

ARTICLE III STANDING AND ABSENT CLASS MEMBERS

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ABSTRACT

Whether absent class members must have standing under Article III has divided the courts of appeals, with some suggesting that the requirements of Article III apply only to the named plaintiff. This Essay argues that the class action procedural device cannot change the fundamental principle that uninjured persons lack standing to have their claims adjudicated by federal courts. To hold otherwise would allow Federal Rule of Civil Procedure 23 to trump a constitutional imperative, in violation of both due process and the Rules Enabling Act, and would impermissibly expand the jurisdiction of federal courts in violation of Federal Rule of Civil Procedure 82. Before certifying a class, courts should require the named plaintiff to show that absent class member standing—like any other element of a claim—can be proven in a classwide proceeding, and should assess whether proving that absent class members have standing would entail individualized inquiries that preclude classwide adjudication.

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INTRODUCTION

The Supreme Court has recently instructed that “[i]n an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so.”¹ Yet some courts have done the exact opposite, suggesting that uninjured plaintiffs can assert claims in federal court that they could never bring in an individual action simply because their claims have been aggregated with others through the class action procedural device created by Federal Rule of Civil Procedure 23. Although the courts of appeals are divided on this issue, the Seventh Circuit, for example, has stated that the “requirement of standing is satisfied” if “one member of a certified class has a plausible claim to have suffered damages” and has suggested that it is “inevitable” that “a class will often include persons who have not been injured by the defendant’s conduct.”²

This view—that absent class members do not need to satisfy the “irreducible constitutional minimum” of Article III standing by virtue of the class action device³—is profoundly flawed and threatens to erode Article III’s limitations on the judicial power of federal courts. As other courts of appeals, including the Second and Eighth Circuits, have recognized, absent class members—like all litigants in federal court—must have Article III standing.⁴

This Essay argues that the class action procedural device cannot change the fundamental principle that uninjured persons lack standing to have their claims adjudicated by federal courts. To hold otherwise would allow Rule 23 to trump a constitutional imperative, in violation of both due process and the Rules Enabling Act, which prohibits the federal rules from “abridg[ing], enlarg[ing] or modify[ing] any substantive right.”⁵ It would also impermissibly expand the jurisdiction of federal courts, in violation of Federal Rule of Civil Procedure 82, which provides that the Federal Rules of Civil Procedure “do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.”⁶ Therefore, because absent class members must have Article III standing to recover in federal court, a named plaintiff seeking certification of a

¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

² *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009).

³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁴ *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (“[N]o class may be certified that contains members lacking Article III standing.”); *accord Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

⁵ 28 U.S.C. § 2072(b) (2012).

⁶ FED. R. CIV. P. 82.

class should be required to establish that absent class member standing—like any other element of a claim—can be proven in a classwide proceeding. And courts should not certify classes where determining absent class member standing entails individualized inquiries that would preclude classwide adjudication.

I. THE IRREDUCIBLE CONSTITUTIONAL MINIMUM OF ARTICLE III STANDING

“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies.”⁷ The standing of a litigant to invoke the power of a federal court goes to the very heart of separation of powers principles to ensure that the judicial process is not “used to usurp the powers of the political branches.”⁸ Indeed, as the Supreme Court recently emphasized in *Hollingsworth v. Perry*, “[t]he Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers.”⁹

Article III’s standing requirement thus ensures that important legal questions will not be resolved “in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”¹⁰ That is, by requiring that a litigant have a “direct stake in the controversy,” Article III’s case or controversy requirement prevents the federal courts from becoming a forum for the “vindication of the value interests of concerned bystanders.”¹¹ “Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States.”¹²

Therefore, to properly invoke the jurisdiction of the federal courts, a litigant must first allege and then ultimately prove at trial the “three elements” that comprise “the irreducible constitutional minimum of standing”: (1) an “injury in fact,” defined as “an invasion of a legally protected interest which is

⁷ *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (internal quotation marks omitted) (citing *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

⁸ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013).

⁹ 133 S. Ct. 2652, 2667 (2013).

¹⁰ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

¹¹ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973).

¹² *Valley Forge*, 454 U.S. at 475–76.

(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”; (2) “a causal connection between the injury and the conduct complained of” that is “fairly traceable” to the actions of the defendant; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable [court] decision.”¹³ Significantly, the injury required to establish standing must be “particularized” in that it “must affect the plaintiff in a personal and individual way.”¹⁴

Although the Supreme Court has never squarely addressed whether absent class members in a certified class action must have Article III standing, it has emphasized on multiple occasions that the class action procedural device cannot trump the requirements of Article III. The Court has explained that the fact “[t]hat a suit may be a class action adds nothing to the question of standing.”¹⁵ And the Court has instructed that “Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act.”¹⁶ Further, Rule 23 is also limited by Rule 82’s prohibition on using the Federal Rules of Civil Procedure to “extend . . . the jurisdiction of the district courts.”¹⁷

II. THE CONFLICT IN THE COURTS OF APPEALS

Although there is broad agreement among the federal courts that at least one class representative must have Article III standing to litigate claims on behalf of a class, the courts of appeals are divided on whether absent class members also must satisfy Article III.

Both the Second and Eighth Circuits have held that “[i]n order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision.”¹⁸ The leading Second Circuit decision, *Denney v. Deutsche Bank AG*, involved an appeal filed by two class action plaintiffs who sought to challenge the

¹³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted) (internal quotation marks omitted).

¹⁴ *Id.* at 560 n.1.

¹⁵ *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)) (internal quotation marks omitted).

¹⁶ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

¹⁷ FED. R. CIV. P. 82; *see also Amchem*, 521 U.S. at 613.

¹⁸ *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013); *accord Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

certification of a settlement class covering claims of improper and fraudulent tax counseling.¹⁹ The objecting class members asserted that the settlement class contained members for whom tax penalties had not yet been assessed, and who therefore lacked Article III standing.²⁰ The Second Circuit held that although class members need not “submit evidence of personal standing,” “no class may be certified that contains members lacking Article III standing”; therefore, “[t]he class must . . . be defined in such a way that anyone within it would have standing.”²¹ Suggesting that this conclusion was settled law, the Second Circuit did not engage in any detailed analysis and instead cited a handful of cases and treatises, none of which squarely address or resolve the issue.²² For example, *Denney* relies on the Supreme Court’s decision in *Ortiz v. Fibreboard Corp.*,²³ a case in which the Court noted, but did not decide, the question whether Article III applies to absent class members.²⁴

The Eighth Circuit in *Avritt v. Reliastar Life Insurance Co.* subsequently adopted, also without much analysis, the Second Circuit’s views.²⁵ In *Avritt*, the district court denied class certification in part because it found that whether the defendant had actually misled the putative class members about its interest-crediting practices and whether the putative class member relied upon any such misrepresentations could not be determined on a classwide basis.²⁶ On appeal, the plaintiffs argued that the court erred in concluding that they were required to show that absent class members had suffered an injury because they claimed that California’s Unfair Competition Law allows absent class members to bring claims in a class action regardless of whether they have suffered an injury.²⁷ The Eighth Circuit reasoned that to the extent California law allows “a single injured plaintiff [to] bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts.”²⁸ The court noted that “[t]he ‘irreducible constitutional minimum of standing requires a showing of injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable

¹⁹ *Denney*, 443 F.3d at 259.

²⁰ *Id.*

²¹ *Id.* at 263–64.

²² *See id.*

²³ *Id.* at 264.

²⁴ *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830–31 (1999).

²⁵ 615 F.3d 1023, 1034 (8th Cir. 2010).

²⁶ *Id.* at 1026.

²⁷ *Id.* at 1033 (citing *In re Tobacco II Cases*, 207 P.3d 20, 31–32 (Cal. 2009)).

²⁸ *Id.* at 1034.

decision.”²⁹ And, relying on *Denney*, the court explained that “[t]he constitutional requirement of standing is equally applicable to class actions” and held that “a class cannot be certified if it contains members who lack standing.”³⁰

The Ninth Circuit followed *Denney* in a recent decision, holding that “no class may be certified that contains members lacking Article III standing.”³¹ In previous decisions, however, the Ninth Circuit had suggested that only named plaintiffs must have Article III standing.³² Yet none of these Ninth Circuit decisions contain a reasoned discussion of the issue.

Recently, the District of Columbia Circuit strongly suggested that absent class members must have Article III standing. In *In re Rail Freight Fuel Surcharge Antitrust Litigation*, the court held that to satisfy the predominance requirement of Rule 23, plaintiffs are required to “show that they can prove, through common evidence, that *all* class members were in fact injured by the alleged conspiracy.”³³ The court further noted that it “expect[ed] the common evidence to show all class members suffered *some* injury.”³⁴ The court also reasoned that if a model submitted by the plaintiffs’ expert could not accurately show that all class members were injured by the allegedly wrongful conduct, that fact would “shred the plaintiffs’ case for certification” because “[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact.”³⁵ Although the District of Columbia Circuit did not expressly mention Article III standing in *In re Rail Freight*, its repeated statements that the plaintiffs were required to show that all

²⁹ *Id.* (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009)).

³⁰ *Id.* (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006)); *see also id.* (“[T]o put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.”). The Eighth Circuit recently reaffirmed its adoption of *Denney*’s view of absent class member standing in *Halvorson v. Auto-Owners Insurance Co.*, 718 F.3d 773, 778–79 (8th Cir. 2013).

³¹ *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (quoting *Denney*, 443 F.3d at 264) (internal quotation marks omitted).

³² *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (claiming that, with respect to “standing under Article III,” Ninth Circuit “law keys on the representative party, not all of the class members, and has done so for many years”); *see also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (“[W]e consider only whether at least one named plaintiff satisfies the standing requirements . . .”). At least one district court in the Ninth Circuit, however, has concluded that neither *Bates* nor *Stearns* “resolve[d] the question of whether *all* members of a class must satisfy Article III requirements.” *See O’Shea v. Epsom Am., Inc.*, No. CV 09-8063 PSG (CWx), 2011 WL 4352458, at *9 (C.D. Cal. Sept. 19, 2011).

³³ 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 252–53.

class members had suffered an injury suggests that the court believed that absent class members must have Article III standing.

The leading case on the other side of the circuit split is the Seventh Circuit's decision in *Kohen v. Pacific Investment Management Co.*, where the court noted that "one named plaintiff with standing . . . is all that is necessary."³⁶ In *Kohen*, the defendants appealed an order certifying a class of plaintiffs who purchased certain futures contracts.³⁷ The plaintiffs alleged that the defendants had violated section 9(a) of the Commodity Exchange Act by cornering the futures market for certain U.S. Treasury notes.³⁸ The defendants argued that some putative class members lacked Article III standing because the class definition potentially included persons who would not have lost money on their futures contract if they had hedged their potential losses.³⁹

Addressing the Article III question, the Seventh Circuit explained that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."⁴⁰ But the primary authority the court cited for this "one member" standing rule—the Supreme Court's decision in *United States Parole Commission v. Geraghty*⁴¹—does not support the court's conclusion. *Geraghty* dealt with an unrelated question regarding whether a putative class action is rendered moot where class certification has been denied and the named plaintiff's claim has been mooted.⁴² *Kohen* also cited a previous Seventh Circuit decision, but that case involved the same mootness issue addressed in *Geraghty*, not whether absent class members must have Article III standing.⁴³

The Seventh Circuit in *Kohen* attempted to distinguish the Second Circuit's decision in *Denney* as a case that "focus[ed] on the class definition" and merely prohibited a class definition from being "so broad that it sweeps within it persons who could not have been injured by the defendant's conduct."⁴⁴ Of course, this ignores *Denney*'s square holding that "no class may be certified

³⁶ 571 F.3d 672, 677 (7th Cir. 2009).

³⁷ *Id.* at 674.

³⁸ *Id.*

³⁹ *Id.* at 676.

⁴⁰ *Id.*

⁴¹ 445 U.S. 388 (1980).

⁴² *Id.* at 404 (holding "that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied").

⁴³ See *Wiesmueller v. Kosobucki*, 513 F.3d 784, 785–86 (7th Cir. 2008).

⁴⁴ *Kohen*, 571 F.3d at 677.

that contains members lacking Article III standing,⁴⁵ which cannot be reconciled with *Kohen*'s statement that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."⁴⁶

Relying on *Kohen*, the Tenth Circuit subsequently stated in *DG ex rel. Stricklin v. Devaughn* that "Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."⁴⁷ According to the court, "[t]hat a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification."⁴⁸ But like the Seventh Circuit in *Kohen*, the court in *Stricklin* did not provide any explanation for why plaintiffs who have *not* suffered any injury should be allowed to have their claims adjudicated by a federal court.

The Third Circuit in *Krell v. Prudential Insurance Co. of America* also adopted the view that absent class members need not have standing under Article III.⁴⁹ In *Krell*, the district court certified a settlement class, and several class members who objected to the settlement appealed, arguing that the class contained uninjured persons who lacked Article III standing because they had not suffered an injury in fact.⁵⁰ Without much discussion, the Third Circuit rejected this argument and noted that "whether an action presents a 'case or controversy' under Article III is determined vis-a-vis the named parties."⁵¹ The court further explained that "[o]nce [the] threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court, and there remains no further separate class standing requirement in the constitutional sense."⁵²

⁴⁵ *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006).

⁴⁶ *Kohen*, 571 F.3d at 676.

⁴⁷ 594 F.3d 1188, 1198 (10th Cir. 2010).

⁴⁸ *Id.* at 1201 (citing *Kohen*, 571 F.3d at 677).

⁴⁹ *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. of Am. Sales Practice Litig.)*, 148 F.3d 283, 306–07 (3d Cir. 1998).

⁵⁰ *Id.* at 306.

⁵¹ *Id.* (citation omitted).

⁵² *Id.* at 306–07 (quoting 1 HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 2.05 (3d ed. 1992)) (internal quotation marks omitted).

III. ABSENT CLASS MEMBERS MUST HAVE ARTICLE III STANDING

Although the courts of appeals are divided regarding whether absent class members must satisfy Article III, none of them truly have grappled with the issue or reasoned from first principles. The fact that these courts have issued conflicting rulings may be the result of a failure to assess the interplay between Article III and the class action procedural device. Tellingly, those courts and commentators endorsing the view that absent class members need not have Article III standing have generally emphasized policy concerns over doctrine.⁵³ When the issue is examined in light of the proper function of procedural rules, and the fact that they cannot modify the substantive law or expand the jurisdiction of federal courts, it becomes clear that Rule 23 cannot be used to subvert the fundamental requirements of Article III.

It is beyond dispute that if an absent class member were to bring a lawsuit in an individual capacity in federal court, he would have to satisfy Article III. Thus, in an individual suit, an absent class member would be obligated first to sufficiently allege, and then prove at trial, that he suffered an injury that affected him “in a personal and individual way”⁵⁴ and could not rely on the fact that *others* may have suffered an injury. As the Supreme Court has held, for a plaintiff to have standing under Article III, he “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”⁵⁵ This obligation continues at each stage of the litigation.⁵⁶

This constitutional prerequisite cannot be altered or eliminated merely because a person’s claims are aggregated with others in a class action certified under Rule 23 rather than brought in an individual action. As the Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*, “the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right.’”⁵⁷

⁵³ See, e.g., *Kohen*, 571 F.3d at 677 (emphasizing that it “is almost inevitable” that “a class will often include persons who have not been injured by the defendant’s conduct”); Joshua P. Davis, Eric L. Cramer, & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 860 (2014) (“Certifying classes containing uninjured members . . . makes sound policy sense.”).

⁵⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992); see also *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“[T]he plaintiff . . . must allege a distinct and palpable injury to himself . . .”).

⁵⁵ *Warth*, 422 U.S. at 499.

⁵⁶ *Lujan*, 504 U.S. at 561 (explaining that the elements of standing are “not mere pleading requirements” and “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . . at the successive stages of the litigation”).

⁵⁷ 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b) (2006) (currently codified as 28 U.S.C. § 2072(b) (2012))).

But construing Rule 23 to authorize federal courts to resolve the claims of absent class members, regardless whether those class members personally have suffered an injury sufficient to establish standing, would exempt uninjured plaintiffs from the requirements of Article III and enlarge their right to pursue claims in federal court. Relatedly, because “a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims,”⁵⁸ and because “[d]ue process requires that there be an opportunity to present every available defense,”⁵⁹ defendants’ right to challenge the standing of uninjured plaintiffs cannot be abridged merely because their claims are aggregated in a certified class action.

In short, granting absent class members a special exemption from Article III that would not apply in an individual suit runs afoul of the Supreme Court’s teaching that “Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’”⁶⁰ Similarly, relieving absent class members of their obligation to establish Article III standing also would impermissibly expand the jurisdiction of federal courts beyond Article III’s constitutional limitations, in clear violation of Rule 82, which provides that the federal rules “do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.”⁶¹

Moreover, “[a]n Article III case or controversy is one where all *parties* have standing,”⁶² and while absent class members, by definition, are not named as parties to the litigation, once a class has been certified, they can and should be considered parties for purposes of Article III because a federal court will

⁵⁸ *Id.*

⁵⁹ *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)) (internal quotation marks omitted); *accord Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Duran v. U.S. Bank Nat’l Ass’n*, 325 P.3d 916, 935 (Cal. 2014).

⁶⁰ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (citing 28 U.S.C. § 2072(b) (1994) (currently codified as 28 U.S.C. § 2072(b) (2012))).

⁶¹ FED. R. CIV. P. 82; *see also Amchem*, 521 U.S. at 613 (citing FED. R. CIV. P. 82); *Flast v. Cohen*, 392 U.S. 83, 94 (1968) (“The jurisdiction of federal courts is defined and limited by Article III of the Constitution.”).

⁶² *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (emphasis added). Although some courts have suggested that Article III does not require that all parties to a litigation have standing, “[t]he Supreme Court has made it very clear that ‘those who do not possess Art. III standing may not litigate as suitors in the courts of the United States.’” *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982)); *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013) (noting that “Article III require[s] that a party invoking the jurisdiction of a federal court” have “a personal, particularized injury”).

adjudicate their claims, and thus they effectively will be “suitors in the courts of the United States.”⁶³ In *Devlin v. Scardelletti*, the Supreme Court rejected the proposition that absent class members can never be considered parties and held that “nonnamed class members” are “considered parties for the purposes of bringing an appeal” of a challenge to a class settlement.⁶⁴ The Court explained that “[n]onnamed class members . . . may be parties for some purposes and not for others” and noted that the “label ‘party’ does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context.”⁶⁵ Significantly, the Court rejected Justice Scalia’s view that parties to the suit are limited to those class members “named in the complaint” and “those who intervene or otherwise enter through third-party practice.”⁶⁶ *Devlin*’s core holding—that absent members of a certified class can be parties in some circumstances—was recently reaffirmed in *Smith v. Bayer Corp.*, where the Supreme Court emphasized that putative absent class members are not parties *before* class certification, or where certification has been denied.⁶⁷

Devlin thus makes clear that absent class members can be considered parties after a class is certified for *procedural* purposes (such as appealing an adverse judgment and tolling of the statute of limitations).⁶⁸ It follows that absent class members should—indeed, must—be considered parties for purposes of the *constitutional* requirement of Article III standing. While the Court in *Devlin* noted that determining whether absent class members are parties might hinge on “the goals of class action litigation,”⁶⁹ the goals of a procedural device cannot alter constitutional requirements.⁷⁰ To ignore absent class members for standing purposes, on the formalistic ground that they are not named parties to the litigation, would ignore the fact that a certified class

⁶³ *Valley Forge*, 454 U.S. at 476.

⁶⁴ 536 U.S. 1, 9 (2002).

⁶⁵ *Id.* at 9–10.

⁶⁶ *Id.* at 15 (Scalia, J., dissenting).

⁶⁷ 131 S. Ct. 2368, 2379 (2011); *see also* *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013).

⁶⁸ *See Devlin*, 536 U.S. at 9–10.

⁶⁹ *Id.* at 10.

⁷⁰ The Court in *Devlin* noted that if absent class members were considered parties for purposes of diversity jurisdiction, that “would destroy diversity in almost all class actions” because “of the complete diversity requirement in suits under 28 U.S.C. § 1332.” *Id.* at 9–10. But “[i]t is settled that complete diversity is not a constitutional requirement.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 n.13 (1978). And there is no reason to believe that requiring class members to establish Article III standing—i.e., to show that they have suffered some particularized injury fairly traceable to the defendant’s conduct—would destroy federal jurisdiction “in almost all class actions.” *Devlin*, 536 U.S. at 10.

action transforms absent class members into “suitors in the courts of the United States” who must, like any other party whose claims will be adjudicated in federal court, “possess Art. III standing.”⁷¹ Any other conclusion would allow Rule 23 to impermissibly expand the power of federal courts far beyond that which Article III contemplates.

IV. INCORPORATING ARTICLE III INTO THE CLASS CERTIFICATION CALCULUS

As established above, the fact that absent class members’ claims are brought before a court through the procedural mechanism of a class action does not eliminate or modify their obligation to satisfy Article III. As a result, courts must consider at the class certification stage whether the named plaintiff will be able to prove, in a classwide proceeding, that the absent members possess standing to have their claims adjudicated in federal court. In other words, when considering whether the requirements of Rule 23 are met, courts should treat the elements of Article III standing like the elements of the underlying substantive causes of action and take them into account in the Rule 23 analysis.

“The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”⁷² “In order to justify a departure from that rule, ‘a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.’”⁷³ The requirements of Rule 23(a)—“numerosity, commonality, typicality, and adequate representation”—“ensure[] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.”⁷⁴

As the Supreme Court has explained, “[w]hat matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.”⁷⁵ To that end, the commonality requirement demands that the named plaintiff prove that the claims of the proposed class “depend on a common contention” that is

⁷¹ Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475–76 (1982).

⁷² Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979)).

⁷³ *Id.* (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)) (internal quotation marks omitted).

“capable of classwide resolution” in that “determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁷⁶ And where damages are sought, Rule 23(b)(3)’s “even more demanding” predominance requirement “requires a court to find that ‘the questions of law or fact common to class members predominate over any questions affecting only individual members.’”⁷⁷ Where individual questions are unmanageable and “overwhelm questions common to the class,” certification should be denied.⁷⁸

The “class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.”⁷⁹ Thus, when considering whether Rule 23’s requirements, including commonality, typicality, and predominance, are satisfied, courts must “conduct a ‘rigorous analysis’” that “includ[es] an ‘examination of what the parties would be required to prove at trial.’”⁸⁰ Therefore, necessarily included among the things a plaintiff must prove at trial are the three elements of Article III standing—injury in fact, fair traceability, and redressability.⁸¹

The Supreme Court made clear in *Lujan* that the elements of Article III standing “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case.”⁸² As a case progresses, “each element 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

⁷⁶ *Id.*; see also FED. R. CIV. P. 23(a)(2) (requiring showing that “there are questions of law or fact common to the class”).

⁷⁷ *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting FED. R. CIV. P. 23(b)(3)).

⁷⁸ *Id.* at 1433; cf. *Duran v. U.S. Bank Nat’l Ass’n*, 325 P.3d 916, 932 (Cal. 2014) (“Trial courts also have the obligation to decertify a class action if individual issues prove unmanageable.”).

⁷⁹ *Dukes*, 131 S. Ct. at 2552 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982)) (internal quotation marks omitted); accord *Comcast*, 133 S. Ct. at 1432.

⁸⁰ *In re Zum Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611 (8th Cir. 2011) (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010)); see also *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (“Considering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” (quoting FED. R. CIV. P. 23(b)(3))); *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (“In this case, as in all class actions, commonality cannot be determined without a precise understanding of the nature of the underlying claims.”); *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int’l*, 695 F.3d 330, 348 (5th Cir. 2012) (holding that a district court correctly began its “analysis by laying out the elements of Appellants’ claims and what must be shown to prove antitrust liability in a class action context”).

⁸¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁸² *Id.* at 561. Even though “the standing inquiry [is] focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed,” “the proof required to establish standing increases as the suit proceeds.” *Davis v. FEC*, 554 U.S. 724, 734 (2008).

successive stages of the litigation.”⁸³ Thus, while “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice,” the elements of standing “must be ‘supported adequately by the evidence adduced at trial.’”⁸⁴ Because the elements of Article III standing must be proven at trial—both as to the named plaintiffs and absent class members—determining whether a class can be certified should incorporate an assessment of whether the need to establish standing for *all* plaintiffs at trial will entail individualized inquiries that preclude classwide adjudication.

Although it recognized that Article III applies to absent class members, the Second Circuit in *Denney* viewed the interaction between Article III and class certification somewhat differently.⁸⁵ Rather than focusing on the impact that proving standing for absent class members would have on a class trial, the court instead held that “no class may be certified that contains members lacking Article III standing” and emphasized that the key inquiry was whether a class could “be defined in such a way that anyone within it would have standing.”⁸⁶ The Second Circuit’s focus on the class definition was likely driven by its belief that absent class members were not required to “submit evidence of personal standing.”⁸⁷ That view, however, is inconsistent with *Lujan*’s instruction that the elements of Article III standing are “an indispensable part of the plaintiff’s case” that must be proven with evidence at trial.⁸⁸ If the requirements of Article III apply to absent class members, and *Denney* makes clear that they do, then evidence of their personal standing must be adduced at trial.

While *Denney*’s framework for incorporating Article III into the class certification analysis is in tension with *Lujan*, it is certainly true that courts should not grant certification where evidence shows that the proposed class is overbroad and would, if certified, include persons who have not suffered an injury sufficient to establish standing under Article III. In that circumstance, it

⁸³ *Lujan*, 504 U.S. at 561.

⁸⁴ *Id.* (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

⁸⁵ *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 263–64 (2d Cir. 2006).

⁸⁶ *Id.* at 264. The Eighth Circuit adopted *Denney*’s definition-focused approach in *Avritt v. Reliastar Life Insurance Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

⁸⁷ *Denney*, 443 F.3d at 263. The fact that *Denney* involved a settlement class, in which there would be no trial, may also have influenced its reasoning. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.” (citation omitted)).

⁸⁸ *Lujan*, 504 U.S. at 561.

would be difficult, if not impossible, to distinguish between injured and uninjured class members in a classwide proceeding without engaging in unmanageable individualized inquiries. In other words, a class definition that includes uninjured persons who cannot be easily identified (and thus excluded from the class definition) is unlikely to satisfy Rule 23's requirements, including commonality and predominance, or constitute a class whose proper membership can be readily ascertained.⁸⁹

Thus, although it overlooks a plaintiff's burden to prove the elements of Article III standing at trial for all class members, *Denney's* definition-focused approach will nonetheless often lead to the right answer. But the better approach would be for courts assessing whether the requirements of Rule 23 are satisfied to simply treat the elements of standing like the elements of the underlying cause of action at issue, and therefore consider whether classwide adjudication is warranted in light of the plaintiff's burden to satisfy both sets of elements. This approach comports with the Supreme Court's guidance in *Lujan* that Article III standing is an "indispensable part of the plaintiff's case"⁹⁰ and avoids creating a unique doctrine of standing, applicable only to class actions, under which no "evidence of personal standing"⁹¹ is required for absent class members.

CONCLUSION

Article III creates a fundamental constitutional limitation on the power of federal courts. Expanding this power to allow uninjured plaintiffs to litigate their claims in federal court solely because they are aggregated with others in a class action would violate the Rules Enabling Act, Rule 82, and due process. Absent class members should therefore be required to prove at trial that they have standing under Article III, and at the class certification stage courts should assess whether the need for all plaintiffs to prove the elements of standing precludes classwide adjudication.

⁸⁹ See *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) ("If class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate." (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)) (internal quotation marks omitted)); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 44 (2d Cir. 2006) (holding that certification was improper where "ascertainment of which putative class members" were injured "brist[ed] with individual questions").

⁹⁰ *Lujan*, 504 U.S. at 561.

⁹¹ *Denney*, 443 F.3d at 263.