No. 14-_____

IN THE
# Supreme Court of the United States

WELLS FARGO BANK, N.A.,

*Petitioner,*

v.

VERONICA GUTIERREZ AND ERIN WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a federal court may certify a class under Federal Rule of Civil Procedure 23, and award monetary relief to all class members, even though the class includes individuals who were not harmed by the challenged conduct and could not have prevailed in an individual action.

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The parent corporation of Petitioner Wells Fargo Bank, N.A. is Wells Fargo & Company. No other publicly-traded company owns 10% or more of the stock of Petitioner Wells Fargo Bank, N.A.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Wells Fargo Bank, N.A. ("Wells Fargo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## INTRODUCTION

It is axiomatic that class certification under Federal Rule of Civil Procedure 23 "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." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (internal quotation marks and citation omitted); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Because the class action device "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits," it "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality).

The Ninth Circuit has embraced a very different view of class actions, conjuring viable claims where none would otherwise exist. Far from leaving the parties' legal rights and duties intact, the Ninth Circuit's approach allows an absent class member to succeed where an identically-situated named plaintiff would fail.

The circuits are divided on the precise question presented, as well as on the broader question of

whether federal courts are authorized to certify classes that include uninjured members. This Court should grant review to resolve the disagreement among the circuits and to halt an extraordinary development in the law of class actions.

## OPINIONS BELOW

The court of appeals' first decision in this case (Pet. App. 1a-39a) is reported at 704 F.3d 712 ("*Gutierrez I*"). The court of appeals' second decision in this case (Pet. App. 40a-45a), issued after a remand to the district court, is unreported but is available at 2014 WL 5462407 ("*Gutierrez II*"). The district court's Findings of Fact and Conclusions of Law After Bench Trial (Pet. App. 46a-190a) is reported at 730 F. Supp. 2d 1080. The district court's decision granting judgment to Respondents after remand (Pet. App. 191a-216a) is reported at 944 F. Supp. 2d 819. The district court's class certification order (Pet. App. 217a-262a) is unreported but is available at 2008 WL 4279550. The district court's order on partial summary judgment (Pet. App. 263a-280a) is unreported but is available at 2009 WL 1246689. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 281a-282a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on October 29, 2014. A timely petition for rehearing was denied on December 11, 2014. Pet. App. 282a. On February 24, 2015, Justice Kennedy extended the time to file a petition for a writ of certi-

orari to and including April 10, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution, the Rules Enabling Act, 28 U.S.C. § 2072, Federal Rule of Civil Procedure 23, and pertinent provisions of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, are reproduced in the appendix to the petition. Pet. App. 283a-287a.

## STATEMENT OF THE CASE

### A. California UCL Class Actions Under *Tobacco II*

California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, is "famously broad,"[1] and class actions asserting claims under the UCL are ubiquitous. *See* Anthony J. Anscombe & Stephanie A. Sheridan, *A Critical Look at the UCL's Role in Food and Beverage Class Actions* 5, Bloomberg BNA (Nov. 14, 2014), http://tinyurl.com/BNA-UCL (noting the "hundreds of class actions filed under the UCL in California over the last few years"); *infra* n. 4.

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[1] *Rosell v. Wells Fargo Bank, N.A.*, No. 12-cv-06321, 2014 WL 4063050, at *6 (Aug. 15, 2014).

Until 2004, California allowed any uninjured citizen to act as a "private attorney general" and sue under the UCL, even though such a plaintiff would "be foreclosed from litigating the same cause of action in federal court." *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in the dismissal of the writ of certiorari as improvidently granted) (noting that a plaintiff could proceed in California court under the UCL despite "not hav[ing] Article III standing" in federal court). In 2004, California voters sought to curtail "abuse of the UCL," *In re Tobacco II Cases*, 46 Cal. 4th 291, 316 (2009), by amending the law to allow a UCL action to be brought only "by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204.

In a 4-3 decision, the California Supreme Court in *Tobacco II* held that this limitation does not apply to absent class members. While the lead plaintiff must demonstrate injury from the challenged conduct, for absent class members, "relief under the UCL is available without individualized proof of deception, reliance and injury." *Tobacco II*, 46 Cal. 4th at 320. Thus, absent class members need not "meet the same standing requirements as are imposed upon the class representative." *Id.*

As Justice Baxter explained in dissent,

> so long as the named plaintiffs actually relied on the allegedly deceptive advertising claims when buying and smoking

> cigarettes, they may seek injunctive and restitutionary relief on behalf of *all California smokers who simply saw or heard such ads* during the period at issue, regardless of whether false claims contained in those ads had anything to do with any class member's decision to buy and smoke cigarettes.

*Id.* at 330. As a result, the *Tobacco II* rule broadly authorizes "no-injury class actions," in which

> a person may be a party to a UCL private representative action as a class member even though he or she could not sue in his or her own name. Thus, an individual whose personal effort to bring a UCL action failed because he or she could not demonstrate any personal injury or loss caused by the unfair practice may simply join, as an uninjured class member, in an identical class action brought by another named plaintiff who does meet the minimal injury-in-fact and causation requirements.

*Id.* at 335-36.

### B. Proceedings Below

This is one of the many diversity cases in which a federal court has applied *Tobacco II* to a Rule 23 class action. *See infra* n. 4. Respondents alleged that Wells Fargo's marketing materials contained misleading statements indicating that the bank would post transactions to customer accounts

in chronological order, which would have resulted in fewer overdraft fees for some customers than the posting order the bank actually used. There was no evidence that the challenged statements caused all or even many class members to incur greater overdraft fees. In fact, the district court expressly found that most customers would "naturally assume" that transactions were posted in chronological order, even without the bank's statements. The Ninth Circuit nonetheless affirmed a class-wide $203 million award, relying on the *Tobacco II* rule that uninjured class members may recover in a class action – even if they could not recover in an individual action.

### 1. "High-To-Low" Posting And Overdraft Fees

Plaintiffs' UCL claims were directed to the order in which the bank posted debit-card transactions to customer accounts. Pet. App. 5a. For a variety of reasons, banks do not post transactions in "real time," but instead post transactions in "batches" at the end of the day. To implement batch posting, a bank must make a number of complex operational decisions, including how to order withdrawals – *e.g.*, from lowest-amount to highest-amount, from highest-amount to lowest-amount, or in some approximation of the order in which the transactions occurred.

If a customer spends more money than is available in her account, an "overdraft" occurs. Pet. App. 80a. The bank's posting order has no effect on whether there is an overdraft: if withdrawals exceed available funds, there will be an overdraft no matter

what posting order the bank uses. Pet. App. 50a. However, posting order can affect the number of separate transactions that are paid against insufficient funds. This, in turn, can affect the total amount of overdraft fees, which typically are assessed on a "per-item" basis. Pet. App. 50a-51a, 156a.

During the period at issue in this case (2004-2008), Wells Fargo posted all customer deposits before posting any withdrawals, a practice that reduced customers' overdraft fees. It then posted debit-card transactions, checks, and Automated Clearing House ("ACH") transactions from highest to lowest dollar amount. Pet. App. 52a-53a.

Use of this "high-to-low" posting method can result in more overdraft fees than would be incurred under an alternate methodology. It can also benefit customers. As federal banking regulators have explained, posting large-dollar transactions first can help ensure that important items like mortgage payments are processed, making it "difficult to set forth a bright-line rule [on posting order] that would clearly result in the best outcome for all or most consumers." 74 Fed. Reg. 5,498, 5,548 (Jan. 29, 2009).

The district court found that most consumers have a "natural expectation" that transactions post chronologically. Pet. App. 160a. However, the typical consumer does not overdraft "strategically" based on this assumption (or any other). She does not, in other words, decide to make certain purchases because she expects them to result in one overdraft fee as opposed to two. Rather, consumers who overdraft generally do not mean to do so at all. *See* C.A. Exc.

Rec. 382-83; *see generally* The Pew Center on the States, Overdraft America 4 (May 2012), available at http://tinyurl.com/PewODReport (90% of depositors who overdraft their accounts do so unintentionally).

### 2. Wells Fargo's Marketing Materials

The Customer Account Agreement between Wells Fargo and its customers expressly stated that "the Bank may, if it chooses, post Items in the order of the highest dollar amount to the lowest dollar amount." Pet. App. 122a-123a. Respondents nevertheless challenged various statements in Wells Fargo's marketing materials. One Wells Fargo brochure stated that debit-card purchases "are automatically deducted from your primary checking account." Pet. App. 55a. Similar language was used in some versions of a "Welcome Jacket" provided to new customers. Pet. App. 129a-130a. In a few instances, the bank used the term "immediately" instead of "automatically" in describing debit-card transactions. Pet. App. 130a-131a.

These statements were not specifically directed to posting order, and were not made in the context of an explanation of overdraft fees. Witnesses at trial testified that Wells Fargo described debit-card transactions as occurring "automatically" in order to explain the difference between debit cards and credit cards. C.A. Exc. Rec. 404-06. Respondents alleged, however, that this terminology reinforced the assumption that the bank would post transactions in chronological order.

### 3. Proceedings In The District Court

Respondents Veronica Gutierrez and Erin Walker overdrafted their accounts, incurring multiple fees on a single day. Pet. App. 58a-63a, 71a-74a. Through trial, their principal claim was focused not on the challenged statements in marketing materials (nearly all of which they had never seen), but rather on their assertion that the practice of high-to-low posting was itself unlawful under the UCL. Consistent with this theory, the district court certified a class of "all Wells Fargo California customers from November 15, 2004, to June 30, 2008, who incurred overdraft fees on debit card transactions as a result of the bank's practice of re-sequencing transactions from highest to lowest." Pet. App. 257a.

Following a bench trial, the district court held that Wells Fargo's use of high-to-low posting violated the UCL, and rejected Wells Fargo's argument that plaintiffs' claims were preempted by federal banking law. Pet. App. 161a-170a. It also held that Wells Fargo violated the "fraudulent" prong of the UCL because it "should have prominently disclosed its high-to-low scheme," again rejecting Wells Fargo's preemption argument. Pet. App. 156a, 170a. Finally, the court found that because Wells Fargo used the words "immediately" and "automatically" in describing debit cards, it misleadingly "promoted the . . . theme of chronological subtraction." Pet. App. 159a. The district court found that these materials "reinforced" the "natural assumption" that transactions would post chronologically, and therefore "enhanced

the likelihood" that customers "would be deceived." Pet. App. 79a, 158a-160a.

As a remedy for high-to-low posting, the district court ordered approximately $203 million in restitution. The court concluded that this was the "differential between the number of overdraft fees that were actually assessed on customers during the class period and the number of overdraft fees that would have been assessed on customers using [an approximation of a chronological] sequence." Pet. App. 186a (emphasis omitted).

#### 4. The Ninth Circuit's Decision in *Gutierrez I*

The Ninth Circuit reversed the district court's decision in substantial part and vacated the restitution award. The court of appeals held that Respondents' challenge to high-to-low posting is preempted by federal law. Pet. App. 21a-27a. It further held that Respondents' challenge to the adequacy of Wells Fargo's disclosures was preempted. *Id.* at 27a-29a.

However, the court affirmed Wells Fargo's liability on the misrepresentation claim. Applying the California Supreme Court's *Tobacco II* decision, the court found that standing was satisfied because Respondents had individually established reliance. Pet. App. 33a-34a. It rejected Wells Fargo's argument that absent class members must also have standing, *see Gutierrez I*, Pet'r's C.A. Br. 53, concluding that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the requirements." Pet.

App. 34a (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)).

The Ninth Circuit next found that certification of a Rule 23(b)(3) class was appropriate. Pet. App. 34a-36a. Again relying on *Tobacco II*, the court held that "[t]he pervasive nature of Wells Fargo's misleading marketing materials amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them." Pet. App. 35a (citing *Tobacco II*, 46 Cal. 4th at 312). Finally, the court affirmed as not clearly erroneous the district court's finding that Wells Fargo's statements "affirmatively reinforced the expectation" that transactions would post chronologically. Pet. App. 36a-38a.

The Ninth Circuit nonetheless vacated the restitution order, because it had been "predicated on liability for Wells Fargo's choice of posting method." Pet. App. 38a-39a. The court remanded so that the district court could determine what relief, "if any," was appropriate as a remedy for the misrepresentations. *Id.*

### 5. The District Court's Repurposing Of The $203 Million Award

On remand, the district court reinstated the original restitution award. While not disputing Wells Fargo's argument that the award provided relief to class members who had not suffered injury because of the misrepresentations, the court held that the UCL "allow[s] recovery *without proof* that

the funds were lost as a result of actual reliance on defendant's deceptive conduct." Pet. App. 210a (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009)) (emphasis added). The district court found it "sufficient" that "class members were likely deceived." *Id.*

### 6. The Ninth Circuit's Decision in *Gutierrez II*

The Ninth Circuit affirmed. It rejected Wells Fargo's argument that the district court had erred by ordering "restitution" to class members who were not harmed by the challenged statements, because "relief under the UCL is available without individualized proof of deception, reliance and injury." Pet. App. 43a (quoting *Tobacco II*, 46 Cal. 4th at 320). The court further concluded that such an award is not "barred by the federal Due Process Clause or the Rules Enabling Act." *Id.*

## REASONS FOR GRANTING THE PETITION

Class certification under Rule 23 "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.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting 28 U.S.C. § 2072(b)); *see also Wal-Mart*, 131 S. Ct. at 2561. These fundamental limitations arise from the fact that class actions are a "species" of "traditional joinder," which "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, [a

class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove*, 559 U.S. at 408 (plurality).

But in California – and in the Ninth Circuit – class actions have become something else entirely. The court of appeals has embraced a view of class actions not as joinder but as a form of jurisprudential alchemy, conjuring viable claims where none would otherwise exist. Far from leaving "the parties' legal rights and duties intact and the rules of decision unchanged," this approach allows an absent class member to succeed where an identically-situated named plaintiff would fail.

The circuits are squarely divided on this issue. Indeed, the Eighth Circuit has taken the opposite view in the exact context of a class action under the UCL, concluding that California's *Tobacco II* framework may not be transposed onto a Rule 23 class action in federal court. This conflict reflects a broader split, in which four circuits have allowed federal courts to certify classes that include uninjured members, while three circuits have refused to water down traditional class action principles in this way.

This Court should grant certiorari to resolve the split in the circuits and halt an extraordinary development in the law of class actions. The Ninth Circuit's willingness to apply California's "*Tobacco II*" approach is inconsistent with decisions of this Court and no fewer than three important principles of federal law: Article III's limits on standing, the Rules Enabling Act's requirement that Rule 23 not be used to modify substantive rights, and the Due

Process Clause's guarantee that a defendant cannot have her defenses stripped away. This case – arising from a final judgment that not only certified a class containing members who could not prevail in an individual action, but actually awarded them monetary relief – presents an ideal vehicle for this Court to review these pressing issues

## I. The Ninth Circuit's Decisions Conflict With Decisions Of Other Courts Of Appeals.

1. The Ninth Circuit's approach to *Tobacco II* class actions conflicts with the Eighth Circuit's ruling on the same issue in *Avritt v. Reliastar Life Insurance Co.*, 615 F.3d 1023 (8th Cir. 2010). In *Avritt*, California residents filed a putative class action alleging that they were misled about the amount of interest that would be paid on annuities. *Id.* at 1026. The plaintiffs argued that *Tobacco II* had "eliminat[ed] any need to show that unnamed class members relied on any misrepresentations or were actually injured." *Id.* at 1034. The Eighth Circuit disagreed, holding that "to the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." *Id.*[2]

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[2] The Eighth Circuit's "to the extent" language reflected its view that *Tobacco II* might be susceptible to a narrow reading under which class members could not be included in a UCL class if (...continued)

The Eighth Circuit explained that "'a class cannot be certified if it contains members who lack standing.'" *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006)). Therefore, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.* Agreeing with the *Tobacco II* dissent, the Eighth Circuit found that the California Supreme Court's "expression of the UCL's standing requirement diverged from federal jurisprudential principles, which we are bound to follow." *Id.* (citing *Tobacco II*, 46 Cal. 4th at 331-32) (Baxter, J., dissenting)) (internal citation omitted). The Eighth Circuit thus has chosen to follow "federal jurisprudential principles" over *Tobacco II*.

In the Ninth Circuit, in contrast, *Tobacco II* trumps the federal limits on class actions. The court of appeals in this case held that "standing to seek class-wide relief" requires only that "*the named plaintiffs* must prove 'actual reliance' on the misleading statements." Pet. App. 33a. Based on nothing more than the "pervasive nature" of the challenged marketing materials, the court of appeals was willing to follow *Tobacco II* and presume reliance by absent class members. *Id.* at 34a. And when Wells Fargo pointed out that absent class members would

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they "may not have had a cause of action themselves." *Avritt*, 615 F.3d at 1034. As this case and *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), demonstrate, the Ninth Circuit has embraced precisely the approach that the Eighth Circuit considers incompatible with federal law.

receive monetary relief even though the statements caused them no harm, the Ninth Circuit invoked the rule of *Tobacco II* that absent class members do not have to establish deception, reliance, or injury. *Id.* at 43a.

This was not an aberration. In *Stearns v. Ticketmaster Corp.*, the Ninth Circuit held that standing and class certification "key[] on the representative party, not all of the class members." 655 F.3d 1013, 1021 (9th Cir. 2011). The district court in *Stearns* had denied certification prior to the California Supreme Court's *Tobacco II* decision. The Ninth Circuit reversed, concluding that *Tobacco II* "makes all the difference in the world." *Id.* at 1020. Now, the Ninth Circuit ruled, "it need not be shown that class members have suffered actual injury in fact connected to the conduct of the [defendant]." *Id.* at 1020-21.

In sum, the fact that absent class members "lack the ability to bring a suit themselves," *Avritt*, 615 F.3d at 1034, is a fatal flaw in a UCL class action in the Eighth Circuit – but not in the Ninth Circuit. Indeed, in the Ninth Circuit, the fact that many class members lack a viable individual claim is not even a barrier to these individuals sharing in a $203 million judgment. These starkly differing approaches to the identical question warrants this Court's review.

2. The split over the application of *Tobacco II* in federal courts is part of a broader circuit split on whether class actions may go forward regardless of whether absent class members have standing suffi-

cient to give federal courts jurisdiction over their claims.

As discussed above, the Eighth Circuit has held that a Rule 23 class "cannot be certified if it contains members who lack standing." *Avritt*, 615 F.3d at 1034 (internal quotation marks and citation omitted); *see also Halvorson v. Auto-Owners Ins.* Co., 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant . . . ."). The Second Circuit agrees, holding that "no class may be certified that contains members lacking Article III standing." *Denney*, 443 F.3d at 264; *see also id.* at 266 (affirming certification because the "class is limited to persons who received and took actions in reliance on the allegedly fraudulent or negligent tax advice provided by defendants"). And the D.C. Circuit has similarly indicated that plaintiffs must be able to show "that *all* class members were in fact injured by" the challenged conduct. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (emphasis added).

The Ninth Circuit is not alone, however, in taking the opposite view that standing "keys on the representative party, not all of the class members." *Stearns*, 655 F.3d at 1021. The Seventh Circuit has concluded that "a class will often include persons who have not been injured by the defendant's conduct," and found that this "inevitability does not preclude class certification." *Kohen v. Pac. Inv. Mgt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009); *see also id.* at 676 ("[A]s long as one member of a certified

class has a plausible claim to have suffered damages, the requirement of standing is satisfied."). The Third and Tenth Circuits have adopted similar rules. *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1201 (10th Cir. 2010) ("That a class possibly or even likely includes persons unharmed by a defendant's conduct should not preclude certification."); *In re Prudential Ins. Co. of Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998) (holding that once a named plaintiff establishes injury-in-fact attributable to the defendant's actions, "absentee class members are not required to make a similar showing"); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 355 (3d Cir. 2011) (en banc) (Jordan, J., dissenting) (criticizing the Third Circuit's practice of approving settlement classes containing uninjured members, notwithstanding "variations in state laws as wide as 'you have a claim' versus 'you have none'").

## II. The Ninth Circuit's Decisions Conflict With Decisions Of This Court.

The split in the circuits reflects a growing disjunction between the limits on class actions established by this Court and the reality on the ground in the lower courts. The Ninth Circuit's decision in this case to affirm the certification of a class and a massive monetary award, based not on evidence of actual harm but on *Tobacco II*'s alteration of the rules of decision for absent class members, is fundamentally at odds with decisions of this Court.

### A. *Tobacco II* Classes In Federal Court Are Inconsistent With Article III Limitations On Standing.

It is axiomatic that federal courts have no power to adjudicate claims of individuals who did not suffer an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This constitutional limit on the jurisdiction of federal courts applies with full force when claims are aggregated through a class action. This Court has instructed that "Rule 23's requirements [for class certification] must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Indeed, "[i]n an era of . . . class actions," the Court has said that the judiciary "must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Thus, for a federal court to have jurisdiction over an absent class member's claim, that class member must have Article III standing – that is, she must have experienced an actual injury as a result of the challenged action of the defendant.

California courts follow a different rule in UCL cases. *Tobacco II* holds that only the named plaintiff is required to have suffered an injury in fact. Absent class members in a misrepresentation case are entitled to be part of the class – and join in its recovery – even if they did not rely on the statements at issue, and even if those statements did not cause them any monetary harm. *Tobacco II*, 46 Cal.

4th at 320. As the dissenters in *Tobacco II* explained, individuals may be included in a class, and receive individual relief, even though "the unfair practice caused [them] no actual harm or loss." *Id.* at 333 (Baxter, J., dissenting).

While California may relax the rules of standing in its own courts (subject to the limits of Due Process, *see infra* § II.C), federal courts are forbidden from doing so. Yet the Ninth Circuit has done exactly that. *See supra* § I.

In its decision in *Stearns*, the Ninth Circuit strained unsuccessfully to reconcile *Tobacco II* with Article III. It did so by simply dropping the requirement that an absent class member suffer an injury *in fact* as a result of the challenged conduct. It is enough that class members were injured "within the meaning of California substantive law." *Stearns*, 655 F.3d at 1021. *Tobacco II*, in other words, creates a "conclusive presumption" that "the defendant has caused an injury"; a "more particularized proof of injury and causation" is no longer a prerequisite to judicial relief. *Id.* at 1021 & n.13.

Adjudicating someone's claim when the practice she challenges did not *in fact* cause her harm is antithetical to Article III. *Tobacco II*'s "conclusive presumption" does not mean that absent class members actually experience an injury as a result of the defendant's conduct; it means that they experience only an injury-in-law by judicial fiat. This legal fiction is not enough to give federal courts jurisdiction over the expansive class actions *Tobacco II* envisions. *Cf. Summers v. Earth Island Inst.*, 555 U.S. 488, 497

(2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").[3]

### B. *Tobacco II* Classes In Federal Court Are Inconsistent With Rule 23 And The Rules Enabling Act.

The Federal Rules of Civil Procedure, including Rule 23, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Just a few Terms ago, this Court unanimously confirmed that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561 (citations omitted); *see also Shady Grove*, 559 U.S. at 408 (plurality) (class actions "leave[] the parties' legal rights and duties intact"); *Amchem*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of

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[3] This Court has invited the Solicitor General to submit a brief for the United States in response to a pending petition for certiorari that raises the question whether an injury-in-law created by a federal statute is sufficient to confer Article III standing. *Spokeo, Inc. v. Robins*, No. 13-1339, 135 S. Ct. 323 (Oct. 6, 2014). While *Spokeo* does not deal with the fundamental limits on federal class actions that are at issue here, the question presented in that case is relevant to the Ninth Circuit's basis for importing *Tobacco II* into federal court. If the Court decides to grant review in *Spokeo*, it may wish to consider the two cases in tandem.

procedure 'shall not abridge, enlarge or modify any substantive right.'").

But in a *Tobacco II* class action in the Ninth Circuit, "substantive rights" very much depend on whether the case is a class action. An individual UCL plaintiff cannot simply point to a misrepresentation, even a widespread one, and recover; she must establish reliance and causation. *See Tobacco II*, 46 Cal. 4th at 326 ("a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct"). Thus, as a matter of substantive California law, a plaintiff who would have purchased a product irrespective of a misrepresentation has no valid claim. *See, e.g.*, *Kwikset v. Super. Ct.*, 51 Cal. 4th 310, 330 n.14 (2011) ("[W]e will allow one party who subjectively relied on a particular deception in entering a transaction to sue, while simultaneously precluding another who subjectively did not so rely from suing."); *Princess Cruise Lines, Ltd. v. Super. Ct.*, 179 Cal. App. 4th 36, 43-44 (2009) (rejecting a UCL claim alleging misrepresentations about the price of a product where the plaintiff admitted he would have made the same purchase "whatever the price"). Yet such an individual "may be a party to a UCL private representative action as a class member even though he or she could not sue in his or her own name." *Tobacco II*, 46 Cal. 4th at 335-36 (Baxter, J., dissenting).

This case is a paradigmatic example of how *Tobacco II* classes enlarge the rights of absent class members and diminish the rights of defendants. Two of the representative plaintiffs barely survived

summary judgment on their individual claims, based on evidence that they read only one of the several marketing materials they challenged. Pet. App. 275a-279a. A third named plaintiff (who sought unsuccessfully to represent a different class) admitted that he "did not read or rely on any [Wells Fargo] advertising or marketing material." *Id.* at 274a. In a class of this size, there are certainly other individuals who did not read, let alone rely on, any of the challenged materials. Yet because this is a class action – and only because it is a class action – Wells Fargo was denied the ability to present a non-reliance defense as to absent class members.

The district court's own findings also indicate that most class members who saw the challenged statements were not harmed by them. The court expressly found that class members had "a natural expectation . . . that transactions will subtract chronologically." Pet. App. 160a; *see also id.* at 37a (affirming the finding that the statements "reinforced th[is] expectation"). The court nevertheless awarded relief to class members on the theory that Wells Fargo's affirmative statements *caused* them to expect chronological posting (and therefore to incur more overdraft fees). For the typical class member who "naturally expected" chronological posting, this theory of causation is invalid. But again, because this is a class action – and only because it is a class action – these class members' claims have prevailed.

To be clear, neither the district court nor the court of appeals ever decided that Wells Fargo's defenses against the absent class members' claims

failed on the facts. They did not, in other words, find that Respondents had established that every class member had *actually* relied on the challenged statements, and had *actually* incurred overdraft charges they otherwise would not have incurred. The Ninth Circuit's answer to Wells Fargo's objections was, as always, *Tobacco II*: "relief under the UCL is available without individualized proof of deception, reliance and injury." Pet. App. 43a (quoting *Tobacco II*, 46 Cal. 4th at 320).

The result in this case was thus exactly what the *Tobacco II* dissenters predicted: absent class members who could not prevail in an individual action receive a monetary award from a class action. The Rules Enabling Act does not permit a Rule 23 class action in federal court to be put to such use.

### C. *Tobacco II* Classes Are Inconsistent With Due Process.

"Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted). In a UCL case brought by an individual plaintiff, defendants may defend themselves by arguing that the plaintiff was not exposed to the alleged misrepresentation, or did not rely on it to her detriment. Not so in a class action, however, where there is a "conclusive presumption" of reliance by absent class members. *Stearns*, 655 F.3d at 1021 n.13. Through the procedural device of a class action, California has taken away the right to present defenses that would otherwise be available.

Justice Scalia has predicted that it is "significantly possible" that the Court would hold that stripping class action defendants of a no-reliance defense violates Due Process. *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). As the decision below illustrates, the consequence of *Tobacco II* is that "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action." *Id.* Allowing procedure to trump substance in order to diminish substantive rights is not compatible with Due Process.

## III. This Case Is An Ideal Vehicle To Consider An Issue Of Extraordinary Importance.

In UCL actions brought in the Ninth Circuit, claims that would be losers in the hands of a named plaintiff become winners in the hands of absent class members. Even if this departure from traditional class action principles were confined to California UCL cases, the issue would be exceptionally important. UCL actions are ubiquitous. In fact, over the span of just 18 months in the wake of *Tobacco II*, *three dozen* UCL class actions were filed in just one district – the Northern District of California – raising just one type of claim – "hyper-technical" challenges to food labeling. Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry*, Bloomberg Business (Aug. 22, 2013), http://tinyurl.com/CalFoodCt (quoting William Stern). The full range of federal-court UCL class ac-

tions seeking to capitalize on *Tobacco II* – with considerable success – is much larger.[4]

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[4] In each of the following cases, federal courts have certified a UCL class *and* specifically relied on *Tobacco II*'s relaxing of the standards for absent class members: *McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *14 (C.D. Cal. Jan. 13, 2014); *Makaeff v. Trump Univ., LLC*, No. 3:10-CV-0940-GPC-WVG, 2014 WL 688164, at *12-13 (S.D. Cal. Feb. 21, 2014); *Khoday v. Symantec Corp.*, No. CIV. 11-180 JRT/TNL, 2014 WL 1281600, at *27-28 (D. Minn. Mar. 13, 2014), *amended on other grounds in* No. CIV. 11-180 JRT/TNL, 2015 WL 1275323 (D. Minn. Mar. 19, 2015); *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK MRWX, 2014 WL 1410264, at *9 (C.D. Cal. Apr. 9, 2014); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 WL 2191901, at *12 (N.D. Cal. May 23, 2014), *decertified on other grounds*, 2014 WL 7148923, at *15 (N.D. Cal. Dec. 15, 2014); *Brazil v. Dole Packaged Foods, LLC*, No. 12-CV-01831-LHK, 2014 WL 2466559, at *7 (N.D. Cal. May 30, 2014), *decertified on other grounds*, 2014 WL 5794873, at *15 (N.D. Cal. Nov. 6, 2014); *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 429 (C.D. Cal. 2014); *Allen v. Hyland's Inc.*, 300 F.R.D. 643, 666-67 (C.D. Cal. 2014); *Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2014 WL 6483216, at *12, *17 (N.D. Cal. Nov. 18, 2014); *In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 668-69 (D. Kan. 2013); *Cox v. Clarus Mktg. Grp., LLC*, 291 F.R.D. 473, 480 (S.D. Cal. 2013); *Vaccarino v. Midland Nat'l Life Ins. Co.*, No. CV 11-5858 CAS MANX, 2013 WL 3200500, at *16 (C.D. Cal. June 17, 2013), *class subsequently certified*, 2014 WL 572365, at *14 (C.D. Cal. Feb. 3, 2014); *Guido v. L'Oreal, USA, Inc.*, No. CV 11-1067 CAS JCX, 2013 WL 3353857, at *5 (C.D. Cal. July 1, 2013), *class subsequently certified*, 2014 WL 6603730, at *19 (C.D. Cal. July 24, 2014); *Ackerman v. Coca-Cola Co.*, No. 09 CV 395 DLI RML, 2013 WL 7044866, at *3, *13-15 (E.D.N.Y. July 18, 2013); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 504-05 (S.D. Cal. 2013); *Thurston v. Bear Naked, Inc.*, No. 3:11-CV-02890-H (BGS), 2013 WL 5664985, at *7-9 (N.D. Cal. July 30, 2013); *Terrill v. Electrolux Home Prods., Inc.*, 295 F.R.D. 671, 694-95 (S.D. Ga. 2013); *Huyer v. Wells Fargo & Co.*, 295 F.R.D. 332, 347 n.20 (S.D. Iowa 2013); *Johns v. Bayer Corp.*, 280 F.R.D. (...continued)

551, 557 n.4 (S.D. Cal. 2012); *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 568 (S.D. Cal. 2012); *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 533-34 (C.D. Cal. 2012); *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 537-38 (N.D. Cal. 2012), *decertified on other grounds*, 2013 WL 1287416, at *9 (N.D. Cal. Mar. 28, 2013); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 482 (C.D. Cal. 2012); *Peel v. BrooksAmerica Mortg. Corp.*, No. 8:11-CV-0079-JST, 2012 WL 3808591, at *4-6 (C.D. Cal. Aug. 30, 2012); *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. MDL 2199, 2012 WL 4490860, at *5 (C.D. Cal. Sept. 28, 2012), *decertified on other grounds*, 2014 WL 1225184, at *1 (C.D. Cal. Mar. 25, 2014); *Walker v. Life Ins. Co. of the Sw.*, No. CV 10-9198 JVS RNBX, 2012 WL 7170602, at *14-16 (C.D. Cal. Nov. 9, 2012); *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 488 (N.D. Cal. 2011), *reconsideration denied*, 2012 WL 993531, at *3 (N.D. Cal. Mar. 23, 2012); *Krueger v. Wyeth, Inc.*, No. 03CV2496 JAH AJB, 2011 WL 8971449, at *12 (S.D. Cal. Mar. 30, 2011), *reconsideration denied,* 2011 WL 8984448 (S.D. Cal. July 13, 2011); *In re Brazilian Blowout Litig.*, No. CV 10-8452-JFW MANX, 2011 WL 10962891, at *8 (C.D. Cal. Apr. 12, 2011); *Johnson v. Gen. Mills, Inc.*, 275 F.R.D. 282, 287 (C.D. Cal. 2011); *Kingsbury v. U.S. Greenfiber, LLC*, No. CV 08-00151 AHM JTLX, 2011 WL 2619231, at *4-5 (C.D. Cal. May 23, 2011); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 WL 2221113, at *4, 9-10 (N.D. Cal. June 7, 2011); *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 586-87 (C.D. Cal. 2011); *Schramm v. JPMorgan Chase Bank, N.A.*, No. LA CV09-09442 JAK, 2011 WL 5034663, at *5, 8 (C.D. Cal. Oct. 19, 2011); *Mathias v. Smoking Everywhere, Inc.*, No. 2:09-cv-03434-GEB-JFM, 2011 WL 5024545, at *3 (E.D. Cal. Oct. 20, 2011); *Galvan v. KDI Distrib. Inc.*, No. SACV 08-0999-JVS ANX, 2011 WL 5116585, at *10 (C.D. Cal. Oct. 25, 2011); *Aho v. AmeriCredit Fin. Servs., Inc.*, 277 F.R.D. 609, 623 (S.D. Cal. 2011); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 534-36 (C.D. Cal. 2011); *Greenwood v. Compucredit Corp.*, No. C 08-04878 CW, 2010 WL 291842, at *7 (N.D. Cal. Jan. 19, 2010); *Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534, 543 (N.D. Cal. 2010); *Cole v. Asurion Corp.*, 267 F.R.D. 322, 328 (C.D. Cal. 2010); *Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 342 (N.D. Cal. 2010); *Estrella v. Freedom Fin. Network, LLC*, No. C 09-03156

(...continued)

As a result, any company selling goods or services in California is exposed to abusive litigation and the significant "risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (citation omitted).

But the sea-change in class action law is not confined to UCL cases. In other contexts, courts have been certifying unwieldy classes encompassing legions of members who were not harmed by the defendant's alleged conduct. This case presents an ideal vehicle for this Court to consider and set sensible limits on federal class actions.

Specifically, this case provides the Court with a rare opportunity to consider this issue in the context of a full trial on the merits and a final judgment

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SI, 2010 WL 2231790, at *10 (N.D. Cal. June 2, 2010), *decertified on other grounds*, 2012 WL 214856, at *7 (N.D. Cal. Jan. 24, 2012); *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. C 07-0371 CW, 2010 WL 2524360, at *11 (N.D. Cal. June 23, 2010); *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 668 (S.D. Cal. 2010); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 375-76, 378-79 (N.D. Cal. 2010); *Ewert v. eBay, Inc.*, No. C-07-02198 RMW, 2010 WL 4269259, at *7 (N.D. Cal. Oct. 25, 2010); *Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2010 WL 5387831, at *5 (N.D. Cal. Dec. 21, 2010); *Menagerie Prods. v. Citysearch*, No. CV 08-4263 CASFMO, 2009 WL 3770668, at *13 (C.D. Cal. Nov. 9, 2009); *Baghdasarian v. Amazon.com, Inc.*, 258 F.R.D. 383, 387 (C.D. Cal. 2009); *Plascencia v. Lending 1st Mortg.*, 259 F.R.D. 437, 448-49 (N.D. Cal. 2009), *amended on other grounds*, 2011 WL 5914278, at *2 (N.D. Cal. Nov. 28, 2011).

awarding class-wide monetary relief. "[T]he overwhelming majority of actions certified to proceed on a class-wide basis . . . result in settlements." Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006). Not surprisingly, then, the only certiorari petition challenging the importation of *Tobacco II* into federal court sought interlocutory review of a class certification decision. *See Ticketmaster v. Stearns*, No. 11-983, *cert. denied*, 132 S. Ct. 1970 (Apr. 23, 2012).[5] Other recent cases raising closely related issues have done so in the context of a court of appeals' denial of permission to appeal a class certification decision, *see Carpenter Co. v. Ace Foam, Inc.*, No. 14-577, *cert. denied*, __ S. Ct. __ (Mar. 2, 2015), and approval of a class settlement, *see BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.*, No. 14-123, *cert. denied*, 135 S. Ct. 754 (Dec. 8, 2014).

That this case comes to the Court after a final judgment is significant. Courts that liberally certify classes notwithstanding the inclusion of uninjured class members have sometimes held out the prospect that all will be sorted out later in the litigation. For

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[5] This case is a better vehicle than *Ticketmaster* for considering the question presented for an additional reason. Wells Fargo has raised the full range of legal protections that have a bearing on the question, including Article III, the Rules Enabling Act, and the Due Process Clause. The *Ticketmaster* petition, by contrast, framed the Ninth Circuit's application of *Tobacco II* as exclusively a standing issue. *See* Petition for Writ of Certiorari at i, *Ticketmaster v. Stearns*, 132 S. Ct. 1970 (2007) (No. 11-983), 2012 WL 441276.

example, the Seventh Circuit has suggested a way to deal with the "inevitability" of classes with uninjured members: "depose a random sample of class members to determine how many . . . were not injured." *Kohen*, 571 F.3d at 679. *But see Wal-Mart*, 131 S. Ct. at 2561 (disapproving such "Trial by Formula"). The Sixth Circuit, in the "moldy washer" class action in which many class members had "not experienced a mold problem," promised that this discrepancy "can be resolved through the individual determination of damages." *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 722 F.3d 838, 856 (6th Cir. 2013). And the Tenth Circuit has offered the possibility of "classwide discovery" as an alternative to determining prior to certification whether class members were actually harmed. *DG ex rel. Stricklin*, 594 F.3d at 1198.

In this case, by contrast, there is no possibility that some later process might ensure that only those individuals with a viable claim will receive monetary relief. As the Ninth Circuit confirmed in its second decision in this case, *Tobacco II* not only allows certification of a class without regard to class members' reliance and injury, but also grants monetary "restitution" to absent class members without regard to whether the defendant's conduct actually caused them any injury. A case that has proceeded to final judgment, in which a class has not only been certified but awarded monetary relief on the premise that reliance, causation, and injury are irrelevant, is an ideal vehicle for this Court to consider the important and recurring issue of the legal limits on class actions.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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