No. 11-983

In The

Supreme Court of the United States

TICKETMASTER; TICKETMASTER, LLC;
ENTERTAINMENT PUBLICATIONS, INC.; AND
IAC/INTERACTIVE CORP.,
Petitioners,

v.

STEPHEN C. STEARNS, CRAIG JOHNSON,
JOHN MANCINI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. In federal court, must all members of a putative class – not just the named plaintiff – have Article III standing to sue?

2. Did the Ninth Circuit err in choosing to follow a state's rule that only a named plaintiff need have standing to sue, regardless of the lack of standing of putative class members, disregarding the requirements of Article III standing?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* Atlantic Legal Foundation states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any corporation that is publicly held.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides legal advice, without fee, to scientists, educators, parents, and other individuals, small businesses and trade and civic associations. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science.

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[1] Pursuant to Rule 37.2(a) *amicus* gave notice of intent to file this brief to all parties at least 10 days before the brief was filed and all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has an abiding interest in the application of sound principles of law, and has been an *amicus curiae* or served as counsel for counsel for *amici curiae* in other cases before this Court, including, of particular relevance here, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

INTRODUCTION AND STATEMENT OF THE CASE

We rely on Petitioners' Statement of the Case, and here highlight the salient facts.

Ticketmaster sells tickets to on line. EPI operates a website. Ticketmaster customers, after purchasing tickets on the Ticketmaster website, and being advised that their order was complete, were offered the option of obtaining a discount on future ticket purchases. To obtain the discount, the customer had to click a button that would transfer them to the EPI site, where they were informed that the ticket discount was available only if they enrolled in an "Entertainment Rewards" program, for which a monthly fee would be charged to the credit card they used for the ticket purchase, after an initial free trial period.

The underlying substantive claim arose under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 (UCL) (as well as under California's Consumer Legal Remedies Act, Cal.

Civ. Code § 1750, and the federal Electronic Funds Transfer Act, 15U.S.C. § 1693).

The gravamen of the complaint is that customers were deceived into enrolling in the Entertainment Rewards program under the false impression that they were still completing their ticket purchases. Less than 2% of Ticketmaster's customers who were presented with the discount offer actually enrolled in the Entertainment Rewards program, and some of the customers comprising that 2% were not deceived into enrolling, even if they did not ultimately take advantage of the program's benefits.

Appellants sought certification of a class composed of "[a]ll persons in the United States who: (1) made a purchase at Ticketmaster.com between September 27, 2004, and the present . . ., (2) were enrolled in Entertainment Rewards by Ticketmaster passing their credit or debit card information to [EPI], (3) were charged for Entertainment Rewards, and (4) did not print any coupon or apply for any cashback award from Entertainment Rewards. . . ." Plaintiffs claim that the class could comprise over 1,000,000 individuals. *See* Pet.App. 37.

The district court denied class certification as to all claims and all classes.[2] The Ninth Circuit reversed as to the claim under the UCL, holding

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[2] The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1332.

that with respect to the UCL claim that it was bound to follow the decision of the California Supreme Court in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009); in which he state supreme court held that as a matter of California law UCL claims can proceed on a class basis even if some class members were not injured by the defendant's alleged misconduct.[3]

SUMMARY OF ARGUMENT

A significant issue in this case is whether in a class action under Rule 23 all members of the class have to have Article III standing, or whether it is sufficient if only the putative class representative have standing. The Ninth Circuit's decision distorted the purpose of Rule 23, by including in a class people who could not have sued on their own behalf. This Court has not directly nor decisively answered that question. It is an issue that is fundamental to the administration of justice, and this Court should provide a definitive answer.

The answer implied by this Court's recent decision, particularly its decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2548 (2011), is that the "commonality" requirement of Rule 23 means that the plaintiff to demonstrate that the class members have suffered the same injury, that their claims depend upon a common contention

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[3] Only the question of class certification of the California state law UCL claim is involved in this Petition.

which must be of such a nature that it is capable of classwide resolution of an issue that is central to the validity of each one of the claims.

Moreover, the Ninth Circuit's decision below created a direct conflict with a decision of the Eighth Circuit which refused to certify a class due to lack of standing of absent class members, in a case arising under the same California statute at issue here, *see Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010), as well as with the Second Circuit (*Denney v. Deutsche Bank AG*, 443 F.3d 253 (2nd Cir. 2006)) and the Seventh Circuit (*Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006)).

Finally, this Court has recently cautioned that certain class actions may present potential for unwarranted pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Fundamental fairness requires that the federal courts be careful in permitting certification of class actions in which a large percentage of the putative class cannot prove, or even allege, injury in fact, and that federal courts demand that the class representatives bear the burden of showing that all members of the class satisfy Article III standing.

ARGUMENT

I.

THE PETITION SHOULD BE GRANTED TO CLARIFY THAT ARTICLE III STANDING FOR ALL MEMBERS OF A CLASS IS NECESSARY FOR CLASS ACTION TO BE MAINTAINED IN FEDERAL COURT

There are several relevant foundational principles that are well-established in this Court's precedents. Perhaps the prime principle, found in Article III itself, is that federal courts may entertain and adjudicate only "cases" and "controversies." As the Court explained in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded, and the "case or controversy" language restricts the federal judicial power "to the traditional role of the Anglo-American courts." *Arizona Christian School Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1441 (2011), quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 129 S.Ct. 1142, 1148 (2009); *see also*, *e.g. Raines v. Byrd*, 521 U.S. 811 (1997).

The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

> The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin, supra*, at 498. . . .The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

Allen v. Wright, 468 U.S. 737, 750-51 (1984).

The *minimum* constitutional requirements for standing were explained in *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555 (1992):

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court."

> Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." * * * [T]he injury must affect the plaintiff in a personal and individual way.

Id., at 560, n. 1. *See Arizona Christian School Sch. Tuition Org. v. Winn*, *supra*, 131 S.Ct. at 1441-42 (2011).

The requirements of Rule 23(a) are: (1) a class so numerous that joinder is impractical (numerosity); (2) common questions of fact or law (commonality);[fn7] (3) typicality of the representatives (typicality); and (4) that the representatives will adequately protect the class (adequate representation).[fn8] Fed.R.Civ.P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2548 (2011). A representative plaintiff must also satisfy one of the provisions of Rule 23(b). Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The pre-dominance inquiry of Rule 23(b)(3) asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."

Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts," Fed. Rule Civ. P. 1; *see Califano* v. *Yamasaki*, 442 U. S. 682, 699-700, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)." *Shady Grove Orthopedic*

Assocs., P.S. v. Allstate Ins. Co., 130 S.Ct. 1421, 1437 (2010). If Rule 23 answers the question in dispute, it controls, California's law notwithstanding, and "[w]e do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid." (*id.*, citations omitted).[4]

Rule 23 class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. at 700-01, quoted in *Wal-Mart*, 131 S.Ct. 2541, 2550 (2011).

In *Wal-Mart*, this Court concluded that "the Rules Enabling Act [28U.S.C. § 2072(b)] forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right ...", and therefore held that Rule 23 could not be applied to preclude a defendant's ability to present an otherwise available defense. 131 S.Ct. at 2550. As this Court also held in *Wal-Mart*, "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S.Ct. at 2561. One of the

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[4] As the Court in *Shady Grove* wrote, "What matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are "enforced," it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not. *** Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us." 130 S.Ct. 1431, 1442 (citations and internal quotations omitted).

most critical defenses, and one which ensures that a claim meets the threshold requirements of "case or controversy", is that each plaintiff satisfies Article III's constitutional requirements. *See Shady Grove Orthopedic Assocs., P.S. v. Allstate Ins. Co.*, *supra*.

This Court has frequently addressed the standing requirements in the context of class action litigation, with respect to challenges to the standing of putative class representatives, and has taught in numerous cases that a class representative must individually and personally have standing [cites] and cannot "piggyback" on the alleged standing of other members of the putative class [cites]. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent."); *O'Shea v. Littleton*, 414 U.S. 488, 494, 674 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *see also Allee v. Medrano*, 416 U.S. 802 (1974).

Some courts have misinterpreted these cases as holding that so long as the named class representative satisfies the standing requirement, a class can be certified (*see, e.g. McNair v. Synapse Group*, ___ F.3d ___, 2012 WL 695655 (3rd Cir.,

Mar. 6, 2012), but we submit that these cases, do not address the question whether unnamed members of the putative class must also have individual standing.

However, we have found no case in which the Court has directly and definitively ruled on the question presented in this case: Whether, assuming the class representative does have individual standing, all members of the class must have standing. This Court's jurisprudence suggests that the answer to the question is affirmative – that no class that includes persons who do not have individual standing can be certified.

A class action is consistent with Article III jurisdictional limitations "[w]here the district court has jurisdiction over the claim of each individual member of the class" and "Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding." *Califano* 442 U.S. at 701.

Including in a class persons who lack standing would violate the "cohesiveness" requirement of Rule 23. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). A class "must therefore be defined in such a way that anyone within it would have standing." *Id.* at 264, and a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

This conclusion follows, we submit, from this Court's reasoning in *Wal-Mart*:

> The Rule's four requirements – numerosity, commonality, typicality, and adequate representation – "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC,* 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980)).
>
> The crux of this case is commonality – the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2). ***Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury"***, *Falcon, supra,* at 157, 102 S.Ct. 2364. *This does not mean merely that they have all suffered a violation of the same provision of law*. . . .Their claims must depend upon a common contention. . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke *** "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Wal-Mart, 131 S.Ct. 2541, at 2550-51 (emphasis supplied, some internal quotations and citations omitted).

The district court determined that individual issues predominated for purposes of the California UCL Claim because individualized proof of reliance and causation would be required.

The Ninth Circuit reversed, holding that, based on *In re Tobacco II Cases*, 46 Cal.4th 298, 207 P.3d 20,93 Cal.Rptr.3d 559 (Cal. 2009),the UCL "focus[es] on the defendant's conduct, rather than the plaintiffs damages, in service of the statute's larger purpose of protecting the general public against un-scrupulous business practices." *Stearns v. Ticketmaster Corp*., 655 F.3d 1013, 1020. While agreeing that "[n]o doubt a plaintiffs injury must be 'concrete and particularized.' [citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560], the Ninth Circuit found that the "injury here meets both of those requirements. Each alleged class member was relieved of money in the transactions. Moreover, it can hardly be said that the loss is not fairly traceable to the action of the Appellees within the meaning of California substantive law." *Id*. at 1021.

We submit that the Ninth Circuit conflated the procedural requirements of Rule 23 and the requirements of Article III standing with the substantive purpose of the California UCL. Had the action been brought in California state court, the plaintiff class representative might have had standing. Not so, we believe, for purposes of

determining the constitutional power of a federal court to entertain an action, which itself is a prerequisite to class certification. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 332 (1980) ("However, the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.") In effect, the Ninth Circuit used a state statute to create a federal right to bring a class action. Just as "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing," *Raines v. Byrd*, 521 U.S. 811, 820 n3 (1997), neither can the California legislature, nor the California Supreme Court, nor the Ninth Circuit.

Moreover, for prudential reasons, as discussed in Point III, *infra*, this Court should not encourage class action litigation that tilts the playing field against defendants by permitting class action claims on behalf of persons who would not have standing to go forward on their own.[5]

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[5] As noted *supra*, plaintiffs sought certification of a class composed of "[a]ll persons in the United States who: (1) made a purchase at Ticketmaster.com between September 27, 2004, and the present . . ., (2) were enrolled in Entertainment Rewards by Ticketmaster passing their credit or debit card information to [E.I.], (3) were charged for Entertainment Rewards, and (4) did not print any coupon or apply for any cashbook award from Entertainment Rewards. . . ." *Stearns v. Ticketmaster*

(continued...)

This Court should grant *certiorari* in this case to clarify the rule that a class action in federal court, under Rule 23, is appropriate only if all members of the proposed class would have standing to sue in his or her own right and name, to dispel the confusion in the circuits, and resolve the conflict between circuit courts, as discussed in Point II, *infr*a.

II.

THERE IS CONFLICT AMONG THE CIRCUITS

A. There Is Direct Conflict Between the Eight Circuit and the Ninth Circuit

The Eighth Circuit in *Avritt v. ReliaStar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) has recently considered class certification on a UCL claim under Rule 23 in light of *Tobacco II*.

The two Courts of Appeals examined the same issue of standing in a case arising under the same state law and came to opposite conclusions. The Ninth Circuit, as described *supra* relied on

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[5](...continued)
Corp., 655 F.3d 1013, 1018 (9th Cir. 2011). This definition omits a crucial element – that each member of the class was actually deceived by defendants' acts or omissions, and based his or her decision to "click" on the "enroll" button because of the deception. Indeed, the district court and the Ninth Circuit disqualified two of the putative class representatives because they could not show that they were in fact deceived. *Id.* at 1019.

Tobacco II to find adequate standing even for persons who may not have relied on defendants' representations in a Rule 23 class action, the Eighth Circuit held that "to the extent that Tobacco II holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." 615 F.3d at 1034. The Eighth Circuit correctly held that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."*Id*. The Eight Circuit found that *Tobacco II* "diverged from federal jurisprudential principles. . . which we [as a federal court] are bound to follow." *Id*.

A more stark conflict between circuits is difficult to imagine.

B. There is Conflict Among Other Circuits

The Ninth Circuit's decision also conflicts with the Second Circuit's decision in *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2nd Cir. 2006), which held that "no class may be certified that contains members lacking Article III standing" and with the Seventh Circuit's holding in *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) that "Countless members of Oshana's putative class could not show damage, let alone damage proximately caused by Coke's alleged deception" and requiring that each putative class member have standing to bring the case as an individual plaintiff.

In addition to the direct and specific conflict between the Eighth and Ninth Circuits as to the effect of *Tobacco II*, and the conflicts between the Ninth Circuit and other circuits, there is also a conflict between the Second and Third Circuits on the underlying issue whether the standing requirement applies to all members of the proposed class or only to the named class representatives. The Second Circuit has held that a class cannot be certified if it contains any members who lack standing. *Denney*, 443 F.3d at 263-64 (2d Cir. 2006).[6] The Third Circuit has just this month said that so long as "one named plaintiff" satisfies the standing requirement, a class can be certified, citing *Warth v. Seldin*, *supra*, and quoting with approval *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir.2011) that "[s]tanding exists if at least one named plaintiff meets the requirements." *McNair v. Synapse Group*, ___ F.3d ___, 2012 WL 695655 (3rd Cir., Mar. 6, 2012).

The Court should grant *certiorari* to clarify the standing requirement as it relates to class actions.

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[6] The Second Circuit also said, somewhat confusingly, that federal courts "do not require that each member of a class submit evidence of personal standing," *id*. Consistent with *Wal-Mart*, however, a defendant should be permitted to challenge the standing and other class qualifications of any putative class member.

III.

TO PERMIT COURTS TO IGNORE OR DILUTE STANDING REQUIREMENTS FOR CLASS ACTIONS DOES NOT SERVE THE INTERESTS OF JUSTICE

The federal courts in general, and this Court specifically, are experiencing an increasing volume of class litigation. As this Court recently wrote: "In an era of frequent litigation [and] class actions. . . courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1449 (2011).

This is of particular concern because, as a practical matter, the aggregation of individual claims in a class action "turns a $200,000 dispute . . . into a $200 million dispute," creating a "bet-the-company" situation for a defendant that "may induce a substantial settlement even if the [plaintiffs'] position is weak." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001);. *see also, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008). A class action, if certified, "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Advisory Committee Notes to 1998 Amendment to Fed. R. Civ. P. 23(f).[7]

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[7] It matters not that in this case that the "UCL is (continued...)

One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143 (1996); *see also* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 2000 Lab. Law. 415, 416. *See also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.").

This Court has recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*,

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[7](...continued)
equitable in nature; damages cannot be recovered. . . . [p]revailing plaintiffs are generally limited to injunctive relief and restitution," *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011), quoting *In re Tobacco II Cases*, 46 Cal.4th 298, 312. The agglomeration of over one million claims for restitution would be a mighty incentive for a defendant to settle if a class were certified, regardless of the merits of the underlying claims of class members.

550 U.S. 544 (2007). The potential for unwarranted settlement pressure "is a factor that should be weighed in the certification calculus." *Hydrogen Peroxide, supra*.

In view of the fact that certification of a huge class[8] creates immense financial exposure, together with corresponding pressure to settle regardless of the merits of the class claims, this Court should require that no defendant be placed in such a position as a result of a rule that only the named class representatives need have standing to sue.

Class certification is proper only if it protects the rights of all parties, *i.e.*, plaintiffs, defendants, and absent class members. *See Wal-Mart*, 131 S.Ct. at 2550, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Fundamental fairness requires that the federal courts be careful in permitting certification of class actions in which a large percentage of the putative class cannot prove, or even allege, injury in fact, and that federal courts demand that the class representatives bear the burden of showing that

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[8] The district court noted that "Plaintiffs claim that 1,178,775 people have signed up for Entertainment Rewards between September 24, 2004 and March 13, 2008 and have been charged at least once for the Entertainment Rewards program. . . .Plaintiffs assert that 1,094,550 of the people that were enrolled and charged for the service never received any benefit." Pet.App. 37. This is not too much smaller than the proposed class of approximately 1,500,000 in *Wal-Mart*, 131 S.Ct. 2541, 2547 (2011).

all members of the class satisfy Article III standing, and not to some lower standard.

CONCLUSION

For the foregoing reasons, *amicus curiae* Atlantic Legal Foundation requests that the Court grant the petition for *certiorari*.

March 12, 2012

Respectfully submitted,

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