No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

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

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a person who in the course of buying goods or services has been subjected to a violation of a legal duty, but has sustained no tangible, emotional, or economic harm as a result, has standing to sue under Article III, § 2.

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BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Together the *amici curiae* represent the manufacturer or distributor of almost every automobile sold in the United States.[1]

The Association of Global Automakers, formerly known as the Association of International Automobile Manufacturers, is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 15 international motor vehicle manufacturers including: American Honda Motor Co., Inc.; American Suzuki Motor Corp.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, LLC; Kia Motors America, Inc.; Mahindra & Mahindra Ltd.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Mitsubishi Motors North America; Nissan North America; Peugeot Motors of America; Subaru of America, Inc.; and Toyota Motor North America, Inc. Global Automakers' mission is to foster an open and competitive automotive marketplace in the United States that works to improve vehicle safety, encourage technological innovation, and promote responsible environ-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters evidencing blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

mental practices. Its members account for about 40 percent of the motor vehicles built and sold in America today.

The Alliance of Automobile Manufacturers, Inc. is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The members of the Alliance are BMW of North America, LLC; Chrysler Group LLC; Ford Motor Company; General Motors Corporation; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motor Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc; Volkswagen of America, Inc.; and Volvo Cars North America, LLC.

The *amici* and their members have a strong interest in the proper delineation of the standing requirements that derive from the Cases or Controversies Clause of Article III. Under the Ninth Circuit's holding in the decision below, standing is whatever Congress (or a State legislature) says it is: whenever Congress (and, presumably, the States) may declare that a person who is passively exposed to an abstract violation of law is entitled to a monetary recovery, that person also has sustained a sufficiently concrete and particularized injury to have standing to sue in the federal courts. Because removing injury from the equation also removes causation, the holding below not only reduces the three-part standing inquiry into a single-factor test, but also makes class certification much more likely. If the only issue that must be proved is an abstract violation of a legal duty, re-

gardless of its widely varying or entirely absent effects on individual class members, commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) would collapse into a single-issue inquiry.

Like petitioners here, the members of the *amici* count their customers in the thousands or even millions. The *amici* are subject to a wide variety of technical legal duties with respect to the marketing and service of motor vehicles, and the financing affiliates of some members are subject to technical requirements regarding consumer credit that resemble those at issue here.

If, for practical purposes, injury and therefore causation were no longer required elements for standing in the federal courts, the members of the *amici* may face class actions with members ranging from the tens of thousands to the millions, seeking annihilating damages for conduct that caused concrete and particularized harm to a handful of customers or none at all. That result would be as senseless and economically harmful as it is unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

The significance of the standing question before the Court extends far beyond the Real Estate Settlement Procedures Act (RESPA). RESPA and the state regulation of the services at issue help sharpen the focus: it is clear that the respondent was not, and could not have been, injured in any perceptible sense by the technical RESPA violation she asserts. Because the State set the price of the fungible services she bought, she indisputably received everything she paid for. And the remedial provisions of RES-

PA—which provide a full (and then trebled) refund under a one-way rescission theory under which the plaintiff keeps the consideration provided by the defendant, but the defendant loses the consideration *it* received three times over—heighten the economic significance of the standing issue, because a class might be (and in fact was ordered to be) certified without need to consider whether causation and actual injury could be established by class-wide common proof.

This case reflects a much wider trend, however, and one that has ensnared many members of the *amici* in high-stakes litigation against plaintiffs and putative class members who have sustained no harm. In those cases, as here, named plaintiffs propose a class consisting of all buyers of a product or service and assert a theory of liability that requires them to prove only their purchases and the defendant's conduct`. The theory is designed to obviate the need to show, as a precondition to certifying a class, that unified proof common to all class members can establish the existence and nature of a concrete and particularized injury to each class member, and that this injury was caused by a violation of legal duty by the defendant that provides a common ground for relief.

This theory of injury through abstract violation overturns fundamental principles of Anglo-American jurisprudence as well as constitutional standing doctrine. While the maxim *de minimis non curat lex* has fallen into disuse, the theory asserted here permits the judiciary to intervene when no one has been (or imminently will be) harmed at all. Presenting the antithesis of "no harm, no foul," the standing prin-

ciples embraced below make every legal misstep into a compensable injury.

Because a proponent of class certification need not demonstrate a means of establishing an abstract or nonexistent injury through common proof—as there is nothing to prove—the net result is drastic and absurd: the lesser the injury, the broader the class, the greater the damages exposure, and the larger the settlement. And that pay-off is deadweight economic loss, a wealth transfer that wildly over-compensates for a nonexistent injury and overdeters insubstantial regulatory violations, leading at best to wasteful expenditures aimed at punctilious compliance with trivial requirements.

Like others who provide goods or services to thousands or millions of consumers, the members of the *amici* are frequent targets of efforts to certify all-buyers (or all-owners) classes on no-injury theories quite similar to the class proposed in this case. Many of the actions asserted against the members of the *amici* involve representative plaintiffs who asserted individual injuries—a vehicle part claimed to have fallen short of warranty standards, or a representation that misled (or was misunderstood by) the named plaintiffs before their purchases.

Yet even when the proposed class representatives have alleged an injury to themselves, they do not seek to represent a class consisting only of those who also were injured. Rather, the named plaintiffs assert that the class properly consists of everyone who purchased the same vehicle, even those whose parts long outlasted the warranty period without incident, or who were not exposed to the challenged communication, did not understand it to mean what

a named plaintiff says it meant, or simply did not care about whatever may have been misrepresented.

Thus, if 3% of a model year's transmissions grind upon shifting, and the manufacturer (or the plaintiff's expert) later identifies a design or manufacturing change that could have reduced the failure rate, plaintiffs assert that every single buyer received a "defective" transmission because it was prone to problems even if they never manifested. Under this theory, a transmission that functioned normally throughout its warranty period or useful life entitles every buyer either to a payment for the vehicle's reduced value or to a recall and replacement at the manufacturer's expense.

Or if the plaintiff asserts an idiosyncratic view of an advertisement—believing, perhaps, that a safety feature absolved the driver from paying attention to certain road conditions—the plaintiff then maintains that a class can be certified, to include not only of buyers who shared that misunderstanding, but all who bought that safety system. All buyers, the theory goes, are entitled to measure whether the advertisement was misleading under a common, objective standard, and then collect some measure of damages or restitution—whether or not the absent class members saw the same advertisement, interpreted it the way the representative plaintiff did, or were motivated at all in deciding whether to purchase or what price to pay.

In the present case, of course, the asserted violation of legal duty did not harm even the representative plaintiff under any definition of "injury" that is not perfectly circular. Similar situations have arisen in litigation against automobile and other manufacturers. The best-known example is the litigation

against Toyota claiming that the unintended acceleration phenomenon that was initially reported to be involved in several accidents represents a violation of legal duty even as to the millions of buyers who have never experienced the phenomenon. Indeed, those claims have extended to buyers whose vehicles have been recalled and retrofitted in ways that, by all appearances, will prevent further instances of any unintended acceleration that may have occurred. The proposed classes *exclude* the handful of persons claiming to have been injured by unintended acceleration, and the classes are not limited to persons who claim to have experienced sudden unintended acceleration but were not involved in a collision. Rather, the proposed classes consist of persons whose vehicles never accelerated unintentionally and almost certainly never will.

The implications of such theories—which affirmance in this case would fuel—are staggering. Class certification would become nearly automatic if standing principles do not limit the members of a class to those who can assert actual injury from the alleged wrong. In that event, class certification could proceed without the need to show that common proof can establish both the fact of injury and causation of that injury by the allegedly unlawful conduct. Cases of formerly limited scope would present the possibility of annihilating damages. Every problem that affects a few, a few dozen or a few hundred vehicles—or alleged "violations" that have no tangible effects on any vehicles—would become compensable for thousands or millions of buyers.

This type of claim presents significant deadweight loss issues when each uninjured buyer stands to recover twenty dollars. But the exposure per buy-

er can reach the hundreds or thousands of dollars—as is easily the case for alleged issues with the more expensive systems in a vehicle, or when statutory damages are available. The present case appears to involve hundreds of millions, if not billions, in potential liability to persons who got everything they paid for. Similar, potentially annihilating exposure could arise in the lawsuits alleging violations relating to the manufacture, advertising, or sale of motor vehicles.

This Court should reaffirm the principle that only those actually injured in a concrete and particularized way may press their claims in federal court, whether as individuals or when swept into a certified class. The judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. Persons Who Are Unaffected By A Violation Of Legal Duty Lack Standing To Sue.

"Article III standing * * * enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quoting *Elk Grove Unified School Dist.* v. *Newdow,* 542 U.S. 1, 11 (2004)). Standing has three familiar components: "First, the plaintiff must have suffered an injury-in-fact * * * . Second, there must be a causal connection between the injury and the conduct complained of * * * . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citations omitted).

It long has been "settled that 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 n.3 (1997) (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979)). Rather, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Institute*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009).

The contrary principle would make no sense in a constitutional system of government. A constitutional limitation that can be conclusively satisfied by a legislative *ipse dixit* is no limit at all. The Ninth Circuit nonetheless equated the existence of a statutory remedy with the constitutional requirement of standing, even if—as is the case here—there is no possibility that a particular plaintiff (or any potential class member) was harmed by the allegedly unlawful conduct.

As this Court recently reiterated, however, injury-in-fact requires not only "an invasion of a legally protected interest," but one that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" *Arizona Christian*, 131 S. Ct. at 1442 (quoting *Lujan,* 504 U.S. at 560). The decision below does away with *both* limiting factors, however, declaring that the mere invasion of *any* legally protected interest is enough so long as a remedy is available or can be devised: the remedy *ipso facto* equates with injury-in-fact.

In excusing a plaintiff from showing an *actual* injury-in-fact, the decision below necessarily excuses a showing of causation as well. Where the only injury arises from a violation of legal duty that had no ef-

fect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442.

As a consequence, the three-part test of Article III standing—injury-in-fact, causation, and redressability—would collapse into the single question of redressability. Once a recognized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone identified in a statute would have standing. That could be any buyer of a vehicle that had manifested a flaw only in the vehicles of a small subset of other buyers. Or it could be anyone who bought a vehicle that was advertised in a misleading way whether or not the buyer saw the ad, misunderstood the vehicle's characteristics as a result, or was motivated by that misunderstanding.

If the decision below stands, the mere violation of the legal duty would be sufficient for standing so long as the buyer had any attenuated connection to the violation. That is, the buyer's interest in a perfectly lawful transaction would be enough.

In determining whether the invasion of particular legal interests amounts to injury-in-fact, however, the Court has held that "the interest in seeing the law obeyed" is categorically insufficient. *FEC* v. *Akins*, 524 U.S. 11, 24 (1998). To the contrary, "[a] plaintiff must always have suffered a distinct and palpable injury to *himself*." *Gladstone*, 441 U.S. at 100 (emphasis added). No plaintiff can enforce every legal obligation that involves her in some way; she can "enforce" only those "specific legal obligations whose violation works a direct harm." *Allen* v. *Wright*, 468 U.S. 737, 761 (1984). That is, a plaintiff

has standing to sue an adjacent driver who sideswipes her, but not to sue the driver who is merely in her field of view when he makes an unsafe lane change.

A government (or court) cannot create Article III injury simply by declaring that an injury occurs whenever someone is exposed to some kind of statutory violation or other legal duty. A contrary holding would significantly alter the role of the federal courts and thus unsettle the constitutional balance between the three branches of government. The judiciary is the "least dangerous branch" precisely because it cannot intrude generally into the affairs of citizens or their government, much less at the instigation of private citizens who have suffered no harm from the conduct about which they wish to complain. The Federalist No. 78, at 402 (George W. Carey & James McClellan, eds., 2001) (Alexander Hamilton). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so" (*Cuno*, 547 U.S. at 341)—much less transferring huge sums from one private party to others on the basis of abstract violations that caused no tangible harm. Such judicial arrogations of power disregard "the proper—and properly limited—role of the courts in a democratic society." *Summers*, 129 S. Ct. at 1148 (quoting *Warth* v. *Seldin,* 422 U.S. 490, 498 (1975)).

If the Ninth Circuit were correct, Congress (not to mention state courts and legislatures) could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. The existence of a remedy would bootstrap into standing to pursue the remedy in federal court, because there would be no requirement of an actual

injury or a causal connection between that nonexistent injury and the defendant's violation of a legal duty. That would shunt aside this Court's standing jurisprudence in a substantial category of cases, a category prospectively limited in size only by legislative and judicial ingenuity. That is not what the Framers intended, nor what the Constitution allows.

II. Permitting Standing To Rest On A Harmless Breach of Legal Duty Would Have Severe, Deleterious Consequences In Class Action Litigation.

The constitutional disarray that affirmance would cause is sufficient to show that reversal is warranted. All doubt should be dispelled, however, by the broader consequences of a holding that would permit Congress to establish Article III standing by providing a remedy to persons who sustained no concrete harm from a violation of statutory or other legal duty.

A. Affirmance Would Entrench And Propagate The Novel Device Of The No-Injury Class Action By Excusing Common Proof—Or Any Proof—Of A Concrete, Particularized Injury-In-Fact And Its Causation.

1. A decision finding that all persons coming within the scope of a remedial statute necessarily have Article III standing could transform a current anomaly of class action practice into the norm. The *amici* and their members (among other mass-market businesses) increasingly are subject to class action claims purporting to encompass all buyers of a product and asserting, not that every buyer was misled by an advertisement or received a part that failed,

but that the value that each buyer received was somehow diminished by the fact that others were misled or received parts that malfunctioned.

The members of the all-buyers class, the plaintiffs in these cases claim, have in common the abstract injury with no manifestation (and certainly none that the plaintiffs care to prove). The theory is that a part that failed in 10% or 5% or 2% or even 0.01% of the vehicles of particular model years was also substandard as to the vast majority of vehicles where the part functioned without incident. Under that theory, no further injury need be proved so long as an expert can estimate the diminished value of the vehicles that functioned adequately through the warranty or other relevant period.

That is, buying the product in itself is injury-in-fact—and the only "injury" requiring proof—even if the product performs to expectations. The *Toyota Motor Corp. Unintended Acceleration Litigation*, ___ F. Supp. 2d ___, 2011 WL 1840555 (C.D. Cal. May 13, 2011), provides a prominent example of this approach. In that case, the plaintiffs assert that their vehicles lost value because of the publicity surrounding accidents involving others, the National Highway Traffic Safety Administration (NHTSA) findings and recalls, and the like, or that the plaintiffs (who do not intend to prove any defect in their own vehicles) would not have bought their cars if they had known about the problem of sudden unintended acceleration. The district court held that the "economic loss injury flows from the plausibly alleged defect." *Id.* at *10. That is, a defect that manifested in other vehicles can be equated with injury-in-fact and causation for vehicles where the claimed defect never appeared.

An analogous theory has been advanced as to false advertising claims. Plaintiffs may assert that they were misled by statements in advertisements, labels, web sites, or sales brochures. They sometimes advance a theory of such striking idiosyncrasy that it would be impossible to prove that a significant number of buyers—much less all of them—either understood the statement in the way the plaintiffs did, or treated the information as material.[2] These cases often rely on state consumer protection law to use an objective "reasonable consumer" standard not only to establish whether statements were unlawfully deceptive or misleading, but also whether individual plaintiffs, including absent class members, relied on the misstatements and were actually injured. See *Yokoyama* v. *Midland National Life Ins. Co.*, 594 F.3d 1087, 1092 (9th Cir. 2010) (construing Hawaii law). These actions seek a common recovery of some discount from the purchase price—a remedy that, when extended to every buyer, becomes huge.

These no-injury/diminished value class actions represent counsel's efforts to avoid having to demonstrate common means of proving causation and in-

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[2] See, *e.g.*, *Mazza* v. *American Honda Motor Co.*, 254 F.R.D. 610 (C.D. Cal. 2008), revised, 2009 WL 6025547 (C.D. Cal. Jan. 8, 2009), appeal pending, No. 09–55376 (Ninth Cir. argued June 9, 2010) (plaintiffs allege in part that they were misled by advertising they took to mean that all three stages of a warning and braking system would deploy in series rather than skipping ahead to stop the vehicle when a collision was imminent; nationwide all-buyers class certified); *Chavez* v. *Blue Sky Natural Beverage Co.*, 268 F.R.D. 365 (N.D. Cal. 2010) (expatriate New Mexican contends that small-type reference to New Mexico on label for nationally distributed soft drink bottled in California deceived him into buying beverage in order to support business in his home state; nationwide all-buyers class certified).

jury (let alone damages) class-wide by taking those issues out of the case: they claim that a cognizable injury results from the violation of a legal duty, an intangible injury that by definition is common to every buyer of a product.

Currently, most (but not all) of these cases involve class representatives who experienced some tangible harm even though they don't want to have to provide common proof for the absent class members. That is, the putative class representative claims to have been misled by an advertisement, or claims that his brakes or tires wore out too early.

If the decision below is correct, however, it would be unnecessary to find even an injured class representative. It would suffice to convince a court to declare that a violation *ipso facto* injures everyone who bought a vehicle that was featured in an advertisement, or that contained a part or system that allegedly did not meet some measure of quality. But standing does not extend to permit private plaintiffs to "enforce [any] specific legal obligations" to which they bear some relation, but only those "whose violation works a direct harm" to the plaintiffs themselves. *Allen* v. *Wright*, 468 U.S. at 761.

2. The elimination of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement—would remove one of the principal limits on the certification of no-injury classes. Several courts of appeals have recognized that buyers who were not actually injured by an unlawfully misleading ad would have no standing to pursue actions on their own. Accordingly, those persons cannot be included in a class, because class certification cannot expand substantive rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

As a consequence, under current law, a class in federal court must be defined so that all of its members have suffered actual injury, or at least so that the presence or absence of injury-in-fact and causation can be determined using common proof and thus "can be productively litigated at once." *Dukes*, 131 S. Ct. at 2551. Conversely, no class may be certified irrespective of whether its absent members have sustained actual injury—or irrespective of whether actual injury is subject to common proof. As one court put it, "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); see *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (same); *Oshana* v. *Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (certification improper when "[c]ountless members of [the] putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception"). Nor can a class be defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct." *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009).

Other courts of appeals have rejected similar theories. Thus, the Eighth Circuit refused to allow purchasers of a recalled crib to recover the cost of their purchase under a contract theory when their cribs had not yet exhibited the alleged defect. See *O'Neil* v. *Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009). And the Fifth Circuit rejected a class seeking reimbursement of money spent on a drug that had harmed others, but not the class members, on the ground that "[m]erely asking for money does not establish an injury in fact." *Rivera* v. *Wyeth-Ayerst Labs.*, 283 F.3d 315, 319–20 (5th Cir. 2002). The decision below in the present case, however, suggests

that "asking for money" may well enough to establish constitutional standing.

Many more no-injury class actions have arisen in the motor vehicle setting. Although standing has not been the only line of defense against ruinous liability exposure to overbroad classes full of uninjured buyers, many of the court of appeal decisions rejecting such actions have relied on related state-law principles of causation and injury (which, of course, can be changed by state legislatures or courts). Those decisions have held either that a proposed class improperly included uninjured parties, or that too many individualized issues prevented class-wide resolution of issues such as causation an injury "in one stroke." *Dukes*, 131 S. Ct. at 2551.

For example, the Seventh Circuit decertified a nationwide class action seeking recovery for economic loss for allegedly defective tires. See *In re Bridgestone/Firestone Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002). Noting that "these persons seek compensation for the *risk* of failure, which may be reflected in diminished resale value of the vehicles and perhaps in mental stress" (*id.* at 1015), the court of appeals noted that their theory was infirm as a matter of bedrock common law: "No injury, no tort, is an ingredient of every state's law." *Id.* at 1017.

Other courts have agreed. The Eighth Circuit affirmed dismissal of an action alleging antilock braking systems had performance problem that had caused no tangible injury because diminished value theory was "too speculative." *Briehl* v. *General Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999). The Fifth Circuit affirmed the denial of certification to a putative class of car buyers alleging that a defect in a

safety module had caused unexpected side air bag deployments for a small number of other buyers; the manufacturer had recalled and offered to replace the module for everyone else. See *Cole* v. *Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007). The plaintiffs nonetheless asserted that the breach of a duty to provide risk-free safety systems had harmed them between the time they bought their vehicles until the time the modules were replaced, even though plaintiffs' own modules had never malfunctioned. Yet the Fifth Circuit held that this no-injury class *had* standing, though it rejected class certification on other grounds. Likewise, the D.C. Circuit accepted the legitimacy of a warranty class of owners who never experienced the experienced the sudden shifts into reverse for which they sought a recovery. *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (vacating and remanding class certification on other grounds). Cf. *DaimlerChrylser Corp.* v. *Inman,* 252 S.W.3d 299, 300 (Tex. 2008) (dismissing "no injury" suit based on allegedly defective seatbelt buckles that might release unintentionally where "[t]wo of the plaintiffs have never experienced anything like what they claim might happen, and the third is not sure whether he has or not, but he has never been injured").

3. The cases discussed above reflect the persistent efforts of class-action plaintiffs to inflate the size and settlement value of what should be modest disputes. Indeed, plaintiffs have succeeded in obtaining class certification on theories of this kind in several cases. For example, in *Wolin* v. *Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010), a case addressing an alignment flaw that accelerated tire wear, the Ninth Circuit accepted a diminished-value theory of liability that extended warranty

terms into perpetuity by providing relief for latent defects that do not (or may not) manifest until after the warranty period expires. That theory, the court of appeals held, sufficed both to show actual injury and to render a broad range of individualized circumstances (and individualized defenses) irrelevant. *Id.* at 1173–1174.

Similarly, in *Daffin* v. *Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), a plaintiff alleged that a defect in his van's throttle body assembly caused the accelerator to stick. *Id.* at 550. Although the alleged defect would not cause accelerator problems in the vast majority of vans, and unintended acceleration could result from numerous other issues—such as driver error—the court nonetheless affirmed the certification of a class of all van purchasers on a diminished-value theory. *Id.* at 554. See also, *e.g.*, *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (denying leave to appeal class certification, on a diminished-value theory, of claim that alleged defect in manifold might lead to coolant leaks in some vehicles).

Decisions of this kind—rendering the injury and standing of individual absent class members irrelevant—permit any court to make this Olympian determination on a class-wide basis: that any issue that has manifested on any subset of vehicles is a "defect" that violates a legal duty as to all buyers and therefore provides a basis for warranty or other recovery for the vast majority of vehicle owners who have experienced no consequences.

That is the type of determination that standing doctrine seeks to remove from the federal courts. Threshold issues of standing must either be obviously satisfied for all members of a proposed class, or subject to reliable and dispositive common proof.

Just as "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims," *Dukes*, 131 S. Ct. at 2561, no class can be certified on the premise that the defendant will be unable to challenge the standing of individual class members who sustained no concrete and particularized injury from the alleged violation of law.

Affirmance here, however, would make it unnecessary in many cases to separate the potentially injured from the set of all customers. So long as a court perceived that a statute (or common-law doctrine) afforded a remedy to all persons with any identifiable connection to a violation of legal duty—not just those who sustained an actual injury caused by the violation—the set of all customers would be co-extensive with a class. Most important, class certification might become nearly automatic, since the fact of a violation would remove all need to show that causation and injury were subject to common proof. See Pet. App. 8a–11a (reversing denial of class certication in present case).

B. Affirmance Would Make Causation And Injury Irrelevant To Standing Or Class Certification Whenever A Court Or Legislature Desired That Result.

Past experience provides a muted vision of the consequences were this Court to open federal courthouse doors to plaintiffs seeking monetary compensation for violations of legal duty that did not cause concrete and particularized harm to the plaintiffs themselves. Some legislatures almost certainly would respond by enacting (and courts eagerly construing) additional causes of action that could be supported solely by an attenuated connection to a vi-

olation of legal duty. The political temptation to create standing by *ipse dixit* often would be strong.

The Ninth Circuit and California predictably provide a cautionary example. California formerly recognized the right of any citizen to sue on behalf of the general public for an injunction, attorney's fees, and a lump-sum restitutionary award under the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), and the related False Advertising Law (*id.* § 17500 *et seq.*) (collectively "UCL"). his Court and the Ninth Circuit agreed that such persons lacked standing to pursue relief in federal court. See *Nike Inc.* v. *Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal as improvidently granted); *Lee* v. *American National Ins. Co.,* 260 F.3d 997, 1001-02 (9th Cir.2001)).

California voters subsequently imposed standing requirements on private UCL plaintiffs that are even stricter than those required by Article III, and limited private representative actions to those that satisfy normal class certification standards. But the California Supreme Court held in the *Tobacco II Cases*, 46 Cal. 4th 296 (2009), that the statutory actual injury requirement extends only "to the class representatives, and not all absent class members." *Id.* at 306. At least at the threshold, absent class members can pursue their claims in California state courts without having standing at all.[3]

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[3] The California Supreme Court relied for its view of Article III standing on *Vuyanich* v. *Republic National Bank*, 82 F.R.D. 420 (N.D. Tex. 1979). See *Tobacco II,* 46 Cal. 4th at 319. But the district court decision in *Vuyanich* applied an across-the-board analysis that this Court pointedly rejected in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1984)—and as a consequence the

The California courts have divided over whether *Tobacco II* extends beyond the setting of standing to make it unnecessary to establish that injury, causation, or restitution are susceptible to common proof, on the theory that all of those elements may be presumed. *See Avritt*, 615 F.3d at 1035 (collecting cases). And the Eighth Circuit, considering a class action asserting California law, has 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." *Ibid.*

The Ninth Circuit, however, has expressed no doubt that California law under *Tobacco II* permits recovery by uninjured class members—and suggested that the federal courts may entertain class actions brought on behalf of class members who would lack standing to sue individually and for whom injury, causation, and the extent of relief could not possibly be resolved "in one stroke," as this Court put it in *Dukes*, 131 S. Ct. at 2551.

In *Stearns* v. *Ticketmaster Corp.*, __ F.3d __. 2011 WL 3659354 (9th Cir. Aug. 22, 2010), the Ninth Circuit reversed a district court's denial of certification of a class of all purchasers of an online discount coupon and cashback award service who did not use the service they purchased. The plaintiffs contended that the sign-up process was deceptive, but they proposed no way of determining through common proof

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Fifth Circuit "vacated and remanded" the class certification "for reconsideration of the proper class in light of *Falcon*." *Vuyanich* v. *Republic National Bank*, 723 F.2d 1195, 1200 (5th Cir. 1984). That is, *Tobacco II*'s passing reference to federal law relied on a reversed decision that used a long-discredited analysis.

who had been deceived and who intended to buy the service—that is, which class members were injured and which received only what they wanted, but simply never used it. The court of appeals held that such proof was unnecessary under *Tobacco II*.

More important, although *this* Court had held only four months earlier that Article III standing requires "a causal connection between the injury[-in-fact] and the conduct complained of" (*Arizona Christian*, 131 S. Ct. at 1442), the Ninth Circuit held that Article III was consistent with the conclusion that "it need not be shown that class members have suffered actual injury in fact connected to the conduct of the [defendants]." *Stearns*, 2011 WL 3659354, at *5. In the Ninth Circuit's view, the class members had shown actual, concrete and particularized injury merely because each member had bought the service and thus "was relieved of money in the transactions." *Ibid.* Under that logic, any purchaser of any product has demonstrated injury-in-fact (or his class representative can demonstrate that element *en masse*) merely by virtue of the purchase itself, even if the buyer (or class members) received everything expected.

As for causation, the Ninth Circuit concluded that the "loss" (*i.e.*, the purchase) was "fairly traceable to the action of the [defendants] *within the meaning of California substantive law*." *Ibid.* (emphasis added). The Ninth Circuit did not acknowledge *this* Court's requirement of a "causal connection" for standing purposes. See *Arizona Christian*, 131 S. Ct. at 1442. "[A]ny connection" was enough. *Stearns*, 2011 WL 3659354, at *5. That seriously dilutes the federal law of causation. As the Court explained in another context, "[t]o touch upon a loss is not to

cause a loss, and it is the latter that the law requires." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 343 (2005).

The Ninth Circuit flaunted its refusal to apply this Court's standing analysis: defendants' "real objection," the court of appeals maintained, "is that state law gives a right to 'monetary relief to a citizen suing under it' (restitution) without a more particularized proof of injury and causation." *Stearns*, 2011 WL 3659354, at *5 (citation omitted). Yet it is the availability of "particularized proof of injury and causation" that separates the claims that may be pressed in federal court from those that cannot.

The court of appeals concluded its standing analysis by holding that all members of a certified class had "class standing" so long as one named plaintiff had standing. *Ibid.* But the circuit jurisprudence that the *Stearns* court cited as support in fact answered a different question. It is true that one named plaintiff with standing is enough to keep a class action in court long enough for the plaintiff with standing to *pursue* class certification.

But class certification analysis cannot be so cavalier. A class action can aggregate only claims that could be presented individually (setting aside jurisdictional amounts and the like). Certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. That result would violate the Rules Enabling Act because it would "enlarge or modify a[] substantive right" that would not exist in the absence of class certification under Rule 23. See *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

Stearns shows how easily undue relaxation of standing requirements could produce class actions with few discernible limits. But even the *Stearns* court recognized that there might be some limits to certification in cases where there was "no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant." 2011 WL 3659354, at *5. Affirmance here might remove even those limits, and could make class certification decisions like *Stearns* commonplace throughout the Nation.

C. Diluting the Injury-In-Fact Requirement Would Exacerbate The Problem Of Annihilating Damages For Harmless Violations of Law.

For companies with many customers or mass-market products, technical violations of law would present the risk of annihilating damages for conduct that actually harmed nothing but the sensibilities of a judge or legislative drafter. As this Court has repeatedly recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). This Court and "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail." *Ibid.* (citing *Kohen*, *supra*); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975); "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.,* 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dis-

senting) (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments).

The present case provides a stark example, with a putative nationwide class seeking treble the amount paid for title insurance which (if respondent's payment was typical) could amount to a total of $2,000 or more per class member. Another recent decision from the Ninth Circuit further illustrates the risks. In *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), a putative class of plaintiffs alleged that the defendant had violated the Fair and Accurate Credit Transactions Act ("FACTA") by printing more than the last five digits of a consumer's credit or debit card numbers on electronically printed receipts. The named plaintiff did not contend that he or any other class member suffered any identity compromise or other injury as a result of the defendant's conduct. Yet the class sought statutory damages ranging from $100 to $1,000 for each willful violation of FACTA, so that—after the Ninth Circuit reversed the denial of class certification—the defendant's potential liability fell between $29 million and $290 million, *id.* at 710, for conduct that caused no harm. And the Fair Credit Reporting Act (FCRA) presents similar issues—issues that, like those under FACTA, may reach the financing affiliates of the members of the *amici*. See *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) (1.2 million-member FCRA class seeking statutory damages of $100 to $1000).

If purchase of a product or service itself is sufficient injury-in-fact, and causation drops out of the analysis, recoveries that may be modest as to each consumer—and would remain modest if applied only to consumers who were harmed by the conduct—

could quickly reach gigantic and annihilative proportions. That is another reason that this Court should continue to apply a principled limitation to the standing of private plaintiffs.

D. Affirmance Would Increase The Risk Of Judicial Intrusion Upon NHTSA's Prerogative To Determine Which Safety Risks Warrant Recalls Of Vehicles That Have Not Manifested Dangerous Defects.

Affirmance of the Ninth Circuit's expansive view of actual injury would have additional adverse effects impinging on the constitutional separation of powers. For decades, plaintiffs have invoked a range of legal theories on behalf of not-yet-injured plaintiffs in an effort to induce a court to order product-wide safety recalls of vehicles that have not manifested any defects, based on alleged safety issues with other vehicles of the same model year and configuration. That is, uninjured parties seek to substitute the discretion of a trial court—or a jury—for that of NHTSA in making the determination which risks warrant the expense of a recall and repair.

Some courts have held that the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, preempts the use of state law to effect a safety recall, or at least renders a superior forum to a private class action. See, *e.g.*, *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, 153 F. Supp. 2d 935, 944 (S.D. Ind. 2001) *Bussian* v. *DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 629 (M.D.N.C. 2006); *Lilly* v. *Ford Motor Co.*, 2002 WL 84603, at *5 (N.D. Ill. 2002); *Namovicz* v. *Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 584 (D. Md. 2001); *American Suzuki Motor Corp.* v. *Superior Court*, 37 Cal. App. 4th 1291

(1995). But other courts permitted private plaintiffs to seek to initiate a safety recall, or at least broaden the scope of an existing NHTSA recall, using a class action. *See*, *e.g.*, *Toyota Motor Corp. Unintended Acceleration Litigation*, 754 F. Supp. 2d 1145, 1194–1199 (C.D. Cal. 2010); *Chamberlan* v. *Ford Motor Co.*, 314 F. Supp. 2d 953 (N.D. Cal. 2004); *Kent* v. *DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208 (N.D. Cal. 2002); *Anthony* v. *General Motors Corp.*, 33 Cal. App. 3d 699 (1973).

If parties without a concrete injury have standing, similar classes are more likely to be certified and relief more likely to be granted. That would work a substantial intrusion on the expertise-driven jurisdiction of NHTSA, creating parallel regulatory regimes administered *ad hoc* by "non-expert judges [who] review highly technical matters on the basis of a record prepared by lawyers, not scientists," and whose determinations in some cases may be founded on jury factual findings with their "random, lottery-like results." Stephen Breyer, Breaking the Vicious Circle 49, 59 (1993). That situation would cause chaos within an automobile industry that could be subjected to much more frequent recalls ordered under varying standards and far greater, wholly unpredictable costs of compliance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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