No. 10-355

IN THE
Supreme Court of the United States

PELLA CORPORATION AND
PELLA WINDOWS AND DOORS, INC.,

Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA,
AND WILLIAM AND NANCY EHORN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Plaintiffs' brief in opposition characterizes the decision below as an "unremarkable" and "straightforward" application of Rule 23 that is not "in tension with [the positions] of other circuits or this Court." Opp. 1, 26. That characterization is incorrect. The decision below firmly takes sides on a question that lies at the heart of modern class-action litigation and has divided the courts of appeals: may a court certify a class to litigate discrete issues that will not establish liability for any claim, or does the presence of individualized liability issues preclude class certification? As underscored by Pella's *amici* (whom plaintiffs ignore), the decision below erroneously ratifies the certification of "issue" classes that will not establish liability for any claim, thereby substantially diluting the requirements of Rule 23, with far-reaching implications for not only courts and litigants, but the economy as a whole. *See* Br. of National Ass'n of Home Builders (NAHB) *et al.*, at 5, 10-13; *see also* Br. of DRI-The Voice of the Defense Bar, at 5-6, 8-10; Br. of Product Liability Advisory Council, Inc., at 3-5, 16-19.

ARGUMENT

I. "Issue" Classes Under Rule 23(b)(3)

Plaintiffs first argue that the decision below "does not implicate" the acknowledged circuit conflict over the propriety of certifying "issue" classes under Rule 23(b)(3). Opp. 11. According to plaintiffs, that conflict does not involve Rule 23(b)(3) at all, but instead Rule 23(c)(4). *See* Opp. 9-11. Plaintiffs are mistaken.

It is axiomatic that "[i]n addition to meeting the four conjunctive requirements of 23(a), a class action must also qualify under one of the three subdivisions of 23(b)." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). Thus, there can be no such thing as "a (c)(4) issue class," Opp. 10, that does not satisfy one of the three subdivisions of Rule 23(b). And a class certified under Rule 23(b)(3) must always satisfy that provision's "predominance" and "superiority" requirements.

This case squarely presents the question whether a court may certify an "issue" class under Rule 23(b)(3) where (as here) liability cannot be established on a classwide basis. That is the very question on which the Second and Ninth Circuits, on the one hand, and the Fifth Circuit, on the other, are divided. *See* Pet. 20-21 (citing, *inter alia*, *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 745 (5th Cir. 1996)).

Like the decision below, the Second and Ninth Circuits hold that a court may certify a class under Rule 23(b)(3) to resolve discrete issues even where a determination of liability would necessarily require individualized adjudication. *See, e.g.*, *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 108-09 (2d Cir. 2007); *Strip Search*, 461 F.3d at 226-27; *Valentino*, 97 F.3d at 1234. The Fifth Circuit, in contrast, holds that a court may not certify a class under Rule 23(b)(3) to resolve discrete issues where a determination of liability would require individualized adjudication. *See, e.g.*, *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598,

601 (5th Cir. 2006); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998); *Castano*, 84 F.3d at 745 n.21. As explained in the petition, this open and notorious circuit conflict has long cast a pall of uncertainty over class-action litigation. *See* Pet. 21 (citing, *inter alia*, *Hohider v. UPS, Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008)).

In support of their view that the "predominance" and "superiority" requirements of Rule 23(b)(3) allow certification of "issue" classes that do not establish liability for any claim, the Second and Ninth Circuits have invoked Rule 23(c)(4), which specifies that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). According to these courts, Rule 23(c)(4) shows that the "predominance" and "superiority" requirements of Rule 23(b)(3) allow certification of "'particular issues'" even when "'the action as a whole'" cannot be adjudicated on a classwide basis. *Strip Search*, 461 F.3d at 225-26 (quoting *Valentino*, 97 F.3d at 1234). The Fifth Circuit squarely rejects this approach: "a cause of action, *as a whole*, must satisfy the predominance requirement of (b)(3)," and "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Castano*, 84 F.3d at 745 n.21 (emphasis added); *see also Steering Comm.*, 461 F.3d at 601; *Allison*, 151 F.3d at 422.

Plaintiffs err by asserting that the dispute in these cases involves "whether 'issue' classes may be certified *under Rule 23(c)(4)* if the 'predominance' requirement of (b)(3) has not been met." Opp. 9 (emphasis added); *see also id.* (asserting that the

dispute in these cases involves "whether courts may certify a class *under Rule 23(c)(4)* notwithstanding that the predominance requirement of Rule 23(b)(3) has not been satisfied.") (emphasis modified). Rule 23(c)—in sharp contrast to Rule 23(a) and (b)—does not establish any certification requirements, but instead addresses logistical issues regarding certified classes. That is why, as noted above, there is no such thing as a Rule 23(c)(4) class that does not satisfy Rule 23(b), and a court cannot certify a class under Rule 23(b)(3) that does not satisfy the predominance and superiority requirements. Accordingly, the issue in all these cases is whether courts can certify "issue" classes under Rule 23(b)(3) where, as here, plaintiffs concededly cannot establish liability on a classwide basis. The fact that the Seventh Circuit broadly held that Rule 23(b)(3) gives a court "the discretion to split a case by certifying a class for some issues, but not others," Pet. App. 7a, without even invoking Rule 23(c)(4) does not negate the conflict. To the contrary, it underscores that the Seventh Circuit interprets the "predominance" and "superiority" requirements of Rule 23(b)(3) so loosely that it did not even bother to invoke Rule 23(c)(4) to buttress its interpretation.

Plaintiffs thus beg the question by insisting that "[t]he district court and Seventh Circuit expressly found that common questions predominate over individual questions in the action as a whole." Opp. 11. The very question here is whether courts *can* find "that common questions predominate over individual questions in the action as a whole," *id.*, where individual proceedings would still be necessary to establish liability for any claim.

As explained in the petition, at least four courts of appeals have held that Rule 23(b)(3) does not allow class certification under these circumstances. *See* Pet. 17-18 (citing, *inter alia*, *Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 393-94 (5th Cir. 2007) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish reliance); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005) (same); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362-63 (4th Cir. 2004) (same); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218-19 (5th Cir. 2003) (same); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish injury); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-90 (3d Cir. 2001) (same); *Gene & Gene LLC v. Biopay LLC*, 541 F.3d 318, 326-27 (5th Cir. 2008) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish consent); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (Rule 23(b)(3) not satisfied where individualized proceedings necessary to establish equities)); *see also St. Jude*, 522 F.3d at 840 ("The need for ... plaintiff-by-plaintiff determinations [into causation and reliance] means that common issues will not predominate the inquiry into [the defendant's] liability."); Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43 (6th ed. 2010) ("[I]ssue certification is not appropriate where the determination of liability itself requires an individualized inquiry."); *id.* § 5:23 ("Judicial economy is not served by class litigation ... unless the evidence used to establish liability as to the

claims of the representative plaintiffs would also establish liability as to the claims of every absent class member.").

Indeed, as noted by *amici* National Ass'n of Home Builders *et al.*, this case is materially indistinguishable from *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138 (4th Cir. 2001). *See* NAHB Br. 10-11. There, as here, the plaintiff alleged that a home building component (there, stucco siding) was defective and that the manufacturer had failed to warn purchasers of the defect. *See* 255 F.3d at 141. There, however, the Fourth Circuit held that the district court erred by certifying a class under Rule 23(b)(3), because the inherently individualized causation issues necessarily precluded a determination of predominance. *See id.* at 147-49. "If ... an individualized inquiry [into causation] is needed to determine the membership of a workable class, it is clear that common issues do not predominate over individual issues as required by Rule 23(b)(3)." *Id.* at 149; *see also McLaughlin on Class Actions* § 4:43 ("In product liability actions, most courts have rejected attempts to certify the issue of a defendant's general or overall liability to a class. The intractable problem is that regardless of whether general liability ... is established, the defendant is entitled to present evidence rebutting the existence or cause of any particular claimants' alleged injuries, thereby dissipating any economies achieved through class-wide adjudication.").

Plaintiffs make no real attempt to distinguish any of the foregoing cases, other than to insist that they merely "appl[ied] Rule 23(b)(3) to the facts at hand." Opp. 15. But even cursory review of the cases shows

that they stand for the legal principle that "'[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.'" *Hydrogen Peroxide*, 552 F.3d at 311 (quoting *Newton*, 259 F.3d at 172); *see also Castano*, 84 F.3d at 745 (class action in which reliance must be established in individual proceedings "fail[s] the predominance requirement of rule 23(b)(3)"). In light of these cases, plaintiffs' assertion that "Pella identifies no opinion from any court" that follows this approach, Opp. 2, is inexplicable.

Similarly inexplicable is plaintiffs' assertion that the Rule 23(b)(3) "issue" class certified here would pass muster "even under the Fifth Circuit's restrictive view" of that Rule. Opp. 11. As noted above, the Fifth Circuit has held that the predominance and superiority requirements of Rule 23(b)(3) cannot be satisfied where, as here, individualized proceedings are necessary to establish an essential element of liability, like reliance, injury, or causation. *See Steering Comm.*, 461 F.3d at 601; *Allison*, 151 F.3d at 421-22; *Castano*, 84 F.3d at 745 & n.21.

Plaintiffs also err by asserting that "the use of subsequent individual proceedings" after classwide adjudication of discrete liability issues "is expressly contemplated in the Federal Rules." Opp. 14. Tellingly, they cite no Federal Rule in support of that assertion. Instead, they cite an Advisory Committee Note observing that Rule 23(b)(3) certification may be warranted to determine classwide liability "despite the need, *if liability is found*, for separate determination of the *damages* suffered by individuals

within the class." Opp. 14 (emphasis modified; internal quotation omitted). If anything, that observation cuts against plaintiffs; it assumes that *liability* must be determined on a classwide basis, with subsequent individual proceedings limited to *damages*. The problem here is not that the class certification order severs liability from damages, but that it severs elements of liability from each other. That is not carving at the joint, which is why the decision below "raises serious Seventh Amendment problems," Pet. 18, that plaintiffs make no real effort to address, *see* Opp. 16 n.1.

Finally, plaintiffs assert that "Pella's argument that class certification cannot be granted because of outstanding issues regarding causation is in stark contrast to the position it consistently maintained in the district court." Opp. 17; *see also id.* at 3-4. That assertion is false. Pella consistently argued below that the need for individualized inquiry into causation precludes class certification, although a determination of causation in any specific case is a merits question. Indeed, both the district court and the Seventh Circuit not only acknowledged this argument, but *agreed* with Pella that the causation inquiry would require individualized adjudication. *See* Pet. App. 7a, 80a, 81a n.13. Plaintiffs need not agree with Pella's argument, but cannot deny that Pella made it.

II. "Issue" Classes Under Rule 23(b)(2)

Plaintiffs next argue that the Seventh Circuit properly upheld certification of a non-opt-out class seeking declaratory relief under Rule 23(b)(2) because the requested declarations provide them

with "final" relief. Opp. 18-22. Again, plaintiffs are mistaken.

The declarations requested here do not "correspond[]" to "final" injunctive relief, Fed. R. Civ. P. 23(b)(2), for the simple reason that they cannot be granted without first finding Pella liable, and plaintiffs concede that Pella's liability cannot be established on a classwide basis. Indeed, the district court stressed that the declarations "do not ask the court to presume causation in all individual instances, only to make a finding regarding the nature of the wood durability defect and its cause." Pet. App. 73a. Accordingly, there is not merely a "possibility" of further proceedings if any plaintiff wants final relief, Opp. 2; there is a *certainty* of such proceedings.

Plaintiffs insist, however, that the declarations *themselves* are "final" relief—"[t]his relief is all that [plaintiffs] seek for the Rule 23(b)(2) class." Opp. 18. But this circular argument reads the requirement of "finality" out of the Rule. If a request for declaratory relief were always a request for final relief, a court could always certify a class to pursue a declaration on any discrete issue, such as whether the defendant breached a legal duty. In sharp contrast to the Seventh Circuit, other circuits have rejected that expansive interpretation of Rule 23(b)(2).

Thus, as explained in the petition, the Fifth and Eleventh Circuits have squarely held that certification under Rule 23(b)(2) is inappropriate where, as here, class proceedings would not establish liability for any claim without further individualized proceedings. *See* Pet. 24 (citing, *inter alia*, *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330,

1344-45 (11th Cir. 2006); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 978-79 (5th Cir. 2000)). Plaintiffs try to distinguish these cases on the ground that the Rule 23(b)(2) classes proposed there "would gain nothing" from the requested declarations. Opp. 20. But the same is true here: the requested declarations do not establish liability, and by definition plaintiffs are entitled to *no* relief (declaratory or otherwise) before establishing liability. A declaration regarding a discrete issue is not, by itself, "final" relief. Where, as here, the declaration does not establish liability for any claim, it does not "correspond[]" to "final" injunctive relief, and hence cannot justify certification under Rule 23(b)(2).

III. Analysis of State Law Under Rule 23(b)(2)

Plaintiffs finally argue that the Seventh Circuit properly upheld certification of a nationwide class under Rule 23(b)(2) to pursue state-law claims without any analysis of the underlying state laws. According to plaintiffs, such an analysis is a predicate to certification of a nationwide class under Rule 23(b)(3), but not Rule 23(b)(2). *See* Opp. 22-26.

That distinction has no basis in law or logic. As explained in the petition, Rule 23(b)(2) requires a court to determine, as a prerequisite for certification, that "declaratory relief is appropriate respecting the class *as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). Needless to say, a court cannot determine that relief is appropriate respecting a nationwide class "as a whole" without any analysis of potential differences among governing state laws. Plaintiffs' argument that such analysis is "premature" at the class certification stage, and can be "addressed during the merits phase of the case," Opp. 22, turns

the law upside down: a court cannot certify a class first and ensure compliance with Rule 23 later. Indeed, the 2003 amendments to Rule 23 abolished "conditional" certification to underscore just this point. *See Hydrogen Peroxide*, 552 F.3d at 319 & n.21.

* * *

A final word is in order regarding this Court's recent grant of certiorari in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 2010 WL 3358931 (Dec. 6, 2010) (No. 10-277). The issues presented there are complementary to the issues presented here. As courts have explained, "Rule 23(b)(2) contains two requirements: (1) behavior generally applicable to the class as a whole; (2) injunctive relief predominates over damages sought." *Bolin*, 231 F.3d at 975. *Wal-Mart* focuses on the latter requirement; this case focuses on the former. To be sure, this Court directed the parties in *Wal-Mart* to brief the additional question whether the class certified there comports with the threshold requirements of Rule 23(a), which implicates the propriety of every class action. *Wal-Mart* does not, however, offer this Court a vehicle to resolve the recurring and far-reaching questions presented here about the certification of "issue" classes under Rules 23(b)(2) and (b)(3), or the certification of a nationwide class to pursue state-law claims without any analysis of the underlying state laws. Indeed, *Wal-Mart* does not present any issue regarding class certification under Rule 23(b)(3)—the only provision allowing certification of claims focused on obtaining monetary damages—at all.

Because this case presents important and recurring issues of class action law that dovetail

perfectly with the issues presented in *Wal-Mart*, this Court should grant this petition too, and use the pair of cases to provide much-needed guidance on the standards for class certification under Rule 23. At the very least, however, this Court should hold this petition pending the resolution of *Wal-Mart*, and revisit the issues presented here at that time.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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