Nos. 18-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re ASACOL ANTITRUST LITIGATION

UNITED FOOD & COMMERCIAL WORKERS UNIONS AND EMPLOYERS MIDWEST HEALTH BENEFITS FUND, *et al.*,
Plaintiffs,

TEAMSTERS UNION 25 HEALTH SERVICES & INSURANCE PLAN, *et al.*,
Plaintiffs-Appellees,

v.

WARNER CHILCOTT LIMITED, *et al.*,
Defendants-Appellants,

ZYDUS PHARMACEUTICALS USA INC., *et al.*,
Defendants.

On Appeal from the United States District Court
for the District of Massachusetts
Civil Action No. 1:15-cv-12730-DJC (Hon. Denise J. Cooper)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS URGING REVERSAL

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Dated: March 5, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public-interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared in this and other federal courts to urge the judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. In particular, WLF regularly appears as *amicus curiae* to support adherence to rules barring federal-court adjudication of claims filed by those lacking Article III standing. *See, e.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

WLF is concerned that the district court decision, by conferring Article III standing on plaintiffs who admit they suffered no injury traceable to violation of many of the state statutes on which they base their claims, dramatically expands the judicial power by assigning to the courts the power to enforce state statutes in contexts far removed from what has traditionally been understood to constitute an adversarial judicial proceeding.

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[1] Pursuant to Fed.R.App.P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF's brief is confined to standing issues; it does not address other arguments raised by Appellants regarding the propriety of class certification.

STATEMENT OF THE CASE

The facts of this case are set out in detail in Appellants' Brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Defendants-Appellants (collectively, "Warner Chilcott") are manufacturers of several brand-name prescription drugs approved by the Food and Drug Administration (FDA) for the treatment of ulcerative colitis (an inflammatory bowel disorder). Warner Chilcott is alleged to have violated the antitrust laws of 26 jurisdictions (25 States and the District of Columbia) by engaging in "product hopping"—that is, withdrawing one brand-name drug from the market for the purpose of "coercing" consumers to begin using other drugs it manufactures. It allegedly withdrew its first drug from the market prematurely (that is, some months before its patent protection on the drug was set to expire), allegedly as a means of preventing consumers from turning to low-cost generic alternatives, which were barred from the market until after the patent's expiration.[2]

[2] Warner Chilcott denies that any consumers were coerced (noting, among other things, the availability of competing FDA-approved products for treating colitis) and argues that it switched its marketing to new, improved drugs at FDA's instigation.

Plaintiffs-Appellees are four union-sponsored health benefits plans that reimbursed members who purchased the "new" colitis drugs in four of the 26 jurisdictions at issue here. Because Plaintiffs are not direct purchasers of Warner Chilcott's drugs, they lack a right of action under federal antitrust law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Instead, they allege violations of the antitrust laws of each of the jurisdictions that do not follow *Illinois Brick*'s direct-purchaser rule, including 22 jurisdictions in which Plaintiffs provided no reimbursement and thus suffered no damages as a result of the alleged violations.

Plaintiffs seek to represent a Rule 23(b)(3) class consisting of all persons or entities who "purchased and/or paid for" one of the two new colitis drugs (Delzicol and Asacol HD) after July 31, 2013 in any of the 26 jurisdictions and *also* purchased the "old" drug before that date. Warner-Chilcott opposed the class certification motion on multiple grounds, including that the four named Plaintiffs lacked standing to assert violations of the laws of the 22 jurisdictions in which they do not allege that their members made the requisite purchases. In a November 9, 2017 Memorandum and Order, the district court rejected Warner Chilcott's no-standing argument and granted the class-certification motion.

The court held that Plaintiffs adequately demonstrated standing with respect to all 26 claims by demonstrating that they had suffered *some* injury as a result of Warner Chilcott's alleged product hopping, and that they need not show that

violations of each of the 26 laws caused them injury:

> [T]o show standing, the named plaintiffs must assert an injury in fact—but they need not assert the same claims as the putative class members that, here, arise under the laws of different states. To require more for Article III standing from the named plaintiffs is to jump forward to a Rule 23 certification analysis about whether the named plaintiffs are typical and common of those of the class and whether the named representatives are adequate representatives of the class.

Mem. and Order at 40.

On January 18, 2018, this Court granted Warner Chilcott's Rule 23(f) petition for permission to appeal the class certification order. The petition included an explicit objection to the district court's determination that the Plaintiffs had standing to assert claims under the laws of the 22 jurisdictions in which they do not assert that their members made the requisite purchases.

SUMMARY OF ARGUMENT

Article III of the Constitution strictly confines the judicial power of federal courts to matters filed by those who can demonstrate standing to invoke the courts' jurisdiction. To make that demonstration, a litigant must prove (among other things) that he has suffered an injury fairly traceable to the allegedly wrongful conduct. Article III demands that the prerequisites for standing persist throughout all stages of the litigation. Because the absence of standing deprives a federal court of all power to act (other than to issue an order dismissing the case for lack of jurisdiction), courts may not address *any* nonjurisdictional aspects of a lawsuit

(including, for example, class certification issues) until after they have satisfied themselves that the plaintiff possesses standing.

Plaintiffs allege that they personally suffered injuries with respect to four of the 26 state antitrust statutes that Warner Chilcott allegedly violated. They allege that Warner Chilcott violated those four statutes by coercing their members living in those four States to purchase Delzicol or Asacol HD, and that they were injured when they were required to reimburse the costs of those drugs. Those allegations are undoubtedly sufficient to plead their standing with respect to the four cited causes of action. But the Supreme Court has made clear that standing is not to be determined in gross. Rather, the Court held in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), that a plaintiff must separately establish standing for each of the causes of action he raises, even when each of those causes of action arises "from a common nucleus of operative fact." 547 U.S. at 352.

None of the four named Plaintiffs can establish standing with respect to the alleged violations of the antitrust laws of the 22 jurisdictions in which they do not allege that any of their members were coerced into purchasing Delzicol or Asacol HD. Plaintiffs have conceded that their injuries are not fairly traceable to a violation of those 22 statutes, none of which apply to injuries incurred outside the State enacting the statute. In the absence of such standing, 22 of Plaintiffs' causes of action must be dismissed for lack of subject-matter jurisdiction.

Plaintiffs insist that they should be permitted to piggy-back onto the standing of absent class members whose injuries, they allege, are fairly traceable to violation of those 22 statutes. The Supreme Court has explicitly barred such piggy-backing, at least where (as here) the named plaintiffs have never possessed standing to assert the claims in question. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013). Indeed, *Symczyk* held that the named plaintiff was not entitled to assert standing on the basis of the injuries suffered by absent plaintiffs (and thus that her not-yet-certified collective action must be dismissed for lack of subject-matter jurisdiction), even though she had at one time incurred an injury fairly traceable to the defendants' alleged misconduct. *Id.* at 73-79. (Her injury disappeared when her employer offered her a full cash settlement, thereby rendering her individual claim moot.) *Symczyk* is fatal to the standing of the Plaintiffs here, who have not alleged that they ever incurred an injury traceable to violation of any of the 22 statutes.

The district court and Plaintiffs cited several district court decisions that have certified class actions under facts similar to those here. Those decisions represent a distinctly minority position and are based on a misreading of two Supreme Court decisions: *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999). The district court decisions have reasoned as follows: (1) *Amchem* and *Ortiz* permit district courts under these

circumstances to address class certification issues in advance of standing questions; and (2) once the class is certified, the named plaintiffs are entitled to rely on the standing of absent class members to establish standing for all of their causes of action, even if the named plaintiffs themselves lack standing with respect to some of their claims. That reasoning misreads *Amchem* and *Ortiz*, which said nothing to suggest that certification of a class is ever appropriate when the district court harbors doubts about the named plaintiffs' standing. To the contrary, the Supreme Court has repeatedly held that a federal court may not pass on *any* substantive aspects of a case—including either the grant or denial of a motion to certify a class—unless the plaintiff can establish his Article III standing. *Steel Co.*, 523 U.S. at 93-102.

Reversal of the district court's decision is also required because the Plaintiffs failed to satisfy the requirements for certification of a Rule 23(b)(3) class. Certification of any Rule 23 class requires a showing of typicality. Named plaintiffs who cannot demonstrate that they suffered any injuries fairly traceable to alleged violations of 22 of 26 statutory claims included in their complaint cannot plausibly assert that their claims are typical of the claims of absent class members who *have* suffered those injuries.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER A CLAIM—AND MAY TAKE NO ACTION WITH RESPECT TO THE CLAIM—IF THE PLAINTIFFS LACK STANDING

Plaintiffs' purported class-action complaint asserts 26 causes of action against Warner Chilcott, based on alleged violations of 26 separate state antitrust statutes. Yet, they do not allege that they suffered any injuries directly traceable to the alleged violations of 22 of those statutes. In the absence of such allegations, Plaintiffs have failed to meet the strict standing requirements imposed on all who seek to invoke the power of the federal courts. The Court should reverse class certification with respect to claims arising under those 22 statutes.[3]

The Constitution confers limited authority on each branch of the federal government. It grants to the federal courts "[t]he judicial Power of the United States." U.S. Const., Art. III, § 1. The judicial power is expressly limited; it extends only to "Cases" and "Controversies." Art. III, § 2. That limitation ensures that federal courts do not seek to aggrandize their power at the expense of the Legislative and Executive branches. Indeed, "[n]o principal is more fundamental to the judiciary's proper role in our system of government than the constitutional

[3] Warner Chilcott raises an addition ground for reversing class certification: it asserts that Rule 23(b)(3)'s requirements are not satisfied because common issues of law do not predominate over individual issues. WLF is not sufficiently acquainted with the trial court record to take a position on that separate argument.

limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

As the Supreme Court recently explained:

> Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. ... The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.

Spokeo, 136 S. Ct. at 1547.

"Any person" seeking to invoke the power of a federal court "must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). The "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must have: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560-61. Moreover, a federal court may not exercise Article III jurisdiction unless the plaintiff maintains his standing throughout the proceedings. *Symczyk*, 569 U.S. at 71-72. In other words, a plaintiff may not invoke the power of a federal court based merely on a hope that a future class certification will bring into the case new plaintiffs whose injuries are fairly traceable to the wrongdoings alleged in the complaint.

Indeed, because the absence of standing deprives a federal court of all power to act (other than to issue an order dismissing the case for lack of jurisdiction), courts may not address *any* nonjurisdictional aspects of a lawsuit (including, for example, class certification issues) until after they have satisfied themselves that the plaintiff possesses standing:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Steel Co., 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. (74 U.S.) 506, 514 (1868)). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible without exception.'" *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

II. PLAINTIFFS LACK STANDING TO ASSERT 22 OF THEIR 26 CLAIMS BECAUSE THEY CANNOT DEMONSTRATE THEY HAVE SUFFERED AN INJURY FAIRLY TRACEABLE TO A VIOLATION OF THE LAWS ON WHICH THEIR CLAIMS RELY

The district court held that Plaintiffs, by alleging that they incurred *some* injury, sufficiently demonstrated their standing to assert all 26 of their causes of action, and that demonstrating standing does not require them to "assert the same claims as the putative class members that, here, arise under the laws of different states." Mem. & Order at 40. That holding was plain error; allegations that a

plaintiff suffered injury-in-fact sufficient to establish Article III standing may not be pleaded in gross.

Plaintiffs lack standing to assert 22 of the 26 claims, as the record demonstrates that they reimbursed their members for qualifying purchases in only four of the 26 jurisdictions covered by the class definition. In the class action context, class representatives must have standing to bring all claims in the suit, and the presumed standing of absent class members who have suffered a "similar" injury does not confer standing on the class representatives.

In reviewing a case involving multiple claims, courts must consider the issue of standing on a claim-by-claim basis. Where plaintiffs, as here, seek to bring a suit for multiple claims, they must establish for each alleged statutory violation that they have suffered an injury-in-fact, fairly traceable to the alleged statutory violation, that will be redressed by a favorable result. *Lujan*, 504 U.S. at 560-61. The Supreme Court has expressly rejected the "proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same class, regardless of the nature of the deficiency that would keep the former claims out of federal court if presented on their own." *Cuno*, 547 U.S. at 351. But that is precisely what Plaintiffs propose here. Plaintiffs contend that because a single course of conduct allegedly undertaken by Warner Chilcott allegedly violated 26 separate antitrust statutes, they can establish standing to state

a claim with respect to all 26 statutory violations by demonstrating that they suffered injury-in-fact directly traceable to four of those violations. That contention is mistaken; Plaintiffs must establish standing for *all* claims in order for the class to be properly certified. *See Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (stating that "[s]tanding is not dispensed in gross").

As *Cuno* explained, it is irrelevant that the claims for which a plaintiff can establish standing arise out of the same set of facts as the other claims; the plaintiff still lacks standing with respect to other statutory violations if he is unable to demonstrate injury fairly traceable to those other violations. 547 U.S. at 351-52. In *Cuno*, the district court had concluded that a group of Toledo taxpayers demonstrated the prerequisites for Article III standing to challenge a property-tax break extended by the city to a local manufacturer (in return for the manufacturer's commitment to expand local operations), but not with respect to a credit against an Ohio franchise tax simultaneously granted to the manufacturer for the same expansion commitment. The district court nonetheless held that it could exercise supplemental jurisdiction over the challenge to the state franchise tax credit, given that the taxpayer's two causes of action arose out of a common nucleus of operative facts and raised identical Commerce Clause challenges to the tax breaks (which were both issued by Ohio or one of its political subdivisions).

The Supreme Court reversed, rejecting arguments that federal courts could

overlook the plaintiffs' lack of standing to assert a claim—and thereby exercise supplemental jurisdiction over the claim—simply because the plaintiffs possessed standing to assert a closely related claim. *Ibid.* The Court stated that while it had authorized federal courts to exercise "supplemental jurisdiction" in a limited number of cases,[4] its "general approach" to the application of that doctrine has been "cautious" and that it has never "appl[ied] the rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that serv[e] to identify those disputes which are appropriately resolved through the judicial process." *Ibid* (citation omitted). The Court held that "our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press," *id*. at 352, and that even if the plaintiffs could establish Article III standing "with respect to their *municipal* taxes, the injury does not entitle them to seek a remedy as to the state taxes." *Id.* at 353 (emphasis in original).

Here, Plaintiffs have conceded that they have not personally suffered an injury-in-fact as a result of the alleged violations of the state laws that form the basis for 22 of their 26 claims. *Cuno* dictates a finding that Plaintiffs lack standing to assert those claims. The fact that all of Plaintiffs' claims arise from the "same

[4] Citing *Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

nucleus of operative facts" and allege highly similar antitrust violations is not sufficient justification for extending Article III jurisdiction to claims for which the Plaintiffs cannot demonstrate standing. *Id.* at 352.

That Plaintiffs' complaint seeks certification of a plaintiff class does nothing to alter the standing analysis. The Supreme Court has not varied its approach to Article III jurisdiction issues in cases in which the complaint includes class allegations. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 73-79 (2013); *Lewis*, 518 U.S. at 357 ("That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.") (internal citations omitted).

Federal appeals courts have also found that class actions follow the same logic as *Cuno*, requiring class representatives to demonstrate standing for each claim they assert. For example, the Second Circuit holds that a named plaintiff lacks standing to assert claims on behalf of absent class members unless he can demonstrate, with respect to each claim, *both* that (1) "he personally has suffered some actual injury as a result the putatively illegal conduct of the defendant"; and that (2) the defendant's allegedly illegal conduct "implicates the same set of concerns as the conduct alleged to have caused injury" to absent class members.

Ret. Bd. of Policemen's Annuity and Benefit Fund v. Bank of New York Mellon, 775 F.3d 154, 161 (2d Cir. 2014) (quoting *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012)). Because the named plaintiffs could satisfy those requirements with respect to claims involving only 25 of 530 trusts for which defendant Bank of New York Mellon served as trustee, the appeals court affirmed dismissal of claims involving the remaining 505 trusts—claims that the named plaintiffs sought to litigate on behalf of absent class members. *Id.* at 159-63.

Similarly, the Eleventh Circuit has held that in certifying a class, the district court "must ensure that at least one of the named class representatives possesses the requisite individual or associational standing to bring each of the class's legal claims." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1267 (11th Cir. 2000). In *Prado-Steiman*, the plaintiffs alleged that the defendants had improperly administered the Florida Medicaid Waiver Program and sought to certify a class involving ten separate causes of action. The defendants did not dispute that a plaintiff class could properly be certified with respect to some of the claims, but argued that the named plaintiffs failed to adequately plead they had standing for seven of the ten claims. The Eleventh Circuit agreed, reversing and remanding the district court's class certification order, and directing the district court not to permit any of the ten claims to proceed unless the amended pleadings adequately

demonstrated that at least one named plaintiff possessed Article III standing to assert the claim. *Id.* at 1283.

Indeed, the Supreme Court in *Symczyk* unequivocally rejected the right of a named plaintiff who lacks Article III standing to proceed with claims on behalf of absent class members who possess the requisite standing. *Symczyk* involved a named plaintiff who had standing at the time that she filed her collective action against her employer (on behalf of herself and similarly situated employees whose rights under the Fair Labor Standards Act (FLSA) the employer allegedly had violated) but whose claims later became moot after her employer offered her a full cash settlement. Although the named plaintiff conceded that she no longer was suffering an injury fairly traceable to the employer's alleged wrongdoing and that her individual claim was moot, she argued that she should be permitted to proceed with her FLSA action on the basis of the standing of her fellow employees.

The Supreme Court rejected that argument, holding that Article III prohibits a federal court from exercising jurisdiction over a named plaintiff's claims if, at *any* time prior to certification, the named plaintiff cannot demonstrate the requisite injury-in-fact. *Symczyk*, 569 U.S. at 73-79. The Court explained that in order for a federal court to exercise Article III jurisdiction, "an actual controversy"—including a demonstration that the plaintiff possesses a "personal stake" in the litigation—"must be extant at all stages of review, not merely at the time the

complaint is filed." *Id*. at 71. The Court held that because no other employees had been added to the lawsuit by the time the plaintiff's claims became moot, dismissal of the suit was mandated; "[the plaintiff's] suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action." *Id.* at 73.

If, as in *Symczyk*, a plaintiff who at one time possessed (but subsequently loses) a "personal stake" in her federal-court claim may not proceed with that claim on behalf of similarly situated individuals, then it is even more apparent that Plaintiffs—who have *never* possessed a "personal stake" in establishing violations of 22 state statutes whose violations caused them no injury—are barred from seeking to represent others in a class action with respect to those claims.

III. *AMCHEM* AND *ORTIZ* DO NOT CREATE AN EXCEPTION TO ARTICLE III'S LIMITATIONS ON FEDERAL COURT JURISDICTION

Plaintiffs and the court below both asserted that federal courts may properly defer considering the named plaintiffs' standing until after a ruling on class certification—and then rely on the standing of absent class members within the certified class to compensate for any deficiencies in the named plaintiffs' standing. *See* Pltfs. Opp. to Petition at 13; Mem. & Order at 40. That assertion is erroneous. Plaintiffs and the court below cited several recent federal court opinions in support

of their assertion.[5] But those opinions are based on a misinterpretation of the Supreme Court's *Amchem* and *Ortiz* decisions.

Amchem and *Ortiz* involved putative class actions in which all named parties sought to uphold certification of massive plaintiff classes (composed of individuals asserting products-liability claims based on their exposure to asbestos) for settlement purposes only. In both cases, the settlements approved by the district courts purported to bind all those who had been exposed to the defendants' products, even if they had not yet suffered a compensable injury. Those appealing from the district courts' approvals of the class settlements objected both to the certification of Rule 23 classes and to the inclusion of absent class members who lacked Article III standing because they had not yet been diagnosed with an injury.

In both *Amchem* and *Ortiz*, the Supreme Court opted to address the class certification issue before addressing the standing of absent class members; the Court ultimately concluded (for a variety of reasons) that the classes should *not* have been certified, and it thus had no need to address the standing issue. In

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[5] *In re Loestrin 24 Fe Antitrust Litig.*, 261 F. Supp. 3d 307, 358-59 (D.R.I. 2017); *Blessing v. Sirius XM Radio Inc.*, 756 F. Supp. 2d 445, 452 (S.D.N.Y. 2010) (stating that "[t]he reason that named plaintiffs in a proposed class action bring claims under consumer protections laws of states where they do not reside is that it allows them to preserve those claims in anticipation of eventually being joined by class members who do reside in the states for which claims have been asserted"); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 268-69 (D. Mass. 2004).

explaining its agreement with the appeals court's decision to address the certification issue first, the *Amchem* Court said:

> The Third Circuit declined to reach these [jurisdictional] issues [including standing] because they "would not exist but for the [class-action] certification." 83 F.3d [610,] 623 [(3d Cir. 1996)]. We agree that "[t]he class certification issues are dispositive," *ibid.*; because their resolution here is *logically antecedent* to the existence of any Article III issue, it is appropriate to reach them first.

Amchem, 521 U.S. at 612 (emphasis added). *Ortiz* repeated *Amchem*'s "logically antecedent" language and held, once again, that the propriety under Rule 23 of adding uninjured individuals to a certified class should be addressed before addressing claims that the uninjured individuals lacked standing (and thus that federal courts lacked Article III jurisdiction over their claims). *Ortiz*, 527 U.S. at 831.

The district court decisions on which Plaintiffs and the court below rely interpreted *Amchem* and *Ortiz* as authorizing a court to "defer ruling" on challenges to the standing of named plaintiffs until after addressing Rule 23 class certification. *See, e.g., In re Loestrin*, 261 F. Supp. 3d at 358 (deferring consideration of the plaintiffs' standing to assert claims against a drug manufacturer for alleged violations of the antitrust laws of 25 States and Puerto Rico, even though the named plaintiffs alleged injuries arising from only a handful of those violations). After certification, the district courts simply assumed that

injuries of absent class members sufficed to provide the class with standing for each of the claims asserted in the complaint. *In re Relafen*, 221 F.R.D. at 267-70.

The cited district court decisions have badly misconstrued *Amchem* and *Ortiz*. In both of those Supreme Court cases, the named plaintiffs unarguably possessed standing for each of the causes of action asserted in their complaints. The issue of Article III standing would never have arisen but for the parties' efforts to include the claims of as-yet-uninjured absent class members within the certified class. Under those circumstances, the Court properly concluded that the class certification issue was "logically antecedent" to the Article III standing issue; a court would never need to consider whether the as-yet-uninjured claimants possessed the requisite Article III standing if it kept those claimants out of the case by denying class certification.

In sharp contrast, when (as here) the standing of the named plaintiffs to assert many of their claims is very much in doubt, there is nothing "logically antecedent" about the class certification issue. As *Steel Co.* (a decision issued a year after *Amchem* and a year before *Ortiz*) makes crystal clear, a federal court may *never* rule on any substantive aspect of a case unless the plaintiffs can establish their Article III standing. *Steel Co.*, 523 U.S. at 93-102.[6] *Amchem* and *Ortiz* are

[6] Concluding that jurisdictional issues must always be addressed first, *Steel Co.* rejected the suggestion of a concurring justice that the case could be dismissed

relevant when the standing of potential absent class plaintiffs is challenged; they do not apply to motions challenging the standing of named plaintiffs.

Indeed, Plaintiffs appear to be arguing that a plaintiff may use Rule 23 class certification motions to expand the limits of federal courts' Article III jurisdiction, an argument that the Supreme Court has repeatedly rejected. As the Court has emphasized:

> [F]ederal courts, in adopting rules, [are] not free to extend or restrict the jurisdiction conferred by a statute. . . . Such a caveat applies *a fortiori* to any effort to extend by rule the judicial powers of the United States described in Article III of the Constitution. The [Federal Rules of Civil Procedure], then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.

Willy v. Coastal Corp., 503 U.S. 131, 135 (1992).

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on an alternative, non-jurisdictional ground: that the defendants failed to state a cause of action under the statute at issue. The concurrence argued that a court could avoid having to decide difficult standing issues if, when the failure to state a cause of action is clear, the court *assumes* the existence of jurisdiction and then dismisses on the merits. *Steel Co.* rejected use of such "hypothetical jurisdiction" because "it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." 523 U.S. at 94. Skipping over jurisdictional questions is even more objectionable when, as here but unlike in the scenario envisioned by the *Steel Co.* concurrence, a district court's deferral of a jurisdictional question does *not* result in dismissal of claims.

WLF does not suggest that a district court is required to address Article III standing issues in advance of all other jurisdictional issues. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999) (holding that district courts are permitted to choose whether to first address an alleged absence of subject-matter jurisdiction or the absence of personal jurisdiction over the defendants). But there is no plausible claim that class certification is a jurisdictional issue.

Similarly, in *Amchem* the Court stated:

> We [are] mindful that Rule 23's requirements must be interpreted in keeping with Article III restraints and with the Rules Enabling Act, which instructs that rules of procedure "should not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend ... the [subject-matter] jurisdiction of the United States district courts.").

Amchem, 521 U.S. at 612-13. Accordingly, given that Plaintiffs lack Article III standing to assert 22 of the 26 claims set out in their complaint, they cannot expand the district court's jurisdiction so as to encompass those claims by including class allegations in the complaint.

IV. BECAUSE PLAINTIFFS LACK STANDING, THEY ALSO FAIL TO SATISFY THE CLASS CERTIFICATION REQUIREMENTS OF RULE 23

Because Plaintiffs lack standing to assert 22 of their 26 causes of action, the federal courts lack Article III jurisdiction even to consider certifying a Rule 23 class with respect to those 22 claims—and thus reversal is mandated. But even if this Court were to address the merits of class certification, it should reverse the district court's certification order for the separate reason that Plaintiffs have failed to satisfy the prerequisites of Rule 23(a). Because Plaintiffs have not been injured by the alleged violations of the antitrust laws of 22 of the jurisdictions in question, their claims are not typical of those absent class members who *were* injured by the alleged violations, and the Plaintiffs cannot adequately represent the interests of those absent class members.

As a condition precedent to certification, Rule 23(a)(3) requires named plaintiffs to demonstrate that their claims are "typical of the claims of the class." To satisfy that requirement, "a class representative must be part of the class and possess the interest and suffer the same injury as the class members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982). As explained above, none of the named Plaintiffs has "suffer[ed] the same injury" as those absent class members whose injuries arose from violations of one of the 22 state laws whose alleged violations did not injure Plaintiffs. Thus, by definition, Plaintiffs have not satisfied the typicality requirement.

As the Eleventh Circuit has explained:

> It should be obvious that there cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class. Typicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of the class.

Prado-Steiman, 221 F.3d at 1279.

In *Prado-Steiman*, the Eleventh Circuit reversed a district court class-certification order in a suit filed on behalf of a putative class of developmentally-disabled individuals who complained about the quality of social services they were receiving from the State of Florida. Although the named plaintiffs alleged ten distinct causes of action, the appeals court concluded that none of them possessed

Article III standing to press seven of the ten claims. *Id.* at 1280. It directed the district court on remand, when determining whether the typicality requirement was satisfied, to "ensure that at least one of the named class representatives possesses the requisite individual or associational standing to bring each of the class's legal claims." *Id.* at 1283.

The court below determined that Plaintiffs satisfied the typicality requirement, finding that their "injuries arise from the same events or course of conduct as do the injuries of the class and ... plaintiffs' claims and those of the class are based on the same legal theory." Mem. & Order at 43. But the Court failed to consider that the legal theories of Plaintiffs and the absent class members do *not* coincide. The vast majority of absent class members rest their claims on alleged violations of state laws that are irrelevant to Plaintiffs' claims—because Plaintiffs were not injured by those violations.

Nor do Plaintiffs satisfy the adequacy requirement. Rule 23(a)(4) requires plaintiffs seeking certification of a class to demonstrate that they "will fairly and adequately protect the interests of the class." To satisfy that requirement, a class representative must "possess the same interests and suffer the same injuries as the class members." *Amchem*, 521 U.S. at 625-26. The injuries that Plaintiffs allege they suffered are not the same ones allegedly suffered by absent class members, whose injuries arose from alleged violations of 22 state laws that had no impact on

Plaintiffs.

As Warner Chilcott has demonstrated, the 26 distinct statutes at issue in this lawsuit are not identical, Appellants Br. 34-36, with the result that absent class members living in some States may possess stronger claims than Plaintiffs—whose claims rise or fall on the laws of four of the 26 jurisdictions. For example, the evidentiary burden imposed on an antitrust plaintiff is not as onerous in California as it is in some other States. *Id.* at 34. Yet Plaintiffs have no incentive to seek a higher settlement for class members with claims under California law because they themselves were not injured by California law—and thus cannot recover for any such violations. That inherent conflict between Plaintiffs' interests and the interests of absent class members whose claims arise under the laws of one of the 22 jurisdictions where Plaintiffs were not injured precludes them from qualifying as adequate representatives of the class.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation (WLF). Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF: (1) complies with the type-volume limitations of Rule 32(a)(7)(B), because, according to the word processing system used to prepare this brief (WordPerfect X5), it contains 6,191 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance; and (2) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in 14-point, proportionately spaced Times New Roman type.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court of the U.S. Court of Appeals for the First Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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