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

BRIEF OF *AMICI CURIAE* 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 IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the U.S. Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases implicating 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, located in each of the fifty states and the District of Columbia, that collectively account for approximately ninety percent of the domestic assets of this nation's banking industry.

The California Chamber of Commerce (CalChamber) is a non-profit business association with over 13,000 members, both individual and corporate, representing

[1] This brief was authored by *amici* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici*, their members, or their counsel has made any monetary contribution to the preparation or submission of this brief. More than ten days before the due date, *amici* notified the parties of their intention to file this brief. *Amici* have the written consent of the parties to file this brief. Letters indicating their consent are being submitted with this brief.

virtually every economic interest in California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community.

The Civil Justice Association of California (CJAC) is a more than 35-year-old non-profit organization of businesses, professional associations, and financial institutions. CJAC's principal purpose is to educate the public about ways to improve civil liability laws to better assure fairness, efficiency, economy, and certainty. Toward these ends, CJAC regularly petitions the government for redress of grievances in controversies over who pays, how much, and to whom, when someone is accused of harming others.

The California Bankers Association (CalBankers) is a non-profit organization established in 1891 that represents most of the FDIC-insured depository financial institutions doing business in California. Its members range in size from single-branch community banks to this nation's largest financial institutions. CalBankers frequently files *amicus curiae* briefs in courts on matters that significantly affect the banking industry.

The question presented by this case is of exceptional importance to *amici curiae* the U.S. Chamber, ABA, CalChamber, CJAC, and CalBankers (collectively, *amici*) and their members. By allowing the district court to certify a broad class of absent claimants who have suffered no injury caused by a business's activities, the Ninth Circuit's opinion here contravenes the jurisdictional limits placed on federal courts by the Constitution. *Amici* have an interest in ensuring that businesses, like everyone else, are subject to class litigation in federal court only when all members of the putative class have standing to sue under Article III.

SUMMARY OF ARGUMENT

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.* (*Sprint*), 554 U.S. 269, 273 (2008). "'No principle is more fundamental to the judiciary's proper role in our system of government than th[is] constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint*, 554 U.S. at 273. To establish standing, a plaintiff must show that the defendant's conduct caused him to suffer a concrete "'injury in fact'" and that a favorable judgment will likely

redress this alleged injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998).

Class actions are not exempt from the standing requirement. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215-16 (1974). But this Court itself has recognized "tension" in its prior cases addressing the problems that arise when the named class representative suffers an injury that absent class members do not share. *Gratz v. Bollinger*, 539 U.S. 244, 262-63 & n.15 (2003). Some past decisions approach such variations between class representatives and absent class members "under the rubric of standing" and others instead do so by assessing "the propriety of class certification pursuant to Federal Rule of Civil Procedure 23(a)." *Id*.

Given these divergent approaches, the federal courts of appeals are sharply divided over whether Article III's standing requirements preclude class certification where the class representative has shown he has standing but the proposed class is broad enough to include absent members who lack standing. Since "[t]he constitutional requirement of standing is equally applicable to class actions," some federal courts have held that a class action "cannot be certified if it contains members who lack standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *accord, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006). Others, however, hold that as long as the named class representative has standing under Article III, a court can

certify a class that includes uninjured members if Rule 23's prerequisites for class certification are met. *See, e.g.*, *DG ex rel. Stricklin v. Devaughn* (*Stricklin*), 594 F.3d 1188, 1197-98, 1201 (10th Cir. 2010).

Echoing this conflict among the circuit courts, the Ninth Circuit is itself confused about Article III's role in class actions. For instance, the Ninth Circuit has stated that "'[n]o class may be certified that contains members lacking Article III standing.'" *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012). But the Ninth Circuit more often follows the contrary approach, holding that a class may be certified "'if at least one named plaintiff meets the [standing] requirements'" and therefore limiting the necessary standing analysis only to the named plaintiff. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011). In this case, the Ninth Circuit followed the latter approach.

This Court should grant certiorari to resolve this conflict among the circuit courts to ensure the Constitution's uniform application to class actions. This Court's intervention is especially necessary here because of the acute constitutional problems that result where, as in this case, a court certifies a class of plaintiffs alleging violations of California's Unfair Competition Law (UCL). As a matter of *California* law, a named plaintiff in a UCL class action brought in a California state court has statutory standing to recover monetary restitution for absent claimants even if the absent claimants suffered no injury caused by the defendant. That rule of California law threatens

to swallow Article III's standing requirement for UCL claims adjudicated in federal court unless federal courts carefully ensure that the class has been limited solely to those absent members who suffered an injury caused by the defendant.

Consequently, by permitting class certification of a UCL claim in this case – where the class includes absent members who never had to show the injury and causation necessary to establish Article III standing even though this is one of the rare class actions to proceed to a final judgment following a trial – the Ninth Circuit improperly failed to ensure compliance with Article III's limitations. This Court should grant certiorari here and hold that federal courts cannot certify UCL claims for class treatment if absent members themselves would lack Article III standing to bring their own UCL claims in federal court.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE SHARP DIFFERENCES BETWEEN THE STANDING REQUIREMENTS OF ARTICLE III AND CALIFORNIA'S UNFAIR COMPETITION LAW EXACERBATE THE CONFLICT OVER WHETHER ARTICLE III PRECLUDES CLASS CERTIFICATION IF ABSENT CLASS MEMBERS LACK STANDING.

A. Article III mandates that the class of plaintiffs all have suffered the same injury caused by a defendant.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Id*. A plaintiff lacks standing to sue in federal court unless he himself "has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Warth*, 422 U.S. at 499.

Under this Court's precedent, "[t]he 'irreducible constitutional minimum of standing' contains three requirements." *Steel Co.*, 523 U.S. at 102. "First and foremost, there must be alleged (and ultimately proved) an injury in fact – a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical." *Id.* at 103 (internal quotation marks omitted). "Second, there must be causation – a fairly traceable connection between the

plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury." *Id.*

Because the "usual rule" in federal courts permits "litigation [to be] conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes* (*Wal-Mart*), 131 S. Ct. 2541, 2550 (2011) (internal quotation marks omitted), ordinarily the focus of the standing requirement is easily identified: the individual plaintiff must show "'*personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines*, 521 U.S. at 818. But Federal Rule of Civil Procedure 23 authorizes an exception to this usual rule, permitting a named plaintiff in certain narrowly defined circumstances to bring a class action to represent the interests of absent class members. *See Wal-Mart*, 131 S. Ct. at 2550. This class action mechanism, however, is nothing more than a procedure that affords no substantive rights. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *see also Wal-Mart*, 131 S. Ct. at 2561 (class action procedure cannot "'abridge, enlarge or modify any substantive right'"). "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.* (*Shady Grove*), 559 U.S. 393, 408 (2010) (plurality opinion).

"'That a suit may be a class action'" therefore "'adds nothing to the question of standing'" under Article III. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). In other words, Article III permits a named plaintiff to sue as a representative only for those "who have been injured in fact, and thus could have brought suit in their own right." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

Consequently, Rule 23's procedural requirements for class certification "must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). "Art[icle] III's [standing] requirement remains" in a class action and this constitutional requirement is satisfied only if the named class representative and the "class of other possible litigants" all share the same injury. *Warth*, 422 U.S. at 501; *accord Schlesinger*, 418 U.S. at 215-16. Where some class members have suffered an injury caused by the defendant but others have not, this does not suffice to satisfy the constitutional standing requirement. *See Lewis*, 518 U.S. at 358 & n.6. "[S]tanding is not dispensed in gross." *Id.* at 358 n.6.

Simply put, federal courts can "provide relief to claimants, in individual *or class actions*," *only* if the claimants "have suffered, or will imminently suffer, actual harm." *Id.* at 349 (emphasis added). Affording a "class of individuals" relief where the defendant caused them no actual harm would eviscerate the separation of powers that is so vital to ensuring that

federal courts not exceed the narrow role assigned to them by the Constitution. *Id.* at 349-50, 357-58.

B. Under California's UCL, litigants have statutory standing to sue on behalf of absent claimants who did not themselves suffer an injury caused by the defendant.

1. Unlike the federal Constitution, California's Constitution does not impose a case-or-controversy requirement. *Grosset v. Wenaas*, 42 Cal. 4th 1100, 1117 n.13, 175 P.3d 1184, 1196 n.13 (2008). Plaintiffs therefore need not ordinarily show the standing mandated by Article III in order to bring any claims in California courts. *Nat'l Paint & Coatings Ass'n v. State of Cal.* (*Nat'l Paint*), 58 Cal. App. 4th 753, 761-62, 68 Cal. Rptr. 2d 360, 365 (1997).

Although California does not require litigants to have constitutional standing to sue, some California laws do impose *statutory* standing requirements. *See Jasmine Networks, Inc. v. Superior Court*, 180 Cal. App. 4th 980, 989-93, 103 Cal. Rptr. 3d 426, 431-35 (2009). But these statutory prerequisites are not equivalent to Article III's constitutional limitations. *See Reycraft v. Lee*, 177 Cal. App. 4th 1211, 1217, 99 Cal. Rptr. 3d 746, 750 (2009). This is so because standing in federal courts "is rooted in the *constitutionally limited subject matter jurisdiction* of those courts" whereas "no such wariness surrounds the subject matter jurisdiction of California courts." *Jasmine Networks, Inc.*, 180 Cal. App. 4th at 990, 103

Cal. Rptr. 3d at 432. California's standing requirements are simply statutory creations and therefore "vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." *Midpenninsula Citizens for Fair Hous. v. Westwood Investors*, 221 Cal. App. 3d 1377, 1385, 271 Cal. Rptr. 99, 104 (1990).

2. The state statute at issue in this class action – California's UCL – exemplifies the significant differences between California and federal standing requirements. Whereas Article III requires each plaintiff in federal court to show an injury caused by the defendant, California allows its state laws to authorize any person to sue "in the undifferentiated public interest" without establishing an injury caused by the defendant. *Nat'l Paint*, 58 Cal. App. 4th at 761-62, 68 Cal. Rptr. 2d at 365. Consistent with the broad reach of California law, the state's UCL, from its very inception, conferred statutory standing to prosecute UCL civil actions on *any* person, *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 560-67, 950 P.2d 1086, 1090-95 (1998), and employed "sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Barquis v. Merch. Collection Ass'n*, 7 Cal. 3d 94, 111, 496 P.2d 817, 829 (1972).

Plaintiffs could therefore bring UCL claims in state court on behalf of either themselves or the public regardless of whether anyone had actually been harmed. *Consumers Union of United States, Inc. v. Fisher Dev., Inc.*, 208 Cal. App. 3d 1433, 1439-40,

257 Cal. Rptr. 151, 154-55 (1989). "[C]onsequently the law became a font for abusive litigation." *Avritt*, 615 F.3d at 1033. Attorneys were permitted to troll the universe of business practices and sue for anything they could argue was unlawful, unfair, or fraudulent, and extort a settlement from the offending business – even if no injury to competition or consumers had occurred. *See In re Tobacco II Cases* (*Tobacco II*), 46 Cal. 4th 298, 316-17, 207 P.3d 20, 32-33 (2009).

3. In 2004, California voters passed Proposition 64, which amended the UCL to "restrict[ ] [its] private enforcement" by modifying its statutory "[s]tanding" requirement. *Yanting Zhang v. Superior Court*, 57 Cal. 4th 364, 372, 304 P.3d 163, 168 (2013). As a result of Proposition 64, "a private plaintiff must be able to show economic injury caused by unfair competition" to bring a UCL claim. *Id*. Additionally, "a private plaintiff must file a class action in order to represent the interests of others." *Id.*

Although Proposition 64 amended the UCL's statutory standing requirement for *named plaintiffs*, the California Supreme Court has held that Proposition 64 did not change pre-2004 California law permitting private litigants to bring UCL class actions on behalf of absent class members without demonstrating that those absent members suffered an injury caused by the defendant. *See Tobacco II*, 46 Cal. 4th at 314-21, 207 P.3d at 30-36; *In re Steroid Hormone Prod. Cases* (*Steroid Cases*), 181 Cal. App. 4th 145, 154, 104 Cal. Rptr. 3d 329, 336 (2010). Thus, plaintiffs today still have statutory standing to bring

UCL claims in California state court on behalf of a class even if none of the absent class members has been injured by a company's business practices. *See Tobacco II*, 46 Cal. 4th at 319-20, 207 P.3d at 34-35; *Steroid Cases*, 181 Cal. App. 4th at 154, 104 Cal. Rptr. 3d at 336. In this respect, California law is fundamentally irreconcilable with Article III. *See Schlesinger*, 418 U.S. at 216.

C. The sharp differences between Article III's mandate and California's UCL demonstrate that review is necessary in this case to resolve the division among courts over Article III's role in class actions.

1. This Court should grant certiorari to resolve the split of authority over whether Article III precludes class certification where the class includes absent members who lack standing to sue in federal court.

Litigation must ordinarily be "'conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 131 S. Ct. at 2550. A class action is a narrow "'exception to th[is] rule,'" appropriate only when, among other things, the named class representative and absent members "'possess the same interest and suffer the same injury.'" *Id*.; *accord Schlesinger*, 418 U.S. at 216.

This Court has never retreated from this long-settled limitation on class actions. But "there is

tension in [this Court's] prior cases" over the legal consequences resulting from violations of this limitation, *Gratz*, 539 U.S. at 262-63 & n.15 – that is, when the named class representative and absent class members in a putative class action do not share the same injury.

On numerous occasions, this Court has held that such variations between the named plaintiff's and absent class members' injuries result in a lack of standing under Article III. *Gratz*, 539 U.S. at 263 n.15 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *see also, e.g.*, *Lewis*, 518 U.S. at 358 & n.6 (Article III standing requirement is not satisfied where some class members suffer an injury but others do not); *Simon*, 426 U.S. at 40 n.20 (same); *Warth*, 422 U.S. at 501-02 (same). But in other cases, this Court held that the variations defeat Rule 23's requirements for class certification. *See Gratz*, 539 U.S. at 263 & n.15 (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982)).

The federal courts of appeals are therefore divided over whether Article III precludes class certification if the class representative has shown he has standing but the putative class includes absent members who lack standing. *See* Pet. 14-18.

Several circuits have held that class certification is inappropriate in such circumstances. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (class cannot be certified unless plaintiffs "can prove, through common evidence,

that all class members were in fact injured"); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013) ("In order for a class to be certified, each [class] member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision" since, under Article III, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves"); *Denney*, 443 F.3d at 263-64 (under the Constitution, "no class may be certified that contains members lacking Article III standing").

Other circuits, however, have held that the named plaintiffs need not show that absent class members have Article III standing before an action can be certified for class treatment. *See, e.g.*, *Stricklin*, 594 F.3d at 1197-98, 1201; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions* (*Prudential*), 148 F.3d 283, 307 (3d Cir. 1998).

Still others – including the Ninth Circuit – are confused about the issue, following different rules in different opinions. *Compare, e.g.*, *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009), *and Stearns*, 655 F.3d at 1021, *with Mazza*, 666 F.3d at 594-95, *and Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

This conflict alone warrants this Court's review. The Court has "always insisted on strict compliance with" Article III's standing requirement because it serves the constitutional separation of powers by "keeping the [federal] Judiciary's power within its

proper constitutional sphere." *Raines*, 521 U.S. at 819-20. Moreover, in the modern era, the number of class actions filed in both federal and state courts has increased dramatically. S. Rep. No. 109-14, at 13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 13-14, 2005 WL 627977. In this age of frequent class actions, federal "courts 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). This Court should grant certiorari to resolve this significant division over how Article III's standing requirement affects the class certification analysis.

2. Review is particularly necessary in this case because the differences between the U.S. Constitution and California law exacerbate the conflict over Article III's impact on class actions.

a. Neither a trial on the merits nor Rule 23's requirements for class certification can substitute for an inquiry into whether absent class members have standing under Article III.

Those who insist that Article III's standing requirement need not preclude class certification – even where the class includes absent members who could not establish injury or causation – usually base their view on one of two rationales. Some contend that Rule 23's prerequisites for class certification (such as the typicality or adequacy of representation requirements) will protect against the possibility that

uninjured absent claimants will ultimately recover by the end of the case; others maintain that later developments (such as a trial on the merits following classwide discovery) will perform the same sifting function. *See, e.g.*, *Stricklin*, 594 F.3d at 1197-98, 1201 (at class certification stage, class representative need not show absent class members suffered an injury caused by the defendant in part because "classwide discovery and further litigation answer th[is] question after certification"); *Kohen*, 571 F.3d at 676-79 (at class certification stage, class representative may not yet know if absent members were injured but this should not preclude class certification because the district court can revisit class certification if subsequent discovery reveals uninjured class members and at any rate the class would lose at trial if it fails to prove injury); *Prudential*, 148 F.3d at 307 (whether absent class members are properly in federal court is an issue of "'compliance with the provisions of rule 23, not one of Article III standing'").

Neither of these misguided justifications should permit federal courts to ignore whether absent class members satisfy Article III's standing requirement.

First, the theoretical possibility that the class may lose on the merits after class certification because of a failure to prove injury does not permit a court to ignore Article III's standing requirement for absent class members. Because "merits question[s] cannot be given priority over an Article III question," there is no basis for "allowing merits questions to be decided before Article III questions." *Steel Co.*, 523

U.S. at 97 n.2. "[T]he proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' that the Constitution leaves for resolution through the political process." *Id.* (citation omitted).

Second, Rule 23's procedural requirements for class certification – such as the need to show typicality and adequacy of representation – are not a sufficient substitute for scrutiny of absent class members' Article III standing. Standing and Rule 23's requirements "spring from different sources and serve different functions." 1 William B. Rubenstein et al., *Newberg on Class Actions* § 2:6 (5th ed. 2011). Thus, "'[c]are must be taken, when dealing with apparently standing-related concepts in a class action context'" because, although "'individual standing requirements'" and "'Rule 23 class prerequisites . . . appear related, in that they both seek to measure whether the proper party is before the court to tender issues for litigation, they are in fact independent criteria. . . . Often satisfaction of one set of criteria can exist without the other.'" *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 605 (S.D.N.Y. 2006). Since "there is a fundamental analytical distinction between" Rule 23's prerequisites for class certification and Article III standing, *In re Aggrenox Antitrust Litig.*, ___ F. Supp. 3d ___, 2015 WL 1311352, at *19 (D. Conn. Mar. 23, 2015), it is improper for courts to replace an examination of Article III standing with an analysis of whether class treatment is proper under Rule 23.

In short, "Article III standing, as a fundamental constitutional requisite of federal judicial power, presents a 'threshold question in every federal case'" – including in class actions. *Id.* Accordingly, a class action "cannot be certified if it contains members who lack standing." *Avritt*, 615 F.3d at 1034.

b. Careful scrutiny of absent class members' standing is especially important in UCL class actions due to the irreconcilable differences between Article III and California law.

"[T]he standing inquiry requires careful judicial examination" by a federal court, *Allen v. Wright*, 468 U.S. 737, 752 (1984), since the merits of a case cannot be resolved if a plaintiff lacks standing. *Steel Co.*, 523 U.S. at 109-10. Even assuming Rule 23's requirements or a trial on the merits following discovery could substitute for an inquiry into the Article III standing of absent class members in the typical class action – an erroneous proposition, as explained above – they could not do so in a case such as this, where the elements of the UCL claim never require absent class members to prove either injury or causation.

Under the Rules Enabling Act, the procedural class action device cannot "'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561. The class action device does no more than provide "the procedural means by which [a] remedy may be pursued." *Shady Grove*, 559 U.S. at 402. This

device "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (plurality opinion).

As a result, even if a court fails to conduct the proper initial inquiry into Article III standing, where the substantive elements of the claim in the class action require proof of injury and causation, absent class members should not be able to recover without first proving at some point in the case that the defendant caused them to suffer an injury. Otherwise, the class action device would have improperly modified the parties' legal rights in violation of the Rules Enabling Act by relieving claimants of their obligation to prove the substantive injury and causation elements of their claims.[2] *See Shady Grove*, 559 U.S. at 402 (class actions, like other procedures allowing multiple claims to be litigated together, merely alter how claims are processed and do *not* change what plaintiffs must show to be entitled to relief).

Thus, the typical cases holding that Article III's standing requirement need not preclude class certification might not necessarily permit absent claimants to evade Article III in every instance. This is so because Article III requires proof of "'injury in fact'" and "causation," *Steel Co.*, 523 U.S. at 102-03, and –

[2] Doing so would also violate constitutional due process, since due process – just like the Rules Enabling Act – "prevents the use of class actions from abridging the substantive rights of any party." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010).

in the typical class action – the Rules Enabling Act will likewise require the absent claimants to prove the substantive injury and causation elements of their claims by the time of trial. This inquiry into the merits of the substantive claims is not a proper replacement for an assessment of Article III standing. *See id.* at 97 n.2; *see also Bond v. United States*, 131 S. Ct. 2355, 2362 (2011). It is, however, theoretically possible – even if constitutionally impermissible, as explained above – that, through this merits inquiry into the elements of their claims, absent class members might fortuitously establish the constitutional elements of injury and causation necessary to (belatedly) show Article III standing.

This theoretical possibility is foreclosed by the Constitution since merits questions cannot be decided before Article III questions. *See Steel Co.*, 523 U.S. at 97 n.2. But what makes the circumstances here particularly egregious is that even the theoretical possibility that absent class members might belatedly establish the constitutional elements of injury and causation in the process of litigating the merits of their claim disappears entirely where, as in this case, a class action alleges violations of the UCL. As explained earlier, the UCL requires the named class representative to prove the defendant caused him personally to suffer an injury, *Yanting Zhang*, 57 Cal. 4th at 372, 304 P.3d at 168, but the California Supreme Court has interpreted this statutory standing provision as not requiring anyone to prove at any stage that the absent class members sustained an

injury caused by the defendant. *See Tobacco II*, 46 Cal. 4th at 314-21, 207 P.3d at 30-36; *Steroid Cases*, 181 Cal. App. 4th at 154, 104 Cal. Rptr. 3d at 336. Accordingly, in UCL class actions, there is no guarantee that, during class certification or at a later trial on the merits, absent class members will ever need to show injury or causation before they are allowed to recover. Article III is thus the only bulwark preventing absent class members who have not suffered an injury caused by the defendant from recovering under the UCL in federal court.

This case aptly illustrates the point. This action sought monetary restitution and injunctive relief on behalf of a class under California's UCL. *See* Pet. App. 47a-49a, 180a-182a, 198a, 209a-216a. "Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting). But this case is one of those rare class actions where the parties tried the case to a final judgment after the district court certified the class. Pet. 9-12. Yet, throughout this case, the district court and Ninth Circuit examined only the standing of the named class representatives; in so doing, they allowed petitioner to be held liable to an entire class of UCL claimants even though the absent class members never had to show they suffered an injury caused by the petitioner. *See id.*; Pet. App. 33a-36a, 43a, 170a-173a, 210a, 248a-250a, 253a-256a.

This Court has never held, as the Ninth Circuit effectively did below, that Article III permits a federal class action to proceed against a defendant if the class includes absent members who did not suffer *any* injury caused by the defendant's alleged misconduct. Rather, this Court has consistently held that the "class representative" and "all members of the class he represents" must "suffer the same injury" to satisfy Article III's standing requirement. *Schlesinger*, 418 U.S. at 215-16; *accord Warth*, 422 U.S. at 501. This constitutional prerequisite would be meaningless if – as occurred below – named class representatives were permitted to proceed with a class action where they may have personally suffered an injury caused by the defendant but some or all of the absent class members did not. *See Avritt*, 615 F.3d at 1034-35 (although California law "holds that a single injured plaintiff may bring a class action [under the UCL] on behalf of a group of individuals who may not have had a cause of action themselves," this approach "is inconsistent with the doctrine of standing as applied by federal courts" and therefore cannot be followed to justify class certification in federal court).

In federal court, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.* at 1034; *see also Simon*, 426 U.S. at 40. But the importation of California law into the federal class action here allowed the named class representatives to dodge this essential constitutional limitation on federal jurisdiction. In conformance with California law, but in contravention of federal

law, absent class members were never required to show the injury or causation necessary for Article III standing. The Ninth Circuit thereby improperly permitted California law to alter the fundamentally limited role of federal courts "by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2667 (2013).

CONCLUSION

This Court should grant certiorari and hold, consistent with Article III's requirements, that lawsuits based on California's UCL cannot be certified as class actions if they include absent class members who lack standing to bring their own UCL action in federal court. At the very least, this Court should hold this petition for its decision in *Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 2015 WL 1879778 (U.S. Apr. 27, 2015) (No. 13-1339), in which this Court will resolve the related question

of whether a plaintiff who suffers no concrete harm from a statutory violation lacks Article III standing.

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