Nos. 23-235 & 23-236

In The Supreme Court of the United States

FOOD AND DRUG ADMINISTRATION, ET AL.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

DANCO LABORATORIES, L.L.C.,
Petitioner,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PROFESSOR F. ANDREW HESSICK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than amicus or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Respondents include four associations ("the Groups"), of which three are professional associations of physicians and the fourth, the Alliance for Hippocratic Medicine ("the Alliance"), is an association of other associations. The Fifth Circuit held that these Groups each has associational standing, concluding that each Group may rely on the Article III standing of its members to establish its own Article III standing.

Associational standing—the theory that an uninjured membership association can base standing to sue on an injury suffered by one of its members—is flatly inconsistent with Article III, which authorizes federal courts to exercise the judicial power only to resolve cases and controversies.

At the heart of an Article III case or controversy is the plaintiff's personal stake in the outcome of the suit. The plaintiff must have personally suffered a concrete injury in fact, which was caused by the defendant's conduct and is redressable by a favorable judicial decision.

Associational standing cannot be squared with these essential requirements of Article III. First, an association does not suffer an injury in fact merely because one of its members has suffered an injury. Second, because it has not suffered an injury, the association cannot show that a court could issue a

remedy to the association that would redress the injury. Associational standing thus empowers federal courts to opine on legal questions outside the context of resolving an actual controversy between the parties to a case.

Associational standing is also incongruous with historical practice. A basic principle of Anglo-American law was that a person could seek judicial relief only for his own injuries. Although a representative could in some circumstances bring suit on behalf of the injured person, those suits sought recovery for the injured person, not the representative. Associational standing deviates from this practice by authorizing the association to obtain a remedy *itself* for an injury to another person.

By authorizing associations to bring suit outside the context of an actual case or controversy, associational standing also violates basic principles of separation of powers. Standing protects the separation of powers by confining the federal judiciary to the "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). By limiting the power of the federal courts to deciding questions of law only when necessary to redress a concrete injury suffered personally by the plaintiff, standing ensures that the federal courts do not usurp the roles of the political branches. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Associational standing guts this

limitation by allowing an uninjured association with no concrete interest at stake to have an issue decided by a federal court.

Because exercising jurisdiction based solely on associational standing violates Article III, the Fifth Circuit's conclusion that the Groups have associational standing cannot stand.

ARGUMENT

The Fifth Circuit in this case held that the Groups have associational standing, concluding that the injuries to the Groups' members sufficed to provide Article III standing to the Groups themselves.

The FDA and Danco argue that the Groups fail to meet the requirements for invoking associational standing. This brief addresses the more fundamental question whether associational standing is ever sufficient to satisfy Article III. It demonstrates that associational standing—the theory that an uninjured membership association can base standing to sue on an injury suffered by one of its members—is flatly inconsistent with Article III, which authorizes federal courts to exercise the judicial power only to resolve cases and controversies.

This Court has repeatedly held that the irreducible constitutional minimum requirements of Article III standing are that the plaintiff must (1) have suffered, or face an imminent threat of suffering, an injury in

fact that is (2) traceable to the defendant's misconduct and that (3) is likely to be redressed by a favorable judicial decision.

Associational standing is inconsistent with two of these minimum requirements: injury in fact and redressability. It permits an association that has not suffered an injury to bring suit merely because one of its members has been injured. Moreover, because the association has not suffered an injury, a judicial order cannot provide the association with any redress.

I. Associations lack Article III standing to bring suit based solely on injuries suffered by their members.

Article III limits the "judicial Power" of the United States to "Cases" and "Controversies." U.S. Const. art. III, § 2. "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). In these cases, the Groups argue, Br. in Opp. at 20–21, and the lower courts held, that the Groups have associational standing to sue—even if the Groups do not have standing in their own right, the standing of their members supplies standing to the Groups. But as shown below, associational standing cannot be squared with the requirements of Article III.

A. Article III standing limits federal courts to adjudicating concrete disputes brought by plaintiffs with personal stakes in the outcomes.

1. The irreducible requirements of standing are injury, causation, and redressability.

For a plaintiff to have standing under Article III, he must have "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth*, 422 U.S. at 498–99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To meet this standard, a plaintiff must show three things: (1) injury in fact; (2) a causal connection between the injury alleged and the conduct complained of; and (3) the injury would likely be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). These three requirements are the "'irreducible constitutional minimum' of Article III standing." *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). Accordingly, federal courts must dismiss a suit for lack of jurisdiction if the plaintiff fails to meet any of them. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

This Court's decisions spell out the meaning of these requirements. To qualify as a cognizable "injury in fact," the plaintiff's alleged injury must be both

"concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). For an injury to be "concrete," it cannot be "abstract" but rather "must actually exist" and cause real-world harm to the plaintiff. *Spokeo, Inc.*, 578 U.S. at 340.

The "particularized" requirement, in turn, demands that the injury "affect the plaintiff in a personal and individual way." *Id.* at 339. It cannot be a "generalized grievance" that is widely shared by other people in an "undifferentiated" way. *United States v. Richardson*, 418 U.S. 166, 176–77 (1974). In addition, the injury must "personally harm" the plaintiff. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021). A plaintiff cannot bring suit as a "concerned bystander[]," asserting standing based on an injury suffered by another person. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) ("Article III standing 'is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."'" (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986))).

Typical examples of concrete, particularized injuries include monetary or physical harms suffered by the plaintiff, as well as identifiable intangible injuries, such as reputational harm and intrusion upon the right to seclusion. *TransUnion*, 141 S. Ct. at 2204; *Spokeo, Inc.*, 578 U.S. at 342–43.

By contrast, a plaintiff does not state an adequately concrete and particularized injury by alleging only that some challenged activity violates the plaintiff's principles or beliefs. *See TransUnion*, 141 S. Ct. at 2205 ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019))). Violation of a plaintiff's principles is only an abstract harm insufficient to provide a basis for standing, no matter how fervent the plaintiff's belief in the principle. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (explaining that "a mere 'interest in a problem,' no matter how longstanding the interest . . . is not sufficient" to confer standing); *see also Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 435 (1952) ("[Standing] is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct.").

To satisfy the redressability requirement, the plaintiff must show that a favorable decision will likely remedy the alleged injury. *Lujan*, 504 U.S. at 560–61. In that regard, to be adequate to support standing, the potential remedy must redress the

specific injury alleged. It is not sufficient that the remedy may address some different injury. *See California v. Texas*, 141 S. Ct. 2104, 2115–16 (2021) ("To determine whether an injury is redressable, a court will consider the relationship between 'the judicial relief requested' and the 'injury' suffered." (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984))); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that a past injury does not provide a basis for seeking a prospective injunction). Likewise, the relief must remedy the plaintiff's injury, not an injury suffered by another person. *Steel Co.*, 523 U.S. at 103 n.5 (stating that redressability requires that a plaintiff "personally would benefit in a tangible way from the court's intervention" (quoting *Warth*, 422 U.S. at 508)); *Warth*, 422 U.S. at 499 (explaining that judicial power "exists only to redress or otherwise to protect against injury to the complaining party").

The redressability requirement also demands that the court's remedy independently can redress the asserted injury. *Uzuegbunam*, 141 S. Ct. at 797 (stating that redressability requires "a remedy that is likely to redress that injury"). If relief from the injury "depends on the unfettered choices made by independent actors" that the court cannot control or predict, redressability is not satisfied. *Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

2. Associational standing allows an organization to establish standing based on a member's injury.

Just like all other plaintiffs, a membership organization or association must establish Article III standing to maintain suit in federal court. To do so, it may assert standing "in its own right" by showing that it seeks "judicial relief from injury to" the organization "itself." *Warth*, 422 U.S. at 511. No one questions an organization's ability to bring suit to seek redress for its own injuries.

But in a sharp break with other Article III jurisprudence, current law also allows an organization to bring suit to seek redress for injuries to one or more of its members. Thus, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id.*; *see also United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996) ("[A]n organization may sue to redress its members' injuries, even without a showing of injury to the association itself.").

Under current law, for a membership association to have this "associational standing," under which standing rests solely on injuries to members, three conditions must be met. *United Food*, 517 U.S. at 553. First, one of the association's members must have suffered a cognizable injury that would support "standing" for that member "to sue in their own right." *Id.* (quoting *Hunt v. Wash. State Apple Advert.*

Comm'n, 432 U.S. 333, 343 (1977)). Second, the interests that the organization "seeks to protect [must be] germane to the organization's purpose." *Id.* (quoting *Hunt*, 432 U.S. at 343). Third, the participation of the member who provides the basis for the association's standing must be unnecessary to resolving the claim and providing the relief requested by the association.[2] *Id.* ("Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (quoting *Hunt*, 432 U.S. at 343)).

B. Exercising jurisdiction based on associational standing violates Article III.

Associational standing does not satisfy the "irreducible constitutional minimum" requirements of injury in fact and redressability.

1. An association that claims standing based solely on a member's injury cannot satisfy the injury-in-fact requirement of Article III.

An association asserting solely associational standing has not suffered a "personal" injury. *Spokeo, Inc.*, 578 U.S. at 339. Rather, the association operates only as a "concerned bystander," seeking to protect the interests of another person. *Hollingsworth*, 570 U.S.

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[2] The Court has held that, unlike the first two requirements, this third requirement is prudential and therefore not essential to Article III standing. *United Food*, 517 U.S. at 555.

at 707. Such an association accordingly lacks one of the fundamental requirements for Article III standing. Michael Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. __ (forthcoming 2024) (manuscript at 18–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540176 (discussing the development of associational standing and its inconsistency with Article III standing requirements).

In recognizing associational standing, this Court has held that an organization that has suffered no injury itself may have standing as a representative of its members. *See Warth*, 422 U.S. at 511. This conclusion is unwarranted.

It is true, of course, that there are certain circumstances in which a person who has not suffered an injury may bring suit as a representative by establishing that the represented person has suffered an injury in fact. In those cases, however, the representative appears in the case on behalf of the represented party solely to pursue the interests of the represented party; the representative does not appear on behalf of the representative himself. For example, in *Karcher v. May*, 484 U.S. 72 (1987), the Court recognized that state officers had standing in their official capacity to bring suit on behalf of a state. *See id.* at 78.

The Court followed similar reasoning in *Whitmore v. Arkansas*, in recognizing standing for a

"next friend" who brought a habeas petition on behalf of an inmate. There, the Court reasoned that the "'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest." 495 U.S. at 163.

Establishing that the representative suffered an injury is unnecessary in these circumstances because the actual dispute is between the represented party and the defendant. The real party in interest is the represented party, not the representative. *See* Fed. R. Civ. P. 17(a). The representative does not appear in her personal capacity and does not seek relief for herself.

In contrast, an association invoking a member's injury does not act solely as a representative of another person who is the real party in interest in this traditional sense. Rather, the association brings suit on its own behalf, and is in no way obligated to litigate in a way that prioritizes the member's interests over the association's interests. *See Auto. Workers v. Brock*, 477 U.S. 274, 289 (1986) ("[A]n association might prove an inadequate representative of its members' legal interests for a number of reasons.").

Nor does the association seek a remedy that belongs to and will flow to the member, as is the case with a true representative who is pursuing a claim solely for the represented party. Any remedies

awarded by the court in an associational standing case go to the association, not to the member. While those remedies may indirectly benefit the member, it is the association, not the member, that receives the remedy and has the power to enforce it. *See, e.g.*, *W. Va. Highlands Conservancy v. Brooks Run Mining Co., LLC*, No. 2:19-CV-41, 2022 WL 677573, at *9–10 (N.D. W. Va. Mar. 7, 2022) (awarding to associations asserting associational standing an injunction prohibiting mining company from discharging excess pollutants).

There is a fundamental difference between, on the one hand, a plaintiff bringing a suit on another person's behalf and, on the other, a plaintiff asserting another person's interest in the plaintiff's own suit. In the former, the actual dispute is between the represented party and the defendant. In the latter, the actual dispute is between the plaintiff acting for itself and the defendant. Accordingly, in this latter case, the plaintiff must establish its *own* standing, as opposed to relying on the standing of the person whose interest is asserted, to proceed in federal court.[3]

[3] In this way, class actions fundamentally differ from associational standing. To have standing to maintain a class action, the lead plaintiff must establish that it suffered its own injury for which it seeks relief. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The plaintiff may also assert claims as a representative on behalf of the other class members to seek relief

This Court recognized this distinction in *Hollingsworth*, when it held that several private individuals seeking to defend California's Proposition 8 could not rely on injury to California to establish their own standing. The Court reasoned that, although the individuals sought to assert California's interests, they were not "agents" of the state, but instead sought to defend the Proposition in their individual capacities. *Id.* at 712. Accordingly, the individuals had to show that they themselves suffered an injury in fact to establish standing. *Id.* at 708.

This Court applied the same reasoning in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), holding that the beneficiaries of a bank's retirement plan seeking to sue the bank could not rely on injury to the plan to establish standing. *Id.* at 1619. Although the beneficiaries asserted the interests of the plan, they did not bring suit on behalf of the plan because they had "not been legally or contractually appointed to represent the plan." *Id.* at 1620. Consequently, they had to show that they "'suffered an injury in fact, thus giving' them 'a sufficiently concrete interest in the

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for their injuries. Fed. R. Civ. P. 23(a). Unlike with associational standing, the relief for those latter injuries goes to the class members, not the lead plaintiff. *See TransUnion*, 141 S. Ct. at 2214 (recognizing standing of class members to seek relief for their injuries).

outcome of the issue in dispute.'" *Id.* (quoting *Hollingsworth*, 570 U.S. at 708).

The same principle logically must apply to associational standing. An association asserting only an injury to its members has not suffered an injury of its own. It thus lacks Article III standing to maintain the suit.[4]

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[4] In *Brock*, this Court suggested that, when an association asserts associational standing, its expertise, financial resources, and ideological commitment to the litigation "assure 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.'" 477 U.S. at 289 (quoting *Baker*, 369 U.S. at 204). But the Court made that statement in the course of rejecting the argument that Rule 23 precludes associational standing, not to explain why associational standing satisfies Article III. In any event, the "adverseness" that exists when an association brings suit is not sufficient to establish Article III standing because standing requires a concrete, particularized, redressable injury in fact. *See Lujan*, 504 U.S. at 560. Adversity standing alone is not enough. *See United States v. Windsor*, 570 U.S. 744, 760 (2013) (explaining that "concrete adverseness" is a "prudential consideration[]"); *see also id.* at 784–85 (Scalia, J., dissenting) (stating that adverseness is an Article III requirement *in addition to* the injury-in-fact requirements laid out in *Lujan*).

2. Associational standing based on a member's injury fails to meet the redressability requirement of Article III.

Associational standing also fails the requirement that a favorable decision must redress the "injury to the complaining party." *Warth*, 422 U.S. at 499. In particular, in an associational standing case, any remedy goes to the association. But the association itself is not the injured party; the true injured party is the association's member. The remedy, which goes to the association, thus does not redress an injury actually suffered by the association-plaintiff because the association-plaintiff suffered no injury. The true injured party, the member, receives nothing through a favorable judgment. *See Ass'n of Am. Physicians & Surgeons v. FDA*, 13 F.4th 531, 540 (6th Cir. 2021) ("Associational standing is in tension with these Article III redressability rules because it creates an inherent mismatch between the plaintiff and the remedy."); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 202 (2000) (Scalia, J., dissenting) (explaining that redressability is not satisfied when the remedy goes to a person other than the injured person).

The disconnect between the injury suffered by the member and the remedy awarded to the organization also means the remedy may not be effective at redressing the injury. The association, not the member, has the discretion to decide whether and how

to enforce the remedy. Consequently, the court's judgment itself does not directly redress the asserted injury. Instead, the member's relief from injury "depends on the unfettered choices" of the association. *Lujan*, 504 U.S. at 562 (quoting *ASARCO*, 490 U.S. at 615).[5]

C. Associational standing conflicts with historical practice.

This Court has repeatedly emphasized that historical practice "is particularly relevant to the constitutional standing inquiry since . . . Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.*, 523 U.S. at 102). History does not support associational standing.

A bedrock principle of the Anglo-American legal system was that the right to a remedy for an injury was personal; if a person was injured, only that person

[5] Beyond conflicting with the basic requirements of Article III standing, associational standing raises a host of other problems. Among other things, it provides a means for circumventing Federal Rule of Civil Procedure 23's requirements regarding class actions, violates Rule 17(a)'s real party-in-interest requirement, and creates claim preclusion anomalies. *See* Morley & Hessick, *supra*, at 29–41. These difficulties underscore the need to revisit associational standing.

was entitled to a remedy for the injury. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 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"). Blackstone recognized this principle when he stated that rights "belong[ed]" to individuals, 3 WILLIAM BLACKSTONE, COMMENTARIES *2, and that if an individual's rights were violated, that person could bring suit—which was defined "to be the legal demand of *one's* right." WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 80 (6th ed. 1771) (emphasis added); *see also* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to A Law for the Redress of Wrongs*, 115 YALE L.J. 524, 549 (2005) ("[T]he law confers on the victim (or his or her survivors) a special privilege to respond to the wrongdoing."). A person asserting only another's right had not suffered a legal injury entitling him to judicial relief.

Historically, representative actions were allowed only in certain limited circumstances. First, in some situations, a personal representative could bring an action on a person's behalf, as in the real-party-in-interest cases discussed above. For example, a guardian could bring suit on behalf of an infant. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *452 ("An infant . . . may sue . . . by his guardian."). Likewise, a next friend could file a habeas petition on behalf of a

detained person. *See Ashby v. White* (1704) 14 How. St. Tr. 695, 814 (QB) (resolving "that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law"); *see also* 1 BLACKSTONE, *supra*, at *452 (noting that an infant may sue by a next friend in some circumstances). In those cases, the representative brought suit on behalf of the represented party, who was the real party in interest.

Second, at the time of the founding, courts of equity had developed an early form of class action. In those actions, claims by multiple plaintiffs against the same defendant could be aggregated into a single case. *See* Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 TEX. L. REV. 467, 495 (2022) ("In addition, the chancellor was willing to aggregate claims that would otherwise have had to be brought one at a time in courts of law.").

Although the general rule was that each plaintiff had to participate as a party in these aggregated actions, in some cases—such as when the number of plaintiffs was great—it was impractical to bring all the plaintiffs before the court. *Cockburn v. Thompson* (1809) 33 Eng. Rep. 1005, 1007 (Ch) (reasoning that the "strict" participatory rule "must not be adhered to in cases, to which consistently with practical convenience it is incapable of application"). For that

reason, the chancellor would allow a few individuals to "represent the entire body" of similarly situated individuals. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854); *see also* Samuel J. Stoljar, *The Representative Action: An Equitable Post-Mortem*, 3 U.W. AUSTL. L. REV. 479, 479 (1956) ("[Courts of] 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.").

A plaintiff in those actions did not bring suit solely in a representative capacity. Instead, the plaintiff brought suit to seek a remedy for his own injury, but he was also permitted to represent "all the others" who suffered a similar injury. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA § 107, at 141 (4th ed. 1848).

As Joseph Story observed, one of the circumstances under which a representative action could be maintained was when "the parties form[ed] a voluntary association . . . , and those who sue or defend may fairly be presumed to represent the rights and interests of the whole." *Id.* at 140–41; *see also Swormstedt*, 57 U.S. at 302 (recounting this exception recognized in Story's commentaries).

Critically, however, even when association membership provided the requisite commonality, the association itself did not bring suit as the plaintiff.

Instead, the plaintiff was one of the members of the association who had been injured. As Story put it, an action could "be brought by some of the parties on behalf of themselves and all the others." STORY, *supra*, § 107, at 141.

Chancey v. May provides an example. (1722) 24 Eng. Rep. 265 (Ch). There, the chancellor allowed the treasurer and manager of the Temple Mills brass works, two partners in the business, to sue the prior treasurer and manager on behalf of themselves and roughly 800 other proprietors and partners in Temple Mills for embezzlement and other wrongs. *Id.* The named plaintiffs thus themselves suffered the same injury they sought to assert on behalf of all proprietors and partners. While recognizing the usual rule against representative actions, the chancellor determined that the circumstances warranted allowing the treasurer and manager to represent "all others [who were] the proprietors of the same undertaking." *Id.*

Many other cases rely on the same principle. *See, e.g.*, *Gray v. Chaplin* (1826) 38 Eng. Rep. 283 (Ch) (permitting two shareholders in a canal to file a bill on behalf of themselves and other shareholders); *Lloyd v. Loaring* (1802) 31 Eng. Rep. 1302 (Ch) (allowing members of the Royal Arch Free Masons to sue on behalf of themselves and other members). These cases did not recognize any procedure by which an association *itself* could bring suit to assert injuries to

its members. Rather, the innovation was that a member of the group could represent himself and others similarly situated because they had suffered the same injury. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 188 (describing the development of this mechanism).

To be sure, multiple individuals could join to form a corporation to further common interests held by the individual constituents. 1 BLACKSTONE, *supra*, at *469. Members of a community, for example, could join together to incorporate a town. *Id.* at *470. These corporations had rights and could bring actions to vindicate their corporate rights. But those actions vindicated only the rights of the corporation, not those of the associated shareholders.[6] *Id.* at *475 (observing that a corporation had the right "[t]o sue or be sued, implead or be impleaded, grant or receive, by its

[6] This restriction—that suits brought by a corporation could vindicate only its rights, and not those of its shareholders—accords with the historical purpose of the corporation, which was to create an entity that could hold its own rights. According to Blackstone, people established corporations as institutions devoted to particular purposes, such as religion. If some property were conferred on an individual member devoted to that purpose, there was a risk that the individual could reconvey the property to another person who did not share that devotion. Creating a corporation to hold the property avoided that possibility. *See* 1 BLACKSTONE, *supra*, at *468.

corporate name, and do all other acts as natural persons may").

In short, associational standing has no historical antecedent. No form of representational action recognized during the era in which the Constitution was drafted permitted an association that had not suffered injury itself to bring suit to assert the legal rights of its members.[7] More fundamentally, those historically recognized representative actions did not deviate from the principle that only the injured party was entitled to relief for his injury.[8]

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[7] Indeed, the first opinion to advocate for associational standing was Justice Jackson's concurrence in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951). One issue in that case was whether several associations had standing to sue the attorney general and other government officials for designating the organizations as Communist. To support his view that the associations had standing, Justice Jackson contended that "where the Government ha[d] lumped all the members' interests in the organization so that condemnation of the one [would] reach all," it would be improper to "deny the standing of the organizations to vindicate its members' rights." *Id.* Justice Jackson offered no historical foundation for that conclusion.

[8] In some circumstances, the plaintiff's injury derived from relationships with others. 3 BLACKSTONE, *supra*, at *138–39 (identifying relationships between "husband and wife, parent and child, guardian and ward, master and servant"). A plaintiff suffered his *own* injury when the other person in the relationship was hurt in a way that interfered with the latter's ability to

In each of the actions described above, the suits were aimed at obtaining relief for the people who were actually injured. They therefore do not support associational standing, under which an association seeks a remedy for itself based on an injury to its members.

D. Associational standing conflicts with fundamental principles of separation of powers.

As this Court has repeatedly stressed, standing protects the separation of powers by confining the federal judiciary to the "the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. It accomplishes this goal by preventing Article III courts from "usurp[ing]" the powers of the other branches of government. *Clapper*, 568 U.S. at 408.

The proper role of the judiciary is to resolve "real" disputes that involve deciding on "the rights of individuals." *TransUnion*, 141 S. Ct. at 2203. Federal courts cannot "adjudicate hypothetical or abstract disputes." *Id.* Nor do they have the powers to "publicly opine on every legal question" or to "exercise general legal oversight of the Legislative and

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provide "company, care, or assistance" of the other. *Id.* at *142. Actions to recover for these harms thus adhered to the principle that a person is entitled to relief only for injuries personally suffered.

Executive Branches, or of private entities." *Id.* Instead, the appropriate function of the courts is to resolve "actual cases or controversies," *Clapper,* 568 U.S. at 408 (quoting *DaimlerChrysler Corp.*, 547 U.S. at 341), brought by individuals who have a "personal stake" in the outcome of the dispute, *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

These separation of powers principles underlie the standing requirements of particularization and concreteness. Recognizing standing for a person who alleges only an abstract, undifferentiated injury would mean that anyone who had an opinion about an activity or situation could bring a federal suit challenging it. *See Lujan*, 504 U.S. at 575. That approach accordingly would confer on the federal judiciary the power to opine on legal questions at anyone's request and "significantly alter the allocation of power . . . away from a democratic form of government." *Summers*, 555 U.S. at 493 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

Applying these principles, the Court has consistently held that standing cannot rest on a plaintiff's opposition to policies that may have harmed others. For example, in *O'Shea v. Littleton*, the Court held that a group of individuals lacked standing to challenge racial discrimination in the administration of their city's criminal justice system because none of

the plaintiffs alleged that they were victims of that discrimination. 414 U.S. at 497.

Likewise, in *Allen v. Wright*, the Court held that individuals of the same race as others who suffered racial discrimination lacked standing to challenge the discrimination, explaining that "only . . . 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct" have standing. 468 U.S. at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)); *see also*, *e.g.*, *Clapper*, 568 U.S. at 411 (denying standing to plaintiffs challenging surveillance policy because they did not demonstrate that they were the subjects of surveillance); *Diamond*, 476 U.S. at 62 ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements.").

Associational standing directly conflicts with these fundamental principles of separation of powers. Under associational standing, an association has standing even when it has not alleged a violation of its rights or some other personal injury that establishes an actual case or controversy. Instead, the basis for the association's suit is an injury to one of the association's members. The association accordingly has no "personal stake" in the suit warranting its invocation of the federal courts. Instead, the association's only interest is the abstract and undifferentiated interest in preventing policies that

injure others. Associational standing thus transforms the federal judiciary into a system that standing doctrine is precisely meant to avoid by authorizing courts to opine on legal matters outside the context of resolving "actual cases or controversies." *Clapper*, 568 U.S. at 408.

Associational standing has the potential significantly to disrupt the separation of powers. To start, associations may have extremely large memberships that create expansive opportunities for standing. The American Association of Retired People ("AARP") provides a startling example. That organization's mission is to "empower people to choose how they live as they age." *About AARP*, AARP, https://www.aarp.org/about-aarp/ (last visited Jan. 19, 2024). The AARP offers membership to anyone who is at least fifty years old; it currently has almost thirty-eight million members. *Social Impact*, AARP, https://www.aarp.org/about-aarp/company/social-impact/ (last visited Jan. 19, 2024). The breadth of the AARP's potential standing is staggering. If any of those thirty-eight million suffers an injury that undermines the ability to choose how to live as they age, the AARP can claim standing to sue to redress that member's injury.

The AARP is not unique. Other associations also have enormous memberships. The National Rifle Association has over five million members. *A Brief History of the NRA*, NRA, https://home.nra.org/ (last

visited Jan. 19, 2024). The National Education Association has more than three million members. *About NEA*, NEA, https://www.nea.org/ (last visited Jan. 19, 2024). The ACLU has one million seven hundred thousand members. *ACLU History*, ACLU, https://www.aclu.org/about/aclu-history (last visited Jan. 19, 2024). Associations with thousands of members are common. *See Professional and Trade Organizations*, ENCYC. OF BUS., https://www.referenceforbusiness.com/encyclopedia/Per-Pro/Professional-and-Trade-Organizations.html (last visited Jan. 19, 2024) (listing associations and their memberships). Because of associational standing, if any of the members of those associations suffers an injury germane to the respective association's mission, those associations have Article III standing to sue. *See Hunt*, 432 U.S. at 343.

Associations may rely on associational standing to further erode the separation of powers by manufacturing standing out of thin air by recruiting members solely to establish standing. For example, if an association opposed to a local law wishes to file suit challenging the law, it can recruit a resident of that locality to join the association. Through this procedure, an association has virtually limitless ability to manufacture standing to challenge any policy it opposes. So long as an association can identify one person who is hurt by that policy, the association can file suit to press its view that the policy should be forbidden.

In short, associational standing significantly undermines the way standing protects the separation of powers. It provides a wide avenue for litigants to file suit to vindicate their values and interests instead of adjudicating a real case or controversy.

II. The Fifth Circuit erred by holding that Respondent medical associations' associational standing satisfies Article III.

Before the Fifth Circuit, the Groups relied primarily on associational standing to establish Article III standing. *Alliance for Hippocratic Med. v. FDA*, 78 F.4th 210, 228 (5th Cir. 2023) ("The Medical Organizations and Doctors chiefly rely on associational standing."). They cited injuries to their members (or in the case of Alliance, injuries to its members' members), claiming that those injuries provided the basis for each association's standing. *See* Brief of Appellees, *Alliance for Hippocratic Med. v. FDA*, No. 23-10362, 2023 WL 3496631, at *15–22 (5th Cir. May 8, 2023). The Fifth Circuit accepted the Groups' arguments, finding a "clear showing" of associational standing on grounds that are widely applicable. *Alliance*, 78 F.4th at 233.

This holding cannot be reconciled with Article III. Basic Article III standing principles prohibit a plaintiff from seeking judicial relief based on injuries to another. The theory of standing accepted by the Fifth Circuit allows the judiciary to enjoin any

number of laws at the insistence of an association, even if that association has not itself suffered a cognizable injury.

The assertion of associational standing by the Alliance is doubly offensive to Article III. The Alliance has no individuals as members. Rather, the entire membership of the Alliance consists of other associations, three of which also appear in this litigation. Neither the Alliance nor its constituent members have any personal stake in the litigation; the required personal stake is at least three steps removed from the Alliance (the members of the members of the Alliance). Any remedy given to the Alliance will not go to the individual physicians claiming injury, but rather to an organization two degrees removed.

Instead of seeking to remedy injuries it has suffered, the Alliance was created and exists in order to bring suits as a "concerned bystander" using the Article III courts as "a 'vehicle for the vindication of [its] value interests.'" *Hollingsworth*, 570 U.S. at 707. The Groups cannot use the Article III courts in this way. The only potentially appropriate parties to bring suit challenging the regulations at issue in this litigation are the individual physician members who claim to have been injured themselves by those regulations.

CONCLUSION

The Court should vacate the decision of the Fifth Circuit.

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