CLASS ACTIONS — STANDING — FIFTH CIRCUIT REFUSES TO DECIDE CORRECT STANDING INQUIRY FOR ABSENT CLASS MEMBERS. — *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), *reh'g en banc denied*, 756 F.3d 320 (5th Cir. 2014), *cert. denied*, 2014 WL 3841261.

Under Article III of the Constitution, federal courts may only adjudicate actual "Cases" or "Controversies." Plaintiffs must therefore establish standing to invoke a court's jurisdiction.[1] This requirement applies with equal force to class actions,[2] where defendants challenging class certification have increasingly argued that plaintiffs lack standing to bring suit.[3] Courts address these standing challenges in two ways. Some consider only the named plaintiffs in standing analysis.[4] Others mandate that a class must be defined such that *all* class members — including those not before the court — could have individual standing to bring the suit.[5]

Recently, in *In re Deepwater Horizon*,[6] the Fifth Circuit faced the question of which standing test to adopt. Rather than choosing which method "articulate[s] the correct test,"[7] the Fifth Circuit avoided the question altogether by applying both approaches and reaching the same result. In so doing, the decision demonstrates that the *practical* difference between the two standing analyses is much narrower than their *theoretical* dichotomy. As it turns out, the seemingly conflicting tests rarely lead to divergent outcomes in class certification decisions.

---

[1] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992). The three bedrock requirements for standing are injury, causation, and redressability. *Id.* at 560–61.

[2] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23[of the Federal Rules of Civil Procedure]'s requirements must be interpreted in keeping with Article III constraints . . . .").

[3] *See, e.g.*, Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 12–14, Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277 (2014) (mem.) (No. 13-430), and Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014) (mem.) (No. 13-431); *see also* Joshua P. Davis et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 861–67 (2014).

[4] *See, e.g.*, Stearns v. Ticketmaster Corp., 655 F.3d 1013, 1021 (9th Cir. 2011).

[5] *See* Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010) (citing Denney v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006)); 7 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785.1 (3d ed.) (Westlaw) (last visited Nov. 23, 2014) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention.").

This comment addresses the standing inquiry for absent class members when they have suffered *no* cognizable injury. The problem of disjuncture — where absent class members suffered a *different* injury than the named plaintiff — is analytically distinct and presents fewer Article III concerns since all parties have suffered some grievance. On disjuncture, see generally 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:6 (5th ed. 2011).

[6] 739 F.3d 790 (5th Cir.), *reh'g en banc denied*, 756 F.3d 320 (5th Cir. 2014), *cert. denied*, 2014 WL 3841261.

[7] *Id.* at 802.

In April 2010, oil giant British Petroleum's (BP) drilling vessel *Deepwater Horizon* exploded, spilling millions of barrels of oil into the Gulf of Mexico.[8] Businesses and individuals brought a class action against BP for the resulting damages.[9] By April 2012, BP agreed to an amended class action complaint and proposed settlement, which the district court preliminarily approved.[10] Pursuant to the terms of the agreement, the court appointed a Claims Administrator to oversee the settlement program.[11] While the Administrator began reviewing initial claims, BP and the plaintiffs moved for final approval and certification of the class.[12] Despite objections from some class members,[13] the district court certified the class and approved the settlement agreement on December 21, 2012.[14] The objectors appealed.[15]

Although BP had originally supported the settlement approval, on appeal it joined the objectors in opposing the settlement.[16] BP reversed its position after the Claims Administrator issued unfavorable interpretations of the settlement agreement following the district court's final approval. BP argued that the settlement agreement as interpreted by the Claims Administrator allowed class members who had not in fact been injured by the spill to claim against the company.[17]

On first hearing the case, the Fifth Circuit reached no agreement on the issue of standing, instead remanding the case on contractual interpretation grounds.[18] Judge Clement, writing only for herself on this point, maintained that standing concerns precluded certification: because the class included absent members who had not been harmed by

---

[8] *Id.* at 795–96.

[9] *See id.* at 796.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Objectors opposed the adequacy of representation under Rule 23(a)(4), *id.* at 808, commonality under Rule 23(a)(2), *id.* at 809–10, predominance over individual adjudication under Rule 23(b)(3), *id.* at 815, class notice deficiencies under Rule 23(c)(2)(B), *id.* at 819, and Rule 23's implicit ascertainability requirement, *id.* at 821.

[14] *Id.* at 796.

[15] *Id.*

[16] *See id.*

[17] *Id.* at 798. Specifically, BP argued the Claims Administrator misinterpreted a provision in the settlement agreement pertaining to the proof — or lack thereof — required to file a claim. Because the settlement agreement's class definition incorporated by reference the causation section of the settlement the Claims Administrator interpreted, BP argued the Claims Administrator had created a class that impermissibly included uninjured members. *See id.* at 796–98.

[18] *See id.* at 797. The Fifth Circuit found the district court had misapplied principles of contract law pertaining to damages accounting, and instructed the lower court on remand to proceed in accordance with prescribed accounting and interpretive principles. *See In re* Deepwater Horizon (*Deepwater Horizon I*), 732 F.3d 326, 333–40 (5th Cir. 2013). The court also granted a preliminary injunction allowing BP to stay claim distributions under the Claims Administrator's original methodology. *Id.* at 345–46.

BP, it violated Article III.[19] Judge Southwick concurred with the result, but did not join Judge Clement's discussion of standing doctrine, in part because there was "no briefing on the constitutional issues" implicated.[20] Judge Dennis concurred in part and dissented in part,[21] arguing that only *named* plaintiffs need be considered when assessing standing in the Rule 23 context.[22] On remand, the district court issued a new ruling in accordance with the Fifth Circuit's instructions, but still certified the class and approved the settlement agreement as interpreted by the Claims Administrator.[23] BP once again appealed.[24]

On this appeal, a different panel of the Fifth Circuit affirmed the class and settlement approval outright. Writing for the majority, Judge Davis[25] "resolve[d] the Article III question as a threshold matter of jurisdiction" before turning to whether the class could be certified under Rule 23.[26] Emphasizing that standing was indeed a critical inquiry,[27] Judge Davis explained that courts were split between two approaches to "evaluat[ing] standing for the purposes of class certification and settlement approval."[28] The first approach — supported by three U.S. Supreme Court Justices concurring in *Lewis v. Casey*,[29] several circuits,[30] and a leading treatise[31] — looks only to the named plaintiffs: so long as the named plaintiffs have standing, so too does the class.[32]

---

19 *See Deepwater Horizon I*, 732 F.3d at 341–44 (opinion of Clement, J.).

20 *Id.* at 346 (Southwick, J., concurring).

21 *Id.* at 347 (Dennis, J., concurring in part and dissenting in part).

22 *See id.* at 358–59. Essentially, Judge Dennis disagreed with Judge Clement's view that "every individual who benefits from a class-action settlement must or is deemed to have an independent cause of action." *Id.* at 359.

23 *See* Order, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, No. 2:10-md-02179 (E.D. La. Dec. 24, 2013).

24 *Deepwater Horizon*, 739 F.3d at 797.

25 Judge Davis was joined by Judge Dennis.

26 *Deepwater Horizon*, 739 F.3d at 798.

27 *Id.* at 799.

28 *Id.* at 800.

29 518 U.S. 343 (1996); *id.* at 395–96 (Souter, J., joined by Ginsburg and Breyer, JJ., concurring in part, dissenting in part, and concurring in the judgment). *Lewis* was a class action of prison inmates claiming they were deprived of access to legal materials necessary to research their defenses. Though the majority did not base its denial of class certification on standing per se, *see id.* at 358–60, 360 n.7 (majority opinion), three concurring Justices wrote separately to highlight that so long as even one named plaintiff has standing, a court has jurisdiction under Article III to entertain the class's suit. *Id.* at 394 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

30 Specifically, the Fifth Circuit ascribed this approach to the Third, Seventh, and Ninth Circuits, and in part to the Tenth Circuit in class actions regarding injunctive relief, and "arguably . . . in class actions for damages as well." *Deepwater Horizon*, 739 F.3d at 800.

31 *Id.* at 800 & n.19 (citing 1 RUBENSTEIN, supra note 5, § 2:3).

32 *See id.* at 800.

Judge Davis dubbed this "named plaintiffs only" method the *Kohen* test after the case most widely cited for that approach.[33]

He then described the alternative approach, the *Denney* test.[34] Under this analysis, though absent class members need not submit evidence of personal standing, "[t]he class must . . . be defined in such a way that anyone within it would have standing."[35] By Judge Davis's count, four circuits have applied *Denney*.[36]

After describing the two approaches, Judge Davis opined that choosing between *Kohen* and *Denney* would be no "simple task . . . based on th[e] roughly even split of circuit authority."[37] He discussed Fifth Circuit precedent that seemed to adopt *Kohen*,[38] and he acknowledged Judge Clement's opinion in *Deepwater Horizon I*, which "applied the *Denney* test."[39] But, because "[w]hichever test [was] applied," BP's standing argument failed,[40] Judge Davis ruled that the case was "not a vehicle" for choosing between *Kohen* and *Denney*.[41]

To prove that both tests reached the same result, Judge Davis first applied *Kohen* and found that certification was appropriate because the *named* plaintiffs indisputably had standing based on their alleged injuries caused by BP.[42] He then turned to *Denney*, where he came to "the same conclusion."[43] Because the class was defined such that claimants must have experienced "[l]oss of income, earnings or profits . . . *as a result of* the DEEPWATER HORIZON INCIDENT,"[44] the standing inquiry ended: all those who had claims might have been injured by the oil spill. Though a "stricter evidentiary standard might reveal persons or entities" who received payment without injury caused by BP,[45] *Denney* in itself did not preclude certification.

---

[33] *Id.* at 800–01 (citing Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009)).

[34] *Id.* at 801 (citing Denney v. Deutsche Bank AG, 443 F.3d 253, 263–64 (2d Cir. 2006)).

[35] *Id.* (quoting *Denney*, 443 F.3d at 264) (internal quotation mark omitted).

[36] Judge Davis observed that the Second, Seventh, Eighth, and Ninth Circuits had applied *Denney*, but he noted that the Seventh and Ninth Circuits had also applied *Kohen* as well. *Id.*

[37] *Id.*

[38] *Id.* at 801–02. Judge Davis confronted whether *Mims v. Stewart Title Guaranty Co.*, 590 F.3d 298 (5th Cir. 2009), had already adopted *Kohen* in the Fifth Circuit. *Deepwater Horizon*, 739 F.3d at 801–02. He ultimately concluded that it was unclear if *Kohen* was adopted, because *Mims* referenced *Kohen* in a discussion of Rule 23 rather than Article III. *Id.*

[39] *Deepwater Horizon*, 739 F.3d at 802.

[40] *Id.* at 799.

[41] *Id.* at 802.

[42] *Id.*

[43] *Id.* at 803.

[44] *Id.* (first alteration in original) (quoting *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2012, 910 F. Supp. 2d 891, 967 (E.D. La. 2012) (appendix), *aff'd sub nom. In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014)) (internal quotation marks omitted).

[45] *Id.* at 805.

Having addressed standing, the court next turned to the Rule 23 arguments of BP and the objectors, which were "based on the same central premise discussed above in the context of Article III — that a class cannot be certified when it includes persons who have not actually been injured."[46] Judge Davis explained why Rule 23's commonality and ascertainability requirements did not preclude certification[47]: assertions that the class contained uninjured plaintiffs spoke to the merits of class members' individual claims rather than the class's cohesiveness under Rule 23.[48] Thus, Judge Davis proceeded to affirm the district court's class certification and settlement approval.[49]

Judge Garza dissented. Highlighting that "Rule 23's requirements must be interpreted in keeping with Article III,"[50] Judge Garza would have applied the *Denney* test outright and reached a different conclusion.[51] He disagreed with the majority's understanding of how the settlement agreement operated: under Judge Garza's view the Claims Administrator's interpretation of the settlement agreement had rendered any causation requirement void.[52] He also felt that the class fell short of Rule 23's commonality requirements because not all absent class members had suffered the same injury at the hands of BP.[53] Because the Claims Administrator had eliminated causation "for a broad swath of the class," Judge Garza would have decertified the class.[54]

Deepwater Horizon presented the Fifth Circuit with a choice not uncommon in federal courts: whether *Kohen* or *Denney* provides the appropriate standing inquiry for class certification.[55] According to several dissenting judges on the Fifth Circuit who voted in favor of rehearing the case en banc, "deep confusion" on the "essential, constitutional" issue of class standing requires intervention from the Su-

---

[46] *Id.* at 808.

[47] *Id.* at 809–12, 821.

[48] *See id.* at 812.

[49] *Id.* at 821.

[50] *Id.* at 821 (Garza, J., dissenting) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997)) (internal quotation mark omitted).

[51] *See id.* at 822. Judge Garza felt that *Kohen* only applied to pretrial classes as opposed to settlement classes, *see id.* at 826, similar to Judge Clement's opinion in *Deepwater Horizon I*, *see id.* (citing *In re* Deepwater Horizon, 732 F.3d 326, 344 n.12 (5th Cir. 2013) (opinion of Clement, J.)).

[52] *See id.* at 821, 823–24.

[53] *See id.* at 827.

[54] *Id.* at 821; *see also id.* at 821–22.

[55] *See, e.g.*, Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 475–79 (S.D. Cal. 2013) (discussing the debate). *Compare, e.g.*, Brief of Amicus Curiae Public Citizen, Inc., in Support of Appellees & Affirmance at 6, *In re* Nexium Antitrust Litig., Nos. 14-1521 & 14-1522 (1st Cir. June 26, 2014) (arguing "the district court has jurisdiction over the class action, even if some class members were not injured by the defendants' conduct" (capitalization omitted)), *with id.* at 11 (recognizing defendants' arguments that absent class members without injury deprived the court of jurisdiction).

preme Court.[56] The results of this "confusion" theoretically could be significant: if plaintiffs lack standing, a court lacks the jurisdiction to even entertain a suit.[57] But by reaching the same result under both tests, *Deepwater Horizon* illustrates that any theoretical distinction between the tests makes little difference in terms of the substantive outcome. Indeed, the case exemplifies a broader pattern within class action standing litigation: even under *Denney*, the result of a certification in the case is almost invariably the same as under *Kohen*.[58]

For the courts that have considered class action standing, in fact, the standing inquiry has rarely proven singularly dispositive of the certification decision.[59] Of the hundreds of cases that quote *Denney* or its progeny discussing absent class member standing,[60] a full review reveals that fewer than five have actually refused to certify a proposed class on standing grounds alone.[61] Thus, in practice *Denney* has almost never created a different substantive outcome than *Kohen*.

Denney rarely reaches a different substantive outcome than *Kohen* for two reasons. First, *Denney* sets a low evidentiary threshold: the class definition need only include those who may *allege* a colorable injury.[62] Thus, to fail *Denney*'s standing inquiry, a class must by its definition include absent members who *could not possibly* have been

---

[56] *In re* Deepwater Horizon, 753 F.3d 516, 521 (5th Cir. 2014) (Clement, J., joined by Jolly and Jones, JJ., dissenting from denial of rehearing en banc). Judge Davis noted such confusion in his *Deepwater Horizon* opinion, pointing to circuits that had applied both *Denney* and *Kohen* at different points in time. *Deepwater Horizon,* 739 F.3d at 801 (describing the Seventh and Ninth Circuits' internally conflicting precedents).

[57] *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

[58] At least one other court has observed that the distinction between the two inquiries is "overblown." *See Waller*, 295 F.R.D. at 476.

[59] In *Deepwater Horizon*, for example, Judge Garza in dissent would have refused to certify on both standing *and* Rule 23 grounds. 739 F.3d at 821–22, 827 (Garza, J., dissenting).

[60] The Fifth Circuit accurately cited the circuit court cases "adopting" *Denney*, which are all frequently cited for *Denney*'s position on absent class members. *Id.* at 801 (majority opinion) (citing Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594 (9th Cir. 2012); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010); and Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980)).

[61] *In re* Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig., No. 09-md-2059, 2010 WL 3893807, at *2 (D. Minn. Sept. 29, 2010); Kempner v. Town of Greenwich, 249 F.R.D. 15, 17–18 (D. Conn. 2008); *see also* Janes v. Triborough Bridge & Tunnel Auth., 889 F. Supp. 2d 462, 467–68 (S.D.N.Y. 2012) (adapting a class definition in a suit involving driving tolls when the relief was injunctive and declarative, since past drivers who had died or lost their license no longer had a personal stake in the suit's forward-looking remedies and thus lacked standing); O'Shea v. Epson Am., Inc., No. CV 09-8063, 2011 WL 4352458, at *10–12 (C.D. Cal. Sept. 19, 2011) (refusing to certify a class after a discussion of lack of standing, but officially ruling on predominance grounds). Had these few cases been considered under *Kohen* rather than *Denney*, concerns about the lack of commonality binding the class members' interests would likely have precluded certification anyway. *See infra* p. 1302.

[62] *See Deepwater Horizon*, 739 F.3d at 804.

injured by the defendant's conduct.[63] *Denney* itself exemplifies how forgiving that evidentiary standard is: the case actually upheld certification of the class at issue despite noting that some class members may only *potentially* have suffered injury.[64] Given *Denney*'s low evidentiary bar, courts applying the test have consistently found the standing requirement satisfied despite the potential of uninjured class members.[65]

Second, concerns regarding cognizable injury manifest themselves regardless of whether the court addresses uninjured class members only via Rule 23 analysis (*Kohen*), or also under standing doctrine (*Denney*).[66] Rule 23 includes at its core commonality, typicality, ascertainability, and predominance requirements to ensure that only definite classes with cohesive interests and injuries are certified.[67] Many courts thus recognize *explicitly* that even if standing were not problematic, Rule 23 would preclude certification of a class including uninjured members: uninjured plaintiffs do not likely have interests sufficiently cohesive with those suffering cognizable injury as to merit class treatment.[68] Other courts have recognized this overlap between *Denney* and Rule 23 *implicitly*, merging their standing discussion with their Rule 23 inquiry rather than treating standing as a truly jurisdictional issue.[69]

---

[63] For example, one paradigmatic case of those who *could not* have been injured involved residents suing their municipality for unreasonable beach access fees. Because the proposed class included *all* residents of the town, but senior citizens did not have to pay the access fees, the proposed class clearly included those who could not possibly have been harmed by the fees. *See Kempner*, 249 F.R.D. at 17–18.

[64] *See* Denney v. Deutsche Bank AG, 443 F.3d 253, 264–65 (2d Cir. 2006); *see also* Franco-Gonzalez v. Napolitano, No. CV 10-02211, 2012 WL 10688876, at *2 (C.D. Cal. Aug. 27, 2012) (noting that *Denney*'s standard for certification is more forgiving than frequently assumed).

[65] *See, e.g.*, Khoday v. Symantec Corp., Civil No. 11-180, 2014 WL 1281600, at *34 (D. Minn. Mar. 13, 2014).

[66] *Cf.* Luiken v. Domino's Pizza, LLC, 705 F.3d 370, 377–78 (8th Cir. 2013) (refusing to address standing arguments "[b]ecause the class certification is unsustainable under Rule 23," *id.* at 377 (citing *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008))); Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 533 (C.D. Cal. 2011) ("[T]he majority of authority militates in favor of . . . analyz[ing] [standing] arguments through Rule 23 and not by examining the Article III standing of the class representative or unnamed class members."); 1 RUBENSTEIN, *supra* note 5, § 2:1 (noting that courts occasionally "confuse and conflate" the "distinct" rules of standing and Rule 23 class certification).

[67] *See* 1 RUBENSTEIN, *supra* note 5, §§ 1:2, 1:3, 3:1.

[68] Phelps v. Powers, 295 F.R.D. 349, 354 (S.D. Iowa 2013) ("[L]ack of standing is not the only obstacle to class certification."); Webb v. Carter's Inc., 272 F.R.D. 489, 500 (C.D. Cal. 2011) (noting that Rule 23 precluded certification even if Article III did not); *Kempner,* 249 F.R.D. at 18 (same); Conigliaro v. Norwegian Cruise Line Ltd., No. 05-21584-CIV, 2006 WL 7346844, at *6 (S.D. Fla. Sept. 1, 2006) (same).

[69] *See, e.g.*, Halvorson v. Auto-Owners Ins. Co., 718 F.3d 773, 779–80 (8th Cir. 2013) (merging standing discussion with the Rule 23 predominance inquiry); Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1029–35 (8th Cir. 2010) (same); Kennedy v. United Am. Ins. Co., No. 2:11CV00131 SWW, 2013 WL 1367131, at *3–6 (E.D. Ark. Apr. 3, 2013) (same); O'Shea v. Epson Am., Inc., No.

Although *Denney* and *Kohen* converge on the same substantive result, the choice between tests theoretically *could* have significant consequences in terms of procedure. Most notably, appellate courts review Rule 23 certification decisions for abuse of discretion but may address standing issues de novo.[70] Further, while courts generally will consider only those certification issues brought by the parties on appeal, standing issues are jurisdictional and thus may be considered sua sponte.[71] Thus, while *Denney* has not yet significantly impacted decisions, its increased adoption may inspire more aggressive application with consequences for appellate review of certification decisions.[72]

But despite these potential distinctions, *Deepwater Horizon* reveals that the practical difference between *Denney* and *Kohen* has not been as wide as may seem at first blush. Because *Denney* sets a low evidentiary threshold, and because Rule 23 is equipped to handle questions of class cohesion, the *Denney* test essentially merges a jurisdictional challenge with Rule 23 inquiries. In practice, *Denney* has merely given defendants another legal doctrine under which to make the same substantive claim. While many have called for clarification on the appropriate inquiry,[73] for the time being lower courts may well consider the choice as largely academic.

CV 09-8063, 2011 WL 4352458, at *8–12 (C.D. Cal. Sept. 19, 2011) (same); *cf. In re* Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402, 419 n.13 (D. Me. 2010) ("Courts insert standing into the class certification requirements by either implying a prerequisite [of predominance] or through typicality."). Indeed, *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) — cited in *Deepwater Horizon* as the Ninth Circuit's adoption of *Denney*, *Deepwater Horizon*, 739 F.3d at 801 & n.29 — explicitly called attention to the underlying similarity between standing and predominance arguments raised by defendants, and chose to rule on predominance grounds. *Mazza*, 666 F.3d at 594–96.

[70] *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 616 (8th Cir. 2011) ("While we reverse [a certification decision] only for an abuse of that discretion, a district court 'abuses its discretion if it commits an error of law.'" (quoting Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005))); Denney v. Deutsche Bank AG, 443 F.3d 253, 262 (2d Cir. 2006) ("We review *de novo* the issue of whether a party has standing.").

[71] *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93 (1998).

[72] Indeed, two of the six Fifth Circuit judges considering *Deepwater Horizon* would have refused to certify the class as defined because of the standing issues it presented. 739 F.3d at 821–22 (Garza, J., dissenting); *In re* Deepwater Horizon, 732 F.3d 326, 340–44 (5th Cir. 2013) (opinion of Clement, J.).

[73] *See, e.g.*, Petition for a Writ of Certiorari at i, BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc., 134 S. Ct. 2750 (2014) (mem.) (No. 13A1177), http://media.wwltv.com/documents/BP+Writ+of+Cert+Petition+8-1-14.pdf [http://perma.cc/HVY8-EDF7]; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at i, Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013) (mem.) (No. 12-322), 2012 WL 4842966, at *i.