No. 18-472

# In the Supreme Court of the United States

BEHR DAYTON THERMAL PRODUCTS LLC, ET AL.,
PETITIONERS

*v.*

TERRY MARTIN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS


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**REPLY BRIEF FOR THE PETITIONERS**

Respondents do not dispute that this case presents an important question concerning the scope of class actions; advocates on all sides agree that the resolution of that question could "fundamentally revamp the nature" of such actions. Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 263 (2002); see Chamber Br. 6-9, 15-16. Instead, respondents devote a full twenty pages to attempting to sand down a longstanding conflict among the courts of appeals—a conflict that was recognized in the decision below and has been recognized in numerous others. Respondents' efforts are unavailing. The Fifth Circuit has not abandoned its narrow approach to issue classes, nor can the decision

below be reconciled with the decisions of the Second and Ninth Circuit applying the "material advancement" test.

The approach adopted in the decision below—under which a class is certified whenever there is any common issue, however minor—is profoundly flawed. It has no basis in the text, structure, and history of Rule 23. And it contravenes this Court's repeated admonition that Rule 23(b)(3) must be stringently applied. The Court should grant the petition for a writ of certiorari and resolve a question of exceptional legal and practical significance.

### A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

Respondents' laborious discussion of the circuit conflict (Br. in Opp. 7-26) cannot obscure two points. First, the Fifth Circuit has not retreated from the "narrow view" of issue classes that it first adopted in *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). That court's subsequent decisions confirm that it continues to limit Rule 23(c)(4) to the "housekeeping" role it was always intended to occupy. See *id.* at 745 n.21. Second, the further conflict between the Second and Ninth Circuits, on the one hand, and the Third, Seventh, and now Sixth Circuits, on the other, is pronounced and leads to different results in otherwise similar cases, as this case demonstrates. Although respondent disparages that conflict as "[s]emantic" (Br. in Opp. 16), this case would have come out the opposite way in the Second and Ninth Circuits. There can be no serious dispute that this case presents a conflict worthy of this Court's review.

1. Respondents primarily contend (Br. in Opp. 10-16) that the Fifth Circuit has silently undertaken an about-face in its approach to Rule 23(c)(4) in recent years. That contention withers under closer scrutiny.

a. Respondents start by asserting (Br. in Opp. 11) that *Castano*, the first decision announcing a narrow approach to issue classes, did so in dicta. But that would be news to the Fifth Circuit, which has held that *Castano* "forbade" an approach like the one adopted by the Sixth Circuit here. *Alison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

The Fifth Circuit's own view of *Castano* is correct. In *Castano*, the Fifth Circuit held that the district court's predominance inquiry had been "incomplete and inadequate" precisely because the court had not conducted the requisite claimwide analysis when it certified issue classes. 84 F.3d at 739, 744-745. In so holding, the Fifth Circuit explained that "a cause of action, as a whole, must satisfy the predominance requirement of [Rule 23](b)(3)" and that "[Rule 23](c)(4) is a housekeeping rule." *Id.* at 745 n.21.

b. Nor has the Fifth Circuit distanced itself from the *Castano* standard in its more recent decisions. In both of the decisions on which respondents rely—*In re Rodriguez*, 695 F.3d 360 (2012), and *In re Deepwater Horizon*, 739 F.3d 790, cert. denied, 135 S. Ct. 754 (2014)—the Fifth Circuit has taken the same approach advocated by petitioners here.

Under that approach, a potential class action must at a minimum meet all of the criteria both in Rule 23(a) and in at least one of the categories of Rule 23(b) as to a cause of action. See Pet. 17. In *Rodriguez*, the Fifth Circuit expressly agreed, observing that "a court should certify a class *on a claim-by-claim basis*." 695 F.3d at 369 & n.13 (emphasis added; citation omitted). The court proceeded to uphold certification of an entire claim for injunctive relief (holding that the requirements of Rule 23(b)(2) had

been satisfied) where the district court had denied certification of separate claims for damages. See *id.* at 363, 366-369 & n.13.

The Fifth Circuit took a similar approach in *Deepwater Horizon*. There, the Fifth Circuit explained that, consistent with the plain text of Rule 23(b)(3), a class action should be certified when common issues "predominate." 739 F.3d at 815 (citation omitted). But it rejected the objectors' argument that individual issues predominate whenever damages are not susceptible to classwide measurement. See *ibid.* Instead, it affirmed the underlying class settlement because, even given the need for individual determinations of damages, the extensive "common issues" on liability meant that common issues predominated for the action as a whole. See *id.* at 816. Rule 23(c)(4), the Fifth Circuit observed, allows courts to phase trials so as to address the common issues first and "reserve other issues for individual determination." *Ibid.*

The Fifth Circuit's approach in all of these cases, then, retains Rule 23(c)(4) for its originally intended, "housekeeping" purpose of allowing for class treatment of common issues when a claim as a whole satisfies the predominance requirement of Rule 23(b)(3) (or the requirements of other provisions of Rule 23(b)). *Castano*, 84 F.3d at 745 n.21. But the Fifth Circuit adheres to its view that "management tools" such as Rule 23(c)(4) cannot be used to "manufacture predominance." *Ibe* v. *Jones*, 836 F.3d 516, 531 (2016) (quoting *Castano*, 84 F.3d at 745 n.21).

Thus, as a leading commentator has noted, "none of the Fifth Circuit's more recent citations to Rule 23(c)(4)"—including *Deepwater Horizon*—"evidences the alleged retreat from its prior holdings that class claims as a whole must satisfy (b)(3)'s predominance requirement." Laura J. Hines, *Codifying the Issue Class Action*, 16 Nev. L.J. 625, 637 (2016). To the contrary, courts within the

Fifth Circuit continue to rely on *Castano* in refusing to certify issue classes. See, *e.g.*, *Payne* v. *Benchmaster Furniture, LLC*, Civ. No. 15-176, 2017 WL 109225, at *3 (E.D. La. Jan. 10, 2017); *Paternostro* v. *Choice Hotel International Services Corp.*, 309 F.R.D. 397, 405 (E.D. La. 2015).

2. Beyond the Fifth Circuit, respondents fare no better. The "material advancement" test applied by the Second and Ninth Circuits and the functional approaches applied by the Third, Sixth, and Seventh Circuits are simply irreconcilable.

While respondents charge that petitioners have "fail[ed] to cite any cases that would have come out differently" under those standards (Br. in Opp. 17), petitioners have already demonstrated that the issue classes in *this case* would not have been certified under the "material advancement" test. See Pet. 16. The analysis of the court below tracks that of the Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2008), but it reaches the opposite result. Both courts determined that the defendants' underlying conduct was susceptible to classwide proof. See Pet. App. 14a-18a; *McLaughlin*, 522 F.3d at 233, 234. And both courts noted that numerous individual issues existed as to causation, injury-in-fact, and damages. See Pet. App. 5a, 47a-53a; *McLaughlin*, 522 F.3d at 234. The Second Circuit determined that issue classes were inappropriate given the presence of those individual issues, while the Sixth Circuit allowed issue classes to proceed. As this case illustrates, therefore, the differing approaches to issue classes have proven to be outcome-determinative.

The differences in those approaches, moreover, are far from mere "[s]emantic variations." Br. in Opp. 16. Some of the considerations relevant to the functional approach are precluded under the "material advancement" test.

For example, the Seventh Circuit, one of the circuits that follows a functional approach, has counseled *against* certification if an issue class would advance a litigation *too much*, reasoning that the pressure on the defendant to settle and the risk of an erroneous outcome can outweigh the efficiencies of moving the case forward. See, *e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir.), cert. denied, 568 U.S. 887 (2012); *Mejdrech* v. *Met-Coil Systems Corp.*, 319 F.3d 910, 912 (7th Cir. 2003). Yet advancement of the litigation is obviously the focus of the "material advancement" test.

3. Respondents devote extensive attention to the observations made in 2015 by participants in the Advisory Committee on Civil Rules to the effect that the "various circuits seem to be in accord" on the question of the interplay of Rule 23(b)(3) and 23(c)(4). Report of the Rule 23 Subcommittee of the Advisory Committee on Civil Rules 90-91 (Nov. 5-6, 2015) <tinyurl.com/subcommittee-report>; see Br. in Opp. 17-26. But the Advisory Committee might have taken a different view if it was aware of the subsequent decisions from and within the Fifth Circuit relying on *Castano*, to say nothing of the decision below. In any event, although this Court has relied on the Advisory Committee's notes as evidence of the drafters' intent, see, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 361 (2011), there is no reason for the Court to defer to its interpretations of case law, especially when courts continue to identify a division in authority.

Whatever the views of the Advisory Committee in the past, "courts and commentators are sharply split on when issue certification is proper under Rule 23(c)(4)." 2 William B. Rubenstein et al., *Newberg on Class Actions* § 4:91 (5th ed. updated Nov. 2018)) (footnote omitted). Courts continue to acknowledge a conflict over the proper role of issue classes in Rule 23(b)(3) class actions, as the court of

appeals did in the decision below. See, *e.g.*, Pet. App. 9a-12a; *In re Atlas Roofing Corp. Chalet Shingle Product Liability Litigation*, Civ. No. 13-2495, 2017 WL 2501756, at *13 (N.D. Ga. June 9, 2017). It remains the case today that "[t]he appellate courts * * * have *not* reached consensus regarding the propriety and contours of the issue class action." Hines, 16 Nev. L.J. at 635.

**B. The Decision Under Review Is Erroneous**

Respondents acknowledge that this Court's interpretation of Rule 23 "must begin with the text, viewed in context of a law's structure, history, and purpose." Br. in Opp. 28 (internal quotation marks omitted). But respondents have little to say about any of those things. Respondents instead rely on the lower courts on their side of the conflict and the views of the "scholarly community." That anemic defense illustrates the need for this Court's review.

1. As to the text of the rule, it is telling that respondents' primary discussion of Rule 23's language is contained within a quotation from the Second Circuit's decision in *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2006). See Br. in Opp. 30. In particular, respondents quote *Nassau County* for the proposition that a court must "first" identify appropriate issues for certification and "then" apply the other provisions of Rule 23, including the predominance requirement of Rule 23(b)(3). *Ibid.* (quoting *Nassau County*, 461 F.3d at 226). But that analysis cannot be squared with the rule's language indicating that the party seeking to satisfy Rule 23(b) must do so at least as to a cause of action, not an individual issue within such an action. See *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997).

In adopting that approach (while expressly rejecting the Fifth Circuit's contrary approach), the Second Circuit

relied on language that has been removed from the rule and that applied only to the formation of *subclasses*, rather than issue classes. See 461 F.3d at 226. At the time *Nassau County* was decided, Rule 23(c)(4) provided that "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." *Ibid.* (emphasis omitted). The distinction between subclasses and issue classes is important, because a subclass (unlike an issue class) is just a subgrouping of class members. See Fed. R. Civ. P. 23(c)(5). It is therefore entirely appropriate that, after identifying a potential subclass, a court should consider whether the subclass satisfies the requirements for Rule 23(a) and (b).

Respondents contend (Br. in Opp. 30) that their interpretation is necessary to avoid rendering Rule 23(c)(4) a nullity. That concern is misplaced. Rule 23(c)(4) authorizes the maintenance of a class action with respect to particular common issues even if a cause of action also contains individual issues, as long as the individual issues do not predominate over the common ones. Although that proposition may seem obvious now, it was not at the time of the drafting of Rule 23. See Pet. 21. And of course, a court can consider the availability of issue classes in Rule 23(c)(4) in determining whether a class action would be manageable. See Fed. R. Civ. P. 23(b)(3)(D).

In fact, it is respondents' interpretation that "reduce[s] Rule 23(b)(3)'s predominance requirement to a nullity." *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 36 (2013). As the "most adventuresome" path to class certification, *Amchem*, 521 U.S. at 614 (citation omitted), Rule 23(b)(3) comes with "greater procedural protections." *Wal-Mart*, 564 U.S. at 362. But the approach embraced by the court below allows a party to whittle away individual issues until

only a common issue is left and predominance is automatically satisfied. In this way, it undoes one of "only [two] prerequisites" for a Rule 23(b)(3) class. *Ibid.*; see Pet. App. 14a-18a.

Respondents further contend that, in interpreting the text of Rule 23, petitioners have "pivot[ed] from 'action' to 'cause of action.'" Br. in Opp. 33. To be sure, there is some ambiguity as to whether the term "action" refers to an entire case or a single cause of action. See *Jones* v. *Bock*, 549 U.S. 199, 220-221 (2007). But respondents offer no credible explanation for how the term "action" can be read to mean a particular "issue" *within* a cause of action. That interpretation is unfaithful to the plain language of Rule 23.

2. As to the structure and history of the rule, respondents simply have nothing to say. The structure and history demonstrate that Rule 23(c)(4) does not, and was not intended to, provide for an additional form of class action free from the constraints of Rule 23(b). See Pet. 18-22. In particular, the structure of Rule 23 indicates that, whereas Rule 23(a) and (b) create requirements for class treatment, Rule 23(c) merely identifies tools for managing class actions that have otherwise met the requirements. See Chamber Br. 11-13. Respondents point to the bare conclusions of certain courts and commentators (Br. in Opp. 29, 31-32), but that is hardly a substitute for a meaningful analysis of the text and context of Rule 23.

3. Respondents' attempt to distinguish this Court's class-action jurisprudence is unavailing. To be sure, the Court has not "addressed issue classes." Br. in Opp. 33. But the Court has repeatedly stated that a party seeking class certification must satisfy the requirements of one of the three categories in Rule 23(b), and it has time and again emphasized the importance of a rigorous predomi-

nance inquiry under Rule 23(b)(3). See Pet. 22-23. Respondents do not dispute those principles, nor do they attempt to explain how their interpretation of Rule 23 is consistent with them.

Respondents affirmatively rely on only one of this Court's decisions, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036 (2016). See Br. in Opp. 34. In fact, that decision supports petitioners. In *Tyson Foods*, the Court reemphasized that the predominance inquiry requires "careful scrutiny" of "the relation between common and individual questions *in a case*." 136 S. Ct. at 1045 (emphasis added). The Court further explained that, "[w]hen one or more of the *central issues in the action* are common to the class and can be said to predominate, *the action* may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." *Ibid.* (emphases added) (internal quotation marks omitted). Those statements support petitioners' interpretation: Rule 23(c)(4) facilitates the class adjudication of "central issues" in a class action properly certified under Rule 23(b)(3), while allowing individualized determinations of others. The court of appeals' contrary interpretation is out of step with the Court's class-action jurisprudence, and the Court's intervention is thus urgently needed.

### C. The Question Presented Is An Exceptionally Important One, And This Case Is An Ideal Vehicle To Address It

Respondents do not dispute that the question presented is an exceedingly important one for class-action litigation. Respondents correctly acknowledge (Br. in Opp. 7-8) that the question is also a recurring one. This case presents that question clearly and cleanly, unlike the earlier cases that respondents cite. See Br. in Opp. at 13-16, *Gunnells* v. *Healthplan Services, Inc.*, No. 03-1282 (filed

May 11, 2004) (contending that the circuit conflict was not implicated in that case); Br. in Opp. at 8-17, *Pella Corp.* v. *Saltzman*, No. 10-355 (filed Dec. 10, 2010) (same); Br. in Opp. at 24, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *McReynolds*, No. 12-113 (filed Aug. 24, 2012) (same). And contrary to respondents' contention (Br. in Opp. 35), this Court routinely grants review of class-action issues at the class-certification stage. See, *e.g.*, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014); *Comcast*, 569 U.S. at 32; *Wal-Mart*, 564 U.S. at 347.

In short, this case offers the Court an ideal opportunity to resolve the longstanding circuit conflict on the use of issue classes and to rein in the overbroad use of those classes by the lower courts, including the court below. Further review on that exceptionally important question is warranted.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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