No. 23-35

In The Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

v.

IVANA KIROLA, On Behalf of Herself and The Certified Class of Similarly Situated Persons,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID CHIU
San Francisco City Attorney
YVONNE R. MERÉ
Chief Deputy
TARA M. STEELEY
Chief of Appellate Litigation
Counsel of Record
ELAINE M. O'NEIL
Deputy City Attorney
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: (415) 554-4655
Tara.Steeley@sfcityatty.org

Attorneys for Petitioners
City and County of San Francisco

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

This Petition presents a pure question of law. Can a court provide injunctive relief where the named plaintiff fails to prove that she suffered any injury caused by the defendant's violation of the law? Respondent Ivana Kirola is the sole named plaintiff in a class action. At trial, she was unable to show that she was injured by—or even encountered—any violations of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). Nonetheless, the Ninth Circuit held that she is entitled to injunctive relief because absent class members experienced a handful of ADAAG violations. That is error. To obtain injunctive relief, a named plaintiff must personally experience injury caused by a violation of the law. *Warth v. Seldin*, 422 U.S. 490 (1975). It is not enough that "injury has been suffered by other, unidentified members of the class." *Id*. at 502. "The remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

The Ninth Circuit failed to apply those principles. In so doing, the Ninth Circuit created confusion within the Ninth Circuit, and a conflict with the decisions of other circuits, including *Fox v. Saginaw County, Mich.*, 67 F.4th 284, 293 (6th Cir. 2023); *Jaimes v. Toledo Metro Hous. Auth.*, 758 F.2d 1086, 1093 (6th Cir. 1985); *Hope, Inc. v. Cnty. of DuPage, Ill.*, 738 F.2d 797, 804 (7th Cir. 1984). Kirola fails to refute the circuit split. She points to minor differences between those cases and this one, but those are distinctions without

a difference. The Sixth and Seventh Circuits held that named class representatives cannot obtain relief for injuries they did not incur personally. By ordering injunctive relief where Kirola failed to prove any legal injury, the Ninth Circuit created a circuit split.

Kirola fails to rehabilitate the Ninth Circuit's conclusion that Kirola is entitled to injunctive relief without showing any legal injury at trial. Kirola repeatedly notes that she had standing. But having standing is not the same as prevailing on the merits. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the petitioner's contention that particular conduct is illegal."). Kirola's standing is irrelevant because she ultimately failed to prove at trial that she was injured by a violation of the law.

Finally, Kirola does not identify any vehicle problem. The Ninth Circuit's error in holding that Kirola is entitled to injunctive relief can and should be reviewed now. The fact that the district court has not yet issued the injunction that the Ninth Circuit erroneously ordered has no effect on the question of law presented in the Petition.

In sum, certiorari should be granted. The parties have spent 16 years litigating a case in which no plaintiff has suffered injury caused by a violation of the law. With no injury, there should be no relief. San Francisco asks this Court to grant certiorari, reverse the Ninth Circuit's erroneous ruling, and provide guidance to

lower courts concerning the limits on class action relief.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION CREATES A CIRCUIT SPLIT.

A. Kirola Failed To Establish That She Encountered Access Barriers That Violated The Law.

Kirola's primary argument is that there is no circuit split because the Ninth Circuit's conclusion in 2017 that she has standing means that she has an injury that entitles her to injunctive relief. That argument confuses the "injury in fact" standing analysis with the merits of Kirola's claim. Similarly misplaced is Kirola's assertion that it is "too late" to challenge the Ninth Circuit's standing analysis. Opp. 4. This Petition does not challenge the Ninth Circuit's standing decision at all. Instead, the Petition challenges the Ninth Circuit's conclusion that Kirola is entitled to injunctive relief although she failed to prove at trial that she suffered any injury caused by a violation of the law.

Having standing is not the same as prevailing on the merits. The Ninth Circuit held that Kirola had standing because she encountered access barriers that *could* establish injury at trial *if Kirola could prove that those barriers violated the ADAAG.* App. 103a–05a. At trial, however, Kirola failed to make that showing. App. 33a; 36a–39a; 42a; 56a–58a 75a, 76a, 79a. Indeed, the

district court held that Kirola "failed to demonstrate, by a preponderance of evidence, that she encountered ADAAG violations with respect to the City's public right-of-way, libraries or swimming pools." App. 82a–83a. While the district court found that class members encountered isolated ADAAG violations at St. Mary's Playground, at a restroom in Golden Gate Park, and at the Main Library, Kirola did not experience those violations. App. 83a. "As such, Plaintiff cannot satisfy her burden of demonstrating that she was actually injured as a result of the ADAAG violations identified by the Court." *Id.*

Notably, Kirola does not cite to any findings by the district court to support her assertion that she proved injury caused by a ADAAG violation. Instead, Kirola relies exclusively on the Ninth Circuit's standing analysis. App. 103a–04a. But the Ninth Circuit's determination that Kirola had *standing* does not mean that she *prevailed at trial*. Indeed, Kirola admits—as she must—that having "injury in fact" as required for standing is distinct from prevailing on the merits. *Whitmore*, 495 U.S. at 155; *Warth*, 422 U.S. at 500. If Kirola were correct that merely having standing were enough to entitle a plaintiff to injunctive relief, there would be no need to have a trial at all. A district court could just determine standing at the outset of a case, and order permanent injunctive relief. Of course, that is not—and never has been—the law.

In short, Kirola's standing got her through the door of the courthouse, but she still needed to prove at trial that she personally suffered injury caused by a

violation of the law. Because she failed to do so, Kirola was not entitled to any relief on behalf of herself or the class.

B. The Ninth Circuit's Decision Created A Circuit Split.

Although Kirola failed to prove injury caused by a violation of the law, the Ninth Circuit nonetheless ordered the district court to provide injunctive relief based on isolated ADAAG violations experienced by class members. App. 3a–4a. To reach that conclusion, the Ninth Circuit held that the "plaintiff" in a class action should be deemed to include all class members, and therefore, harm to absent class members alone could justify injunctive relief. App. 4a. The Ninth Circuit's decision conflicts with the decisions of other federal appellate courts.

In *Fox v. Saginaw County*, *Michigan*, 67 F.4th 284, 294 (6th Cir. 2023), the Sixth Circuit refused to allow a plaintiff to seek relief against defendants that did not personally injure the plaintiff. The court explained that class representatives—like all plaintiffs—"must prove their own 'case or controversy with the defendants' in order to seek relief for 'any other member of the class.'" *Id.* (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Class representatives "cannot piggyback off the injuries 'suffered by other, unidentified members of the class[.]'" *Id.* (quoting *Warth*, 422 U.S. at 502). Nor can class representatives "seek relief against different conduct that has harmed other class

members even when it is 'similar' to the conduct that harmed the representatives." *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999–1001, 1001 n.13 (1982)).

Kirola's attempts to distinguish *Fox* are unavailing. Kirola notes that *Fox* concerned an attempt by a plaintiff to obtain relief from defendants that had not injured the plaintiff but injured unnamed class members, whereas here Kirola only seeks relief from one defendant, the City and County of San Francisco. Opp. at 23. But the number of defendants involved makes no difference. The point in *Fox* is the same as the point here: Kirola cannot obtain relief against San Francisco because San Francisco did not cause her any legal injury. She cannot piggyback off of injuries experienced by unnamed class members. Indeed, this is an easier case than *Fox* because the plaintiff in *Fox* could at least show that he experienced some injury caused by a defendant in the case. Here, Kirola has shown none. App. 82a–83a.

Kirola similarly fails to distinguish *Jaimes v. Toledo Metropolitan Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985) or *Hope, Inc. v. Cnty. of DuPage, Ill.*, 738 F.2d 797 (7th Cir. 1984). In both cases, circuit courts refused to allow named plaintiffs who could not allege *and show* injury to obtain relief on behalf of unnamed class members. Kirola notes that both *Jaimes* and *Hope* framed their analysis in terms of standing, while Kirola had standing. But Kirola fails to recognize the importance of the holdings in *Jaimes* and *Hope*. Both cases hold that a plaintiff cannot obtain relief on behalf of a class unless the plaintiff can personally show injury caused

by the defendant's violation of the law. The fact that *Jaimes* and *Hope* applied that principle while considering standing, while the issue arises here after a trial on the merits, makes no difference. The limitation on the power of federal courts is the same.

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Ninth Circuit's opinion also conflicts with this Court's precedents. This Court has repeatedly and consistently held that relief in a class action must be tailored to remediate the harm suffered by the named plaintiff. Injury to unnamed class members alone cannot support relief. This Court made that rule clear in *Warth v. Seldin*, 422 U.S. 490, 502 (1975), where it held that named plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." This Court affirmed that principle in *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976), and again in *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982).

Kirola offers no persuasive response to any of those cases. She simply notes that she had standing. Opp. 23–26. But again, the problem is not Kirola's standing. The problem is her failure to prevail on the merits at trial. Kirola boldly asserts that she "has established a clear causal connection between the

injuries she has suffered and Petitioners' unlawful conduct, and she has established that her injuries are redressable by injunctive relief," but that is plainly incorrect. Opp. 24. At trial, Kirola did not prove that she suffered any injuries caused by any unlawful conduct by San Francisco. App. 82a–83a. Therefore, Kirola failed to show that she is entitled to any relief. *Id.*; *Warth*, 422 U.S. at 502; *Simon*, 426 U.S. at 40 n.20; *Blum*, 457 U.S. at 1001 n.13.

The Ninth Circuit's error is even more apparent in light of *Lewis v. Casey*, 518 U.S. 343 (1996). In *Lewis*, 22 named plaintiffs filed a class action on behalf of prisoners, alleging widespread deprivations of their rights of access to the courts. *Id.* at 346. After a three-month trial, the trial court found only two instances of actual injury. *Id.* at 356. One named plaintiff suffered injury caused by the prison system's failure to provide the services he "would have needed, in light of his illiteracy, to avoid dismissal of his case." *Id.* at 358. In addition, a non-plaintiff class member experienced injury because he did not speak English.

In response to the harms to those two individuals, the trial court mandated "sweeping changes." *Lewis*, 518 U.S. at 347. Straying far from the injury the one named plaintiff proved at trial, the district court ordered changes to the library's hours, the minimal educational requirements for prison librarians, and the content of a legal-research course. The injunction addressed harm to lockdown prisoners and non-English-speaking inmates, even though no named plaintiff

proved any injuries caused by a lack of services to lockdown or non-English-speaking inmates. *Id.*

After the Ninth Circuit affirmed the injunction, this Court reversed. Explaining that the remedy must be "limited to the inadequacy that produced the injury in fact that the plaintiff has established," this Court held that the district court erred by issuing injunctive relief broader than necessary to remedy the harm proven by the one named plaintiff who experienced injury. *Lewis*, 518 U.S. at 357–58. Although one absent class member experienced injury caused by a lack of services to non-English-speaking inmates, this Court "eliminate[d] from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers" because any inadequacies with respect to those services "have not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." *Id.* at 358.

The Ninth Circuit's order cannot be reconciled with *Lewis.* Because Kirola failed to prove that she suffered any injury caused by a violation of the law, there should be no injunctive relief. Nonetheless, the Ninth Circuit ordered the district court to issue an injunction based on the reasoning that the "plaintiff" in class action lawsuits "has been broadened to include the class as a whole, and no longer simply those named in the complaint." App. 4. That was error. As Kirola admits, *Lewis* stands for the proposition that courts cannot issue injunctive relief to remedy harms not experienced by a named plaintiff. Opp. 26.

Kirola does not even attempt to defend the Ninth Circuit's reasoning. Instead, Kirola asserts that she has the "same type of injury as the class members" because she and all class members have a "right to ADAAG-compliant newly constructed or altered facilities." Opp. 27. But Kirola ignores that she failed to show at trial that she encountered any ADAAG violations or experienced any injury caused by ADAAG violations. App. 82a–83a. A generalize interest in ADAAG compliance does not entitle Kirola to injunctive relief, just as the *Lewis* plaintiffs' generalize interest in the right to access the courts did not justify injunctive relief in the absence of injury to a named plaintiff. *Lewis*, 518 U.S. at 358.

Finally, Kirola asserts that she, as a plaintiff with standing, should be able to obtain "relief regarding all facilities that fall within the class definition." Opp. 28 (quoting *Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001)). But that could only be true if she had proved a violation of the law at trial that would entitle her to relief. *Lewis*, 518 U.S. at 358. If all one needed was a plaintiff with standing for the class to obtain relief for all harms identified within the class definition, then the plaintiffs in *Lewis* would have been entitled to the broad relief issued by the district court. But that is not the law. Because Kirola did not experience any injury caused by a violation of the law, the Ninth Circuit erred in holding that Kirola is entitled to injunctive relief.

III. THIS CASE PRESENTS THE PERFECT VEHICLE FOR RESOLVING THE CONFUSION IN THE CIRCUITS.

This case presents an excellent vehicle for resolving the conflict in the circuits concerning the availability of injunctive relief where the class representative fails to prove injury caused by the defendant's violation of the law. That question was squarely presented and considered by the district court and the Ninth Circuit. App. 4a, 83a.

Kirola does not dispute that the issue presented is an important question of law. Instead, Kirola raises two arguments in an attempt to muddy the water.

First, Kirola asserts that the question presented is not at issue in this case because the Ninth Circuit held that she has standing to pursue her claims. Again, Kirola confuses standing with prevailing on the merits. Because the Ninth Circuit held that Kirola was entitled to injunctive relief on behalf of a class even though Kirola failed to prove at trial that she suffered any injury caused by a violation of the law, App. 4a, 82a–83a, this case squarely presents the question of "[w]hether a court may order injunctive relief in a case where the sole named plaintiff failed to prove she suffered any legal injury at trial."

Kirola fares no better with her assertion that this case is a poor vehicle for "review of questions regarding the scope of injunctive relief." Opp. 33. This Petition does not challenge the scope of injunctive relief. Instead, the Petition challenges whether Kirola is entitled to

any injunctive relief at all. Therefore, it does not matter that the district court has not yet issued injunctive relief in compliance with the Ninth Circuit's order. The parties need not wait for the district court to follow the Ninth Circuit's erroneous order before challenging the Ninth Circuit's errors of law.

The question presented in this Petition is crying out for resolution now. The Ninth Circuit's erroneous view that a plaintiff representing a class need not show injury caused by the defendant's violation of the law is gaining traction within the Ninth Circuit. Pet. 19. It is also symptomatic of the uncertainty across multiple circuits concerning the availability of class action relief against a defendant who has not harmed any named plaintiff. In *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002), the Seventh Circuit allowed a class action to proceed against defendants who had not injured the named class representative, but allegedly injured unnamed class members. *Id.* at 678–82. In *Fox*, 67 F.4th 284, the Sixth Circuit repudiated the *Payton* decision, and identified a circuit split. *Id*. at 293. This case provides the Court with the opportunity to resolve that disagreement among the circuits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: September 11, 2023

Respectfully submitted,

DAVID CHIU
San Francisco City Attorney
YVONNE R. MERÉ
Chief Deputy
TARA M. STEELEY
Chief of Appellate Litigation
Counsel of Record
ELAINE M. O'NEIL
Deputy City Attorney
CITY ATTORNEY'S OFFICE
City Hall Room 234
One Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
Telephone: (415) 554-4655
Tara.Steeley@sfcityatty.org

Attorneys for Petitioners
City and County of San Francisco