No. 14-1230

IN THE

Supreme Court of the United States

WELLS FARGO BANK, N.A.,

Petitioner,

v.

VERONICA GUTIERREZ AND ERIN WALKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Unlike virtually every challenge to class certification brought to this Court, the underlying action here has already been fully tried to judgment. The trial established that Petitioner Wells Fargo Bank engaged in a persistent pattern of fraudulent misrepresentations about how it charged its clients for the use of their debit cards. The critical findings, affirmed by the Court of Appeals, were that Wells Fargo "provided to all customers who opened a consumer checking account … misleading representations regarding how debit-card transactions were processed." App. 37a.

Despite uniform representations by Wells Fargo that debit-card purchases "were deducted 'immediately' or 'automatically' from the user's checking account," *id.,* the reality was otherwise. Instead of processing debit-card transactions in the sequence received, the bank's computer programs sought out the highest possible transaction (dollar-wise) each day and processed that one out of sequence, then sought out the next highest and so on, so that the customer's account would go into overdraft as quickly as possible, and hence more transactions would trigger more overdraft fees. The result of this "high to low posting" system was a dramatic compounding of charges for Wells Fargo's most economically vulnerable customers, to whom the bank touted the security and ease of debit-card transactions.

The district court found that Wells Fargo misled customers by telling them—contrary to the

bank's actual practices—that "the money comes right out of your checking account the minute you use your debit-card," and that "[i]f you don't have enough money in your account to cover the withdrawal, your purchase won't be approved." App. 195a. The district court further found the deception was both willful and material: "Such representations would lead reasonable consumers to believe that the transactions would be deducted from their checking accounts in the sequence transacted." App. 37a. The Court of Appeals confirmed these fact findings as sufficient under California's objective standard for reliance: "[t]he pervasive nature of Wells Fargo's misleading marketing materials amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them." App. 35a.

Consumers paid dearly for the "massive" overdraft charges resulting from the "high to low posting" that went contrary to Wells Fargo's express written representations. App. 5a, 46a. The bank's computerized records revealed that it imposed about $203 million in additional overdraft charges in California alone during the approximately three-and-one-half year class period (out of the approximately $1.77 billion in total overdraft fees that Wells Fargo charged in California during that time). App. 182a-188a.

It is impossible to reconcile the repeated—and unfounded—premise of uninjured class members underscoring every point of the Petition

with the trial evidence that the fraudulent statements at issue were directed to the entire class of Wells Fargo debit-card customers. The courts below applied California law, which protects the objectively reasonable expectations of consumers in misrepresentation cases and requires a showing "that members of the public are likely to be deceived." *In re Tobacco II Cases,* 46 Cal. 4th 298, 312 (2009) (citation omitted). Upon such a finding of deceit, restitution flows to those who show loss from the practice. Thus, the district court ordered a remedy in restitution only to those who had been charged excess fees as a result of the high-to-low posting practice that was proven at trial to be contrary to the bank's pervasive misrepresentations.

There is nothing at all problematic about this result. This is precisely how consumer class actions arising from a widespread fraud are supposed to work. Indeed, the framers of Rule 23 contemplated that the class mechanism would allow defrauded consumers to efficiently seek relief in just this kind of situation—"a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action …." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966).

Moreover, this is *not* a case where uninjured persons stand to recover money to which they are not entitled, as Wells Fargo disingenuously implies, or where the proof of harm relies on a statistical abstraction. Rather, Plaintiffs were able to prove,

account by account, using the individual transaction histories for each and every checking account, exactly which customers were harmed in the form of unexpected overdraft fees, and by how much. App. 183a-188a. The trial evidence clearly demonstrated that *no class member* would have preferred the practice Wells Fargo actually carried out, as it conferred no benefit in comparison to what the bank promised. App. 35a-36a, 100a-101a.

Despite being dressed in the procedural garb of an attack on class certification, the heart of the Petition is a claim that it is somehow legal error to interpret California's substantive law to protect its consumers' reasonable contractual expectations. The putative Circuit conflict concerns only an asserted division over how California state law should be interpreted, a matter left to resolution by the California Supreme Court. Questions of state law lie outside certiorari review under 28 U.S.C. §1257(a) and this Court has long held that "[a]s to questions controlled by state law … conflicts among circuits is not of itself a reason for granting writ of certiorari." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

The state law basis for the rulings below is not altered by drumming up Article III in the context of a trial record establishing exactly who was injured by Wells Fargo's fraud. The bank claims that certiorari is needed to enforce a per se rule that no class deception claims may be certified in federal court absent proof of the subjective state of mind of

every individual class member. There is absolutely no legal basis for this remarkable suggestion (which would change long-established common law on how reliance may be proved), and in fact it is contrary to holdings of this Court affirming the viability of the class device to address deceptive conduct without the need to examine each class member's subjective state of mind.

The Petition should therefore be denied.

STATEMENT OF THE CASE

A. The Trial.

A two-week trial was held in this case in 2010. The evidence showed that Wells Fargo embarked on a deliberate campaign to raise revenues from bank fees by manipulating its accounting practices to maximize the incidence of overdrafts. Wells Fargo implemented a practice of deducting customers' debit-card purchases each day in the order of highest-to-lowest in dollar amount, for the very purpose of draining the accounts more quickly so as to maximize the overdraft fees assessed on the accounts. [1] App. 83a-100a. The

[1] For example, a customer with $100 in his or her checking account might make the following five debit-card purchases in the following order: $1, $5, $7, $5, and $110. If the purchases were deducted in the order transacted, as Wells Fargo had promised to do, only the last transaction—the $110 purchase—would overdraw the account balance, and a single overdraft fee would be charged. However, because Wells Fargo did *not*

Footnote continued on next page….

evidence at trial—including the account records for each individual checking account—confirmed that Wells Fargo ordered the transactions of *all class members* in this manner. App. 7a, 51a.

The evidence further showed that this high to low posting practice was contrary to the stated policies that Wells Fargo communicated to all of its customers. Wells Fargo made pervasive representations to its customers that it would deduct their debit-card purchases from their checking accounts chronologically, in the order transacted. App. 129a-133a, 158a-160a. [2] These representations were prominent and widespread; *all class members* received them and were thus led to expect that their transactions would be ordered as promised. App. 131a, 159a.

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sequence transactions as it promised, and instead re-ordered the transactions from highest-to-lowest in dollar amount, the $110 transaction would be posted first, draining the account right away and causing *all five* transactions to be overdraft transactions and *five* overdraft fees to be charged, instead of one. App. 51a-52a. Given the amount charged per overdraft fee—typically $35 per transaction—the five transactions described here would yield $140 in excess overdraft penalties on a total of $128 in debit charges.

[2] Petitioner even in this Court seeks to relitigate the clear facts of record by claiming that the terms "automatically" and "immediately," in its representations of how debit-card charges are deducted from accounts, were somehow not made "in the context of an explanation of overdraft fees." Pet. 8. If anything, not explaining the basis for the ensuing cascade of fees exacerbates the injury.

The named representative plaintiffs testified that they personally had read Wells Fargo's representations, and therefore expected that their debit transactions would be ordered chronologically, as Wells Fargo had promised them. App. 69a, 79a, 172a. Plaintiffs also presented evidence showing that other class members were likely to be misled, and were misled, in the same manner. App. 129a-133a, 158a-160a.

Based on the evidence at trial, the district court found that: Wells Fargo misrepresented its posting order to customers; the misrepresentations "were distributed in such a widespread manner that class members were likely to be misled by them"; and Wells Fargo's "misrepresentations would lead reasonable consumers to believe that the transactions would be deducted from their checking account in the sequence transacted" while "obfuscating [Wells Fargo's] contrary practice of posting transactions in high-to-low order to maximize the number of overdrafts assessed on customers." App. 129a-133a; *see also* App. 120a-129a, 158a-160a.

The district court rejected, as belied by the evidence, Wells Fargo's contentions that the representations were not misleading or not pervasive. App. 129a-133a, 158a-160a. The court also found that Wells Fargo, for all its efforts, failed to prove that any customers were *not* misled or were somehow "on notice" of the actual high-to-low

practice in spite of the deception. App. 156a-160a, 212a; *see also* App. 120a-129a.

Based on the trial record, the district court determined that Wells Fargo's contrary posting practice provided no benefit to any customer, as compared to the chronological posting order the bank had promised. Because debit-card transactions are authorized by the bank prior to the time they are posted, and the bank is obligated to pay the transactions once authorized, the *only* impact of the posting order is on the number of overdraft fees that are assessed. App. 100a-101a, 149a. The district court concluded that Wells Fargo was liable under the "fraudulent" prong of the state Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200 *et seq.*, for its deceptive conduct. App. 154a-161a. As the district court explained: "It is wrong … to lead customers to expect items will be deducted in chronological order only to surprise them with a different sequence that generates an avalanche of unexpected overdrafts." App. 160a.[3]

The district court ordered classwide restitution in the amount of $202,994,035.46, calculated by Plaintiffs' expert, on an account-by-account basis, by measuring the difference between

[3] The district court also found Wells Fargo liable under the "unfair" prong of the UCL because, even apart from its false promise of a different posting order that would have been less harsh to customers, the evidence showed that Wells Fargo acted in bad faith in adopting the high-to-low posting order. App. 148a-150a.

the overdraft fees Wells Fargo charged under its high-to-low posting order and the fees Wells Fargo would have charged under a chronological ordering that class members reasonably expected from Wells Fargo's promises. App. 183a-187a. The district court also ordered permanent injunctive relief. App. 180a-182a.

B. The First Appeal (*Gutierrez I*).

The Ninth Circuit affirmed the district court's findings on liability for misrepresentation under the UCL. App. 29a-38a (holding that the district court's findings that Wells Fargo made misleading representations about its posting order were "amply supported by the court's factual findings," and that "[t]he pervasive nature of Wells Fargo's misleading marketing materials amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them"). In addition, the Court of Appeals affirmed the propriety of class certification, and in doing so distinguished this case from cases where the motives of purchasers could vary. App. 34a-36a. As the trial record convincingly showed, the bank's contrary posting practice provided no benefit to any customer compared to what the bank had promised, and thus the Court of Appeals was "hard pressed to agree that any class member would prefer to incur

multiple overdraft fees" over fewer fees. App. 35a-36a.[4]

Simultaneously, the Ninth Circuit held that the National Bank Act, 12 U.S.C. §1 *et seq*., preempted any injunction against the use of high to low posting and any finding of liability for the use of high to low posting in and of itself. App. 21a-27a.

The Court of Appeals remanded for a determination of the appropriate restitution for the affirmed statutory deception claims, and for entry of a modified injunction that would prohibit further misrepresentations concerning debit posting order. App. 38a-39a

C. The District Court's Order Following Remand.

On remand, the district court reinstated the $203 million in class restitution, finding that this remained the appropriate amount in light of the evidence at trial and the nature of the affirmed deception. The district court specifically noted that the quantification of the original restitution award continued to fit the affirmed claims because it was expressly premised on "restor[ing] the class members to the position consistent with their reasonable expectations induced by the affirmative

[4] The claim in the Petition that high to low posting of debit transactions "can also benefit customers," Pet. 7, is thus directly contrary to the facts found by two courts below.

representations." App. 209a-213a. As the district court explained:

> Plaintiffs proved at trial—and our court of appeals affirmed—that Wells Fargo misled the class via affirmative misdirection that caused the class members to believe that their debits would be posted chronologically…. The harm from Wells Fargo's affirmative misrepresentations came in the form of unexpected overdraft fees…. Because Wells Fargo misrepresented the posting order and overdraft charges to its customers, the appropriate form of restitution is to restore the unexpected charges to Wells Fargo's customers. This is exactly the calculation performed by plaintiffs' damages expert report.

App. 211a-213a. The district court confirmed that the reinstated restitution award penalized, *not* Wells Fargo's choice of posting order, but rather its "affirmatively misleading the class as to what the practice was, namely engaging in a practice likely to mislead the class to believe that processing would be done in chronological order when, in fact, processing was done in high-to-low, non-chronological order." App. 213a.

D. The Second Appeal (*Gutierrez II*).

Following Wells Fargo's second appeal, the Court of Appeals affirmed the judgment and the remedial award, holding that "substantial evidence" in the record supported it. App. 42a-43a. The Court of Appeals also found that the new injunction was overbroad and remanded with instructions to enter a modified injunction. App. 44a.

Wells Fargo sought panel rehearing and rehearing *en banc*, both of which were denied. App. 282a. This Petition followed.

REASONS TO DENY THE WRIT

I. There Is No Circuit Conflict On Any Issue Of Federal Law.

The Petition claims a "circuit split" between the Eighth and Ninth Circuits on whether the class includes individuals "who could not have prevailed in an individual action." Pet. i. Although this claim is central to the Petition, the reason why such individuals could not have prevailed is never established. Wells Fargo rests its claim on an assumption that the class trial somehow allowed individual claims to be established on less than a full record. To the contrary, the exact same evidence that established liability in the class trial would have sufficed to establish liability under state law for each class member had he or she elected to proceed alone. Under California's deceptive business practices statute, Cal. Bus. & Prof. Code §17200 *et*

seq., state courts have "repeatedly and consistently [held] that relief under the UCL is available without individualized proof of deception, reliance and injury." *In re Tobacco II Cases,* 46 Cal. 4th 298, 320 (2009). Plaintiffs here not only "could have" prevailed at trial—they did. Far from some sort of "jurisprudential alchemy" (Pet. 13), Wells Fargo obtained the true gold standard of legal protection: a full front-to-back trial on the merits, reviewed twice by the Court of Appeals.

A. The Trial Record Demonstrates Every Class Member Sustained Injury From Wells Fargo's Fraud.

At trial, the named plaintiffs, as required by California law, established that they were deceived by fraudulent misrepresentations upon which they relied to their detriment. App. 69a, 79a, 172a. The same deception that was established with regard to the named plaintiffs was also shown to satisfy the state law objective standard for proof of reliance on fraudulent misrepresentation by all class members. As found by the district court and affirmed by the Court of Appeals, the record "amply demonstrates that class members, like the named plaintiffs, were exposed to the [fraudulent] materials and likely relied on them." App. 35a. The district court found that Wells Fargo's fraud was part and parcel of its "Balance Sheet Engineering" practices that "were implemented for no other purpose than to increase overdrafts and overdraft fee revenue." App. 83a. The district court concluded, based on the evidence at

trial, that Wells Fargo "went to great lengths to hide these practices while promulgating a facade of phony disclosure." App. 120a; *see also* App. 127a (finding Wells Fargo made disclosures "in a way that was calculated to go unnoticed by class members and used language that, even if read, obfuscated" the true posting practice).

Petitioner's argument wrongly treats the procedural standing requirement for named plaintiffs under the UCL as a substantive element of a UCL fraud claim, which it is not. The UCL was amended in 2004 by Proposition 64 to require a named UCL plaintiff, as a condition of serving as a class representative, to establish by direct evidence that he or she is "a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code §§17203, 17204. In *Tobacco II*, the California Supreme Court confirmed that the new provision is a procedural one that alters the requirements for serving as a class representative but does not alter the substantive law of the UCL. Accordingly, the California court held that the UCL amendment neither affects the standing of absent class members, nor the long-established standards for proving reliance on deceptive conduct under the UCL. The court explained:

> [W]ho in a UCL class action must comply with Proposition 64's standing requirements, the class representatives or all unnamed class members, in order

> for the class action to proceed? We conclude that standing requirements are applicable only to the class representatives, and not all absent class members.... [R]equiring all unnamed members of a class action to individually establish standing would effectively eliminate the class action lawsuit as a vehicle for the vindication of [consumer] rights.

46 Cal. 4th at 306, 321.

Equally important, the California Supreme Court expressly did *not* alter the controlling standard of objectively proven reliance for UCL fraud claims. *Id*. at 314 (holding that the 2004 "procedural modifications to the statute … left entirely unchanged the substantive rules governing business and competitive conduct.") (citation omitted). With regard to the substantive standard for establishing liability, the California court has held consistently that objective proof of how a reasonable person under the circumstances would act—as opposed to direct evidence of individual-by-individual subjective reactions—suffices to establish reliance on a fraudulent misrepresentation under the UCL, regardless whether the claim is brought individually or on behalf of a class. *Tobacco II*, 46 Cal. 4th at 312, 326-27; *Bank of the West v. Super. Ct.*, 2 Cal. 4th 1254, 1267 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.*,

35 Cal. 3d 197, 211 (1983); *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 449-53 (1979).

In this case, the class members all have Article III standing because they all suffered an invasion of their interests protected under this substantive law, an injury-in-fact that is both redressable and traceable to Wells Fargo's conduct as established at trial. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The preponderance of the evidence showed that the class sustained economic harm as a result of being exposed to Wells Fargo's fraudulent misrepresentations. The proof at trial therefore satisfied the Article III case or controversy requirements of injury-in-fact, causation, and redressability for every member of the affected group. *Id.*

A higher threshold for serving as a named class representatives is neither troubling nor unusual. For example, the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. 104-67, 109 Stat. 737, requires the lead plaintiff to be the class member with the greatest financial stake in the outcome of the case, so long as that class member also meets the Rule 23 requirements. 15 U.S.C. §78u-4(a)(3)(B)(iii). Congress enacted the PSLRA in recognition that investors who suffered the largest losses "have every incentive to make sure that class counsel are doing a good job prosecuting their claims." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 192 (3d Cir. 2005). The 2004

amendment to California's UCL functions similarly. *See Tobacco II*, 46 Cal. 4th at 316-17, 324. The result is a division of labor between class representatives and unnamed class members similar to that which prevails in federal practice under Fed. R. Civ. P. 23.

As this Court has long recognized, class representatives assume different burdens than the inactive members of a class. Critically, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 810 (1985). Among the safeguards are the stringent provisions of Rule 23(a)(3) and (a)(4) requiring that named plaintiffs be typical of the class they propose to represent and adequate to the task at hand. Thus a certifying court must conduct a rigorous "inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest." *Id.*

California's 2004 UCL amendment simply brought the requirement for serving as a named class representative under that statute into line with the parallel federal requirement under Rule 23. In a case such as this, the unnamed class members need not prove that they directly relied on

the misrepresentations *unless* they wish to serve as a representative plaintiff. As class members, they are entitled to relief under the substantive elements of proof for fraud for UCL misrepresentation claims.[5] The district court found those elements satisfied in this case, and the Court of Appeals affirmed.

B. The Putative Conflict Does Not Exist.

The asserted Circuit conflict between the Eighth and Ninth Circuits is not a proper vehicle for certiorari. The conflict itself is illusory, and evaporates upon probing what the Eighth Circuit actually held. Moreover, even if there were a disagreement between the two courts, the dispute would be about the interpretation of California state

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[5] This point is fundamentally garbled by the Petition and the amicus briefs. All invoke *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), to claim that state law was somehow used to override the requirements of Rule 23. First, the premise of *Shady Grove* is that there is actually tension between the federal and state law procedures, something which is not the case in California after the 2004 UCL amendment. The heart of the Petition, however, is not *Shady Grove* but a demand that somehow federal procedure should be used to rewrite California substantive law in order to require individual subjective proof of reliance rather than the use of an objective standard to show that a reasonable person would have been deceived under the facts established at trial. That applicable substantive standard was satisfied at the trial—and it is distinct from the heightened Rule 23 requirements for serving as a class representative.

law, a matter which is neither central to the work of the Eighth Circuit nor a basis for certiorari.

Wells Fargo builds its claim of conflict entirely from a single case, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010). *Avritt*, however, presents no conflict with the law of the Ninth Circuit, and is plainly distinguishable from this case on its facts. The plaintiff in *Avritt* alleged *oral* misrepresentations in connection with the sale of the defendant's annuities. The evidence in *Avritt* established that the oral representations did not follow uniform scripts and, as a result, the trial court denied certification of the UCL claim, finding "commonality" lacking. The Eighth Circuit panel affirmed, noting that certification was inappropriate absent "common evidence of misconduct," and that the annuities at issue were sold by "thousands of independent insurance agents," meaning individual inquiries would be necessary to determine what oral representations, if any, were made to each putative class member. 615 F.3d at 1034-35.

The denial of class certification in *Avritt* is standard fare in class action law. A case that would require individual examination of thousands of direct and particularized interactions between sales representatives and isolated consumers could not meet the class action standards of predominance or superiority without some unifying thread of how these interactions occurred. In sharp contrast to the facts of *Avritt*, Plaintiffs here proved, at trial, that Wells Fargo engaged in a common course of

deceptive misconduct and subjected *all* class members to common written misrepresentations. App. 34a-36a. Unlike in *Avritt*, nothing in the present case turns on oral representations or disclosures that differ from consumer to consumer. Both *Avritt* and the rulings below are entirely consistent with venerable California authority on the substantive elements of proof and their application to class claims for consumer fraud. Under the settled law of California, consumers' receipt of standard written material containing objectively misleading statements supports classwide resolution of the claims. *Vasquez v. Super. Ct.*, 4 Cal. 3d 800 (Cal. 1971).

II. All Class Members Have Standing Based Upon Their Proven Injuries.

Wells Fargo asks this Court to use this case to decide whether Article III precludes certification of a class in which not all members have suffered a cognizable injury for purposes of constitutional case or controversy standing. That question is not presented on the facts of this case. What sets this case apart from virtually every other class action brought before this Court is that there was a trial on the merits. And the trial facts found below, affirmed by the Court of Appeals, establish that all class members were injured and that the damages award is firmly grounded in individualized proof of harm suffered by each class member.

"Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum,* 472 U.S. at 804. Petitioner, however, reads dicta in *Avritt* to suggest erroneously that the Article III standing of absent class members depends on the additional standing requirement of the 2004 amendment to California's UCL pertaining to named plaintiffs. That is neither an accurate statement of California law, as set forth above, nor a basis for certiorari.

The statutory standard for serving as a UCL named class representative is, of course, a question of California state law. Among the courts that deal routinely with California law—the California state courts and the federal courts within the Ninth Circuit—there is no serious dispute after *Tobacco II* that, when a UCL class is proposed, the post-2004 heightened standard of direct reliance only applies to the named plaintiff. Dicta about wider application of this discrete state law, from a lone opinion of the Eighth Circuit, a court that seldom has occasion to interpret California law, presents no "conflict" or worthy grounds for this Court's attention.

In further dicta, the *Avritt* court stated that a class must be defined such that all members of the class will have standing if the claims are proved up. 615 F.3d at 1034 (citing *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006)). This is not only unremarkable, it is indistinguishable from controlling Ninth Circuit law—which likewise relies

on *Denney* for this same principle. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney*, 443 F.3d at 264). The only other case cited by the Petition as a claimed source of conflict, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013), never even mentions standing.

Here, the injury to each of the class members has not only been alleged, it has been *proven at trial*. Under nearly a century of California law, the "fact of reliance upon alleged false misrepresentations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." *Hunter v. McKenzie*, 197 Cal. 176, 185 (Cal. 1925); *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.") (citation omitted); *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 976-77 (Cal. 1997) (the materiality of a misrepresentation is a question of objective fact: a given misrepresentation will be "judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' ") (citing Restatement (Second) of Torts §538(2)(a)); *Vasquez*, 4 Cal. 3d at 814 (reliance may be proved as a common element in a class action,

and is inferred from the materiality of common classwide misrepresentations).[6]

Petitioner repeatedly returns to the incorrect assumption of the Question Presented that this certified class includes "individuals who were not harmed by the challenged conduct …." Pet. i. Again, unlike in every case invoked by Wells Fargo, here Plaintiffs have *already proven at trial* that each class member was injured, and the fact of damages was precisely calculated, based on the bank's own computerized account records, down to the individual class member level.[7]

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[6] Wells Fargo mistakenly invites this Court "to consider" this case together with *Spokeo, Inc. v. Robbins*, No. 13-1339. In *Spokeo*, the Court is considering whether a plaintiff who alleges no concrete harm may be granted standing to pursue statutory damages under the terms of the Fair Credit Reporting Act. In this case, the facts of record establish proof of harm to each individual class member under longstanding common law tort principles.

[7] Amicus curiae DRI's repeated characterization of this case as a "trial by formula" runs directly counter to what was established at trial. Plaintiffs proved, through an extensive evidentiary showing, that Wells Fargo engaged in uniform classwide deception in violation of the substantive law. This proof of classwide liability entailed no more of a "trial by formula" than in any other case alleging economic harm from common misconduct, such as an antitrust or securities law violation. Further, every class member's restitution award was calculated individually (not through an aggregate damages formula), using Wells Fargo's transactional data for each individual account. These circumstances make this case nothing like *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), where the plaintiffs improperly attempted to use a

Footnote continued on next page….

Consistent with the California substantive law focus on the "the circumstances attending the transaction," the district court in the course of the two-week trial found that Wells Fargo's "misrepresentations were placed in such a wide array of marketing documents and these documents were distributed in such a widespread manner that class members were likely to be misled by them." App. 131a. The Court of Appeals agreed, holding that "[t]he pervasive nature of Wells Fargo's misleading marketing materials amply demonstrates that class members, like the named plaintiffs, were exposed to the materials and likely relied on them." App. 35a; *see also* App. 160a (Wells Fargo "affirmatively reinforced the expectation that transactions were covered in the sequence made while obfuscating its contrary practice of posting transactions in high-to-low order to maximize the number of overdrafts assessed on customers."); App. 133a (Wells Fargo "promoted a false perception that debit-card purchases would be deducted from their accounts in the order transacted").

At trial, Wells Fargo failed to rebut this evidence. It did not identify even a single class member who was not misled or who did not rely on its misrepresentations. Nor could the bank make any such showing, as it "went to great lengths to hide [its true] practices while promulgating a facade

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statistical model to establish liability without proof tying the aggregate alleged conduct to the claimed harm to any individual class member.

of phony disclosure." App. 120a; *see also* App. 127a (finding Wells Fargo made disclosures "in a way that was calculated to go unnoticed by class members and used language that, even if read, obfuscated" its true posting practice).

Wells Fargo's deception was tied at trial to specific harms to particular class members. Plaintiffs were able to identify and measure this harm on an account-by-account basis, via a comprehensive expert analysis that employed Wells Fargo's own transactional data for each individual account. App. 211a-213a ("[T]he appropriate form of restitution is to restore the unexpected charges to Wells Fargo's customers. This is exactly the calculation performed by plaintiffs' damages expert report."); *see also* App. 183a-187a.

The calculations were done by comparing, for each individual account, the difference between the overdraft fees Wells Fargo actually charged a given customer under high-to-low posting with the overdraft fees that customer would have incurred had the bank posted chronologically, as it had promised. The total differential calculated (i.e., the excess fees charged under the bank's contrary practice), for all of the individual accounts during the class period, was $202,994,035.46. App. 183a-187a, 211a-213a.

III. There Is No Basis For Wells Fargo's Suggestion That Each Class Member Had To Prove Reliance Through Direct Evidence.

Stripped of its repeated assertion that this is a "no-injury class," Petitioner invites a radical per se rule, under either the Due Process Clause or the Rules Enabling Act, that no class deception claims may be certified absent proof of each individual class member's subjective state of mind. There is no legal support anywhere for this breathtakingly novel suggestion.[8] Wells Fargo is reduced to a bare "predict[ion]" (Pet. 25) that the Court might deem it unconstitutional for a defendant to be denied the ability to contest class members' reliance—something not at issue here.

Contrary to what Wells Fargo would have this Court believe (Pet. 18, 25), there is nothing extraordinary about allowing well-grounded objective proof of reliance in a fraud case, subject to rebuttal evidence if any exists. For instance, in *Basic Inc. v. Levinson*, the Court upheld the propriety of a class action over the defendant's argument that all absent class members needed to prove they relied on the defendant's

[8] Wells Fargo failed to preserve these Due Process and Rules Enabling Act arguments by not raising them prior to its second appeal to the Ninth Circuit. It is this Court's "general practice" to "decline to address" a "claim that was waived below." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

misrepresentations. 485 U.S. 224, 245-46 (1988) (allowing proof of overall market response to create a prima facie case of reliance, subject to rebuttal). The Court has repeatedly affirmed the reasoning of *Basic*. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S. Ct. 1184 (2013); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011); *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972).

Wells Fargo also repeatedly mischaracterizes the controlling standard under California law. According to the Petition, "the Ninth Circuit invoked the rule of *Tobacco II* that absent class members do not have to establish deception, reliance, or injury." Pet. 16. The citation for this proposition is to the Appendix at 43a. Turning to that page from *Gutierrez II*, the Ninth Circuit *nowhere* suggests that absent class members are relieved from establishing "deception, reliance, or injury." The cited passage instead deals with *how* deception, reliance and injury" may be established as an evidentiary matter, not *whether* they need to be established: "California courts … have 'repeatedly and consistently [held] that relief under the UCL is available without *individualized proof* of deception, reliance and injury.' " App. 43a (emphasis added) (citing *Tobacco II*, 46 Cal. 4th at 320). Omitting the reference to "individualized proof" may seem rhetorically clever, but it distorts the holding below. No court below held that plaintiffs may recover without proof of harm. Rather the courts

held, consistent with a century of California substantive law, that the harm was established objectively under a reasonable person standard.

Proof of harm based on an objective reasonable person standard is nothing more than the ABCs of the common law. The federal courts are in agreement that class actions may reasonably be litigated through use of "legitimate inferences based on the nature of the alleged misrepresentations at issue." *In re US FoodServ. Pricing Litig.*, 729 F.3d 108, 120 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1938 (2014) (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005)). These decisions and the Restatement enshrine the common law principle that reliance on a fraud may be established objectively, through proof that a reasonable person would have avoided or modified the transaction but for the fraud. *See* Restatement (Second) of Torts §538.

The real difficulty for Wells Fargo is that the trial disclosed ample proof of reliance it was simply unable to rebut. Wells Fargo had every opportunity to show that it did not communicate the offending misrepresentations to the entire class, that these statements were not actually and materially false, and that they did not harm every class member. Wells Fargo lost on the facts. Based upon the trial evidence, the district court concluded that Wells Fargo obfuscated its overdraft policies and their consequences with the intent and effect of deceiving its customers and saddling them with more fees.

App. 127a, 144a. The upshot was a practice that was not only hidden from the customers' awareness but that worked exclusively to their disadvantage. As the Court of Appeals observed, one would be "hard pressed to agree that any class member would prefer to incur multiple overdraft fees" over fewer fees. App. 36a. The evidence regarding the bank's deception was clear and sufficient.

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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