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## DOES ARTICLE III REQUIRE PUTATIVE UNNAMED CLASS MEMBERS TO DEMONSTRATE STANDING?

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### I. INTRODUCTION

In 2010, an explosion aboard the “Deepwater Horizon” – an oil drilling rig operating on the British Petroleum Exploration & Production, Inc., (“BP”) owned “Macondo Prospect” – caused the worst oil spill in U.S. history.<sup>1</sup> Over 3,000,000 barrels of oil were spilled, and eleven people were killed.<sup>2</sup> The environmental damage was catastrophic.<sup>3</sup>

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<sup>1</sup> Richard Pallardy, *Deepwater Horizon Oil Spill of 2010*, ENCYCLOPEDIA BRITANNICA [hereinafter Pallardy] <https://www.britannica.com/event/Deepwater-Horizon-oil-spill-of-2010> (last visited April 3, 2017).

<sup>2</sup> Pallardy, *supra* note 1.

<sup>3</sup> Pallardy, *supra* note 1.

Naturally, lawsuits were filed, including *In re Deepwater Horizon*,<sup>4</sup> a class action filed against BP and others for damages arising from the infamous oil spill.<sup>5</sup> The district court certified the class and approved a settlement agreement that was reached.<sup>6</sup> On appeal, BP and others challenged the district court's decision to certify the class and approve the settlement agreement.<sup>7</sup>

The crux of the appellants' argument was that the class should have never been certified because it included unidentified members and members who incurred no injury as a result of the spill.<sup>8</sup> The U.S. Court of Appeals for the Fifth Circuit noted that the United States Supreme Court has never – at least not in a majority opinion – explicitly addressed the issue of whether putative, unnamed class members in a class action lawsuit must prove standing before class certification.<sup>9</sup> However, in *Lewis v. Casey*,<sup>10</sup> Justices Souter, Ginsberg, and Breyer, in their concurring and dissenting opinion, explained that, in the context of standing and class action certification, “[u]nnamed plaintiffs need not make any individual showing of standing in order to obtain relief, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.”<sup>11</sup>

The Fifth Circuit recognized that a minority of jurisdictions relied on this opinion when they formulated their rule regarding the present issue.<sup>12</sup> The court also examined cases involving application of the majority rule, which the court characterized as “ensur[ing] that absent class members possess Article III standing by examining the class definition.”<sup>13</sup> Following the Second Circuit's decision in *Denney*, other

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<sup>4</sup> 739 F.3d 790 (5th Cir. 2014).

<sup>5</sup> See generally *id.*

<sup>6</sup> *Id.* at 795.

<sup>7</sup> *Id.* at 798-99.

<sup>8</sup> See *In re Deepwater Horizon*.

<sup>9</sup> *In re Deepwater Horizon* at 798-99.

<sup>10</sup> 518 U.S. 343, 395-96 (1996).

<sup>11</sup> *In re Deepwater Horizon*, 739 F.3d at 800 (quoting *Lewis*, 518 U.S. at 395-96).

<sup>12</sup> *Id.* at 800-01.

<sup>13</sup> *Id.* at 801 (citing *Denney*, 443 F.3d at 262).

circuits have followed suit, requiring classes to be defined in such a way that nobody within the class—named or unnamed—would lack standing.<sup>14</sup> Ultimately, after looking at both the majority and minority rule, and declining to specifically adopt either one, the court held that the class possessed standing under either standard.<sup>15</sup>

As explained by the Fifth Circuit in *In re Deepwater Horizon*, currently the federal circuits are split on whether putative unnamed class members in a class action lawsuit must possess standing.<sup>16</sup> The majority of circuits hold that a class action lawsuit cannot be certified under Federal Rule of Civil Procedure 23 if the class contains members who lack standing.<sup>17</sup> A minority of circuits hold that unnamed putative class members need not establish standing; rather, the “cases or controversies” requirement is satisfied so long as a class representative has standing.<sup>18</sup> The United States Supreme Court has yet to definitively resolve the issue, and scholars are similarly divided over whether the majority or minority approach is proper.<sup>19</sup>

In addition to describing the differences between Article III standing and class certification under the Federal Rules of Civil Procedure in Part II, Part III provides an updated account of the circuit split.<sup>20</sup> Part IV of this article argues that the minority rule is compelled by recent Supreme Court jurisprudence and is consistent with the purpose of class action devices.<sup>21</sup> First, Justice Souter’s concurrence in *Lewis v. Casey* supports the proposition that the minority rule—that putative unnamed class members need not establish standing—is

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 802-05.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part III.a.

<sup>18</sup> See *infra* Part III.b.

<sup>19</sup> Compare Joshua P. Davis, et. al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, (2014) (contending that the minority rule is correct), with Theane Evangelis, Bradkey J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L. J. 384 (arguing in favor of the majority rule).

<sup>20</sup> See *infra* Parts II-III.

<sup>21</sup> See *infra* Part IV.

correct.<sup>22</sup> Second, the Court's decision in *Tyson Foods, Inc. v. Bouaphakeo* not to address the issue of whether a class can be certified when absent class members lack standing—even though this issue was raised by the petitioner—suggests that only named plaintiffs need establish standing.<sup>23</sup> This is because the Supreme Court has repeatedly held that the Court has an obligation to address standing, even if the issue was not raised by the parties, if the lower court possessed no jurisdiction over the case.<sup>24</sup> Finally, Part V argues that the purpose of the class action device—judicial efficiency—is furthered by the minority rule.<sup>25</sup> In contrast, the broad rule will result in unnecessary prosecution of separate actions by individual class members.<sup>26</sup>

## II. THE DIFFERENCE BETWEEN ARTICLE III STANDING AND CLASS CERTIFICATION

### A. CLASS CERTIFICATION UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A class action lawsuit is a suit where a plaintiff – or multiple plaintiffs – represents many individuals where it is efficient to do so.<sup>27</sup> The Federal Rules of Civil Procedure provide that, before a class action may proceed, a judge must

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<sup>22</sup> See *infra* Part IV.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> See *infra* Part V.

<sup>26</sup> See *infra* Part V.

<sup>27</sup> See BLACK'S LAW DICTIONARY 304 (Bryan A. Garner ed., 10th ed. 2014) (A class action lawsuit is a suit where "the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative, or through a person specially appointed to act as a trustee or guardian."); see also *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (a class action suit is an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only").

“certify” the class.<sup>28</sup> For certification, several requirements must be met.<sup>29</sup> First, under Rule 23(a), a party may sue as a representative plaintiff only if: (1) joining all members would be impracticable because of the number of class members; (2) the class has common questions of law or fact; (3) the representatives have claims or defenses typical of those of the class; and (4) the interests of the class would be protected by the representatives.<sup>30</sup> Next, one of the requirements in Rule 23(b) must be met, specifically (1) separate actions would create a risk of inconsistent or varying adjudications or would be dispositive of non-party interests or substantially impair the ability to protect their interests; (2) injunctive relief or declaratory relief is appropriate; or (3) questions of law or fact predominate over questions affecting individual members and a class action is superior to other available methods.<sup>31</sup> If Rule 23(a) and (b) are both satisfied, a judge may certify the class.<sup>32</sup> However, “[t]he Supreme Court has required district courts to conduct a ‘rigorous analysis’ into whether the prerequisites of Rule 23 are met before certifying a class.”<sup>33</sup>

To illustrate, in the case of *In re American Medical Systems, Inc.*,<sup>34</sup> a subsidiary of Pfizer, American Medical Systems (“AMS”), created certain prosthetics.<sup>35</sup> The representative plaintiff, Paul Vorhis, was injured by a prosthesis manufactured by AMS, filed suit in the U.S. District Court for the Southern District of Ohio, alleging, among other claims, negligence, breach of warranties, and strict products liability.<sup>36</sup> In its brief in opposition to Vorhis’ motion for certification, AMS argued that: (1) Vorhis would not adequately protect the

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<sup>28</sup> See generally FED. R. CIV. P. 23.

<sup>29</sup> See generally Fed. R. Civ. P. 23.

<sup>30</sup> FED. R. CIV. P. 23(a).

<sup>31</sup> FED. R. CIV. P. 23(b).

<sup>32</sup> See FED. R. CIV. P. 23(c).

<sup>33</sup> *In re American Medical Systems, Inc.* 75 F.3d 1069, 1078-79 (1996) (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). “The trial court has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23.” *In re American Medical Systems, Inc.*, 75 F.3d at 1079.

<sup>34</sup> 75 F.3d 1069 (1996).

<sup>35</sup> *Id.* at 1074.

<sup>36</sup> *Id.*

interests of other class members because his psychiatric condition rendered him irrational; (2) Vorhis' claim was not typical of that of other class members because his problems with the prosthesis arose from his unique health conditions; and (3) Vorhis only had issues with one type of prosthesis; thus, he could not represent other class members who had problems with the other types of prostheses manufactured by AMS.<sup>37</sup>

In response, Vorhis' psychiatrist testified that, despite his conditions, Vorhis was competent to withstand trial.<sup>38</sup> Vorhis also argued that even though he only had issues with one of the prostheses, the designs of the others were basically the same; thus, he could fairly represent other class members who had issues with the different models.<sup>39</sup> The district court judge issued an order which conditioned class certification on Vorhis amending his complaint to add other representative plaintiffs to the case.<sup>40</sup> The order appeared to stem from the judge's concerns about the ability of Vorhis to fairly represent the class.<sup>41</sup> After Vorhis amended his complaint to add more representative plaintiffs, the court certified the class.<sup>42</sup> The defendants filed a writ of mandamus with the U.S. Court of Appeals for the Sixth Circuit, seeking to vacate the district court's decision to certify Vorhis' action.<sup>43</sup>

The Sixth Circuit first noted that a class may not be certifiable simply because the pleadings say it is so.<sup>44</sup> According to the court, "[t]here must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled."<sup>45</sup> This burden lies with the party moving for class certification.<sup>46</sup> Next, the court discussed the first element required for certification—that the class be numerous so as to

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<sup>37</sup> *Id.* at 1075.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1075-76.

<sup>41</sup> *See id.*

<sup>42</sup> *Id.* at 1076.

<sup>43</sup> *Id.* at 1077.

<sup>44</sup> *Id.* at 1079 (citing *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970)).

<sup>45</sup> *Id.* at 1079 (quoting *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974)).

<sup>46</sup> *Id.* at 1079.

render joinder impracticable—and noted that this element was easily met.<sup>47</sup> Indeed, the district court found that the number of class members could be anywhere between 15,000 and 120,000.<sup>48</sup> Nor did defendants dispute that this element was satisfied.<sup>49</sup>

Second, the court addressed the “commonality” requirement in Rule 23(a).<sup>50</sup> In order to satisfy this element, there must be issues of law or fact common to all members of the class.<sup>51</sup> The court held that this element was not satisfied.<sup>52</sup> The court reasoned that, because Vorhis’ complaint contained conclusory allegations regarding the types of injuries that each class member suffered, and because the defendants proffered uncontradicted evidence showing that class members would have different injuries because of the different prosthetics used (and thus different proofs would be required for each claim), the commonality requirement was not satisfied.<sup>53</sup> Although lack of commonality would be enough to render the district court’s certification order faulty, the Sixth Circuit also explained that the “typicality” element was not satisfied because the representative plaintiffs had not used all the models that other class members used.<sup>54</sup> The court also found that the district court failed to consider whether Vorhis would adequately and fairly represent the interests of the other class members.<sup>55</sup>

## B. ARTICLE III STANDING REQUIREMENTS

In comparison, “standing” typically must be met in every case, and its requirements are derived not only from the

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1080.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1082.

<sup>53</sup> *See id.* at 1080-82.

<sup>54</sup> *Id.* at 1080-83.

<sup>55</sup> *Id.* at 1080-83.

Constitution, but also prudential concerns.<sup>56</sup> Article III's case or controversy language requires litigants to show that they have suffered an "injury-in-fact", that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.<sup>57</sup> The first step is to determine whether plaintiffs have satisfied the "injury-in-fact" requirement. Plaintiffs bear the burden of proof, and must clearly allege facts satisfying each element.<sup>58</sup> To establish an "injury-in-fact", a plaintiff must prove the "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"<sup>59</sup> An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way."<sup>60</sup> A "concrete" injury means that the injury must actually exist.<sup>61</sup> The next step is determine whether the injury is caused by the defendant's unlawful actions and is redressable by the court.<sup>62</sup> If these elements are satisfied, the plaintiff has standing.

### III. THE CIRCUIT SPLIT

The federal circuits are currently split on whether putative unnamed class members in a class action lawsuit must possess standing.<sup>63</sup> The majority of circuits hold that a class

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<sup>56</sup> See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (articulating a prudential limitation on standing – i.e. the prohibition against generalized grievances).

<sup>57</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also *Spokeo v. Robbins*, 136 S.Ct. 1540, 1547 (2016) ("Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood.").

<sup>58</sup> *Spokeo*, 136 S.Ct. at 1545.

<sup>59</sup> *Id.* at 1548 (quoting *Lujan* 504 U.S. at 560).

<sup>60</sup> *Id.* (quoting 504 U.S. at 560, n.1).

<sup>61</sup> *Id.*

<sup>62</sup> See e.g., *Allen v. Wright*, 468 U.S. 727, 751 (1984).

<sup>63</sup> Compare *Denney v. Deutsche Bank*, 443 F.3d 253, 263-64 (2d Cir. 2006) (standing required), and *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2011) (standing required), and *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013) (standing required),



action lawsuit cannot be certified under Federal Rule of Civil Procedure 23 if the class contains members who lack standing.<sup>64</sup> The United States Courts of Appeals for the Second, Eighth, Ninth, and D.C. Circuits reason that standing is an irreducible constitutional minimum that must always be met.<sup>65</sup> Thus, a class must be defined in such a way that all class members would possess standing (the “majority rule”).<sup>66</sup> In contrast, the United States Courts of Appeals for the First, Third, and Seventh Circuits each hold that unnamed putative class members need not establish standing; rather, the “cases or controversies” requirement is satisfied so long as a class representative has standing (the “minority rule”).<sup>67</sup> The United States Supreme Court has yet to explicitly resolve the issue.

#### A. THE MAJORITY RULE

The Second Circuit was the first circuit to address the issue of putative unnamed class members and standing. In *Denney v. Deutsche Bank*, the representative plaintiffs alleged that Deutsche Bank and other defendants had engaged in “improper and fraudulent tax counseling.”<sup>68</sup> Specifically, the plaintiffs alleged that they were misled by defendants about the legal validity of certain tax strategies – which were created and marketed by defendants – involving the purchase of foreign

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*and* In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869, 725 F.3d 244, 252 (D.C. Cir. 2013) (standing required), *with* Kohen v. Pacific Inv. Mgmt Co., LLC, 571 F.3d 672, 676 (7th Cir. 2009) (standing not required), *and* Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 363 (3d Cir. 2015) (standing not required), *and* AstraZenecaAstrazeneca AB v. UFCW (In re Nexium Antitrust Litig.), 777 F.3d 9, 25 (1st. Circ. 2015) (standing not required).

<sup>64</sup> *Denney*, 443 F.3d at 263-64; *Mazza*, 666 F.3d at 581; *Halvorson*, 718 F.3d at 779; *Rail Freight*, 725 F.3d at 252.

<sup>65</sup> *See Denney*, 443 F.3d at 263-64; *Mazza*, 666 F.3d at 581; *Halvorson*, 718 F.3d at 779; *Rail Freight*, 725 F.3d at 252.

<sup>66</sup> *See Denney*, 443 F.3d at 263-64; *Mazza*, 666 F.3d at 581; *Halvorson*, 718 F.3d at 779; *Rail Freight*, 725 F.3d at 252.

<sup>67</sup> *Kohen*, 571 F.3d at 676; *Neale*, 794 F.3d at 363; *UFCW*, 777 F.3d at 25.

<sup>68</sup> 443 F.3d 253, 259 (2d Cir. 2006).

currency options.<sup>69</sup> Ultimately, a settlement was reached between the parties and was approved by the district court.<sup>70</sup> The court also certified the class pursuant to Federal Rule of Civil Procedure 23.<sup>71</sup> The defendants and one group of plaintiffs appealed the district court's order approving the final settlement and certifying the class.<sup>72</sup> The appellants argued—*inter alia*—that class certification was improper because the class included two groups of persons who did not have Article III standing.<sup>73</sup>

First, the Second Circuit noted that, even though the district court did not expressly address the issue of standing raised by appellants, the court must “consider any standing issue, as it speaks to [the court’s] jurisdiction over th[e] action.”<sup>74</sup> The court explained that standing is a threshold question in *every* case—and it does not matter whether the suit is filed as a class action or not.<sup>75</sup> Second, the court stated that each member of the class need not submit evidence of personal standing;<sup>76</sup> however, “[t]he class must therefore be defined in such a way that anyone within it would have standing.”<sup>77</sup>

With this new rule, the court analyzed whether the two groups within the plaintiff’s class possessed standing.<sup>78</sup> The

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<sup>69</sup> *Id.* at 259.

<sup>70</sup> *Id.* at 261.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 262.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 263, n.3 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990)).

<sup>75</sup> *Id.* at 263 (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

<sup>76</sup> *Id.* at 263-64. This is because represented members in a class action are “passive members,” and the issue of standing focuses on whether the *Plaintiff* is rightfully before the court. *Id.* (citing HERBERT B. NEWBERG & ALBA CONTE, 1 NEWBERG ON CLASS ACTIONS § 2.7 (4th ed. 2002)).

<sup>77</sup> *Id.* at 264.

<sup>78</sup> *Id.* at 263. The court also recognized the familiar rule that in order to determine standing, the court “‘must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party’ (i.e., the class members).” *See id.* (quoting *Warth*, 422 U.S. at 501.)

appellants argued that two groups of persons within the plaintiff's class did not suffer an "injury in fact" because they were "future risk" plaintiffs.<sup>79</sup> The first group had not yet been audited by the Internal Revenue Service and the second group never received an opinion by defendants affirming the legal validity of the tax strategy.<sup>80</sup> The court rejected the appellants' argument.<sup>81</sup>

First, the court reasoned that there is a difference between a "legal interest" and the concept of "injury-in-fact":

[A]n injury-in-fact need not be capable of sustaining a valid cause of action under applicable tort law. An injury-in-fact may simply be the fear or anxiety of future harm. For example, exposure to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact requirement even without physical symptoms of injury caused by the exposure, and even though exposure may not provide sufficient ground for a claim under state tort law.<sup>82</sup>

Second, the so-called "future risk" plaintiffs suffered "injuries in fact" because, according to the allegations in the complaint, they were given fraudulent tax counseling, relied on said counseling, and suffered harm because of it.<sup>83</sup> The court explained that the other elements of standing were also met because the plaintiff's class was "limited to persons who received and took actions in reliance on the allegedly fraudulent or negligent tax advice provided by defendants, and the asserted injuries-in-fact were a direct result of that reliance."<sup>84</sup>

Next, in *Mazza v. Am. Honda*,<sup>85</sup> plaintiffs brought a class action lawsuit against American Honda Motor Company.<sup>86</sup> The

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<sup>79</sup> *Id.* at 264.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 264-65 (citing *Whitmore v Arkansas*, 495 U.S. 149, 155 (1990)).

<sup>83</sup> *Id.* at 265.

<sup>84</sup> *Id.* at 266.

<sup>85</sup> 666 F.3d 581 (9th 2011).

<sup>86</sup> *Id.* at 585.

plaintiffs alleged that Honda violated California's Unfair Competition Law ("UCL") when its advertisements misrepresented the qualities of certain braking systems contained within Acura RLs.<sup>87</sup> Honda appealed the district court's decision to certify the class action lawsuit, arguing—among other things—that the class included members who did not suffer an "injury in fact" because, under California's UCL, "restitution is available to class members without individualized proof of deception, reliance, or injury."<sup>88</sup>

The U.S. Court of Appeals for the Ninth Circuit court disagreed with Honda's standing argument.<sup>89</sup> First, the court explained that "no class may be certified that contains members lacking Article III standing."<sup>90</sup> Next, because of Honda's deceptive advertising, plaintiffs' class members paid more than they otherwise would have paid.<sup>91</sup> Thus, the court held, "[t]o the extent that class members were relieved of their money by Honda's deceptive conduct—as Plaintiffs allege—they have suffered an 'injury in fact.'"<sup>92</sup> Notably, the Ninth Circuit deviated from its prior decision, *Stearns*, which followed the minority rule; however, it did not expressly overrule *Stearns*.<sup>93</sup>

The Eighth Circuit also followed the majority rule in *Halvorson v. Auto-Owners Ins. Co.*<sup>94</sup> In *Halvorson*, plaintiffs sued Auto-Owners Insurance Company, alleging that the company failed to exercise good faith when the company breached its personal injury protection insurance policy with policyholders.<sup>95</sup> The class members included all policyholders in the states of Minnesota and North Dakota who submitted claims for medical expenses under their policies and received less than their policies allowed.<sup>96</sup> Specifically, plaintiffs took

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 595 (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 320, 93 Cal. Rptr. 3d 559, 207, P.3d 20 (Cal. 2009)).

<sup>89</sup> *Id.* at 594.

<sup>90</sup> *Id.* (citing *Denney*, 443 F.3d at 264).

<sup>91</sup> *Id.* at 595 (quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011)).

<sup>92</sup> *Id.*

<sup>93</sup> Compare *id.* at 594, with *Stearns*, 655 F.3d at 1021.

<sup>94</sup> 718 F.3d 773, 779 (8th Cir. 2013).

<sup>95</sup> *Id.* at 774.

<sup>96</sup> *Id.*

issue with Auto-Owners' method for calculating and paying out an individual policyholder's claim.<sup>97</sup> Auto-Owners appealed the district court's decision to certify plaintiff's class from North Dakota, arguing that certification was improper because individual questions predominated over common questions and certain class members lacked standing.<sup>98</sup>

The court accepted both of Auto-Owners' arguments.<sup>99</sup> First, the court noted that, under Federal Rule of Civil Procedure 23(b)(3), a "class action may be maintained if 'questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'"<sup>100</sup> According to the court, in the present case "the individual questions necessary to determine breach of contract and bad faith include whether a provider's charge was usual and customary and, thus, whether the claim payment was reasonable."<sup>101</sup> Because these individual questions would predominate over the larger question of whether Auto-Owners processed claims in bad faith, F.R.C.P. 23(B)(3) is not satisfied.<sup>102</sup>

Finally, the court explained that some members of plaintiff's class would, by definition, not have standing because they did not suffer any damages.<sup>103</sup> The court distinguished plaintiff's case from *In re Zurn Pex Plumbing Prods. Liab. Litig.*,<sup>104</sup> a case involving a class action lawsuit based on a defendant's alleged violation of a statute.<sup>105</sup> In *Zurn*, the U.S. Court of Appeals for the Eighth Circuit found standing even though certain members of the class did not suffer any damages.<sup>106</sup> Unlike *Zurn*, the plaintiffs in *Halvorson* were not relying on the defendant's alleged violation of a statute conferring upon them

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<sup>97</sup> *Id.* at 775.

<sup>98</sup> *Id.* at 778.

<sup>99</sup> *Id.* at 780.

<sup>100</sup> *Id.* at 778 (quoting FED. R. CIV. P. 23(b)(3)).

<sup>101</sup> *Id.* at 779.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 644 F.3d 604, 630 (8th Cir. 2011).

<sup>105</sup> *Halvorson*, 718 F.3d 773, 779 (citing *Zurn*, 644 F.3d at 630).

<sup>106</sup> *Id.* at 779.

a right to sue.<sup>107</sup> Thus, the court found that lack of standing was another reason to overrule the district court's decision to certify plaintiff's class.<sup>108</sup>

The U.S. Court of Appeals for the District of Columbia is the last circuit to follow the majority rule. *In re Rail Freight Fuel Surcharge Antitrust Litigation*<sup>109</sup> involved a class action lawsuit—consisting primarily of parties utilizing several railroads for freight shipment—filed against the railroads, alleging that they had engaged in a “price-fixing conspiracy” by imposing fuel surcharges on shipments, which allegedly violated certain antitrust laws.<sup>110</sup> The district court certified the class, despite the fact that it contained members who suffered no injury.<sup>111</sup> In part, the district court relied on the Fifth Circuit's reasoning regarding absent class members and class standing.<sup>112</sup> On appeal, the D.C. Circuit reversed, holding that the plaintiffs needed to show that all class members suffered an injury-in-fact.<sup>113</sup> The court reasoned that if the plaintiffs did not make such a showing, “individual trials [would be] necessary to establish whether a particular shipper suffered harm from the price-fixing scheme.”<sup>114</sup>

## B. THE MINORITY RULE

The Seventh, Third, and First Circuits are the only circuits to deviate from the majority rule. First, in *Kohen v. Pacific Mgmt Co.*,<sup>115</sup> a class action lawsuit was filed by purchasers of certain futures contracts against a group of defendants, Pacific Investment Management Company, LLC (PIMCO), for allegedly violating the Commodity Exchange Act by “cornering the market.”<sup>116</sup> PIMCO appealed the district

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<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 779-80.

<sup>109</sup> 725 F.3d 244 (D.C. Cir. 2013).

<sup>110</sup> *Id.* at 247.

<sup>111</sup> *Id.* at 255.

<sup>112</sup> *See id.* at 255 (quoting *Kohen*, 571 F.3d at 677).

<sup>113</sup> *Id.* at 252.

<sup>114</sup> *Id.*

<sup>115</sup> 571 F.3d 672 (7th Cir. 2009).

<sup>116</sup> *Id.* at 674-75.

court's certification of plaintiff's class, arguing that it was error for the judge not to determine which class members suffered damages.<sup>117</sup> Judge Richard Posner rejected PIMCO's argument, holding that Article III's standing requirement is met if the class representative has standing.<sup>118</sup> Posner explained:

If the case goes to trial, this plaintiff may fail to prove injury. But when a plaintiff loses a case because he cannot prove injury the suit is not dismissed for lack of jurisdiction. Jurisdiction established at the pleading stage by a claim of injury that is not successfully challenged at that stage is not lost when at trial the plaintiff fails to substantiate the allegation of injury; instead the suit is dismissed on the merits. Pressed at argument, PIMCO's counsel retreated, conceded or at least seemed to concede that the issue was not jurisdictional, and clarified that his argument was only that the class members lacked 'statutory standing.' Then he took back his concession, arguing that if any class member were found not to have sustained damages, the court would have no jurisdiction over that class member, who would therefore not be bound by any judgment or settlement and so could bring his own suit for damages. That is to say that if a plaintiff loses his case, this shows that he had no standing to sue and therefore can start over. That would be an absurd result, and PIMCO need not fear it.<sup>119</sup>

Next, in *AstraZeneca AB v. UFCW (In re Nexium Antitrust Litigation)*,<sup>120</sup> class action plaintiffs – certain union funds – sued defendant drug manufacturers and others, alleging patent and antitrust violations.<sup>121</sup> A federal district court certified the class even though the class, by definition, contained members who

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<sup>117</sup> *Id.* at 676.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 677 (internal citations omitted).

<sup>120</sup> 777 F.3d 9 (1st. Cir. 2015).

<sup>121</sup> *Id.* at 13-15.

had suffered no “injury-in-fact”.<sup>122</sup> The defendants appealed the certification decision, which the First Circuit reviewed under an abuse of discretion standard.<sup>123</sup> The defendants argued that because the class included members who had not been injured, the class lacked Article III standing.<sup>124</sup> The First Circuit disagreed.<sup>125</sup> The court concluded that, because the named plaintiffs proved standing, the class therefore had standing.<sup>126</sup>

Finally, in *Neale v. Volvo Cars of N. Am., LLC*,<sup>127</sup> plaintiffs filed a class action against Volvo Cars of North America, LLC, and others, for the sale of allegedly defective vehicles.<sup>128</sup> The district court certified plaintiff’s class, which included purchasers of the allegedly defective vehicle within six states.<sup>129</sup> Volvo appealed the district court’s decision to certify the class, arguing that the class contained putative, unnamed members who lacked standing.<sup>130</sup> Ultimately, the Third Circuit remanded the case back to the district court; however, it rejected Volvo’s standing argument.<sup>131</sup>

The Third Circuit held that “unnamed, putative class members need not establish Article III standing. Instead, the ‘cases or controversies’ requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class.”<sup>132</sup> First, the court reasoned that this holding was compelled by its prior decision, *In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions*,<sup>133</sup>

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<sup>122</sup> *Id.* at 14, 17 (this is because several of the class members would have continued to purchase the brand name drug even if the generic brand was on the market).

<sup>123</sup> *Id.* at 17.

<sup>124</sup> *Id.* at 31.

<sup>125</sup> *Id.* at 32.

<sup>126</sup> *Id.* (“The named plaintiffs thus have standing to sue for their injuries and to request, under Rule 23(b)(3), that the court allow them to represent and secure a judgment on behalf of a class.”).

<sup>127</sup> 794 F.3d 353 (3d Cir. 2015).

<sup>128</sup> *Id.* at 356.

<sup>129</sup> *Id.* at 357.

<sup>130</sup> *Id.* at 358.

<sup>131</sup> *Id.* at 358, 375.

<sup>132</sup> *Id.* at 362.

<sup>133</sup> 148 F.3d 283, 290-92 (3d Cir. 1998).



where the Third Circuit held that only the named representative plaintiff in a settlement class needs to establish standing.<sup>134</sup>

The difference between the two cases was that *Neale* involved a litigation class, whereas *Prudential* involved a settlement class.<sup>135</sup> Second, the court examined the history of representative lawsuits—including class action suits—and explained that “a class action is a representative action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court's jurisdiction and they are held accountable for satisfying jurisdiction.”<sup>136</sup> Thus, only the named class plaintiff need establish Article III standing.<sup>137</sup>

#### IV. ARTICLE III IS SATISFIED SO LONG AS THE CLASS REPRESENTATIVE HAS STANDING

In *O’Shea v. Littleton*,<sup>138</sup> a § 1983 class action lawsuit was filed against certain officials in Alexander County, Illinois.<sup>139</sup> The plaintiffs alleged that the officials engaged in unconstitutional conduct with respect to the administration of criminal justice.<sup>140</sup> However, none of the representative plaintiffs, at the time the suit was initiated, suffered any injury.<sup>141</sup> The Supreme Court held that the plaintiffs lacked Article III standing.<sup>142</sup> The Court reasoned that “if none of the *named* plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”<sup>143</sup> Left unanswered was the question of whether

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<sup>134</sup> *Neale*, 794 F.3d at 363 (citing *Prudential*, 148 F.3d at 290-92).

<sup>135</sup> Compare *id.* at 357, with *Prudential*, 148 F.3d at 290-92.

<sup>136</sup> *Neale*, 794 F.3d at 363-64.

<sup>137</sup> *Id.* at 364.

<sup>138</sup> 414 U.S. 488 (1974).

<sup>139</sup> *O’Shea*, 414 U.S. at 490-91.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 495-96.

<sup>142</sup> *Id.* at 493.

<sup>143</sup> *Id.* at 494 (citing *Bailey v. Patterson*, 369 U.S. 31, 32-33, (1962) (emphasis added)).

putative, *unnamed* class members must establish Article III standing.<sup>144</sup>

The lower courts are sharply divided over the question left unanswered in *O'Shea*.<sup>145</sup> At minimum, four circuits adhere to the majority rule, which requires all class members to possess standing as a prerequisite for class certification.<sup>146</sup> Three circuits follow the minority rule, requiring only that the named class representative needs to demonstrate standing.<sup>147</sup> This article argues that the minority rule is correct because it is consistent with the Supreme Court's decision in *Tyson v. Bouaphakeo*<sup>148</sup> and Justice Souter's concurrence in *Lewis v. Casey*.<sup>149</sup> The purpose of class action devices—judicial efficiency—is also served by the minority rule.<sup>150</sup>

## A. THE MINORITY RULE IS COMPELLED BY SUPREME COURT PRECEDENT

### i. LEWIS V. CASEY

#### 1. BACKGROUND

*Lewis v. Casey*<sup>151</sup> involved a class action lawsuit filed by inmates in prisons run by the Arizona Department of Corrections (“ADOC”).<sup>152</sup> The inmates alleged that the petitioners violated the Supreme Court's decision in *Bounds v. Smith*,<sup>153</sup> where the Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of

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<sup>144</sup> See *id.* at 494.

<sup>145</sup> See *supra* Part III.

<sup>146</sup> Denney, 443 F.3d at 263-64; Mazza, 666 F.3d at 581; Halvorson, 718 F.3d at 779; Rail Freight, 725 F.3d at 252.

<sup>147</sup> Kohen, 571 F.3d at 676; Neale, 794 F.3d at 363; UFCW, 777 F.3d at 25.

<sup>148</sup> 136 S. Ct. 1036 (2016).

<sup>149</sup> 518 U.S. 343 (1996). See *infra* Part IV.a., b.

<sup>150</sup> See *infra* Part IV.c.

<sup>151</sup> 518 U.S. 343 (1996).

<sup>152</sup> *Id.* at 346.

<sup>153</sup> 430 U.S. 817 (1977).

meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”<sup>154</sup> Specifically, the inmates alleged that their Constitutional rights were violated because the petitioners did not adequately train law library staff, legal materials were not updated, illiterate and non-English speaking prisoners did not receive legal assistance, and prisoners in solitary confinement were denied access to the prison law libraries.<sup>155</sup>

The district court below found in favor of the inmates and granted a permanent injunction against the petitioners.<sup>156</sup> Among other things, the injunction required the prisons to drastically increase prisoners’ access to the law library and legal materials within the library and mandated the training of legal assistance for non-English speaking and illiterate prisoners.<sup>157</sup> The Supreme Court granted certiorari to determine whether the district court exceeded its authority when it granted the permanent injunction after it found that petitioners violated the Court’s holding in *Bounds*.<sup>158</sup> The petitioners argued that (1) the district court erred when it found that petitioners violated *Bounds*, and (2) the district court’s finding of individual injuries did not warrant the broad injunction.<sup>159</sup>

The majority, in an opinion written by Justice Scalia, started with the proposition that a violation of *Bounds* requires a plaintiff to allege an injury-in-fact, which is also an essential requirement for Article III standing.<sup>160</sup> Next, the court disagreed with respondents’ interpretation of *Bounds*. First, the court explained that the decision in *Bounds* did not establish the expansive right that respondents wished it did—instead, *Bounds* was a narrow decision simply establishing prisoners’ right of access to the courts.<sup>161</sup> Second, *Bounds* did not impose an affirmative duty on prisons to establish specific conditions favorable to prisoners; rather, to establish a *Bounds* violation, a

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<sup>154</sup> Lewis, 518 U.S. at 346 (quoting *Bounds*, 430 U.S. at 828).

<sup>155</sup> *Id.* at 346-47.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 347-48.

<sup>158</sup> *Id.* at 348.

<sup>159</sup> *Id.* at 348-49.

<sup>160</sup> *Id.* at 349.

<sup>161</sup> *Id.* at 350, (citing *Bounds*, 430 U.S. at 817, 821, 828)

plaintiff must show “that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.”<sup>162</sup>

With this new formulation of *Bounds*, the Court examined the district court’s finding of injuries and decision to grant a broad, permanent injunction.<sup>163</sup> First, the Court noted that the district court found that at least two prisoners suffered injuries because of ADOC’s policies: one inmate—a slow reader—had a case dismissed with prejudice and another inmate was unable to file a legal action.<sup>164</sup> Notably, in dicta, the Court stated that “[t]he general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation . . . ;” however, whether these injuries justified the district court’s broad injunction was another question entirely.<sup>165</sup> This is because “[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”<sup>166</sup> Finally, the Court concluded that the district court’s finding of two individual injuries was wholly inadequate to support the broad injunction.<sup>167</sup>

Justice Thomas joined the majority’s narrowing of *Bounds* and its conclusion that the district court below exceeded its authority when it issued the injunction.<sup>168</sup> However, Justice Thomas wrote that the majority did not go far enough with its position on *Bounds*—because, according to Justice Thomas, while the right of access to the courts is valid, there is “no basis in the Constitution - and ...*Bounds* cited none - for ...the right

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<sup>162</sup> *Id.* at 351 (“He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.”).

<sup>163</sup> *Id.* at 356-57.

<sup>164</sup> *Id.* at 357-58.

<sup>165</sup> *Id.* at 357.

<sup>166</sup> *Id.* (citing *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995)).

<sup>167</sup> *Id.* at 359-60 (citing *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 417 (1977); *Califano*, 442 U.S. at 702).

<sup>168</sup> *Id.* at 365 (Thomas, J., concurring).

to have the government finance the endeavor.”<sup>169</sup> Further, the district court’s decision, according to Justice Thomas, was just another example of the federal judiciary’s overreach, which is antithetical to principles of separation of powers and federalism.<sup>170</sup>

Justice Souter, joined by Justices Ginsberg and Breyer, concurred with the majority’s judgment to the extent that the district court was not justified – based on its factual findings of injury – in granting the permanent injunction.<sup>171</sup> Specifically, Justice Souter acknowledged that the district court’s finding that the prisons generally had complete libraries did not support the broad injunction, which, among other things, “imposed detailed rules and requirements upon each of the State’s prison libraries, including rules about library hours, supervision of prisoners within the facilities, request forms, educational and training requirements for librarians and their staff members, prisoners’ access to the stacks, and inventory.”<sup>172</sup>

Justice Souter disagreed, however, with several of the majority’s statements regarding standing.<sup>173</sup> First, Justice Souter noted that, because the majority acknowledged that at least one class representative had standing, awarding class-wide relief did *not* require a showing that “some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs.”<sup>174</sup> Justice Souter explained:

[Unnamed plaintiffs] need not make any individual showing of standing [in order to obtain relief], because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. Whether or not the named plaintiff who meets individual standing requirements may assert the rights of absent class members is neither a

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 385.

<sup>171</sup> *Id.* at 393 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment).

<sup>172</sup> *Id.* at 397.

<sup>173</sup> *Id.* at 393.

<sup>174</sup> *Id.* at 395.

standing issue nor an Article III case or controversy issue but depends rather on meeting the prerequisites of Rule 23 governing class actions.<sup>175</sup>

Justice Souter concluded that, under the majority's view, for a class plaintiff to establish standing, a court may be required to examine the merits of a plaintiff's complaint instead of merely the allegations contained therein.<sup>176</sup> This would be contrary to traditional understandings of Article III standing requirements.<sup>177</sup>

Finally, Justice Stevens wrote his opinion, where he primarily dissented from the majority's reasoning, although he agreed with the decision to remand the case back to the district court to modify the injunction.<sup>178</sup> Justice Stevens' primary objection was that the majority was incorrect to narrow *Bounds*, address standing, and address the district court's decision to certify the class action lawsuit because these issues were never raised by petitioners.<sup>179</sup> Thus, he was unable to join the majority's opinion.<sup>180</sup>

## 2. ANALYSIS

For some, *Lewis v. Casey* stands for the proposition that the constitutional protections laid out in *Bounds* have been drastically scaled back.<sup>181</sup> This may be true, but the case also has implications for standing and class-action lawsuits. To be sure, *Lewis* is not a typical standing case: the majority's decision

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<sup>175</sup> *Id.* (quoting 1 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 2.07, pp. 2-40 to 2-41 (3d ed. 1992)).

<sup>176</sup> *Id.* at 399.

<sup>177</sup> *Id.* at 399-402.

<sup>178</sup> *See, e.g.*, David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1459 (2010)

("In the wake

<sup>181</sup> *See, e.g.*, David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1459 (2010) ("In the wake of *Casey*, many prison systems dramatically cut back on their law libraries; some eliminated them entirely. . .") (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633 n. 268 (2003)).

to address standing—even though a trial had already commenced, and even though petitioners never objected to standing in the first place—should be treated as dicta because it was not essential to the majority’s holding.<sup>182</sup> However, Justice Souter’s concurrence supports the proposition that the minority rule—that putative unnamed class members need not establish standing—is the correct rule.<sup>183</sup>

While the *Lewis* majority *may* have heightened the requirements of standing when a plaintiff is asserting a *Bounds* violation and denied standing to certain plaintiffs, the majority never explicitly addressed the issue of unnamed class members and standing.<sup>184</sup> However, Justice Souter’s concurrence expressly adopted the minority rule.<sup>185</sup> In his concurrence, Justice Souter stated that so long as the class representative of a class action lawsuit has standing, a court need not determine whether unnamed class members also have standing.<sup>186</sup> Justice Souter also agreed with the majority that at least two of the class plaintiffs possessed standing to bring the suit.<sup>187</sup> In sum, Justice

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<sup>182</sup> See *Lewis*, 518 U.S. 343, 358; see also *id.* at 407 (Stevens, J. concurring in part, dissenting in part, and concurring in the judgment). Dicta can be defined as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” Michael Abramowicz, Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 959 (2005) (quoting BLACK’S LAW DICTIONARY 1102 (8th ed. 2004)). Nevertheless, this view is consistent with Justice Scalia’s approach to standing. Compare *Lewis*, 518 U.S. at 358, with *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 198-215 (2000) (Scalia, J. dissenting).

<sup>183</sup> In fact, the United State Court of Appeals for the Fifth Circuit noted that other circuits relied on *Lewis* when adhering to the minority rule. See *In re Deepwater Horizon*, 739 F.3d at 800-01.

<sup>184</sup> See generally *id.*

<sup>185</sup> Compare *Lewis*, 518 U.S. at 395 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment), with Kohen, 571 F.3d at 676, and Neale, 794 F.3d at 363, and UFCW, 777 F.3d at 25.

<sup>186</sup> *Lewis*, 518 U.S. at 395 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment) (quoting 1 H. NEWBERG & A. CONTE, *NEWBERG ON CLASS ACTIONS* § 2.07, pp. 2-40 to 2-41 (3d ed. 1992)).

<sup>187</sup> *Id.* at 395 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment).

Souter's concurrence is persuasive authority supporting the notion that the minority rule is correct.<sup>188</sup>

ii. *TYSON FOODS, INC. v. BOUAPHAKEO*

1. BACKGROUND

In *Tyson Foods, Inc. v. Bouaphakeo*,<sup>189</sup> employees for Tyson Foods, Inc., working at a processing plant, filed a class action lawsuit against their employer.<sup>190</sup> The employees claimed that they were denied compensation for time spent changing in and out of protective gear, in violation of the Fair Labor Standards Act, which requires employers to compensate their employees for time spent on activities integral to their work.<sup>191</sup> When the case was initially filed in the U.S. District Court for the Northern District of Iowa, Tyson Foods argued that "because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis."<sup>192</sup> The district court rejected Tyson's argument and certified the class.<sup>193</sup>

The case ultimately went to trial.<sup>194</sup> In order to recover unpaid wages under the FLSA, the employees needed to show that they each worked over 40 hours per week, including time spent changing in and out of protective gear.<sup>195</sup> However, because Tyson did not maintain records of these times, "representative evidence" was used by the parties at trial.<sup>196</sup> First, an "industrial relations expert" proffered an estimate of average time spent by employees changing in and out of

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<sup>188</sup> See *id.* at 395 (Souter, J. concurring in part, dissenting in part, and concurring in the judgment) (quoting 1 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS § 2.07, pp. 2-40 to 2-41 (3d ed. 1992)).

<sup>189</sup> 136 S. Ct. 1036 (2016).

<sup>190</sup> *Id.* at 1042.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1043.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1043.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*



protective gear.<sup>197</sup> Second, the employees' expert witness used the industrial relations expert's estimate to come up with specific estimates as to the "amount of uncompensated work each employee did . . . ." <sup>198</sup> With this estimate, the employees' expert asked the jury for almost \$7 million in unpaid wages.<sup>199</sup>

A jury found that the time employees spent changing gear was compensable time.<sup>200</sup> The jury awarded almost \$3 million in unpaid wages to the workers, roughly half the amount the employees' expert witness testified the employees were owed.<sup>201</sup> Tyson moved for judgment notwithstanding the jury verdict.<sup>202</sup> The Northern District of Ohio overruled Tyson's motion and the U.S. Court of Appeals for the Eighth Circuit affirmed.<sup>203</sup> The Supreme Court granted Tyson's petition for writ of certiorari.<sup>204</sup> Tyson argued, *inter alia*, that the district court's decision to certify plaintiff's class was improper because some members of the class suffered no injuries.<sup>205</sup> Tyson also took issue with the fact that uninjured class members could receive compensation under the substantial jury award.<sup>206</sup>

Justice Kennedy first addressed whether the class action was properly certified under F.R.C.P. 23(b)(3), which requires common questions of fact or law to "predominate" over individual questions.<sup>207</sup> The Court noted that "the predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."<sup>208</sup> The ultimate issue in *Tyson* was whether "representative" or statistical evidence—used in the case by the employees' expert witnesses to provide estimates of (1) the

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1043-44.

<sup>199</sup> *Id.* at 1044.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 1041.

<sup>205</sup> See Pet. for Writ of Cert, *Tyson Foods, Inc. v. Bouaphakeo*, 2015 WL 1285369, at \*i (Mar. 19, 2015).

<sup>206</sup> *Tyson*, 136 S. Ct. at 1049.

<sup>207</sup> *Id.* at 1045 (quoting FED. R. CIV. P. 23(b)(3)).

<sup>208</sup> *Id.* (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

average time spent by employees changing in and out of protective gear and (2) uncompensated time spent by each employee working – was admissible in class action lawsuits.<sup>209</sup>

Tyson requested a broad rule prohibiting such representative evidence to be used in class action suits.<sup>210</sup> Tyson contended that “[r]eliance on a representative sample . . . absolves each employee of the responsibility to prove personal injury, and thus deprives [Tyson] of any ability to litigate its defenses to individual claims.”<sup>211</sup> Thus, Tyson argued that the “predominance” test was not met, and the district court improperly certified the employees’ class.<sup>212</sup> The Court disagreed.<sup>213</sup> The Court explained that the admissibility of such evidence should not depend on whether the case is an individual or class action lawsuit; rather, admissibility of representative evidence—like *any* evidence—is dependent on its relevance and reliability.<sup>214</sup>

Next, the Court declined to address Tyson’s standing argument because Tyson conceded this point when the case reached the Supreme Court.<sup>215</sup> Instead, the Court addressed Tyson’s new argument that the employees needed to provide a way of preventing uninjured class members from receiving money damages.<sup>216</sup> The Court agreed with Tyson that uninjured class members would have no legal right to damages; however, the damages award had not yet been disbursed.<sup>217</sup> Thus, the district court would be able to review the award on remand.<sup>218</sup>

Chief Justice Roberts, with Justice Alito, joined the majority opinion in full, concurring only to express concern regarding the district court’s ability – upon remand – “to fashion a method for awarding damages only to those class

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<sup>209</sup> *Id.* at 1046.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1049.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

members who suffered an actual injury.”<sup>219</sup> First, it was undisputed that many members of the class did not suffer an injury in the case at all.<sup>220</sup> Second, the jury awarded the employees a lump-sum damages award “without specifying any particular amount of donning and doffing time used to calculate that number.”<sup>221</sup> Thus, instead of rendering the jury award invalid—as requested by Tyson—Chief Justice Roberts explained that the best course of action would be to leave the jury award intact, but to remand to the district court to find a way to disburse the award without awarding uninjured class members.<sup>222</sup> In short, “Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”<sup>223</sup> Finally, Justice Thomas dissented from the majority opinion.<sup>224</sup> Justice Thomas explained that the majority should have reversed the district court’s order certifying the employees’ class because the predominance factor was not met.<sup>225</sup> Justice Thomas was primarily concerned with the Court’s decision to allow the use of representative evidence.<sup>226</sup>

## 2. ANALYSIS

The Supreme Court is more likely to grant petitions for writ of certiorari when the federal circuits are split on an important matter.<sup>227</sup> In *Tyson*, many expected the Supreme Court to resolve the split over whether absent class members need to establish standing before class certification.<sup>228</sup> As noted

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<sup>219</sup> *Id.* at 1050 (Roberts, CJ., concurring).

<sup>220</sup> *Id.* at 1051 (Roberts, CJ., concurring).

<sup>221</sup> *Id.* (Roberts, CJ., concurring).

<sup>222</sup> *Id.* at 1052-53 (Roberts, CJ., concurring).

<sup>223</sup> *Id.* at 1053 (Roberts, CJ., concurring).

<sup>224</sup> *Id.* at 1056-61 (Thomas, J., dissenting).

<sup>225</sup> *Id.* at 1056-61 (Thomas, J., dissenting).

<sup>226</sup> *Id.* at 1056-61 (Thomas, J., dissenting).

<sup>227</sup> *See Sup. Ct. R.* 10(a).

<sup>228</sup> *See, e.g.* Theane Evangelis and Cynthia E. Richman, *The Need to Establish Absent Class Member Standing*, THE ANITRUST SOURCE, <http://www.gibsondunn.com/publications/Documents/Evangelis-Richman-The-Need-to-Establish-Absent-Class-Member-Standing-ABA-Oct-2015.pdf> (Oct. 2015); Christopher J. Michie, *Absent Class Members and Constitutional Standing*, LAW360,

by the Third Circuit in *Neal*, the second question presented for review in *Tyson* was “[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.”<sup>229</sup> Unfortunately, however, *Tyson*—the petitioner—abandoned this point, conceding that “[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.”<sup>230</sup> Because of this concession, the Court declined to consider the issue.<sup>231</sup>

Nevertheless, the Court’s decision not to address the issue of standing suggests that absent class members need not establish standing before class certification.<sup>232</sup> The Supreme Court has repeatedly held that it has an obligation to address standing—even if the issue was not raised by the parties—if the lower court possessed no jurisdiction over the case.<sup>233</sup> This is because:

‘Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.’  
Ex parte McCardle, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869). ‘On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then

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[https://www.law360.com/articles/683755/absent-class-members-and-constitutional-standing#\\_ednref44](https://www.law360.com/articles/683755/absent-class-members-and-constitutional-standing#_ednref44) (July 27, 2015).

<sup>229</sup> Neale, 794 F.3d at 360, n. 2, (quoting Pet. for Writ of Cert, *Tyson Foods, Inc. v. Bouaphakeo*, 2015 WL 1285369, at \*i (Mar. 19, 2015)).

<sup>230</sup> *Tyson*, 136 S. Ct. at 1049 (quoting Brief for Petitioner 49).

<sup>231</sup> *Id.* at 1049 (“In light of petitioner’s abandonment of its argument from the petition, the Court need not, and does not, address it.”)

<sup>232</sup> *See id.*

<sup>233</sup> *See, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (“We are obliged to examine standing sua sponte where standing has erroneously been assumed below.”) (citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95 (1998)).

of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' *Great Southern Fire Proof Hotel Co. v. Jones*, supra, 177 U.S. 449 at 453. The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States" and is inflexible and without exception.' *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884).<sup>234</sup>

However, in *Tyson*, the majority did not address the issue of standing, *even though* the petitioner raised the issue in its petition for certiorari (although it eventually abandoned this argument at the Supreme Court).<sup>235</sup> Furthermore, in his concurrence, Chief Justice Roberts acknowledged that hundreds of class members did not suffer any injury yet declined to address standing.<sup>236</sup> Because of its obligation to correct standing issues, the Court's decision in *Tyson* not to address standing *sua sponte* suggests that there was never any real standing issue to correct in the first place.<sup>237</sup> In other words, the decision suggests that unnamed putative class members need not establish standing—the minority rule. A contrary conclusion necessarily requires an invalidation of the holding in *Tyson* due to lack of jurisdiction.<sup>238</sup>

#### B. THE MINORITY RULE IS CONSISTENT WITH THE PURPOSE OF CLASS ACTION SUITS

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<sup>234</sup> *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

<sup>235</sup> *Tyson*, 136 S. Ct. at 1049.

<sup>236</sup> *Id.* at 1051 (Roberts, C.J., concurring).

<sup>237</sup> Compare *id.*, at 1049, with *Adarand Constructors, Inc.*, 534 U.S. at 110, and *Steel Co.*, 523 U.S. at 94-95.

<sup>238</sup> See, e.g., *Steel Co.*, 523 U.S. at 94-95 ("Without jurisdiction the court cannot proceed at all in any cause.") (quoting *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869)). But see *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011) (Kagan, J., dissenting) (examining Establishment Clause challenges to tax credits that the Court had decided on the merits *before* ruling in *Winn* that the plaintiffs lacked standing).

“Judicial economy” is defined as “[e]fficiency in the management of a particular litigation or of the courts in general; refers to measures taken to avoid unnecessary effort or expense on the part of the court or the court system.”<sup>239</sup> Class action lawsuits generally promote judicial economy by allowing a single representative to sue on behalf of many similarly situated individuals when it would be more efficient to do so.<sup>240</sup> In *Califano v. Yamasaki*,<sup>241</sup> the Supreme Court explained that class action lawsuits are “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.”<sup>242</sup> “[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23.”<sup>243</sup> The Federal Rules of Civil Procedure aim to facilitate this purpose.<sup>244</sup>

The minority rule promotes judicial efficiency because it is consistent with the nature of class action lawsuits. The minority rule only requires class representatives to possess standing.<sup>245</sup> This is because “a class action is a representative action brought by a named plaintiff or plaintiffs. Named plaintiffs are the individuals who seek to invoke the court’s jurisdiction and they are held accountable for satisfying jurisdiction.”<sup>246</sup> In contrast, the majority rule, which prohibits certification of classes containing members who lack standing, hinders judicial efficiency.<sup>247</sup> Indeed, the majority rule results in exactly what Rule 23 aims to prevent: unnecessary

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<sup>239</sup> WEBSTER’S NEW WORLD LAW DICTIONARY, <http://www.yourdictionary.com/judicial-economy> (last visited April 3, 2017).

<sup>240</sup> See generally FED. R. CIV. P. 23.

<sup>241</sup> 442 U.S. 682 (1979).

<sup>242</sup> *Califano*, 442 U.S. at 700-701.

<sup>243</sup> *Id.* at 700-701.

<sup>244</sup> See generally FED. R. CIV. P. 23.

<sup>245</sup> See, e.g., *Kohen*, 571 F.3d at 676; *Neale*, 794 F.3d at 363; *UFCW*, 777 F.3d at 25.

<sup>246</sup> *Neale*, 794 F.3d at 363-64.

<sup>247</sup> See, e.g., *Denney*, 443 F.3d at 263-64; *Mazza*, 666 F.3d at 581; *Halvorson*, 718 F.3d at 779; *Rail Freight*, 725 F.3d at 252.

prosecution of separate actions by individual class members.<sup>248</sup> This is an inefficient use of judicial resources.<sup>249</sup> As such, the minority rule is necessary to effectuate the purpose of class action lawsuits.

## V. CONCLUSION

In sum, the minority rule is compelled not only by Justice Souter's concurring opinion in *Lewis*—where he explicitly stated that only a class representative needs to demonstrate standing—but also by the Court's opinion in *Tyson*.<sup>250</sup> The Court's decision in *Tyson* not to address the issue of whether a class can be certified when absent class members lack standing—even though this issue was raised by the petitioner and the Court has repeatedly held that it has an obligation to address standing—suggests that only named plaintiffs need establish standing.<sup>251</sup> Both of these opinions, examined in light of the nature of class action suits, support the minority rule.<sup>252</sup> Finally, the minority rule also serves the purpose of class action devices, since it promotes judicial efficiency.<sup>253</sup>

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<sup>248</sup> See, e.g., FED. R. CIV. P. 23(b)(1).

<sup>249</sup> But see Toby J. Stern, *Federal Judges and Fearing the "Floodgates" of Litigation*, 6 U. PA. J. CONST. L. 377 (2003) (arguing that Article III should generally prevent judges from deciding cases based on the "floodgates" argument). Luckily, this article is not a judicial opinion.

<sup>250</sup> See *supra* Part IV.

<sup>251</sup> See *supra* Part IV.

<sup>252</sup> See *supra* Part IV.

<sup>253</sup> See *supra* Part IV.