No. 11-983

IN THE

# Supreme Court of the United States

TICKETMASTER; TICKETMASTER, LLC; ENTERTAINMENT PUBLICATIONS, INC., A/K/A ENTERTAINMENT, INC.; IAC/INTERACTIVECORP,

*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 OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI


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## INTEREST OF *AMICUS CURIAE* DRI[1]

*Amicus curiae* DRI – The Voice of the Defense Bar ("DRI") is a 22,500-member international organization of attorneys defending individuals, corporations, insurance carriers and local governments involved in civil litigation. Committed to enhancing the skills, effectiveness, and professionalism of defense lawyers, DRI seeks to address issues germane to defense lawyers and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system fairer and more efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI's members are regularly called upon to defend their clients in class action lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. The Ninth Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to these types of suits as it alters the doctrine of standing to allow the judiciary to resolve disputes of unnamed class members who cannot show an actual injury. Left unreviewed by this Court, the Ninth Circuit's decision, which directly conflicts

1. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed written consent to the filing of *amicus* briefs pursuant to Rule 37. Additionally, *amicus* notified counsel of record for all parties of its intention to file an *amicus* brief, consistent with Rule 37.2(a).

with the Eighth Circuit's decision in *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010), would promote the certification of class action lawsuits comprised largely of non-injured plaintiffs who cannot establish causation. DRI has a strong interest in assuring 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 a maintain a claim themselves. Altering the standing doctrine in the way the Ninth Circuit has done opens the floodgates of litigation well beyond the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

Both the bench and bar need guidance regarding the outer limits of Article III's standing requirement. The current lack of clarity in the law of standing, as exemplified by the conflicting circuit and district court decisions, may lead federal courts to inappropriately exercise power beyond the scope authorized by Article III or erroneously dismiss for lack of jurisdiction cases over which the federal courts have jurisdiction. DRI has a strong interest in assuring that a uniform rule is adopted which maintains the viability of class action suits while safeguarding the constitutionally-mandated requirement to establish standing for everyone on whose behalf a claim is presented for litigation in federal court.

## SUMMARY OF THE ARGUMENT

A useful litigation tool when class members are "united in interest," the class action mechanism results in needless and costly litigation when it grants uninjured persons a day in federal court to which they would not otherwise be entitled. Natasha Dasani, 75 Fordham L. Rev. 165, 167, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23* (October 2006). This is exactly what has occurred in this case. The Ninth Circuit's decision marks a radical departure from the constitutional mandate that all persons presenting a claim for litigation in federal court have an actual "Case" or "Controversy" to invoke the power of the federal courts. U.S. Constitution, Article III, Section 2, Clause 1. Article III forms the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by a procedural rule allowing litigants to combine their claims into a single adjudicatory device known as the class action. Fed. R. Civ. P. 23. But the decision in this case allows one or more members of a putative class to circumvent the standing requirement and rely on standing established by the named plaintiff or plaintiffs. In essence, the Ninth Circuit's decision provides individuals who have suffered no "actual injury" with a "back door" to enter federal courts, a practice of which this Court has expressed its disapproval. *Alle v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring).

Whether the Court will reaffirm that the requirement of standing applies to everyone on whose behalf a claim is presented for litigation in federal court – including those who combine their claims in a class action – or diminish the doctrine of standing well beyond the Framer's intent,

now is the time for this Court to rule on this significant issue. Already, the federal circuits to address this issue have reached inconsistent results. In *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010), the Eighth Circuit held, and DRI submits correctly so, that a "named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." The *Avritt* Court reached this conclusion by looking to the Second and Sixth Circuits, both of whom have recognized the importance of strict adherence to the standing requirement even in the class action setting. *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2nd Cir. 2006). But the Ninth Circuit reached the opposite conclusion. (Pet'r App. 15). The conflicting decisions leave both bench and bar with no clear directive on how to interpret the standing requirement when faced with a proposed class action under Rule 23. This Court should therefore grant review to resolve the disagreement among the circuits and provide guidance on whether a suit brought as a class action under Rule 23 relieves unnamed class members from satisfying Article III's standing requirement.

Failure to address and reverse the Ninth Circuit's decision will not only provide an additional forum for individuals with no actual injury to seek and possibly obtain relief, it will also result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. DRI believes that preserving the right of plaintiffs to adjudicate large claims through the class action vehicle while simultaneously requiring every class member to allege actual injury will safeguard the constitutionally-derived balance of powers between and among the three branches of government.

## ARGUMENT

**This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The Actual Injury Requirement Of Article III, Applied In The Context Of A Class Action Under Fed. R. Civ. P. 23, Requires All Members Of A Proposed Class To Satisfy The Constitutional Standing Requirement.**

### A. The standing doctrine, which is essential to maintaining the equilibrium between the separate but overlapping branches of government embodied in our federal Constitution, applies equally to Fed. R. Civ. P. 23 class actions as to all other suits brought in federal court.

Standing, a threshold requirement to any suit, originated from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." U.S. Constitution, art III, § 2; *Hein v. Freedom From Religions Foundation, Inc.*, 551 U.S. 587, 598 (2007); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan,*

*supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts must therefore satisfy the threshold standing requirement imposed by Article III. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). That means that a plaintiff must demonstrate "a personal stake in the outcome" in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. *Id.* at 101. Under such an approach, abstract injury is not enough. *Id.* A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Id.* at 102. The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services*, *supra*, at 180-81.

The requirement of standing serves as a means of resisting judicial intrusion into the operations of the other branches of government. The standing doctrine is a critical element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

"The Article III standing requirements apply equally to class actions." *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005), citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Class actions, governed by Federal Rule of Civil Procedure 23, will be certified only if the party seeking such certification demonstrates that

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R Civ. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Additional requirements, of which the proposed class must satisfy at least one of the three, are listed in Rule 23(b). *Wal-Mart Stores*, *supra*. While Rule 23 class certification issues should in rare instances be addressed before standing, a court must nevertheless be "mindful that [Rule 23's] requirements must be interpreted in keeping with Article III constraints...." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999), quoting *Amchem Products*, *Inc. v. Windsor*, 521 U.S. 591, 612-613 (1997). This has led the federal circuits to affirm a district court's decision that the representative's claims were atypical where several members of the proposed class could not show injury. See, e.g., *Oshana v. Coca–*

*Cola Co.* 472 F.3d 506, 514–515 (7th Cir. 2006). In short, "[s]tanding cannot be acquired through the back door of a class action." *Allee*, 416 U.S. at 829.[2]

The Second Circuit has explained, that, while it does not require that each member of a class submit evidence of personal standing, "[a]t the same time, no class may be certified that contains members lacking Article III standing. The class must therefore be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) (citations omitted). Several district courts have relied on *Denney*. See *Tartt v. Wilson County*, Tenn., 3:09-01179, 2012 WL 208943 (M.D. Tenn. Jan. 24, 2012), *Dykes v. Dudek*, 4:11CV116/RS-WCS, 2011 WL 4904407 (N.D. Fla. Oct. 14, 2011), *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419 (D. Me. 2010), *Allen v. Holiday Universal*, 249 F.R.D. 166, 171 (E.D. Pa. 2008). And the Ninth Circuit itself inexplicably cited *Denny, supra*, with approval in *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594-95 (9th Cir. 2012), when it stated that "[n]o class may be certified that contains members lacking Article III standing."

When a court encroaches on Article III's standing requirement by certifying a class where one or more class members do not have actual injury, on the theory that the named plaintiff's standing suffices as standing

2. In addition to Article III requirements, this Court recently reiterated that the commonality requirement of Rule 23(a), "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" *Wal-Mart Stores,* 131 S. Ct. at 2551, citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

for the entire class, it strips Article III of its power. That is exactly what the Ninth Circuit did in this case when it held that standing is demonstrated if at least one named plaintiff meets the requirement. (Pet'r App. 15). This holding not only undermines respect for the law, and particularly, our federal Constitution, it also renders it difficult for DRI's members to adequately represent their clients' interests.

### B. The Court's review is needed to resolve a circuit conflict created by the Ninth Circuit's decision and engender uniformity on the issue of whether all members of a proposed class, not just the named plaintiff, must individually satisfy the standing requirement.

This Court has long sought to achieve uniform pronouncements of federal law. "Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmakng*, 73 Tex. L. Rev. 1, 38 (November 1994). Uniformity serves several "laudable goals," including "ensuring the predictability of legal obligations," garnering respect for judicial authority, and ensuring that "similarly situated litigants are treated equally." *Id.* at 38-39. Given the desire for uniformity among the circuits, a decision that "conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue" is deemed, for purposes of rehearing en banc, a decision of "exceptional importance" requiring review. See Fed. R. Civ. P. 35(b)(1). And many appellate circuits,

including the Ninth Circuit, have expressly recognized the importance of ruling consistent with sister circuits on issues of federal law, viewing deviations from past decisions a last resort to be avoided. See, e.g., *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); *Alternative Sys. Concepts, Inc. v. Synopsys Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3rd Cir. 1997).

The question raised in this case – whether all members of a proposed class action must have standing to sue – is an issue of "exceptional importance" this Court should address. The inconsistency created by the Ninth Circuit's decision leaves DRI's members unable to predict accurately for their clients the outcome of class certification requests. Prior to this decision, the Eighth Circuit held that the constitutional requirement of standing applies to all members of a putative class. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010). The class seeking to be certified in *Avritt* alleged violations of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200, arising out of the purchase of fixed deterred retirement annuities. *Id.* at 1026. The issue of whether all the class members must establish standing was raised in response to a California Supreme Court decision, *In re Tobacco II Cases (Tobacco II)*, 46 Cal.4th 298, 306 (2009), which held that under the UCL, "standing requirements are applicable only to the class representatives, and not all absent class members."[3] The *Avritt* Court rejected

3. The Court in *Tobacco II* also insisted that "federal case law is clear that the question of standing in class actions

that holding, explaining 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. Indeed, the "irreducible constitutional minimum of standing requires a showing of injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision." *Id.*, citing *Braden v. Wal–Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). Therefore, the *Avritt* Court held, and DRI submits correctly so, that "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Id.*, citing *Sutton*, 419 F.3d at 570 and *Denney*, 443 F.3d at 263–64.

Just over one year later, the Ninth Circuit, faced with the exact same issue, reached the complete opposite conclusion, thus creating a circuit conflict that would quickly infiltrate into the federal district courts. As in *Avritt*, the proposed class in *Stearns v. Ticketmaster* claimed violations of the UCL, among other state and federal statutes. (Pet'r App. 4). But the Ninth Circuit took a completely different reading of *Tobacco II,* Article III, and Rule 23, than the *Avritt* Court, holding that "while Rule 23 does not give the district court broad discretion over certification of class actions, here the [district] court erred when it based its exercise of that discretion on what

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involves the standing of the class representative and not the class members." 46 Cal.4th at 318-319, citing *Clay v. American Tobacco Company,* 188 F.R.D. 483, 490 (S.D.Ill.1999), *In re General Motors Corporation Dex–Cool Products Liability Litigation*, 241 F.R.D. 305, 310 (S.D. Ill. 2007); *Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420, 428 (N.D. Tex. 1979).

turned out to be an inaccurate reading of the California UCL." (Pet'r App. 15-16). The Ninth Circuit did not cite authority from this Court or elsewhere for the proposition that state law should factor into the analysis of standing under Article III. Rather, it merely noted that its own case law "keys on the representative party, not all of the class members, and has done so for many years." (Pet'r App. 15).

Dissention among the central district of California is merely one example of the way in which *Stearns* and *Avritt* will divide the federal courts' approach to standing in the class action context. *Compare O'Shea v. Epson America, Inc.*, No. CV 09-8063 PSG CWX, 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011), *with Bruno v. Quten Research Institute, LLC*, No. SACV 11-00173 DOC EX, 2011 WL 5592880 (C.D. Cal. Nov. 14, 2011). And as many states follow the approach of federal courts when making class certification decisions, the federal circuit conflict will permeate into state courts as well. Victor E. Schwartz, et. al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Leg. 483, 500 (Summer 2000), citing H.R. Rep. No 106.

The unpredictability created by the circuit split makes it difficult for DRI's members to advise their clients on whether to litigate a class action or settle. In addition, the lack of predictability makes it difficult for defense counsel, their clients, or any insurers covering the claim to properly place a value on the case for settlement purposes or to set reserves. This Court has the opportunity to restore uniformity to the nation's courts and clarify the outer limits, if any, of the constitutional standing requirement for unnamed class members before divergence among the

federal courts predominates. Failure to do so will have a devastating impact on the businesses and individuals DRI's members are regularly called upon to defend.

### C. Left to stand, the relaxed standing requirement for class members will encourage needless litigation, dramatically increase costs against businesses and individuals, and encourage forum shopping.

This Court has required careful consideration of the propriety of certifying class actions, most recently in its decision reversing the Ninth Circuit's decision to certify the largest employment class action in history. *Wal-Mart Stores,* 131 S.Ct. at 2556-57. Although this Court has recognized that class actions can be a useful tool to protect certain public rights, DRI believes that when used as a "back door" for plaintiffs who lack standing to bring suits on their own behalf, they pose a great potential for abuse by non-injured plaintiffs seeking undeserved remuneration. Stated simply, allowing uninjured class members to rely on standing established by the named class plaintiff(s) runs afoul of the fundamental requirement that class members and the class representative suffer the same injury. *Id.* at 2550. It is a matter of simple logic that where one suffers injury and the other does not, there is no "same injury."

Relaxation of the standing requirement for unnamed class members will broaden the composition of a class to unfounded proportions. This, in turn, will increase the expense of defending a class action, possibly to the point of no return. Even before the Ninth Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering

under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). But with the new lax standing requirement announced by the Ninth Circuit, defendants may be forced to make payouts to hundreds or even thousands of additional – and undeserving – class members.

As Seventh Circuit Judge Richard Posner aptly observed, class actions of this magnitude place defendants in the untenable position of betting the company on the outcome of a trial. Defendants, unwilling to roll the dice, are placed under intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483 , 489-90 (updated 8/5/96). The Ninth Circuit's holding in this case, if left uncorrected by this Court, will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

The false leverage created by large classes of individuals with no standing further diminishes the likelihood of arriving at a fair settlement. The Ninth Circuit's decision gives an inordinate amount of power in upfront settlement discussions to plaintiffs pursuing claims on behalf of absent class members who, ultimately, should not be entitled to any recovery. "Such leverage can

essentially force corporate defendants to pay ransom…" S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010).

Equally troubling, DRI's members will have no way to predict whether their clients will fall victim to these ills. Certainly, the Ninth Circuit's relaxation of class certification requirements will encourage potential class members to forum-shop, a practice looked upon with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guaranty Nat. Bank, Jackson, Miss. V. Roper*, 445 U.S. 326 (1980). But beyond that, because of confusion in the Eighth and Ninth Circuits as well in the district courts, *O'Shea*, *supra*, *Bruno*, *supra*, DRI's members and clients have no way of knowing what standard a particular court will apply. DRI therefore has a strong interest in assuring that this Court adopts a clear standing rule that is capable of consistent application across the country.

The doctrine of standing provides the key component to the balance of governmental powers by assuring that the judiciary's jurisdiction is limited to "cases" or "controversies" as originally contemplated by the Framers of our Constitution. The Ninth Circuit's decision disrupts this careful balance by permitting unnamed class members to recover without actual injury. It is imperative that this Court review the Ninth Circuit's decision and adopt a rule that preserves the careful balance. And this Court can do so by upholding the viability of the Rule 23 class action in appropriate situations, but declining to allow litigants to

use the Rule in a manner that circumvents constitutional strictures.

## CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully urges the Court to grant Ticketmaster Corporation's Petition for Writ of Certiorari.

Respectfully submitted,

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