No. 24A884

IN THE
Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Applicants,

v.

CASA, INC., *et al.*,
Respondents.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The Chamber files here solely to respond to the Government's suggestion that the injunction granted to the plaintiff associations be limited to only those association members identified in their complaint. As an association that regularly represents the interests of its members in litigation, the Chamber submits this brief in support of neither party to defend the ability of associations generally to sue on behalf of their affected members and obtain equitable relief that benefits those members. The Chamber does not take a position in this brief on any other issue raised by the Government or on the underlying merits question in the case.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a passing and virtually unsupported assertion, the Government argues that as to the plaintiff associations, the injunction should be limited to "the identified members." App. at 16, 22. The lack of supporting authority is unsurprising, as the Government's position is squarely at odds with this Court's precedents on representational standing. It is settled that an association seeking to establish representational standing need not identify *all* its injured members. And likewise, if an association satisfies the requirements for representational standing, any relief applies to every affected member, whether identified or not. Regarding injunctions in particular, this Court has indicated there is no need to expressly identify each such member in a representational standing case because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975).

The Government's real quarrel is with the very existence of representational standing, which was rightly reaffirmed by this Court just two years ago in *Students for Fair Admissions, Inc.* v. *President and Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*"). And while that issue is not presented in this case, the Chamber acknowledges that some jurists have recently criticized the doctrine. The Chamber respectfully urges that, in an appropriate case, the Court reaffirm the doctrine again. As explained in Part II below, this Court's precedents already suggest that representational standing—and more generally, the ability of a party to raise the rights of another—raises no Article III concerns. And that suggestion is correct:

representational standing is consistent with Article III because it is deeply rooted, as a conceptual matter, in American history and tradition.

The Chamber takes no position in this brief on the question whether courts can, pursuant to their equitable powers, issue universal injunctions. Nor does the Chamber take a position on the merits of the Government's Application more generally or on the underlying merits of the plaintiffs' suit. This brief addresses only the Government's drive-by swipe at the scope of injunctions that may be obtained by associations with representational standing. That largely unexplained suggestion is at odds with both precedent and history, and should be swiftly rejected.

ARGUMENT

I. It is settled that an injunction awarded to an association with representational standing applies to all of the association's affected members.

A. The right to associate, including for purposes of litigation, is an important part of our legal system.

Stated perhaps most powerfully in this Court's decision in *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas" is a constitutionally protected aspect of "freedom of speech," *id.* at 460. Since the Founding, our country has contained a diverse array of associations, often formed to advocate on "political, economic, religious or cultural matters," *id.*, sometimes before government bodies and sometimes in the courts.

In fact, because members can pool their resources in an association, associations serve as a particularly powerful tool for countering unlawful action in

the courts. *Ibid.* ("Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association."). In recent years, for example, the Chamber has successfully challenged anti-arbitration laws, *e.g.*, *Chamber of Com. v. Bonta*, 62 F.4th 473 (9th Cir. 2023), financial-services regulations, *e.g.*, *Chamber of Com. v. CFPB*, No. 4:24-cv-00213, __ F. Supp. 3d __, 2024 WL 5012061 (N.D. Tex. 2024); *Chamber of Com. v. CFPB*, 691 F. Supp. 3d 730 (E.D. Tex. 2023); *Chamber of Com. v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018), and environmental regulations, *Chamber of Com. v. EPA*, 577 U.S. 1127 (2016), on behalf of its affected members.

For the Chamber's members, such associational suits are an important and sometimes only means by which they will be able to obtain relief in court from unlawful government action. See *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 289–90 (1986) ("[T]he primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."). Small-business members lack the resources to bring these lawsuits. And while larger business members may have the resources to bring *some* of these lawsuits, they will not bring all of them. Some government policies harm many businesses without affecting any one business enough for it to expend the resources to fund an entire lawsuit itself. Moreover, even for those challenges that are particularly important to a larger member, that member may still prefer to litigate as part of an association, whether to take advantage of the association's litigation expertise, to better explain the wide range of harms from a government policy, or to avoid being singled out for retaliation.

These suits are also brought in the pre-enforcement posture, which is particularly critical to businesses. Even if businesses think that a particular regulation is unlawful, they do not want to run the risk of ending up subject to an enforcement action by the government. To state the obvious, enforcement actions can carry the risk of significant penalties, not to mention loss of customer good will and the distraction and expense of defending against the action even if it turns out the regulation is unlawful. And once a business has adapted its compliance program to an unlawful regulation, it may not be economically feasible or prudent to unwind those choices if the regulation is subsequently held unlawful. An associational challenge can prevent such harms.

An additional benefit of associational litigation is privacy for the members. This Court has also long recognized the right of associations to maintain the privacy of their members as a general matter. *See NAACP*, 357 U.S. at 462; *John Doe No. 1 v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) (explaining the "vital relationship between political association and privacy in one's associations"). Indeed, such privacy is necessary if a protected association is to serve its "especially important [role] in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021). It is thus no surprise that several circuit courts have recognized associations' right in litigation to identify affected members by pseudonym, rather than name. *See Am. All. for Equal Rights v. Fearless Fund Mgmt.*, 103 F.4th 765, 772–73 (11th Cir. 2024) (joining two circuits in holding that,

in the context of associations suing on behalf of pseudonymously identified members, "pseudonymity poses no bar to a plaintiff's standing"); *cf. Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144–45 (2d Cir. 2006) (suggesting that an "argument that the persons allegedly injured must be identified by name might have some validity if this litigation were at the summary judgment stage" but rejecting it at the motion to dismiss stage). And as explained below, courts have long held that any relief obtained by an association flows to all affected members, not just those identified by name or pseudonym in a lawsuit.

B. This Court has held that if an association meets the requirements for representational standing, it may obtain an injunction that applies to all affected members, whether identified or not.

As this Court recently reaffirmed, an association can satisfy the standing requirements of Article III in two alternative ways. *SFFA*, 600 U.S. at 199. First, the association can show "that it suffered an injury in its own right." *Ibid.* Second, the association "can assert 'standing solely as the representative of its members.'" *Ibid.* (quoting *Warth*, 422 U.S. at 511). To invoke this second type of "representational" standing, the association must show that "'(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Ibid.* (quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

An association seeking to establish representational standing need not identify *all* its injured members. Rather, the association must only identify "any one" of its members that is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth*, 422 U.S. at 511; *see also United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554 (1996) (an association must show "that at least one of the organization's members would have standing to sue on his own"). Indeed, to require otherwise—and demand that associations bring forward every injured member to demonstrate its own standing *individually*—would be inconsistent with the very concept of *representational* standing.

Similarly, if an association satisfies the requirements for representational standing, any relief applies to all its members, whether identified or not. This necessary consequence is apparent from this Court's explication of the third *Hunt* factor described above—specifically, that the relief requested by the association must *not* require the participation of individual members in the lawsuit. As this Court explained in *Warth*, this factor comes into play when an association seeks "relief in damages for alleged injuries to its members," because there may be questions about the amount of damages due to each member that can only be answered by "individualized proof." 422 U.S. at 515–16; *see also United Food & Com. Workers Union*, 517 U.S. at 553–54 & n.5. But those same concerns about possibly improper distribution of relief do not arise when an association seeks a declaration or injunction on behalf of its members, because such relief, by its nature, will only have effect where

appropriate. As this Court said, "it can reasonably be supposed that the [injunctive or declarative] remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515. Plainly underlying that analysis is the recognition that any relief obtained by an association with representational standing applies to all its affected members. That is *why* the potential for improper distribution of relief must (at least sometimes) preclude representational standing for damages, but not do so for an injunction or declaration.

C. The Government's real objections are to the doctrine of representational standing.

The Government never once contradicts, or even confronts, the points above. Instead, it suggests: (1) that allowing an injunction for all an association's members will inevitably lead to a universal injunction, Govt. Reply at 7; and (2) that "Article III confines courts to adjudicating the rights of 'the litigants brought before the Court,'" App. at 22 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)). Neither suggestion helps it.

First, the Government's concern about a slippery slope to universal injunctions ignores the limitations inherent in representational standing. Even assuming that universal injunctions are legally and historically suspect—a question on which the Chamber takes no position[2]—there are guardrails that limit the reach of an

[2] The Chamber does note that, although not at issue in this case, vacatur of agency rules under the Administrative Procedure Act (APA) is analytically distinct from a universal injunction because "the text of the APA expressly authorizes federal courts to 'set aside' agency action." *Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 603 U.S. 799, 838 (2024) (Kavanaugh, J., concurring) (quoting 5 U.S.C. § 706(2)). And an injunction, which carries with it the potential for contempt

injunction obtained by an association on behalf of its affected members. The Government's attempt to create a false equivalence between the two types of injunctions merely confirms that it has no answer to the case law above.

A universal injunction prohibits the Government from enforcing a policy with respect to anyone, regardless of their relationship to the litigation. In contrast, as discussed above, an association seeking an injunction on behalf of its members must meet the requirements of representative standing, which include demonstrating that at least one member would have standing to sue on its own, and that "the interests [the organization] seeks to protect are germane to the organization's purpose." *Hunt*, 432 U.S. at 343. Put another way, there must be a sufficient "nexus" between the litigation, the association, and all of its members. *NAACP,* 357 U.S. at 458. In addition, an association must be "a genuine membership organization in substance, if not in form." *SFFA*, 600 U.S. at 200. And to the extent there are concerns about creative exploitation of membership status, a court can exercise its equitable powers to address those concerns. For example, a court could limit an injunction to those individuals or entities who were members of an association at the time the injunction was entered.

Second, the Government's contention that "Article III confines courts to adjudicating the rights of 'the litigants brought before the Court,'" App. at 22, even more starkly reveals that the Government simply objects to the doctrine of

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proceedings if violated, implicates different potential equitable limitations on a court's power than does vacatur.

representational standing itself. The very point of representational standing for associations is that the association can speak on behalf of its members, who need not be before the court as parties themselves. That is, in fact, the third *Hunt* factor: that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Thus, even individual members who are identified in the course of a representational standing case are not "brought before the Court" as parties. Rather, as explained above, it is the association with representational standing that "act[s] as [its members'] representative before th[e] Court." *NAACP*, 357 U.S. at 458–59. The Government's argument makes sense only if it refuses to accept this core premise underlying representational standing.

* * *

This Court thus need not tarry long with the Government's offhand suggestion that an injunction can or should be limited to "the identified members" of the plaintiff associations. *See*, *e.g.*, App. at 16, 22. If the Government does not contest an association's representational standing—and here, it does not appear to—this Court's precedents make clear that any injunction applies to all of an association's affected members, whether identified or not. The Government's real objection is with the doctrine of representational standing itself, but it has not asked the Court to revisit that doctrine in this case.

II. In an appropriate case, this Court can and should recognize that representational standing is consistent with Article III.

Although the Government has not here challenged the existence of representational standing, the Chamber acknowledges that the doctrine has been

criticized by some jurists as inconsistent with Article III because, traditionally, a plaintiff could not raise the legal rights of others. *See*, *e.g.*, *Food & Drug Admin.* v. *All. for Hippocratic Med.*, 602 U.S. 367, 399 (2024) (Thomas, J., concurring); *Mi Familia Vota v. Fontes*, 129 F.4th 691, 764 (9th Cir. 2025) (Bumatay, J., dissenting); *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1168 (D.C. Cir. 2025) (Henderson, J., concurring); *Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 13 F.4th 531, 540 (6th Cir. 2021) (dictum). The Chamber respectfully urges that, in an appropriate case, this Court should confirm that representational standing comports with Article III, consistent with this Court's repeated recognition of the doctrine and its recent reaffirmance in *SFFA*.

To begin with, this Court has rejected the argument already. In *United Food and Commercial Workers Union*, this Court explained that "'the general prohibition on a litigant's raising another person's legal rights' is a 'judicially self-imposed limi[t] on the exercise of federal jurisdiction,' not a constitutional mandate." 517 U.S. at 557 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). And then it further held that "associational standing"—the term at the time used to describe an association's representational standing—"rests on the premise that in certain circumstances, particular relationships . . . are sufficient to rebut th[at] background presumption . . . that litigants may not assert the rights of absent third parties." *Ibid.*

In all events, representational standing is consistent with Article III because it has a close analogue in American history and tradition. This Court has explained that "'history and tradition offer a meaningful guide to the types of cases that Article

III empowers federal courts to consider.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (citation omitted); *see also id.* at 446 (Thomas, J., dissenting) (Article III judicial power is limited to "case[s] or controvers[ies]" as those terms were originally understood). And although the general rule historically was that a plaintiff had to raise his own rights, there were exceptions, one of which—the representational suit—mirrors representational standing in all fundamental respects.

A. English and early American courts developed the representational suit as an exception to the general rule that a plaintiff must raise his own rights.

The general rule in the English and early American court systems was that a plaintiff had to assert his own personal rights. WILLIAM BLACKSTONE, TRACTS, CHIEFLY RELATING TO THE ANTIQUITIES AND LAWS OF ENGLAND 80 (3d ed. 1771). But there were well-recognized exceptions. For example, under English common law and the law of equity, agents or guardians could raise the rights of someone who was incapacitated or unable to litigate on his own behalf. *See*, *e.g.*, *Ashby v. White*, 14 How. St. Tr. 694, 825 (1704) ("[E]very Englishman, who is imprisoned . . . has an undoubted right to apply by his agents, or friends, in order to procure his liberty by due course of law."). Adults could litigate on behalf of minors. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-1979) 503–04 (1992). The executor of an estate could litigate on behalf of a decedent. *Id.* at 510. And individuals could assign their claim to someone else, permitting a third party to raise their rights by consent. *Id.* at 442.

Another exception was where some members of a group sued on behalf of the rest. This happened as far back as medieval England—villagers sued their lords; parishioners sued their parsons; and representatives of guilds, towns, and boroughs sued on behalf of the whole. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 65 (1987). These suits were brought largely in the same form: "'The citizens of X' or the 'burgesses of Y' [would] appear … to urge the claims and defend the rights of the community." *Id.* at 26 (quoting FREDERICK POLLOCK & FREDERICK MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 680–81 (2d ed. 1898)). And though these types of suits had died out by the 17th and 18th centuries, a type of group litigation persisted in equity—the representational suit.

English courts designed the representational suit to solve the practical problem that joinder of all necessary parties, though technically required, may be impracticable. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 243 (1990); *see, e.g.*, *Cockburn v. Thompson*, 33 Eng. Rep. 1005, 1007 (1809). Where the joinder of all necessary parties was a barrier to relief, and the parties shared a common interest that was represented by the lead plaintiff, that plaintiff could raise his own rights and seek equitable relief on behalf of the harmed group. *See* Samuel L Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 495 (2017). The suit was thus an exception to the "technical rule that prevented

equity courts from acting, even formally, on the rights or duties of 'strangers' to a suit." Bone at 244.

There are a number of examples of these suits. Leaders of business partnerships or shareholders in joint stock companies, for example, could sue on behalf of the rest to reclaim a common interest. *See, e.g.*, *Chancey v. May*, 24 Eng. Rep. 265, 265 (1722); *Adair* v. *New River Co.*, 32 Eng. Rep. 1153, 1159 (1805). Leaders of social organizations, too, could sue on behalf of the other members for an accounting. See, *e.g.*, *Cockburn*, 33 Eng. Rep. at 1005. Members of a ship crew could sue on behalf of the whole crew for a common bounty. *See, e.g.*, *Good v. Blewitt*, 34 Eng. Rep. 542, 543 (1815). And it was a "familiar case" in Chancery for creditors to "su[e] on behalf of themselves and all others." *Cockburn*, 33 Eng. Rep. at 1007; *accord Leigh v. Thomas*, 28 Eng. Rep. 201, 201 (1751). In short, the representational suit could appear in a number of situations, including as relevant here where "the parties form[ed] a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole." JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA § 97 (4th ed. 1848).

The representational suit in early American courts mirrored those in England. *See* Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. 1539, 1596 (2024). Indeed, an English treatise circulated widely in America explained that "where a great many individuals are interested, the court will

permit a few to represent the whole, and sue in this court." GEORGE COOPER, A TREATISE OF PLEADING ON THE EQUITY SIDE OF THE HIGH COURT OF CHANCERY 39 (New York ed. 1813). Justice Story, riding circuit in Rhode Island, cited a number of English cases for the proposition that creditors, crew members of a ship, voluntary societies, and other large groups could sue in equity via representatives. *West v. Randall*, 29 F. Cas. 718, 722–23 (C.C.D.R.I. 1820). In that case, he recognized that granting relief without making all interested persons parties was justified because otherwise the court would have to "wholly deny the plaintiffs an equitable relief." *Id.* at 723. This Court recognized the principle as well. *See Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 585 (1829) (Story, J.) ("Thus, some of the parishioners may sue a parson to establish a general modus, without joining all; and some of the members of a voluntary society or company, when the parties are very numerous, may sue for an account against others, without joining all."); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others. . . .").

B. The representational suit is analogous to representational standing litigation in all fundamental respects.

The representational suit is a close historical analogue to modern representational standing cases. As just discussed, in the historical representational suit, several interested parties would raise the rights of the group, and in some cases, the parties even formed a voluntary association and sued to "represent the rights and interests of the whole." STORY § 97, at 123. Today, in modern representational

standing cases, the association typically exists as a separate legal entity and similarly pursues litigation to vindicate the rights of its members. To be sure, the named plaintiff in a representational suit was typically an injured member of the group, whereas in modern representational standing suits, the named plaintiff is typically the group itself. But the core tenets of the two types of cases are undeniably the same: in both, a claim may be brought on behalf of non-participating group members so long as the moving party has shown the existence of at least one injured group member. And the Article III inquiry requires only "a close historical or common-law analogue," not "an exact duplicate." *TransUnion*, 594 U.S. at 424.

What is more, there are several other important similarities between representational suits in English and American history and today's representational standing doctrine. First, both types of suits require sufficient commonality of injury such that the lawsuit could practically proceed without every group member. In the historic representational suit, the asserted "rights or duties [had to be] in effect clones of the general right"—*i.e.*, "simply 'multiples' of one prototypical lawsuit." Bone at 238. Likewise, for representational standing, the association must show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. And that cannot be done if "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Warth*, 422 U.S. at 515–16.

Second, both types of suits require a sufficient connection among the members of the group. Historically, the representational suit required some tie between members and some interest that they held in common. *See* Bray at 426–27; STORY § 120, at 152 (explaining that such suits required "a common interest or a common right"); Francis H. Bohlen, Jr., Note, *Bills of Peace in Tort Cases*, 68 U. PA. L. REV. 167, 167 (1920) (such suits required a "certain privity, common right, or community of interest between the numerous parties") (citing *How v. Tenants of Bromsgrove*, 1 Vernon 22 (Eng. 1681); *Brown v. Vermuden*, 1 Ch. Ca. 282 (Eng. 1676). Today, the doctrine of representational standing equally requires that an association's mission be germane to the interests being vindicated through the lawsuit. *Hunt*, 432 U.S. at 343. That germaneness requirement, while modest, not only ensures a sufficient "nexus" between and among the association and its members, *NAACP*, 357 U.S. at 458, it also "raises an assurance that the association's litigators will themselves have a stake in the resolution of the dispute," *United Food & Com. Workers Union*, 517 U.S. at 555–56.

Third, both types of suits award prospective relief to all affected members of the group, whether identified or not. As discussed above, *supra* Part I.B., it is settled under this Court's cases that an injunction granted to an association with representational standing applies to all the association's affected members. This was true in historic equity practice as well. As representational suits became common, Chancery developed the bill of peace as a remedial device to give group-wide relief. Bray at 426; *see also* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45

HARV. L. REV. 1297 (1932). The bill of peace was "a broad remedy embracing absentees." Bone at 243. And because the absentees were deemed "quasi-parties," the court could exercise such authority "in the face of a technical rule that prevented equity courts from acting, even formally, on the rights or duties of 'strangers' to a suit." *Id.* at 244. As Justice Story explained, "[t]he principle upon which all these [representational suits] stand, is, that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil." *West*, 29 F. Cas. at 723; *accord Wendell's Ex'rs v. Van Rensselaer*, 1 Johns. Ch. 344, 349 (N.Y. Ch. 1815).

Finally, both historic representational suits and modern representational standing cases can involve asymmetric claim preclusion. As Justice Thomas has observed, representational standing "creates the possibility of asymmetrical preclusion." *All. for Hippocratic Medicine*, 602 U.S. at 402–403 (Thomas, J., concurring). Specifically, if an association wins, its non-party members receive the benefit of the injunction against the defendant, but "if the association loses, it is not clear whether the adverse judgment would bind the members." *Id.* at 403 (citing *Brock*, 477 U.S. at 290).[3]

Although there is some debate about the extent to which asymmetric claim preclusion was endorsed by courts in historical representational suits, it is clear that it did happen in that context. For example, where a ship's crew sued for access to a

[3] But, of course, in litigation against the government, the government benefits from asymmetric preclusion doctrines as well. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160–61 (1984).

common fund, "absent crew members were not barred from bringing a subsequent action for their share of the fund if the defendants prevailed in the first stage of the representative suit." Bone at 266 & n.126. And in general, it was understood that representational suits were created "to benefit, not burden, the class." *Id.* (citing STORY § 97). Representational suits were designed to allow the court to craft a broad remedy that would benefit absentees but without "binding them to the decree." Bone at 243.

* * *

The constitutionality of representational standing has not been challenged here and thus should not, and need not, be decided in this case. But in an appropriate case, this Court can and should reaffirm that representational standing is consistent with Article III. Assuming this Court would even consider representational standing to raise a constitutional question, the Article III inquiry asks whether there is "a close historical or common-law analogue." *TransUnion*, 594 U.S. at 424. There undoubtedly is—even if it is not "an exact duplicate." *Ibid.*

CONCLUSION

This Court should reject the Government's suggestion that an injunction awarded to an association with representational standing should be limited only to the association's identified members.

Respectfully submitted,

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