No. 12-113

IN THE
Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
Petitioner,

v.

GEORGE MCREYNOLDS ET AL.,
Respondents.

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

SUPPLEMENTAL RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This submission responds to the supplemental brief filed by respondents on September 21, 2012, pursuant to Rule 15.8, reporting *Rodriguez v. Countrywide Home Loans, Inc.*, 2012 U.S. App. LEXIS 19372 (5th Cir. Sept. 14, 2012). Respondents assert that *Rodriguez* "conclusively puts to rest any notion that the circuits are split in interpreting [Federal Rule of Civil Procedure] 23(c)(4)." Resp. Supp. Br. 1. Respondents are wrong.

Respondents mischaracterize both the Rule 23(c)(4) question raised in the petition for certiorari and the holding of *Rodriguez*. According to respondents, the petition contends that the circuits are in conflict over the question whether a class may be certified under Rule 23(c)(4) when "the *action* as a whole" does not satisfy Rule 23(b). *Id.* (emphasis added). In fact, the pertinent Question Presented asks whether Rule 23(c)(4) permits "class certification of a discrete *sub-issue* when the *claim* as a whole does not satisfy Rule 23(b)." Pet. i (emphases added). Thus, as the reply brief explains—addressing the same error in the brief in opposition (Opp. 19, 34)—the issue here is *not* "whether Rule 23(c)(4) can be used to certify a distinct claim when the entire case as a whole cannot be certified," but instead "is whether Rule 23(c)(4) can be used to break apart an *individual claim* and litigate fragmented elements or sub-issues on a classwide basis." Cert. Reply Br. 11 (emphases altered) (distinguishing *Gunnells v. Healthplan Servs.*, 348 F.3d 417 (4th Cir. 2003)); *see id.* at 9.

Rodriguez addresses the former issue, affirming certification of an injunction class even though the "action as a whole"—to use respondents' phrase—could not be certified, because of an individualized

damages claim. As explained, that holding has exactly nothing to do with whether a court may break apart *an individual, non-certifiable claim* and certify a class to litigate arguably common sub-issues or elements within that claim. The Fifth Circuit has long held "a *cause of action*, as a whole, must satisfy" Rule 23(b) requirements. *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (emphasis added)); *see Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998) (rejecting use of Rule 23(c)(4) to separate liability from damages within single Title VII claim). *Rodriguez* explicitly reiterates that rule, stressing—in the very passage block-quoted by respondents (Supp. Br. 2)—that "a court should certify a class on a *claim-by-claim* basis, treating each *claim* individually." 2012 U.S. App. LEXIS 19372, at *22 n.13 (emphasis added, citations omitted). *Rodriguez* thus affirms class certification only because the claim for injunctive relief, taken as a whole, satisfied Rule 23(b)(2). *Id.* at *10-*23. Nowhere does *Rodriguez* suggest that a court may certify individual issues within a claim that does not itself satisfy Rule 23(b), as the Seventh Circuit did here, and as the Second and Ninth Circuits also allow. Pet. 22-24; Reply 8-11.

The conflict between those decisions and the Fifth Circuit's decisions in *Allison* and *Castano* remains clear, concrete, and intolerable. Certiorari should be granted.

Respectfully submitted,

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