No. 11-983

In The
Supreme Court of the United States

TICKETMASTER; TICKETMASTER, LLC, ENTERTAINMENT PUBLICATIONS, INC.; AND IAC/INTERACTIVECORP, PETITIONERS,

v.

STEPHEN C. STEARNS, CRAIG JOHNSON, JOHN MANCINI, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BANKERS ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, AND CALIFORNIA BANKERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

FRED J. HIESTAND
CIVIL JUSTICE ASSOCIATION OF CALIFORNIA
2001 P Street, Suite 110
Sacramento, CA 95811
(916) 448-5100

Counsel for Amicus Curiae Civil Justice Association of California

ROBIN S. CONRAD
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

BRIAN R. MATSUI
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
bmatsui@mofo.com
(202) 887-1500

WILLIAM L. STERN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7637

Counsel for Amici Curiae

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ERIKA C. FRANK
CALIFORNIA CHAMBER
OF COMMERCE
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

Counsel for Amicus Curiae
California Chamber of Commerce

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Amici curiae respectfully submit this brief in support of petitioners.[1]

INTEREST OF AMICI CURIAE

The **Chamber of Commerce of the United States of America** (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress,

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[1] Pursuant to Rule 37.2(a), the parties' counsel of record received timely notice of the intention to file this brief. Copies of letters consenting to the filing of this brief by the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

The **American Bankers Association** (ABA) is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including national and state chartered banks; community, regional, and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the ABA are located in each of the 50 states and the District of Columbia, and collectively they account for approximately 90% of the domestic assets of the banking industry in the United States.

California Chamber of Commerce (Cal Chamber) is a non-profit business association with more than 14,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, Cal Chamber has been the voice of California business. While Cal Chamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. Cal Chamber acts on behalf of the business community to improve the state's economic and job climate by representing business on a broad range of legislative, regulatory and legal issues.

Civil Justice Association of California (CJAC) is a more than 30-year-old nonprofit organization of businesses, professional associations, and local government groups. CJAC's principal purpose is to educate the public about ways to improve our civil liability laws to better assure fairness, efficiency, economy, and certainty. Toward these ends, CJAC regularly petitions government for redress of grievances in controversies over who pays, how much, and to whom, when someone is accused of occasioning harm to others.

California Bankers Association (CalBankers) is a nonprofit organization established in 1891 that represents most of the FDIC-insured depository financial institutions that do business in California. Its members range in size from single-branch community banks to the largest financial institutions in the nation. CalBankers frequently files amicus letters and briefs in state and federal courts on matters that significantly affect the banking industry.

Amici and their members are concerned that the Ninth Circuit's ruling will allow the certification of broad classes of plaintiffs who have suffered no injury-in-fact, solely because *one* plaintiff—the named plaintiff—meets the requirements of Article III.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class actions cannot manufacture claims where none exists. The decision below does precisely that. The Ninth Circuit held that it was no impediment to certification for a class to include persons who have suffered no "injury in fact" in their asserted California unfair competition law claims, Cal. Bus. & Prof. Code § 17200 *et seq*. (UCL). Had those absent, no-injury class members sued individually in federal court, their claims would have been dismissed for lack of standing. It should go without saying that aggregating such claims under Rule 23 makes them no more justiciable.[2] Rule 23 simply is not a vehicle to circumvent Article III's requirements.

How did the Ninth Circuit conclude that a collection of largely unharmed claimants can be worthy of class treatment?

Three reasons:

A. The Ninth Circuit permitted Article III's *initial* standing requirements—for when the named plaintiff walks in the federal courthouse door—to obviate any scrutiny into whether absent class members have standing—i.e., injury-in-fact—*during class certification* under Rule 23.

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[2] All "Rule" references are to the Federal Rules of Civil Procedure.

The Ninth Circuit did so by importing into the federal courts a California-specific rule—taken from California's ubiquitous consumer protection statute. That state law rule permits a UCL class to proceed *in state court* as long as just one named plaintiff has been injured. According to the Ninth Circuit, federal courts must certify such class actions as well, because California law requires no more. Thus, the Ninth Circuit made the initial determination that the named representative had standing the beginning and end of the Article III inquiry.

By contrast, the Eighth Circuit understands that Article III requires that the class be drawn so that *all* absent class members have standing—no matter what the state law says. In *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010), the Eighth Circuit affirmed the denial of class certification in an almost indistinguishable case brought under the *same* state law, California's UCL. The Seventh Circuit likewise reached the opposite result from the Ninth Circuit in *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), a class action arising on similar facts brought under the Illinois Consumer Fraud Act.

The conflict among circuits is concrete: The Seventh and Eighth Circuits would have precluded class certification in this case as inconsistent with Article III, whereas the Ninth Circuit would have allowed class certification in *Avritt* and *Oshana*. On this basis alone the Court should grant review.

B. Worse, the Ninth Circuit has now codified as a matter of federal class action law this aberrant California rule of UCL standing.

Unless the decision below is reviewed, California's peculiar no-injury-in-fact-required rule will be available to all UCL class action claims brought in federal courts throughout the Ninth Circuit. That is no small concern. *Even if* the Ninth Circuit ruling is not replicated elsewhere, that court has opened the door for a countless number of no-injury unfair competition suits to be adjudicated by federal courts within that circuit against banks, manufacturers, retailers—indeed almost any entity doing business somewhere in California or by any consumers residing in California.

It is one thing for California to decide that its courts must accommodate UCL class actions on a showing in which only the named plaintiff and no one else has been injured. It is quite another for the Ninth Circuit to make the federal courts, which are constitutionally bound by Article III, open to such suits.

C. Finally, even if Article III somehow provided no impediment to the certification of absent, no-injury claimants, the Ninth Circuit mistakenly allowed a state law rule of UCL standing to supply the rule of decision in federal court on an issue governed by Rule 23. That cannot be reconciled with the result in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (plurality),

which required a conflicting state law (regardless of whether it was procedural or substantive) to yield to Rule 23 in a class action in federal court.

ARGUMENT

A. The Ruling Below Conflicts With Decisions Of The Seventh And Eighth Circuits Regarding Absent Class Member Standing Requirements

1. The petition presents an important issue at the intersection of Rule 23 and Article III's standing requirements: whether, in a class action brought in federal court alleging violations of a state consumer protection law, it is sufficient for only the named plaintiff to have Article III standing at class certification, as the Ninth Circuit held. Or, must the class comprise members who *all* have Article III standing, as the Seventh and Eighth Circuits have held. In other words, should a federal court certify a UCL class in which vast numbers of absent class members cannot show harm (i.e., Article III "injury-in-fact") so long as one class member—the named plaintiff—can make that showing?

The Ninth Circuit said yes. The court held that a UCL class may be certified as long as "at least one named plaintiff meets the requirements [of Article III]." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (quotation omitted). Because petitioners did not deny that at least *one* named plaintiff had standing, the Ninth Circuit held that the district court "erred" by denying class certification

based on "an inaccurate reading of the California UCL." *Ibid*.

"Unfortunately," reasoned the Ninth Circuit, "the district court did not have the benefit of *In re Tobacco II Cases*, 46 Cal.4th 298, 207 P.3d 20, 93 Cal.Rptr.3d 559 (2009), when it ruled, and that case makes all the difference in the world." *Id*. at 1020. Under *Tobacco II*, "relief under the UCL is available without individualized proof of deception, reliance and injury." *Ibid*. (quotation omitted).

In short, the Ninth Circuit held that, under Rule 23, the California UCL standing principles trump Article III. As the Ninth Circuit bluntly put it, petitioner's mistake was in thinking that the Constitution mattered: "Basically, [petitioner's] real objection is that state law gives a right to 'monetary relief to a citizen suing under it' (restitution) without a more particularized proof of injury and causation. That is not enough to preclude class standing here." *Id*. at 1021 (footnotes omitted).

2. The Eighth Circuit begs to differ. Like the decision below, *Avritt v. Reliastar* arose from an appeal of a denial of class certification of a California UCL claim. Contrary to the Ninth Circuit, however, the Eighth Circuit did not interpret the California Supreme Court's decision in *Tobacco II* as establishing a rule of class certification that could ignore Article III. *Avritt*, 615 F.3d at 1033.

The Eighth Circuit held that the California Supreme Court's decision in *Tobacco II* regarding the

lack of injury-in-fact for absent class members could not alter what Article III requires. *Ibid*. As the Eighth Circuit explained, "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*. at 1034. The court held that "a class cannot be certified if it contains members who lack standing" and that "[a] class must therefore be defined in such a way that anyone within it would have standing." *Ibid*. (internal quotation omitted). Thus, "to put it another way," the Eighth Circuit explained that "*a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.*" *Ibid.* (emphasis added).

Nor is the conflict over Rule 23 confined to California UCL claims. In *Oshana v. Coca-Cola Co*., for example, the Seventh Circuit confronted the same issue under the Illinois' Consumer Fraud and Deceptive Practices Act, 815 ILCS 505 (ICFA). *Oshana*, 472 F.3d 506. *Oshana* was a class action against a soft drink company alleging violations of the ICFA as a result of the company's failure to disclose that its fountain Diet Coke products contained different artificial sweeteners than its bottled diet beverage products. In *Oshana*, as in *Stearns* and *Avritt*, the named plaintiff satisfied Article III standing. The class could not be certified, however, because it

included millions of absent class members who were unharmed:

> Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke because it contained saccharin, and some people may have bought fountain Diet Coke even though it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.

Id. at 514 (citations and emphasis omitted.).

In short, there is a clear divide between the Ninth Circuit, on one side, and the Eighth and Seventh Circuits, on the other. The Ninth Circuit would certify the *Avritt* and *Oshana* classes, whereas the Eighth and Seventh Circuits would deny certification in this case. On this basis alone, review should be granted.

B. The Ninth Circuit Ruling Wrongly Expands The Number Of Potential Plaintiffs In Nationwide Class Actions

1. The Ninth Circuit incorrectly believed this was simply a question of state law and Rule 23, and gave little regard to the Article III consequences of a certified class where some—if not most—of the absent class members have suffered no injury. Namely, the court ignored that class certification is still an exercise of a federal court's Article III jurisdiction (here,

over absent class members), and that every member of the certified class thus must satisfy Article III's requirements.

As an initial matter, when named plaintiffs first bring their complaint in federal court seeking certification of a class action, a federal court may properly consider their case if those plaintiffs satisfy Article III standing. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)); *accord* 7AA Wright, Miller & Kane, Federal Practice & Procedure, § 1785.1 (3d ed. 2005); 1 Newberg & Conte, Newberg on Class Actions, § 2:3 (5th ed. 2011). That part the Ninth Circuit got right. *See Stearns*, 655 F.3d at 1021 ("in a class action, standing is satisfied if at least one named plaintiff meets the [Article III] requirements").

But that initial inquiry does not end the matter of Article III. As other courts have explained, "a class cannot be certified if it contains members who lack standing." *Avritt*, 615 F.3d at 1034; *see also Oshana*, 472 F.3d at 513-514; *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980). "A class 'must therefore be defined in such a way that anyone within it would have standing.'" *Avritt*, 615 F.3d at 1034 (citing *Denney*, 443 F.3d at 264). "Or, to put it another way, a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Ibid.*

2. Moreover, this issue has national importance.

By obviating any Article III standing requirements at the certification stage simply because the original filers themselves initially alleged a case or controversy, the Ninth Circuit created a vehicle by which federal courts will now be required to host a unique breed of "no-injury" UCL class actions. All that is needed to get a class certified under the Ninth Circuit's *Tobacco II* formula is a single named plaintiff willing to say: "I saw, I relied, and I was damaged." That no one else did, and that the named plaintiff may be in a class by himself, does not matter.

Although a 2-to-1 conflict is worthy of this Court's review, the effects will be far more profound than the division might otherwise suggest. This conflict means that class certification will turn on the particular circuit in which the UCL class action is filed. That choice will not be mere happenstance. Plaintiffs will be able to bring nationwide California UCL claims against California businesses—including some of the nation's largest banks, manufacturers, and retailers—or on behalf of any California citizens.

Indeed, amici and its members are concerned that such ease of certification for state consumer protection class actions will expand exponentially the filing of such suits in federal courts and greatly increase their members' exposure to liability where there has been no harm. In such a regime, claims of unharmed class members—persons who would have no claim had they sued individually—could be leveraged to coerce a higher settlement than a class that is

defined and confined, as Rule 23 requires, to those persons who can show actual harm.

Nor is this concern inchoate. Even before *Tobacco II*, California's UCL permitted redress where other states' consumer protection laws did not, as California's state law is a favorite vehicle for plaintiffs complaining of certain business practices. That gave California's UCL a gravitational attraction to potential plaintiffs beyond its borders, to wit: *Avritt* involved a UCL claim brought in federal court in Minnesota. Now, after *Tobacco II* and the ruling below, consumer class actions that could not get certified elsewhere will find a welcome haven under California's UCL, *even if the case is brought in or removed to federal court*.[3] The Ninth Circuit's opinion places certification of UCL class actions on an easier footing, effectively suspending Article III's standing requirements during the Rule 23 certification stage. No better proof of this exists than this case itself, in which the Ninth Circuit gave the green light to a UCL class while rejecting certification as to plaintiffs' other claims under the federal Electronic Funds Transfer Act, 15 U.S.C. § 1693e, and California's

[3] *Tobacco II* itself shows how California is an outlier. Until that decision, federal and state courts consistently had denied class certification in cases brought against tobacco companies under state consumer protection laws due to the individual issues that arise in proving reliance and causation. *See McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008). *Tobacco II* allowed such a class under the UCL.

Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq*. *Stearns*, 655 F.3d at 1022-1025.

As the Ninth Circuit observed in this case, California has concluded that, in the name of protecting the public, UCL class actions can be certified without a showing that anyone other than the named plaintiff was harmed. *Stearns*, 655 F.3d at 1021. But that does not mean that federal courts can be conscripted to implement that conclusion, in contravention of Article III's standing requirements.

C. The Ruling Below Allows A State Rule Of Procedure To Supply The Rule Of Decision As To An Issue Governed By Rule 23

Finally, even if Article III provides no impediment to certification of no-injury absent class members, review also should be granted for an additional, independent reason: The Ninth Circuit decision permits a state law rule of UCL procedure to define and govern Rule 23. That is contrary to the result in *Shady Grove*, 130 S. Ct. at 1444.

At issue in *Shady Grove* was the interplay between Rule 23 and a New York statute, CPLR § 901(b), which prohibits classwide imposition of statutory penalties. The district court dismissed the case for lack of jurisdiction because without statutory penalties, the claim could not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332. The Second Circuit affirmed, seeing no conflict between

the New York statute and the federal rules because, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Section 901 was a substantive rule of state law that must be applied in federal diversity cases.

But this Court reversed. A plurality of the Court explained: "A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)." *Shady Grove*, 130 S. Ct. at 1444. Thus, the plurality explained:

> [I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. We have held since *Sibbach* [*v. Wilson & Co.*, 312 U.S. 1, 14 (1941)], and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by [the Rules Enabling Act] and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights.

Ibid. (internal citation omitted).

Here, the Ninth Circuit acknowledged that "the district court might well have been correct" that Rule 23 otherwise would have required the denial of certification of this UCL class because of the predominance of individual issues of reliance and causation.

Stearns, 655 F.3d at 1020. But the court concluded that the intervening decision by the California Supreme Court in *Tobacco II* "makes all the difference in the world" and required remand. *Ibid*.

To the extent the *Shady Grove* plurality reflects the reasoning of the Court, the Ninth Circuit's ruling runs to the contrary. If a Federal Rule "regulates procedure"—here, Rule 23 "regulates" class certification in the federal courts—then it must be applied "with respect to all claims, regardless of its incidental effect upon state-created rights." *Shady Grove*, 130 S. Ct. at 1444. The Ninth Circuit violated this principle by giving precedence to the state-law rule of standing as expressed by the California Supreme Court in *Tobacco II*.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

FRED J. HIESTAND
CIVIL JUSTICE ASSOCIATION OF CALIFORNIA
2001 P Street, Suite 110
Sacramento, CA 95811
(916) 448-5100

Counsel for Amicus Curiae Civil Justice Association of California

BRIAN R. MATSUI
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
bmatsui@mofo.com
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ROBIN S. CONRAD
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION
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ERIKA C. FRANK
CALIFORNIA CHAMBER
OF COMMERCE
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

Counsel for Amicus Curiae California Chamber of Commerce

WILLIAM L. STERN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7637

Counsel for Amici Curiae

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