

ARTICLE

Justices' Labcorp Questions Explore Class Cert. Tensions

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On April 29, the U.S. Supreme Court heard oral argument in *Laboratory Corporation of America Holdings v. Davis*, a case that could have far-reaching implications for federal class action litigation.

The question before the court is "[w]hether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury."

The justices' questioning highlighted a fundamental tension between constitutional standing requirements, the procedural framework of Rule 23, and the practical challenges of managing large, diverse classes in complex litigation.

BACKGROUND AND LOWER COURT PROCEEDINGS

The case stems from a class action alleging that Labcorp, a life sciences company providing laboratory services for healthcare providers and patients, offered self-service check-in kiosks at its patient service centers that were inaccessible to blind individuals, in violation of the Americans with Disabilities Act and the California Unruh Civil Rights Act.

The U.S. District Court for the Central District of California certified a nationwide injunctive class, under Rule 23(b)(2), and a damages subclass, under Rule 23(b)(3), of legally blind individuals who visited a Labcorp patient service center in the U.S. with a self-service kiosk, and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations due to Labcorp's failure to make its kiosks accessible to them during the applicable limitations period.

Labcorp sought immediate review of the class certification order, arguing that many class members suffered no cognizable injury and lacked Article III standing, because they either did not know that the Labcorp kiosks existed, or did not intend to use them because they preferred instead to check in at the front desk or online.

The U.S. Court of Appeals for the Ninth Circuit granted review, and later affirmed the district court’s Rule 23(b)(3) class certification decision, reasoning that there was no need for individualized standing inquiries because it is not “required that each plaintiff suffer identical harm; rather, the relevant inquiry is whether class members were subject to the same injuring behavior.”

In a footnote, the Ninth Circuit explained, “Labcorp’s allegation that some potential class members may not have been injured does not defeat commonality at this time” because “Rule 23 permits ‘certification of a class that potentially includes more than a de minimis number of uninjured class members.’”^[1]

The Ninth Circuit’s holding deepened an existing divide among the federal circuits over whether a class can be certified when some class members lack an Article III injury. Generally speaking, the circuits can be divided into three different camps on this issue.

“Article III” circuits, including the Second and Eighth Circuits, do not allow a class to be certified if it includes any members who have not suffered an Article III injury and therefore, lack standing.

“De minimis” circuits, including the D.C. and First Circuits, allow a class to be certified only if it does not contain more than a de minimis number of uninjured persons, as otherwise the class fails to satisfy Rule 23(b)(3)’s predominance requirement.

“Back-end” circuits, including the Seventh, Eleventh and Ninth Circuits, allow certification of classes containing more than a de minimis number of uninjured class members, because individualized issues of member standing or damages can be addressed on the back end of the case, following certification.

Labcorp petitioned for review by the Supreme Court as to the question of “whether a federal court may certify a class action when some of its members lack any Article III injury.” In granting certiorari, the Supreme Court narrowed the question presented to focus on certification of classes seeking damages under Rule 23(b)(3) specifically — perhaps suggesting that the predominance requirement will feature centrally in the court’s decision.

PETITIONER’S AND RESPONDENTS’ CORE ARGUMENTS

At the Supreme Court, the petitioner argued that courts cannot certify proposed classes with uninjured members because doing so would (1) violate Article III’s standing requirement; and (2) necessitate individualized mini-trials to determine actual class membership, defeating Rule 23(b)(3)’s predominance requirement.

The petitioner argued that the separation of injured from uninjured individuals must occur at the certification stage, not later, because, among other things, allowing such classes places inappropriate settlement pressure on defendants due to the artificially inflated class size, as Justice Brett Kavanaugh recognized.

In response, the respondents emphasized that Rule 23, not Article III, should govern whether uninjured members may be part of a certified class. They argued that consistent with historical practice, it is the class representative actually before the court — not the absentee class members — who must prove the existence of an Article III case or controversy at the outset.

The respondents argued that courts have long addressed the issue of uninjured class members following class certification by requiring administratively feasible mechanisms — such as claims forms, affidavits or record reviews — to identify and exclude uninjured individuals at or before the time relief is awarded.

The respondents also rejected the purported need for individualized trials at the certification stage, noting that common issues can be resolved first, with injury determinations handled fairly and efficiently during the remedial phase.

THE JUSTICES’ CONCERNS DURING ORAL ARGUMENT

During the argument, the justices focused on several recurring themes.

Timing of Standing Inquiry

The petitioner argued that Article III requires the courts to determine that each member of a proposed class has standing before certifying a class. Certain justices pushed back on this proposition, including Justice Ketanji Brown Jackson, who stated that “you only need one plaintiff, one plaintiff, who establishes standing, even if there are others there who are making the same claim.”

Further, Justice Jackson, Justice Sonia Sotomayor, Justice Elena Kagan and Justice Neil Gorsuch noted that historically, absentee class members are not parties over whom the court exercises jurisdiction, unless and until the court exercises its remedial power with respect to an absentee, or decides a question that it wouldn’t otherwise have to decide, like an individual question.

Such comments suggest that the court may not require Article III standing of absentee class members at the time of class certification, and the petitioner’s Rule 23 argument may have a better chance of success.

Rule 23 Predominance

While the justices were seemingly unmoved by the petitioner’s Article III arguments, certain justices, including Justice Gorsuch, suggested that the issues Labcorp raised might be more appropriately handled under Rule 23 rather than as a constitutional requirement.

The petitioner argued that under Rule 23(b)(3), common issues cannot predominate where a class is saturated by uninjured members because, among other things, “you’ve got to have an administrable way to separate the wheat from the chaff [the injured from the uninjured] before you address the merits, not after you address the merits.”

But Justice Jackson expressed skepticism about the petitioner’s Rule 23 argument — specifically, the idea that a class cannot be certified if there is not commonality or predominance on the injury question for all class members. She suggested that courts typically consider commonality and predominance as a whole, not by isolating a single issue and making it dispositive.

Practicality and Mechanisms

The justices raised several points regarding the practicality of, and mechanisms for, identifying injured members in a class action. They questioned whether it is necessary to address these issues at the class certification stage, or if they could be managed later in the process.

Justice Kagan, for example, explored the feasibility of using affidavits, surveys or other mechanisms to separate injured from uninjured members, and whether these methods would adequately protect the defendants’ rights.

Settlement Pressure

The justices’ questioning highlighted the potential implications of certifying large classes with uninjured members, including with respect to settlements. They explored whether the certification of such classes could unfairly pressure defendants into settling — or alternatively, whether a broad class definition might benefit defendants by providing reassurance that no additional lawsuits are likely.

On the one hand, Justice Gorsuch stated, “often defendants like broad class definitions because it gives them peace. And the alternative, which I think [the petitioner’s] rule would invite, is mass tort claims in which you’re litigating these — you talk about piecemeal; you’re really going to be litigating it piecemeal.”

On the other hand, Justice Kavanaugh stated, “So the flip side of the peace from a larger class is the disaster, from [the petitioner’s] perspective, of being pressured into a settlement with an overly broad class once it’s certified.”

Case-or-Controversy Requirement

Finally, at least three justices — Gorsuch, Sotomayor and Kagan — appeared concerned with whether the question certified was properly before the court, and whether they were being asked to give an advisory opinion.

Labcorp petitioned for review of the Ninth Circuit’s decision, which upheld the district court’s class certification order from May 2022. But the district court later issued a new class certification order in August 2022 that replaced the

May order, changing the class definition and broadening its scope.^[2]

As a result, the justices expressed concern that issuing a ruling on the now-superseded May order might constitute an impermissible advisory opinion. Accordingly, it is possible that the court will decline to answer the question on justiciability grounds.

POTENTIAL IMPACT

Assuming the court does not decline to rule on the matter, its decision may resolve the circuit split with respect to certification of classes with uninjured members, including whether Article III imposes a categorical bar on such classes, or whether procedural safeguards under Rule 23 are sufficient to manage any concerns.

If the court determines that all class members must have Article III standing for the class to be certified, it could limit the use of class actions in cases involving difficult-to-prove harm. Justice Gorsuch theorized that such a result may not be as defendant-friendly as one might expect, because it could lead to increased individual filings such as in mass tort cases.

Of course, any concerns could be addressed by more narrowly tailoring the class definition to include only those individuals that suffered harm, as the petitioner argued during the hearing. And, if the definition excludes uninjured persons, it is unlikely that any excluded person would have an individual claim, because they were, by definition, uninjured.

Alternatively, if the court affirms the Ninth Circuit’s approach, plaintiffs may have an easier time achieving class certification, including in circuits where it was previously more difficult.

Such a decision could continue to place settlement pressure on defendants at the time of class certification, as litigation costs will loom large, even in cases where the claims may be unlikely to succeed on their merits.

Indeed, as Justice Samuel Alito stated earlier this year in *Cunningham v. Cornell University*, getting into discovery “is often the whole ball game because of [its] cost” and “[d]efendants facing those costs often calculate that it is efficient to settle a case even though they are convinced that they would win if the litigation continued,” which can result in a “windfall” for plaintiffs and their attorneys.

[1] 2024 WL 489288 at *2, n.1 (9th Cir. Feb. 8, 2024), quoting *Olean Wholesale Grocery Coop. Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 668–69 (9th Cir. 2022).

[2] The August order defined the damages class as: “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.” This August definition is considerably broader than the class certification ordered by district court and affirmed by the Ninth Circuit, which defines the damages class as: “All legally blind individuals in California who visited a LabCorp patient service center in California during the applicable limitations period and were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations due to LabCorp’s failure to make its e-check-in kiosks accessible to legally blind individuals.”

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Authors

[Jeffrey L. Steinfeld](#)

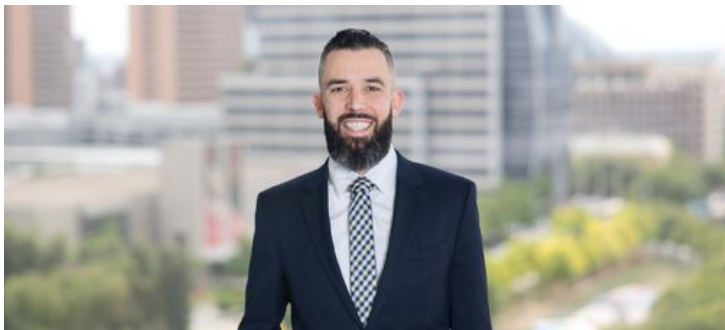
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