No. 09-248

IN THE
Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY

The petition for certiorari asks the Court to resolve a 6-6 circuit split over "the extent to which a district court may look beyond the pleadings to resolve factual disputes in the record in determining whether to certify a class under Rule 23." Pet. 10. One set of circuits holds that a district court must accept plaintiffs' substantive allegations as true, while another group of circuits permits courts to evaluate whether factual support exists for the allegations underlying class certification. *Id.* at 12–23.

In an effort to confuse the issue, plaintiffs mischaracterize the split as involving "whether a district court *may* look beyond the pleadings." Br. in Opp. 1 (emphasis added). See also *id.* at 24, 30. That is not the issue that divides the circuits. That issue is whether, in probing behind the pleadings, the court must accept the pleadings' substantive allegations as true.

Plaintiffs also wrongly contend that this case is a poor vehicle to examine the question presented. The district court below held that plaintiffs' theory of class certification—that a diffuse class of employees was united because they were all the victims of a single wide-ranging RICO enterprise and a single conspiracy—has no support in the extensive class discovery record. The Eleventh Circuit reversed the district court because plaintiffs' complaint alone contained such allegations, thereby requiring the district court to accept the complaint's most fundamentally important substantive allegations at face value. This case provides a perfect vehicle to address the split because the question presented was

fully decided below and its outcome is fundamental to the further conduct of this case. Accordingly, this Court should grant certiorari to address the important federal issue in this case and to resolve the division among the courts of appeals.

I. The Circuits Are Divided Over Whether A District Court Must Accept Substantive Allegations As True For Class Certification Purposes.

A deep, acknowledged split divides the circuits over the extent to which a district court can test the complaint's substantive allegations in deciding a Rule 23 motion. Indeed, the twelve regional circuits are split evenly: six circuits require courts to accept as true the pleadings' substantive allegations, and six do not. See Pet. 12–23. As the First Circuit put the issue, "[t]he circuits are divided" over whether "a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another," or whether "the complaint's allegations are necessarily controlling." *Tardiff v. Knox County*, 365 F.3d 1, 4–5 & n.5 (1st Cir. 2004). See also *Johnston v. HBO Film Mgmt.*, 265 F.3d 178, 186 (3d Cir. 2001) (describing the issue as "whether in making a class certification decision the court must take as true the allegations in the complaint where those allegations are unsupported, and in some instances rebutted, by a well-developed record").

Plaintiffs miss the mark entirely, claiming that "there is no circuit split over whether a district court *may* look beyond the pleadings" because "the lower courts are all bound to follow" this Court's holding that "a district court '*may* ... probe behind the

pleadings before coming to rest on the [class] certification question.'" Br. in Opp. 1 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982)) (alteration in original) (emphasis added). *Falcon* did settle the antecedent question of whether a court may ever "probe behind the pleadings." But this Court has not addressed the logical follow-up issue over which the circuits are divided: whether, in probing behind the pleadings, the court must accept the pleadings' substantive allegations as true.

The circuit conflict over this issue stems from the tension between this Court's decision in *Falcon* and its decision in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974). See Pet. 11–12. Circuits requiring acceptance of the complaint's substantive allegations have perceived *Falcon's* holding that "it may be necessary for the court to probe behind the pleadings," *Falcon*, 457 U.S. at 160–61, as being circumscribed by *Eisen's* statement that "nothing in ... Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits." *Eisen*, 417 U.S. at 177. Circuits on the other side have not read *Eisen* as requiring a district court to accept the pleadings' substantive allegations as true when it "probe[s] behind the pleadings," and rely on the class discovery record to determine whether to certify a class.

The First, Second, Third, Fourth, Fifth, and Seventh Circuits all permit or require a district court to test the pleadings' relevant substantive allegations before deciding whether to certify a class. See Pet. 18–23. The Fourth Circuit has reversed a grant of class certification, for example, because "by accepting the plaintiffs' allegations for purposes of certifying a class in this case, the district court failed to comply adequately with the procedural requirements of Rule

23." *Gariety v. Grant Thornton LLP*, 368 F.3d 356, 365 (4th Cir. 2004).[1]

By contrast, the Eleventh Circuit's decision below faulted the district court for not accepting the complaint's allegations that the almost 50,000 putative class members were united because they were all victims of a single RICO enterprise and a single conspiracy. Pet. App. 11a–13a. By requiring the district court to accept the complaint's substantive allegations as being true, the Eleventh Circuit followed the approach taken in the D.C., Sixth, Eighth, Ninth, and Tenth Circuits. See Pet. 14–18. For example, the Tenth Circuit has explained that in deciding a motion for class certification, "the court must accept the substantive allegations of the complaint as true." *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004).[2] As a result, Plaintiffs

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[1] See also, *e.g.*, *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41 (2d Cir. 2006) (requiring "judge [to] resolv[e] factual disputes relevant to each Rule 23 requirement and [to] fin[d] ... whatever underlying facts are relevant to a particular Rule 23 requirement"); *Oscar Private Equity Inv. v. Allegiance Telecom*, 487 F.3d 261, 266 (5th Cir. 2007) (holding "court must consider all evidence, both for and against loss causation, at the class certification stage"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations ... cannot be found in Rule 23 and has nothing to recommend it.").

[2] See also, *e.g.*, *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n. 8 (D.C. Cir. 1984) (holding it "would be impermissible at this stage of the proceedings" to examine factual dispute over affirmative defense); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552–54 (6th Cir. 2006) (refusing to consider dispute over affirmative defense because it was a "merits issue"); *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) ("The court is bound to take the substantive allegations of the complaint as true.").

are simply wrong to assert that "no circuit courts require district courts to accept allegations in the pleadings." Br. in Opp. 23 (internal quotation marks omitted).

The Eleventh Circuit and the other five circuits aligned with it require a district court to accept substantive allegations in the pleadings and only permit them to "probe behind the pleadings" to supplement those allegations to evaluate, for example, the *nature* of the proof that would be introduced to establish common injury or proof of damages. For example, in *Blades v. Monsanto* the Eighth Circuit explained that district courts can "resolve disputes going to the factual setting of the case," but "only insofar as resolution is necessary to determine the *nature* of the evidence that would be sufficient, *if the plaintiff's general allegations were true*, to make out a prima facie case for the class." 400 F.3d 562, 567 (8th Cir. 2005) (emphasis added).

Each of the cases discussed by plaintiffs stands only for the unremarkable proposition that a district court *can* evaluate the factual record when the issue is not resolved by the pleadings alone. See Br. in Opp. 19–30. The issue, however, is whether a district court, in probing behind the pleadings, must accept the pleadings' substantive allegations as true. And on that issue, the circuits are deeply divided.

It is axiomatic that the "district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Although "[t]he circuits are divided," *Tardiff*, 365 F.3d at 5 n.5, and lower courts have noted that "little guidance is available" on this issue, *In re*

Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008), "the Supreme Court has said little about meeting Rule 23 requirements." *Miles v. Merrill Lynch & Co., Inc.*, 471 F.3d 24, 33 n.4 (2d Cir. 2006). See also Pet. 23–28. Accordingly, this Court should grant Mohawk's petition to provide guidance on whether (and to what extent) courts can test the pleadings' substantive allegations in ruling on a class certification motion.

II. This Case Provides A Good Vehicle To Address The Question Presented.

A. The Eleventh Circuit Opinion Cleanly Presents An Opportunity To Resolve The Circuit Split.

Plaintiffs incorrectly assert that the decision below "had nothing to do with the district court's review of the available evidence versus the allegations in the Complaint." *Id.* at 9. Rather, they argue, the Eleventh Circuit merely "corrected a legal error wholly unrelated to whether the district court was permitted to look beyond the allegations of plaintiffs' complaint." *Id.* at 1, 13.

Plaintiffs are simply wrong, and the Eleventh Circuit's decision cannot be read any other way except as relying solely on the pleadings to reverse the district court's determinations on commonality and typicality. Plaintiffs moved for certification on the ground that the class claims were common (and thus the named plaintiffs' claims were typical) because all class members were injured by a single "corporate-wide RICO enterprise" and "one grand conspiracy." Pet. App. 74a, 75a n.4. See also, *e.g.*, Pls.' Mot. for Class Cert. 20 ("Here, the issues ... [of] whether Mohawk conducted or participated in the

affairs of *an enterprise* ... and participated in *a conspiracy* ... are issues that would have to be resolved in every class member's individual RICO claim against Mohawk.") (emphasis added).

The district court examined the factual record and denied class certification: "Contrary to Plaintiffs' arguments that [Mohawk] engaged in one grand conspiracy to employ illegal workers, the evidence in the record indicates ... that [Mohawk's] relationships with the various temporary employment agencies occurred on a division-by-division basis, rather than on a corporate-level basis." Pet. App. 74a. Likewise, the district court concluded that "the evidence in the record ... fails to support Plaintiffs' contention that [Mohawk] engaged in a corporate-wide RICO enterprise with temporary employment agencies." *Id.* at 75a n.4.

The Eleventh Circuit reversed the district court based *solely* upon the plaintiffs' allegations in the complaint. It held that the district was compelled to find that Rule 23's requirement of commonality was met because the "*complaint* raises questions that are common to all members of the class." *Id.* at 12a (emphasis added). The Eleventh Circuit further reversed the district court on typicality based solely upon the legal theory in the complaint, holding that "although [Plaintiffs'] legal theory may ultimately not be sustained by the evidence, it is typical of the class of which [named plaintiffs] are representative." *Id.* at 13a. The issue, therefore, is not that the Eleventh Circuit corrected a legal error, but that it required the district court to accept the most fundamentally important allegations in the complaint at face value.

Likewise, plaintiffs are wrong to claim that the decision below merely "corrected a legal error wholly unrelated to" the question presented. Br. in Opp. 13. The error plaintiffs identify is the conclusion below that the district court should not have applied Title VII class certification authority to this case, and, conversely, that it should have applied its RICO precedent, *Klay v. Humana,* 382 F.3d 1241 (11th Cir. 2004). See Br. in Opp. 9–10, 13–14. This issue over the proper Eleventh Circuit precedent, however, is completely dependent upon the underlying issue presented in this petition: whether a court must accept the substantive allegations as true at the class certification stage. This is because the Eleventh Circuit concluded that *Klay* applied only *because* it first assumed that the complaint's substantive allegations were true.

Plaintiffs moved to certify a class in reliance upon "*Klay*[*'s* holding] that questions concerning the existence of a RICO enterprise, pattern of racketeering activity and conspiracy are common questions that predominate." Pls.' Mot. for Class Cert. 20. The district court noted that it "understood and appreciated Plaintiffs' argument," but concluded that it "[could] not simply ignore the evidence in the record, which fails to support" the complaint's common allegations that plaintiffs were injured by a single RICO enterprise or conspiracy. Pet. App. 75a n.4. See also *id.* at 74a–75a, 77a–78a. Absent a single enterprise or conspiracy this case was more akin to certain Title VII discrimination cases, which may not be certified if the factual variations in each class member's cause of action are inconsistent with class treatment. See *id.* at 74a–75a, 77a–78a.

The decision below, however, held that "the district court erred when it relied on ... precedents about the certification of a class action for a [Title VII] complaint." Pet. App. 11a. This was error, according to the court of appeals, because "claims under RICO, in contrast with claims under Title VII, are often susceptible to common proof." *Id.* Specifically, the court of appeals found it significant that it "often is the case under Title VII" that the "*complaint* is ... dependent on proof of individual acts of disparate treatment," which renders such cases not "susceptible to common proof." *Id.* at 11a–12a (emphasis added). In contrast, RICO cases are more "susceptible to common proof" because *allegations* of racketeering activity and enterprise do not vary from class member to class member, but rather constitute the "essential elements of each plaintiff's RICO claims." *Id.* (quoting *Klay,* 382 F.3d at 1257). The district court's error in applying Title VII precedent, therefore, consisted solely of its failure to accept without challenge the complaint's substantive allegations that a single enterprise and conspiracy existed. In sum, the dispute over the proper Eleventh Circuit precedent to apply is completely dependent upon the issue presented by this petition: whether a complaint's substantive allegations must be accepted at the class certification stage.

B. This Court Should Not Wait To Address The Question Presented.

Plaintiffs incorrectly argue that this Court should not grant Mohawk's petition because this case is before the Court on an interlocutory appeal under Rule 23(f). See Br. in Opp. 16–18.

This Court has repeatedly accepted interlocutory review of class action questions because of the transformational importance of the issue as to whether a case proceeds as a class action. See, *e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549–50 (2005) (granting certiorari to resolve circuit split, in an interlocutory appeal, over whether court may assert "supplemental jurisdiction over the claims of class members who did not meet the jurisdictional minimum amount in controversy"); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 172 (1974) (granting certiorari to review, under "collateral order" doctrine, district court's allocation of class notice costs); *Snyder v. Harris*, 394 U.S. 332, 334 (1969) (granting certiorari "to resolve the conflict between" the circuits, in an interlocutory appeal, over whether "claims brought together in a class action could ... be aggregated for the purpose of establishing the jurisdictional amount in diversity cases").

With respect to review of class certification decisions, Rule 23(f) was enacted only recently in 1998. Significantly, Rule 23(f) represented an important "expansion of ... opportunities to appeal ... in cases that show appeal-worthy [class] certification issues." Fed. R. Civ. P. 23(f), advisory committee note of 1998. That rule acknowledged "several concerns justify[ing this] expansion," including the reality that class certification "may force a defendant to settle rather than incur the costs of defending a class action." *Id.* The advent of Rule 23(f) thus reflects this Court's concern that the "district court's ruling on the certification issue is often the most significant decision rendered" in the course of a class action. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). As a result, this Court should not be

reluctant to review important questions decided on a Rule 23(f) appeal—just as it does not refuse to review other issues that can be appealed and decided on interlocutory review.

The issue presented in this petition is the subject of a 6-6 circuit split and is of crucial importance to the conduct of class action litigation. The time is ripe for this Court's review in order to settle this deep divide on an important question going to the core of the class certification inquiry that a district court must conduct.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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