No. 23-344

In the

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

EPIC GAMES, INC.,

Respondent.

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

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, in the absence of class certification, a federal court is precluded from entering an injunction that extends to nonparties without a specific finding that such relief is necessary—as to all nonparties—to redress any injury to the individual plaintiff.

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INTEREST OF *AMICUS CURIAE*[1]

The Civil Justice Association of California ("CJAC") is a nonprofit organization whose members are businesses from a broad cross-section of industries. Our principal purpose is to educate the public about ways to assure that civil liability laws are fair, efficient, certain, and uniform. Toward that end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including cases involving nationwide injunctions that proscribe business conduct, as here.

Nationwide injunctions are problematic. They can cause abrupt changes in federal policy and interrupt or even dictate federal policy for months or years while they go through the appeal process. But they are also problematic in civil, non-governmental litigation in which litigants, without having to certify a class under Federal Rule of Civil Procedure 23(b)(2), seek to enjoin company policies that challenge generally applicable business policies. That is particularly problematic in this case, where the lower courts relied on a California statute to impose an injunction that will have consequences far beyond that state's borders. Scholars have noted that nationwide injunctions are a recent phenomenon, and that no statutory or constitutional basis explicitly authorizes single district courts to issue nationwide injunctions.

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[1] Counsel of record for the parties received timely notice of the intent to file this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *amicus* made a monetary contribution to the preparation or submission of this brief.

Understandably, the lower courts are split on the requirements.

The CJAC believes that the Ninth Circuit opinion injects an inharmonious voice into the already discordant Circuit chorus on the constitutional requirements for the issuance of nationwide injunctions. That decision intensifies the need for clarity and guidance for uniformity of decision, which only this Court can provide.

SUMMARY OF THE ARGUMENT

A federal court may constitutionally provide injunctive relief beyond the named plaintiff only if (i) a class is certified or (ii) broader relief is "*necessary* to redress" the *named* plaintiff's injury. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). There is no third option.

The Ninth Circuit begs to differ. So do numerous other federal courts, which have been increasingly issuing nationwide injunctions in disregard of *Califano*'s constitutional constraints. The opinion in this case is an eye-popping example of "nonclass class" universal injunctive relief gone awry.

The only plaintiff is Epic Games, Inc. ("Epic"). As the district court found, Epic brought suit "first and foremost" to pursue "tremendous monetary gain and wealth" for itself. Pet. App. 119a.[2] Epic "wanted to

[2] Epic is a developer of computer games and other apps. Pet. App. 95a–96a. Epic's most popular game is the hugely popular *(Cont'd on next page)*

open a competing app store [to Apple's] and could not." *Id.,* at 245a. So, it "ignored" an earlier-filed class action called *Cameron*[3] and opted out, choosing instead to "[go] forward on [its] own" because it wanted to "rush to court with its own plan to protect its self-avowed interests." *Id.* at. 126a.

The district court issued, and the Ninth Circuit affirmed, a breathtakingly broad "nonclass class" universal injunction potentially affecting millions of nonparty iOS developers around the globe. Because this is not a class action, *Califano*'s first option was unavailable. Neither was *Califano*'s second option—*necessary* to redress the *named* plaintiff's injury. Epic was no longer an iOS developer at the time the injunction was issued. It lacked any cognizable Article III injury that injunctive relief could redress.

Never mind that in *Cameron*, and just months before issuing its "nonclass class" injunction in this case, the same district court issued a materially *different* nationwide injunction in favor of the same nonparties. But unlike this injunction, the *Cameron* injunction was the result of a settlement of a real class action. In approving that settlement, the district court certified a class under Federal Rule of Civil Procedure 23(b)(2) and found that *Cameron*'s injunctive terms were "fair, reasonable, and adequate." That finding ought to have been dispositive, rendering any subsequent "nonclass class" injunction in this case not

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Fortnite, which allows players to compete against one another in a virtual "battle royale." *Id.* at 99a–100a.

[3] *Cameron v. Apple Inc.*, No. 4:19-cv-3074-YGR (N.D. Cal.)

only gratuitous but "more burdensome than necessary to redress" any imagined injury to Epic. *Cf. Califano*, 442 U.S. at 702.

The Ninth Circuit' approval of this nationwide "nonclass class" injunction violates Article III and due process. It also subverts Rule 23(b)(2) by opening a backdoor through which individual, nonclass litigants like Epic can obtain nationwide "nonclass class" injunctive relief that they never could have gotten otherwise. This Court's guidance is urgently needed.

The Court recently granted certiorari in a case that raises a similar question about the permissible scope of a district court injunction. In *Murthy v. Missouri*, Case No. 23-411, federal officials are challenging a district court injunction that bars certain communications with all social-media platforms regarding all posts by any person on any topic. The officials' challenge is based in part on the same question presented in this case, that is, whether the challenged order violates the *Califano* principle that an injunction must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." 442 U.S. at 702.[4] Hence, this may be an appropriate case to hold Apple's petition, until the Court decides the *Murthy* case.

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[4] On October 20, 2023, the Court granted the federal officials' application for a stay, treated the application as a petition for a writ of certiorari, and then granted the petition on the questions presented in the application. The third of those questions is: "Whether the terms and breadth of the preliminary injunction are proper."

ARGUMENT

The Court should grant review for two reasons. First, review is necessary to clarify that the already-established constitutional boundaries laid down in *Califano* and its progeny govern *all* requests for nationwide injunctions. Second, review is necessary to close the Ninth Circuit's endorsement of a "nonclass class" backdoor to Federal Rule of Civil Procedure 23(b)(2)'s exclusive provisions for obtaining classwide injunctive relief.

I. Review is necessary to clarify that a federal court may not enter nationwide injunctive relief absent a certified class or a specific finding that such relief is necessary as to all affected nonparties.

The Ninth Circuit opinion injects "confusion worse confounded"[5] into the debate over the proper scope of nationwide injunctive relief. That should not have happened. The Ninth Circuit should have applied this Court's simple, long-standing precedent directing that unless there is a properly certified class, "injunctive relief must be no more burdensome to the defendant than *necessary* to provide complete relief *to the plaintiffs,*" and that a federal court should "not improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 700 (emphasis added); *Lewis v. Casey*, 518 U.S. 343, 360 (1996) ("[G]ranting a remedy beyond what [is]

[5] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010).

necessary to provide relief to [the plaintiffs is] therefore improper.")[6] The Ninth Circuit opinion crosses both *Califano* lines.

Nationwide injunctions have drawn much criticism of late, including by Members of this Court. Justice Thomas expressed "skeptic[ism]" whether district courts "have the authority to enter universal injunctions."[7] Three years ago, Justice Gorsuch noted that "[u]niversal injunctions have little basis in traditional equitable practice."[8] Since then, "[m]atters have not improved with time." Justice Gorsuch observed just last term that "a number of lower courts have asserted the authority to issue decrees that purport to define the rights and duties of sometimes millions of people who are not parties before them."[9]

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[6] A plaintiff 's remedy must be tailored to redress the plaintiff 's particular injury. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (similar); *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (vacating statewide injunction because "[t]he Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it").

[7] *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); see also *Trump v. Int'l Refugee Assistance Project*, 512 U.S. 571, 585 (2017) (Thomas, J., concurring in part and dissenting in part) (suggesting that it is unreasonable to leave a preliminary nationwide injunction in place when "[n]o class has been certified, and neither party asks for the scope of relief" to extend to an "unidentified, unnamed group").

[8] *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring).

[9] *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring, joined by Thomas, J. and Barrett, J.).

These concerns are well-founded. A class action certified under Rule 23(b)(2) carries built-in due process safeguards. "Nonclass class" injunctive relief does not. This Court has repeatedly warned that such relief should happen only within Article III and due process parameters. See *Califano*, 442 U.S. at 702, and the cases cited in footnotes 6 through 8 above.

The Ninth Circuit ignored that mandate. The universal injunction it endorsed was neither part of a class action nor was it "necessary to redress" the alleged injury to Epic. It is unconstitutional.

A. Epic did not suffer any Article III injury.

Epic suffered no Article III injury. The district court found that "Epic Games has *not* proven a present antitrust violation." Pet. App. 370a, emphasis added. At most, certain of Apple's policies "*threaten* an *incipient* violation of the antitrust law…." *Id.*, emphasis added. That finding makes Epic's injury a twice-removed contingency.[10]

"Incipiency" and Article III are mutually exclusive. Dismissal was compelled the moment the district court made its "incipiency" finding. The district court lacked jurisdiction to entertain any

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[10] "Incipient" means "beginning to come into being or to become apparent. *See* https://www.merriam-webster.com/dictionary/incipient (last viewed Oct. 1, 2023). "Threat" means "an expression of intention to inflict evil, injury, or damage" and "an indication of something impending." *See* https://www.merriam-webster.com/dictionary/threat (last viewed Oct. 1, 2023).

injunction, let alone a universal one *not* affecting Epic. The Ninth Circuit should have dismissed *sua sponte* for lack of Article III injury.

Epic needed to demonstrate "an 'injury in fact' that is . . . 'concrete and particularized.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). "A 'concrete' injury must be 'de facto'; that is, it must actually exist." It must be "real," and not "abstract," and it must "actually exist." *Spokeo v. Robins*, 578 U.S. 330, 340 (2016). An "incipient" injury that is merely "threatened" does not "actually exist." And "the mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210-11 (2021). Likewise, the Ninth Circuit "cannot erase Article III's standing requirements" by "granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo*, 578 U.S. at 339, internal quotes omitted.

Even if Epic had Article III standing to *sue*, it lacked Article III standing to seek *injunctive relief*. "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). But Epic was no longer an iOS developer when the injunction was entered. As the district court found, Epic willfully breached its contract with Apple (Pet. App. 386a–387a), such that Apple was justified in removing Epic's product Fortnite from the App Store and terminating Epic's developer account. Pet. App. 396a.

That should have foreclosed any injunctive relief.[11] Instead, the district court entered, and the Ninth Circuit approved, a universal injunction that can never affect Epic. Yet, it prohibits Apple from enforcing the anti-steering provision against *other* developers of iOS apps anywhere in the world who promote their apps on the United States storefront of the App Store. Pet. App. 376a; 416a–417a.

The Ninth Circuit disagrees. In affirming, it held that the district court's sweeping order issued through a "nonclass class" could be "tied to" Epic's imagined injury:

> [T]he district court did not abuse its discretion when setting the scope of the injunctive relief because *the scope is tied to Epic's injuries*. The district court found that the anti-steering provision harmed Epic by (1) increasing the costs of Epics' subsidiaries' apps that are still on the App Store, and (2) preventing other apps' users from becoming would-be Epic Games Store consumers. Because Epic benefits in this second way from consumers of other developers' apps making purchases through the Epic Games Store, an injunction limited to Epic's subsidiaries would fail to address

[11] "Particularization is necessary to establish injury in fact." *Spokeo*, 578 U.S. at 339. To be "particularized," the injury must affect Epic "in a personal and individual way." *Id*. That cannot happen here.

> the full harm caused by the anti-steering provision.

Pet. App. 82a (emphasis added).

This is entirely made up. The Ninth Circuit cited no evidence or findings that a single nonparty was harmed. The opinion muses about hypothetical injury to two nonparties—Epic subsidiaries and other nonparty developers on the Epic Games Store—but Epic presented no evidence regarding the effect of the anti-steering provision on *its* business, that of *its* subsidiaries,[12] or any hypothetical customers frustrated because they couldn't make a purchase on the Epic Games Store.[13] The "tied to" standard is law-by-levitation.

The Ninth Circuit might just as well have labelled it "anything goes." Even a butterfly flapping its wings in Brazil can be said to be "tied to" a tornado weeks later in Texas.[14] How is a court to determine

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[12] Epic identified just one subsidiary that currently distributes apps on the App Store, but it distributes only one app that could be affected by the anti-steering provision. See D.C. Dkt. No. 825-8.

[13] The Epic Games Store allows developers to distribute apps on Mac and Windows personal computers but not other platforms. But the trial evidence established that only about one hundred developers offer apps on the Epic Games Store. See D.C. Trial Tr. 1220:18–20.

[14] The "butterfly effect" is an allegory for chaos theory. The metaphor is attributed to Edward Norton Lorenz from a lecture he gave on December 1972 at a session of the annual meeting of the American Association for the Advancement of Science

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which nonparty claims of injury are "tied to" the plaintiff's injury and which are not? And how is a defendant supposed to defend against hypothetical injuries to millions of indeterminate nonparties invented *post* hoc by an appellate court that the plaintiff itself never even asserted?

The Ninth Circuit's "tied to" overreach was unnecessary. All that was needed was to apply decades-old Supreme Court precedent, which admonishes that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Califano*, 442 U.S. at 702 (emphasis added).[15]

It was not "necessary" to afford universal *nonparty* relief to afford "complete relief to [Epic]." Epic admitted this. It submitted proposed injunctions to the district court, both before and after trial, that never even mention the anti-steering provision. See D.C. Dkt. No. 276-1; D.C. Dkt. No. 777. At trial, Epic confirmed it would be content with a special carve-out from the App Store rules just for itself and no one else. Pet. App. 126a–127a.

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describing how the details of a tornado (the exact time of formation, the exact path taken) can be influenced by minor perturbations such as a distant butterfly flapping its wings several weeks earlier.

[15] Even under the Ninth Circuit's "tied to" test, the injunction could constitutionally apply to no more than Epic's single subsidiary and the approximately one hundred developers that offer apps through the Epic Games Store. *See* fns. 12-13, above.

The Ninth Circuit trespassed Article III by entertaining an appeal in which the district court found the appellant's injury to be merely "incipient" and "threaten[ed]," findings that flunk Article III's "injury in fact" test. The Ninth Circuit compounded that error by fashioning an injunction that can never affect Epic because it was no longer an iOS developer, which is a separate affront to Article III. It approved a universal injunction—outside of a certified class action—against Apple's enforcement of an anti-steering provision indistinguishable from one this Court found to be procompetitive in *Ohio v. American Express Co.*,[16] and then defied *Califano*'s edict that such "nonclass class" relief must be no more "burdensome to the defendant than necessary to provide complete relief to the plaintiff."

B. The Nationwide Injunction Improperly Interferes With The Litigation of Similar Issues in Other Judicial Districts.

The Ninth Circuit opinion crosses *Califano*'s separate caution that federal courts should not issue nationwide injunctions that "improperly interfere with the litigation of similar issues in other judicial districts." *Califano*, 442 U.S. at 700. As this Court noted, that may "have a detrimental effect by foreclosing adjudication by a number of different

[16] 138 S. Ct. 2274, 2289 (2018). The offending provision is part of the license agreement iOS developers must sign, which says that "[a]pps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP]." Pet. App. 13a–14a.

courts and judges." *Id.* at 702. The Ninth Circuit's "nonclass class" injunction detrimentally affects two other class actions.

As the district court found, other "related lawsuits were already pending before the Court well before the commencement of this action." Pet. App. 95a. *Cameron*, filed in 2019—before Epic filed its suit—was brought on behalf of a putative class of iOS app developers like Epic who challenged the same anti-steering provision. *Id.* *Cameron* settled. The district court certified a class of iOS developers and found the settlement to be "fair, reasonable, and adequate" under Rule 23(e)(2).[17] The *Cameron* settlement includes an injunction, but it requires only that Apple clarify how developers communicate with users outside of their apps regarding alternative purchase mechanisms.[18] It does not require Apple to remove or modify the anti-steering provision.

The Ninth Circuit's approval of *different* and *broader* injunctive relief amounts to a declaration that the *Cameron* settlement was not "fair, reasonable, and adequate." That "nonclass class" injunction directly and detrimentally "interfere[s] with the litigation of similar issues" pending in *Cameron*. Cf. *Califano*, 442 U.S. at 702.

The Ninth Circuit's injunction also has "a detrimental effect" on *Beverage v. Apple, Inc.*, a

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[17] See *ibid.*, Order (June 10, 2022), Dkt. No. 491.

[18] See *ibid.*, Stipulation of Settlement § 5.1.3, *Cameron*, No. 19-CV-3074 (Aug. 26, 2021), Dkt. No. 396-1 Ex. A.

putative state court consumer class action brought against Apple by Fortnite purchasers. No. 20CV370535 (Santa Clara Super. Ct). *Beverage* was a copycat action filed shortly after Epic sued Apple. It challenged the same anti-steering provision. The trial court sustained Apple's demurrer, holding as a matter of state substantive law that "the antitrust laws do not preclude a trader from unilaterally determining . . . the terms on which it will transact business," citing *Chavez v. Whirlpool Corp*., 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001). On appeal,[19] the *Beverage* plaintiffs are inviting the California appellate court to ignore *Chavez* on a question of substantive state law and instead follow the Ninth Circuit's contrary ruling.[20] That would turn upside down the holding of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), which teaches that federal courts do not make substantive state law, they only apply it.

A federal court subverts federalism when it issues relief affecting millions of entities around the world based on an eccentric interpretation of the law and policy of a single State. Even if Apple's anti-steering provision is "unfair" under California law, the Ninth Circuit's universal injunction transforms that statewide policy into a *federal* directive, even though

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[19] *Beverage v. Apple, Inc.*, No. H050526 (Cal. Ct. App. 6th Dist.).

[20] The Ninth Circuit's opinion could also have detrimental effect on a third class action, *In Re Apple iPhone Antitrust Litigation*, No. 4:11-cv-6714-YGR (N.D. Cal.), which was filed in 2011 and like *Beverage* is brought on behalf of a putative class of iOS device consumers alleging harm from the commission rate. Pet. App. 96a.

Epic failed to prove that Apple violated any federal law.

II. Review is necessary to close the Ninth Circuit's endorsement of a backdoor to Federal Rule of Civil Procedure Rule 23's exclusive provisions for obtaining classwide injunctive relief.

As noted, Article III and due process mandate that a federal court may provide injunctive relief beyond the named plaintiff only if (i) a class has been certified or (ii) broader relief is *necessary* to redress the *named plaintiff's* injury. *Califano*, 442 U.S. at 701-02 (emphasis added). The district court's nationwide injunction was not the product of a class action, though the nationwide injunction in *Cameron* was. Neither the district court nor the Ninth Circuit made a "*Califano* finding" that broader relief was "necessary to redress [Epic's] injury." Instead, the lower courts contrived a third option.

There is no third option. Rule 23(b)(2) is exclusive:

> These rules govern the procedure *in all civil actions* and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of *every action and proceeding*.

Fed. R. Civ. P. 1 (emphasis added). A "clear expression of congressional intent [is necessary] to exempt actions … from the operation of the Federal Rules of Civil Procedure." *Califano*, 442 U.S. at p. 700.[21] No "clear expression of congressional intent" gave the lower courts license to create a backdoor to Rule 23(b)(2).

The Ninth Circuit's "nonclass class" injunction jettisons the due process safeguards that are built into Rule 23(b)(2). No one determined that Epic was an "adequate" class representative. It was not. Epic brought this suit "first and foremost" to pursue "tremendous monetary gain and wealth" for itself, it "ignored" *Cameron* and "decided it would rush to court with its own plan to protect its self-avowed interests." Pet. App. 119a, 126a. Commonality and typicality were also lacking. *Cf.* Rule 23(a).

If Epic had pursued a true class action, Rule 23(b)(2) would have required it to prove that Apple "has acted or refused to act on grounds that apply generally to the class," in other words, that *all* nonparty iOS developers would be entitled to the same relief that Epic sought. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345–46 (2011). Epic could never make

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[21] "When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

that showing. It sought only individual relief in the form of a special exemption from the App Store rules for itself. Pet. App. 126a–127a. After opting out of the *Cameron* class, it obtained a "nonclass class" injunction that binds millions of absent developers yet fails to afford them the right to object or opt out that Epic enjoyed.

That violates due process. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

The harm is real. Unlike large developers such as Epic, small developers may prefer that the anti-steering provision remain in place for the same reason articulated in *Ohio v. American Express Co.*, *supra*, in which this Court upheld an analogous provision as procompetitive. It was a reasonable way to reduce transaction friction and improve the platform's quality generally and attract more users. 138 S. Ct. at 2289.

The Ninth Circuit's injunction also violates Apple's due process rights because it creates asymmetrical *res judicata*. If Apple had prevailed against Epic with respect to the anti-steering provision, that judgment may not have barred any of the millions of developers, who could file successive lawsuits seeking the nationwide relief obtained here until they found an accommodating judge.

A state violates due process when it forces a litigant to defend itself in a forum "without assurance

that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Western Union Tel. Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71, 75 (1961). Nationwide adjudications of rights outside of the class action context prejudice defendants, because while the defendants will be bound nationwide if they lose, they will have no res judicata rights against future litigants if they win. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985).

Why bother with a class action when you can get a nationwide injunction without the fuss? The Ninth Circuit opinion opens that backdoor to Rule 23(b)(2). "Nonclass class" nationwide injunctions will become every litigant's preferred remedy in single-plaintiff cases that challenge, as here, a generally applicable policy. That will encourage would-be plaintiffs to engage in no-risk forum shopping, hoping thereby to fashion a *de facto* federal common law in defiance of *Erie v. Tompkins Railroad*.

CONCLUSION

The Ninth Circuit opinion adds to the wave of nationwide "nonclass class" injunctions that have drawn criticism of late. This case raises a host of constitutional and prudential concerns regarding the authority of federal courts to issue such injunctions. It

presents a perfect candidate for this Court's review of this important and timely issue.

Respectfully submitted,

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