

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

SUPPLEMENTAL BRIEF FOR PETITIONER

Sonya D. Winner
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
(415) 591-6000

Robert A. Long, Jr.
Counsel of Record
David M. Zions
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

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Counsel for Petitioner

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Wells Fargo Bank, N.A. files this supplemental brief to address the Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo*, __ S. Ct. __, No. 14-1146 (Mar. 22, 2016). The Court's opinion in *Tyson Foods* recognized that the ability of uninjured individuals to recover as part of a class action is a question of "great importance," but concluded that the issue was not "fairly presented." Slip Op. 16. This case squarely presents that question of "great importance" and provides an ideal vehicle for resolving it.

1. Respondents in this case alleged that Petitioner made statements that misled checking account customers as to the order in which their transactions would be posted to their bank accounts. The court certified a plaintiff class and awarded Respondents \$203 million in restitution for overdraft fees incurred because of those statements. It did so even though Respondents never presented individual or class-wide evidence establishing that, as a result of the misrepresentations, absent class members incurred overdraft fees that they otherwise would have avoided. To the contrary, the district court's findings made clear that most class members would have incurred exactly the same fees in the absence of any misrepresentations. *See* Pet. 23.

This case therefore presents the fundamental question that was not fairly presented in *Tyson Foods*: whether a person who would be entitled to no relief in an individual action can receive a monetary

award as an absent member of a class action. If class members had brought individual actions, it is clear that they could not have secured relief on the same evidentiary record. See Cal. Bus. & Prof. Code § 17204 (individual plaintiff must show “injury in fact” “as a result of” unfair competition). The Ninth Circuit nevertheless affirmed the award on the basis of a California class action rule that authorizes absent class members to recover without showing reliance or causation. Pet App. 43a; see also Resp. *Gutierrez II* C.A. Br. 56 (arguing that “absent class members were not required to prove actual reliance or injury”).¹

2. This question was raised but ultimately not decided in *Tyson Foods*. The petitioner in *Tyson Foods* originally asked the Court to decide “whether a class may be certified if it contains ‘members who were not injured and have no legal right to any damages.’” Slip Op. 15. In its merits briefing, however, the petitioner presented a “new argument”: “‘where class plaintiffs cannot offer’ proof that all class members are injured, ‘they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure

¹ After briefing on the certiorari petition was completed, the Ninth Circuit reiterated its view that “a court need not make individual determinations regarding entitlement to restitution. Instead, restitution is available on a classwide basis once the class representative makes the threshold showing of liability” under California’s Unfair Competition Law. *Pulaski v. Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986 (9th Cir. 2015). But see Pet. 14-16 (explaining the Eighth Circuit’s directly conflicting approach as a matter of federal law).

that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages.” *Id.* at 16.

This Court agreed that “the question whether uninjured class members may recover is one of great importance.” *Id.* It concluded, however, that it was not “fairly presented.” *Id.* The damages award, issued by the jury as a general verdict, “ha[d] not yet been disbursed,” and “the record [did not] indicate how it will be disbursed.” *Id.* While the respondents had suggested “ways of distributing the award to only those individuals who” had a right of recovery, the Court considered it “premature” to address the issue. *Id.* at 17.

Unlike in *Tyson Foods*, the Petitioner in this case has squarely presented *both* the question of class certification and class member recovery where many class members have no individual right to relief. *See* Pet. i (“Whether a federal court may certify a class under Federal Rule of Civil Procedure 23, *and award monetary relief to all class members*, even though the class includes individuals who were not harmed by the challenged conduct and could not have prevailed in an individual action.” (emphasis added)).

There is also no uncertainty in this case, unlike in *Tyson Foods*, about how the \$203 million award will be disbursed. As Respondents have emphasized, the award was calculated “on an account-by-account basis.” Resp. Br. 25. Thus, every class member will receive a refund of overdraft charges they were personally assessed based on a particular

posting order. They will receive this monetary recovery even though there is no evidence that individual class members relied on any misrepresentations, or that they incurred these fees because of any misrepresentations.

This case is therefore an ideal vehicle to decide whether uninjured class members can receive monetary relief from an Article III court by virtue of inclusion in a class action. Because class actions raising these issues typically settle, the Court will rarely have the opportunity to review a final judgment that awards relief to absent class members irrespective of individual injury. Having recognized that this issue is one of great importance, the Court should take this opportunity to resolve it.

3. *Tyson Foods'* discussion of representative evidence provides an additional reason to grant review in this case. The Court recognized that for class-wide evidence to be appropriate in inferring an individual's entitlement to relief, the same evidence would have to be "relevant in proving a plaintiff's individual claim" in a non-class action. Slip Op. 10; *see also id.* at 11 ("If the [statistical] sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action."). By contrast, if absent class members "could [not] have prevailed in an individual suit by relying on depositions detailing the ways in which other" individuals were treated, they cannot prevail in a class action on the basis of that evidence. *Id.* at 14.

It is undisputed that if a member of this class action had brought an individual action, she would have been required to prove reliance, causation, and injury under section 17204 of the California code. *See* Resp. Br. 14. Respondents have never suggested that the evidence in the record satisfies this requirement for every class member. Because the evidence in this case would not have been sufficient for these absent class members to prevail in an individual action, *Tyson Foods* makes clear that they cannot recover in a class action.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the Court should vacate the decision below, and remand for further consideration in light of *Tyson Foods*.²

Respectfully submitted,

Sonya D. Winner
COVINGTON & BURLING
LLP
One Front Street
San Francisco, CA 94111
(415) 591-6000

Robert A. Long, Jr.
Counsel of Record
David M. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

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Counsel for Petitioner

² The Court may also wish to continue to hold the Petition pending disposition of *Spokeo, Inc. v. Robins*, No. 13-1339. See Pet. 21 n.3.