No. 14-1230

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

REPLY BRIEF

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REPLY BRIEF

Since the Petition was filed, this Court has determined that the question presented warrants review. *Compare* Pet. i ("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.") *with Tyson Foods Inc. v. Bouaphakeo*, No. 14-1146, Pet. i ("Whether a class action may be certified or maintained under Rule 23(b)(3) . . . when the class contains hundreds of members who were not injured and have no legal right to any damages."), *cert. granted*, 83 U.S.L.W. 3765 (2015). At a minimum, the Court should hold the Petition pending disposition of *Tyson Foods*.

But the Court should go further, grant the Petition, and decide this case as a complement to *Tyson Foods*. The question presented is vitally important, and the grant of certiorari in *Tyson Foods* recognizes that the question should be decided by this Court. Yet the question may evade final resolution in *Tyson Foods* – either because the Court is able to resolve that case on the basis of a separate (although related) question presented there, concerning the use of statistical methodologies, or because the court of appeals' finding of "invited error" proves an obstacle. Considering this case in tandem with *Tyson Foods* would ensure that the critically important question presented in both cases receives an answer.

Respondents do not even mention *Tyson Foods*. Nor do they make any serious argument that the question presented is unimportant. Instead, their opposition is built on the fiction that they "proved at trial" that every single absent class member was injured by the alleged misrepresentations. That is not what they argued below, and it is not what the Ninth Circuit decided. The Ninth Circuit held that in a "*Tobacco II*" class action, only the named plaintiffs – and not the absent class members – must have experienced an "injury in fact" that was the "result" of the defendant's conduct. In response to Petitioner's substantial arguments that most class members were not harmed by the misrepresentations, the Ninth Circuit held that *Tobacco II* makes such arguments irrelevant. Certiorari is warranted to review this use of the class action device to award relief to claimants who could not have prevailed in an individual action.

I. The Question Is Squarely Presented.

Before the district court and the Ninth Circuit, Respondents did not mince words: "absent class members were not required to prove actual reliance or injury." *Gutierrez II* Resp. C.A. Br. 56. Respondents never pretended that they had proved at trial, by class-wide inference or otherwise, that every class member actually suffered a loss caused by misrepresentations. Instead, Respondents argued that "the elements of reliance, causation, and injury" are not "requirements" for class members to recover restitution. *Id.* They contended that all they needed to establish was the existence of misrepresentations "of

a sufficiently pervasive nature," after which "restitution is properly awarded to the entire class" – "even if reliance was not uniform throughout the class." *Id.* at 43-44, 56; *accord Gutierrez I* Resp. C.A. Br. 71 ("no requirement to show that each of the absent class members was deceived").

That is the theory the courts below accepted. Only now, seeking to insulate their judgment from review, do Respondents contend that "the injury to each of the class members . . . has been *proven at trial*." Resp. Br. 22. Respondents now claim that based on "the exact same evidence," every class member would have prevailed "had he or she elected to proceed alone." *Id.* at 12.

This newly-minted theory presents no obstacle to certiorari. *First*, the Ninth Circuit decided this case on the basis of Respondents' previous view that absent class members need not be injured. *Second*, Respondents' assertion that injury to every class member was "proven" is not based on actual evidence, but on an asserted legal fiction that misstates California law. And *third*, even if that fiction did have a basis in state law, it would not change the serious problems with transplanting *Tobacco II* to federal court.

1. Petitioner did not "los[e] on the facts." Resp. Br. 28. It lost because the facts were deemed irrelevant.

In *Gutierrez I*, the court of appeals rejected Petitioner's argument that absent class members had to be injured, holding instead that "standing is satis-

fied 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)). On remand, the district court held that class members could recover "without proof that the funds were lost as a result of actual reliance." Pet. App. 210a (quoting *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009)). And in *Gutierrez II*, the Ninth Circuit specifically mentioned, but refused to entertain, Petitioner's argument that there was "no evidence" that "all class members would have behaved differently in the absence of the misrepresentations." Pet. App. 43a. It did so *not* because it disputed the premise, but because "California courts" have eliminated the reliance and causation elements of absent class members' UCL claims. *Id.*

Although Respondents repeatedly assert that class members' injuries were "proven at trial" (Resp. Br. 23), they do not explain how they proved it. All Respondents attempted to prove was that Petitioner made statements that were misleading and pervasive. "But proof of misrepresentation – even widespread and uniform misrepresentation – only satisfies half of the equation." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008). As to the other half, Respondents presented no evidence showing that each class member incurred additional fees because of the statements. They did not even present class-wide evidence (*e.g.*, by an expert in consumer behavior) purporting to show that most individuals would have changed their spending patterns if not for Petitioner's descriptions of debit

cards. Nor do Respondents dispute that the district court's findings *affirmatively show* that most class members would have incurred exactly the same fees in the absence of misrepresentations. Pet. 23.[1]

Respondents' revisionism is especially glaring when they claim that they proved "injury-in-fact, causation, and redressability" for every class member. Resp. Br. 16. These Article III requirements are materially identical to what California requires a named plaintiff to show. *See* Cal. Bus. & Prof. Code § 17204 (plaintiff must show "injury in fact" "as a result of" unfair competition); *Kwikset v. Super. Ct.*, 51 Cal. 4th 310, 322 (2011) (UCL adopts "established federal meaning" of injury-in-fact and causation). If Respondents believed the evidence at trial met this standard for every class member, they would have said so before now.

In short, the claim that Petitioners "had every opportunity to show . . . that [the misrepresentations] did not harm every class member" but "lost on the facts" (Resp. Br. 28) is an unsuccessful effort to muddy the waters. That strategy is also unoriginal; the respondents in *Tyson Foods* unsuccessfully opposed certiorari on the ground that every class member's claims had been properly adjudicated

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[1] The Ninth Circuit's dismissal of Petitioner's arguments negating reliance and causation – including its *class-wide* arguments – makes clear that, when it held that "individualized proof of deception, reliance and injury" are unnecessary, it was not making a mere evidentiary point. *See* Resp. Br. 27-28 (citation and internal quotation marks omitted).

based on "just and reasonable inferences from representative proof." *Tyson Foods*, Resp. Br. 9. But what actually happened here is that Respondents persuaded the lower courts that absent class members can recover without establishing actual reliance, injury, and causation, by "reasonable inference" or otherwise. Respondents' belated, unpersuasive, and never-adopted factual claims do not preclude review of the significant legal questions their theory raises.

2. Respondents' new theory is not that they *actually* proved that every class member was injured. Rather, they now read California law to grant a valid claim for "restitution" to anyone who can prove that the defendant made a misrepresentation that "objectively" is likely to deceive. That is not California law.

There is no dispute that the named plaintiff in a UCL class action must establish injury and causation. The same would be required of anyone who pursued a claim in an individual action. The UCL, as amended by Proposition 64, demands this showing of any non-governmental "person" seeking to bring an "[a]ction[] for relief." Cal. Bus. & Prof. Code § 17204. This standard plainly applies to plaintiffs bringing individual actions, and it is exactly the standard that applies to class representatives as well. *See id.* § 17203 ("any person may pursue representative claims . . . only if the claimant meets the standing requirements of section 17204"). Thus, Respondents' assertion that any class member could have obtained the same relief "had he or she elected to proceed alone" (Resp. Br. 12) is plainly inaccurate.

Respondents seek to avoid this problem by arguing that the elements of the claim remain the same for a plaintiff and a class member; the difference is just the "standing" requirement. That is mere semantics. The principle that class members must possess valid individual claims cannot be formalistically defeated by terming a critical component of the plaintiff's case "standing." This Court has recognized that the phrase "statutory standing" – referring to whether an individual "falls within the class of plaintiffs whom [the legislature] has authorized to sue" – is just a way of referring to the scope of the "cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.4 (2014).

Respondents also contend that where a misrepresentation is "objectively" likely to deceive, California allows absent class members an "infer[ence]" of reliance based on "circumstantial evidence." Resp. Br. 15, 22. However, while an objective likelihood to deceive may be enough to obtain an injunction, only "*[a]ctual direct victims* of unfair competition may obtain restitution." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003) (emphasis added); *see also Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 814 (1971) (defendant may "rebut[]" any "inference" of reliance). Petitioner presented substantial arguments for why most class members were not "actual direct victims" of any misrepresentations, and accordingly have no claim to restitution. But because this is a *Tobacco II* class ac-

tion, the Ninth Circuit deemed these arguments irrelevant.[2]

On this point, Respondents' selective quotation of the commentary to Federal Rule 23 is telling. Claiming that there is nothing unusual about California law, Respondents recite that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action." Resp. Br. 3 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966)). But Respondents omit the rest of the sentence, which states that after "liability is found," it may be necessary "for separate determination of the damages suffered by individuals within the class." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966). They also omit the next sentence, which notes that "a fraud case may be unsuited" for class treatment where the "kinds or degrees of reliance" vary. *Id.* Respondents cannot defend the notion that substantive California law nonetheless deems reliance and injury conclusively satisfied for *every* misrepresentation that is sufficiently widespread, with no need to articulate why reliance should be

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[2] Petitioner was also denied any realistic opportunity to probe the substantial possibility that individual class members never even saw the challenged marketing materials. Of the three named plaintiffs, two saw only one of the challenged items, and the third saw *none*. Pet. 22-23. The class mechanism is all that prevented Petitioner from identifying what is likely a significant number of claimants who never saw any misrepresentations.

presumed, or even to consider the defendant's contrary evidence.[3]

3. Even if Respondents' view of the elements of a UCL claim were accurate, it would not change the basic issues. Respondents agree that individuals who cannot meet the "standing" requirements of § 17204 may not be the named plaintiff in a UCL action, but may participate as a class member. While they describe that requirement, without citation, as a "heightened standard of direct reliance" (Resp. Br. 21), the actual requirement is just Article III standing: an "injury in fact" that is the "result" of the challenged conduct. *Supra* p. 5. If class members are not so injured but are nonetheless "entitled to relief under the substantive elements of proof for fraud for UCL misrepresentation claims" (Resp. Br. 18), that is just another way of saying that they may prevail based on an "injury-in-law." *See Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015) (granting review of "injury-in-law" claims).

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[3] The *Tobacco II* approach has little in common with the "fraud-on-the-market" presumption. That "substantive doctrine of federal securities-fraud law" applies to named plaintiffs and class members alike, is based on market facts, and is "rebuttable." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408, 2410, 2411 (2014). *Tobacco II* does not "presume" class members' reliance based on evidence; it relieves class members of the reliance requirement faced by plaintiffs, whatever the evidence. Similarly, *Tobacco II* does much more than federal statutes that require the named plaintiff to have "the greatest financial stake" (Resp. Br. 16); it permits class members *without* a stake to recover.

Neither does Respondents' view of California law minimize the Rules Enabling Act and Due Process problems. Their argument is essentially that "as a matter of [California's] substantive law, [defendants] *have* no nonreliance defense." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). But again, Respondents cannot dispute that an individual who fails to meet the § 17204 injury and causation requirement cannot recover as a named plaintiff, but *can* recover in a class action. The troubling consequence "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.*[4]

II. Respondents' Effort To Dispute The Circuit Split Is Unpersuasive.

Respondents do little to dispute the importance of the question presented. In the specific context of *Tobacco II* class actions under the ubiquitous UCL, there is a square conflict between the Eighth and Ninth Circuits. The Eighth Circuit held that *Tobacco II* "diverge[s] from federal jurispruden-

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[4] Petitioner did not waive its Due Process and Rules Enabling Act arguments "by not raising them prior to its second appeal to the Ninth Circuit." Resp. Br. 26 n.8. Petitioner raised these arguments before the district court on remand. Dist. Ct. Dkt. No. 581, at 16-17. It had no reason to raise them earlier because the original restitution award was based on the use of high-to-low posting, not on the misrepresentations. Pet. 38a-39a. These arguments were also pressed and passed upon in the Ninth Circuit without any finding of waiver. Pet. App. 43a.

tial principles, which [Article III courts] are bound to follow." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (citation omitted). The Ninth Circuit, by contrast, does not require absent class members to "have suffered actual injury in fact connected to the conduct of the [defendant]." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011).[5]

Respondents attempt to limit *Avritt* to its facts, but they cannot explain how the Eighth Circuit's rejection of the *Tobacco II* approach is anything but a clear holding. The court's subsequent discussion of the facts in *Avritt* at most constituted an alternate holding that did not render the main ground of decision "dicta" (Resp. Br. 21).

Respondents say even less about the broader split in the circuits over whether class actions may include members who lack standing. *See* Pet. 16-18. That is unsurprising in light of this Court's decision to grant certiorari on essentially the same question. *See Tyson Foods*, Pet. 25-30 (discussing the circuit split and noting many of the same cases).

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[5] The Ninth Circuit did not retreat from this position in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (2012), where it cited *Stearns* and adhered to the view that California law can alter federal standing. *See id.* at 595.

III. The Petition Should Be Granted As A Complement To *Tyson Foods*.

This Court granted review in *Tyson Foods* to resolve two questions: whether "differences among individual class members may be ignored" based on "statistical techniques" to determine liability and damages, and whether a class containing "hundreds of members who were not injured and have no legal right to any damages" may be certified. *Tyson Foods*, Pet. i. The question presented here is materially identical to the second question in *Tyson Foods*. Ordinarily this Court would hold such a petition.

But the Court should grant certiorari outright and decide the two cases as complements. As confirmed by the amicus briefs in both cases, the problem of class actions that include uninjured class members is recurring and important. While the Court did not limit its grant in *Tyson Foods* to the first question, the improper use of a statistical "Trial by Formula" may be sufficiently clear-cut that the Court opts to resolve the case on that ground only. The risk that significant questions may be left undecided is compounded by the fact that the Eighth Circuit found any error in including uninjured class members to have been "invited" by the defendant's proposed jury instruction. 765 F.3d 791, 798 (2014).

Wells Fargo invited no error. The courts below awarded $203 million based on a California theory of class actions, under which an individual plaintiff must be injured but class members may recover money regardless. This Court should grant certiorari to ensure that next Term's class action de-

cisions definitively resolve whether this remarkable approach to claim-aggregation is permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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