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CLASS STANDING ANALYSIS: THE REQUIREMENTS OF ARTICLE III AND RULE 23

Jacqueline Dewart

CLASS STANDING ANALYSIS: THE REQUIREMENTS OF ARTICLE III AND RULE 23

By: Jacqueline Dewart*

This Note addresses two intertwining issues: what Article III requires of classes to meet the constitutional requirement of standing, and what the certification requirements of Federal Rule of Civil Procedure 23(b)(3) require regarding the standing of class members. There is disagreement among the circuit courts as to whether Article III requires that the standing of all class members be established before a class can be certified, with the Second and Eighth Circuits saying that the standing of all class members must be demonstrated before a class can be certified, and the Seventh, Third, and Eleventh Circuits holding that standing of all class members does not have to be established before a class can be certified. Several circuits have asked the Supreme Court to answer this question, though the Court has not done so yet. This Note argues that the standing of all class members does not have to be established at the class certification stage, but that a court certifying a class does need to look into the standing of class members to determine whether individualized standing issues will prevent the class from meeting the requirements of Rule 23(b)(3).

* Third-year law student at Lewis & Clark Law School. The author would like to thank Professor Robert Klonoff for his supervision and guidance during the research and writing of this paper. The author would also like to thank her entire family, especially her husband, James Siderius, for his endless love and support, and her mom, Jennifer Dewart, for being a constant source of inspiration.

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INTRODUCTION

In the 2021 case *TransUnion LLC v. Ramirez*, the United States Supreme Court acknowledged, but declined to answer, the question of whether the Article III standing of absent class members must be established at the certification stage of a class action.¹ In a footnote, the Court wrote “[w]e do not here address the distinct question whether every class member must demonstrate standing *before* a court certifies a class.”²

This question “has engendered . . . debate and confusion.”³ While a majority of courts in the United States require only that a named class member have standing at the certification stage,⁴ others have said that no class may be certified if it contains class members who lack Article III standing.⁵ And, despite the Supreme Court’s indication that standing and certification issues are to be addressed separately,⁶ some courts have failed to address Article III standing independently, and have instead addressed it within the analysis required for certifying class actions under Federal Rule of Civil Procedure 23 (“Rule 23”).⁷ A rule that requires demonstration of the standing of all class members at the certification stage would threaten the viability of many class action lawsuits.⁸

This Note seeks to provide a framework for analyzing the standing of unnamed class members in a (b)(3) class at the certification stage. Section I examines Article III and argues that Article III requires only that one plaintiff have standing at the certification stage. Section II examines, and responds to, arguments to the contrary. Section III discusses the extent to which the standing of absent class members must be addressed as part of a Rule 23 analysis and argues that courts need to examine whether unnamed class members without standing prevent the class from meeting Rule 23 requirements.

¹ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 n. 4 (2021).

² *Id.*

³ 1 William Rubenstein, *Newberg on Class Actions*, §2:3 (5th ed. 2016).

⁴ *Id.* See, e.g., *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359 (3d Cir. 2015).

⁵ E.g., *Denney v. Deutshebank*, 443 F.3d 253, 264 (1st Cir. 2006); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

⁶ See *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996).

⁷ See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.* 725 F.3d 244, 252-53 (D.C. Cir. 2013).

⁸ See, e.g., *Kohen*, 571 F.3d at 677; *Neale*, 794 F.3d at 367.

Class Standing Analysis: The Requirements of Article III and Rule 23

I. WHAT ARTICLE III REQUIRES

The “irreducible constitutional minimum”⁹ of Article III standing (the elements of which are injury in fact, traceability, and redressability)¹⁰ is “an essential and unchanging part of the case-or-controversy requirement.”¹¹ The case-or-controversy requirement of Article III¹² bears on justiciability, or the power of the federal courts to hear cases.¹³ The purpose of this requirement is to ensure separation of powers,¹⁴ limiting the role of the federal courts to “cases or controversies” so that the judicial branch will not “usurp the powers of the political branches.”¹⁵ Standing doctrine accomplishes this task by identifying which disputes are appropriate for resolution through the judicial process.¹⁶ The requirements of standing allow a federal court to hear only those suits brought by a plaintiff who has a personal stake in the litigation, ensuring that the federal courts’ jurisdiction is limited to those cases which demonstrate “a real need to exercise” the judicial power.¹⁷

Standing thus ensures that the role of the federal courts remains “properly limited.”¹⁸ It limits the subject matter jurisdiction of the courts to cases where the plaintiff, by satisfying the standing requirements, has demonstrated her right to invoke the power of the federal courts.¹⁹ Standing serves to limit the class of persons who may invoke the power of the federal courts.²⁰ Because the case-or-controversy requirement is a limitation on the courts’ jurisdiction,²¹ and jurisdiction is “the power to declare law,” standing must be determined as a threshold matter

⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁰ *Id.* at 560–61.

¹¹ *Id.* at 560.

¹² U.S. CONST. ART. III, § 2, cl. 1.

¹³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

¹⁴ *See id.* (noting that the doctrine of standing is “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”).

¹⁵ *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013)); *see also Warth*, 422 U.S. at 498; *Summers v. Earth Island Inst.*, 555 U.S. 488, 492–93 (2009).

¹⁶ *See Lujan*, 504 U.S. at 560; *TransUnion LLC*, 141 S. Ct. at 2203 (“Federal courts do not possess a roving commission to publicly opine on every legal question.”).

¹⁷ *Summers*, 555 U.S. at 493 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)); *see also Town of Chester*, 137 S. Ct. at 1650.

¹⁸ *Warth*, 422 U.S. at 498.

¹⁹ *See id.* (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute[.]”).

²⁰ *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

²¹ *Warth*, 422 U.S. at 498.

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before a court can reach the merits of a case.²² When no plaintiff has standing, the court lacks authority to decide the case.²³

This means a court must generally determine that the requirements of standing have been met before it determines any substantive questions of law, including whether a class meets Rule 23 certification requirements.²⁴

However, the Supreme Court has not always adhered to this general practice: in *Amchem Products, Inc. v. Windsor*, the Court addressed Rule 23 issues before addressing standing²⁵ because it considered the class certification issues to be “logically antecedent” to Article III issues.²⁶ The *Amchem* Court denied certification,²⁷ leading the Third Circuit to posit that *Amchem* “stands for the proposition that when a federal court would *deny* a class certification motion, that court need not reach the question of jurisdiction.”²⁸ The *Amchem* Court recognized that Rule 23 “must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act’s instruction that procedural rules not abridge, enlarge, or modify any substantive right.”²⁹ This suggests, consistent the Third Circuit’s interpretation, that the Court would have needed to do a standing analysis before *granting* certification.

So, before a court can grant certification of a class, it must determine that it has jurisdiction to do so. This determination requires examining whether the case-or-controversy requirement is met by a plaintiff with standing.

A. *Applying Article III in 23(b)(3) Class Actions*

The Court has been clear that the standing analysis in class actions should be the same as in any other case. “That a suit may be a class action . . . adds nothing to the question of standing.”³⁰ What is required to establish standing in a class action, then, is no more than what is required in any other suit. The Court has also

²² *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–94 (1998) (“Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case.”) (quoting *ex parte McCardle*, 7 Wall. 506, 514 (1868)).

²³ *Steel Co.*, 523 U.S. at 101–02 (“For a court to pronounce upon the meaning or the constitutionality of [the law] when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”) (alteration in original).

²⁴ *See Neale*, 794 F.3d at 360.

²⁵ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997).

²⁶ *Id.* at 612.

²⁷ *Id.* at 592–95.

²⁸ *Neale*, 794 F.3d at 360–61 (emphasis added). This proposition in turn would seem to indicate that to deny certification does not amount to declaring law, while granting certification does.

²⁹ *Amchem*, 521 U.S. at 613.

³⁰ *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, n. 20 (1976).

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stated that “[t]he standing determination is quite separate from certification of the class.”³¹

Accordingly, there is no reason to conclude that the standing requirement is any more demanding in a class action than in any other case. In fact, a requirement that standing must be shown for all absent class members before certification would be at odds with the purpose of Rule 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”³² The class action device is intended to save resources by allowing a named plaintiff to litigate an issue affecting many class members “in an economical fashion.”³³ This purpose would be “eviscerate[d]” by requiring a showing of Article III standing for all absent class members at the certification stage.³⁴ Such a requirement would pose a formidable barrier to certification. When a class action is first filed, the identities of the unnamed class members are often unknown.³⁵ Discovery may be necessary to identify unnamed class members.³⁶ These facts are part of the nature of class actions as “representative actions.”³⁷ The history of the class action also weighs against creating a more stringent standing requirement for class actions. The class action developed in courts of equity as “an exception to the formal rigidity of the necessary parties rule.”³⁸

Because Article III standing is intended to limit the federal courts’ jurisdiction to “cases or controversies,” the requirement is met when the party invoking the court’s power has standing to bring the asserted claim(s) and to seek the relief requested. In a class action, there is no reason to go beyond the constitutional scope of standing and apply a stricter standard. This view has the support of most of the circuit courts and is consistent with Supreme Court precedent.

B. Circuit Court Case Law

The Seventh Circuit determined in *Kohen v. Pacific Investment Management Co. LLC*, that a court has jurisdiction to hear a class action as long as one member of the class can plausibly claim to have suffered damages.³⁹ In *Kohen*,

³¹ *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996).

³² *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

³³ *Id.* at 701.

³⁴ *Neale*, 794 F.3d at 364.

³⁵ *Id.* at 367; *Kohen*, 571 F.3d at 677.

³⁶ *See Neale*, 794 F.3d at 367.

³⁷ *Id.* at 362.

³⁸ *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 832 (1999) (citing Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Soble, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1859–60 (1998)).

³⁹ 571 F.3d at 676–77 (citing *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404 (1980); *Wiesmueller v. Kosobucki*, 513 F.3d 784, 785–86 (7th Cir. 2008)).

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the defendant challenged the standing of two out of three named plaintiffs.⁴⁰ The court stated that whether the two challenged plaintiffs had standing did not matter, because even if the two challenged plaintiffs did not have standing, there was one named plaintiff whose standing was unchallenged, and “one is all that is necessary” for certification.⁴¹ The Seventh Circuit also noted that requiring plaintiffs to show standing at the certification stage would amount to holding the trial before the certification.⁴²

The Third Circuit in *Neale v. Volvo* performed a thorough analysis of whether Article III requires that absent class members establish standing at the certification stage.⁴³ The Third Circuit recognized that it had a duty to ensure that the litigants had standing pursuant to Article III.⁴⁴ The court reasoned that Article III standing is determined by looking at the named class members.⁴⁵ The court explained that it need not look at the standing of absent class members, because once the named class members have established standing, “the issue becomes one of compliance with the provisions of Rule 23, not one of Article III standing.”⁴⁶ This is because the “cases or controversies” requirement is satisfied once the class representative has established standing.⁴⁷ Because it is the named plaintiff who is invoking the power of the federal courts, it is the named plaintiff who must establish jurisdiction.⁴⁸ The court went on to compare class actions to the associational standing context, where it said “the [standing] test ensures there is an actual case or controversy without inquiring into the standing of every member of an organization.”⁴⁹ The Third Circuit interpreted Supreme Court precedent to indicate that, throughout the class action, Article III only requires that there be a “live case or controversy.”⁵⁰

The Eleventh Circuit addressed whether Article III requires demonstrating the standing of absent class members at the certification stage in *Cordoba v. DIRECTV*.⁵¹ There, the named plaintiff sought to represent a class of customers who had received telemarketing calls from DIRECTV in violation of federal law.⁵² The named plaintiff sought to represent anyone who had received multiple

⁴⁰ *Kohen*, 571 F.3d at 676-77.

⁴¹ *Id.*

⁴² *Id.* at 677.

⁴³ 794 F.3d 353 (3d Cir. 2015).

⁴⁴ *Id.* at 358.

⁴⁵ *Id.*

⁴⁶ *Id.* at 361-62, (citing *In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 290-92 (3d Cir. 1998) (quoting *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122 (3d Cir. 1985))).

⁴⁷ *Kohen*, 571 F.3d at 362.

⁴⁸ *Neale*, 794 F.3d at 364.

⁴⁹ *Id.* at 365 (alteration in original).

⁵⁰ *Id.* at 367 (citing *Lujan*, 504 U.S. at 561).

⁵¹ *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019).

⁵² *Id.* at 1263-64.

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telemarketing calls from DIRECTV’s telemarketing service.⁵³ The Eleventh Circuit acknowledged that, while the named plaintiff had standing because he had asked not to be called, any unnamed plaintiffs who had not asked DIRECTV to stop calling them would not have standing, because their injury was not traceable to the defendant’s violation of federal law.⁵⁴ The court analyzed standing under both Article III and Rule 23. In its Article III analysis, the court said “[A]ll that Article III requires for the claim to be justiciable is that a named plaintiff have standing.”⁵⁵ The court explained that the case was justiciable, even though there might be many unnamed class members without standing, because the named plaintiff had standing.⁵⁶

The First Circuit, in *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, addressed only the standing of named plaintiffs in its standing analysis, citing Supreme Court precedent establishing that Article III requires in class actions that there be at least one named plaintiff with standing.⁵⁷ The court noted that the standing requirement “emanates from Article III’s requirement that there remain a live case or controversy throughout the course of a litigation.”⁵⁸

C. Supreme Court Case Law

Review of Supreme Court case law shows that as long as one plaintiff has standing to bring a case, the case-or-controversy requirement of Article III is met. At least one scholar has referred to the Court’s practice of considering the requirement of Article III standing to be met whenever one plaintiff has standing as the “one-plaintiff rule,”⁵⁹ noting that “applying the one-plaintiff rule has become the Court’s usual practice in cases in which different plaintiffs present distinct standing issues.”⁶⁰

In *Tyson Foods v. Bouaphakeo*, a class action, the Supreme Court affirmed the denial of a motion for decertification, even though the class contained unnamed class members who lacked standing because they had not suffered any injury.⁶¹ In *Horne v. Flores*, a case that involved multiple plaintiffs, the Supreme Court opined: “Here, as in all standing inquiries, the critical question is whether at least one

⁵³ *Id.* at 1266.

⁵⁴ *Id.* at 1264.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 522 F.3d 6, 13–14 (1st Cir. 2008) (citing *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)); *see also* *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

⁵⁸ *In re New Motor Vehicles*, 522 F.3d at 13 (citing *Golden v. Zwickler*, 394 U.S. 103, 108-109, (1969)).

⁵⁹ Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L. J. 481, 481 (2017).

⁶⁰ *Id.* at 488.

⁶¹ 577 U.S. 442, 447–52 (2016).

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petitioner has ‘alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.’”⁶² Finding that one plaintiff had standing, the *Horne* Court found that it “need not consider” whether the other plaintiffs in the case also had standing, and proceeded to the merits.⁶³ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, where plaintiffs included a nonprofit and individuals, the Court said that because there was at least one plaintiff who had demonstrated standing to assert certain claims, it did not need to consider whether the other plaintiffs had standing to assert those same claims.⁶⁴

While not all of these Supreme Court cases were class actions, they were all cases with multiple plaintiffs, where the standing of one plaintiff was established but the standing of another was in question. In each case, the Court said that the issue of standing as to the additional plaintiff did not matter, because the case-or-controversy requirement had been met by the plaintiff whose standing was established. If we are to take seriously the Court’s admonition that the fact of a suit being a class action does not change the standing analysis, then the non-class action suits are instructive. These cases indicate that as long as one named plaintiff has established Article III standing, the case-or-controversy requirement is met, and the Court may exercise its jurisdiction over the entire class.

The Court has established that the converse is also true: Article III cannot be satisfied at the certification stage by merely establishing that an unnamed class member has standing. Rather, only the named plaintiff can establish standing at the certification stage.⁶⁵ This supports the notion that before certification, *only* the standing of the named plaintiff matters for establishing Article III standing.

In *Warth v. Seldin*, a class action, the Court said that named plaintiffs who represent a class “must allege that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”⁶⁶ In *O’Shea v. Littleton*, the Court determined that the requirements of Article III were not satisfied where the named plaintiffs purporting to represent a class could not establish that they had suffered an injury.⁶⁷ The Court explained that the party seeking to invoke the power of the federal courts—the named plaintiff—must be able to meet the case-or-controversy requirement.⁶⁸ This serves to ensure that the litigant has a personal stake in the outcome which “assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends”⁶⁹ In *Town of*

⁶² 557 U.S. 433, 445 (2009) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

⁶³ *Id.* at 446.

⁶⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, n. 9 (1977).

⁶⁵ *Warth*, 422 U.S. at 502; *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974).

⁶⁶ 422 U.S. at 502.

⁶⁷ 414 U.S. at 493.

⁶⁸ *Id.*

⁶⁹ *Id.* at 494 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) (alteration in original).

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Chester, N.Y. v. Laroe Estates, Inc., the Court, acknowledging that “standing is not dispensed in gross,”⁷⁰ clarified that this means that the plaintiff must demonstrate standing for each claim and each form of relief requested.⁷¹ When there are multiple plaintiffs, all that is required is that at least one plaintiff have standing to raise each claim and to seek each form of relief sought.⁷²

The Court further demonstrated in *Sosna v. Iowa*⁷³ that what matters for Article III standing is that there is *someone* who has standing to establish a case or controversy that the court can address. There, the Court recognized that in the mootness context, even when the named plaintiff’s claim became moot, the class action did not need to be dismissed because “the controversy remain[ed] very much alive for the class of unnamed persons who she represent[ed] and who, upon certification of the class action, acquired a legal status separate from [the named plaintiff’s] asserted interest.”⁷⁴ The Supreme Court did not require that all class members have a live claim; some class members with a live claim is enough to satisfy the case or controversy requirement in the mootness context.⁷⁵

The mootness case is also instructive on why, at the certification stage, a named plaintiff must be able to establish standing, though at a *later* stage the standing of an unnamed plaintiff could suffice to establish standing for the case. Until the class is certified, the unnamed class members are not parties to the suit, so their standing cannot be used to justify invocation of the court’s jurisdiction. The same reasoning applies to the injury-in-fact element of standing. Before certification, an unnamed class member is in no way a party to the litigation.⁷⁶ At that stage, then, the court can *only* look to the standing of the named plaintiff(s) to determine whether the requirement of standing has been met—and thus whether it has jurisdiction to certify the class.

The Court’s analysis in these cases demonstrates that the purpose of the case-or-controversy requirement—of which standing is an “essential and unchanging part”⁷⁷—is to ensure that the party before the court has a personal interest adverse to the opposing party. As the Court in *Warth v. Seldin* explained, the constitutional requirements of standing are focused on justiciability.⁷⁸ If Article III standing is about limiting the power of the judiciary, this purpose is served by establishing the standing of one named plaintiff at the certification stage. As long as the constitutional minimum is met by the plaintiff who is invoking the power of

⁷⁰ 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

⁷¹ *Id.*

⁷² *See id.* at 1650–51.

⁷³ 419 U.S. 393 (1975).

⁷⁴ *Id.* at 393 (alteration in original).

⁷⁵ *Id.*

⁷⁶ *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011).

⁷⁷ *Lujan*, 504 U.S. at 560.

⁷⁸ 422 U.S. at 498.

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the federal court, he “may have standing to seek relief on the basis of the legal rights and interests of others.”⁷⁹ Whenever one named plaintiff has standing, the court can feel confident that the case presents an Article III “case” or “controversy” over which it may exercise its judicial power.

D. Contrary Case Law

Examination of cases where courts have required a showing that all class members have standing at the certification stage suggests that these courts are either addressing Rule 23 issues rather than Article III issues or have not thoroughly examined Supreme Court precedent on the issue. For example, in *In re Rail Freight Fuel Surcharge Antitrust Litigation-MDL No. 1869*,⁸⁰ cited by scholars for the proposition that Article III requires showing that all class members have suffered an injury before a class can be certified,⁸¹ the D.C. Circuit did not actually mention Article III standing or perform a standing analysis. Rather, the court held in analyzing Rule 23 predominance that plaintiffs had to “show that they [could] prove, through common evidence” that all class members were injured by the defendants’ actions.⁸² In another case, the Second Circuit offered little reasoning⁸³ before concluding that “no class may be certified that contains members lacking Article III standing.”⁸⁴ The court also seemed to treat its conclusion as settled law,⁸⁵ and cited cases which “did not squarely address or resolve the issue.”⁸⁶ Similarly, the Eighth Circuit’s determination that “a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves” was supported by only a few sentences of analysis.⁸⁷ Adherence to the proposals of the Second and Eighth Circuits would also likely lead to the creation of “fail-safe” classes, which are problematic because their membership cannot be determined until after the suit has been litigated.⁸⁸

⁷⁹ *Id.* at 501.

⁸⁰ 725 F.3d 244, 252 (D.C. Cir. 2013).

⁸¹ Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L. J. 383, 389–90 (2014).

⁸² *In re Rail Freight*, 725 at 252 (D.C. Cir. 2013).

⁸³ Evangelis & Hamburger, *supra* note 81, at 388 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006)).

⁸⁴ *Id.* (quoting *Denney*, 443 F.3d at 263–64).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010)).

⁸⁸ Rubenstein, *supra* note 3.

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II. ARGUMENTS AGAINST THE “ONE-PLAINTIFF RULE”

A. *The One-Plaintiff Rule Violates Article III, Which Requires that Each Party Whose Claims are Adjudicated Must Establish Standing*

The authors of *Article III Standing and Absent Class Members* argue that certifying a class that contains uninjured class members creates a “special exemption” from the standing requirement for absent class members, because it allows their claim to be litigated even though those class members would not have met the requirements of standing in an individual lawsuit.⁸⁹ They argue this practice violates both the Constitution and Federal Rule of Civil Procedure 82⁹⁰ by expanding federal court jurisdiction.⁹¹

This argument is based on the idea that an Article III case or controversy is “one where all *parties* to the litigation have standing.”⁹² Proponents of this view argue that, once the class is certified, all class members become parties to the litigation for Article III purposes because their claims will be adjudicated.⁹³ Although absent class members are not named parties to the litigation, the argument cites *Devlin v. Scardelletti* for the proposition that absent class members “may be parties for some purposes and not for others.”⁹⁴ In *Scardelletti*, the Court held that unnamed class members were parties for purposes of appealing a class settlement.⁹⁵ Because absent class members *may* be considered parties later for procedural purposes, Evangelis and Hamburger argue that “[i]t follows that absent class members should—indeed, must—be considered parties for purposes of the constitutional requirement of Article III standing.”⁹⁶ Once the class is certified, the absent class members become parties whose claims will be adjudicated in federal court.⁹⁷ So, like any other party seeking to have their claim adjudicated in federal court, the standing of absent class members must be demonstrated at the outset. To find differently would allow Rule 23 to extend the federal courts’ jurisdiction to claims that do not fall within Article III “cases or controversies.” Class certification, they argue, is thus being used to extend the court’s jurisdiction to the individual

⁸⁹ Evangelis & Hamburger, *supra* note 81, at 393.

⁹⁰ FED. R. CIV. P. 82. “These rules do not extend or limit the jurisdiction of the district courts” *Id.*

⁹¹ Evangelis & Hamburger, *supra* note 81, at 385.

⁹² *Id.* at 393 (alteration in original) (quoting *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996) (arguing that “an Article III case or controversy is one where all *parties* have standing.”) (alteration in original).

⁹³ *See* Evangelis & Hamburger, *supra* note 81, at 394–95.

⁹⁴ *Id.* at 394 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002)).

⁹⁵ *Scardelletti*, 536 U.S. 1, 14 (2002).

⁹⁶ Evangelis & Hamburger, *supra* note 81, at 394.

⁹⁷ *Id.* at 394–95.

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claims of the absent class members—claims which could not have come within the court’s jurisdiction in the absence of the class action.⁹⁸

This view focuses on jurisdiction as to each individual party. The position is contrary to Supreme Court cases demonstrating that as long as one plaintiff has standing, the court has jurisdiction to hear the suit.⁹⁹ Standing is about establishing the court’s jurisdiction to address a given *case* or *controversy*. Once jurisdiction has been established over a case, it may extend beyond the individual who invoked it.

B. The One-Plaintiff Rule is Contrary to the Rules Enabling Act

One could also argue that allowing certification of a class with members who lack standing violates the Rules Enabling Act, which mandates that the Rules of Civil Procedure must not “modify any substantive right.”¹⁰⁰ Under the one-plaintiff rule, one can argue that Rule 23 functions to modify the substantive rights of absent class members by allowing their claims, which would not otherwise be before the court, to be adjudicated.

However, no substantive right is modified by Rule 23 if class members without standing are unable to recover damages, and only class members who have standing are able to recover. As one scholar has noted, this is an issue that can be “sorted out at the remedies phase” of litigation.¹⁰¹ Additionally, unnamed class members who cannot establish standing still lack the right to invoke the power of the federal courts.

C. Absent Class Members are Seeking “Different Relief” from what the Named Plaintiff is Seeking.

This argument gets some support from *Town of Chester*, where the Court held that an intervenor of right must establish its own standing if it seeks “to pursue relief different from that which is sought by a party with standing.”¹⁰² The Court said that an intervenor is seeking separate relief when it seeks a money judgment in its own name, even when a plaintiff with standing is already seeking a money judgment.¹⁰³ The Court indicated that the relief is the “same” if the intervenor is not seeking a separate judgment against the defendant, and is different—and thus requires a showing of Article III standing—if the intervenor is seeking a separate

⁹⁸ *See id.* at 386.

⁹⁹ *See, e.g.,* *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, n. 9 (1977).

¹⁰⁰ 28 U.S.C. § 2072(b).

¹⁰¹ Rubenstein, *supra* note 3.

¹⁰² *Town of Chester*, 137 S. Ct. at 1645 (2017).

¹⁰³ *Id.* at 1651.

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award of damages.¹⁰⁴ The Court remanded the case to the lower court to determine whether the intervenor was seeking damages for himself or was “simply seeking the same damages” sought by the plaintiff with standing.¹⁰⁵ So, in a class action, if the individual damages sought for unnamed plaintiffs are considered “different” from the relief sought by the named plaintiff, separate standing would be required.

However, Rule 23 indicates that a court deciding a class action issues a single judgment, which applies to those “whom the court finds to be class members.”¹⁰⁶ Additionally, in a (b)(3) case, the unnamed class members are not seeking relief “different” from that sought by the named plaintiff. Rather, it is the named plaintiff who is seeking relief *for* the unnamed class members—they are not seeking any relief on their own.

D. The Court’s Judgment is not Binding on an Unnamed Class Member Who Lacks Standing

An additional concern with the “one-plaintiff rule” in class actions was raised in *Kohen*, where the defendant Pacific Investment Management Co. (PIMCO) argued that allowing a class with uninjured members to be certified and go through trial would create asymmetric risks for the defendant.¹⁰⁷ PIMCO feared that, because a class member determined to have suffered no injury would also have no standing, the court would be determined not to have had jurisdiction over that class member.¹⁰⁸ The court’s judgment, then, would not be binding on the uninjured class member, and he would be free to bring a new suit against the defendant.¹⁰⁹

The Seventh Circuit dismissed the defendant’s concern as “an absurd result.”¹¹⁰ However, it is worth addressing this argument in more depth to determine whether there is any unfair risk to defendants resulting from a rule that requires only that one named plaintiff have standing at the certification stage. If it is true that an uninjured class member is not bound by the result of the case, then that class member would effectively get a second opportunity to pursue his claim. This class member would get the benefit of seeing what worked in the class action and get a second chance to litigate the issue on which his claim failed—for example, injury-in-fact. As we’ve seen in a number of recent Supreme Court cases on the subject, injury-in-fact can be a contentious issue.¹¹¹ It does not seem ridiculous to

¹⁰⁴ *Id.* at 1651–52.

¹⁰⁵ *Id.* at 1652.

¹⁰⁶ FED. R. CIV. P. 23(c)(3)(B).

¹⁰⁷ *See Kohen*, 571 F.3d at 677.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See, e.g., TransUnion LLC*, 141 S. Ct. at 2204–13.

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suppose that a class member who loses on injury-in-fact—or traceability or redressability, for that matter—might believe that he could succeed on the same issue in front of another court. Class action defendants would be justified in expressing concern if uninjured class members were not bound by the judgment in a class action.

Fortunately for defendants, an examination of the standing discussion in the previous section of this Note would seem to indicate that an absent class member who the court finds uninjured is bound by that decision. Standing is focused on the courts' ability to exercise their judicial power over a case or controversy—it is an issue of subject matter jurisdiction.¹¹² The court has personal jurisdiction over an absent class member because a class member who has declined to opt out has consented to the court's jurisdiction over him. Since the court presiding over a class action has both subject-matter jurisdiction over the case and personal jurisdiction over the absent class member, the court's decision that the class member is not injured is within the court's jurisdiction. The determination is therefore binding on the absent class member.

Case law also supports this conclusion. The *res judicata* effect of a final judgment in a (b)(3) class action suit “generally extends to the entire certified class.”¹¹³ A later court, determining whether an earlier court's class action judgment is binding on a litigant, may make exceptions to the general rule of *res judicata* if it finds that the class suit lacked either requisite notice or adequate representation.¹¹⁴ Since both notice and adequate representation are requirements of Rule 23,¹¹⁵ which federal courts must apply when dealing with class actions, it will probably be rare for a later court to determine that a prior class judgment is not binding on an absent class member.

Policy considerations also favor finding that absent class members are subject to the *res judicata* effect of the class suit. Both “legal consistency and protection of party expectations” require that the same people who are part of the class at the outset—because they fall within the class definition—should be bound by the outcome.¹¹⁶

¹¹² “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. . . .” *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

¹¹³ *McDowell v. Brown*, 5 Vet. App. 401, 405 (1993).

¹¹⁴ *Id.*

¹¹⁵ FED. R. CIV. P. 23(c)(2)(B) (notice); FED. R. CIV. P. 23(a)(4) (adequacy of representation).

¹¹⁶ *Hazard et al.*, *supra* note 38, at 1854.

*Class Standing Analysis: The Requirements of Article III and Rule 23**E. Certification of a Class puts Artificial Pressure on the Defendant to Settle if Many Class Members are in fact Uninjured or Otherwise Lack Standing*

Courts have noted the *in terrorem* nature of class actions, which weighs against certification of overbroad classes.¹¹⁷ An overbroad class increases the pressure on defendants to settle their cases by increasing the potential liability defendants may face. This may induce defendants to settle even when they believe the plaintiffs' chance of success is small.¹¹⁸ The *Kohen* court conceded that "if the class definition clearly were overbroad," there would be a strong argument for requiring that it be narrowed.¹¹⁹

While this is a legitimate concern, the overbroad class does not present a standing issue. Concerns about an overbroad class can be resolved through the Rule 23(b)(3) analysis, such as through the predominance or superiority requirements, discussed below.

III. ADDRESSING STANDING WITHIN THE RULE 23 ANALYSIS

As a matter of Rule 23(b)(3) analysis, a court should determine that the issue of standing for unnamed class members will not be so individualized as to present problems for the management of the class action.¹²⁰

To achieve certification of a (b)(3) class, a plaintiff must meet the requirements of commonality, typicality, and adequate representation.¹²¹ In addition, the plaintiff must meet the requirement that "the questions of law or fact common to class members predominate over any questions affecting only individual members."¹²² Certification of a (b)(3) class also requires a court to determine that a class action is "superior to other available methods" of adjudication.¹²³ The Supreme Court emphasized in *Amchem* that courts have an obligation to take a "close look" at both the predominance and superiority of (b)(3) classes.¹²⁴ Plaintiffs bear the burden of showing that class certification requirements are met,¹²⁵ and they must "affirmatively demonstrate" their

¹¹⁷ *E.g.*, *Cordoba*, 942 F.3d at 1276; *see also Kohen*, 571 F.3d at 678.

¹¹⁸ *Kohen*, 571 F.3d at 678.

¹¹⁹ *Id.*

¹²⁰ For an in-depth discussion of this argument, *see Evangelis & Hamburger*, *supra* note 81.

¹²¹ FED. R. CIV. P. 23(a).

¹²² FED. R. CIV. P. 23(b).

¹²³ *Id.*

¹²⁴ *Amchem*, 521 U.S. at 615.

¹²⁵ *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 722 F.3d 838, 851 (6th Cir. 2013).

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compliance with Rule 23 to certify a class.¹²⁶ The Rule 23 analysis is rigorous, and can be used to address the perceived problems associated with classes containing class members who lack individual standing.¹²⁷

As the Supreme Court has held, the inquiry into whether the requirements for class certification are met will “frequently entail ‘overlap with the merits of the plaintiff’s underlying claim.’”¹²⁸ This is because class certification issues frequently incorporate the facts and legal issues of the plaintiff’s cause of action.¹²⁹ A court determining whether to certify a class must therefore look at the elements of a plaintiff’s claim to determine whether the class meets the requirements of Rule 23(b)(3) as to that claim. Federal courts do not have the authority to award recovery to someone who has not been injured.¹³⁰ This means that, in a class suit for damages, the standing of absent class members will eventually have to be determined. “Every class member must have Article III standing in order to recover individual damages.”¹³¹

So, like any other issue at the certification stage, the court should look into standing issues to the extent necessary to determine that establishing the standing of absent class members will not be so individualized as to cause individual issues to predominate over classwide issues. Courts should treat the elements of standing like the elements of the underlying cause of action at issue.¹³² Because Article III standing of absent class members is an issue that will need to be addressed at some point in the litigation, it has the potential to make the class trial unmanageable if it turns out that highly individualized proof is needed to establish standing for absent class members. In determining whether a class meets the requirements of Rule 23, the court must consider “difficulties likely to be encountered in the management of a class action.”¹³³ What Rule 23 requires, then, is that the court consider at the certification stage “whether the need to establish standing for *all* plaintiffs at trial will entail individualized inquiries that preclude classwide adjudication.”¹³⁴ For example, a court should not certify a class that contains “a great many members who . . . could not have been harmed” by the defendant’s conduct.¹³⁵

¹²⁶ *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

¹²⁷ *See Comcast*, 596 U.S. at 33-34.

¹²⁸ *Id.* (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–61 (1982)).

¹²⁹ *Comcast*, 596 U.S. at 34.

¹³⁰ *Bouaphakeo*, 577 U.S. at 466 (Roberts, C.J., concurring) (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)).

¹³¹ *TransUnion LLC*, 141 S. Ct. at 2208.

¹³² *Lujan*, 504 U.S. at 561.

¹³³ *Amchem*, 521 U.S. at 615 (quoting FED. R. CIV. P. 23(b)(3)(D)).

¹³⁴ *Evangelis & Hamburger*, *supra* note 81, at 397 (alteration in original).

¹³⁵ *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012).

*Class Standing Analysis: The Requirements of Article III and Rule 23**A. Relevant Case Law*

The Eleventh Circuit’s analysis in *Cordoba v. DIRECTV* provides an example of proper Article III standing and Rule 23 analysis at the certification stage. Though holding that the standing requirement was met because there was one named plaintiff with standing, the court said that the possibility of many class members who had no standing was still “extremely important to the class certification decision,”¹³⁶ because of problems it could present for the predominance requirement of Rule 23(b)(3).¹³⁷ In its certification analysis, the Eleventh Circuit treated standing as it would any other necessary element of a class claim.¹³⁸ It found that, because the district court had not considered how individualized questions of standing would impact predominance, and because the court would eventually have to determine individual standing before it could award relief, the lower court had failed to make the necessary determinations to establish that the requirements of Rule 23(b)(3) were met.¹³⁹

The D.C. Circuit’s analysis in *In re Rail Freight* is more relevant in the Rule 23 analysis than in the Article III discussion, because that court analyzed the question of unnamed class members’ injury under Rule 23 predominance, and not under Article III.¹⁴⁰ In its predominance analysis, the court held that common questions of fact *cannot* predominate—and thus the requirements of Rule 23(b)(3) cannot be satisfied—when a case requires individualized proof of injury.¹⁴¹ While plaintiffs do not have to demonstrate the *amount* of harm suffered by each plaintiff, the court said that plaintiffs must be able to show at the certification stage that all class members suffered an injury.¹⁴²

In contrast, the First Circuit has said that even where the issue of injury-in-fact presents individual questions, it “does not necessarily follow” that the individualized questions *predominate* over common questions.¹⁴³ Thus, class treatment may still be appropriate even where individualized proof of injury will be required.¹⁴⁴

The Supreme Court has said that a plaintiff seeking class certification is not required to prove that each element of her claim can be demonstrated by classwide

¹³⁶ *Cordoba*, 942 F.3d at 1264.

¹³⁷ *Id.*

¹³⁸ *See id.* at 1272–77.

¹³⁹ *Id.* at 1276–77.

¹⁴⁰ *See In re Rail Freight*, 725 F.3d at 252–53.

¹⁴¹ *Id.* at 249 (alteration in original).

¹⁴² *Id.* (alteration in original).

¹⁴³ *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (citing *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108 (2d Cir. 2007)) (alteration in original).

¹⁴⁴ *In re Nexium*, 777 F.3d at 21.

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proof.¹⁴⁵ Rather, the focus of the predominance inquiry is to establish that a class is “sufficiently cohesive” to justify “adjudication by representation.”¹⁴⁶ The elements of standing “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.”¹⁴⁷ At the certification stage, “[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”¹⁴⁸ So, treating standing the same as any other element of the claim that the plaintiff must show at the certification stage, the Court’s statements indicate that a plaintiff is not necessarily required to show that standing can be established by classwide proof.

CONCLUSION

In approaching a certification decision, a court must first ensure that it has jurisdiction over the case.¹⁴⁹ This requires only that at least one named plaintiff be able to establish standing. When one named plaintiff has standing, the Constitutional case-or-controversy requirement is met, and federal court jurisdiction exists. Having thus met the requirements of Article III and established its jurisdiction, the court will move on to its Rule 23 analysis. To meet the requirements of Rule 23(b)(3), the court must establish that a class action will be superior to other forms of adjudication and that issues common to the class will predominate over individualized issues.¹⁵⁰ Because individual standing of class members must be shown before individuals may receive damages,¹⁵¹ standing should be treated like any other element of the plaintiff’s claim.¹⁵² In a (b)(3) class, this means looking into standing to the extent necessary to determine that the requirements of Rule 23, including predominance and superiority, are met.

While some inquiry into the standing of absent class members is necessary before certification, the conclusion that Article III does not require more than one named plaintiff to have standing should reassure courts that they are not required to deny certification merely because the standing of unnamed class members has not been demonstrated. Courts and scholars who are concerned about classes made up mostly of class members who lack standing can take comfort in knowing that the Rule 23 requirements are sufficient to prevent classes that are clearly overbroad.

¹⁴⁵ *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 469 (2013).

¹⁴⁶ *Amchem*, 521 U.S. at 623.

¹⁴⁷ *Lujan*, 504 U.S. at 561 (1992).

¹⁴⁸ *Amgen*, 568 U.S. at 466.

¹⁴⁹ *Warth*, 422 U.S. at 498.

¹⁵⁰ FED. R. CIV. P. 23(b)(3).

¹⁵¹ *TransUnion LLC*, 141 S. Ct. at 2208.

¹⁵² *Lujan*, 504 U.S. at 561.