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. Zionts
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
rlong@cov.com
(202) 662-6000

*Counsel for Petitioner*


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## 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 recent decision of the U.S. Court of Appeals for the Third Circuit in *Neale v. Volvo Cars of North America, LLC*, __ F.3d __, No. 14-1540, 2015 WL 4466919 (July 22, 2015). *Neale* "squarely hold[s] that unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing." *Id.* at *5.

This decision deepens the circuit split identified by Petitioner. *See* Pet. 14-18. It also offers a detailed argument in support of the view that absent class members need not have suffered Article III injury, based on reasoning that is starkly at odds with this Court's precedents. Finally, the Third Circuit's decision expressly notes this Court's grant of *certiorari* in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, but recognizes that *Tyson Foods* may not resolve this important question. *Neale* thus confirms both the growing need to settle the role that uninjured individuals may play in a class action, and the prudence of granting *certiorari* in this case as a complement to *Tyson Foods*.

1. *Neale* confirms that the circuits are divided on whether uninjured class members may participate in a class action. In addition to "squarely hold[ing]" that in the Third Circuit, absent class members need not have suffered Article III injury, *Neale* recognizes that the First, Fifth, Ninth, and Tenth Circuits agree. 2015 WL at *5, *10 n.5 (citing *In re Nexium*

*Antitrust Litig.*, 777 F.3d 9, 25, 30-31 (1st Cir. 2015); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009)). The court correctly understood the Ninth Circuit's position in the circuit split. While Respondents appear to suggest that *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) modifies the Ninth Circuit's position, *see* Resp. Br. 21-22, the Third Circuit explains that *Mazza* "did not expressly overrule the Ninth Circuit's previous declaration that 'our law keys on the representative party, not all of the class members.'" *Neale*, 2015 WL 4466919, at *9 (quoting *Stearns*, 655 F.3d at 1020-21); *accord* Reply Br. 11 n.5.

The Third Circuit expressly declined "to adopt the approach taken by some of our sister courts that require all class members to possess standing." *Id.* at *8. It acknowledged the Second Circuit's holding that "'no class may be certified that contains members lacking Article III standing.'" *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006)). The court observed that "[t]he Second Circuit has not expanded upon this declaration," *id.*, but it did not question that *Denney* is the law of the Second Circuit. The court further explained that the Eighth Circuit "held that a California law that permitted a single injured plaintiff to bring a class action on behalf of a group of uninjured individuals was 'inconsistent with the doctrine of standing as applied by federal courts.'" *Id.* at *9 (quoting *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th

Cir. 2010)). Respondents view that holding as "dicta," Resp. Br. 21, a characterization that *Neale* rerefutes. Finally, the Third Circuit noted the D.C. Circuit's requirement that "'*all* class members were in fact injured.'" *Neale*, 2015 WL 4466919, at *9 (quoting *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013)).[1]

*Neale* thus confirms and deepens a broad circuit split over whether absent class members must have standing sufficient to give federal courts jurisdiction over their claims, with five circuits now answering in the negative, and three circuits answering in the affirmative.

2. *Neale* is also notable for the substance of its analysis. The Third Circuit's argument in support of its holding that absent class members need not have standing rests on the striking notion that "the class action device treats individuals falling within a class definition as members of a group *rather than as legally distinct persons*." *Neale*, 2015 WL 4466919, at *7 (emphasis added). As Petitioner has explained, this Court treats class actions as a procedural device

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[1] The Third Circuit suggested that it was "not clear to us whether the Eighth Circuit's standing analysis rests on Article III or Rule 23," and similarly noted that the D.C. Circuit did "not say[]" whether its approach "was required pursuant to Article III." *Neale*, 2015 WL 4466979, at *9. It did not explain why this distinction between Article III and Rule 23 makes any difference, particularly in light of this Court's instruction that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997).

for aggregating claims, without enlarging any individual's substantive right to judicial relief. Pet. 18-25. The Third Circuit's conception of class actions erasing "legally distinct" individuals in favor of "group" status is sharply at odds with the decisions of this Court.

*Neale* also neatly illustrates the way courts have avoided grappling with the consequences of their approach to uninjured class members. Proposing to "[f]ocus[] on certification questions," the Third Circuit offered vague assurances that a "rigorous analysis" under Rule 23 would suffice to keep class actions within their proper bounds. *Neale*, 2015 WL 4466919, at *11. Yet in practice that is not what happens, as the present case illustrates. Even though the district court's findings pointed directly to the conclusion that many class members were not injured (because they would have incurred exactly the same fees irrespective of the challenged conduct), the court nonetheless allowed them to recover more than $200 million in "restitution." *See* Pet. 22-24, 30; *see also, e.g.*, *Nexium*, 777 F.3d at 32-35 (Kayatta, J., dissenting) (criticizing certification of a class that includes "as many as 24,000 consumers" who suffered no injury, with no explanation for how the defendants would be able to "exercise their acknowledged right to challenge individual damage claims at trial" (internal quotation marks omitted)).

3. Finally, *Neale* confirms the prudence of granting *certiorari* in this case as a complement to *Tyson Foods*. Recognizing the importance of the issue, the Third Circuit pointed out that "[t]he

Supreme Court has yet to comment on what Article III requires of putative, unnamed class members during a Rule 23 motion for class certification." *Neale*, 2015 WL 4466919, at *3. It went on to note, however, "[t]he second question presented" in *Tyson Foods*, concluding that "[t]he Supreme Court *may*, therefore, answer this question during its October 2015 term." *Id.* at *3 n.2 (emphasis added).

As Petitioner has explained and the Third Circuit appears to have understood, there are various reasons why *Tyson Foods* might not definitively resolve the circuit split over the treatment of uninjured class members. Reply Br. 12. The Court should ensure not just that it "may" decide this important question, but that it is able to do so however it decides *Tyson Foods*.[2]

[2] The Third Circuit remanded *Neale* to the district court for additional consideration of the class certification motion, so that case is unlikely to reach this Court in the near future.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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
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