class member make a "sufficiently specific" showing of their injuries – before a court rules on Rule 23 certification. That would transmogrify Article III principles into a freestanding, pre-certification evidentiary requirement that all putative class members prove their injuries "at the front end," per Petitioner. Such a theory is fundamentally misguided and would be deeply disruptive in many areas of law that affect workers, consumers, investors, and businesses.

For example, in cases where military servicemembers seek benefits equal to those that their employers provide to nonmilitary employees, Petitioner's theory would demand that, before certification, *both* parties expend enormous time and expense gathering employer and military data, paying experts to organize and analyze it, and litigating

related disputes. Requiring plaintiffs to go to such great lengths at the pre-certification stage would be arduous, expensive, and wasteful of judicial resources – and would complicate areas of the law that are already complex enough. This simply cannot be squared with the logic of *Tyson Foods*, which properly recognized that class action litigants (like any litigant) have the right to prove to a jury that they were injured. To adopt Petitioner's position, the Court would either have to overrule *Tyson* or require that injury be proven through trial before a class can be certified.

Petitioner and its *amici* try to justify their novel theory on the ground that certification rulings are effectively final judgments, forcing them to pay without proof of damages. But that is mistaken both statistically and practically. As shown by comprehensive empirical studies at Stanford Law and elsewhere, the majority of class actions are still resolved through dismissal – not certification, settlement, or trial. In addition to the dismissal and certification stages, there are several other guardrails in place that protect defendants from being forced to settle once a Rule 23 class is certified. District courts have a number of tools in their tool belt to reduce awards and winnow classes, as appropriate.

The net effect of Petitioner's theory would be to undermine the viability of class actions where each individual member tends to recover modest sums. This Court has repeatedly highlighted the legal and societal significance of so-called "small dollar" class actions, both to economize and incentivize class-based recovery in the first place. And also because of the reality that leaving such small dollar cases unremedied would exacerbate the nickel-and-diming of Americans from all walks of life.

Last but certainly not least, this Court should sidestep the pitfalls of Petitioner's theory and reject its constitutional argument because of the doctrine of constitutional avoidance. For the reasons that Respondent lays out in their merits brief, this Court should affirm the judgment below – or at most, vacate and remand this case on the narrow Rule 23(b)(3) predominance issue.

ARGUMENT

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Mot. Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Notwithstanding this bedrock doctrine, Petitioner invites this Court to adopt, as a matter of first impression, a novel constitutional theory that would create a freestanding requirement that every member of a putative class establish injury before certification.

Aside from being wrong as a matter of text, history, and practice, Resp. Br. 36-43, that theory would also have profoundly unsettling effects across numerous areas of law and would significantly undermine "small dollar" class actions. This Court should rebuff this constitutional argument.

I. PETITIONER'S THEORY REQUIRES CALCULATING AND PARSING INJURIES OF PUTATIVE CLASS MEMBERS BEFORE RULE 23 CERTIFICATION, WHICH WOULD BE ARDUOUS AND UNSETTLING IN MANY AREAS OF LAW.

Petitioner and its *amici* advance a broad rule that would transform general Article III principles into a fact-specific evidentiary requirement for putative class members before the Rule 23 certification stage. That is wrong as a matter of law and practice.

A. Petitioner's Constitutional Argument is Sweeping and Unnecessary.

It is black letter law that a named plaintiff is required to show Article III standing in every case. But under Petitioner's theory, there would now be "evidence required" for putative class members, *inter alia*, to "plausibly establish that all class members have been [] harmed." Pet. Br. 25 (citation omitted). According to Petitioner, this would mandate a "**sufficiently specific**" showing of injury, Pet. 25 n.2 (emphasis added), and could "'necessit[ate] [] **touching aspects of the merits** [determinations]" Pet. 26 (citation and quotations omitted) (emphasis added). Under all circumstances, Petitioner insists it is "critical that Article III standing be policed at the front end," Pet. Br. 4.

Petitioner's *amici* openly admit that this theory necessitates detailed "determinations about injury for each individual [that] are inherently fact-specific" and that "require close scrutiny of the facts surrounding each individual violation." Brief of the City of Beverly Hills et al., as *Amici Curiae* in Support of Petitioners at 11. They also stress that "complex merits

determinations dovetail with Article III concerns" – and even try to shoe-horn aspects of *Monell* into Petitioner's new theory. *Id.* at 12. That is a sweeping and blatant attempt to frontload merits and damages determinations to impede class actions.

While Petitioner occasionally tries to downplay the extent of the evidentiary burden of its own theory, Pet. Br. 13, 14, 25, that simply cannot be squared with the categorical rule that it ultimately wants. *Compare* Pet. Br. 22 ("Certifying a Rule 23(b)(3) class with uninjured members, however, would [impermissibly extend Article III and violate the Rules Enabling Act.]"), *with id.* at 14 ("[N]o one maintains that a class must invariably be decertified whenever an uninjured member is found hiding in the ranks."). *See also* Pet. Br. at 24. Moreover, establishing injuries for all class members would necessarily require *some sort* of heightened proceedings or evidentiary submissions, which Petitioner does not seriously deny and the First Circuit has previously recognized. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (to "entirely separate the injured from the uninjured at the class certification stage" would—at least "[w]ithout the benefit of further proceedings"—be "almost impossible in many cases.").[2]

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[2] Moreover, Petitioner's fallback argument about Rule 23(b)(3) similarly foreshadows "individualized mini-trials" "to determine which class members were injured and which ones were not." Pet. Br. 14. One way or the other, Petitioner cannot escape its own suggestion that its theory seeks to weigh down class actions with "individualized, adjudicatory inquiries" on the front end that this Court has never before seen fit to impose. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 n.4 (2021); *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997).

At the very least, Petitioner's constitutional theory would considerably complicate areas of law that are already quite complex, *see also* Resp. Br. at 43-46, and would be unworkable in practice. Judge Posner laid out these concerns clearly:

> To require the district judge to determine whether each of the 150 members of the class has sustained an injury—on the theory that if 140 have not, and so lack standing, and so should be dropped from the class, certification should be denied and the 10 remaining plaintiffs be forced to sue (whether jointly or individually)—would make the class certification process unworkable; the process would require, in this case, 150 trials before the class could be certified. The defendants are thus asking us to put the cart before the horse. How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.

Parko v. Shell Oil Co., 739 F.3d 1083, 1084–85 (7th Cir. 2014).[3]

All of this hubbub is unnecessary. There is already a workable procedure for assessing standing at the certification stage. Under Article III, named plaintiffs must maintain standing at each stage of the litigation, but the burden of demonstrating standing rises as the

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[3] At the certification stage, the Seventh Circuit also rejected the notion that plaintiffs "have the burden of showing that every class member must prove at least some impact from the alleged violation," and held that "[w]hile we have no quarrel with the proposition that each and every class member would need to make such a showing in order ultimately to recover, we have not insisted on this level of proof at the class certification stage." *Kleen Products LLC v. International Paper Company*, 831 F.3d 919, 927 (7th Cir. 2016).

litigation proceeds. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) ("A plaintiff must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). *See also Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 414 (S.D.N.Y. 2012) ("[A]lthough it is plaintiffs' burden to establish such injury, plaintiffs are not required to prove injury-in-fact at the class certification stage. Instead, at this stage of the litigation, plaintiffs need only properly allege such an injury.") (cleaned up). *See also id.* at 417 ("In determining whether to certify a class, a district court is required to consider only the allegations set forth in the complaint and to take all of plaintiffs' allegations as true.") (citing *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n. 15 (2d Cir. 1978)). LabCorp and its *amici* are asking to upend that longstanding practice.

B. Petitioner's Theory Would Upend Many Areas of Law.

This Court should be aware of the problematic real-world consequences that Petitioner's theory could impose across various areas of law affecting workers, consumers, investors, and businesses.

For instance, consider a group of U.S. military servicemembers who allege discriminatory benefit policies at their civilian day job when they take leave to train in the National Guard. Since such conduct violates the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. Chapter 43, the servicemembers have the right to pursue a class action provided they satisfy the normal requirements of Rule 23, "numerosity, commonality, typicality, and adequate representation," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (quoting

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982)).

Typically, these cases present a class of employees who share common circumstances; they serve in the National Guard or Reserves, work for the same civilian employer, and are subject to the same company benefit policies.[4] Most of them sacrifice weekends, vacations, or other time to serve in the Guard – an obligation that sometimes, but not always, requires them to take time off from work. They all experience the same company policies, but whether a given class member was impacted in a given week – while ascertainable – requires significant work to determine.

Under Petitioner's theory, district courts handling such USERRA cases would first have to "police" Article III by requiring a "sufficiently specific" showing that "all class members have been so harmed" by their civilian employer. In practice, in a USERRA case like this, that would require all the putative class members to undertake a number of specific and onerous steps, including:

(1) obtaining detailed payroll records from the defendant for an extended, multiyear period;

(2) obtaining military service records from the U.S. Department of Defense, Department of

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[4] Courts regularly certify classes in these cases. *See e.g., Baker v. UPS*, No. 21 Civ. 0114, 2023 U.S. Dist. LEXIS 115334, at *17 (E.D. Wash. July 5, 2023) (certifying USERRA class alleging that military leave did not receive equivalent benefits compared with other leaves of absence); *Scanlan v. Am. Airlines Grp. Inc.*, No. 18 Civ. 4040, 2022 U.S. Dist. LEXIS 63755, at *18-21 (E.D. Pa. Apr. 6, 2022) (same); *Huntsman v. SW. Airlines Co.*, No. 19 Civ. 83, 2021 U.S. Dist. LEXIS 20856, *40-41 (N.D. Cal. Feb. 3, 2021) (same); *Clarkson v. Alaska Airlines Inc.*, No. 19 Civ. 5, 2020 U.S. Dist. LEXIS 138838, at *19-21 (E.D. Wash. Aug. 4, 2020) (same).

Homeland Security, and/or relevant state national guard units;

(3) obtaining records of civilian benefits from the defendant (such as profit-sharing plans and how awards were calculated)

(4) identifying, preparing, and compensating a quantitative expert or statistician;

(5) directing the expert to review and analyze data from these different sources; and

(6) having that expert calculate the individual financial injury experienced by each member of the class.

The employer in a case like this, careful not to forego any argument or defense, would then be obliged to engage their own expert to evaluate the work done by the plaintiffs' expert. That in turn would require:

(7) identifying and paying a second quantitative expert or statistician;

(8) having that expert prepare a report evaluating the work done by the plaintiff's expert;

(9) deposing the plaintiffs' expert and defending the defense expert's deposition; and

(10) potentially briefing a *Daubert* challenge.

This is no small feat for plaintiffs or defendants.[5] For these very reasons, it is standard practice in class

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[5] It can take a surprisingly long time to obtain basic military service dates from the U.S. Department of Defense, so expert witnesses could have at least a starting point for their analysis. *See Baker v. United Parcel Service, Inc.*, No. 21 Civ. 114, ECF Nos. 82, 95 (E.D. Wa.) (court ordered subpoenas to Department of Defense in October 2023; parties requested sixth deadline extension in January 2025 due to still-pending Department of

actions to stage the litigation to defer expensive and disputed forms of discovery to later phases.[6]

All told, Petitioner's theory would frontload an enormous amount of work for military plaintiffs that is properly saved for later damage calculations. The net result is that this would impede Rule 23 class actions for USERRA and military cases or eliminate the vast majority of class members if they could not make such a specific evidentiary showing pre-certification.

In the antitrust realm too, Petitioner's argument could destabilize existing precedent and practice. Consider, for instance, a case involving smartphone

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Defense production); *White v. United Airlines, Inc.*, No. 19 Civ. 114, ECF Nos. 145-46, 167 (N.D. Ill.) (court ordered subpoenas to Department of Defense and Department of Homeland Security in July 2024; by March 2025, subpoenas were still pending, with no timetable for production); *Haley et al. v. Delta Airlines*, No. 21 Civ. 1076 at ECF No. 54 (N.D. Ga. June 13, 2022) ("The putative class potentially comprises thousands of individuals and the records potentially involve hundreds or thousands of periods of short-term military leave over a proposed class period of over 15 years . . . this case will likely require subpoenaing military records from non-parties such as the Department of Defense, and such subpoenas can only be issued once [the civilian employer] produced its military leave data for the Class . . . .").

[6] *See, e.g., Won v. Amazon.com Services LLC*, No. 21 Civ. 2867, ECF No. 30 (E.D.N.Y. Oct. 7, 2022) ("the parties anticipate that class certification briefing will involve the production of significant data . . . the Parties believe that six months is an appropriate period for class-certification discovery, with merits discovery to follow."); *Baker v. United Parcel Service, Inc.*, No. 21 Civ. 114, ECF No. 45 (E.D. Wa. June 2, 2022) ("The parties propose an initial period of discovery focused primarily on class certification . . . . The parties will propose a schedule for additional discovery, if any, including expert discovery, following the Court's decision on Plaintiff's anticipated motion for class certification").

users who allege an anti-competitive pricing structure for mobile apps. *See generally Apple, Inc., v. Pepper*, 587 U.S. 273 (2019). Under Petitioner's theory, before moving for class certification, every smartphone user (including all absent class members) would now need to make a specific, individualized showing of injury, for example by:

(1) documenting which app(s) they had purchased and at what price(s);

(2) collecting data about app pricing, software development costs, and other market dynamics;

(3) identifying, preparing, and compensating an economist or quantitative expert;

(4) designing an appropriately rigorous economic model;

(5) directing the expert to assess the competitive price and the economic impact of the anti-competitive behavior; and

(6) having that expert calculate relevant injuries to each putative member of the class.

See generally American Bar Association, *Antitrust Class Action Handbook* 192-94, 196-99 (1st ed. 2010). If this sounds like it would be complex and difficult for each individual user to do early in litigation, that is because it is. Indeed, in the *Pepper* litigation, "Apple [itself] warn[ed] that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases." 587 U.S. at 286. *Accord* Rami Abdallah Elias Rashmawi, *No Injury? No Class:*

*Proof of Injury in Federal Antitrust Class Actions post-*Wal-Mart, 77 Wash. & Lee L. Rev. 1375, 1397 (2020) ("Establishing antitrust injury frequently involves voluminous testimony from an assertedly qualified expert.") (citing *In re Rail Freight Fuel Surcharge Antitrust Litig. (Rail Freight II)*, 292 F. Supp. 3d 14, 40–87 (D.D.C. 2017); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 46 (1st Cir. 2018)). Petitioner seeks to further frontload intricate expert inquiries and the concordant questions about admissibility.[7]

In other antitrust cases, courts have also rejected the logic behind Petitioner's theory that the occasional presence of uninjured class members defeats class certification. *See, e.g.*, *Nexium*, 777 F.3d at 21 ("[I]t is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification."); *id.* at 23 (noting the "obvious utility of allowing the inclusion of some uninjured class members in the certified class"). "[T]he district court is well situated to winnow out those non-injured members," *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016). Particularly since "[f]ederal antitrust law is a central safeguard for the Nation's free market structure," *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 502 (2015), this Court should be careful not to unintentionally throw it into disarray.

Additionally, in the context of securities and retirement fund class actions, parsing and calculating the injury to every putative member of the class at the front end would be inappropriate, inefficient, and

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[7] Although the plaintiffs in *Pepper* did not make such specific showings of their injuries (before certification), this Court did not raise or see any Article III problems when it affirmed and let the class action claims there proceed.

challenging. For example, in cases involving fraud on the market, Petitioner's theory would require each class member to retain a quantitative expert to perform nuanced empirical examination of how a given piece of information affected market efficiency and the price of relevant securities. These types of in-depth economic assessments often take the form of a regression analysis known as an "event study," which can be relevant to both the question of certification and to merits issues. *See, e.g.*, *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 614-15 (C.D. Cal. 2009); Andrew C. Baker, *Single-Firm Event Studies, Securities Fraud, and Financial Crisis: Problems of Inference*, 68 Stan L. Rev. 1207, 1217 (2016) ("[T]here must be . . . a proper calculation of classwide damages upon positive disposition on the merits. Each of these factual determinations would become empirical prerequisites, requiring the provision of expert testimony and econometric analysis.").

These sorts of econometric studies require extensive data and expertise and are fundamentally inappropriate at the pre-certification stage. Here too, Petitioner's theory would disrupt settled practice in the securities bar and be a drain on the judiciary's resources. As a guide from the Federal Judicial Center highlighted, "damages calculations [in securities cases] can be quite complex, so they often require considerable judicial attention." Jayme Herschkopf, *Securities Litigation* 35 (Federal Judicial Center, 2017).

In the securities law context, this Court has previously rejected the suggestion by some companies that individualized questions should defeat (or preempt) Rule 23 certification:

> *Basic* does afford defendants an opportunity to rebut the presumption of reliance with respect to

> an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock. While this has the effect of "leav[ing] individualized questions of reliance in the case," *post,* at 2424, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 276 (2014) (emphasis added). Lower courts have rightly relied upon this language and recognized that in some circumstances, defendants can prove that particular class members did not rely upon the defendant's fraudulent statement (and hence were not injured).[8]

Overall, this Court should be careful not to adopt Petitioner's theory – and therefore inadvertently affect complex questions of substantive law, such the examples discussed above – when its concern about uninjured class members is sufficiently addressed by Rule 23(b)(3)'s predominance inquiry.

C. Petitioner's Theory Clashes With the Logic of *Tyson Foods*.

The reasoning of *Tyson Foods* also underscores the unworkability of Petitioner's new theory. In *Tyson*

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[8] *See, e.g.*, *Weiner v. Tivity Health, Inc.*, 528 F. Supp. 3d 795, 805–06 (M.D. Tenn. 2021); *Roofer's Pension Fund v. Papa*, 333 F.R.D. 66, 80–81 (D.N.J. 2019); *In re SunEdison, Inc. Securities Litig.*, 329 F.R.D. 124, 142–44 (S.D.N.Y. 2019). Federal courts can and do resolve questions of individual injuries after deciding classwide issues. *See, e.g.*, *In re Vivendi Univ., S.A. Securities Litig.*, 123 F. Supp. 3d 424 (S.D.N.Y. 2015) (securities).

Foods, this Court rejected a broad rule that would have categorically barred representative evidence in class actions. In so doing, the Court underscored the vital role juries play in deciding all kinds of issues at trial – including the fact and extent of injury – and recognized that such issues must often be proven by allowing juries to weigh evidence and draw inferences.

In *Tyson*, as in many wage and hour cases, the only practical way to identify class members who worked over 40 hours – and thus suffered the injury of unpaid overtime – was for an expert to analyze evidence that gave rise to a "just and reasonable inference" about each employee's hours of work. 577 U.S. at 456-57 ("Rather than absolving the employees from *proving individual injury*, the representative evidence here was a permissible means of making that very showing.") (emphasis added). And just as in any case where evidence must be weighed and inferences drawn, *Tyson* affirmed that this task "is the near-exclusive province of the jury." *Id* at 459. To prevent class action plaintiffs from using such evidence "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* at 455 (citation omitted).

If this Court were to accept Petitioner's theory that "Article III standing must be policed at the front end," Pet. Br. 4, by requiring an evidentiary showing for putative class members, Pet. Br. 25, that rule would force district courts to weigh evidence on merits questions that are properly left to the jury. Petitioner claims there are limits to the showing it would require but it is vague and inconsistent about what those limits are. *Tyson*, like many cases, presents a class where some members were uninjured, and there is a clear way to sort them from the injured class members. The manner and ease of identifying uninjured class

members is the province of Rule 23(b)(3)'s predominance inquiry, but that process cannot be done before trial, where a jury may need to weigh competing approaches to doing so. Petitioner's insistence on a categorical standing rule cannot be squared with such cases, or with the overarching rule that merits inquiries should be limited at the class certification stage. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013).

Petitioner's sweeping constitutional theory would force district courts into *ad hoc* decisions about how far to delve into standing issues, graft a new requirement onto Rule 23, and deprive district courts of the flexibility they have to sequence and referee methods of proof. In *Tyson*, this Court rightly left those determinations to the district court (on remand).[9] Allowing district courts flexibility in addressing variable damages was prudent then and now.

D. Petitioner and Its *Amici* Are Wrong About Class Action Settlement Dynamics.

Petitioner and its *amici* try to justify their expansive new theory by arguing that "once certification is granted by the trial court, the fate of the case is largely sealed." Brief of the City of Beverly Hills et al., as

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[9] Moreover, the majority opinion in *Tyson Foods* highlighted that individualized defenses could still be litigated, including "as a matter of summary judgment, not class certification.'" 577 U.S. at 457 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 107 (2009)). Here too, if uninjured class members come to light, other solutions are readily available, including summary judgment, specific jury instructions (so as not to determine a damages award on uninjured individuals), or a narrower class definition. BIO at 33.

Amici Curiae in Support of Petitioners at 15; 22-30.[10] *See also* Pet. Br. at 3, 46, 47; Brief of the National Federation of Independent Business Small Business Legal Center, Inc. as *Amicus Curiae* in Support of Petitioner at 3, 19-24; Brief for the United States as *Amicus Curiae* Supporting Neither Party at 19-20; Brief of Chamber of Commerce et al., as *Amici Curiae* Supporting Petitioner at 26-28.

But this is wrong in three fundamental ways.

1. Empirical Context. Petitioner's and *amici*'s suggestion that Rule 23 certification is the be-all and end-all of class litigation belies the broader picture and considerably overstates the role of certification. This Court should keep in mind that a wide majority of class actions are resolved through dismissal – not certification, settlement, or trial. In the securities context:

> Plaintiffs voluntarily dismissed the action 18 percent of the time and settled 8 percent of the time. Courts ruled in 73 percent of cases, dismissing the case in whole or in part 80 percent of the time: 54 percent without prejudice, 7 percent with prejudice; 19 percent were partially granted. Courts denied motions to dismiss in their entirety only 20 percent of the time.

James K. Goldfarb et al., *Securities Class Actions: Data, Trends, and Insights* (March 13, 2023), https://www.dwt.com/blogs/financial-services-law-advisor/2023/03/securities-class-actions-data-trends-2022. *See also* Jason Hegland, *When are Class Actions*

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[10] To the extent that the City's ultimate gripe is that the Ninth Circuit is not applying Rule 23 rigorously — either in fact-specific protest cases or after settlement or trial — that is neither an Article III issue nor within the purview of the question presented.

Dismissed and When Do They Settle, Stanford Securities Litigation Analytics (May 6, 2013), https://law.stanford.edu/2013/05/06/sla-2013-05-06-when-are-class-actions-dismissed-and-when-do-they-settle/ ("Despite the paradigm that frames class actions as lengthy and litigious, most cases reached a resolution relatively quickly. In fact, 58% of class actions in the study were dismissed, dropped, abandoned, or settled before the filing of a Second Consolidated Complaint."). *See also* Stanford Securities Class Action Clearinghouse, *Key Statistics* (2025), https://securities.stanford.edu/stats.html.

2. Discovery and Litigation Expenses. Contrary to the main thrust of Petitioner's and *amici*'s policy argument – that early certification of allegedly overbroad classes imposes undue settlement pressure – adjudicating class certification early generally does the opposite. If no class is certified, expensive discovery and expert work can be avoided. Alternatively, if a class is certified, and the defendant has not yet expended litigation costs, it is in a better position to manage risk by deciding whether to defend or settle.

Forcing parties to litigate the standing of absent class members early would achieve the opposite effect. It would frontload discovery expenses in a class action, imposing costs that are often borne by defendants. *See* Newberg and Rubenstein on Class Actions § 7:17 (6th ed.) (listing reasons why district courts avoid merging class certification and merits discovery). This increased up-front litigation cost would impose settlement pressure whether or not a class is ultimately likely to be certified.[11] This Court's

[11] This problem is especially acute in small-dollar cases that are unlikely to continue if certification is not granted. *See* Manual for

precedents, including those cited extensively by Petitioner and *amici*, recognize that discovery and litigation expense – not the fact of class certification per se – has the potential to drive settlement dynamics. *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive *discovery* and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements") (emphasis added); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of *discovery expense* will push cost-conscious defendants to settle even [presumably] anemic cases before reaching" summary judgment) (emphasis added). That logic applies squarely to Rule 23(b)(3) cases too.

3. Other Guardrails and Tools. After the motion to dismiss and certification stages, there are several guardrails in place that protect defendants from being forced into settling after a Rule 23(b)(3) class is certified.

To begin with, many consumer protection statutes, such as the Truth in Lending Act and the Fair Debt Collections Practices Act, cap statutory damages for this very purpose. *See* 15 U.S.C. § 1640(a) (TILA); 15 U.S.C. § 1692k (FDCPA).

Additionally, the parties can and do stay litigation pending settlement talks and the defendants may assess their own records (pursuant to Rule 408) to determine the extent of possible injuries. *See, e.g.*, *C.K. through P.K. v. McDonald*, 2:22-cv-01791 (NJC) (JMW), 2024 WL 730494, at *6 (E.D.N.Y. Feb. 22, 2024) (granting parties' joint motion to certify two

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Complex Litigation, Fourth, § 21.14 ("in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden").

proposed classes, including an ADA class, extend current litigation deadlines, and stay litigation activity for three months for the purpose of settlement discussions). They do not simply assume that every class member is owed full damages and stroke a check.

More generally, district courts have several tools at their disposal to manage the size and shape of the class after certification, which informs settlement dynamics. They can "(1) bifurcat[e] liability and damage trials with the same or different juries; (2) appoint[] a magistrate judge or special master to preside over individual damages proceedings; (3) decertify[] the class after the liability trial and provid[e] notice to class members concerning how they may proceed to prove damages; (4) creat[e] subclasses; or (5) alter[] or amend[] the class." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayor, J.), *abrogated on other grounds by In re Initial Public Offerings Sec. Litig.*, 471 F.3d 70 (2d Cir. 2007).[12]

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[12] *See also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016) ("fortuitous non-injury to a subset of class members does not necessarily defeat certification of the entire class, particularly as the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition.") (citing Newberg on Class Actions); *Bright v. Brookdale Senior Living, Inc.*, No. 3:19-CV-00374, 2021 WL 6496799, at *16 (M.D. Tenn. Mar. 12, 2021) (citation omitted) ("refus[ing] to foreclose class certification merely 'due to the possibility that some unnamed class members might have signed arbitration agreements,' but reserv[ing] the right to create a subclass, modify the class definition, or otherwise specially treat the class members subject to arbitration at a later juncture."). *See also* 1 Newberg and Rubenstein on Class Actions § 2:3 (6th ed.) ("the possibility that a well-defined class will nonetheless encompass some class members who have suffered no injury . . . is generally unproblematic as the non-injured parties can just be sorted out at the remedies phase of the suit").

Even once a settlement has been reached, Rule 23(e) requires "the court's approval," which can be granted only after considering "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." That is yet another opportunity to address uninjured class members.

All told, federal courts have various tools at their disposal to address or reduce any undue settlement pressure that certification might impose, *see also* Brief of *Amici Curiae* Claims Administrators in Support of Neither Party at 5-15 – and the vast majority of class action cases still never reach this phase.

II. PETITIONER'S THEORY WOULD UNDERMINE CLASS ACTIONS WHERE EACH MEMBER HAS A MODEST RECOVERY, WHICH THIS COURT HAS REPEATEDLY SAFEGUARDED.

Petitioner's theory would frontload complex damage calculations, requiring the retention of expert witnesses early on in litigation to establish the individual Article III injuries of absent class members, and imposing a major pre-certification evidentiary burden. Many plaintiffs and absent class members would face great difficulty satisfying such new requirements and would be deterred from seeking relief in the first place. The net effect would inevitably make it harder and more costly to bring class actions where each member would recover a modest sum.

As this Court has repeatedly stressed, class actions are a vital mechanism to facilitate recovery and equitable relief in these types of cases. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not

provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). "The availability of the class action procedure to these consumers is the only way both to provide them with restitution for their injuries and to deter . . . unlawful conduct in the future. . . ." *Id.* "Class actions [] may permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

Judge Posner again put it aptly: "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits . . . ." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Justice Souter echoed this sentiment: even for cases involving medium-sized damages, for example in the $12,000 to $39,000 range, "there is a real question whether the putative class members could sensibly litigate on their own . . . especially with the prospect of expert testimony required." *Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 67 (1st Cir. 2010) (vacating and remanding for further consideration of this issue as well as predominance).

In the real world, this wisdom bears out. Older adults and consumers of all stripes are regularly affected by predatory practices, fraud, and junk fees and are normally only able to obtain some relief through class actions. *See, e.g.*, *Scharfstein v. BP West Coast Products, LLC,* 292 Or. App. 69 (Or. Ct. App. 2018) (facilitating refunds to 1.7 million residents of Oregon who saw one price at the pump but paid another at the register; ultimately denying decertification of class, among other things, after trial

on the merits and award of damages); *McKinney v. U.S. Postal Service*, 292 F.R.D. 62, 66 (D.D.C. 2013) (noting, in a case about unpaid interest on death benefits for postal workers, that "it is unlikely that many putative plaintiffs could or would sue to recover those amounts individually, given the comparatively high costs of litigation"). *See also Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 567 (6th Cir. 2007) ("[A] small possible [individual] recovery would not encourage individuals to bring suit, thereby making a class action a superior mechanism for adjudicating this dispute."); *Glass Dimensions, Inc. v. State Street Bank & Trust Co.* 285 F.R.D. 169, 180 (D. Mass. 2012) ("[W]hile individual ERISA plans may not have a financial incentive to challenge the reasonableness of the [relevant] fee split, when the claims of the different ERISA plans are aggregated, it provides an incentive to thoroughly litigate the issue.").

The non-partisan RAND Corporation highlighted the practical and legal reasons why preserving the ability to bring these types of class actions is critical:

> Most individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to 'lump it,' rather than expend the time and energy necessary to remedy a perceived wrong. Moreover, in some circumstances, courts have recognized grounds for claims that are inherently collective, rather than individual. For example, in securities law, the 'fraud on the market' theory asserts that when a publicly traded corporation engages in behavior that artificially inflates or deflates the value of its

> stock, it can be held liable for the excess costs or losses incurred by those who purchased or sold stocks during the period after the corporation engaged in this behavior and before the behavior was brought to a halt. This sort of collective harm is unlikely to be detected by an individual stockholder, whose involvement in actual purchases and sales may be minimal.

Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* at 68 (2000). *See also id.* at 70 ("[Requiring an opt-in procedure] would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable.") (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397–98 (1967)).

Lastly, in addition to adhering to the logic of *Amchem* and its predecessors, this Court should be aware that impeding "small dollar" class actions could have the unintended consequence of requiring greater public enforcement and larger government budgets to address the underlying forms of misconduct and deception. "Congress could, of course, have provided public funds or government attorneys for litigating [] claims, but it chose to 'limi[t] the growth of the enforcement bureaucracy' by continuing to rely on the private bar and by making defendants bear the full burden of paying for enforcement of their [] obligations." *Hensley v. Eckerhart*, 461 U.S. 424, 445-

446 (1983) (citation omitted). *See generally* Brian Fitzpatrick, *The Conservative Case for Class Actions* (2019).[13]

[13] Additionally, adopting Petitioner's broad theory could result in channeling "small dollar" class actions into state courts, where Article III would not apply, effectively frustrating Congress's intent in passing the Class Action Fairness Act in the first place. *See, e.g.*, *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 448–50 (2019).

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

WILLIAM A. RIVERA
LOUIS LOPEZ
REBECCA RODGERS
AARP FOUNDATION
601 E Street NW
Washington, D.C. 20049
(202) 434-3392
warivera@aarp.org

JOHN PAUL SCHNAPPER-CASTERAS
Counsel of Record
RACHAEL R. YOCUM
SCHNAPPER-CASTERAS PLLC
1717 K Street NW, Suite 900
Washington, D.C. 20006
(202) 630-3644
jpsc@schnappercasteras.com

LORI ANDRUS
JEFFREY R. WHITE
AMERICAN ASSOCIATION
FOR JUSTICE
777 6th Street NW, #200
Washington, D.C. 20001
(202) 617-5620
Jeffrey.White@justice.org

Counsel for Amici Curiae

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