No. 18-1518

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS H. KRAKAUER,
Plaintiff-Appellee,

v.

DISH NETWORK, L.L.C.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CATHERINE C. EAGLES, DISTRICT JUDGE • CASE NO. 1:14-CV-00333-CCE-JEP

AMICUS CURIAE BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF DEFENDANT AND APPELLANT DISH NETWORK L.L.C.

[All parties have consented. FRAP 29(a).]

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FELIX SHAFIR
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800

DRI–THE VOICE OF THE DEFENSE BAR
JOHN F. KUPPENS, PRESIDENT
55 WEST MONROE STREET
CHICAGO, ILLINOIS 60603
(312) 795-1101

ATTORNEYS FOR AMICUS CURIAE
DRI–THE VOICE OF THE DEFENSE BAR

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1518 Caption: Krakauer v. DISH Network L.L.C.

Pursuant to FRAP 26.1 and Local Rule 26.1,

DRI–The Voice of the Defense Bar
(name of ~~party/~~amicus)

DRI–The Voice of the Defense Bar

who is amicus curiae, makes the following disclosure:
(~~appellant/appellee/petitioner/respondent/~~amicus~~/intervenor~~)

1. Is ~~party/~~amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does ~~party/~~amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of ~~a party/~~amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

We are unaware of any entities that must be identified other than those entities identified by defendant and appellant DISH Network L.L.C. in its disclosure of corporate affiliations and other interests.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Felix Shafir Date: October 10, 2018

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on October 10, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Felix Shafir
(signature)

October 10, 2018
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules

Regulations

Miscellaneous

INTEREST OF AMICUS CURIAE

Amicus curiae DRI–The Voice of the Defense Bar ("DRI") is an international organization that includes more than 22,000 members involved in the defense of civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as amicus curiae in cases that raise issues of vital concern to its members, their clients, and the judicial system.

The question presented by this case—whether or not class actions can include numerous uninjured class members—is of exceptional importance to DRI because its members routinely represent clients in class actions. By certifying a broad class of unnamed class members who suffered no injury and entering a judgment allowing these uninjured members to recover, the district court contravened the jurisdictional limits placed on federal courts by the United States Constitution.

DRI has an interest in ensuring that parties are subject to class litigation in federal court only when all unnamed class members have standing to sue under Article III of the Constitution. Indeed, DRI has repeatedly filed amicus briefs addressing significant class action issues. *See, e.g.*, Brief for DRI–The Voice of the Defense Bar as Amicus Curiae Supporting Petitioner, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 4967192; Brief of DRI–The Voice of the Defense Bar as Amicus Curiae in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 108362.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

DRI obtained consent of all the parties to file this brief. This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). "No principle is more fundamental to the judiciary's proper role in our system of government than th[is] constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted).

"That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint*, 554 U.S. at 273. To establish standing, a plaintiff must show that the defendant's conduct caused him or her to suffer a concrete "injury in fact" and that a favorable judgment will likely redress this alleged injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (citation omitted).

Class actions are not exempt from the standing requirement. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215-16 (1974). However, federal Courts of Appeals are divided over the interplay between Article III's standing requirements and unnamed class members.

Since the "constitutional requirement of standing is equally applicable to class actions," some Courts of Appeals hold that "each [class] member must have standing" and that "a class cannot be certified if it contains members who lack standing." *Halvorson v. Auto-Owners Ins.*, 718 F.3d 773, 778-79 (8th Cir. 2013); *accord, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

Other courts, however, indicate the named plaintiff need not show the unnamed members have standing, concluding "the 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015).

Still others authorize class certification where the class includes only a de minimis number of injured members as long as defendants ultimately are not required to pay those members. *E.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21-25 (1st Cir. 2015).

Finally, some courts inconsistently follow different approaches to the standing issue in different cases. *Compare, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012), *and Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980), *with Torres v. Mercer Canyons*

Inc., 835 F.3d 1125, 1137-38 (9th Cir. 2016), *and Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016).

This Court has not yet taken a position on this split of authority.[1] Consistent with Article III's limitations, this Court should hold that Article III precludes district courts from certifying class actions that include uninjured absent class members. At a minimum, this Court should hold that class action judgments cannot require defendants to provide relief to these uninjured members. And this Court should vacate the judgment here because the order granting class certification and the subsequent judgment contravene these principles.

[1] This Court has previously said that, "[i]n a class action, we analyze standing based on the allegations of personal injury made by the named plaintiffs." *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017). But such case law assessed whether the *named* plaintiffs had standing to sue, without considering whether the *unnamed* class members must also be shown to have standing. *See, e.g.*, *id.* at 266-78. Cases are not authorities for propositions never considered by them. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992).

ARGUMENT

I. Article III precludes class certification where unnamed class members lack standing.

"The Constitution confers limited authority on each branch of the Federal Government." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016). As to the Judiciary, Article III "endows the federal courts with '[t]he judicial Power of the United States,'" and "specif[ies] that this power extends only to 'Cases' and Controversies.'" *Id.* at 1547 (citations omitted).

Article III therefore "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Id.* (citations omitted).

"[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc.,* 136 S. Ct. at 1547. "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and actual or imminent, not 'conjectural' or 'hypothetical.'" *Steel Co.*, 523 U.S. at 103 (citations omitted). "Second, there must be causation—a fairly traceable

connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.*

Because the "usual rule" in federal courts permits "litigation [to be] conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted), the focus of the standing requirement is ordinarily easy to identify: the individual plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines*, 521 U.S. at 818 (citation omitted). But Federal Rule of Civil Procedure 23 authorizes an exception to this usual rule, permitting a named plaintiff in certain narrowly defined circumstances to bring a class action to represent the interests of unnamed class members. *See Wal-Mart*, 564 U.S. at 348-49.

"That a suit may be a class action," however, "adds nothing to the question of standing" under Article III. *Spokeo, Inc.*, 136 S. Ct. at 1547 n.6 (citations omitted). Rule 23's procedural requirements for class certification "must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). "Art[icle]

III's [standing] requirement remains" in a class action and this constitutional requirement is satisfied only if the named class representative and the "class of other possible litigants" all share the same injury. *Warth*, 422 U.S. at 501; *accord Schlesinger*, 418 U.S. at 215-16. Where some class members have suffered an injury caused by the defendant but others have not, the constitutional standing requirement is not satisfied. *See Lewis v. Casey*, 518 U.S. 343, 358 & n.6 (1996).

Simply put, federal courts can "provide relief to claimants, in individual or class actions," only if the claimants "have suffered, or will imminently suffer, actual harm." *Id.* at 349. Affording a "class of individuals" relief where the defendant caused them no actual harm would eviscerate the separation of powers that is so vital to ensuring that federal courts do not exceed the narrow role assigned to them by the Constitution. *Id.* at 349-50, 357-58.

Accordingly, variations between the named plaintiff's and unnamed class members' injuries result in a lack of standing under Article III. *Gratz v. Bollinger*, 539 U.S. 244, 262-63 & n.15 (2003) (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *see also, e.g.*, *Lewis*, 518 U.S. at 358 & n.6 (holding that Article III standing requirement is not satisfied where some

class members suffer an injury but others do not); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (same); *Warth*, 422 U.S. at 501-02 (same).

Consistent with this precedent, several federal appellate courts hold that class certification is inappropriate where the class representative demonstrates he has standing but the putative class includes unnamed members who lack standing. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *Halvorson*, 718 F.3d at 778-79; *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney*, 443 F.3d at 264.

This Court should adopt the same rule. "In order for a class to be certified, each [class] member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision," since the "constitutional requirement of standing is equally applicable to class actions." *Halvorson*, 718 F.3d at 778-79; *accord Rail Freight*, 725 F.3d at 252 (explaining that named plaintiffs must "show that they can prove, through common evidence, that all class members were in fact injured by the alleged" misconduct). Consequently, "a class cannot be certified if it contains members who lack standing."

Halvorson, 718 F.3d at 779 (citing *Denney*, 443 F.3d at 263-64); *accord Mazza*, 666 F.3d at 594 (same); *Avritt*, 615 F.3d at 1034 (same); *Adashunas*, 626 F.2d at 604 (affirming denial of class certification where it was unclear whether "proposed class members have all suffered a constitutional or statutory violation warranting some relief"); *see also Wal-Mart*, 564 U.S. at 364 (acknowledging "necessity" of excluding putative class members who "lack standing to seek injunctive or declaratory relief" from proposed class seeking such relief).

Other appellate decisions have reached a contrary conclusion. *See, e.g.*, *Torres*, 835 F.3d at 1137 & n.6; *Kleen Prods.*, 831 F.3d at 927; *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197-98, 1201 (10th Cir. 2010); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998).

But these latter decisions are predicated on flawed rationales. Some contend that Rule 23's prerequisites for class certification (such as the typicality or adequacy of representation or predominance requirements) will protect against the possibility that uninjured absent claimants will ultimately recover by the end of the case; others maintain that later developments (such as a trial on the merits following classwide

discovery) will perform the same sifting function. *See, e.g.*, *Torres*, 835 F.3d at 1137 (explaining that the presence of uninjured class members "does not necessarily defeat certification of the entire class" because a "district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition"); *Kleen Prods.*, 831 F.3d at 927 (explaining that, at class certification stage, named plaintiffs need not show every class member was injured as long as the class does not include "too many" uninjured members and each member must "ultimately" show injury "to recover"); *Stricklin*, 594 F.3d at 1197-98, 1201 (explaining that, at class certification stage, named plaintiffs need not show unnamed class members suffered an injury caused by the defendant in part because "classwide discovery and further litigation answer th[is] question after certification"); *Prudential*, 148 F.3d at 307 (explaining that, whether unnamed class members are properly in federal court is an issue of "compliance with the provisions of Rule 23, not one of Article III standing").

Neither of these misguided justifications should permit federal courts to ignore whether unnamed class members satisfy Article III's standing requirement at the class certification stage.

First, the theoretic possibility that the class may lose on the merits after class certification because of a failure to prove injury, or that uninjured class members might be winnowed out on the merits through post-certification proceedings, does not permit a court to ignore Article III's standing requirement for unnamed class members. Because "merits question[s] cannot be given priority over an Article III question," there is no basis for "allowing merits questions to be decided before Article III questions." *Steel Co.*, 523 U.S. at 97 n.2. "[T]he proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' that the Constitution leaves for resolution through the political process." *Id.* (citation omitted).

Second, Rule 23's procedural requirements for class certification—such as the need to show typicality, adequacy of representation, or predominance—are not a sufficient substitute for scrutiny of unnamed members' Article III standing. Standing and Rule 23's requirements "spring from different sources and serve different functions." 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed. 2012 & Supp. 2018). Thus, "[c]are must be taken, when dealing with apparently standing-related concepts in a class action context" because, although

"individual standing requirements" and "Rule 23 class prerequisites . . . appear related, in that they both seek to measure whether the proper party is before the court to tender the issues for litigation, they are in fact independent criteria. . . . Often satisfaction of one set of criteria can exist without the other." *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 605 (S.D.N.Y. 2006) (citation omitted).

Since "there is a fundamental analytical distinction between" Rule 23's prerequisites for class certification and "Article III standing," *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 250 (D. Conn. 2015), it is improper for courts to replace an examination of standing with an analysis of whether class treatment is proper under Rule 23. The Supreme Court has "always insisted on strict compliance with" standing requirements because they serve the constitutional separation of powers by "keeping the Judiciary's power within its proper constitutional sphere." *Raines*, 521 U.S. at 819-20. In this era of frequent class actions, "courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

In short, "Article III standing, as a fundamental constitutional requisite of federal judicial power, presents a 'threshold question in every federal case'"—including in class actions. *Aggrenox*, 94 F. Supp. 3d at 250 (citation omitted); *accord Denney*, 443 F.3d at 263 ("The filing of suit as a class action does not relax this jurisdictional [standing] requirement."). Thus, "a class cannot be certified if it contains members who lack standing" because "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Halvorson*, 718 F.3d at 779; *see also, e.g., Rail Freight*, 725 F.3d at 252 (holding that "common evidence" must "show all class members suffered *some* injury").

II. At a minimum, Article III prevents federal courts from entering judgments that afford relief to uninjured class members.

Even assuming a lawsuit could be certified for class treatment where the class includes uninjured members, this Court should hold that, at a minimum, a class action judgment cannot allow uninjured members to recover. Any conclusion to the contrary would contravene Article III.

Article III standing is a constitutional prerequisite "in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. Consequently, the "class representative" and "all

members of the class he represents" must "suffer the same injury" to satisfy Article III's standing requirement. *Schlesinger*, 418 U.S. at 215-16; *accord Warth*, 422 U.S. at 501. In other words, Article III permits a named plaintiff to sue as a representative only for those "who have been injured in fact, and *thus could have brought suit in their own right*." *Simon*, 426 U.S. at 40 (emphasis added). This requirement "for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers," and cannot be altered "by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

This essential constitutional limitation would be meaningless if a judgment could be entered in favor of uninjured class members merely because the named plaintiff brought a lawsuit as a class action, can show he or she suffered an injury caused by the defendant, and included uninjured members in the class. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). "Therefore, if there is no way to ensure that the jury's

damages award goes only to injured class members, the award cannot stand." *Id.*

Accordingly, even appellate decisions authorizing class certification notwithstanding the inclusion of uninjured members generally hold that defendants ultimately cannot be required to pay damages to uninjured members. *See, e.g.*, *Torres*, 835 F.3d at 1137 (holding that uninjured class members do "not necessarily defeat certification" where the district court can "winnow out those non-injured members at the damages phase of the litigation" or refine the class to exclude all such uninjured members); *Kleen Prods.*, 831 F.3d at 927 (holding that each class member must prove some injury from the alleged violation "in order ultimately to recover," even if they need not do so "at the class certification stage"); *Nexium*, 777 F.3d at 32 n.28 (holding that the law "preclude[s] *recovery* for uninjured class members"); *Stricklin*, 594 F.3d at 1198 (holding that although Rule 23 does not require named plaintiffs, at the class certification stage, to answer whether all class members were injured, "classwide discovery and further litigation answer the question after certification").

Some courts, however, appear to indicate that a class action judgment can afford relief to uninjured members without contravening Article III. *See, e.g.*, *Neale*, 794 F.3d at 369 (explaining that, "so long as a named class representative has standing, a class action presents a valid 'case or controversy'" under Article III). If such cases actually stand for this proposition, they are wrong.

According to such cases, "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23." *Id.* at 367. These courts therefore maintain that "the requirements of Rule 23" should be the sole means for testing "the propriety of granting class-wide relief" to all class members. *Id.* at 368.

This rationale is flawed in several respects.

First, requiring unnamed class members to prove Article III standing is *not* inconsistent with the nature of a class action under Rule 23. The "constitutional requirement of standing is equally applicable to class actions," *Halvorson*, 718 F.3d at 779, and "standing is not dispensed in gross," *Lewis*, 518 U.S. at 358 n.6.

Indeed, Rule 23's class action requirements and Article III's standing requirement are wholly "independent criteria"—the "standing

doctrine is primarily concerned with ensuring that a real case or controversy exists" whereas Rule 23's distinct prerequisites "address concerns about the relationship between the class representative and the class." Rubenstein, *supra*, § 2:6. "Often satisfaction of one set of [these independent] criteria can exist without the other." *Salomon Smith Barney*, 441 F. Supp. 2d at 605 (citation omitted).

Second, even if the nature of a class action under Rule 23 were inconsistent with Article III, the latter's standing requirement would nonetheless mandate that each unnamed class member prove standing prior to the entry of a judgment. Article III trumps the Federal Rules of Civil Procedure. *See Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (holding that Federal Rules of Civil Procedure cannot "expand the judicial authority conferred by Article III"). Class actions are nothing more than a "procedural" mechanism for the "litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)—a device that does not itself furnish any substantive rights but instead provides "only the procedural means by which the remedy may be pursued," *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 402 (2010) (majority opinion). Such a procedural device "leaves the

parties' legal rights and duties intact and the rule of decision unchanged." *Id.* at 408 (plurality opinion). Moreover, the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive right.'" *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b) (2012)).

Hence, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem Prods.*, 521 U.S. at 612-13. At a minimum, Article III and the Rules Enabling Act bar uninjured members from recovering in a class action. *See, e.g.*, *Bouaphakeo*, 136 S. Ct. at 1053 (Roberts, C.J., concurring); *Nexium*, 777 F.3d at 32 n.28.

III. The district court's judgment contravenes Article III and should therefore be vacated because the district court improperly certified a class containing uninjured class members and entered a judgment allowing them to recover.

A. The district court improperly certified a class that includes numerous uninjured members.

At the class certification stage, the district court acknowledged the proposed classes may include uninjured members but nonetheless authorized class treatment because, in the court's view, "the fact that it is impossible to exclude all uninjured class members at this [class certification] stage does not prevent certification." (*E.g.*, ECF No. 111 at

23-25, 29-30.) But, as explained above, *supra* pp. 6-14, "[i]n order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant"; "a class cannot be certified if it contains members who lack standing," *Halvorson*, 718 F.3d at 778-79. Consequently, the judgment should be vacated because the court erred in certifying a class with uninjured members.

Moreover, at the very least, a "class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009). The order granting class certification acknowledged this principle, (ECF No. 111 at 24), but improperly failed to prevent the class from including many uninjured members.

Plaintiff Thomas Krakauer sued under the Telephone Consumer Protection Act ("TCPA") for alleged violations of 47 U.S.C. § 227(c). (ECF No. 32 at 13.)[2] Section 227(c) "gives consumers 'who have received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of [certain] regulations' a private right of

[2] Plaintiff also alleged a second claim for violations of a regulation, (ECF No. 32 at 13-14), but the district court dismissed that claim based on the stipulation of the parties, (ECF No. 271 at 2-3).

action." *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2018) (quoting 47 U.S.C. § 227(c)).

The order granting class certification explained that Plaintiff's expert "obtained the names and addresses" of people "associated with" phone numbers on the Do-Not-Call Registry, and said "[t]hese persons make up the [Do-Not-Call Registry] class." (ECF No. 111 at 11.) When defendant DISH Network L.L.C. ("DISH") explained that only the subscribers for such phone numbers could sue under § 227(c), the court disagreed, concluding *any* person who received a call on such a number could sue under this provision. (ECF No. 111 at 14.) And the class definition did not even confine the class to members who actually answered a call or heard the phone ring. (*See, e.g.*, ECF No. 111 at 4; ECF No. 153 at 1.)

But the court was wrong: § 227(c) authorizes only subscribers to sue. (Appellant's Opening Brief ("AOB") 21-26.) By certifying a class of those who were merely associated with a number on the Do-Not-Call Registry, without limiting the class to telephone number subscribers (i.e., the only people who can sue under § 227(c)), the district court necessarily certified a class consisting of numerous people who were not injured

within the meaning of § 227(c). The court did not find that this uninjured component of the class was de minimis, and therefore failed to guard against an order certifying a class that includes many uninjured people.

B. The district court erroneously entered a judgment affording relief to uninjured class members.

Even if, at the class certification stage, a court could certify a class that includes uninjured members, the judgment should be reversed because it ultimately awarded damages to uninjured members.

The jury here did *not* find that every class member was injured. Instead, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period, (ECF No. 293 at 8-10; AOB 38-39), and the district court entered judgment for thousands of class members based on the jury's verdict, directing DISH to pay "each member of the class" $1,200 per call, (ECF No. 439 at 1, 3-4). In other words, at most, the jury was called on to decide only whether a technical violation of the statute at issue had occurred. *See* 47 U.S.C. § 227(c) (creating right of action for those who have "received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection"); 47 C.F.R. § 64.1200(c)(2)

(2018) (prohibiting telephone solicitations to "residential telephone subscriber[s]" who registered their numbers "on the national do-not-call registry").

However, "a statutory violation *alone* does not create" Article III standing. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017). A plaintiff cannot "automatically satisf[y] [Article III's] injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.*, 136 S. Ct. at 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id*. Thus, a statutory violation "divorced from any concrete harm" is insufficient to "satisfy the injury-in-fact requirement" since a violation without more "may result in no harm." *Dreher*, 856 F.3d at 344 (citation omitted).

Courts look to several considerations to assess whether a statutory violation constitutes an injury-in-fact under Article III. Because the standing requirement "is grounded in historical practice," courts consider whether a harm "has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc.*, 136 S. Ct. at 1549. Additionally, courts look to whether Congress identified a particular

statutory harm as satisfying Article III requirements. *Id.* Finally, even where Congress has done so, a claimant must show the violation in question is not "divorced from any concrete harm" before it can satisfy Article III. *Id.* The judgment here fails to satisfy *any* of these considerations.

First, the harm here has not traditionally been regarded as providing a basis for a lawsuit.

When Congress enacted the TCPA, it determined that "[u]nrestricted telemarketing . . . 'can be an intrusive invasion of privacy'" and the TCPA therefore "bans certain practices invasive of privacy." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371-72 (2012).

Under *certain* circumstances, American law allows suits for intrusive invasions of privacy: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (Am. Law Inst. 1977 & Supp. 2018). But the law places sharp limitations on when a person can bring such a lawsuit based on a telephone call. There is "no liability

unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man." *Id.* § 652B cmt. d. Thus, "there is no liability" for "calling [a person] to the telephone on one occasion *or even two or three*" occasions because "[i]t is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded." *Id.* (emphasis added).

Here, the jury did not find that each class member received calls with such frequency that the calls amounted to an unlawful "course of hounding" under traditional legal principles. Instead, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period. (ECF No. 293 at 8-10; AOB 38-39.) Because two or three unsolicited telephone calls traditionally are not actionable, Restatement (Second) of Torts § 652B cmt. d, and since the jury never found that each class member received more than two or three unsolicited telephone calls from DISH's alleged agent, the judgment necessarily awarded damages

to class members who traditionally would not have been afforded a right to sue for these calls.

Second, the judgment awarded damages for a harm never identified by Congress in the statute at issue, 47 U.S.C. § 227(c)(5).

"Subsection (c)" of 47 U.S.C. § 227 creates private rights of action for certain calls "initiated for telemarketing purposes to residential telephone *subscribers*." *Chavrat v. NMP, LLC*, 656 F.3d 440, 449 (6th Cir. 2011) (emphasis added); *see also* 47 U.S.C. § 227(c)(1), (5) (directing the Federal Communications Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone *subscribers*' privacy rights to avoid receiving telephone solicitations to which they object" and creating a right of action for those who have "received more than one telephone call within any 12-month period by or on behalf of the same entity *in violation of the regulation prescribed under this subsection*" (emphasis added)); 47 C.F.R. § 64.1200(c)(2) (prohibiting entities from initiating telephone solicitations to a "residential telephone *subscriber* who has registered his or her telephone number on the national do-not-call registry" (emphasis added)). The statutory right of action "is accordingly limited to redress for violations of the regulations

that concern residential telephone *subscribers*." *Cunningham v. Spectrum Tax Relief, LLC*, No. 3:16-cv-02283, 2017 WL 3222559, at *3 (M.D. Tenn. July 7, 2017) (emphasis added), *adopted by* 2017 WL 3220411, at *1 (M.D. Tenn. July 28, 2017). But the district court did not limit the class to subscribers who received telemarketing calls on phone numbers listed on the Do-Not-Call Registry—the harm targeted by the statutory provision at issue.

Instead, the court certified a class consisting of members who were merely associated with a phone number on the Registry, without limiting the class to the subscribers of those numbers. *Supra* p. 21. As the court later stressed, "[a]t the time of class certification, all the telephone numbers had been identified" using records that "included names and addresses associated with many of the phone numbers." (ECF No. 351 at 2.) Plaintiff therefore provided class notice to thousands of persons "associated with these phone numbers." (ECF No. 351 at 3.) This vague, ambiguous "associated with" standard did not apply solely to subscribers, but also swept in those who merely lived or worked in subscribers' households or otherwise used subscribers' numbers during the class period. *See infra* p. 28.

Furthermore, the court subsequently refused to permit DISH to receive discovery or a trial on whether each "class member was the 'subscriber' to the phone number," reiterating its earlier ruling that class members need not prove "they are 'subscribers'" and concluding that Plaintiff proved his case when the jury found each class member received the calls in question. (ECF No. 351 at 5-11 & n.8.) The court then decided members could recover by affirming, via a claim form, that "the number was theirs *or their household's* during the class period" and showing "they, or *their household*, paid for *or used* the phone number at a time within the class period"—in other words, to recover damages without proving they were the numbers' subscribers. (ECF No. 351 at 18 (emphasis added); *see also* ECF No. 407 at 4-5, 11 (agreeing to enter judgment based on the data identifying "names associated with" phone numbers).)

The court later relieved many class members from complying with even this procedure, finding that, with narrow exceptions, thousands of members "were entitled to recover without going through [this] claims process" based on member lists likewise derived from names merely associated with phone numbers. (ECF No. 437 at 2-3, 6-8.) Ultimately

the court entered judgment in favor of thousands of class members based on such data, directing DISH to pay each member $1,200 per call. (ECF No. 439 at 1, 6.)

In short, the judgment permitted class members to recover without proving they were the subscribers of the phone numbers at issue—even though the harm identified by Congress in § 227(c)(5) is that sustained by certain telephone number *subscribers*. Consequently, in contravention of Article III, the judgment allowed class members to recover damages without proof that they suffered the harm singled out by the statute in question.

Finally, even assuming § 227(c) encompasses harm to nonsubscribers and the harm alleged here has traditionally provided a basis for a lawsuit (neither of which is the case), the judgment nonetheless violated Article III by awarding damages for a statutory violation without proof of any concrete injury.

Before trial, the district court determined that class members need not show they actually picked up or even heard the calls, concluding that each member "on a do-not-call list" who received a call here sustained a concrete injury from the "*risk* of an invasion of a class member's privacy"

since these "calls are a disruptive and annoying invasion of privacy." (ECF No. 218 at 3-4.) But the supposed risk of an invasion of privacy stemming from the receipt of the calls cannot suffice to show the injury necessary to satisfy Article III.

Standing requirements "ensure that the alleged injury is not too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (citation omitted). The injury must be "'real,' and not 'abstract.'" *Id.*

Although "'threatened rather than actual injury can satisfy Article III standing requirements,' not all threatened injuries constitute an injury-in-fact." *Beck*, 848 F.3d at 271 (citation omitted). The "threatened injury must be 'certainly impending'" and bare assertions of such an injury are insufficient to confer Article III standing. *Id.* at 272-73 (citation omitted). "[A] threatened event can be 'reasonabl[y] likel[y]' to occur but still be insufficiently 'imminent' to constitute an injury-in-fact." *Id.* at 276. The prospect of "'*possible* future injury' [is] not sufficient,"

Clapper, 568 U.S. at 409, so a plaintiff must show facts demonstrating the risk of the threatened harm is not too speculative, *Beck*, 848 F.3d at 274-75.

The district court decided, prior to trial, that the calls at issue could create a sufficiently concrete risk of harm because "unwanted telemarketing calls are a disruptive and annoying invasion of privacy." (ECF No. 218 at 3-4.) But "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice" to show an Article III injury-in-fact. *Dreher*, 856 F.3d at 346; *see also Beck*, 848 F.3d at 273 (holding that bare assertions of emotional injury from a statutory violation are insufficient to confer Article III standing). In any event, during and after trial, the court ultimately did not require class members to demonstrate that any calls were actually disruptive or frustrating or threatened disruption or frustration. Rather, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period, and judgment awarding damages was entered based on the jury's verdict. *Supra* pp. 22, 25. The members were therefore allowed to

recover without proving any statutory violations had real world effects or that such threatened effects were certainly impending. Claimants cannot recover in federal court based on "a statutory violation divorced from any real world effect" because a "statutory violation absent a concrete and adverse effect does not confer standing." *Dreher*, 856 F.3d at 346.

In sum, since the judgment allowed class members to recover without showing any real harm, much less the harm Congress sought to prevent, it cannot stand. See *id.* at 347.[3]

[3] That the judgment permitted uninjured class members to recover confirms the importance of ensuring that *all* class members have Article III standing *at the class certification stage*. Some federal courts maintain that class certification is proper notwithstanding the inclusion of uninjured members because later proceedings will winnow out the uninjured members. *See, e.g., Torres*, 835 F.3d at 1137-38; *Kohen*, 571 F.3d at 676-79. But this view cannot be squared with this case, which proceeded to trial and final judgment yet still allowed uninjured members to recover. This case confirms that the Article III standing of all members should be resolved at the class certification stage because post-certification merits proceedings cannot sufficiently safeguard against the possibility that uninjured members will obtain relief by the end of the case.

CONCLUSION

For the foregoing reasons and for the reasons stated in DISH Network L.L.C.'s opening brief, this Court should vacate the judgment and remand for further proceedings consistent with this Court's opinion.

October 10, 2018

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FELIX SHAFIR
DRI–THE VOICE OF THE DEFENSE BAR
JOHN F. KUPPENS, PRESIDENT

By: s/ Felix Shafir

Attorneys for Amicus Curiae
DRI–The Voice of the Defense Bar

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-1518 Caption: Krakauer v. DISH Network, L.L.C.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[X] this brief or other document contains 6,448 [*state number of*] words
[ ] this brief uses monospaced type and contains _____ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

[X] this brief or other document has been prepared in a proportionally spaced typeface using
Word [*identify word processing program*] in
14 point Century Schoolbook [*identify font size and type style*]; **or**

[ ] this brief or other document has been prepared in a monospaced typeface using

_____ [*identify word processing program*] in
_____ [*identify font size and type style*].

(s) s/ Felix Shafir

Party Name DRI–The Voice of the Defense Bar

Dated: October 10, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on October 4, 2018.

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.

October 10, 2018

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FELIX SHAFIR
DRI–THE VOICE OF THE DEFENSE BAR
JOHN F. KUPPENS, PRESIDENT

By: s/ Felix Shafir

Attorneys for Amicus Curiae
DRI–The Voice of the Defense Bar