

IN THE  
**Supreme Court of the United States**

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MERRILL LYNCH, PIERCE, FENNER  
& SMITH, INCORPORATED,

*Petitioner,*

*v.*

GEORGE McREYNOLDS, MAROC HOWARD, LARUE  
GIBSON, JENNIFER MADRID, FRANKIE ROSS,  
MARVA YORK, LESLIE BROWNE, HENRY WILSON,  
LEROY BROWN, GLENN CAPEL, CHRISTINA  
COLEMAN, J. YVES LABORDE, MARSHALL MILLER,  
CARNELL MOORE, MARK JOHNSON, CATHY  
BENDER-JACKSON, AND STEPHEN SMARTT, on  
behalf of themselves and all others similarly situated,

*Respondents.*

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

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**SUPPLEMENTAL BRIEF FOR  
RESPONDENTS**

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**SUPPLEMENTAL BRIEF FOR RESPONDENTS**

Pursuant to Supreme Court Rule 15.8, Respondents respectfully submit this Supplemental Brief to bring to the Court's attention a case decided by the Fifth Circuit one week ago, *Rodriguez v. Countrywide Home Loans, Inc.*, No. 11-40056, 2012 U.S. App. LEXIS 19372 (5th Cir. Sept. 14, 2012). *Rodriguez* confirms Respondents' argument that the circuits are uniform in certifying issue classes under Federal Rule of Civil Procedure 23(c)(4) that meet the requirements of Rule 23(b), even if the action as a whole does not.

Petitioner Merrill Lynch urged this Court to review the decision below and to hold that no issue class may be certified under Rule 23(c)(4) unless the action as a whole satisfies Rule 23(b) – a view that Merrill Lynch attributed to the Fifth Circuit. Merrill Lynch acknowledged that no other circuit has adopted this view. Respondents argued that any conflict occasioned by dicta in Fifth Circuit cases from the 1990s has all but vanished, and the Fifth Circuit now interprets Rule 23(c)(4) in accord with the consensus view of the other circuits. *Rodriguez* conclusively puts to rest any notion that the circuits are split in interpreting Rule 23(c)(4).

The plaintiffs in *Rodriguez* sought money damages, declaratory relief, and injunctive relief against a mortgage service company that imposed undisclosed and unauthorized fees on homeowners. 2012 U.S. App. LEXIS 19372 at \*1-2. Like the Seventh Circuit did in this case, the bankruptcy court in *Rodriguez* limited its Rule 23(b)(2) class certification to the requests for declaratory and injunctive relief, despite its finding that the

individuals' damages claims did not meet the requirements of either Rule 23(b)(2) or Rule 23(b)(3). *Id.* at \*4-5. The Fifth Circuit held that this issue certification under Rule 23(b)(2) was proper "since only injunctive relief was at issue." *Id.* at \*22. Limited class certification would not interfere with "the legitimate interests of potential class members who might wish to pursue their monetary [damages] claims individually," the court held, because the class trial would focus on the defendant's practices, "not on the individualized manner in which each class member may have been affected by the practices." *Id.* at \*14 & n.9 (quoting cases). The Fifth Circuit explained that Rule 23(c)(4) authorizes the certification of injunctive claims even where damages claims cannot meet the requirements of Rule 23(b):

The bankruptcy court's limited grant of class certification is especially appropriate because "a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate. . . . Rule 23(c)(4) explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." . . .

*Id.* at n.13 (citations omitted).

In affirming the certification of the issues of injunctive and declaratory relief, the Fifth Circuit made clear that Rule 23(c)(4) means what it says: "an action may be brought or maintained as a class action with respect to particular

issues” that satisfy the requirements of Rule 23(b). Fed. R. Civ. P. 23(c)(4). The Fifth Circuit’s analysis in *Rodriguez* parallels the reasoning of the Seventh Circuit decision below and demonstrates that the circuits are uniform in interpreting Rule 23(c)(4) in accordance with its language, history, and purpose.

### CONCLUSION

For the foregoing reasons and the reasons stated in Respondent’s Brief in Opposition, the petition for writ of certiorari should be denied.

Respectfully submitted,

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