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 DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar ("DRI") is an international organization of 22,500 attorneys involved in the defense of civil litigation. Committed to enhancing the effectiveness, skills, and professionalism of defense attorneys, DRI seeks to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system. This is such a case.

DRI members have extensive experience with class actions and with state unfair trade practices acts including the California Unfair Competition Law. As a result, DRI seeks to ensure that such statutes are enforced fairly, efficiently, and predictably, including in the context of class action suits. The Ninth Circuit's decision in this case—if uncorrected—will have a profound effect on businesses and individuals who may be subject to these types of suits because it erroneously allows the federal judiciary to compensate unnamed class members who cannot show an actual injury. The Ninth Circuit's ruling conflicts with this Court's precedent and deepens an already well-entrenched circuit split. DRI has a strong interest in assuring

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

that the class action mechanism permitted by Federal Rule of Civil Procedure 23 does not provide a "back door" for uninjured litigants to obtain relief in federal court where they would be unable to maintain a claim themselves. This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice systems and is thus of vital interest to the members of DRI.

SUMMARY OF ARGUMENT

Certiorari is warranted to clarify the limitations the Rules Enabling Act imposes on class action suits and to address the recurring problem of class action suits that violate defendants' due process rights by permitting individual plaintiffs who could not recover had they sued on their own to recover through the procedural device of the class action.

First, certiorari is warranted to clarify that the limitations of the Rules Enabling Act apply to class action suits under Rule 23(b)(3) and that class certification can neither enlarge the substantive rights of plaintiffs nor deprive defendants of their substantive rights. This Court has previously held that the pooling of numerous individuals' claims into a class action cannot strip defendants of their "defenses to individual claims" and that the Rules Enabling Act forbids "trial by formula" without individualized proceedings. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Here, the Ninth Circuit did exactly what is forbidden by the Rules Enabling Act, and deprived Wells Fargo of the opportunity to argue that the bank's statements caused no harm to the individual class members who did not rely on them.

Second, certiorari is warranted to address the recurring problem of the lower courts' complicity in the violation of defendants' due process rights by permitting individual plaintiffs who could not recover had they sued on their own to recover when their claims are aggregated with others' claims in a class action. Here, for example, Wells Fargo was denied the opportunity to determine if individual class members had seen, relied on, or been injured by the supposedly misleading and deceptive statements.

This Court has not yet squarely addressed the question of whether the class action device may be used to excuse the unnamed class members' need to establish the elements of their cause of action. Its precedent, however, indicates that they must. See *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (holding named plaintiffs must "'possess the same interest and suffer the same injury' as the class members") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). Similarly, the Court has held that classwide adjudication "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 599 U.S. 939, 408 (2010) (plurality opinion). In accordance with this precedent, other Circuits have held a defendant must have the opportunity to defend against *all* of the class members' claims, not just those of the class representatives. See, e.g., *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

The Ninth Circuit's rulings in *Gutierrez v. Wells Fargo*, 704 F.3d 712 (9th Cir. 2012) and 2014 WL 5462407 (9th Cir. Oct. 29, 2014) depart from this precedent and diverge from those of her sister circuits. Such rulings ignore the due process protections of the Constitution and permit uninjured plaintiffs to leverage staggering settlements or judgments from defendants such as DRI's members and their clients. Accordingly, DRI respectfully urges this Court to grant certiorari to correct the lower courts' judgments in this suit and to bring clarity and uniformity to this area of the law.

ARGUMENT

I. This Court's review is needed to clarify the limitations imposed by the Rules Enabling Act on class action suits in federal courts.

The Rules Enabling Act, enacted in 1934, provides that federal procedural rules "shall not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. This stricture applies to Rule 23 and classes certified under that Rule. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act."). Accordingly, Rule 23 provides no shortcut to recovery for absent class members.

The Ninth Circuit's ruling deprived Wells Fargo of the opportunity to argue—as it would have been entitled to argue in individual actions brought by these plaintiffs—that the bank's statements caused no harm to the individual class members who did not rely on them. This ruling enlarges the unnamed class members' substantive rights and simultaneously abridges the defendant's rights in direct violation of the Rules Enabling Act. In contrast to the Ninth Circuit's ruling, this Court has held that the pooling of numerous individuals' claims into a class action cannot strip defendants of their "defenses to individual claims," and "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 Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Stated differently, each plaintiff remains obligated to provide "the requisite proof" of his or her claim, and Rule 23 gives the court "no power to define differently the substantive right of

individual plaintiffs as compared to class plaintiffs." *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978).

The Ninth Circuit's ruling is squarely foreclosed by *Wal-Mart*. Nor can this Court's holding in *Wal-Mart* be distinguished on the basis that *Wal-Mart* involved a class that was wrongly certified pursuant to Rule 23(b)(2), whereas this suit involves a class certified pursuant to Rule 23(b)(3). The limitations of the Rules Enabling Act apply equally to both subsections of Rule 23. The notes of the Rules Advisory Committee make clear that Rule 23 was never intended to alter the substantive requirements and procedural fairness required by the constitution and controlling law. For example, the Committee stated that Rule 23(b)(3) "encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness*." Advisory Committee's 1966 Note on subd. (b)(3) of Fed. R. Civ. P. 23 (emphasis added). The Committee went on to highlight how the presence of individualized defenses on causation and damages could render class treatment inappropriate. For example, the Committee explained, a fraud case in which similar representations are made to each plaintiff may still require "separate determination of the damages suffered by individuals within the class." *Id.* Similarly, a case "may be unsuited for treatment as a class action if there was material variation in . . . the kinds or degrees of reliance by the" plaintiffs. *Id.*

The Ninth Circuit has previously acknowledged the applicability of the Rules Enabling Act to class action suits. Specifically, and in contrast to its ruling

in the case at bar, the Ninth Circuit formerly held that it was inappropriate to certify a class pursuant to Rule 23(b)(3) where there were material variations in the representations made to or the reliance by the class members:

> [A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights . . . . Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure.

In re Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974). The Ninth Circuit's more recent ruling in the case at bar deviates from *In re Hotel Telephone Charges* and indicates the Ninth Circuit failed to learn the lesson of *Wal-Mart* in which this Court indicated that the Rules Enabling Act forbids "trial by formula" bereft of individualized proceedings. *Wal-Mart*, 131 S. Ct. at 2561.

If uncorrected, the Ninth Circuit's ruling in this suit places corporations such as those whose counsel comprise DRI's membership in a precarious position, subject to different potential liability in different jurisdictions, and deprived of significant substantive rights when facing claims asserted in class actions. Accordingly, certiorari is warranted to clarify that, just as the Rules Enabling Act prevented this "novel idea" in a Rule 23(b)(2) suit, *id.*, it also prevents it in suits under Rule 23(b)(3).

II. This Court's review is needed to clarify that Due Process requires that defendants be permitted to assert individualized defenses to the claims asserted in class action suits.

It is well settled that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). In addition, due process does not permit states to void defenses in such a way 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." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (Scalia, J. in chambers) (granting stay of execution of state court's judgment pending resolution of petition for *certiorari*).

Here, the Ninth Circuit denied Wells Fargo the opportunity to present every available defense against the individual class members, including the question of whether they had seen, relied upon, or been injured by Wells Fargo's supposed violation of the UCL. Certifying a class and awarding a staggering equitable restitution award without giving Wells Fargo an opportunity to present defenses to the claims violates the fundamental requirements of due process. For example, even one of the named plaintiffs in this suit admitted that he "did not read or rely on any [Wells Fargo] advertising or marketing material." Pet. App. 274a.

This Court has long limited representative litigation to cases in which the claims can be fully and fairly litigated by a genuinely representative plaintiff. See, e.g., *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853) (emphasizing that where "a few are permitted to sue and defend on behalf of the many by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried" and thus "the interest of all will be properly protected and maintained").

Deviation from traditional individualized litigation is tolerated only "in certain limited circumstances" and only under specific conditions that ensure due process protections for both class members and defendants alike. *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citing *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940)). Accordingly, class actions rest on the assumption that it is unnecessary to bring every claimant into court because the class representatives and their claims are effective proxies for the absent class members and their claims. It is this "class cohesion that legitimizes representative action in the first place." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). For this reason, this Court "has repeatedly held a class representative must be part of the class and 'possess the same interest and *suffer the same injury*' as the class members." *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)) (emphasis added).

This Court has not, however, squarely addressed whether Rule 23 permits the aggregation of individual claims *only* where the named plaintiffs

are truly representative of the absent class members or whether the class action device may be used to excuse the class members' need to each establish the elements of their cause of action. In this case, the District Court and the Ninth Circuit adopted the latter view—a view DRI respectfully argues encroaches on a defendant's due process rights.

The view adopted in this case by the Ninth Circuit and the District Court diverges from this Court's guidance as to the nature of representative actions and the due process requirement that class members have suffered a common injury. The aggregation of a class does not and cannot change the claims asserted or the elements of those claims; it merely avoids the inefficiency of repeatedly deciding the same claims involving the same injury. "[N]o less than traditional joinder (of which it is a species)," classwide adjudication enables the trial of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 599 U.S. 939, 408 (2010) (plurality opinion); see also *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F3d 1159, 1176 (11th Cir. 2010) ("The Rules Enabling Act, 28 U.S.C. § 2072—and due process—prevents the use of class actions from abridging the substantive rights of any party."). A class action is therefore "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980).

As this Court has emphasized, the "Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the

absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The defendant must have the opportunity to defend against all of the class members' claims even though only a few plaintiffs (the class representatives) are present for trial. See, e.g., *Broussard v. Meineke Discount Muffler Shops*, Inc., 155 F.3d 331, 345 (4th Cir. 1998) (Wilkinson, J.) (reversing judgment in favor of class, noting that the defendant "was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation" and that it "is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members.").

In sum, the Ninth Circuit and District Court did exactly what due process forbids, and permitted "individual plaintiffs who could not recover had they sued separately [to] recover only because their claims were aggregated with others' through the procedural device of the class action." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (Scalia, J. in chambers). State and federal courts that permit such actions ignore the Constitution and permit plaintiffs to leverage significant settlements or judgments from defendants such as DRI's members and their clients. DRI respectfully urges this Court to grant certiorari to correct the judgments below in this suit and to bring clarity and uniformity to this area of the law.

CONCLUSION

For the reasons set forth above, *amicus curiae* respectfully requests this Court grant the petition for a writ of certiorari and set the case for plenary review of whether class members may recover monies under a state unfair competition law that they would not have been able to obtain in an individual suit.

Respectfully submitted,

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