WHICH COMES FIRST: CLASS CERTIFICATION OR JURISDICTIONAL ANALYSIS*

I. INTRODUCTION

The shift in wealth and economic power from individuals to businesses over the past century created an asymmetry in the American legal system.[1] To counter the considerable legal heft of large corporate entities, plaintiffs—and plaintiffs' counsel—rely on class (or collective) actions.[2] A class action is a procedural mechanism that permits a representative plaintiff to bring suit on behalf of similarly harmed individuals.[3] This, in turn, creates sufficient bargaining power to grab the attention of deep-pocketed and powerful foes.[4] Examples of this procedural mechanism can be found in areas of the law as diverse as mass tort litigation,[5] shareholder derivative lawsuits,[6] and employment discrimination disputes.[7] Even though class actions are both time-

* Brett M. Feldman, J.D. Candidate, Temple University Beasley School of Law, 2016. I would like to acknowledge the *Temple Law Review* staff and editorial board for their hard work in preparing this project for publication. I also owe a debt of gratitude to the many teachers and professors who helped me develop as a student, writer, and person over the years—this work is as much a product of their efforts as it is mine. Finally and most importantly, thank you to my parents, Lynn and Samuel, for teaching me what it means to be a "real lawyer." I truly stand on the shoulders of giants.

1. *See* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 1:3 (11th ed. 2014) (describing class actions as "the Colt pistol of the little folks" (quoting *In re* Prempro Prods. Liab. Litig., 230 F.R.D. 555, 574 (E.D. Ark. 2005))); *see also* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 545 (2006) ("The procedural device routinely employed as the means of resolving the countless individual claims that may now be made against economically powerful defendants is the class action . . . .").

2. 1 MCLAUGHLIN, *supra* note 1 (explaining how the consolidation of discrete claims into one large action dramatically increases the potential award, and puts pressure on defendants to settle claims they would otherwise have litigated).

3. FED. R. CIV. P. 23(a) (authorizing "[o]ne or more members of a class [to] sue . . . on behalf of all members" if certain requirements are met).

4. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 433 (2001) (arguing that representative actions, including class actions, "promote equality" of bargaining power between plaintiffs and defendants).

5. *E.g.*, *In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 390–92 (S.D.N.Y. 2008) (declining to certify three statewide classes alleging that Fosamax caused plaintiffs to develop osteonecrosis of the jaw, a condition characterized by an area of exposed bone in the mouth); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 740 (E.D.N.Y. 1984) (seeking recovery for injuries—including death and severe birth defects—sustained by soldiers exposed to Agent Orange, a hazardous herbicide, during the Vietnam War).

6. *E.g.*, *In re* Constar Int'l Inc. Sec. Litig., 585 F.3d 774, 778 (3d Cir. 2009) (affirming the district court's order certifying a class in a securities lawsuit seeking relief under section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (2006)); Brickman v. Tyco Toys, Inc., 731 F. Supp. 101, 101 (S.D.N.Y. 1990) (seeking recovery on behalf of a class for violations of federal securities laws, negligent misrepresentation, and breach of fiduciary duty).

7. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2544 (2011) (seeking recovery

consuming and expensive,[8] they have become an important feature of the American legal landscape.[9]

Although governed by Federal Rule of Civil Procedure 23 (Rule 23),[10] the Class Action Fairness Act of 2005,[11] and decades of case law, one aspect of class action law remains unsettled. In *Amchem Products v. Windsor*[12] and *Ortiz v. Fibreboard Corp.*,[13] the Supreme Court held that, where "logically antecedent," courts may resolve class certification *before* determining whether the plaintiffs possess Article III standing.[14] In the wake of these holdings, plaintiffs have sought, with some success, to persuade trial courts to interpret this language broadly in order to permit certification proceedings to commence before establishing the court's jurisdiction.[15] Some courts have agreed with these plaintiffs, holding that *Amchem* and *Ortiz* created a broad exception to established precedent, while other courts have recognized the dual cases as creating a very narrow exception to the order of analyses.[16]

This Comment argues against the adoption of the "broad exception" interpretation of *Amchem* and *Ortiz* and in favor of the "narrow interpretation" of the "logically antecedent" exception. This assertion rests on several grounds, namely that a narrow construction (1) conforms closely to long standing interpretations of Article III,[17] (2) advances the purposes of the Federal Rules of Civil Procedure (the Rules) as enunciated in Federal Rule of Civil Procedure 1 (Rule 1),[18] and (3) hews more closely to the language and procedural history of *Amchem* and *Ortiz*.[19]

against Wal-Mart for violations of Title VII); Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 962 (11th Cir. 2008) (requiring the plaintiffs in a pattern or practice disparate treatment lawsuit to bring their claims on behalf of a class, rather than in their individual capacities).

8. *See* Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2042 (2010) (explaining that "class certification is not a quick and clean procedure").

9. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1), 119 Stat. 4, 4 (noting that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties").

10. FED. R. CIV. P. 23.

11. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C. (2012)).

12. 521 U.S. 591 (1997).

13. 527 U.S. 815 (1999).

14. *Ortiz*, 527 U.S. at 831; *Amchem*, 521 U.S. at 612–13.

15. See *infra* Part II.D for a discussion of subsequent courts' interpretations and applications of the Supreme Court's "logically antecedent" language.

16. See *infra* Part II.D for a discussion of both broad and narrow interpretations of the "logically antecedent" language by lower courts.

17. See *infra* Part III.B.1 for a discussion of the relationship between the narrow interpretation of the "logically antecedent" language and Article III of the Constitution.

18. See *infra* Part III.B.2 for a discussion of how a narrow interpretation of the Court's language advances the goals of the Rules, as stated in Rule 1.

19. See *infra* Part III.B.3 for a discussion of how a narrow construction of *Amchem* and *Ortiz* is more faithful to the peculiar factual context that produced those opinions.

II. OVERVIEW

Courts throughout the country are split on whether the "logically antecedent" language utilized by the Court in *Amchem* and *Ortiz* should be construed as a broad exception to the general rule that courts must be sure of their jurisdiction before proceeding on a claim,[20] or a narrow exception to the background rule.[21] Courts endorsing the broad exception permit certification to precede jurisdictional analysis in a broad range of circumstances.[22] On the other hand, some courts that read the "logically antecedent" language narrowly apply it much more restrictively.[23]

The goal of this Overview is to trace how courts arrived at this difference of interpretation. In order to do that, the Overview will proceed in five parts. Part II.A summarizes the federal rules of civil procedure that bear upon this issue,[24] as well as the statute authorizing those rules. Part II.B provides an overview of the intersection of jurisdictional and class certification analyses. Part II.C details the Supreme Court's decisions in *Amchem* and *Ortiz*, including the factual context that produced these two decisions. Part II.D discusses subsequent interpretations of the Supreme Court's "logically antecedent" language by lower courts. Finally, Part II.E surveys some scholarly analyses of *Amchem* and *Ortiz*.

A. The Rules

The Rules Enabling Act—the statute authorizing the Rules—permits the Supreme Court to "prescribe general rules of practice and procedure . . . in the United States district courts . . . and courts of appeals."[25] This authorization is limited—the Rules Enabling Act prohibits promulgated rules from "abridg[ing], enlarg[ing], or modify[ing] any substantive right."[26] Within that statutory framework, the Supreme Court adopted Rule 1, which establishes a set of principles designed to aid courts' implementation of the remaining rules.[27]

20. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . ." (quoting Great S. Fire Proof Hotel Co. v. Jones, 177 U.S. 449, 453 (1900))).

21. *Compare* Payton v. Cty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002) (noting the "Supreme Court's *directive* to consider issues of class certification prior to issues of standing" (emphasis added)), *and* Clark v. McDonald's Corp., 213 F.R.D. 198, 204–05 (D.N.J. 2003) (noting that it was appropriate to consider class certification before standing, where class certification gave rise to jurisdictional issues), *with* Easter v. Am. W. Fin., 381 F.3d 948, 962 (9th Cir. 2004) ("[*Ortiz*] does not require courts to consider class certification before standing."), *and* United States *ex rel.* Krahling v. Merck & Co., 44 F. Supp. 3d 581, 600–01 (E.D. Pa. 2014) (declining to interpret the "logically antecedent" language broadly, and conducting a standing analysis before determining certification).

22. See *infra* Part II.D for a discussion of subsequent courts' interpretations of the "logically antecedent" language, including the contexts in which the exception has been considered.

23. See *infra* Part II.D for a discussion of both broad and narrow interpretations of the "logically antecedent" language among lower courts.

24. Courts analyzing this issue have predominantly sought guidance from Rules 1 and 23.

25. 28 U.S.C. § 2072(a) (2012).

26. *Id.* § 2072(b).

27. *See* FED. R. CIV. P. 1.

According to Rule 1, the Rules "should be construed and administered to secure the *just*, *speedy*, and *inexpensive* determination of every action and proceeding."[28]

Class and collective actions are authorized under the Rules and federal legislation,[29] as well as the rules of civil procedure of many states.[30] Rule 23 authorizes class action lawsuits in federal courts.[31] Although Rule 23 has been amended several times since its adoption,[32] its premise—that a representative or group of representatives may exercise legal rights on behalf of other similarly harmed individuals or entities—has not been altered.[33]

The procedural oddity contained in Rule 23 has been the subject of significant controversy.[34] Plaintiffs favor the rule because it "provide[s] the key to the Temple of Justice for those who could not possibly afford an individual action."[35] Consolidating numerous small claims into one action "multiplies the potential damages award, often to a figure so large that it exerts irresistible pressure on defendants to agree to substantial settlements."[36] Because of this, defendants decry Rule 23 as "legalized blackmail," whereby a questionable cause of action can produce enormous pressure on a defendant to settle where it would ordinarily have litigated the claim to judgment.[37] Regardless of one's opinion of the propriety of the class action device itself, it is clear that jurisdictional issues

28. *Id.* (emphasis added).

29. FED. R. CIV. P. 23; *see, e.g.*, 29 U.S.C. 216 (2012) (authorizing collective actions for claims arising under the Fair Labor Standards Act).

30. *See, e.g.*, CAL. CIV. PROC. CODE § 382 (West 2016) ("[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."); PA. R. CIV. P. 1703 (providing the method by which a plaintiff may initiate a class action in Pennsylvania); TEX. R. CIV. P. 42 (establishing the procedural requirements for maintaining a class action in Texas state courts).

31. FED. R. CIV. P. 23.

32. *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:15 (5th ed. 2015) (discussing the 1966 amendments to Rule 23).

33. *See id.* § 1:1; Redish & Kastanek, *supra* note 1, at 545 ("Though the [class action] finds its origins in ancient practice and received codification in the original Federal Rules of Civil Procedure in 1938, the practice assumed its modern form—dramatically different from its earlier structure—in the amendments of 1966." (footnotes omitted)).

34. *See* 1 MCLAUGHLIN, *supra* note 1, § 1:1 (noting that "[t]he class action is the most prominent exception to the[] baseline legal tenets" that one is not bound by a judgment in litigation to which one is not party, and that one may not, ordinarily, prosecute an action where he purports to represent only the rights of another).

35. *Id.* § 1:3 (quoting *In re* Prempro Prods. Liab. Litig., 230 F.R.D. 555, 574 (E.D. Ark. 2005)); *see also* Chloe Keating, *Fair Standards for Labor Arbitration: An Analysis of the FLSA and FAA*, 88 TEMP. L. REV. 137, 147 (2015) ("Rule 23 . . . provides those who would individually lack the resources to bring a lawsuit with the means to vindicate their rights.").

36. 1 MCLAUGHLIN, *supra* note 1, § 1:3.

37. *Id.* (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Lit., 55 F.3d 768, 784 (3d Cir. 1995)).

create certain procedural and substantive strategic considerations for class action litigants.[38]

B. Jurisdiction

Although a plaintiff, as "master of the complaint," reserves the right to pick the forum of his choice,[39] he also bears the burden of demonstrating that the court selected is one of competent jurisdiction.[40] Accordingly, before a court reaches the merits of a plaintiff's claim, including a motion for class certification,[41] a defendant generally reserves the right to object to a court's jurisdiction.[42] One of the many ways a defendant might challenge a court's jurisdiction is by objecting to a plaintiff's Article III standing.[43] The United

38. Linda S. Mullenix, *Standing and Other Dispositive Motions After* Amchem *and* Ortiz*: The Problem of "Logically Antecedent" Inquiries*, 2004 MICH. ST. L. REV. 703, 706–07. In her article, Professor Mullenix outlines such particular strategic concerns. With respect to class defendants, she argues, "[I]t has always been to the defendant's advantage to challenge the plaintiff's standing prior to certification. If the defendant prevailed . . . the class action would be dismissed . . . ." *Id.* at 707. From the plaintiffs' perspective, "class counsel seek to deflect, defer, or prevent a court's consideration of standing until after class certification because class counsel gain a strategic advantage merely by having the court certify the action." *Id.* In other words, because the act of certifying a class—totally independent of the actual merits of the case—is so powerful, not only does it create its own set of strategic considerations, but it also can often be the focal point of the litigation.

39. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 398–99 (1987) (stating that, as "the master of the complaint," a plaintiff may choose which claims to bring and cannot have that choice of forum usurped by a defendant).

40. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing [standing to sue in federal court].").

41. *See* FED. R. CIV. P. 23(a)(1)–(4) (establishing four procedural prerequisites for the initiation of a class action in federal court: (1) impracticability of joinder of all plaintiffs because the class is "so numerous," (2) commonality of "questions of law or fact," (3) typicality of the legal "claims and defenses" between the representatives of the class and the class members, and (4) adequate representation by named plaintiffs).

42. FED. R. CIV. P. 12(b)(1)–(2) (permitting a defendant to object to a court's subject matter and personal jurisdiction by motion).

43. Mullenix, *supra* note 38, at 706–07. Generally, standing doctrine helps a court determine whether a particular litigant is entitled to have the court decide the merits of a dispute. Warth v. Seldin, 422 U.S. 490, 498 (1975). This requirement originates from "an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." Worth v. Jackson, 451 F.3d 854, 857 (D.C. Cir. 2006) (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)). Standing jurisprudence falls into several broad categories. One category is Article III standing, which refers to the case or controversy requirement of Article III and is the subject of this Comment. *See* Lujan v. Defs. of Wildlife, 504 U.S. 560–61 (1992). A second category is statutory standing, which considers whether a particular plaintiff possesses a cause of action under a statute—although the remaining vitality of this category with respect to jurisdiction is unclear. *See* Lexmark Int'l v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 n.4 (2014) (arguing that the statutory standing label "is misleading[] since 'the absence of a valid (as opposed to arguable) cause of action does not implicate . . . the court's statutory or constitutional *power* to adjudicate the case.'" (quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642–43 (2002))). A third category of standing is prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). The prudential principles that bear on standing include (1) the requirement

States Constitution limits the jurisdiction of federal courts to "[c]ases" and "[c]ontroversies."[44] To determine whether a case or controversy is properly before it, a court will rely on the doctrine of standing to separate justiciable from nonjusticiable claims.[45] To demonstrate Article III standing, a plaintiff must show (1) a specific and identifiable "injury in fact," (2) a causal connection between the alleged conduct of the defendant and the plaintiff's injury in fact, and (3) the likelihood that a favorable decision by the court would provide redress for the injury.[46] Where a plaintiff lacks Article III standing, no case or controversy is before the federal court, and the case must be dismissed.[47]

Because standing is a matter of jurisdiction, and jurisdiction is required as a "threshold matter" before courts may consider the merits of a case,[48] it follows that courts should determine whether plaintiffs possesses Article III standing *before* addressing the propriety of class certification.[49] The Supreme Court's decisions in *Amchem* and *Ortiz* upturned this notion. In those decisions, the Court wrote that, in circumstances where class certification analysis is "logically antecedent" to an evaluation of a plaintiff's standing, a trial court may conduct the certification analysis first and then evaluate the jurisdictional challenge.[50] In subsequent decisions, courts have reached different conclusions on the breadth of the "logically antecedent" language.[51]

that a plaintiff generally assert his own legal rights; (2) avoiding ruling on "abstract questions of wide public significance, which "amount to 'generalized grievances'"; and (3) only granting standing where "the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982) (internal citations omitted). These prudential principles are not relevant to the discussion or argument in this Comment and will not be addressed further.

44. U.S. CONST. art. III, § 2, cl. 1.

45. *Lujan*, 504 U.S. at 560.

46. *Id.* at 560–61 (citations omitted).

47. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is [the] power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869))).

48. *See id.* at 94–95 ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (alteration in original) (quoting Mansfield, C. & L.M. Ry. Co. v. Swan, 111 U.S. 379, 382 (1884))).

49. *See* Warth v. Seldin, 422 U.S. 490, 498 (1975) (noting that "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III" is "the threshold question in every federal case").

50. Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999); Amchem Prods. v. Windsor, 521 U.S. 591, 612 (1997).

51. Mullenix, *supra* note 38, at 709. See *infra* Part II.D for a discussion of subsequent interpretations of the "logically antecedent" language.

C. Amchem *and* Ortiz

The first step in analyzing the Supreme Court's holdings in *Amchem* and *Ortiz* is to understand the legal context that produced these decisions—namely, the glut of asbestos litigation clogging the American court system.[52] Although the impact of asbestos litigation on the American legal system has been discussed and dissected ad nauseam, a brief recitation here provides crucial context for the problems presented by *Amchem* and *Ortiz*.

1. Asbestos Litigation

In the first half of the twentieth century, manufacturers added asbestos (a mineral fiber valued for its strengthening and fire retardant qualities) to a number of consumer and industrial products.[53] In the 1960s, doctors discovered a link between this commonplace compound and a number of serious health problems—including asbestosis, malignancies, and pleural plaques.[54] In 1973, the Fifth Circuit's decision in *Borel v. Fibreboard Paper Products Corp.*[55] opened the asbestos litigation floodgates.[56] In *Borel*, the circuit court affirmed the district court's strict liability jury instruction, holding that the asbestos manufacturers failed to warn asbestos users and asbestos workers that the product was unreasonably dangerous.[57] This holding had the effect of expanding recovery for those exposed to asbestos.[58] From that point on, the exposed could bring workers' compensation claims not only against their employers, but also against suppliers and installers of asbestos.[59] As a result, the volume of asbestos litigation increased significantly, as demonstrated by thousands of new claims against asbestos manufacturers.[60]

52. *See* Mullenix, *supra* note 38, at 712 (explaining that "the idiosyncratic way in which the standing problem developed in *Amchem* and *Ortiz* suggests that context is everything").

53. *See Asbestos in the Home*, U.S. CONSUMER PROD. SAFETY COMM'N, http://www.cpsc.gov/en/Safety-Education/Safety-Guides/Home/Asbestos-In-The-Home/ (last visited Feb. 1, 2016) (stating that "until the 1970s, many types of building products and insulation materials used in homes contained asbestos"). See Christopher J. O'Malley, Note, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1101–06 for a discussion of the history of the use of asbestos and its deleterious health effects.

54. O'Malley, *supra* note 53, at 1103.

55. 493 F.2d 1076 (5th Cir. 1973). According to the Fifth Circuit opinion, Clarence Borel worked as an industrial insulation worker from 1936 to 1969. *Borel*, 493 F.2d at 1081–82. On January 19, 1969, Mr. Borel was diagnosed with pulmonary asbestosis, which his doctors believed to be irreversible. *Id.* at 1082. Later that year, Mr. Borel filed suit against eleven asbestos manufacturers. *Id.* at 1086. Subsequent to the removal of his right lung in February of 1970, Mr. Borel was diagnosed with mesothelioma—a form of lung cancer caused by asbestosis. *Id.* at 1082. Mr. Borel died before trial and his wife became the plaintiff. *Id.* at 1086. At the trial, the jury found, inter alia, that all defendants were strictly liable and set damages at $79,436.24. *Id.* The defendants appealed. *Id.*

56. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 54 (2003).

57. *Borel*, 493 F.2d at 1091–92.

58. Brickman, *supra* note 56, at 54.

59. *Id.*

60. O'Malley, *supra* note 53, at 1107 (noting that Johns-Manville—the leading manufacturer of

The floodgates of asbestos litigation creaked open more widely in the early 1980s as a result of *Keene Corp. v. Insurance Co. of North America*.[61] In that case, the Keene Corporation—a manufacturer of thermal insulation products that contained asbestos—sought a declaratory judgment against its insurer, seeking a "determination of the extent to which each policy covers its liability for asbestos-related diseases."[62] Circuit Judge David Bazelon held that, under the ambiguous language of the manufacturer's liability insurance policy, the insurance defendant in *Keene* was liable to the limits of the policy it extended for every policy issued to an asbestos manufacturer from the time of its workers' initial exposures to the time of the actual disease manifestation.[63] Practically, this decision meant that insurance companies were now on the hook for tens of billions of dollars in new liability.[64] When coupled with successor liability,[65] it created a vast new pool of resources from which potential asbestos claimants could draw.[66]

In the early 1990s, the volume of asbestos litigation created a significant problem in the American legal system.[67] In 1990, one in every three civil cases in one district was an asbestos-related personal injury claim.[68] In 1994, a newspaper report concluded that nearly fifty new asbestos claims were filed in the United States each and every day.[69] In response to this glut of new litigation, Chief Justice Rehnquist appointed the United States Judicial Conference Ad Hoc Committee on Asbestos Litigation "to address the substantial number of asbestos personal injury cases and the complex issues they present[ed]."[70] The Committee noted a laundry list of problems associated with asbestos litigation: "long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may

asbestos-containing products, as well as a significant player in the mining of the mineral—faced 11,000 asbestos claims in 1982, which ultimately drove the company to seek the protection of bankruptcy).

61. 667 F.2d 1034 (D.C. Cir. 1981). *See generally* Eugene R. Anderson, *A "*Keene*" Story*, 2 NEV. L.J. 489 (2002) (providing a comprehensive background of the *Keene* decision).

62. *Keene*, 667 F.2d at 1038.

63. *Id.* at 1041.

64. Brickman, *supra* note 56, at 55.

65. George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 11 (2007) ("Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests.").

66. *See* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 385 (1993) (estimating that approximately $7 billion was spent on asbestos litigation in the 1980s and early 1990s).

67. *Id.* at 383–84 (noting that, as of the time of writing, "[f]ederal and state courts are clogged with 100,000 asbestos suits," and discussing a myriad of problems related to that glut of litigation).

68. Deborah R. Hensler, *As Time Goes by: Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1899, 1900 (2002).

69. *Id.*

70. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 12, 1991) (discussing the charge, work, and findings of the Ad Hoc Committee on Asbestos Litigation); *see* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 597–98 (1997).

lose altogether."[71] Although the Ad Hoc Committee recommended a legislative solution to the crisis, Congress never acted, and the Judicial Panel on Multidistrict Litigation (JPMDL) consolidated pending asbestos cases into one and transferred it to the Eastern District of Pennsylvania.[72]

2. *Amchem*

Amchem became the vehicle for the consolidation by the JPMDL.[73] Once consolidated, plaintiffs and defense counsel began settlement discussions.[74] After a lengthy negotiating process, the defendant asbestos companies and the plaintiff class's counsel reached what they believed to be an adequate settlement, resolving both current claims and establishing a process by which future claims could be disposed.[75] Both parties then sought a settlement class, which would bind the plaintiffs with pending cases, future asbestos claimants, and the defendants.[76] Ultimately, over the objections of a number of interested parties, the district court found the proposed global settlement "fair, adequate, and reasonable to the class," and certified the class for settlement purposes.[77]

The objectors[78] appealed on a number of different jurisdictional grounds,

71. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 70, at 2–3.

72. *Amchem*, 521 U.S. at 598–99. The JPMDL consists of seven circuit and district court judges selected by the Chief Justice of the Supreme Court of the United States. 28 U.S.C. § 1407(d) (2012). The JPMDL is empowered to transfer civil actions involving one or more common questions of fact pending in different districts to a single district for coordinated or consolidated pretrial proceedings. *Id.* § 1407(a). The JPMDL is expressly prohibited from transferring any litigation arising under the antitrust laws. *Id.* § 1407(g). Cases consolidated by the JPMDL reflect a broad range of claims. *See, e.g.*, *In re* Protegrity Corp. & Protegrity USA, Inc., Patent Litig., 84 F. Supp. 3d 1380 (J.P.M.L. 2015) (involving patent litigation); *In re* Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig., 643 F. Supp. 2d 1378 (J.P.M.L. 2009) (involving undercapitalization and concealment litigation); *In re* DirecTech S.W., Inc., Fair Labor Standards Act (FLSA) Litig., 581 F. Supp. 2d 1370 (J.P.M.L. 2008) (involving litigation addressing alleged violations of the FLSA); *In re* Air Disaster at Lockerbie, Scot., on Dec. 21, 1988, 709 F. Supp. 231 (J.P.M.L. 1989) (involving litigation following a plane crash).

73. *Amchem*, 521 U.S. at 599.

74. *Id.*

75. *Id.* at 601.

76. *Id.* at 601–05.

77. Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 325 (E.D. Pa. 1994), *vacated and remanded with directions to decertify class*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

78. Ultimately, four different groups of objectors presented argument before the Supreme Court—three groups of objectors and one pair of individual objectors. *Amchem*, 521 U.S. at 605 n.7. The "White Lung Group" included the White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Atomic Workers International Union, and several individuals. Brief of Respondents White Lung Association of New Jersey, et al. at ii, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (No. 96-270), 1997 WL 13206. The "Cargile Group" consisted of six Californians—three of whom died before the Supreme Court's decision—who had "either contracted mesothelioma or [were] at risk of contracting it in the future." Brief for Respondents Aileen Cargile, et al. at 2, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (No. 96-270), 1997 WL 13207. The individual objectors in the case were Margaret and Casimir Balonis, who had been exposed to asbestos while working at a shipyard and had been diagnosed with mesothelioma. Brief for

including that no justiciable case or controversy existed before the court.[79] Judge Edward Becker, writing for the Third Circuit, not so delicately sidestepped these jurisdictional arguments.[80] The judge offered a terse justification for the court's avoidance of these issues rooted in constitutional avoidance doctrine.[81] Citing *Spector Motor Service, Inc. v. McLaughlin*,[82] Judge Becker asserted that "it [would be] prudent not to decide issues unnecessary to the disposition of the case, especially when many of these issues implicate constitutional questions."[83] Judge Becker then argued that, because certification gave rise to the jurisdictional arguments advanced by the class objectors, the court was free to determine the certification issue without considering the jurisdictional issues.[84] The judge's brief rationale concluded with his assertion that "a court need not reach difficult questions of jurisdiction when the case can be resolved on some other ground in favor of the same party."[85] The Third Circuit ultimately found that the class certified by the district court failed to meet the requirements of Rule 23, thereby avoiding the jurisdictional challenges altogether.[86]

Although the Third Circuit refused to rule on the jurisdictional issues in the initial class action, the objectors raised them for a second time in their brief to the Supreme Court.[87] The objectors to the initial class raised two arguments with respect to Article III standing.[88] First, the respondents asserted that the exposure-only plaintiffs—the claimants with exposure to asbestos, but with no disease at present—failed to meet the Article III requirement of injury in fact.[89] Because the exposure-only plaintiffs (who were included with the pending plaintiffs without any subclass distinction) had "disclaim[ed] any concrete injury," it would have been impossible for them to claim an injury in fact for

Respondents Casimir and Margaret Balonis at 9, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (No. 96-270), 1997 WL 13204. The final group of objectors—the "Windsor Group"—is only identified as the "Windsor Group" without any further elaboration. *Amchem*, 521 U.S. at 605 n.7.

79. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 622 (3d Cir. 1996), *aff'd sub nom.* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

80. *Id.* at 623.

81. *Id.* The constitutional avoidance doctrine holds that a court, when faced with a question that could be decided either on constitutional grounds or other grounds, should avoid the constitutional issue. *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184–89 (defining the constitutional avoidance doctrine and discussing its theoretical underpinnings). Justice Brandeis stated this idea clearly in his concurring opinion in *Ashwander v. Tennessee Valley Authority*: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

82. 323 U.S. 101, 105 (1944) (asserting that courts should refrain from addressing constitutional questions "unless such adjudication is unavoidable").

83. *Amchem*, 83 F.3d at 623.

84. *Id.*

85. *Id.*

86. *Id.* at 634.

87. Brief for Respondents George Windsor, et al. at 17–18, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (No. 96-270), 1997 WL 13208.

88. *Id.* at 17–26.

89. *Id.* at 17–18.

Article III purposes.[90] Additionally, the respondents asserted that the plaintiffs' claims could not be redressed by a favorable judgment of the court.[91] They pointed to the fact that the settlement sought medical monitoring, but failed to provide any program or money for that purpose.[92]

The objectors' arguments failed to persuade the Supreme Court.[93] Justice Ginsburg, writing for the majority, passed on the jurisdictional questions raised by the objectors to the class.[94] The Court was persuaded by the Third Circuit's assertion regarding the dispositive nature of class certification. Justice Ginsburg noted, "We agree [with the Third Circuit] that '[t]he class certification issues are dispositive'; because [class certification] . . . is *logically antecedent* to the existence of any Article III issues, it is appropriate to reach them first."[95] Before affirming the Third Circuit's decision, Justice Ginsburg noted the Court should be "mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act."[96] With these few lines, Justice Ginsberg initiated a running battle between class action plaintiffs and defendants over the order of jurisdictional and certification analyses.[97]

3. *Ortiz*

The Court's subsequent decision in *Ortiz* parallels the conclusion reached in *Amchem*. Again, the Court faced a challenge to the certification of a class in an "elephantine mass" of asbestos litigation.[98] Fibreboard Corporation, a producer of goods containing asbestos, was the subject of "a stream of personal injury claims" that began in the late 1960s and continued for the next several decades.[99] By the 1990s, thousands of individuals had filed claims for compensatory damages each year.[100] As a result of the enormous potential liability, Fibreboard began to assign its rights against its insurer to asbestos plaintiffs.[101] This practice sparked litigation between Fibreboard and its insurer over the extent of Fibreboard's coverage and its insurer's corresponding liability, which was

90. *Id.* at 17 (emphasis omitted).

91. *Id*. at 23.

92. *Id.* at 24.

93. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997).

94. *Id.* at 612–13.

95. *Id.* at 612 (second alteration in original) (emphasis added) (citations omitted) (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996)).

96. *Id.*

97. Mullenix, *supra* note 38, at 707–08 (noting that the "logically antecedent" language "has caused a great deal of mischief"). See *infra* Part II.D for a discussion of the different contexts in which the Court's *Amchem* and *Ortiz* opinions have been considered.

98. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

99. *Id.* at 822.

100. *Id.*

101. *Id.* at 823. According to the Supreme Court's opinion, in 1988 Fibreboard Corporation began to pay asbestos plaintiffs forty percent of their claims up front, with the remaining balance contingent upon a successful settlement with its insurance carrier. *Id.* However, the stream of lawsuits continued unabated, and by 1991 Fibreboard began to settle cases by totally assigning its rights against its insurance carrier. *Id.*

ultimately resolved in Fibreboard's favor.[102] The ruling in that case motivated both Fibreboard and its insurer to explore the possibility of settlement of all asbestos-related claims.[103] Ultimately, a global settlement agreement was reached wherein a plaintiff class agreed to release claims against Fibreboard in exchange for a trust process.[104]

The objectors,[105] like those in *Amchem*, challenged the justiciability of the certified class on Article III grounds.[106] Relying on a nearly identical argument, the petitioners in *Ortiz* asserted that the exposure-only class members failed to demonstrate an injury in fact sufficient to confer Article III standing.[107] Again, the Supreme Court rejected this argument. Justice Souter, writing for the majority, determined that the Article III arguments proffered by those objecting to the settlement could be set aside in favor of the class certification issue.[108] Quoting *Amchem*, Justice Souter asserted that the Rule 23 class certification issues were "logically antecedent" to Article III considerations.[109] Accordingly, Justice Souter brushed past this issue.[110] His reasoning, or lack thereof, contributed to the impression that certification is to be given primary consideration over jurisdictional issues.[111] Neither the *Amchem* nor the *Ortiz* opinions fully addressed the scope of this change in the order of analyses, which, in turn, has created confusion among lower courts.[112]

D. Subsequent Interpretations of Amchem *and* Ortiz

Subsequent lower court interpretations of the Supreme Court's decisions have left traditional notions about the sequencing of jurisdictional and certification analyses in limbo.[113] The following survey of federal court cases seeks to provide a picture of the legal landscape now that the issue has percolated through the courts for more than fifteen years. Although not all of the circuit courts have addressed this issue, there is a substantial body of case law at the district court level.[114]

102. *Id.*

103. *Id.* at 823–24.

104. *Id.* at 827.

105. The petitioners before the Supreme Court were Esteban Yanez Ortiz, Edee Cochran, Lester E. Taylor, John Allgood, and Henry Evers. Brief for Petitioners at ii, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (No. 97-1704), 1998 WL 464933. According to their brief, these five individuals were all members of the plaintiff class who intervened in the district court. *Id.* at 9.

106. *Id.* at 44.

107. *Id.* at 48.

108. *Ortiz*, 527 U.S. at 831.

109. *Id.* (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997)).

110. *See id.* (stating that the issue of Rule 23 certification should be treated first).

111. *Id.*

112. See *infra* Part II.D for a discussion of the subsequent interpretations of the Court's opinions, and see *infra* Section III for an additional discussion of the implications of lower court applications of a broadly constructed exception.

113. Mullenix, *supra* note 38, at 726–27.

114. *See, e.g.*, Zaycer v. Sturm Foods, Inc., 896 F. Supp. 2d 399, 407 (D. Md. 2012) (discussing

The "logically antecedent" language has been invoked in an array of class actions outside of the asbestos context. For example, the district court in *In re Chocolate Confectionary Antitrust Litigation*[115] relied on *Amchem* and *Ortiz* to dispose of a jurisdictional challenge before certification in the antitrust context.[116] Courts have invoked the "logically antecedent" language in cases as diverse as the propriety of bail fees[117] and federal securities litigation.[118] It is perhaps unsurprising then that courts have inconsistently interpreted the *Amchem* and *Ortiz* language, with some determining that the language is a broad "directive" to delay jurisdictional objections until class certification,[119] while others have taken a much narrower view.[120]

One example of a particularly emphatic embrace of a broad interpretation of the "logically antecedent" language can be found in a Seventh Circuit case, *Payton v. County of Kane*.[121] In *Payton*, the plaintiff arrestees brought claims against a number of counties, alleging that the counties had charged an unconstitutional bail fee.[122] The named plaintiffs, however, brought their suit against defendant counties where they had never been arrested or subjected to the fee.[123] The county defendants challenged the standing of the named plaintiffs to bring their claims, and the district court subsequently granted their motion to dismiss.[124] Circuit Judge Diane Wood, writing for the Seventh Circuit panel, reversed and remanded the decision of the district court, noting that it was "mindful of the Supreme Court's *directive* to consider issues of class certification

Ortiz and *Amchem* in the context of a class action concerning consumer product labeling); Thunander v. Uponor, Inc., 887 F. Supp. 2d 850, 862–63 (D. Minn. 2012) (holding that an evaluation of the named plaintiff's standing was permissible, despite the Supreme Court rulings in *Amchem* and *Ortiz*); *In re* Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 656–57 (E.D. Mich. 2011) (providing an overview of the split among circuit and district courts in the wake of the Supreme Court's rulings in *Amchem* and *Ortiz*); *In re* Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 152–55 (E.D. Pa. 2009) (concluding that the exception created by *Amchem* and *Ortiz* applies in only a limited number of factual scenarios and that standing, with respect to named plaintiffs, should be decided before proceeding to class certification).

115. 602 F. Supp. 2d 538 (M.D. Pa. 2009).

116. *In re Chocolate*, 602 F. Supp. 2d at 579 (asserting that in class actions, the Supreme Court has crafted an exception to the general rule that standing must be addressed before turning to the merits).

117. *E.g.*, Payton v. Cty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002).

118. *E.g.*, Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762, 769–70 (1st Cir. 2011) (discussing standing doctrine, *Amchem*, and *Ortiz* in the context of allegations of securities fraud related to the sale of mortgage-backed securities).

119. *See, e.g.*, *Payton*, 308 F.3d at 680.

120. *See, e.g.*, Mahon v. Ticor Title Ins., 683 F.3d 59, 65 (2d Cir. 2012) ("The [Supreme] Court's language regarding the logical antecedence of class certification issues appears to us to be a description of the case before it, and not . . . a general directive regarding the order in which a court should treat class certification and Article III standing in every class action.").

121. 308 F.3d 673 (7th Cir. 2002).

122. *Payton*, 308 F.3d at 675–76.

123. *Id.*

124. *Id.* at 676.

prior to issues of standing."[125] In Judge Wood's view, the district court ignored the logically antecedent "directive" and improperly dismissed the plaintiffs' action for lack of standing *before* conducting a certification analysis.[126] Accordingly, the circuit court reversed and remanded the case to the district court for further class certification proceedings.[127]

In contrast to the Seventh Circuit's expansive reading of the "logically antecedent" language, the Second Circuit took a much narrower approach in *Mahon v. Ticor Title Insurance Co*.[128] In that case, the plaintiff brought suit on behalf of a class against two title insurance companies, Ticor Title Insurance Company and Chicago Title Insurance Company, both wholly owned subsidiaries of the same parent and operating in the Connecticut title insurance market.[129] After determining that the named plaintiff had done business with only Chicago Title Insurance Company, Ticor and related entities moved to dismiss the claims against them for a lack of Article III standing.[130] The district court agreed and granted the motion.[131] The Second Circuit affirmed the dismissal, noting that

> [t]he Court's language regarding the logical antecedence of class certification issues appears to us to be a description of the case before it, and not, as the *Payton* decision maintained, a general directive regarding the order in which a court should treat class certification and Article III standing in every class action.[132]

The Second Circuit explained further that, in its opinion, "the [Supreme] Court's 'logical antecedence' language is relevant when resolution of class certification obviates the need to decide issues of Article III standing."[133]

The split within the districts of the Third Circuit provides another exemplar of the current debate over the breadth of the *Amchem* and *Ortiz* language. In the Middle District of Pennsylvania and the District of New Jersey, district judges have interpreted the "logically antecedent" language broadly.[134] In *In re Chocolate*, the plaintiffs brought antitrust claims under section 1 of the Sherman Act[135] and various state antitrust and consumer protection statutes.[136]

125. *Id.* at 680 (emphasis added).

126. *Id.*

127. *Id.* at 682.

128. 683 F.3d 59 (2d Cir. 2012).

129. *Mahon*, 683 F.3d at 60.

130. *Id.* at 61.

131. *Id.*

132. *Id.* at 65.

133. *Id.*

134. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 579 (M.D. Pa. 2009) (permitting the certification analysis to precede jurisdictional analysis); *In re* Hypodermic Prods. Antitrust Litig., No. 05-CV-1602, 2007 WL 1959225, at *15 (D.N.J. June 29, 2007) (declining to rule on the defendant's challenge to putative class members' standing until the court conducted class certification analysis).

135. 15 U.S.C. § 1 (2012).

136. *In re Chocolate*, 602 F. Supp. 2d at 548.

Subsequent to the JPMDL's consolidation of eighty-seven actions into the Middle District of Pennsylvania,[137] the defendant candy manufacturers moved to dismiss certain plaintiffs' claims for lack of Article III standing.[138] Because the plaintiffs did not live or do business in several of the jurisdictions upon whose laws their claims were predicated, the defendants asserted they lacked proper standing to advance such claims.[139]

In rejecting the defendants' assertion, the district court took a broad view of *Amchem* and *Ortiz*. First, the district court noted that neither the Supreme Court nor the Third Circuit articulated a precise set of circumstances that triggered the exception discussed in the two Supreme Court cases.[140] The district court then looked to one of its sister districts for guidance.[141] Relying on the District Court of New Jersey's opinion in *Clark v. McDonald's Corp.*,[142] the *In re Chocolate* court determined that "*Ortiz* allows a court to defer ruling on Article III standing issues when they are circumscribed by the act of certifying a class."[143] The court then applied this ruling to the facts before it: because the standing issue would not exist but for the plaintiffs' assertion of state antitrust claims on behalf of the class members, certification should precede a jurisdictional analysis.[144] Accordingly, the court refrained from analyzing standing.[145]

In contrast to the approach taken in *In re Chocolate*, the Eastern District of Pennsylvania court in *In re Wellbutrin XL Antitrust Litigation*[146] reached a different conclusion based on similar facts. In that case, a group of employee benefit plans brought an action against manufacturers and distributors of the pharmaceutical Wellbutrin XL.[147] The gravamen of their complaint was that the defendants colluded to block the generic version of the antidepressant from reaching the market and thereby violated various states' consumer protection and antitrust laws.[148] Like in *In re Chocolate,* the named plaintiffs in *Wellbutrin* invoked the laws of jurisdictions in which they did not reside or do business to support their claims.[149] The defendants similarly moved to dismiss for a lack of Article III standing.[150]

Instead of relying on the decisions of its sister districts, the *Wellbutrin* court took the opposite approach. Judge Mary McLaughlin, who authored the *Wellbutrin* opinion, focused on the highly specific factual circumstances that

137. *Id.* at 555.
138. *Id.* at 578.
139. *Id.*
140. *Id.* at 579.
141. *Id.*
142. 213 F.R.D. 198 (D.N.J. 2003).
143. *In re Chocolate*, 602 F. Supp. 2d at 579.
144. *Id.* at 579–80.
145. *Id.*
146. 260 F.R.D. 143 (E.D. Pa. 2009).
147. *In re Wellbutrin XL*, 260 F.R.D. at 147–48.
148. *Id.*
149. *Id.* at 148.
150. *Id.* at 152–53.

produced the rulings in *Amchem* and *Ortiz*. In Judge McLaughlin's view, those two cases consisted of challenges to the standing of *future claimants*, not the *named plaintiffs* currently before the court.[151] According to Judge McLaughlin, this explained why the Supreme Court determined that certification was logically antecedent to a jurisdictional analysis: it would be illogical for a court to evaluate whether a class member not currently before the court possesses Article III standing.[152] The court thus concluded, "[I]t is unlikely that [*Amchem* and *Ortiz*] were intended to overturn silently the holdings of long standing precedent."[153] Relying on past precedent, Judge McLaughlin conducted a standing analysis and ultimately dismissed a number of the plaintiffs' claims.[154]

The *Wellbutrin* approach seems to have gained traction within the Eastern District of Pennsylvania.[155] In *United States ex rel. Krahling v. Merck & Co.*,[156] Judge C. Darnell Jones II of the Eastern District considered a motion to dismiss for lack of standing in the class certification context. In that case, the plaintiffs—two physicians from New York, two physicians from New Jersey, and a healthcare group in Alabama—brought consumer fraud claims based on the laws of New York and New Jersey, as well as twenty-two other jurisdictions where they neither resided nor transacted business.[157] Judge Jones dismissed the state claims to the extent they relied on the laws of states where the plaintiffs did not reside or do business.[158] Quoting extensively from Judge McLaughlin's opinion in *Wellbutrin*, Judge Jones held that *Ortiz* was "unavailing" on the facts before the court.[159] Accordingly, he construed *Ortiz* and *Amchem* narrowly and conducted a standing analysis before a certification analysis.[160]

The conflicting approaches taken by these courts—one set of courts articulating a permissive exception that fundamentally alters the way jurisdictional challenges are considered in class actions, and the other explaining a small exception applicable in a narrow set of factual circumstances—demonstrates the great difficulty posed by the unanswered questions in *Amchem* and *Ortiz*.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 155, 167–68.

155. *See, e.g.*, Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 263 F.R.D. 205, 211 (E.D. Pa. 2009) (holding that a court must determine whether a named plaintiff has stated a claim before determining class certification and summary judgment motions and "before allowing the parties to engage in the extensive and costly process of discovery").

156. 44 F. Supp. 3d 581 (E.D. Pa. 2014).

157. *Krahling*, 44 F. Supp. 3d at 599–603.

158. *Id.* at 602–03.

159. *Id.* at 600.

160. *Id.* at 600–01.

E. Scholarly Reaction to Amchem *and* Ortiz

As courts continue to wade into the debate over the scope of the "logically antecedent" language, so has the legal academy—albeit in a relatively muted way. Professor Linda Mullenix authored what is, perhaps, the most in-depth study of the *Amchem* and *Ortiz* decisions and their implications on class action practice.[161] After providing a detailed analysis of the procedural history and the Supreme Court's holdings in the dual opinions, Professor Mullenix argues that the narrow interpretation of the "logically antecedent" language is the "better approach."[162] Professor Mullenix's argument boils down to fairness. She asserts that a broad interpretation permitting a plaintiff to achieve certification before establishing jurisdiction "violates the fundamental tenet that federal procedure be party neutral."[163] Such would be the end result of a legal regime "that favors plaintiffs' ability to achieve class certification in a proposed class, with standing defects—and thereby gain strategic advantage to leverage a class action settlement."[164] Moreover, Professor Mullenix asserts that "[p]ermitting defendants to raise and argue standing challenges prior to class certification is not defendant-favoring, because plaintiffs have the opportunity to join the standing issue and defend it on the merits."[165] Accordingly, Professor Mullenix concludes, "[C]ourts should adhere to *pre-Ortiz* practice (and precedent) that considers standing challenges to the class representative *prior* to class certification."[166]

Although Professor Mullenix's piece is the most significant work on the interpretive problem created by the "logically antecedent" language,[167] a few student works have also discussed the problem.[168] For example, James Keenley's comment in the *California Law Review* argues in favor of a broad interpretation of the "logically antecedent" language.[169] According to Keenley, the *Amchem* and *Ortiz* "rationale implicitly recognized that in passing Rule 23 of the Federal Rules of Civil Procedure, Congress had granted all plaintiffs statutory standing to represent a class of similarly situated claimants so long as certain conditions are met . . . which could be properly analyzed prior to any Article III inquiry."[170] Although Keenley concedes that a narrow interpretation of *Amchem* and *Ortiz*

161. *See* Mullenix, *supra* note 38, at 726–30.

162. *Id.* at 730.

163. *Id.* at 732.

164. *Id.*

165. *Id.* at 732–33.

166. *Id.* at 733.

167. A casual review of Professor Mullenix's article on Westlaw reveals that, as of November 2015, it has been cited more than thirty times, including by fourteen cases and eight law review articles.

168. *See, e.g.*, Daniel D. DeVougas, Note, *Without a Leg to Stand on? Class Representatives, Federal Courts, and Standing Desiderata*, 97 CORNELL L. REV. 627, 633–39 (2012) (noting that, after the passage of the Class Action Fairness Act of 2005, district courts have used Article III standing doctrine to heavily scrutinize the standing of named plaintiffs under Rule 23(a)).

169. James Keenley, Comment, *How Many Injuries Does It Take? Article III Standing in the Class Action Context*, 95 CALIF. L. REV. 849, 870–71 (2007).

170. *Id.* at 870.

"is not on its face unreasonable," he asserts that "the notion that the substantive policy concerns determine the width of the exception misses the mark."[171] Instead, in his view, the Court announced "the logically antecedent rule because it perceived that there was an important question of statutory standing that would be dispositive of the case even if constitutional standing was valid."[172] Thus, in Keenley's view, the "logically antecedent" language is a permissible outgrowth of the Court's constitutional avoidance doctrine; because the decision could be decided on nonconstitutional grounds, the Court properly avoided the Article III-implicating interpretation.[173]

In contrast to Keenley, Isil Yildiz takes a more pragmatic approach to the question.[174] The Yildiz note argues that there are several advantages to a narrow interpretation of the "logically antecedent" language.[175] Most interestingly, Yildiz appears to invert the constitutional avoidance argument urged by Keenley. Yildiz argues that "by turning away a class of future claimants based on Article III standing rather than Rule 23 certification, courts can avoid making needless pronouncements on Rule 23 and its constitutional dimensions."[176] In essence, she argues that rather than continue to interpret the more malleable issues concerning Rule 23, the Supreme Court should settle the issue by ruling on the Article III implications.[177] As additional evidence in favor of a narrow interpretation, Yildiz asserts that such a result lends itself to judicial economy.[178] In her view, "Denying standing before certification will deter class actions fully composed of future claimaints. . . . [which] will ultimately lead to political solutions for affected individuals without compromising the integrity of the courts."[179] The other arguments offered by Yildiz parallel those advanced by Professor Mullenix, namely that allowing classes with standing defects to proceed would be unfair to class defendants and that such an interpretation would be at odds with long-held rules and precedent.[180]

III. DISCUSSION

Given the split among federal appellate and district courts, and the Supreme Court's silence on the breadth of its jurisdictional holdings in *Ortiz* and *Amchem*, it appears as though this procedural question will remain unanswered into the near future. Given the resulting "mischief" from these decisions, the

171. *Id.* at 872.

172. *Id.*

173. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also *supra* note 81 for a more thorough description of the constitutional avoidance principle.

174. Isil Yildiz, Note, *Standing First: Addressing the Article III Standing Defects of Rule 23(b)(3) Class Actions Composed Wholly of Future Claimants*, 26 REV. LITIG. 773 (2007).

175. *Id.* at 796–97.

176. *Id.* at 796.

177. *Id.*

178. *Id.* at 797.

179. *Id.*

180. *Id.*

issue of timing with respect to certification and jurisdictional analyses is ripe for evaluation.[181] This Section attempts to do just that. In so doing, it will venture into relatively uncharted territory, evaluating the broad and narrow interpretations of the *Amchem* and *Ortiz* exception in light of Article III, the Rules Enabling Act, the stated purposes of the Rules, and the actual text of the Supreme Court opinions.

This Section proceeds in two steps. Part III.A discusses what this Comment refers to as the "broad interpretation," which permits certification analysis before standing analysis. This Part highlights many of the flaws of the broad interpretation. Part III.B discusses the "narrow interpretation," which adopts a very restrictive reading of the "logically antecedent" language. In that Part, this Comment asserts that three competing rationales justify the adoption of the narrow reading of the "logically antecedent" language.[182] First, the adoption of a narrowly tailored exception is consistent with long-held interpretations of Article III.[183] Second, a narrow interpretation advances the aims of the Rules, as enunciated in Rule 1: the "just, speedy, and inexpensive determination" of civil actions.[184] And third, the narrow exception accurately reflects the factual and legal conditions from which the exception came—mass tort litigation.[185]

A. The Broad Interpretation Is Flawed and Should Be Abandoned by Courts

Courts should abandon the broad interpretation because it is seriously flawed when considered in light of the Rules Enabling Act, the purposes of the Rules, and the history of *Ortiz* and *Amchem*.

1. The Broad Interpretation May Not Comply with the Rules Enabling Act

Before proceeding, it is important to first recognize that the Court's "logically antecedent" language does, in fact, raise a Rules Enabling Act issue. At least one circuit court has interpreted the language as a "directive" to consider jurisdiction before class certification.[186] This interpretation implies that the Court sought to craft an order of judicial analysis informed by, but wholly independent of, the Rules, thus sidestepping any problem with the Rules Enabling Act. Although not without some merit, this interpretation is undermined by a close reading of the Court's opinion in *Amchem*. In *Amchem*,

181. Mullenix, *supra* note 38, at 707 (noting that the "logically antecedent" language "in both *Amchem* and *Ortiz* has caused a great deal of mischief").

182. Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997).

183. See *infra* Part III.B.1 for a discussion of why the narrow interpretation is more consistent with Article III precedent.

184. FED. R. CIV. P. 1. See *infra* Part III.B.2 for a discussion of how the narrow interpretation advances the aims of the Rules, as delineated in Rule 1.

185. See *infra* Part III.B.3 for a discussion of how the narrow interpretation reflects the particularized factual and procedural circumstances that led to the "logically antecedent" language.

186. *E.g.*, Payton v. Cty. of Kane, 308 F.3d 673, 680 (7th Cir. 2002).

in the sentence *immediately following* the "logically antecedent" language, Justice Souter wrote: "We therefore follow the path [of delaying jurisdictional analysis until after certification], *mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act,* which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'"[187] This language suggests the Court itself believed that its decision to adjudicate the "logically antecedent" certification issues might raise a problem with the Rules Enabling Act. Moreover, given the brevity with which the Court addressed the order of analyses,[188] it is unlikely the Justices sought to issue a fiat that would have had the effect of altering years of settled precedent concerning the order of analyses.[189] Accordingly, the Court's "logically antecedent" language is best understood not as a directive independent of the Rules, but as a construction of Rule 23 itself, which raises the question of whether the Court's interpretation complies with the Rules Enabling Act.

Turning to the merits, the broad interpretation of the *Ortiz* and *Amchem* exception construes the Rule in a way that would violate the Rules Enabling Act. This Act, which delegated the authority to promulgate procedural rules for federal trial and appellate courts to the Supreme Court, prohibits those rules from "enlarg[ing]," "modify[ing]," or "infring[ing]" upon any substantive right.[190] By delaying jurisdictional analysis until after certification, courts appear to have created a safe harbor from the strictures of jurisdictional analysis within Rule 23. This newly created mechanism would violate the Rules Enabling Act by expanding plaintiffs' right to access the courts.[191] It does this by relieving plaintiffs (and class counsel) of their long-recognized obligation to demonstrate proper standing at the outset of litigation.[192] Relieved of this preliminary burden, plaintiffs are free to proceed with their suit before any court, and force that court

187. *Amchem*, 521 U.S. at 612–13 (emphasis added) (quoting 28 U.S.C. § 2072(b) (1994)).

188. *Id.*

189. See *supra* Part II.B for a discussion of Supreme Court precedent concerning the order of analyses.

190. Rules Enabling Act, 28 U.S.C. § 2072(b) (2012).

191. Given the difficulty the Court has faced in demarcating the difference between procedural and substantive rights, there may be some question of whether a right to sue would be considered a substantive right sufficient to trigger the Rules Enabling Act. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965); Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99 (1945); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In *Hanna v. Plumer*, Chief Justice Warren, writing for the Court, asserted, "The line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" 380 U.S. at 471 (quoting *Guar. Tr. Co.*, 326 U.S. at 108). Here, the variables presented by the particular problem highlighted in this Comment—namely, permitting a plaintiff to prosecute a cause of action in a court unsure of its own jurisdiction, and unfairly increasing the settlement pressure on a defendant in such a case—point towards the classification of the right to maintain a cause of action as touching on litigants' substantive rights, and not simply the practice and procedure of the courts.

192. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148 (2013) (noting that "'[t]he party invoking federal jurisdiction bears the burden of establishing' standing" to appear before the court (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992))); Warth v. Seldin, 422 U.S. 490, 498 (1975) (noting that the "essence" of the standing question "is whether the litigant is entitled to have the court decide the merits of the dispute").

and adverse parties to expend resources to determine certification without any guarantee that the court is one of competent jurisdiction.[193] This modification of plaintiffs' right to bring suit in a court of competent jurisdiction under the auspices of a federal rule of civil procedure runs afoul of the Rules Enabling Act, which specifically prohibits any interpretation of a rule that would "modify any substantive right."[194]

Moreover, as these courts expand plaintiffs' substantive right of access to the federal judiciary, they confine the substantive right of defendants to object to that court's jurisdiction. The Rules expressly,[195] and the Supreme Court's affirmation of the limited jurisdiction of federal courts implicitly,[196] grant defendants the right to object to a court's jurisdiction. By delaying defendants' ability to object until after certification analysis, a court abridges this right and thus violates the plain meaning of the Rules Enabling Act.

2. The Broad Interpretation Does Not Advance the Purposes of the Federal Rules of Civil Procedure

In addition to violating the Rules Enabling Act, the broad interpretation of the *Amchem* and *Ortiz* exception interprets Rule 23 in a way that violates the stated purpose of the Rules.[197] According to Rule 1—the Supreme Court's statement on the scope and purpose of the Rules—the Rules "should be construed and administered to secure the *just*, *speedy*, and *inexpensive* determination of every action and proceeding."[198] Interpreting Rule 23 to permit certification to precede jurisdictional analysis would seriously undermine each of Rule 1's purposes.

First, as noted above, altering the sequence of analyses would have deleterious effects on the administration of justice by enlarging the rights of plaintiffs at the expense of defendants.[199] Second, permitting certification to precede jurisdiction may increase the cost of litigation by inserting enormous risk into the litigation process: parties may have to sink significant amounts of money into litigating certification issues only to discover that the court lacks the

193. *See* Effron, *supra* note 8, at 2042 (noting that "class certification is not a quick and clean procedure").

194. 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

195. FED. R. CIV. P. 12(b)(1) (permitting a defendant to object to a court's subject matter jurisdiction by motion).

196. *See* Raines v. Byrd, 521 U.S. 811, 818 (1997) (noting that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976))); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (explaining that parties must "allege . . . facts essential to show jurisdiction" and that, if they fail, they possess no standing to appear before the court (ellipsis in original) (quoting McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936))).

197. See *supra* notes 27–28 and accompanying text for a discussion of Rule 1.

198. FED. R. CIV. P. 1 (emphasis added).

199. See *supra* Part III.A.1 for a discussion of how a broad interpretation of the "logically antecedent" language enlarges plaintiffs' rights.

jurisdiction to proceed.[200] This would be a tremendous waste of *both* parties' financial resources.[201] Rather than risk additional uncertainty in the litigation process, defendants would be even more inclined to settle their cases in order to save money, even though they may have a strong case on the merits. This alteration would thus undermine Rule 1's goal of securing inexpensive determinations of civil matters.

Third, the broad interpretation of the exception makes little sense from an economic standpoint. Because standing doctrine is a tool used by courts to determine the justiciability of a case, its role in judicial resource allocation should not be underappreciated.[202] By altering the sequence of analyses to permit certification before jurisdiction, courts risk slowing down litigation, clogging dockets, and squandering judicial resources.[203] Just as a decision certifying a class but finding a lack of jurisdiction would waste litigants' time and money, so too would it needlessly divert courts' time and attention.[204] Judicial resources that could have been spent evaluating justiciable cases would be sunk into nonjusticiable ones, ultimately causing needless, costly delays to other litigants and the courts themselves. Moreover, given that federal courts are still recovering from the effects of budget sequestration,[205] any rule that would have the incidental effect of unnecessarily consuming sparse judicial resources should be closely scrutinized.

3. The Broad Interpretation Expands the "Logically Antecedent" Exception Beyond the Factual Circumstances of *Amchem* and *Ortiz*

The broad interpretation applies the exception in *Amchem* and *Ortiz* in factual situations not contemplated in the original decisions. In *Amchem* and *Ortiz*, the objectors to class certification asked the Supreme Court to determine the standing of parties who had only *anticipated* injuries, not the standing of the

200. *See* Effron, *supra* note 8, at 2042.

201. This risks putting pressure on judges as well. An attentive judge, who understands the tremendous amount of resources involved in large, commercial class actions, may be reluctant to dismiss a case so as to counteract the risk of tremendous waste.

202. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (explaining that "some of [the] elements [of standing] express merely prudential considerations that are part of judicial self-government"); *see also* Jenkins v. McKeithen, 395 U.S. 411, 437 (1969) (Harlan, J., dissenting) (describing the "disposing of unmeritorious and unjusticiable claims at the outset, before the parties and courts must undergo the expense and time consumed by evidentiary hearings" as an "important function of the federal system of procedure"); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 740–41 (2009) (discussing the important role that standing doctrine plays in the conservation of scarce judicial resources).

203. *See* Effron, *supra* note 8, at 2042 (describing the certification process as "not a quick and clean procedure").

204. *See id.*

205. *Judiciary's FY 2015 Funding Meets Needs*, U.S. COURTS (Dec. 15, 2014), http://www.uscourts.gov/news/2014/12/15/judiciarys-fy-2015-funding-meets-needs (explaining that, although the funding level for the federal judiciary is adequate to meet its most pressing needs, the courts are still struggling to recover from the effects of drastic budgets cuts).

named plaintiffs.[206] In that context, the Court's decision makes sense—ruling on the standing of parties not before the court would have been "illogical."[207] However, in the context in which the broad interpretation arises, this is rarely—if ever—the factual scenario before a court.[208] Take, for example, *Payton*, one of the clearest examples of a court adopting the broad interpretation of *Amchem* and *Ortiz*.[209] Unlike *Amchem* or *Ortiz*, the defendants contested that the named plaintiffs (the arrestees)—parties *already* before the court—satisfied standing.[210] The Seventh Circuit ignored this important factual distinction and applied the exception from the asbestos cases.[211] As a result, the Seventh Circuit effectuated a major expansion of the applicability of the "logically antecedent" language, and ultimately overstepped the bounds of the Ginsburg and Souter opinions.

Finally, the broad interpretation ignores the actual text of the opinions, which suggests that neither opinion intended to radically alter standing doctrine. In *Amchem*, Justice Ginsburg wrote, "We agree [with the Third Circuit] that '[t]he class certification issues are dispositive'; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first."[212] Nonetheless, Justice Ginsburg, before turning to Rule 23, continued by noting that the Court must be "mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act."[213] Taken as whole, this quoted language demonstrates that the Court was aware that it was about to wade into an unsettled area of the law. Given Justice Ginsburg's express acknowledgment of the limitations of the Rules imposed by Article III and the Rules Enabling Act it is unlikely that she meant to radically alter standing doctrine. Accordingly, interpretations that read too broadly into the language of the exception engage

206. Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999) (reciting the petitioners' argument: "[T]his [wa]s a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the vast majority of the exposure-only class members being without injury in fact and hence without standing to sue" (internal quotation marks omitted)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (explaining that the objectors contested standing on the grounds that the "exposure-only claimants . . . ha[d] not yet sustained any cognizable injury").

207. *See In re* Wellbutrin XL Antitrust Litig., 260 F.R.D. 143, 154 (E.D. Pa. 2009) (arguing that a ruling on "the standing of people . . . *not asserting claims* . . . would have been illogical" (emphasis added)).

208. *See, e.g.*, *In re* Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 578 n.49 (M.D. Pa. 2009) (noting that the defendant chocolate manufacturers challenged the standing of the named plaintiff, who resided in Kansas and brought antitrust claims predicated on the laws of twenty-five states); Clark v. McDonald's Corp., 213 F.R.D. 198, 204–05 (D.N.J. 2003) (acknowledging that the defendant challenged the standing of the named plaintiffs—a Pennsylvania nonprofit corporation and a citizen of New Jersey—to bring claims predicated on the antidiscrimination statutes of several additional states).

209. See *supra* Part II.D for a discussion of interpretations of *Amchem* and *Ortiz* by lower courts, including the Seventh Circuit's *Payton* decision.

210. Payton v. Cty. of Kane, 308 F.3d 673, 676–77 (7th Cir. 2002).

211. *Id.* at 680.

212. 521 U.S. 591, 612 (1997) (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 623 (3d Cir. 1996)).

213. *Amchem*, 521 U.S. at 612–13.

in an expansive interpretation that goes well beyond the four corners of Justice Ginsburg's opinion.

The broad interpretation of *Amchem* and *Ortiz* is fraught with potential pitfalls. The widespread adoption of this interpretation not only risks infringing upon the substantive rights of class action defendants, but also condones a serious violation of the Rules' guiding principles.[214] Moreover, this reading significantly deviates from the factual context in which it arose. Accordingly, courts should abandon this reading of *Amchem* and *Ortiz*.

B. The Narrow Interpretation Adheres to Article III, Advances the Goals of Rule 1, and Reflects the Facts from Which It Came

Where the broad interpretation of *Amchem* and *Ortiz* fails, the narrow interpretation succeeds. Three rationales justify this conclusion. Part III.B argues that the narrow interpretation of Rule 23 adheres to the longstanding precedent that jurisdiction is a threshold issue, contends the narrow interpretation advances the goals of Rule 1, and explains how the narrow exception of the "logically antecedent" language is more faithful to its legal origins.

1. The Narrow Exception Adheres to the Requirements Contained in Article III

Limiting the scope of the *Amchem* and *Ortiz* exception is consistent with the long-standing notion that courts must be sure of their jurisdiction before proceeding to the merits of a case.[215] As Article III, Section 2 makes clear, the jurisdiction of a federal court is limited to "[c]ases" and "[c]ontroversies."[216] Supreme Court opinions both modern and more antiquated have remained remarkably consistent about the importance of this limitation—jurisdictional requirements must be met before a court can turn to the claim before it.[217] By narrowly construing *Amchem* and *Ortiz* to provide very limited exceptions to long-held precedent, courts will remain faithful to Article III and avoid overstepping the authority granted to them by the Constitution.[218] To determine whether plaintiffs have met the requirements of Rule 23[219] before determining whether they presented a court with a legally cognizable dispute would unconstitutionally "put the cart before the horse."[220]

214. The Rules "should be construed, administered and employed by the court . . . to secure the *just*, *speedy*, and *inexpensive* determination of *every* action and proceeding." FED. R. CIV. P. 1. (emphasis added).

215. *See supra* Part II.B for a discussion of the adjudicative norm of establishing jurisdiction prior to assessing the merits.

216. *See* U.S. CONST. art. III, § 2, cl. 1.

217. See *supra* Part II.B for a discussion of federal courts' jurisdictional requirements. *See also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869))).

218. See *supra* Part II.B for a discussion of federal jurisdictional requirements and Article III.

219. See *supra* note 41 for the mandatory requirements to sustain a class action in federal court.

220. *The Supreme Court, 2012 Term—Leading Cases*, 127 HARV. L. REV. 268, 270 (2013) ("Therefore, requiring proof of materiality before certification would 'put the cart before the horse' by

2. The Narrow Interpretation Advances the Goals of the Rules

The narrow interpretation does more to advance the purposes of the Rules than the broad interpretation. As Professor Mullenix argues in her article, the narrow interpretation leads to more just outcomes by advancing party neutrality. That is to say, by construing the "logically antecedent" language narrowly, courts will ensure that their application of the Rules treats both parties equally.[221] Permitting certification before jurisdictional analysis places a judicial thumb on the scales of justice and skews the Rules to favor the plaintiffs.[222] Given that the act of certifying creates enormous pressure on a defendant to settle,[223] certifying earlier exposes a defendant to greater settlement pressure much earlier in the litigation (and before a court has determined whether it can even hear the matter). Keeping jurisdictional analysis before certification in the sequence of litigation events would avoid this pitfall, hew closer to the party neutral principle, and thereby foster more just determinations.

The narrow interpretation may also advance the goal of inexpensive determinations of civil actions. The process of class certification is not an easy one.[224] Although total costs fluctuate depending on the complexity of the case,[225] research indicates that in many class actions a substantial portion of the recovery never reaches class members, but rather, lines the pockets of plaintiffs' counsel.[226] The same research indicates that, although litigation costs (as distinct from fees) may be modest as a ratio of any award, they are "strongly associated with hours expended on the case."[227] The narrow interpretation may play a key part in maintaining this downward pressure on litigation costs by limiting the scope of otherwise sprawling class actions to those claims that present actual controversies. Narrowing a piece of litigation by eliminating nonjusticiable claims reduces the litigation's complexity and accordingly, the time necessary to litigate the case. This ultimately decreases the costs incurred by the parties.

making the class 'first establish that it will win the fray.'" (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1204 (2013))).

221. *See id.* at 732–33.

222. *Id.*

223. See *supra* Part II.A for a discussion of the strategic considerations of class action litigation. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (discussing the incentives to settle in class action suits and characterizing settlements induced by the enormous potential liability of a defendant—despite the small probability of plaintiff success—as "blackmail settlements"); *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 528–57 (1991) (explaining and identifying the various incentives that lead securities class action defendants to settle, rather than litigate cases to final judgment on the merits).

224. *See* Effron, *supra* note 8, at 2042 (noting that "class certification is not a quick and easy procedure").

225. *Id.*

226. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 258 (2010) (noting that, according to the authors' study, the "mean [attorney's] fee to [class] recovery ratio was . . . 23 percent").

227. *Id.* at 250.

The district court's opinion in *Krahling* may be illustrative of this point,[228] although further research is warranted. In that case, the court dismissed numerous claims reliant on the laws of states where the plaintiffs did not reside or do business, before ruling on any Rule 23 certification motion.[229] In so doing, the court considerably simplified the issues to be litigated.[230] While it is impossible, at this time, to say with absolute certainty that the *Krahling* court's narrow interpretation saved the litigants both time and money, common sense suggests that limiting discovery and simplifying the scope of the litigation at the pre-certification stage would promote such a result.

3. The Narrow Interpretation is More Faithful to the Legal Context from Which the Logically Antecedent Language Came

Finally, a narrow interpretation of *Amchem* and *Ortiz* conforms more closely to the legal context from which the exception originated. *Amchem* and *Ortiz* presented the Supreme Court with large settlement classes that sought to provide redress for asbestos exposure, control the liability of the alleged tortfeasors, and wind down the mass of asbestos litigation.[231] In that context, the Supreme Court determined that the objection to constitutional standing was more effectively resolved through the Rule 23 analysis. This makes sense. As Judge McLaughlin pointed out in *Wellbutrin*, "It would be illogical to find that a non-party lacks standing to pursue a claim precisely because they are not pursuing a claim."[232] Currently, however, named plaintiffs often use the exception in an attempt to shield *themselves* from standing analysis.[233] Courts correctly heed the language and procedural history of the *Amchem* and *Ortiz* decisions when they reject such arguments, as those cases were about challenges to *nonparties*' standing, not parties before the court.

As the preceding discussion of the benefits of a narrow construction make clear, courts should apply the "logically antecedent" language in a narrow range

228. *See* United States *ex rel.* Krahling v. Merck & Co., 44 F. Supp. 3d 581, 602–03 (E.D. Pa. 2014).

229. *Id.*

230. The court did so by limiting the broad range of discovery to two geographic areas where the named plaintiffs could actually prove injuries in fact, as opposed to the twenty-two jurisdictions the plaintiffs sought to include in their claim. *Id.*

231. See *supra* Part II.C.1 for a brief overview of the history of asbestos litigation in the United States, its impact on the court system, and the measures taken to wind down the elephantine mass of suits.

232. 260 F.R.D. 143, 154 (E.D. Pa. 2009).

233. *See, e.g.*, *In re* Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1026–27 (N.D. Cal. 2007) (noting that the plaintiffs countered the defendants' motion to dismiss the claims based on the laws of states where the named plaintiffs did not reside or transact business by arguing that the court's standing analysis should be deferred); *In re* Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1106–07 (N.D. Cal. 2007) (recounting the plaintiffs' argument that the court's standing analysis should be delayed until class certification, even though the defendant challenged only the standing of the named plaintiffs and not putative class members).

of factual circumstances. In so doing, courts will satisfy the requirements of Article III, promote the goals of the Rules, and honor the text of the *Amchem* and *Ortiz* opinions.

IV. CONCLUSION

Although the class action is a regular feature of the American legal landscape, the law governing this procedural mechanism remains unsettled with respect to standing, jurisdiction, and certification. According to the Supreme Court, where certification is "logically antecedent" to the jurisdictional analysis, a court may certify first and conduct the jurisdictional analysis second. Ever since the Supreme Court published this vague language, lower courts have been left to wrestle with its precise scope. Unsurprisingly, courts' holdings have diverged, some taking a broad approach, others a more narrow approach.

As this Comment suggests, there are serious drawbacks to the broad interpretation. This approach simply does not hold up when considered in light of the Rules, their authorizing statute, and the text of *Amchem* and *Ortiz*. In contrast, the narrow approach holds up much better—advancing just, speedy, and inexpensive determinations of class proceedings without "enlarg[ing]" or "enhanc[ing]" any substantive right. Accordingly, courts considering this issue in the future should construe the "logically antecedent" language according to the narrow approach.