ARTICLES

Against Associational Standing

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Associational standing is a widely used doctrine that has never been subject to serious academic scrutiny. It allows an organization that has not suffered any injury in fact to sue in its own name to assert its members' causes of action. Though the doctrine is often associated with public interest groups, major corporations have usurped it to be able to sue, through trade groups or entities created solely to pursue a particular lawsuit, without becoming party litigants to the case.

The Supreme Court first recognized associational standing as an offshoot of third-party standing to allow an organization that had suffered institutional harm to assert its members' rights concerning their relationship with the organization itself. The Court has since extended associational standing to allow an uninjured group to pursue any of its members' claims relating to the group's purpose, including claims completely unconnected to their membership in the group. The Court has likewise allowed associational standing to be invoked by both zero-member groups and compulsory groups whose members are not free to quit.

This anomalous exception to Article III's injury-in-fact requirement stands in tension with the fabric of U.S. law in ways that have been generally overlooked. Statutes, procedural rules, and most judge-created requirements were not crafted with associational standing in mind, repeatedly creating unnecessary quandaries throughout the litigation process. Associational standing allows plaintiff groups to circumvent Federal Rule of Civil Procedure 23 by enabling them to effectively craft their own classes without judicial approval or satisfying the Rule's requirements. The doctrine also violates Rule 17(a)'s real-party-in-interest requirement, triggers disputes over potential asymmetric claim preclusion, and offers a backdoor method for courts to inappropriately issue nationwide defendant-oriented injunctions. Moreover, it undermines public policy goals by impacting how statutes such as the Equal Access to Justice Act apply to a rightsholder's claims, and violates traditional equitable principles. While courts may adopt ad hoc solutions to address each of these

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difficulties individually, such patches underscore the poor fit between associational standing and the structure of litigation in the United States.

This Article calls for the abandonment, or at least serious modification, of associational standing. Even without associational standing, groups may still sue to enforce their own rights. And they could continue to help vindicate their members' rights by providing legal representation for member plaintiffs in individual or class action suits (filed anonymously, if necessary), covering members' litigation costs, and providing expert witnesses and other guidance. In short, associational standing is a largely unnecessary deviation from both Article III's injury-in-fact requirement and the fundamental principles underlying our justice system. Eliminating associational standing would not limit public law and other important collective litigation, but rather ensure that such cases proceed through the proper channels (i.e., Rule 23) while preventing a range of unnecessary procedural, preclusive, remedial, and other complications.

INTRODUCTION

On June 29, 2023, the Supreme Court decided *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[1]

[1] 143 S. Ct. 2141 (2023).

holding that public and publicly funded colleges may not directly consider race in their admissions processes.[2] The landmark decision overturned years of precedent permitting race-conscious admissions.[3] Making the decision all the more remarkable is the fact that the Court should not have decided the case at all.

The plaintiff was Students for Fair Admissions (SFFA), a membership organization devoted to challenging the consideration of race in college admissions.[4] SFFA did not claim that it had suffered or would suffer any injury from the defendants' consideration of race in admissions.[5] The Court nevertheless held that the cases was justiciable based on associational standing, a doctrine that allows an organization that has not itself suffered any injury to nevertheless sue based on injuries suffered by its members.[6]

Associational standing is a surprisingly underexamined anomaly in the landscape of modern justiciability law. To sue in federal court, a plaintiff must establish both constitutional standing under Article III[7] and prudential standing.[8] Article III standing requires a plaintiff to demonstrate that it has suffered a concrete, particularized injury in fact.[9] As a prudential matter, the Supreme Court has further held that a plaintiff usually may sue only for violations of its own rights.[10]

Traditional third-party standing principles, however, sometimes allow a plaintiff to sue for a concrete, particularized injury it has suffered through a violation of someone else's rights.[11] Such third-party standing is particularly appropriate where the

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2 *Id.* at 2175–76.

3 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Fisher v. Univ. of Tex., 579 U.S. 365, 377–78 (2016); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316–18 (1978).

4 *See Students for Fair Admissions*, 143 S. Ct. at 2157–59.

5 *See* Reply Brief for Petitioner at 2–5, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199) (omitting any mention of direct injury to SFFA in claiming standing).

6 *Students for Fair Admissions*, 143 S. Ct. at 2157–59.

7 *See* U.S. CONST. art. III, § 2, cl. 1 (limiting federal jurisdiction to "Cases" and "Controversies").

8 Warth v. Seldin, 422 U.S. 490, 498 (1975) (explaining that the standing inquiry "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise").

9 *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

10 *See* Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.").

11 Powers v. Ohio, 499 U.S. 400, 410–11 (1991) (citing Singleton v. Wulff, 428 U.S. 106, 112–16 (1976)).

plaintiff has a relationship with that third party—such as doctor-patient or vendor-customer—and the plaintiff is better positioned than the third party to pursue litigation.[12] For example, third-party standing doctrine allows a private school to challenge a law requiring parents to send their children to public school by asserting the right of its enrollees' parents to direct their children's education.[13] These principles likewise allow bartenders who have been prohibited from selling alcohol to 18-year-old males (but not females of that age) to enforce their customers' right to be free of gender-based discrimination as to the legal drinking age.[14]

Associational standing both creates a glaring exception to Article III's injury-in-fact requirement and goes well beyond the traditional prudential standing principles animating third-party standing. The doctrine allows an organization that has not itself suffered any legally cognizable harm to sue based solely on an injury suffered by one or more of its members.[15] It fundamentally differs from "next friend" suits in which a representative, such as a guardian, sues on behalf of someone who "cannot appear on his own behalf," such as a child, to secure a remedy *for that person*.[16]

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[12] *Id.* at 411 (citations omitted):

> The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

[13] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[14] Craig v. Boren, 429 U.S. 190, 192–97 (1976). Third-party standing has also been invoked frequently to allow (1) family-planning institutions to challenge contraception restrictions on behalf of their clients, *see* Carey v. Population Servs., Int'l, 431 U.S. 678, 682–84 (1977); Eisenstadt v. Baird, 405 U.S. 438, 443–46 (1972); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); (2) physicians to challenge abortion restrictions on behalf of their pregnant patients, June Med. Servs., L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (collecting cases); *see also Singleton*, 428 U.S. at 118; (3) criminal defendants to challenge racial discrimination against jurors, *see* Campbell v. Louisiana, 523 U.S. 392, 400 (1998); *Powers*, 499 U.S. at 415; and (4) attorneys to challenge restrictions that interfere with their clients' ability to retain counsel, *see* Dep't of Labor v. Triplett, 494 U.S. 715, 720–21 (1990); Caplin & Drysdale v. United States, 491 U.S. 617, 623 n.3 (1989). *But see* Kowalski v. Tesmer, 543 U.S. 125, 134 (2004) (holding that attorneys may not assert third-party standing to challenge a law restricting the availability of court-appointed counsel on behalf of indigent potential clients).

[15] *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 342 (1977) ("[A]n association may have standing to assert the claims of its members even where it has suffered no injury from the challenged activity."); *Warth*, 422 U.S. at 511 (holding that an association "may have standing solely as the representative of its members," even "in the absence of injury to itself").

[16] Whitmore v. Arkansas, 495 U.S. 149, 163–64 (1990). Federal Rule of Civil Procedure 17(c) expressly authorizes such representative lawsuits by guardians and trustees. FED. R. CIV. P. 17(a)(1)(C), (E). In next-friend suits, the "'next

With associational standing, the association sues in its own name to assert a member's rights in order to secure a remedy *for the association*. Indeed, associational standing "may be the only situation in which the titular litigant may litigate without any injury to itself."[17]

Associational standing is not only the purview of labor, environmental, and civil rights groups, but also ad hoc entities formed solely for the purpose of bringing a particular case,[18] as well as trade associations and other organizations that enable corporate behemoths and other private companies to litigate claims without becoming actual party litigants.[19] Moreover, a large association with broad or general purposes "would seem to be able to bring any lawsuit it wanted, becoming a roving enforcer of the law."[20] Although the Court's associational standing rulings directly apply only to federal courts, numerous state constitutions impose justiciability restrictions analogous to Article III on their state

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friend' does not himself become a party to the . . . action in which he participates, but simply pursues the cause on behalf of [an incapacitated] person, who remains the real party in interest." *Whitmore*, 495 U.S. at 163. Thus, a next friend need not establish their own injury in fact because they are not actually a party litigant. *But see* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 63 (2021) (dismissing this distinction between ordinary lawsuits and next-friend litigation as a "fiction" because "the next friend initiates the suit, asserts the prisoner's rights, and controls the litigation").

[17] William Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. 153, 163 n.45 (1985); *cf.* Donald F. Simone, Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U. L. REV. 174, 176 (1981) ("Even the *jus tertii* theory, which allows a plaintiff to assert the rights of a party not before the court, requires the plaintiff to have suffered his own injury from the act that violated the third party's rights.").

[18] *See* Pennell v. City of San Jose, 485 U.S. 1, 7 n.3 (1988) (recognizing associational standing for a group that was "organized for the purpose of representing the interests of the owners and lessors of real property in San Jose in this lawsuit" (quotation marks omitted)); *see also* Rumsfeld v. F. for Acad. & Inst. Rights, Inc., 547 U.S. 47, 52 n.2 (2006).

[19] *See, e.g.*, *Pennell*, 485 U.S. at 7 n.3 (recognizing associational standing for a landlord association challenging a rent control statute); Nat'l Motor Freight Traffic Ass'n v. United States, 372 U.S. 246, 247 (1963) (per curiam) (holding that motor carrier associations had associational standing to challenge a tariff from the Interstate Commerce Commission lowering the rates that the associations' members could charge); Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 668–69, 669 n.6 (1993) (recognizing associational standing for an association of general contractors challenging a set-aside program to benefit racial minorities).

[20] Heather Elliott, *Associations and Cities as (Forbidden) Pure Private Attorneys General*, 61 WM. & MARY L. REV. 1329, 1333 (2020).

judiciaries.[21] Many of these jurisdictions, following the federal courts, have recognized associational standing.[22]

This doctrine is not only anomalous but historically novel. Courts did not traditionally permit associational standing; the doctrine did not develop until the twentieth century.[23] The earliest associational standing cases drew upon traditional third-party standing principles to allow civil rights groups that had suffered institutional harms to defend their members' interests concerning their association with the groups themselves.[24] Over time, the doctrine expanded, evolving into an exception to both Article III and third-party standing requirements.[25] A group could invoke this new generalized understanding of associational standing to sue even where it did not face any harm as an entity and its cause of action was unrelated to its relationship with its members.

Associational standing stands in tension with the overall fabric of U.S. law. A core premise of our legal system is that the plaintiff in a case should be either the real party in interest—the person who suffered the harm that gave rise to the lawsuit—or a representative standing in the shoes of that real party in interest.[26] Many statutes, procedural rules, and judge-created requirements were crafted against that background presumption. By departing from this usual practice, associational standing creates unnecessary quandaries throughout the litigation process.

In some cases, associational standing can change the way in which the law applies to a rightsholder's claims, potentially frustrating important policy goals. For example, some courts have allowed wealthy global corporations that litigate their claims through sparsely funded trade associations to recover attorneys' fees from the government under the Equal Access to Justice Act (EAJA).[27] Because of their extravagant net worth, those corporations would have been ineligible to recover such fees if they had sued in their own names.

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[21] *See* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 66 (2014) (listing states with standing doctrines that mirror federal doctrine).

[22] *See* Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Torts Claims for Adjudication*, 91 VA. L. REV. 1463, 1465 n.3 (2005) (citing cases).

[23] *See infra* notes 294–322 and accompanying text.

[24] *See infra* notes 67–74 and accompanying text.

[25] *See infra* notes 84–95 and accompanying text.

[26] *See, e.g.*, FED. R. CIV. P. 17(a) (requiring litigation to be brought by, or in the name of, the real party in interest).

[27] 5 U.S.C. § 504; *see infra* Section IV.D.

Associational standing also exacerbates remedial problems that already plague the federal courts. Many federal courts typically issue "[p]laintiff-[o]riented" injunctions, granting relief only for the particular plaintiffs in a case.[28] In recent years, some federal courts have been issuing greater numbers of "nationwide" or "[d]efendant-[o]riented" injunctions that go beyond such limited relief.[29] Defendant-oriented injunctions completely prohibit a governmental defendant from enforcing a challenged legal provision against anyone, anywhere in the state or nation.[30] Justices[31] and scholars[32] have questioned this practice on a variety of grounds.

Associational standing provides a ready means of easily circumventing any limitations or prohibitions on nationwide defendant-oriented injunctions the Court or Congress may adopt.[33] Courts often award nationwide defendant-oriented injunctions in associational standing cases,[34] likely in part due to the difficulty of crafting more appropriate, narrower relief. Injunctions cannot readily be tailored to a plaintiff organization's rightsholder members—who are the real parties in interest and whose rights underlie the lawsuit—when they are not party litigants in the case. Moreover, attempting to draft an injunction to protect the rights of an association's members raises practical problems of its own, including, among other things, an

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[28] *See* Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL'Y 487, 489–90, 510 (2016) [hereinafter Morley, *De Facto Class Actions*] (explaining that a plurality of circuits have established a presumption in favor of granting plaintiff-oriented injuntions).

[29] *Id.* at 504–12; *see also Deputy Attorney General Jeffrey A. Rosen Delivers Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs*, U.S. DEP'T JUST. (Feb. 12, 2020), https://perma.cc/9WY3-F8JR.

[30] Morley, *De Facto Class Actions*, *supra* note 28, at 490.

[31] *See infra* note 283 and accompanying text.

[32] *See, e.g.*, Morley, *De Facto Class Actions*, *supra* note 28, at 521–38; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 457–68 (2017). *But see* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1090–1103 (2018) (defending the permissibility of nationwide plaintiff-oriented injunctions under some circumstances).

[33] *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1, 25–27 (2019) [hereinafter Morley, *Disaggregating Nationwide Injunctions*].

[34] *See, e.g.*, Casa de Md., Inc. v. Trump, 414 F. Supp. 3d 760, 786 (D. Md. 2019) ("[A] nationwide injunction is appropriate to provide complete relief to CASA. CASA has over 100,000 members located in Maryland, Virginia, D.C., and Pennsylvania."); Saget v. Trump, 375 F. Supp. 3d 280, 378–79 (E.D.N.Y. 2019) ("Here, a national injunction is warranted in this case. Plaintiffs not only include residents of New York but also individuals and a nonprofit entity based in Florida. Limiting a preliminary injunction to the parties would not adequately protect the interests of all stakeholders.").

organization's reluctance to publicly disclose its member list.[35] Restrictions on associational standing would likely be a necessary complement to reforms concerning nationwide or defendant-oriented injunctions.

These remedial difficulties underscore a broader problem with associational standing—it is in tension with Federal Rule of Civil Procedure 23, which governs class actions.[36] Associational standing cases present courts with pre-formed classes that are subject to neither approval under Rule 23 nor the rule's substantive restrictions. The doctrine allows an organization to litigate a member's legal claims, potentially without their knowledge or consent. Courts must make ad hoc determinations of whether the association can fairly represent its members' interests. Perhaps more importantly, allowing courts to grant effectively classwide relief outside the context of class action lawsuits raises problems of asymmetric preclusion. If the plaintiff organization is successful, all of its members stand to benefit. If the organization loses, in contrast, it is unclear whether its members are bound by the adverse ruling—or if they even should be.

While courts may adopt ad hoc solutions to address each of these difficulties individually, the need for such patches simply underscores the poor fit between associational standing and the structure of litigation in the United States. What's more, associational standing is almost completely unnecessary. Were Congress or the Court to reject associational standing,[37] organizations could still provide legal representation for their members to litigate their own claims, cover their litigation costs, and provide expert witnesses and other guidance.[38] Since organizations asserting associational standing already must provide evidence about their members' injuries,[39] becoming a party plaintiff would not invade a member's privacy to a substantially greater degree. Once a named plaintiff has been identified, litigation could proceed on a

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35 *Cf. infra* Part I.B (describing litigation seeking disclosure of such lists).

36 FED. R. CIV. P. 23. The Court discussed and dismissed some aspects of this issue in Int'l Union v. Brock, 477 U.S. 274, 288–90 (1986).

37 Professor Heather Elliott has argued that "Congress could not bar associational standing . . . . Congress is likely forbidden from doing so by the First Amendment." Elliott, *supra* note 20, at 1387. We disagree with this analysis, especially to the extent that third-party standing requirements in general, and associational standing in particular, are not constitutional doctrines. *Cf. infra* Part I.B. The scope of Congress's authority to prohibit associational standing is beyond the scope of this Article, however.

38 *See infra* Part II.A.

39 *See infra* notes 108–13 and accompanying text.

classwide basis under Rule 23. In the rare cases where a rightsholder would face a serious risk of violence or other harm by litigating in their own name, the court may allow them to proceed anonymously.[40] In short, organizations can garner nearly all of the benefits of associational standing by facilitating their members' litigation without formally taking control of their members' claims.

Associational standing doctrine has received surprisingly little academic scrutiny. Many scholars,[41] as well as all of the major federal courts treatises,[42] outline the requirements for asserting associational standing without considering its consequences. Those who have considered the issue have generally embraced the doctrine.[43] Several scholars have discussed how current

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[40] *See, e.g.*, Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011) ("When a litigant sufficiently alleges that he or she has a reasonable fear of severe harm from litigating without a pseudonym, courts of appeals are in agreement that district courts should balance a plaintiff's interest and fear against the public's strong interest in an open litigation process."); *see also* Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992) ("A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity.").

[41] *See, e.g.*, Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1225 (2014); Burnham, *supra* note 17, at 162–64 & 163–64 nn.44–46; C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME L. REV. 862, 909–11 (1985).

[42] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 117–18 & n.11 (7th ed. 2015); ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 2.3.7, at 117–19 (8th ed. 2021); 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 3591.9.5 (3d ed. 2022); 18A *id.* at § 4456 (3d ed. 2022); 15 MOORE'S FEDERAL PRACTICE, § 101.60[1][b] (3d ed. 2022); *see also* 33 WRIGHT ET AL., *supra* at §§ 8334, 8345.

[43] *See, e.g.*, Elliott, *supra* note 20, at 1393 (noting that it would be "undesirable" to abolish associational standing); Re, *supra* note 41, at 1225 (arguing that associational standing reflects the judiciary's preference that the "superior" plaintiff" bring a claim); Lea Brilmeyer, *The Jurisprudence of Article III: Perspectives on the Case or Controversy Requirement*, 93 HARV. L. REV. 297, 318–20 (1979) (endorsing the reasoning underlying the Court's associational standing doctrine); Dale Gronemeier, Note, *From Net to Sword: Organizational Representatives Litigating Their Members' Claims*, 1974 U. ILL. L. FORUM 663, 674 (labeling associational standing a "necessary development" and advocating for the adoption of a new Federal Rule of Civil Procedure to govern it); Robert Allen Sedler, *Standing to Assert Constitutional* Jus Tertii *in the Supreme Court*, 71 YALE L.J. 599, 656 (1962) ("[A]n appropriate representative association should have standing to assert the rights of the individual members of the class where such persons are affected by action because of their being members of that class."); Andreas M. Petasis, Comment, *Associational Standing Under the Copyright Act*, 84 U. CHI. L. REV. 1517, 1558 (2017) ("Associational standing is an important part of standing doctrine that provides unique benefits to litigants."); Vivian Weston Lathers, Comment, *Associational Third-Party Standing and Federal Jurisdiction Under* Hunt, 64 IOWA L. REV. 121, 122 n.14 (1978) ("Allowing uninjured associations to sue on behalf of their injured members is generally a good policy and has certain advantages.");

associational standing doctrine applies in particular contexts[44] or urged the Court to expand it, generally to facilitate public law litigation.[45] Some have argued that municipalities are likely to have associational standing to sue on behalf of their citizens.[46]

Brandon Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 638 (2012) [hereinafter Garrett, *Aggregation*] (arguing that associational standing is an "important tool that can encourage group constitutional litigation"); Brandon Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 139 (2014) [hereinafter Garrett, *Corporations*] (arguing that associational standing offers many of the same advantages as other forms of aggregate litigation); Marc Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 432 (1981) (defending associational standing because "the association-litigant, in a very real sense, personifies the very third parties whose rights it asserts" and "[t]he association represents its members generally . . . with respect to the issues or concerns that led to their organization"); Fred C. Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453, 493 (1978) (arguing that a public interest group "that is willing to commit its resources to litigation should be permitted to assist the court in resolving controversial issues on behalf of the public they both seek to protect").

44 *See, e.g.*, Karl S. Coplan, *Is Voting Necessary? Organization Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 SE. ENVTL. L.J. 47, 76 (2005) (arguing that groups without voting members should be permitted to invoke associational standing); Petasis, *supra* note 43, at 1518 ("[A]ssociational standing should be allowed under the Copyright Act."); Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations' Associational Standing to Sue*, 157 U. PA. L. REV. 237, 261–62 (2008) (arguing that protection and advocacy organizations should have associational standing to pursue disabled people's legal claims); Tacy F. Flint, Comment, *A New Brand of Representational Standing*, 70 U. CHI. L. REV. 1037, 1051–52 (2003) (arguing that associations should be permitted to bring members' claims that themselves rely on third-party standing); *cf.* Garrett, *Corporations*, *supra* note 43, at 138, 145, 160 (arguing that for-profit corporations should not be permitted to assert associational standing to enforce their owners' rights due to their "legal structure"); Cindy Freeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 302–06 (1990) (arguing that Federal Rule of Civil Procedure 24's standard for intervention should be applied generously to public interest groups, including those asserting associational standing, seeking to join public interest litigation).

45 *See, e.g.*, Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 735 (1988) ("[A]ssociations merit standing when they seek to litigate collective interests they reasonably claim as theirs."); Roche, *supra* note 22, at 1463 ("[C]ombining existing associational standing doctrine with statistical sampling methodology produces a more effective means of pursuing claims on an aggregated basis."); Robert B. June, *Citizen Suits: The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 796 (1994) (recommending that Congress enact a statute allowing any group to sue for violations of environmental statutes when one of its members would have standing and the member consents); Glenn D. Magpantay, *Associational Rights and Standing: Does* Citizens United *Require Constitutional Symmetry Between the First Amendment and Article III?*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 667, 698–700 (2012) (arguing that associational standing should be broadened to make it easier for private voting rights groups to defend racial minorities'—particularly Asian-Americans'—rights notwithstanding Article III restrictions).

46 *See, e.g.*, Elliott, *supra* note 20, at 1372 ("[C]ities may, in fact, meet the *Hunt* test [for associational standing]."); Sarah Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227,

But very few scholars have questioned associational standing,[47] and none have spent more than a few sentences in doing so.[48]

This Article is the first to trace the history of associational standing and examine its modern scope; identify the problems it raises for various aspects of the litigation process; and

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1256–59 (2018); Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 83–99 (2014) ("Allowing cities to regularly use associational standing to sue on behalf of residents would correct the unique disadvantage at which they have been placed with respect both to states and to private, democratically unaccountable corporations."). Chief Justice John Roberts similarly analogized states' *parens patriae* suits to associational standing cases. *See* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting).

[47] One Case Comment argues that the Fifth Circuit has inappropriately extended associational standing to zero-member organizations beyond the bounds of Supreme Court precedent. Lisa White Shirley, Recent Development, Friends of the Earth, Inc. v. Chevron Chemical Co.*: The United States Court of Appeals for the Fifth Circuit Extends Associational Standing to a Nonmembership, Nonprofit Corporation*, 72 TUL. L. REV. 1875, 1890 (1998) ("The Fifth Circuit's extension of associational standing . . . in the noted case dilutes the doctrine beyond that which the Constitution allows."). A few pieces dating back as far as a half-century ago explored ways in which conflicts of interest could arise among the members of organizations invoking associational standing. *See, e.g.*, Simone, *supra* note 17, at 175, 181 (discussing "the various ways in which an association may be an ineffective representative of its members"); Nathaniel B. Edmonds, Comment, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. CHI. L. REV. 351, 358–66 (2002) (discussing the circuit split concerning conflicts of interest within groups attempting to assert associational standing). Some have recommended incorporating additional elements into the Court's test for determining the propriety of associational standing in a particular case. Lathers, *supra* note 43, at 135–37; Simone, *supra* note 17, at 175, 190–96 (proposing an "expanded test which provides for a thorough examination of adequate representation in associational suits"); Edmonds, *supra*, at 353, 366–67 (arguing that courts should reject associational standing when a "profound" conflict of interest exists among the plaintiff group's members, unless "the litigation was adequately authorized by its members"); Elliott, *supra* note 20, at 1394–95 (discussing the possibility of "giv[ing] the germaneness prong more teeth," categorically prohibiting cities from asserting associational standing, requiring associations to demonstrate "expertise" relating to the lawsuit, and mandating that their members vote to approve any lawsuit based on associational standing).

[48] Professors Curtis Bradley and Ernest Young's *Yale Law Journal* article on third-party standing discusses associational standing briefly, suggesting that an association's lack of Article III injury to itself is a "fundamental problem." Bradley & Young, *supra* note 16, at 69 ("It is unclear why, in these circumstances, an organization should be able to rely on its member's injury to establish Article III standing."). Professor Henry Monaghan's work on third-party standing also would counsel against recognizing associational standing, though he did not expressly address the issue. Henry Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 314 (1984) ("[R]ecognition of jus tertii standing as a constitutional imperative" where unnecessary to protect the rights of the plaintiff itself "seems . . . problematic" and "deeply inconsistent with the private rights model" of federal adjudication."); *see also* Note, *Standing to Assert Jus Tertii Claims*, 88 HARV. L. REV. 423, 426–27 (1974) (situating associational standing within third-party standing doctrine). Professor Aaron-Andrew P. Bruhl also raised concerns about the doctrine in a footnote. Aaron-Andrew P. Bruhl, *One Good Plaintiff is Not Enough*, 67 DUKE L.J. 481, 538 n.255 (2017).

demonstrate that abandoning the doctrine would be unlikely to impede important public law or other collective litigation. Part I begins by introducing the general principles governing Article III and prudential standing. It then traces the development of associational standing from its early roots in third-party standing cases up through its modern formulation. This Part concludes by exploring the Court's most recent expansions of the doctrine.

Part II addresses the justifications that the Court and other advocates have provided for associational standing, demonstrating that the doctrine is not well tailored to achieving these goals. Part III focuses on the tension between associational standing and Federal Rule of Civil Procedure 23's standards for class actions. By circumventing Rule 23, associational standing allows plaintiffs to engage in collective litigation through pre-formed classes without judicial certification, unnecessarily generating several problems that could likely be avoided in a class action suit.

Part IV turns to the wide range of other difficulties that associational standing creates under the rules and doctrines governing federal litigation. This Part demonstrates that associational standing violates Federal Rule of Civil Procedure 17(a)'s requirement that the litigants in a case be the real parties in interest. It likewise raises difficulties concerning the applicability of claim preclusion; the proper scope of injunctive relief; and the manner in which the EAJA applies to wealthy rightsholders' claims. The doctrine also violates traditional equitable principles. A brief conclusion follows. Associational standing has expanded over the decades with surprisingly little academic or judicial scrutiny; this Article fills that gap.

I. THE DOCTRINE OF ASSOCIATIONAL STANDING

Standing doctrines limit who may sue in federal court. Article III grants standing only to those who have suffered an injury in fact. Even when this constitutional requirement is satisfied, the prudential doctrine of third-party standing presumptively prohibits a person who has suffered an injury from asserting someone else's rights to obtain relief. Associational standing is an exception to these constitutional and prudential requirements, allowing an uninjured association to sue in its own name and seek relief for harm to one or more of its members.

This Part begins by exploring the traditional requirements for Article III and prudential standing in greater detail. It then

traces the development of associational standing doctrine, examining its departures from these traditional requirements. After reviewing the modern standard for invoking associational standing, this Part concludes by assessing some of the doctrine's surprising applications.

A. Article III and Third-Party Standing

Standing doctrine has both constitutional and prudential components. The constitutional standing requirement derives from the "Cases" and "Controversies" limitations in Article III.[49] To have Article III standing, a plaintiff must establish, among other things, that he has suffered—or is imminently about to suffer—a "concrete" and "particularized" injury in fact that "would likely be redressed by judicial relief."[50] An organization may satisfy this requirement by alleging that it been harmed as an entity—for example, property owned by the organization has been damaged, taken, or destroyed.[51] But a plaintiff generally cannot sue based on injury in fact to some other third-party nonlitigant.[52] These standing restrictions are a critical component of separation

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[49] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

[50] *Id.* Many commentators have argued that, contrary to the Court's holdings, the Constitution does not actually mandate the injury-in-fact test. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231 (1998); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988); Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 691–94 (1990).

[51] This theory is called organizational standing. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378–79 (1982) (holding that a plaintiff organization can assert standing by alleging a "concrete and demonstrable injury to [its] activities—with the consequent drain on the organization's resources"); *see also* Warth v. Seldin, 422 U.S. 490, 511 (1975) ("[A]n [organization] may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.").

[52] In *Hollingsworth v. Perry*, for example, the Court held that proponents of a California ballot initiative could not establish Article III standing based on an alleged injury to the State of California. 570 U.S. 693, 715 (2013). The Court explained that, rather than asserting California's interests, the proponents had to identify an injury to themselves to establish standing. *Id.* Likewise, in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020), the Court held that the beneficiaries of a bank's retirement plan who sought to sue the bank could not establish standing based on alleged harm to their retirement plan. The beneficiaries lacked standing, the Court said, since they had failed to show that they "'suffered an injury in fact, thus giving' them 'a sufficiently concrete interest in the outcome of the issue in dispute.'" *Id.* (quoting *Hollingsworth*, 570 U.S. at 708).

of powers that prevent courts from straying beyond the historical limitations of their role.[53]

Prudential standing doctrines do not derive from the Constitution, but instead are judicially created limitations on federal jurisdiction.[54] Although a variety of prudential standing rules used to exist, the Court has eliminated or reconceptualized most of them in recent years.[55] The only remaining prudential standing requirement is the restriction on third-party standing.[56] Third-party

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[53] Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)); *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013); *Warth*, 422 U.S. at 498; Allen v. Wright, 468 U.S. 737, 752 (1984).

[54] United States v. Windsor, 570 U.S. 744, 757 (2013) ("[P]rudential standing . . . embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" (quoting *Allen*, 468 U.S. at 751)).

[55] *See* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 115–27 (2014) (describing the restriction of prudential standing). For example, for decades the Court described the prohibition on adjudicating "generalized grievances" as a prudential doctrine. *See Allen*, 468 U.S. at 751; Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 475 (1982); *Warth*, 422 U.S. at 499. It has since clarified that this restriction is constitutionally rooted—a corollary of Article III's requirement that a plaintiff assert a concrete, particularized injury in fact. Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) ("[A] plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."); *see also* Lexmark Int'l Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014) (reiterating that generalized grievances "are barred for constitutional reasons, not 'prudential' ones").

Another longstanding prudential standing principle was the "zone of interests" test, which required courts to determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Ass'n of Data Proc. Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). This "zone of interests" requirement was long considered a prudential standing doctrine. *Valley Forge Christian Coll.*, 454 U.S. at 475; *Allen*, 468 U.S. at 751. In *Lexmark*, however, the Court changed course, holding that this test is a nondiscretionary analysis about whether the plaintiff can assert a valid substantive cause of action. 572 U.S. at 127 ("Whether a plaintiff comes within the zone of interests is an issue that requires us to determine . . . whether a . . . cause of action encompasses a particular plaintiff's claim." (quotations marks omitted)).

[56] *See* Brown, *supra* note 55, at 114 ("The only remaining common component of prudential standing . . . is third-party standing."); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2117 (2020) (plurality opinion); *cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (listing the traditional doctrines categorized as aspects of "prudential standing") (quoting *Allen*, 468 U.S. at 751 (1984)). Some have argued that both the rule against third-party standing, as well as the exceptions to it, are not prudential but instead required by Article III. *See June Med. Servs.*, 140 S. Ct. at 2145 (Thomas, J., dissenting) ("The rule against third-party standing is constitutional, not prudential."). Like the "zone of interests" test in *Lexmark*, third-party standing could instead be reconceptualized as a limitation on a plaintiff's ability to assert a valid substantive cause of action rather than a judicially created limitation on jurisdiction. Under this approach, the substantive law creating a cause of action could determine whether a plaintiff may assert a valid claim based on third-party standing. In other words, if associational standing were constitutionally permissible (even though it runs afoul of the general Article III requirement that the

standing principles limit the circumstances under which a person with Article III standing may sue when the asserted injury arises from a violation of someone else's rights.

An injured plaintiff may assert the rights of another only when two conditions are met. First, the third-party rightsholder must face an impediment that prevents it from suing in its own name.[57] Second, the plaintiff seeking to assert the third party's rights must have a special relationship with that rightsholder.[58] For example, the Supreme Court has held that a foreign employee had standing to challenge a state law limiting employers' ability to hire noncitizens;[59] a business had standing to challenge a union's allegedly tortious attempts to stop "employees, owner[s] and customers" from accessing it;[60] and landowners had standing to challenge a law restricting their ability to lease land to noncitizens on the grounds it discriminated based on alienage.[61]

Perhaps the best-known example, cited by some of the earliest associational standing cases,[62] is *Pierce v. Society of Sisters*.[63] There, the Court held that corporations operating religious and military schools had standing to challenge a state law requiring parents to send their children to public school.[64] The plaintiff corporations were permitted to sue state officials for violating the right of their students' parents to "direct the upbringing and

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plaintiff demonstrate that it has suffered some injury in fact), then it would be available only when a particular constitutional, statutory, or common law cause of action allowed it as a matter of substantive law. As this Article suggests, however, the tension between associational standing and several other aspects of the litigation process counsels strongly in favor of simply abandoning the doctrine altogether.

57 *See* Kowalski v. Tesmer, 543 U.S. 125, 129–130 (2004).

58 *Id.*

59 Truax v. Raich, 239 U.S. 33, 38–39 (1915). The Court rejected the argument that an employee could not "complain for the master" because "it [was] the master who [was] subject to prosecution, and not the [employee]." *Id.* at 38. Instead, the Court held that noncitizen employees can challenge laws limiting employers' ability to hire them because "the act undertakes to operate directly upon the employment of aliens." *Id.*

60 Truax v. Corrigan, 257 U.S. 312, 327 (1921) ("Plaintiffs' business is a property right and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort." (citation omitted)).

61 Terrace v. Thompson, 263 U.S. 197, 216 (1923) ("The owners have an interest in the freedom of the alien, and he has an interest in [the owners'] freedom, to make the lease.").

62 *See, e.g.*, *Warth*, 422 U.S. at 501; NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

63 268 U.S. 510 (1925).

64 *Id.* at 535–36.

education of their children."[65] Although this right did not belong to the corporations themselves, they faced a loss of business and property from "the unwarranted compulsion which [the state was] exercising over present and prospective patrons of their schools."[66] The Court accordingly allowed the corporations to assert the parents' rights through third-party standing in their challenge to the law.

Together, Article III and prudential standing requirements generally allow plaintiffs to seek relief in federal court only for injuries they have personally suffered because of violations of their own rights.

B. The Development of Associational Standing

Associational standing doctrine developed as an offshoot of third-party standing principles. The earliest associational standing cases allowed a group that had suffered injury in fact to its organizational interests to assert not only its own institutional rights, but also its members' rights regarding their membership in the group itself—such as protecting the privacy of the group's membership lists. Over the course of the mid-twentieth century, this doctrine evolved in two significant ways. First, the Court no longer limited associational standing to disputes concerning members' affiliations with the plaintiff organization. Second, the doctrine morphed from involving only third-party prudential standing into an exception to Article III standing, allowing an uninjured association to sue in cases where only a member had suffered injury.

Associational standing originated during the Civil Rights Era as a variation of third-party standing doctrine.[67] The earliest associational standing cases allowed civil rights groups to protect their members from laws and investigations that targeted those members' involvement with the groups themselves.

In the 1958 case *NAACP v. Alabama ex rel. Patterson*,[68] the Alabama Attorney General sought an injunction to bar the NAACP's Alabama state chapter from operating because the national NAACP had failed to register in Alabama as an out-of-state

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65 *Id.* at 534–35.

66 *Id.* at 535.

67 *See* United Food & Commer. Workers Union Loc. 751 v. Brown Grp., 517 U.S. 544, 551–52 (1996).

68 357 U.S. 449 (1958).

corporation.[69] In the course of the litigation, the court ordered the NAACP to produce a list of its Alabama members.[70] The NAACP refused to do so and was held in contempt.[71]

The Supreme Court reversed. The Court concluded that the NAACP had standing to "argue[ ] . . . the rights of its members" because the NAACP's "nexus with them [was] sufficient to permit that it act as their representative before this Court."[72] The members' claimed right of privacy concerning their affiliation with the NAACP would be nullified if they had to participate in the litigation, thereby identifying themselves, to assert it.[73] The Court went on to declare that the NAACP and its members "are in every practical sense identical," because the NAACP was "but the medium through which its individual members seek to make more effective the expression of their own views."[74]

Patterson simply applied traditional third-party standing doctrine to allow an organization that had suffered its own injury in fact to assert its members' rights—rights that related directly to their membership in the organization itself. The NAACP in *Patterson* faced its own injury as an entity—being forced to disclose its members' identities—that supported Article III standing. As the Court recognized, such disclosure could imperil the NAACP by deterring people from joining or providing financial support to it.[75] Moreover, the NAACP satisfied third-party standing requirements for invoking its members' rights to seek redress for that harm.[76] The NAACP had a special relationship with its members, who were impeded from enforcing their own rights because individual lawsuits challenging the Alabama court's order would likely reveal the plaintiffs' identities and membership in the NAACP.

Other early decisions recognizing associational standing were likewise consistent with traditional third-party standing

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69 *Id.* at 451–52.

70 *Id.* at 453.

71 *Id.* at 454.

72 *Id.* at 458–59 ("If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association.").

73 *Patterson*, 357 U.S. at 459.

74 *Id.*

75 *Id.* at 459–60 ("The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members.").

76 *See supra* notes 67–68 and accompanying text.

principles. The Court allowed civil rights groups that had suffered Article III injuries in fact to their organizational interests to assert their members' rights relating to membership in the groups themselves.[77] In the 1963 case *NAACP v. Button*,[78] for example, a Virginia law prohibited an organization from offering to represent a litigant in court where the organization neither was a party to the action nor had a legal interest in it.[79] The Court held that the NAACP had associational standing to argue that the provision violated its members' rights.[80] The NAACP's Article III standing was clear because the law regulated activities in which the NAACP was "directly engaged."[81] The Court went on to conclude that, as a representative organization, the NAACP "has standing to assert the corresponding rights of its members" to receive legal representation from the group.[82]

Later that same year, however, in *National Motor Freight Traffic Ass'n v. United States*,[83] the Court radically reconceptualized and expanded associational standing.[84] There, industry trade associations challenged a tariff schedule on behalf of their members.[85] The tariff did not injure the associations themselves or affect them in any other way. For that reason, a three-judge district

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77 *See, e.g.*, Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961) (holding, in a case where the state sought to require the NAACP to disclose its membership lists, "that NAACP has standing to assert the constitutional rights of its members"); *see also* Bates v. City of Little Rock, 361 U.S. 516, 523 n.9 (1960) (noting the lack of any challenge to the standing of the NAACP's record custodians to seek invalidation of a statute requiring them to disclose the group's membership list); Uphaus v. Wyman, 360 U.S. 72, 77–78 (1959) (assuming that a group's executive director "had sufficient standing to assert any rights of the [group's] guests whose identity the [legislative] committee seeks to determine"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 187 (1951) (Jackson, J., concurring) (arguing that groups should be able to invoke associational standing to assert their members' rights where the Attorney General arbitrarily labeled them as communist because "[t]he only practical judicial policy when people pool their capital, their interests, or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all"); *cf.* Bell v. Maryland, 378 U.S. 226, 267 (1964) (Douglas, J., concurring in part) (Appendix I) ("At times a corporation has standing to assert the constitutional rights of its members, as otherwise the rights peculiar to the members as individuals might be lost or impaired.").

78 371 U.S. 415 (1963).

79 *Id.* at 425–26.

80 *Id.* at 428.

81 *Id.*

82 *Id.*

83 372 U.S. 246 (1963).

84 *Id.* at 247 (per curiam) (denying petition for rehearing but recognizing the existence of standing).

85 *Id.*

court concluded that the associations lacked standing to maintain their challenge.[86] In a one-paragraph, per curiam order, the Supreme Court disagreed. It stated that, "[s]ince individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are proper representatives of the interests of their members, appellants have standing" to pursue their challenge in federal court.[87]

With this decision, the Court made two significant changes to associational standing doctrine.[88] First, it extended associational standing to legal claims that did not arise from the members' relationships with the plaintiff organizations. The tariff in *National Motor Freight Traffic Ass'n* did not target or penalize carriers based on their membership in the trade associations.[89] Second, the Court converted associational standing from an application of traditional third-party standing principles into an exception to Article III's injury-in-fact requirement, allowing the associations to sue despite the lack of any injury to them.

Although *National Motors Freight Traffic Ass'n* was only a summary order, the Court subsequently confirmed these changes in *Sierra Club v. Morton*.[90] The Sierra Club sued the Secretary of the Interior under the Administrative Procedure Act[91] (APA) to stop the government from issuing permits to allow the Walt Disney Corporation to develop a ski resort in the Mineral King Valley in California.[92] The Court began by holding that, to pursue an APA claim, a plaintiff must be able to establish that it has suffered an injury in fact.[93] Citing *Button*, the Court went on to

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86 Nat'l Motor Freight Traffic Ass'n v. United States, 205 F. Supp. 592, 593 (D.D.C. 1962) (three-judge court) (denying standing because the "associations will in no way be affected by the freight forwarder rates fixed by the challenged Commission order"), *aff'd*, 371 U.S. 223 (1962) (per curiam), *reh'g denied*, 372 U.S. 246, 247 (1963) (per curiam).

87 *Nat'l Motor Freight Traffic Ass'n*, 372 U.S. at 247.

88 The Court cited *Patterson* without acknowledging the material differences from that case, as well as another precedent that had nothing to do with associational standing. *See id.* (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (holding that the federal Communications Act permitted an applicant for a radio station to challenge the FCC's decision to grant a permit to a competitor that would serve the same region (citing 47 U.S.C. § 402))).

89 Nat'l Motor Freight Traffic Ass'n, 205 F. Supp. at 594.

90 405 U.S. 727 (1972).

91 5 U.S.C. §§ 551–559.

92 *Sierra Club*, 405 U.S. at 728–29.

93 *Id.* at 733 ("[P]ersons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact . . . .'"); *see also id.* at 734–35 (explaining that the injury-in-fact standard "requires that the party seeking review be himself among the injured").

declare that "an organization whose members are injured may represent those members in a proceeding for judicial review."[94] The Court did not acknowledge that the plaintiff organization in *Button* had suffered its own injury and sought to assert its members' rights relating to their membership in the organization itself. Instead, it treated *Button* as creating a broad exception to third-party and Article III standing requirements.

The Court concluded that the Sierra Club lacked standing because it had "failed to allege that it *or its members* would be affected in any of their activities or pastimes" by the proposed construction at Mineral King.[95] Our modern conception of generalized associational standing stems from this single sentence suggesting that an association's standing could rest solely on an injury to the members—even though the Court did not announce that it was materially changing the law or modifying the much narrower, and far more defensible, associational standing doctrine that it had applied throughout the early 1960s.

In the immediate aftermath of *Sierra Club*, associational standing's status was somewhat precarious, as demonstrated by the 1974 case *California Bankers' Ass'n v. Shultz*.[96] There, the Court expressed "serious doubt" about the California Bankers' Association's standing to litigate constitutional challenges to the Bank Secrecy Act of 1970[97] based on injuries suffered by the association's member banks.[98] Since one of the banks subject to the challenged legal provisions was also a plaintiff, however, the Court simply "assum[ed] without deciding" that the association had standing.[99]

The following year, however, *Warth v. Seldin*[100] treated *Sierra Club*'s expanded conception of generalized associational standing as settled law—without even acknowledging *California Bankers' Ass'n*.[101] The plaintiffs were a nonprofit organization that advocated for low-income housing, as well as various low-income racial minorities who claimed they could not afford to

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94 *Id.* at 739 (citing *Button*, 371 U.S. at 428).

95 *Id.* at 735 (emphasis added).

96 416 U.S. 21 (1974).

97 Pub. L. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 12, 15, and 31 U.S.C.).

98 *California Bankers'*, 416 U.S. at 44.

99 *Id.* at 44–45; *cf.* Bruhl, *supra* note 48, at 514–40 (explaining why a court should separately confirm the standing of each individual plaintiff in a lawsuit).

100 422 U.S. 490 (1975).

101 *Id.* at 511.

live in Penfield, New York, due to its single-family zoning ordinances and density restrictions.[102] A few months after the lawsuit was filed, two additional entities sought to intervene as plaintiffs in the case, including a builders' association alleging that Penfield's ordinances limited its members' opportunities to build new homes there,[103] as well as a nonprofit corporation comprised of various groups that had been prevented from developing low-income housing in Penfield.[104]

The Court held that the individual plaintiffs in *Warth* lacked standing.[105] It reasoned that the connection between the town's rejection of permits and variances for certain developers and the individual plaintiffs' inability to purchase a home there was too attenuated and speculative.[106] It then turned to the associational plaintiffs and intervenors. Reaffirming its recognition of generalized associational standing, the Court declared that, "*[e]ven in the absence of injury to itself*, an association may have standing solely as the representative of its members."[107] Citing a seven-page swath of *Sierra Club*, it explained that a group may assert associational standing by alleging that "any one" of its members has suffered an injury in fact that would grant that member Article III standing to sue in their own name.[108] Such associational standing is unavailable, however, where "the nature of the claim and of the relief sought" make that member's involvement as a party "indispensable to proper resolution of the cause."[109] The Court held that the intervenors lacked associational standing to seek injunctive relief since none of their members had recently either submitted applications to build low-income housing in Penfield or had such an application denied.[110]

Warth also suggested limits on associational standing, stating that the doctrine's applicability "depends in substantial measure on the nature of the relief sought."[111] Prospective relief such

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[102] *Id.* at 493–94.

[103] *Id.* at 497.

[104] *Id.*

[105] *Warth*, 422 U.S. at 504–05.

[106] *Id.* at 504–07.

[107] *Id.* at 511 (emphasis added).

[108] *Id.* ("The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." (citing *Sierra Club*, 405 U.S. at 734–41)).

[109] *Id.*

[110] *Warth*, 422 U.S. at 516.

[111] *Id.* at 515.

as a declaratory judgment or injunction will generally "inure to the benefit" of the plaintiff group's members who suffered an injury in fact.[112] Damages, in contrast, may be inappropriate where a plaintiff group's members have not assigned their claims to the group, or those claims were neither "common to the entire membership, nor shared by all in equal degree."[113] The *Warth* Court declined to allow the plaintiff groups to invoke associational standing to pursue their members' damages claims because those claims required individualized proof.[114]

Following *Warth*, the Court continued to treat associational standing as settled law.[115] The break with traditional Article III and third-party standing requirements was complete.

C. The Modern Standard for Associational Standing

In the 1977 case *Hunt v. Washington State Apple Advertising Commission*,[116] the Court established the current test for associational standing, setting forth three requirements.[117] Those three requirements constitute the prerequisites for establishing associational standing today.

First, at least one of the association's members must have suffered a concrete, particularized injury giving that member Article III standing to sue in his own right.[118] This first element, the Court has explained, is constitutionally required, reflecting Article III's mandate that a federal lawsuit arise from a legally cognizable injury in fact.[119]

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112 *Id.*

113 *Id.*

114 *Id.* at 516.

115 *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). *Compare* Meek v. Pittenger, 421 U.S. 349, 355 n.5 (1975) (recognizing associational standing of entities to enforce the rights of their members to bring Establishment Clause, U.S. CONST. amend. I, claims under a theory of taxpayer standing), *overruled in part on other grounds*, Mitchell v. Helms, 530 U.S. 793, 835 (2000), *with* Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40, 45 (1976) (holding that the plaintiff organizations lacked standing to challenge the tax-exempt status of certain hospitals because none of their members could assert standing to bring such a claim).

116 432 U.S. 333 (1977).

117 *Id.* at 343; *accord* Int'l Union v. Brock, 477 U.S. 274, 290 (1986) ("reaffirm[ing] the principles we set out in *Hunt*"); *cf.* Lathers, *supra* note 43, at 123 (contending that the *Hunt* test "does not simply reiterate previous decisions" but rather identifies the requirements for associational standing "for the first time"). *Hunt* was also the first time the Court used the term "associational standing."

118 *Hunt*, 432 U.S. at 343.

119 *United Food*, 517 U.S. at 555.

This requirement is not onerous for a plaintiff organization that is eager to litigate. A group is not required to show that a significant portion of its membership has been harmed; injury to a single member suffices.[120] Nor must the injured person belong to the group at the time they suffered the injury. To the contrary, a group may seek out a person who has been injured, invite them to join, and even pay for their membership specifically be able to invoke associational standing.[121] Moreover, the injury need not even have been suffered by one of the organization's direct members. Rather, "[a]n organization with associations for members may rely on the standing of 'its members' members.'"[122] It is often fairly easy for an organization that wishes to pursue a particular claim to identify a member, or recruit a new member, who has suffered the requisite injury to satisfy this element.[123]

Second, the interest that the association seeks to vindicate through its lawsuit must be "germane" to the association's "purpose."[124] For example, a group devoted to preventing racism may assert associational standing based on racial discrimination experienced by one of its members.[125] In contrast, a random assault on a member unrelated to race would not provide a basis for

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[120] *Warth*, 422 U.S. at 511; Elliott, *supra* note 20, at 1352–53 ("The organization need not show that a significant proportion of its membership is affected; one member suffices."); *see, e.g.*, Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 186 (4th Cir. 2007) (recognizing associational standing to challenge a statute that affected only a single member of the plaintiff organization).

[121] *See, e.g.*, Freedom from Religion Found., Inc. v. Connellsville Area Sch. Dist., 127 F. Supp. 3d 283, 298 n.7 (W.D. Pa. 2015) ("The [defendant] points out that Doe 5's membership in [the plaintiff organization] was paid for by the organization and that she was recruited solely for the purpose of this lawsuit. The [defendant] has not, however, cited any authority suggesting that this was improper."); *see also* Burnham, *supra* note 17, at 168 ("The member may have even joined the organization for the sole purpose of providing it with standing.").

[122] Elliott, *supra* note 20, at 1353 (quoting 13A WRIGHT ET AL., *supra* note 42, § 3531.9.5). Indeed, "an organization may even be able to sue to help nonmembers if its members would have third-party standing to represent the interests of those nonmembers." *Id.*

[123] *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 812 (2009) ("An organization with a nationwide membership will often be able to satisfy this requirement, and will therefore retain prosecutorial discretion to pursue a number [of claims and defendants].").

[124] *Hunt*, 432 U.S. at 343; *see also, e.g.*, *Brock*, 477 U.S. at 286–88 (holding that a union had associational standing to challenge the Secretary of Labor's interpretation of the federal Trade Act on behalf of some of its members because the interests the union sought to promote were germane to its purpose).

[125] *Cf.* Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 668–69, 669 n.6 (1993) (recognizing associational standing for a trade association of general contractors challenging a set-aside program to benefit racial minorities).

associational standing. This germaneness requirement "raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute, and thus be in a position to serve as the defendant's natural adversary."[126] The Court has not specified, however, whether this element is constitutionally mandated or merely prudential.[127]

Third, the court must be able to adjudicate the plaintiff group's claims and grant the requested relief without the participation of the member(s) who provide the basis for the group's standing.[128] The Court has explained that this element promotes adversarial presentation of the issues, prevents damages claims from being litigated without necessary individualized evidence, and helps to ensure that an association's injured members actually receive any damages the associational plaintiff recovers on their behalf.[129] This requirement is purely prudential, however, promoting "administrative convenience and efficiency."[130]

This three-part test sharply diverges from typical Article III and third-party standing requirements. A plaintiff group asserting associational standing need not demonstrate that *it* has suffered a concrete, particularized injury,[131] which the Court has labeled the "irreducible constitutional minimum of standing."[132] Moreover, unlike in other third-party standing contexts,[133] a group may assert its members' rights regardless of whether any impediments prevent those members from filing their own lawsuits.

Associational standing also contravenes the primary justification for standing doctrine: separation of powers. According to the Court, the function of standing is to prevent the judiciary from

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126 *United Food*, 517 U.S. at 555–56.

127 *Id.* at 556 n.6 ("We therefore need not decide whether this prong is prudential in the sense that Congress may definitively declare that a particular relation is sufficient."). At least one commentator has suggested that this prong "appear[s] essentially prudential in nature." June, *supra* note 45, at 788. *But see* 13A WRIGHT ET AL., *supra* note 42, § 3531.9.5 ("The first two of the three elements established in the Apple Commission case have been anchored in Article III.").

128 *United Food*, 517 U.S. at 553 ("[N]either the claim asserted nor the relief requested [can] require[ ] the participation of individual members in the lawsuit." (quoting *Hunt*, 432 U.S. at 343 (quotation marks omitted)).

129 *Id.* at 556.

130 *Id.* at 557.

131 *Cf.* Spokeo, Inc. v. Robbins, 578 U.S. 330, 339 (2016) (requiring plaintiffs to show they have suffered injury in fact to establish Article III standing).

132 *Lujan*, 504 U.S. at 560.

133 *Kowalski*, 543 U.S. at 129–30 (setting out the general test for third-party standing).

usurping the role of the political branches.[134] Standing doctrine performs this function by preventing "concerned bystanders" from using litigation "simply as a 'vehicle for the vindication of value interests.'"[135] Associational standing contravenes this limitation by allowing an association that has not suffered any injury to itself to sue as a concerned bystander based on harm suffered by a third-party nonlitigant—one of its members. The fact that the member's injury happens to be germane to the association's purpose does not transform the association itself into an injured party.

At the same time, the associational standing test notably does not require a plaintiff organization to establish that it is particularly well-suited to bring its members' claims. For example, a plaintiff association does not need to demonstrate "a certain level of expertise with regard to the subject matter of the litigation" or have "a certain amount of resources" to devote to the case.[136] Likewise, the three-prong test does not expressly require a court to "ensur[e] that [the] association will adequately represent its members."[137] Thus, the Court's modern standard for associational standing is fairly easy for many organizations to meet and omits important considerations.

D. Further Expansions of the Doctrine

The Court has applied *Hunt*'s three-part test for associational standing in three remarkable ways. First, it has allowed zero-member organizations to assert associational standing[138]—a seeming contradiction in terms. Second, it has endorsed the assertion of associational standing by groups where membership is mandatory.[139] Finally, despite suggestions to the contrary in

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[134] Clapper v. Amnesty Int'l, USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.").

[135] *Hollingsworth*, 570 U.S. at 707 (quoting Diamond v. Charles, 476 U.S. 54, 62 (1986)).

[136] Retired Chi. Police Ass'n v. City of Chicago, 76 F.3d 856, 863 (7th Cir. 1996).

[137] Simone, *supra* note 17, at 175. That said, some circuits have stretched either the "germaneness" or "no class member participation required" elements to incorporate such considerations. *See Edmonds*, *supra* note 47, at 359–66.

[138] *Hunt*, 432 U.S. at 344–45.

[139] *See* Elliott, *supra* note 20, at 1373 ("[F]reedom to join or quit the membership of an association has not actually been considered necessary for associational standing.").

earlier cases, it has allowed Congress to authorize organizations to seek damages based on their members' injuries.[140]

Hunt itself adopted these first two developments. The plaintiff in *Hunt* was a state commission established to "protect[ ] and promot[e]" the State of Washington's apple industry.[141] The commission "engaged in advertising, market research and analysis, public education campaigns, and scientific research."[142] It did not have any "'members' . . . in the traditional trade association sense."[143] Nevertheless, the state's apple growers and dealers elected the commission's members, were the only people eligible to serve on the commission, and paid levies to finance the commission's activities.[144] There was no way, however, for an apple grower or dealer to quit or otherwise terminate their relationship with the commission.[145]

The commission challenged a North Carolina law prohibiting apple containers in the state from displaying any grades for apples other than the classifications established by the federal government. The Supreme Court unanimously held that the commission had associational standing to bring its lawsuit based on injuries suffered by Washington's apple growers and dealers. The Court explained that, although the commission did not have any official members, the apple growers and dealers "possess[ed] all of the indicia of membership in an organization."[146] Moreover, the commission "represent[ed] the State's growers and dealers and provide[d] the means by which they express[ed] their collective view and protect[ed] their collective interests."[147]

The Court deemed it irrelevant that the growers' and dealers' relationships with the commission were involuntary. It observed that union membership is often compulsory for laborers, as is membership in bar associations for attorneys, yet both organizations may assert standing based on their members' injuries.[148]

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[140] *United Food*, 517 U.S. at 556–57.

[141] *Hunt*, 432 U.S. at 337, 344.

[142] *Id.* at 344.

[143] *Id.*

[144] *Id.* at 344–45.

[145] *Id.* at 345.

[146] *Hunt*, 432 U.S. at 344.

[147] *Id.* at 345; *see also id.* at 344 (noting that the plaintiff group "serves a specialized segment of the State's economic community which is the primary beneficiary of its activities").

[148] *Id.* at 345:

> Membership in a union, or its equivalent, is often required. Likewise, membership in a bar association, which may also be an agency of the State, is often a

The *Hunt* Court concluded, "[I]t would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency."[149]

This ruling was particularly significant because many nonprofits "are not organized as membership organizations"[150] and do not allow constituents or beneficiaries to vote on their leadership.[151] The Court did not spell out the precise criteria, however, for "determining when a court may 'make up' members" to facilitate associational standing.[152] *Hunt* creates the possibility that organizations devoted to a particular cause may manufacture standing by deeming anyone who suffers an injury which the organization wishes to combat to be a "member." The decades since *Hunt* have borne out this fear to some degree. For example, courts have upheld associational standing for memberless environmental groups.[153] Similarly, the D.C. Circuit held that an airline passengers' advocacy group that lacked members could assert associational standing to promote the interests of its volunteers and people who signed up for its information distribution list.[154] And some circuits have concluded that nonprofits that contract with the state to provide services to disabled people have

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prerequisite to the practice of law. Yet in neither instance would it be reasonable to suggest that such an organization lacked standing to assert the claims of its constituents.

149 *Id.*

150 Magpantay, *supra* note 45, at 682.

151 Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 290 (2016) ("Most nonprofits do not have voting members, though, which means that control over the organization is vested exclusively in a self-perpetuating board.").

152 Burnham, *supra* note 17, at 165 n.49; *see also* Flyers Rights Educ. Fund, Inc. v. U.S. Dep't of Transp., 957 F.3d 1359, 1362 (D.C. Cir. 2020) (stating that it is "quite doubtful" that "the list of 'indicia' identified in *Hunt* was meant to be exhaustive").

153 *See, e.g.*, Friends of the Earth v. Chevron Chem. Co., 129 F.3d 826, 829 (5th Cir. 1997).

154 *Flyers Rights Educ. Fund*, 957 F.3d at 1362. At the same time, the D.C. Circuit has rejected associational standing claims by zero-member groups in other circumstances. For example, it has generally prohibited nonprofit law centers that are devoted to various causes but lack members from asserting associational standing to litigate on behalf of members of the public who share their goals. *See, e.g.*, Am. Legal Found. v. FCC, 808 F.2d 84, 87–88, 90 (D.C. Cir. 1987) (denying associational standing to a nonprofit legal group that billed itself as a "media watchdog" because "it does not appear from the record that ALF's 'supporters' play any role in selecting ALF's leadership, guiding ALF's activities, or financing those activities"); *cf.* Fund Democracy, LLC v. SEC, 278 F.3d 21, 25 (D.C. Cir. 2002) (denying associational standing to a nonprofit law center to litigate claims on behalf of another entity with which it had worked on previous projects). The D.C. Circuit has also held that a magazine's readers are not members for associational standing purposes. *See* Gettman v. DEA, 290 F.3d 430, 435 (D.C. Cir. 2002).

associational standing to sue state and local agencies on behalf of the disabled[155]—though other circuits have disagreed.[156] If the Court retains the doctrine of associational standing, then at a minimum its applicability should be limited to groups with traditional members, in which participation is voluntary and a person may terminate their membership—or the group's ability to litigate their claims—at any time.

The Court's other noteworthy expansion of associational standing was allowing an association to pursue its members' damages claims, at least where Congress has authorized such litigation. Language in *Warth* had suggested that associational standing was unavailable for damages claims because they would require the involvement of the particular group members who had been harmed.[157] In *United Food & Commercial Workers Union Local 751 v. Brown Group*,[158] however, the Court held that these

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[155] *See* Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1111 (9th Cir. 2003) (holding that a disability rights organization had associational standing, despite substantial differences from *Hunt*, because the people it served "possess many indicia of membership"); Doe v. Stincer, 175 F.3d 879, 886 (11th Cir. 1999) (finding associational standing for disability rights organization in part because "the constituents of the [plaintiff group] possess the means to influence the priorities and activities the [group] undertakes"), *overruled in part on other grounds*, Lewis v. Gov. of Ala., 944 F.3d 1287, 1305 n.19 (11th Cir. 2019); Disability Rights Wis., Inc. v. Walworth Cnty. Bd. of Supers., 522 F.3d 796, 803–04 (7th Cir. 2008) (holding disability rights group lacked associational standing, but only due to the lack of any injured individual); Heilman, *supra* note 44, at 261–77 (defending associational standing for such groups).

[156] *See* Mo. Prot. & Advoc. Servs. v. Carnahan, 499 F.3d 803, 810 (8th Cir. 2007) (refusing associational standing because "the 'constituents' of [the group] have no such [membership] relationship to the organization"); Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs., 19 F.3d 241, 244 (5th Cir. 1994) (rejecting associational standing because "most" of the organization's clients are "handicapped and disabled people" who are "unable to participate in and guide the organization's efforts"); *cf.* Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc., 675 F.3d 149, 159 (2d Cir. 2012) (holding that a contractor for a disability rights group lacked associational standing to assert the rights of disabled people).

[157] *Warth*, 422 U.S. at 515–16; *see, e.g.*, Telecomms. Res. & Action Ctr. *ex rel.* Checknoff v. Allnet Commun. Servs., 806 F.2d 1093, 1095 (D.C. Cir. 1986) ("[L]ower federal courts have consistently rejected association assertions of standing to seek monetary . . . relief on behalf of the organization's members."); *accord* Simone, *supra* note 17, at 185; Bradley & Young, *supra* note 16, at 68 ("The third requirement tends to rule out claims for damages relief, as individual members will generally need to appear as parties to establish their damages."); Roche, *supra* note 22, at 1499 & n.173 (collecting cases refusing to permit associational standing for damages claims); *cf.* MOORE, *supra* note 42, § 101.60[1][b] ("An association's action seeking damages running solely to its members would generally be barred, because it would require an individualized inquiry into the damages sustained by each member.").

[158] 517 U.S. 544 (1996).

concerns were only prudential rather than constitutional.[159] Consequently, Congress may allow an entity that has not suffered any legally cognizable harm to itself to sue for damages to its members, or pursue other claims that would otherwise require individual members' participation.[160] The Court acknowledged the risk that "damages recovered by [an] association will fail to find their way into the pockets of the members on whose behalf the injury is claimed," but concluded it is not of constitutional dimension.[161] The Court has yet to address the ensuing complications of this holding, including whether a plaintiff organization actually has any presumptive legal obligation to provide recovered funds to its injured members. Again, if the Court retains associational standing, it should reverse this ill-considered expansion of the doctrine.

II. THE (UNPERSUASIVE) RATIONALES FOR ASSOCIATIONAL STANDING

Courts and commentators have offered several rationales for associational standing.[162] These arguments are unpersuasive, however, and the Court's subsequent expansions of the doctrine have further undermined them.

A. Promoting Effective Litigation of Meritorious Claims

One major justification for associational standing is that it leads to more effective litigation of valid claims. This argument has two strands. First, associational standing allows groups to litigate important, meritorious claims that individual rightsholders would not pursue because of the cost or other burdens of litigation.[163] Professor Heather Elliott has argued, for example, that associations may "be the best or only litigants in certain situations."[164] Second, and closely related, associational standing leads

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[159] *Id.* at 556–57.

[160] *Id.* at 556.

[161] *Id.*

[162] *See, e.g.*, Int'l Union v. Brock, 477 U.S. 274, 289 (1986) (explaining that associational standing has "special features" which make it more "advantageous" than class actions "both to the individuals represented and to the judicial system as a whole").

[163] Zacharias, *supra* note 43, at 491; Magpantay, *supra* note 45, at 684–85; Heilman, *supra* note 44, at 252, 276 ("[I]ndividuals often face significant economic and other barriers to bringing suit."); *see also* Barrows v. Jackson, 346 U.S. 249, 257 (1953) (holding that the "rule denying standing to raise another's rights" is "only a rule of practice" and can be "outweighed by the need to protect the fundamental rights" of third parties).

[164] Elliott, *supra* note 20, at 1349, 1381.

to more effective litigation because associations may have more resources, legal experience, and substantive expertise than individual rightsholders.[165] As the Court explained, "[A]n association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital."[166] It may also be able to focus more of its institutional attention on a lawsuit than could an individual member.

These arguments are not well matched to associational standing doctrine, however. The test for establishing associational standing does not require the plaintiff association to demonstrate that it has relevant expertise, sufficient resources, or even its members' best interests at heart—or more generally that it would be able to litigate the case effectively.[167] Rather, the test focuses primarily on whether at least one member of the plaintiff group has suffered an injury germane to the group's purpose.[168]

These arguments also prove too much. If expansive resources, experience, and expertise justify associational standing, they would equally support standing for any well-resourced person who is interested in a legal issue. If an individual harmed by pollution is reluctant to sue because of the cost of litigation, a wealthy individual interested in protecting the environment could bring that case instead. Because of his resources, he likely would litigate the case more effectively than the harmed individual. The wealthy would have broader standing than the poor.

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165 *See* Lathers, *supra* note 43, at 122 n.14; Garrett, *Corporations*, *supra* note 43, at 139 (allowing "an association to stand in for the interests of its members" enables a form of "[a]ggregate litigation" which "can provide more effective representation, attract better resources for the litigation, and make it feasible to litigate individual injuries that would not be economically feasible to litigate individually"); Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 396, 424–25, 465 (2009) (arguing that the judiciary is the branch most accessible to the underprivileged, and associational standing allows groups to litigate on their behalf and offer courts "competent presentation of the issues"); Petasis, *supra* note 43, at 1556 (arguing that associational standing "avoid[s] multiple nonexpert plaintiffs bringing almost indistinguishable individual suits by providing the ability to litigate group interests as a single, expert party with preexisting resources"); Magpantay, *supra* note 45, at 682; Zacharias, *supra* 43, at 485; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983) ("Often the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no 'concrete injury in fact' whatever."); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044–45 (1968).

166 *Brock*, 477 U.S. at 289.

167 *See supra* notes 136–37 and accompanying text.

168 *See supra* notes 122–26 and accompanying text.

Moreover, these arguments do not establish that associational standing is necessary. Instead of invoking associational standing to sue in its own name, an organization could facilitate the effective litigation of its members' claims in virtually the same manner by helping those members bring either individual lawsuits or class actions.[169] The organization could provide counsel, assist with overall strategy, supply expert witnesses, and cover the cost of the litigation to the same extent as if it were relying on associational standing. That is precisely the approach taken in *District of Columbia v. Heller*[170] by the Cato Institute in mounting a successful challenge to the District of Columbia's gun laws.[171]

To be sure, supporting an individual's lawsuit is not a perfect substitute for associational standing. An association may prefer to sue in its own name to retain ultimate decisionmaking authority over the case, rather than vesting such power in particular members. But an association could still exercise substantial control over a private suit through the contract establishing the funding and support relationship between the association and member plaintiffs.

Similarly, a rightsholder may prefer to have an organization litigate their claims through associational standing to maintain some level of anonymity. Even in associational standing cases, however, significant amounts of information about the member whose injury the plaintiff association relies upon becomes public. Because the rightsholder's claims are the basis for the association's suit, the association's complaint often must include allegations about the rightsholder. That person will also be required to disclose information about the harm they have suffered and other

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169 *See* Elliott, *supra* note 20, at 1393–94 ("As a practical matter, many lawsuits brought by individuals in the wake of a *Hunt* abolition would in reality be pursued by the associations. . . . [These associations would] recruit members to serve as plaintiffs, much as class action attorneys do now."); Bruhl, *supra* note 48, at 538 n.255 ("Eliminating associational standing would not be very disruptive because of the availability of suits brought by affected members (who could be represented by the organization as counsel) and class actions."); *see also* Bradley & Young, *supra* note 16, at 70 ("It would probably be easy, in most cases, for a large advocacy organization to find some member willing to serve and participate as a named plaintiff.").

170 554 U.S. 570 (2008).

171 *See The Right to Keep and Bear Arms: 10 Years after* Heller, CATO INST., https://perma.cc/VV4Z-CX6R (recounting how the Cato Institute sought out and funded Dick Heller to be a plaintiff to challenge the District of Columbia's prohibition on possessing firearms at home).

related issues in discovery and sometimes even testify in court.[172] Moreover, in the rare case where serving as a plaintiff rather than suing through an organization may create a risk of harm for a group member, the court could permit them to proceed anonymously.[173] Thus, associational standing offers only a modicum of additional privacy for rightsholders, and does not substantially enhance an organization's ability to provide counsel, funding, or expertise in support of its members' claims.

B. Voluntary Consent to Litigation

The other major argument for associational standing is that, by joining an organization, a person intends to help further the group's values, goals, principles, or beliefs,[174] and perhaps even implicitly consents to having it litigate any of that person's legal claims which relate to the group's purposes.[175] As the Court

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[172] Elliott, *supra* note 20, at 1353 ("[O]rganizations ordinarily file affidavits from individuals who affirm that they are members of the organization and testify to facts that they believe meet the standing test." (citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181–83 (2000)).

[173] *See supra* note 40.

[174] *See, e.g.*, Sedler, *supra* note 43, at 652 ("Since the association is the collective embodiment of the individual members, it is not unreasonable for the members to expect the organization to protect those rights which derive from membership."); Floyd, *supra* note 41, at 910; *see also* Feldman, *supra* note 45, at 754 (explaining that associational standing reflects the fact that "in forming associations, members identify exactly the sort of shared interests collective standing is premised upon").

[175] *See, e.g.*, MOORE, *supra* note 42, § 101.60[1][a], [c]:

> Cases in which associations are permitted to sue to redress wrongs to their members turn on the fiction that an individual member authorizes the group to sue on his or her behalf . . . . [T]he primary reason people join an organization is to create an effective vehicle for vindicating interests that they share with others.

See also Rohr, *supra* note 43, at 432 (describing how groups represent members "generally . . . with respect to the issues or concerns that led to [the] organization"); *see also* Lathers, *supra* note 43, at 122 n.14 ("Individuals unite into organizations to litigate collectively and they, therefore, expect the organization to protect their legal interests and the courts to recognize the representative function of the organization.").

One variation of this argument is that an association is simply an aggregation of its members, so its members' rights can therefore be invoked by the group. *See, e.g.*, *Brock*, 477 U.S. at 297 (Powell, J., dissenting) ("[T]he concept of organizational representation is based on a theoretical identity between the organization and its members . . . ."); Simone, *supra* note 17, at 174–75 ("Under this 'aggregation theory' an association assumes its members' injuries and acquires the personal stake in the litigation required by [A]rticle III."). This argument appears to assume even more than the implied consent or member expectation theories discussed in the main text above. It overlooks the fact that "associations function as distinct entities with interests separate from their individual members." Simone, *supra* note 17, at 174–75. Moreover, this aggregation theory is inconsistent with the Court's recognition of "organizational standing" based on injury in fact to the organization itself. *See supra* note 51; *see also* Burnham, *supra* note 17, at 163 n.45.

declared, "the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."[176]

The fact that a person typically joins an organization to advance a particular interest or cause, however, does not imply that the person necessarily wishes for the organization to assert legal claims on their behalf. People join groups for a wide range of reasons. A member may wish to support the organization's goals by providing donations, volunteering at events, or helping with its administration. But joining an organization does not constitute an agreement to allow the organization to use that person's resources (beyond any membership fee) to further its goals. A person who joins an environmental group, for example, does not presumptively consent to letting the group fund litigation from his bank account, have members borrow his car for group-related purposes, or host meetings in his living room. That logic extends to pursuing legal claims. Most people are unlikely to regard joining a group, even litigious public interest groups such as the Sierra Club or NAACP, as automatically empowering the group to litigate their causes of action.[177]

This rationale also assumes that a member has voluntarily chosen to associate with an organization.[178] But *Hunt* extended associational standing to entities that do not have any members or in which membership is compulsory.[179] A person who never

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[176] *Brock*, 477 U.S. at 290.

[177] *See* Zacharias, *supra* note 43, at 488 (explaining that the willingness of a group's members to have the group "pursue idealistic goals and to sue in its own name does not necessarily imply that they are satisfied to have it assert their personal rights"); *cf.* Bradley & Young, *supra* note 16, at 69 ("It seems a stretch to conclude categorically that organizations always have a sufficiently 'special' or 'close' relationship to their members to represent their interests adequately."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106 (1972) (discussing value of nonmonetary remedies).

[178] Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1333 (2016) ("[I]t is assumed that, in order to survive, an organization must effectively represent the interests of a substantial proportion of its members, and that any member who objects strenuously to the representation afforded can resign." (quoting Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1743 (1975))); Coplan, *supra* note 44, at 79 ("The ability of an organization's constituents to join or quit the group would appear to be a very effective means of ensuring the responsiveness of the organization's management—and also ensuring the concrete adverseness required for organizational standing" (quotation marks omitted)); *see also* Zacharias, *supra* note 43, at 490.

[179] *See supra* notes 138–56 and accompanying text.

decided to join a particular group or was legally compelled to join cannot be presumed to support the group's goals, much less to have acquiesced to the group's assertion of their legal claims.

Even if members generally wish for the groups they join to litigate claims on their behalf, consent is generally not a basis for allowing an uninjured person to litigate someone else's rights.[180] To the contrary, courts typically allow people to seek redress only for harm to themselves and enforce their own rights unless there are substantial impediments to their doing so.[181] Because a group asserting associational standing can usually choose to fund a member's litigation instead—as well as provide counsel, strategic guidance, expert witnesses, and other support for such a lawsuit—this requirement will seldom be met in associational standing cases. In short, mere membership in a group does not appear to reflect implicit consent for the group to litigate members' rights. Even assuming that such an intention or consent existed, it is an insufficient basis for allowing associational standing given the readily available alternatives.

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In sum, the justifications for associational standing neither are persuasive on their own terms, nor support the Court's later expansions of the doctrine.

III. CIRCUMVENTING RULE 23'S REQUIREMENTS FOR CLASS ACTIONS

One of the most serious objections to associational standing is that it is in tension with Federal Rule of Civil Procedure 23, which authorizes class actions by similarly situated rightsholders seeking relief.[182] The Rule sets out substantive requirements that a plaintiff must satisfy to maintain a class action, as well as procedural requirements for establishing the class,[183] representing

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[180] *See* Hollingsworth v. Perry, 570 U.S. 693, 710 (2013) (questioning whether "mere authorization to represent a third party's interest is sufficient to confer Article III standing on private parties with no injury of their own").

[181] *Warth*, 422 U.S. at 498 ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."); Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979); Singleton v. Wulff, 428 U.S. 106, 113–14 (1976) (plurality opinion).

[182] FED. R. CIV. P. 23.

[183] *See, e.g.*, *id.* 23(e) (setting forth certification and notice requirements).

the class,[184] and settling the action.[185] Given these extensive restrictions, Rule 23 would appear to provide the presumptively exclusive means for maintaining collective litigation, absent express congressional authorization of an alternate mechanism.[186] Associational standing, however, effectively allows a plaintiff association to present a court with a preformed class that neither satisfies Rule 23's substantive requirements for a class action nor is certified through the Rule's procedures.[187] Indeed, some commentators defend associational standing precisely because it allows courts to avoid Rule 23, which they contend is unnecessarily burdensome.[188]

The Supreme Court has concluded that Rule 23 does not preclude associational standing.[189] To the contrary, in *International Union v. Brock*,[190] the Court held that associational standing can be superior to Rule 23 as a vehicle for collective adjudication for two main reasons. First, *Brock* explained that an association can often draw upon a "pre-existing reservoir of expertise and capital" to assist with litigation.[191] As explained earlier, the standard the *Hunt* Court established for associational standing does not require a group to demonstrate that it possesses any such "expertise and capital."[192] And a group may share

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184 *Id.* 23(d), (h).

185 *Id.* 23(e).

186 See, e.g., 29 U.S.C. § 216(b) (authorizing opt-in collective actions outside of Rule 23 for certain suits under the Fair Labor Standards Act); *see also Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) ("Rule 23 actions are fundamentally different from collective actions under the FLSA.").

187 *See* Bruhl, *supra* note 48, at 538 n.255 ("[O]ne could challenge the correctness of associational standing as well, such as because it has the effect of circumventing Rule 23 or other legal requirements for establishing representational relationships."); *see also* Garrett, *Aggregation*, *supra* note 43, at 637 (recognizing that associational standing and class actions are both forms of aggregate litigation, but that the Court's test for associational standing is "far more relaxed" than Rule 23).

188 *See, e.g.*, Petasis, *supra* note 43, at 1554–55 (arguing that associational standing lets "plaintiffs avoid dealing with the complexity of class certification requirements" and Rule 23's restrictions on class settlements); *see also* June, *supra* note 45, at 795 ("The test of 'adequate representation' under Federal Rule of Procedure 23, although perhaps appropriate for class actions where each plaintiff's right to recover money damages is at stake, is too restrictive for the somewhat less-demanding needs of citizen suits."); Roche, *supra* note 22, at 1476 (arguing that mass tort victims should form a voluntary association to sue on their behalf, asserting associational standing, specifically to avoid seeking class certification under Rule 23).

189 Int'l Union v. Brock, 477 U.S 274, 289–90 (1986).

190 477 U.S. 274 (1986).

191 *Id.* at 289.

192 *See supra* notes 136–37 and accompanying text.

its expertise and capital with its members even if they sue in their own names or through a class action.

Second, *Brock* pointed out that people typically join organizations "to create an effective vehicle for vindicating interests that they share with others."[193] Such reasoning does not apply, of course, to zero-member organizations that *Hunt* permitted to assert associational standing.[194] And it is far from clear that most people view joining an organization as consent to having that group litigate their rights on their behalf.[195]

Beyond *Brock*'s unpersuasive rationales for associational standing, the case fails to grapple with Rule 23's text and purpose. Rule 23 balances the benefits of collective litigation with the need to protect the rights of putative class members.[196] The Rule's drafters spent countless hours analyzing how its requirements should be framed.[197] The best understanding of Rule 23's detailed scheme is that it constitutes the presumptively exclusive means for collective litigation in federal court. The Supreme Court itself has elsewhere held that "courts may not 'recognize . . . a common-law kind of class action' or 'create *de facto* class actions at will.'"[198] Yet that is exactly what associational standing empowers courts to do.

The conflict between associational standing and Rule 23 is not merely a formalistic concern. Collective litigation raises a number of thorny questions. Allowing plaintiffs to assert associational standing as an alternative to class certification unnecessary creates several problems that Rule 23 would otherwise avoid or mitigate. Even for challenges that persist in class-action cases, recognizing associational standing unnecessarily replicates those unresolved issues in a new context. This Part explores these various issues.

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193 *Brock*, 477 U.S. at 290.

194 *See supra* Part I.D.

195 *See supra* Part II.B.

196 *See generally* 7A WRIGHT ET AL., *supra* note 42, § 1751 (describing how Rule 23 was adopted to balance the benefits and pitfalls of classwide litigation); *see also* Taylor v. Sturgell, 553 U.S. 880, 901 (2008) ("[T]he procedural protections prescribed in . . . Rule 23 [are] grounded in due process.").

197 7A WRIGHT ET AL., *supra* note 42, §§ 1752–1753.1 (describing the various studies, proposals, and successful amendments to Rule 23 from 1938 to 2018).

198 United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1539 (2018) (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008)); *see also* Smith v. Bayer Corp., 564 U.S. 299, 315 (2011) ("Federal Rule 23 determines what is and is not a class action in federal court . . . .").

A. The Problem of Semi-Classwide Litigation and Nonmember Rightsholders

One potential objection to associational standing is that it undermines judicial economy. Litigation falls into two general categories: individualized and aggregate. Individualized suits are those brought on behalf of a single rightsholder or a small number of rightsholders. Individualized litigation has various advantages. It limits the complexity of the case, narrows the range of relevant facts, and reduces the burdens of discovery. Moreover, both the court and the litigants can readily determine the parties to whom the court's final judgment applies.

Individualized litigation also tends to improve decisionmaking across cases. A core virtue of our common law system is that courts can develop the law over a series of cases as they confront new factual situations.[199] Individualized litigation of cases with varying fact patterns provides the sequential opportunities necessary for courts to consider how the law should grow.[200] The assignment of such cases to different judges helps to produce a range of perspectives on how to address the underlying issues.

Aggregate litigation also has advantages. Classwide adjudication conserves judicial resources by allowing a single case to determine the rights of all rightsholders throughout the jurisdiction.[201] It concomitantly ensures that rightsholders within that jurisdiction are treated equally, including indigent and other marginalized people who may otherwise be unable to litigate their rights. Moreover, it often is relatively easy to determine whether a particular rightsholder falls within the plaintiff class and is therefore covered by the court's judgment.

Associational standing falls between these two extremes of individualized and classwide litigation, offering the advantages

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[199] Donald L. Doernberg, *Betraying the Constitution*, 74 BAYLOR L. REV. 323, 373 (2022) ("The genius of the common law is that it is dynamic, not static."); FREDERICK POLLOCK, THE GENIUS OF THE COMMON LAW 110 (1912) (praising the common law for being "not a museum of antiquities, but a living and active law").

[200] Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 906 (2006) ("One of the arguments for case-based lawmaking has always been the allegedly self-correcting character of the common law."); *see also* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1153 (1994) (describing the process by which doctrine evolves).

[201] Classes can be district-, circuit-, or even nationwide. *See* Califano v. Yamasaki, 442 U.S. 682, 706 (1979) (approving certification of nationwide classes). *But see* Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 653–56 (2017) (arguing that courts should generally certify district- or circuit-wide classes in constitutional challenges and other public law cases, rather than nationwide classes).

of neither. On the one hand, associational standing is partly aggregate because it permits the adjudication of the rights of numerous similarly situated members of the plaintiff organization. From this perspective, associational standing loses the advantages of individualized litigation.

On the other hand, associational standing is incompletely aggregate because the suit is limited to the plaintiff association's members. Excluding similarly situated rightsholders who are not members of the plaintiff group leads to inconsistent enforcement of people's rights. It also undermines judicial economy because nonmember rightsholders would need to file their own suits raising the same issues to obtain relief. Moreover, associational standing adjudicates the claims of only those people who were the association's members at a particular point in time—either when the complaint was filed or when the judgment was issued—and it can be difficult (or at least costly) to determine who was a member at that time. In short, associational standing is a type of intermediate-scope collective litigation that complicates a case without offering the benefits of classwide adjudication under Rule 23.

B. Adequacy of Representation and Intra-Associational Conflicts

Rule 23's class certification process requires the court to ensure that the class representative "will fairly and adequately protect the interests of the class."[202] This adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent."[203] The test for associational standing, in contrast, does not require a court to assess or prevent any such conflicts of interest within the plaintiff group[204]—though some circuits have held that an entity cannot assert associational standing when a conflict exists among its members regarding the subject of a lawsuit.[205]

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[202] FED. R. CIV. P. 23(a)(4).

[203] Amchem Prods. v. Windsor, 521 U.S. 591, 625 (1997) (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

[204] *See* Elliott, *supra* note 20, at 1355 ("[C]onflicts within the membership over litigation are often not fatal to organizational standing.").

[205] *See* Sea Shore Corp. v. Sullivan, 158 F.3d 51, 56 n.7 (1st Cir. 1998) (discussing circuit split); Ret. Chi. Police Ass'n v. City of Chicago, 7 F.3d 584, 603–07 (7th Cir. 1993) (same); Auto. Body Parts Ass'n v. Ford Global Techs., LLC, 2014 WL 4652123, at *9 (E.D. Tex. Sept. 17, 2014) (same). One commentator has argued that the Court should incorporate a fourth prong into the *Hunt* test to ensure the absence of such conflicts of interest.

Conflicts of interest among an organization's members can interfere with the organization's ability to represent its members' rights in an associational standing suit.[206] A challenged legal provision might impact members of an organization in different ways; a provision that hurts some members may not affect others,[207] or could even benefit certain members.[208] Consider *Brock*. There, the Court allowed a union to assert associational standing to challenge the Secretary of Labor's interpretation of the federal Trade Act.[209] Although the interpretation did not apply to all members of the union and had actually benefitted some of them,[210] the Court held that the union could assert associational standing because at least some members were harmed by it.[211]

The Court upheld associational standing despite similar conflicts in *Northeastern Florida Chapter of the Ass'n of General Contractors v. Jacksonville*.[212] There, an association of contractors in Jacksonville challenged the validity of a municipal ordinance which set aside certain contracts for minority-owned businesses.[213] The group argued that ordinance harmed members who did not qualify for the set-aside program. In upholding associational standing, the Court stated that "most" of the group's members did not qualify for the set-aside—thereby implicitly acknowledging that at least some members did qualify.[214] To make matters worse, the Court upheld the preliminary injunction completely prohibiting the city from implementing the challenged

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See Lathers, *supra* note 43, at 135; *cf.* Garrett, *Corporations*, *supra* note 43, at 159 ("What the Supreme Court has not carefully defined in associational standing case law is what threshold of adequacy permits the association to assert an injury on behalf of its constituents, members, or other individuals.").

[206] *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 505–11 (1976).

[207] Lathers, *supra* note 43, at 135 ("The vast majority of the members in the organization may not be interested in the litigation at all; it may be that only the organizers wish to further their own interests without a true concern for the rest of the membership.").

[208] Simone, *supra* note 17, at 180 ("An adequate representation problem also occurs when an association represents a diverse membership which has varied interests in the litigation. Groups within the membership may oppose the position taken by their association in a lawsuit.").

[209] *Brock*, 477 U.S. at 276–77.

[210] *Id.*

[211] *Id.* at 286.

[212] 508 U.S. 656 (1993).

[213] *Id.* at 658.

[214] *Id.* at 659, 668–69.

ordinance,[215] despite the fact that some of the plaintiff association's members apparently benefitted from it.

Conflicts may also exist between members and the association itself.[216] For example, an association may have an interest in filing litigation in order to garner publicity or bolster fundraising, even if it lacks the resources or interest to effectively litigate the case and ultimately prevail.[217] Organizations also may face conflicts between their major donors' preferences and the best interests of the members whose rights they are invoking in a lawsuit.[218] Likewise, a group's long-term or policy goals may differ from a member's immediate legal interests.[219]

The Court has not been receptive to concerns that an organization's interests might conflict with those of its members. *Brock* minimized the possibility that such conflicts would arise, declaring that the "very forces that cause individuals to band together in an association . . . provide some guarantee that the association will work to promote their interests."[220] Elsewhere in the opinion, however, the Court speculated that if an organization were not able to "represent adequately the interests of all [its] injured members," a judgment against the organization "might not preclude subsequent claims by the association's members."[221] Thus, rather than ensuring ex ante that a group's rightsholders will be adequately represented, the Court relegated any assessment of whether conflicts existed to future litigation, to determine the res judicata effect of any judgment against the group on its members.

This arrangement is counterintuitive and wasteful. Both judicial economy and fairness to the defendant should bar a court from allowing a plaintiff group to assert its members' causes of

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215 *Id.* at 659, 669.

216 Garrett, *Corporations*, *supra* note 43, at 159 ("[A]n association may diverge from the interests of its members."); *see also Button*, 371 U.S. at 462 (Harlan, J., dissenting) ("[I]t is plainly too large a jump to conclude that whenever individuals are engaged in litigation involving claims that the organization promotes, there cannot be any significant difference between the interests of the individual and those of the group."); Simone, *supra* note 17, at 175 ("[A]n association may be an ineffective representative of its members."). As Professor Miriam Seifter has explained, "Interest groups fall along a varied spectrum of governance models, with different degrees of divergence between the preferences of the principals (group members) and the actions of the agents (group leaders)." Seifter, *supra* note 178, at 1305.

217 *See Brock*, 477 U.S. at 297 (Powell, J., dissenting).

218 John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 304 (2010).

219 *See Button*, 371 U.S. at 462 (Harlan, J., dissenting).

220 *Brock*, 477 U.S. at 290.

221 *Id.*

action when those members might not be bound by the court's judgment and could instead bring their own subsequent actions for the same claims. Allowing such litigation to proceed can also harm the group's members themselves. Even where res judicata does not bar them from subsequently pursuing their own claims, rulings or findings made in the organization's lawsuit could easily impact any such subsequent actions. The judge in a later case, for example, may be inclined to simply find the same facts and adopt the same legal conclusions as the judge in the earlier action precisely because both matters involve the same causes of action being pursued on behalf of the same rightsholders.

Rule 23 avoids these problems by expressly prohibiting courts from certifying a class of rightsholders where conflicts of interest exist among the members. When such conflicts threaten to interfere with the zealous presentation of rightsholders' claims and arguments, the proper solution is to prevent such flawed litigation from occurring in the first place,[222] rather than simply ignoring the court's initial judgment and granting rightsholders a do-over.

C. Litigation Control Problems

The plaintiff in a lawsuit has ultimate control over the litigation, including decisions concerning the relief to seek and settlement or termination of the action. In a suit resting on associational standing, the plaintiff is the uninjured organization, rather than the actually aggrieved members. The organization, rather than the rightsholder members, thus dictates the litigation strategy and makes crucial decisions such as whether to settle and appeal.[223] As discussed earlier,[224] the organization's short- or long-term priorities may differ from those of individual rightsholders.

Moreover, the plaintiffs' attorneys in associational standing cases represent the association instead of the members whose rights are actually at stake. Consequently, the attorneys' fiduciary and other ethical duties run toward the organization as their client, rather than the members whose rights were actually

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[222] AM. L. INST., PRINCIPLES OF AGGREGATE LITIGATION § 1.02 reporters' notes cmt. b(1)(B) (suggesting that associational standing suits require "protection against interest conflicts").

[223] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023).

[224] *See supra* Part II.B.

violated and whose causes of action the organization is pursuing.[225] Of course, if rightsholders are dissatisfied with the organization's legal representation, they presumably remain free to intervene in the lawsuit to pursue their claims directly.[226] But doing so introduces extra costs and complexity.

Class actions avoid these problems to some degree. In such cases, the rightsholders themselves are the plaintiffs and may exercise at least a degree of control over class counsel. Moreover, the class counsel's duties run toward all class members—even if an outside organization is paying the legal fees.[227] Of course, class actions do not eliminate all potential for intraclass conflicts since unnamed class members cannot exercise control over the litigation or class counsel.[228] Principal-agent problems and other conflicts between attorneys and clients also arise frequently in class litigation.[229] But associational standing exacerbates these problems by introducing a new, unnecessary entity into the attorney-client relationship that has neither been injured nor seeks to assert its own rights.

D. Lack of Member Consent

Beyond a rightsholder's lack of control over litigation brought through associational standing, an organization may file cases resting on associational standing without its member rightsholders' consent or even knowledge. The Court does not require an entity seeking to assert associational standing to obtain members' consent to assert their rights in court. Indeed, it does not even

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[225] Commissioner v. Banks, 543 U.S. 426, 436 (2005) ("The attorney is an agent who is dutybound to act only in the interests of the principal.").

[226] Moreover, a member might be able to withdraw from the organization to prevent the organization from continuing to pursue their claims—though withdrawal is not always an option. *See supra* note 148 and accompanying text.

[227] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless . . . there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.").

[228] Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 68 (2003) ("[A]s a practical matter, class counsel defines the group membership, manages the litigation, makes unilateral strategic decisions, oversees the accrual of fees and costs, and shapes the outcome of a mysterious process class members neither launched nor agreed to resolve."); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 601–02 (2015) (explaining that unnamed class members "lack any practical control over the conduct of the litigation").

[229] Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 TEX. L. REV. 385, 395–96 (1997); *see also* Jay Tidmarsh, *Rethinking the Adequacy of Representation*, 87 TEX. L. REV. 1137, 1174 (2009).

require the organization to notify members of the suit.[230] In at least some circumstances, members could be completely unaware that their rights are being invoked or litigated.[231]

Of course, a rightsholder who becomes aware of ongoing litigation and disapproves of it may be able to quit the plaintiff organization, eliminating its continued ability to assert that person's rights.[232] But that option is not always available—for example, in associations with mandatory membership and zero-member organizations that claim the ability to pursue the rights of nonmember constituents.[233] Alternatively, a member may seek to intervene in the organization's lawsuit, either to assert their own claims or dismiss claims that rest on their injury.[234] But a member cannot take such actions unless they know about the suit.

Class actions ameliorate these concerns to some degree. For damages claims, class counsel must provide putative class members with notice and an opportunity to opt out of the class.[235] Fewer protections are mandated in lawsuits that solely seek injunctions or declaratory relief. Courts have discretion whether to require that putative class members be given notice and an opportunity to opt out.[236] Thus, rightsholders are not necessarily guaranteed an opportunity to withdraw from class actions challenging the constitutionality or validity of legal provisions.[237] Even so, the ability of the court to choose to require plaintiff's

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[230] *See supra* Part I.C.

[231] If an organization has numerous rightsholder members, the defendant might not seek discovery from all of them.

[232] Zacharias, *supra* note 43, at 490.

[233] *See supra* Part I.D.

[234] *See* FED. R. CIV. P. 24(a).

[235] *See* FED. R. CIV. P. 23(b)(3), (c)(2)(B); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011) ("In the context of a class action predominantly for damages . . . absence of notice and opt out violates due process."); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (holding that, under Rule 23(c)(2), "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985) ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law . . . [t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation . . . .").

[236] FED. R. CIV. P. 23(c)(2) ("For any class certified under Rule 23(b)(1) or (b)(2), the court may direct notice to the class.").

[237] Professor Ryan Williams has explained why, when a plaintiff class sues to enforce "divisible" rights, it may violate due process to include rightsholders in the class without offering them notice and an opportunity to opt out. *See* Williams, *supra* note 228, at 646–53.

counsel to notify putative class members provides more protection than is available in associational standing actions.

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Viewed in light of Rule 23, associational standing creates both formalistic and pragmatic problems. Formalistically, associational standing appears to violate Rule 23. That Rule's comprehensive substantive and procedural scheme suggests that class actions are the presumptively exclusive means for maintaining collective litigation in federal court, unless Congress dictates otherwise. At the very least, the Rule's protections should presumptively extend to other types of collective federal litigation, such as associational standing suits.

Pragmatically, associational standing is less economical than class actions because it resolves the claims of only some—not necessarily all—similarly situated rightsholders within a jurisdiction. Associational standing cases offer rightsholders less protection against conflicts of interest than class actions, give rightsholders less control over the litigation, and may even be brought without a rightsholder's knowledge or consent. Although class actions are imperfect mechanisms for collective litigation, Rule 23 at least seeks to ameliorate many of the attendant costs and burdens. Associational standing, in contrast, does not.

IV. OTHER PROBLEMS WITH ASSOCIATIONAL STANDING

Even beyond its conflicts with both general standing doctrine and class action rules, associational standing raises a range of other difficulties that have largely been overlooked in both precedent and academic analysis. The doctrine is in tension with Rule 17's real-party-in-interest requirement, triggers res judicata problems, and has created a backdoor through which courts have entered inappropriate, nationwide defendant-oriented injunctions. Associational standing also leads to unnecessary disputes over plaintiffs' entitlement to attorneys' fees under the Equal Access to Justice Act and is inconsistent with traditional equitable practice. This Part delves into each of these objections in turn.

A. Rule 17's Real-Party-in-Interest Requirement

A fundamental difficulty with associational standing is that it conflicts with Federal Rule of Civil Procedure 17(a)(1).[238] Rule 17(a)(1) states, "An action must be prosecuted in the name of the real party in interest."[239] A real party in interest is the person who, "under governing *substantive law*, is entitled to enforce the right asserted."[240] According to the accompanying Advisory Committee Note, the Rule's purposes are to "protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata."[241] The concept of a real party in interest is related to standing, but the fact a person has standing does not necessarily mean they are a real party in interest.[242] The former turns on whether the plaintiff asserts a cognizable injury in fact; the latter on whether substantive law entitles the plaintiff to relief.

Rule 17(a)(1) establishes numerous exceptions to the real-party-in-interest requirement, such as for executors, guardians, and trustees.[243] But it contains no language allowing uninjured associations to sue to enforce the rights of their members or other constituents.[244] None of the Supreme Court's precedents dealing with associational standing attempts to reconcile that doctrine with Rule 17(a). In *Smith v. Board of Education*,[245] then-Judge Harry Blackmun wrote for the Eighth Circuit that an association asserting its members' rights could qualify as a real party in interest under Rule 17, but the plaintiff group in that case had also suffered its own injury in fact as an entity "through diminution in membership and financial support."[246]

To the extent *Smith* purported to recognize a general exception to Rule 17 for uninjured plaintiff groups asserting

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238 FED. R. CIV. P. 17(a)(1).

239 *Id.*

240 Iowa Pub. Serv. Co. v. Med. Bow Coal Co., 556 F.2d 400, 404 (8th Cir. 1977) (emphasis added) (quoting 6 WRIGHT ET AL., *supra* note 42, §§ 1543–1544). For state law claims, state law determines whether a particular person qualifies as a real party in interest. *Id.*

241 FED. R. CIV. P. 17 advisory committee's note to 1966 amendment.

242 4 MOORE, *supra* note 42, § 17.10[1] ("[N]ot every party who meets standing requirements is a real party in interest."); *see also* 6 WRIGHT ET AL., *supra* note 42, § 1542 ("[P]laintiff must both be the real party in interest and have standing.").

243 FED. R. CIV. P. 17(a)(1)(A)–(G).

244 *See id.*

245 363 F.2d 770 (8th Cir. 1966).

246 *Id.* at 777–78.

associational standing, the court failed to reconcile that conclusion with Rule 17's failure to authorize representative litigation by them. Wright and Miller's federal procedure treatise points to *Smith* to conclude that, "at least when constitutional issues are involved, the often-rigid real-party-in-interest rule will be treated flexibly" and may be satisfied through associational standing.[247] But, like *Smith*, the treatise offers no explanation for the glaring inconsistency with Rule 17. As the treatise itself recognizes, in general, "[a]bsent statutory authority . . . an association is not the appropriate party for bringing suit to assert the personal rights of its members."[248]

Associational standing doctrine similarly fails to address Rule 17's procedure for handing suits filed by someone other than the real party in interest. In such cases, the court must grant the plaintiff "a reasonable time" to have the real party in interest "ratify, join, or be substituted into the action."[249] After any of those actions occur, the case continues "as if it had been originally commenced by the real party in interest."[250] Accordingly, while Rule 17(a) would not require dismissal of a case brought by a group claiming associational standing, one or more group members whose rights were at issue would have to participate, thereby obviating the need to have an uninjured group serve as a plaintiff in the first place.

B. Asymmetric Preclusion

Associational standing raises challenging questions concerning the preclusive scope of courts' judgments. Res judicata doctrines prevent relitigation of claims and issues that were resolved in an earlier case[251] to promote efficiency and preserve judicial resources.[252] Res judicata typically applies only against a party to a previous action, partly because of due process concerns. But preclusion can sometimes extend to people who were not involved in

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247 6 WRIGHT ET AL., *supra* note 42, § 1552.

248 *Id.*

249 FED. R. CIV. P. 17(a)(3).

250 *Id.*

251 Brownback v. King, 141 S. Ct. 740, 747 n.3 (2021) (describing claim preclusion and issue preclusion).

252 Davis v. City of Chicago, 53 F.3d 801, 803 (7th Cir. 1995) ("Preclusion serves a vital purpose, inducing people to combine claims and theories that are efficiently litigated jointly, and preventing the waste of judicial resources (and the adverse parties' time) that sequential suits create.").

the earlier case when their interests were sufficiently represented in that action.[253]

The Supreme Court has not resolved whether a judgment in a case brought based on associational standing operates as res judicata against the organization's members, and its opinions on related matters are inconsistent. On the one hand, in *Brock*, the Court strongly implied that a judgment in a case brought based on associational standing is binding on both the plaintiff group as well as its members, except for those who can show they were not adequately represented in that prior litigation.[254]

On the other hand, the Court's later ruling in *Taylor v. Sturgell*[255] calls into question whether any of an association's members can be bound by a judgment against the association itself, regardless of whether a conflict of interest existed.[256] *Taylor* reiterated the fundamental principle that only a party to a prior action who had notice of the case is bound by the resulting judgment.[257] The Court identified several exceptions under which a judgment could bind a nonparty to the case as well,[258] explaining that in those situations the nonparty had been

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[253] *See* Taylor v. Sturgell, 553 U.S. 880, 893–95 (2008).

[254] *Brock*, 477 U.S. at 290 (permitting associational standing but recognizing judgments might not have preclusive effect when the group does not "represent adequately" the member); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 cmt. b(1)(B), at 18–27 (AM. L. INST. 2010); Simone, *supra* note 17, at 181; Garrett, *Corporations*, *supra* note 43, at 152 ("In associational standing cases . . . if there was a lack of adequacy of representation, the ruling might not preclude subsequent suits by members of the association for due process reasons."); Flint, *supra* note 44, at 1058–60; *cf. United Food*, 517 U.S. at 556 n.6 ("The germaneness of a suit to an association's purpose may . . . satisfy a standing requirement without necessarily rendering the association's representation adequate to justify giving the association's suit preclusive effect as against an individual ostensibly represented.").

Some circuits apply this approach. *See, e.g.*, Midwest Disability Initiative v. JANS Enters., 929 F.3d 603, 609 (8th Cir. 2019) ("When an association representing its members suffers an adverse final judgment, whether that judgment precludes subsequent claims by the association's members is a separate issue that turns, in part, on whether the association was an adequate representative."). Others appear to mechanistically apply res judicata against a group's members without expressly taking into account whether they had notice of the prior suit or any potential conflicts of interest existed. *See* Simone, *supra* note 17, at 186–87; *see also* Zacharias, *supra* note 43, at 487 ("Where the rights are not substantial and personal, it does not seem unjust to bind the member.").

[255] 553 U.S. 880 (2008).

[256] *Id.* at 893–95.

[257] *Id.* at 893 ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))).

[258] *Id.* at 894 (naming "properly conducted class actions" and "suits brought by trustees, guardians, and other fiduciaries").

adequately represented in the action.[259] Associational standing does not fit within any of the exceptions that *Taylor* identified.

Moreover, *Taylor* rejected broader theories of "virtual representation" under which third-party nonlitigants could be bound by judgments in cases in which they had not been involved, as long as their interests had been "adequately represented by a party to the [earlier] proceedings."[260] Associational standing appears to be precisely the sort of "virtual representation" that *Taylor* rejected as an adequate basis for res judicata.[261] *Taylor* thus strongly suggests that a judgment in an associational standing case should not have preclusive effect in a member's subsequent suit.[262] That is particularly so for members who did not receive actual notice of the lawsuit, have an opportunity to prevent their rights from being adjudicated, or authorize the association to litigate their claims on their behalf.[263]

Each of the potential approaches the Court could adopt for determining the res judicata effect of a judgment based on associational standing is deeply problematic. One option is to endorse *Brock*'s suggested approach of granting such judgments preclusive effect in the absence of a conflict of interest between the association and its members.[264] Under this policy, res judicata could preclude members from attempting to enforce their own constitutional or other public law rights, even though they had no idea the earlier case was pending or that their membership in the plaintiff organization could have any such effect. The obvious solution to this problem is to require a plaintiff group wishing to assert associational standing to provide notice and an opportunity to be heard or opt out to members whose rights are at issue. At that point, associational standing procedures would resemble

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259 *Id.*

260 *Taylor*, 553 U.S. at 896.

261 *Id.* at 898.

262 *See* Bradley & Young, *supra* note 16, at 69 ("[I]t is far from clear that members are bound by any adverse judgment against the organization."); Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 623 (6th Cir. 2016) ("[M]ere overlapping interest will not work to preclude a nonparty from litigating a claim that a putative representative tried earlier.").

263 *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 254, § 1.02 cmt. b(1)(B), at 20 (noting that associational standing suits "justify preclusion less easily"); *cf.* Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 422–23 (6th Cir. 1999) (identifying narrow circumstances in which res judicata may apply to third parties).

264 *See Brock*, 477 U.S. at 290 (stating that, if an association does not adequately represent a member, "a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles").

Rule 23, bolstering the conclusion that such cases should instead proceed through the established class certification process.

Another alternative, consistent with *Taylor*, is to refuse to apply res judicata against some or all of a plaintiff group's members. This approach, too, presents problems. Most obviously, it would be unfair to defendants. If a plaintiff organization wins, the victory would redound to the benefit of its member rightsholders. The defendant's rights and duties with regard to each such member would be, in effect, settled in that member's favor. In contrast, if the plaintiff organization loses, the unbound members could freely sue the defendant for the same claims, particularly since federal district court rulings lack any stare decisis effect.[265] The situation is thus one of "heads, I win; tails, I don't lose." If res judicata is inapplicable to a plaintiff organization's members—either in general or because of a conflict of interest—the only party that stands to be bound by a judgment in the defendant's favor is the organization itself, which does not have any claims of its own to resolve. This asymmetry would functionally give members of the plaintiff organization two bites at the apple, unfairly tilting the scales in their favor.[266]

Other difficult questions also arise in associational standing cases about *which* members of a plaintiff organization should be bound if res judicata applies. There are many possible ways to determine the scope of preclusion. It could be limited only to the particular members whose legally cognizable claims formed the

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[265] *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011).

[266] Morley, *De Facto Class Actions*, *supra* note 28, at 531–34 (explaining how defendant-oriented injunctions create comparable asymmetric preclusion problems). Difficulties with asymmetric preclusion may also arise in class action cases for injunctive and declaratory relief under Rule 23(b)(2). Members of a certified class are typically bound by an adverse judgment against the class. *See Taylor*, 553 U.S. at 894 ("Representative suits with preclusive effect on nonparties include properly conducted class actions." (citing Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989))). When certifying classes under Rule 23(b)(2), however, a court has discretion as to whether to require notice and an opportunity to opt out for putative members. *See* FED. R. CIV. P. 23(c)(2)(A). The Court has suggested that it may violate due process to bind unnamed members of Rule 23(b)(2) classes who did not receive notice or an opportunity to opt out to judgments. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 363 (2011) (recognizing "the serious possibility" that denying opt-out rights to members of Rule 23(b)(2) classes violates due process); *see also* Williams, *supra* note 228, at 618–43. Thus, a judgment against a Rule 23(b)(2) class of rightsholders may not necessarily protect the defendant from subsequent lawsuits by class members. Accordingly, Rule 23(b)(2) does not necessarily eliminate the res judicata and asymmetric preclusion problems with associational standing. Nevertheless, due to the limited benefits and numerous other problems with associational standing, courts should be reluctant to replicate these asymmetric preclusion concerns in another context.

basis for the association's standing. Or preclusion could also extend to other members with similar claims, even though they were not ripe when the court entered its judgment. Or res judicata might instead apply to anyone who was a group member either at the start of the case or at the time of final judgment. Indeed, it could extend even further to new members who join the group after judgment. These sorts of difficult questions further counsel against retaining the doctrine of associational standing.

C. Defendant-Oriented Injunctions

Associational standing also creates unnecessary challenges at the remedial stage of a lawsuit. Ordinarily, when a plaintiff prevails on a claim for injunctive relief, the court should enter a plaintiff-oriented injunction, protecting the plaintiff from the defendant's challenged conduct.[267] The scope of such an injunction expands as the number of plaintiffs in a case grows. Each member with standing of a class certified under Rule 23, for example, is entitled to relief if the class wins.[268]

Plaintiff-oriented injunctions make less sense, however, when the plaintiff is an entity asserting associational standing. In such cases, the court typically cannot issue an order barring the defendant from harming the association as an entity, since the association is not necessarily claiming harm to itself (but rather is enforcing its members' rights).[269] Indeed, in public law cases, a plaintiff association that was neither subject to a challenged legal provision nor otherwise suffered any legally cognizable harm under it would lack standing to seek an injunction prohibiting the government from enforcing that provision against it.[270]

A more appropriate remedy would be an injunction barring the defendant from enforcing the challenged provision against members of the plaintiff organization with standing to challenge

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[267] *See* Morley, *De Facto Class Actions*, *supra* note 28, at 534–35.

[268] *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

[269] *See Warth*, 422 U.S. at 515 (endorsing associational standing in part because, when a plaintiff entity seeks an injunction or declaratory relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured"); *see also, e.g.*, Conservation L. Found. of New Eng., Inc. v. Reilly, 950 F.2d 38, 41, 43 (1st Cir. 1991).

[270] *See TransUnion*, 141 S. Ct. at 2208 ("[P]laintiffs must demonstrate standing for each claim they press and for each form of relief they seek (for example, injunctive relief and damages)." (citing Davis v. FEC, 554 U.S. 724, 734 (2008))); Lewis v. Casey, 518 U.S. 343, 357 (1995) (holding that a plaintiff's remedy must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established").

it.[271] The organization would likely have to provide a list of its members as of the time of judgment to both the court and the defendant, a step it may be reluctant to take.[272] Members who joined the group after the court entered final judgment would presumably not be covered by it.

In many public law cases involving associational standing, however, the plaintiff group seeks much broader relief. Such plaintiffs frequently request a nationwide, "defendant-oriented" injunction: an order completely barring the government defendant from enforcing the challenged provision against anyone, anywhere in the nation.[273] Associations often bring constitutional and other public law challenges not only to protect their members, but to advance their preferred policy objectives or rectify perceived social harms more generally as well. Several of the cases in which the Supreme Court considered or approved the use of associational standing involved complaints seeking such sweeping relief, rather than an injunction protecting only the plaintiff organization or its members.[274]

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[271] *See, e.g.*, *Conservation L. Found.*, 950 F.2d at 41, 43.

[272] *See supra* Part I.B.

[273] *Cf. supra* note 32; Nat'l Press Photographers Ass'n v. McCraw, 594 F. Supp. 3d 789, 799–800 (W.D. Tex. 2022) (discussing a statewide defendant-oriented injunction), *rev'd*, 90 F.4th 770 (5th Cir. 2024), *petition for cert. filed sub nom.* Nat'l Press Photographers Ass'n v. Higgins, 92 U.S.L.W. 3271 (U.S. Apr. 11, 2024) (No. 23-1105). Of course, in cases involving "indivisible rights," it is impossible to limit relief to only certain rightsholders; enforcing a plaintiff's rights through an appropriately tailored plaintiff-oriented injunction will appear functionally indistinguishable from a nationwide or statewide defendant-oriented injunction. Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 11–12. For example, a plaintiff who prevails in a constitutional challenge to legislative districts cannot obtain a newly drawn district only for herself; any such relief will necessary enforce the rights of other voters within the new district as well. Most cases, however, involve "divisible rights," in which the government defendants could refrain from enforcing a challenged provision against members of a plaintiff organization while continuing to enforce it against third-party nonlitigants. *Id.* at 20–21.

[274] *See, e.g.*, Rumsfeld v. F. for Acad. & Inst'l Rights, Inc., 547 U.S. 47, 52 n.2, 54 (2006) (holding that the plaintiff association of law schools had associational standing to seek an injunction completely barring enforcement of the Solomon Amendment, which denies federal funds to institutions of higher education that discriminate against military recruiters); Pennell v. City of San Jose, 485 U.S. 1, 4, 8 (1988) (recognizing associational standing of a landlord association, joined by a landlord member, that sued in state court for a declaration that the "tenant hardship" provisions of a local rent-control ordinance were "facially unconstitutional and therefore . . . illegal and void"); *Brock*, 477 U.S. at 276–77, 290 (recognizing associational standing where a union challenged the Secretary of Labor's interpretation of a federal statute).

Defendant-oriented injunctions have garnered significant criticism.[275] We offer only a brief summary of the debate here. Many opponents argue that a plaintiff lacks Article III standing to seek, and a court accordingly lacks constitutional authority to grant, relief on behalf of third-party nonlitigants who are not part of the "case or controversy" before the court.[276] They also contend that permitting district courts to enter defendant-oriented injunctions is inconsistent with the hierarchical, decentralized structure of the federal judiciary, since it allows a single district judge to dictate how the government must act with regard to rightsholders throughout the nation, including those in other circuits who would not otherwise be subject to the issuing court's view of the law.[277] Opponents further contend that defendant-oriented injunctions effectively make classwide relief available outside the context of a Rule 23 class action,[278] circumvent the principle that the government cannot be precluded from relitigating lower courts' adverse rulings,[279] and run afoul of traditional equitable principles.[280]

Pragmatically, allowing a single trial court to suspend a legal provision throughout the nation creates incentives for extreme forum shopping. Plaintiffs seeking to completely end a governmental practice will sue in the district most amenable to their position. Once an injunction is entered, it effectively determines the rights of people throughout the nation.[281] The breadth of these injunctions also places pressure on appellate courts to review these cases quickly, resulting in adjudication of unsettled, controversial constitutional issues in harried, emergency proceedings.[282]

For its part, the Supreme Court has not directly ruled on the legality of defendant-oriented injunctions. But several Justices

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[275] The controversy over plaintiff- versus defendant-oriented injunctions, often termed the debate over "nationwide injunctions," has been thoroughly canvassed elsewhere in the literature. *See, e.g.*, Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 28 nn. 144–47 (citing articles).

[276] Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 28–29; Morley, *De Facto Class Actions*, *supra* note 28, at 523–27.

[277] Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 29–30.

[278] *Id.* at 29; Morley, *De Facto Class Actions*, *supra* note 28, at 534–35.

[279] United States v. Mendoza, 464 U.S. 154, 162–63 (1984).

[280] Bray, *supra* note 32, at 425–27.

[281] *Id.* at 457–61; *see also* Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 363–64 (2018).

[282] Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 33.

have expressed concern over them in recent years,[283] and such orders are at least in tension with Supreme Court precedents declaring that a federal court may grant relief only to the plaintiffs before it.[284] The Court appears substantially likely to prohibit, or at least greatly curtail, nationwide defendant-oriented injunctions in the years to come.

These powerful objections to defendant-oriented injunctions counsel against permitting associational standing. Associational standing cases often act as a "backdoor" through which courts issue such orders to protect the plaintiff organization's future members.[285] Given both the difficulties in crafting appropriate plaintiff-oriented relief in associational standing cases, as well as courts' general reluctance to limit relief to a plaintiff association's members—the Court's skepticism toward defendant-oriented injunctions further calls associational standing's propriety into question.

D. Changing the Application of Statutory Rights

Allowing associations to litigate on behalf of their members also raises difficult questions concerning whether the real parties in interest—the members—should be able to assert greater rights in the associational suit than if they had sued in their own name. Associational standing may impact the application of statutes governing plaintiffs' rights because the doctrine allows a case to be brought by someone other than the real party in interest. This issue arises frequently in disputes over plaintiff associations' entitlement to attorneys' fees under the EAJA.[286]

The EAJA allows a party who prevails in litigation against the federal government to recover attorneys' fees when the government's position was not "substantially justified."[287] Certain high-net-worth litigants are excluded from recovering attorneys' fees, however. Individuals with a net worth of more than

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[283] *See, e.g.*, Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) ("[Nationwide] [i]njunctions . . . raise serious questions about the scope of courts' equitable powers under Article III.").

[284] Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 28 nn.148–50 (collecting cases).

[285] Ass'n of Am. Physicians & Surgeons v. FDA, 13 F.4th 531, 541 (6th Cir. 2021) (citing Morley, *Disaggregating Nationwide Injunctions*, *supra* note 33, at 25).

[286] 5 U.S.C. § 504; 28 U.S.C. § 2412; *see* John W. Finley II, Note, *Unjust Access to the Equal Access to Justice Act: A Proposal to Close the Act's Eligibility Loophole for Members of Trade Associations*, 53 WASH. U. J. URB. & CONTEMP. L. 243, 252–62 (1998).

[287] 28 U.S.C. § 2412(d)(1)(B).

$2 million and businesses or associations with a net worth of more than $7 million (except for § 501(c)(3) nonprofits and agricultural cooperative associations) are prohibited from recovering their fees.[288]

Major corporations whose net worth easily exceeds the EAJA's threshold sometimes form lightly funded trade associations to invoke associational standing to litigate their claims for them. If the corporations had litigated their own claims, they would have been ineligible to recover attorneys' fees. But associational standing provides a potential way around this limitation. Many courts have held that the EAJA's text permits an association to recover fees, regardless of its members' net worth, because it is formally the plaintiff.[289]

This approach short-circuits the EAJA's restrictions, which were designed to limit attorneys' fees to "small business owners and those individuals for whom cost may be a deterrent to vindicating their rights."[290] It is also at odds with the EAJA's legislative history, which "strongly suggests that Congress contemplated that courts would in fact consider the membership of such associations and would disqualify such associations in the event that the aggregate net worth of [their] members exceeds $7 million."[291] But even if one concludes that the EAJA prohibits associations from recovering attorneys' fees when their individual members would be ineligible to do so, difficulties would still arise in

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[288] *Id.* § 2412(d)(2)(B).

[289] *See, e.g.*, Nat'l Ass'n of Mfrs. v. Dep't of Lab., 159 F.3d 597, 602 (D.C. Cir. 1998) ("We simply have no indication that Congress intended to exclude small associations representing large members from the benefits conferred by the EAJA."); Tex. Food Indus. Ass'n v. U.S. Dep't Agric., 81 F.3d 578, 581–82 (5th Cir. 1996) (holding that both statutory text and post-enactment legislative history established a trade association's right to recover attorneys' fees despite its members' ineligibility); Diamond Sawblades Mfrs. Coal. v. United States, 816 F. Supp. 2d 1342, 1355 (Ct. Int'l Trade 2012) ("[N]othing in the statute suggests that one member's ineligibility should disqualify an entire association's eligibility or convert the association-eligibility inquiry into one of individual-eligibility for each member."); *see also* Love v. Reilly, 924 F.2d 1492, 1495 (9th Cir. 1991) (holding that the real party in interest for purposes of the EAJA is the entity responsible for paying the attorneys' fees, rather than the entity that stood to benefit as a practical matter from a favorable judgment). This view is not unanimous. The Sixth Circuit, for example, has held that the total net worth of a plaintiff trade association's members should be considered when determining its eligibility for attorneys' fees under the EAJA in associational standing cases. *See, e.g.*, Nat'l Truck Equip. Ass'n v. Nat'l Highway Traffic Safety Admin., 972 F.2d 669, 673–74 (6th Cir. 1992).

[290] Finley, *supra* note 286, at 265 (quotation marks omitted); *accord* H.R. REP. NO. 96-1418, at 10 (1980).

[291] Finley, *supra* note 286, at 264 n.115 (citing 125 Cong. Rec. S10,918 (daily ed. July 31, 1979) (statements of Sen. Hayawaka and Sen. Thurmond)).

cases where only some of the association's members were ineligible.

Although only one example, this dispute under the EAJA exemplifies the legal system's broad presumption that the plaintiff in a case will be the real party in interest seeking redress for injury it has suffered. Deviations from that principle trigger unnecessary problems.

E. Inconsistency with Historical Equitable Practice

The Supreme Court has repeatedly held that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."[292] They likewise determine the scope of the modern federal judiciary's equitable powers.[293] Neither historical practice nor traditional equitable principles support associational standing.

A basic tenet of the English legal system was that only a person who had suffered injury could seek a remedy for that harm.[294] Jurist William Blackstone explained that an individual whose rights were violated could bring suit, which he defined "to be the legal demand of *one's* right."[295] As with current law, however, representative actions were permitted in some situations. Guardians,[296] executors,[297] and "next friends,"[298] for example, could sue on behalf of a rightsholder to enforce that person's rights. Such a suit was not for the benefit of the representative himself. Rather, a

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[292] *TransUnion*, 141 S. Ct. at 2204 (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008)); *see also* GTE Sylvania, Inc. v. Consumers Union of U.S., 445 U.S. 375, 382 (1980); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 102 (1998).

[293] Grupo Mexicano de DeSarrollo, S.A. v. All. Bond Fund, 527 U.S. 308, 318–19 (1999).

[294] *See, e.g.*, John Locke, *Second Treatise on Government*, *in* TWO TREATISES OF GOVERNMENT 285, 291 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (stating that the right of "taking reparation [for violation of a private right] . . . belongs only to the injured party").

[295] WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 80 (3d ed., Oxford, Clarendon Press 1771) (emphasis added); *see* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–81 (2008) (recounting the historical foundation for the requirement of injury).

[296] 2 WILLIAM BLACKSTONE, COMMENTARIES *464 [hereinafter BLACKSTONE, COMMENTARIES] ("An infant . . . may sue . . . by his guardian.").

[297] *See, e.g.*, *id.* at *510 ("[H]e has very large powers and interests conferred on him by law; being the representative of the deceased.").

[298] A next friend was an individual who brought suit on behalf a person who was not in a position to assert his own rights and who could not rely on a guardian to do so. *See* Ashby v. White, 14 How. St. Tr. 695, 825 (stating that an inmate's "friends" may seek to "obtain a Writ of Habeas Corpus, in order to procure [the inmate's] liberty"); *see also* BLACKSTONE, COMMENTARIES, *supra* note 296, at *464 (recognizing next-friend actions against fraudulent guardians).

representative could sue on behalf of the represented person, based on the represented person's injury, to obtain relief for that person.[299]

In early class actions in equity, where it was too impractical to bring all rightsholders before the court, a few injured individuals could act as representatives for an entire class of similarly situated people.[300] In such cases, "a portion" could "represent the entire body."[301] As in modern class actions, the representative plaintiffs must have themselves been injured in the same manner, and be asserting the same rights, as those who they sought to represent. For example, in the 1722 case *Chancey v. May*,[302] the chancellor allowed the treasurer and manager of the Temple Mills Brass Works to sue on behalf of themselves and all other proprietors and partners in the company for embezzlement and other wrongs they had suffered in common.[303]

Sometimes the common injury shared by individuals derived from their membership in a "voluntary association."[304] In such

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[299] *See, e.g.*, *Ashby*, 14 How. St. Tr. at 825 (declaring "that every Englishman, who is imprisoned, by any authority whatsoever, has an undoubted right" to "apply, *by his friends or agents*, to obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law" (emphasis added)); BLACKSTONE, COMMENTARIES, *supra* note 296, at *464 (stating that a guardian's suit is an infant's suit "by his guardian").

[300] Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 495 (2022); Samuel J. Stoljar, *The Representative Action: An Equitable Post-Mortem,* 3 U.W. AUSTL. ANN. L. REV. 479, 495–96 (1956) (noting that equity "permitted a few parties to represent the many; representative parties could sue, or be sued, on behalf of or on account of themselves and others"); *see also* Cockburn v. Thompson (1809) 33 Eng. Rep. 1005, 1007, 16 Ves. Jun. 321, 326 (stating that the "strict" participatory rule "must not be adhered to in cases, to which consistently with practical convenience it is incapable of application"); Hansberry v. Lee, 311 U.S. 32, 41 (1940) ("The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.").

[301] *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1854) ("[A] court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all . . . .").

[302] (1722) 24 Eng. Rep. 265, Prec. Ch. 592.

[303] *Id.* at 265, Prec. Ch. 592.

[304] JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA, § 97, at 123 (4th ed. 1848) (stating that a representative action could be maintained when "the parties form a voluntary association . . . , and those who sue, or defend, may fairly be presumed to represent the rights and interests of the whole"); *see also* Geoffrey C. Hazard, Jr., John L. Gedid, & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1874–76 (1998) (recounting history of aggregate litigation brought by individuals in "unincorporated associations"); STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 188–90 (1987) (describing the

cases, an association member who had been injured could sue on behalf of himself "and all other members" who had suffered a similar injury.[305] Again, however, those lawsuits were brought by members of the association or society to vindicate their shared interests as members of the group; they were not brought by the society or association as an entity to assert the rights of its members.[306]

For example, in *Lloyd v. Loaring*,[307] members of a local Free Mason Lodge sued on behalf of themselves and similarly situated members because certain other members had stolen property from the Lodge.[308] The plaintiffs were linked by their membership in the "voluntary society" of the Lodge.[309] The court concluded that their claim was proper, but the Lodge itself could not sue to assert its members' rights. The court explained that "individuals forming a voluntary society may as individuals" sue to assert their collective property interests, but could not sue "as a voluntary society" to assert those interests.[310]

Early U.S. courts imported this English practice. Injury was generally required to initiate a lawsuit; a person who had suffered no injury could not sue.[311] These courts also recognized the same types of representative suits as England, including suits by

development of this mechanism); Lloyd v. Loaring (1802) 31 Eng. Rep. 1302, 1304, 6 Ves. Jun. 773, 778.

[305] *Lloyd*, 31 Eng. Rep. at 1302, 6 Ves. Jun. at 773; *see Chancey*, 24 Eng. Rep. at 265, Prec. Ch. at 592 (permitting suit on "behalf of themselves, and all other proprietors of the same undertaking"); Gray v. Chaplin (1825) 57 Eng. Rep. 348, 350, 2 Sim. & St. 267, 272 (allowing certain shareholders of a corporation that had been formed to operate a canal to file a bill on behalf of both themselves as well as the corporation's other shareholders to set aside an agreement the corporation had executed on the ground that it violated the act authorizing the canal).

[306] Hazard, Jr., et al., *supra* note 304, at 1876 ("[U]nincorporated associations, if not other groups, could sue . . . by the mechanism of the representative suit.").

[307] (1802) 31 Eng. Rep. 1302, 6 Ves. Jun. 773.

[308] *Id.* at 1302–03, 6 Ves. Jun. at 773–75.

[309] *Id.* at 1303, 6 Ves. Jun. at 776.

[310] *Id.* at 1304, 6 Ves. Jun. at 778.

[311] The Marianna Flora, 16 F. Cas. 736, 738 (C.C.D. Mass. 1822) (recounting the rule that a person who suffered "damnum absque injuria"—factual harm without legal injury—had no legal recourse), *aff'd*, 24 U.S. 1 (1825); *see* Hessick, *supra* note 295, at 284–85 (discussing American adoption of the rule that a person could seek a remedy only when their rights had been violated).

executors[312] and guardians.[313] And as in England, these representatives were merely "nominal parties"; the real parties in interest were the "principals" they were representing.[314]

U.S. courts also permitted primitive class actions in equity. In his treatise on equity, Justice Joseph Story recounted the "general rule" that everyone with a material interest in a suit had to be made a party.[315] He also recognized, however, that it was sometimes impractical for all rightsholders to be joined in a single suit. In such circumstances, an action could "be brought by some of the parties on behalf of themselves and all the others, taking care, that there shall be a due representation of all substantial interests before the Court."[316] He further explained that membership in a voluntary organization could provide the requisite link among rightsholders, allowing a few injured members to sue to enforce not only their own rights, but those of the association's other members, as well.[317]

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[312] *See, e.g.*, Eppes v. Demoville, 6 Va. 22 (2 Call), 31 (1799) (noting that "the executor . . . represents [the] personal rights" of the "decedent"); *see also* Telfair v. Stead's Ex'rs, 6 U.S. (2 Cranch) 407, 407–08 (1805) (resolving a dispute between two executors representing different estates).

[313] *See* Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 106 (1795) (opinion of Paterson, J.) ("I will suppose that in a common law case an infant sues in a personal action by his guardian, and obtains a judgment; the guardian receives the money, and pays it to the infant after he comes of age."); Stewart v. Crabbin's Guardian, 20 Va. 280, 280 (1819) (stating that an action by an infant is to be brought "*by the infant by his guardian*" (emphasis in original)).

[314] *Penhallow*, 3 U.S. (3 Dall.) at 106 (opinion of Paterson, J.). Representative suits could also arise in other circumstances. In *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 323 (1799), for example, the discharged executor of a closed estate was permitted to sue to seek the manumission of the decedent's slaves after Virginia enacted a law making such manumissions legal. The executor sued only in a representative capacity—the executor sought relief only for the slaves, not himself—even though the case did not fall neatly within any of the typical categories of representative litigation. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 724–25 (1975) (arguing that the executor acted essentially as a guardian by suing on behalf of the slaves).

[315] STORY, *supra* note 304, § 76, at 91:

> The general rule, in Courts of Equity, as to parties, is . . . that all persons materially interested in the subject-matter, ought to be made parties to the suit, either as plaintiffs, or as defendants, however numerous they may be, in order, . . . that complete justice may be done, and that multiplicity of suits may be prevented . . . .

See also id. § 95, at 120 (noting the general rule that "the parties, although numerous, are still ordinarily required to be brought before the Court"). Indeed, Justice Story has been credited with "virtually creat[ing] the American law of class suits" by describing this practice in his commentaries. Hazard, Jr., et al., *supra* note 304, at 1878.

[316] STORY, *supra* note 304, § 107, at 141.

[317] *Id.* § 97, at 123 (stating that a representative action can be maintained when "the parties form a voluntary association . . . , and those who sue, or defend, may fairly be

Based on this rule, early federal and state courts permitted lawsuits brought by some of a group's members on behalf of themselves and others similarly situated[318]—though such litigation as a general matter was rare.[319] In *Beatty v. Kurtz*,[320] for example, the Supreme Court allowed an action by several parishioners of a church on behalf of themselves and all other parishioners against a person who was interfering with the church's cemetery.[321] The Court reasoned that the suit was proper because it was "one of those cases, in which certain persons, belonging to a voluntary society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society, for purposes common to all, and beneficial to all."[322]

These English and early U.S. decisions do not suggest that an association itself could sue to assert the rights of its members, and research has not revealed any other early federal or state case recognizing a doctrine akin to associational standing. Certainly none of the Court's opinions upholding associational standing cite historical cases or assert that it is consistent with historical practice.

Thus, to the extent the Court relies on history for guidance concerning the scope of Article III and the federal judiciary's equitable powers, it counsels strongly against recognizing associational standing. And equity permitted a group's members to sue

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presumed to represent the rights and interests of the whole"); *see* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853) (recounting this principle); *see also* Hazard, Jr., et al., *supra* note 304, at 1880 (critiquing Story for failing to recognize the potential conflicts of interest in these lawsuits).

318 *See, e.g.*, West v. Randall, 29 F. Cas. 718, 722 (C.C.D. R.I. 1820):

> [W]here the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole . . . if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree.

See also Wendell's Ex'rs v. Van Rensselaer, 1 Johns. Ch. 344, 349 (N.Y. Ch. 1816) (recounting the "general rule, requiring all persons interested to be parties," but noting that the rule "is dispensed with when it becomes extremely difficult or inconvenient"); *Swormstedt*, 57 U.S. (16 How.) at 302 (recognizing class actions of this sort).

319 The focus of early federal courts was whether an injured person could sue on behalf of others similarly situated. *See* Hazard, Jr., et al., *supra* note 304, at 1882 ("There are few federal cases dealing with any aspect of representative suits from 1789, when the federal court system was created, until 1853 . . . . Of the handful of cases, all dealt with class suits in the context of the necessary parties problem.").

320 27 U.S. (2 Pet.) 566 (1829).

321 *Id.* at 579.

322 *Id.* at 585.

for not only their own injuries, but those of other similarly situated members in a type of proto-class action.[323] These historically recognized types of representational actions did not deviate from the principle stated by Blackstone and philosopher John Locke that only an injured party may seek judicial relief.[324] There is no English or early U.S. precedent for an uninjured association to sue on behalf of its members to assert their rights. And as the preceding Sections demonstrate,[325] departing from this history leads to a range of unnecessary practical difficulties at various stages of the litigation process.

CONCLUSION

Associational standing is an anomaly. The doctrine began as a valid application of traditional third-party standing principles, allowing a plaintiff organization that had suffered an injury in fact to seek redress for both that injury, as well as harm its members had suffered based on their relationships with the organization.[326] But associational standing has expanded far beyond these roots. It has evolved into a powerful exception to both the supposedly "irreducible" Article III requirement that a plaintiff in a federal case have suffered a concrete and particularized injury in fact, as well as third-party prudential standing restrictions on asserting the rights of others.[327] The Court has broadened the doctrine even further by allowing it to be invoked by zero-member groups,[328] groups with compulsory membership,[329] and in the context of certain damages actions.[330]

In its current state, associational standing is unwarranted. It raises a host of procedural and remedial issues with which few courts have seriously grappled.[331] In particular, the Court has brushed aside concerns about the doctrine's circumvention of Rule 23, which governs collective litigation by similarly situated rightsholders in the federal courts.[332] Moreover, an entity can

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[323] *See supra* notes 285–90 and accompanying text.

[324] *See supra* notes 294–95 and accompanying text.

[325] *See supra* Parts IV.A–D.

[326] *See supra* Part I.B.

[327] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); *see supra* notes 130–31 and accompanying text.

[328] *Hunt*, 432 U.S. at 344; *see supra* note 146 and accompanying text.

[329] *Hunt*, 432 U.S. at 344; *see supra* notes 147–48 and accompanying text.

[330] *Brock*, 477 U.S. at 287–88.

[331] *See supra* Parts III–IV.

[332] *See supra* Part III.

provide its members with nearly all of the benefits of associational standing by having one or more members sue in their own name (anonymously, if necessary)—in either an individual suit or a class action—and providing legal counsel, funding, public support, substantive expertise, and strategic guidance. Any lawsuit currently brought by an organization asserting associational standing could instead be brought by one or more of the rightsholders whose injuries gave rise to that standing.

Given these alternatives, one wonders whether associational standing doctrine is a solution in search of a problem. As generalized associational standing has persisted for more than a half-century, however, the Court may be reluctant to completely abolish the doctrine. If the Court decides to retain associational standing, then at a minimum it should substantially reform the doctrine in several respects. We propose six changes, though the list is hardly exhaustive.

First, the Court should refashion associational standing to be a matter of substantive law rather than a court-created prudential doctrine. Associational standing should be permitted only to the extent substantive law confers a cause of action on a particular entity. In other words, the law establishing a plaintiff's cause of action—which may be a federal or state statute, or common law—should determine whether a group may pursue an associational standing claim.[333] As a matter of statutory interpretation, a court may presume that federal laws generally authorize associational standing. This approach would align with *Lexmark International, Inc. v. Static Control Components, Inc.*,[334] which supports recharacterizing prudential standing doctrines as matters of substantive law.[335] Such a retrenchment would confirm that Congress and state legislatures, not federal courts, are primarily responsible for determining which entities may pursue social change through public interest litigation.

Second, the Court should require trial courts to protect plaintiff organizations' members from potential conflicts of interest, including both conflicts among different groups of members, as well as conflicts between members and the organization's leadership.[336] A fourth prong should be added to the *Hunt* test for

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[333] *See supra* Part IV.A.

[334] 572 U.S. 118 (2014).

[335] *See id.* at 127 n.3.

[336] *Cf.* Edmonds, *supra* note 47, at 386, 377 ("A court should only dismiss based on a lack of associational standing when a conflict is so profound that it *requires* dissenting

associational standing that expressly requires trial courts to ensure that no such intragroup conflicts exist. The Court could further bolster protections for group members by allowing associational standing to be asserted only by voluntary organizations that members are free to quit.[337] Such a self-help remedy gives members the opportunity to decide for themselves whether a plaintiff organization is adequately representing their interests.

Third, since member consent is one of the primary justifications for associational standing, the Court should ensure that such consent actually exists in associational standing cases. A plaintiff organization invoking associational standing should be required to file a consent form from any member whose rights it will assert in the underlying litigation. The trial court should be required to limit any relief solely to members who had filed such consent forms. Conversely, only members who had provided such consent would be bound by res judicata. Obtaining members' actual consent would help to alleviate concerns that a plaintiff organization is improperly usurping its members' interests in their own legal claims, while also providing a convenient way to resolve disputes over the appropriate scope of res judicata and injunctive relief in associational standing cases.

Fourth, the Court should roll back *Brock* by barring associational standing for damages claims, rather than allowing Congress to authorize such suits. Alternatively, at the very least, the Court should recognize that a plaintiff association has an obligation to remit any damages it recovers to the members whose rights it was asserting.

Fifth, rightsholders should not be able to obtain special advantages under statutes such as the EAJA simply by litigating their claims through an entity asserting associational standing, rather than in their own names.[338] The Court should specify that a plaintiff organization asserting associational standing should generally receive the same treatment as its injured members would have received had they litigated their own claims.

Sixth, and finally, associational standing should not be used as a backdoor method for obtaining nationwide defendant-oriented injunctions.[339] The Court should clarify that, if a plaintiff

members to intervene to protect their rights."); Simone, *supra* note 17, at 175, 190; Lathers, *supra* note 43, at 135, 137.

[337] *Cf. supra* Part II.B.

[338] *See supra* Part IV.D.

[339] *See supra* Part IV.C.

entity asserting associational standing is entitled to injunctive relief, courts may not enter a nationwide defendant-oriented injunction completely suspending enforcement of the challenged legal provision. Rather, courts should enjoin the provision's enforcement with regard to the association's members as of final judgment (and, more specifically, members who filed consents with the court, as recommended above).

These changes would solve many of the problems created by associational standing. Rather than engaging in such extensive reforms, however, the Court might instead be better served by abandoning the doctrine and advancing the goals that associational standing seeks to promote in other ways. Eliminating associational standing is not about reducing the amount of public law and other important collective litigation, but rather adjudicating such cases through the correct procedures (i.e., Rule 23) and avoiding a range of unnecessary procedural, preclusive, remedial, and other complications.