No. 14-123

IN THE

Supreme Court of the United States

BP EXPLORATION & PRODUCTION INC., ET AL.,

Petitioners,

v.

LAKE EUGENIE LAND & DEVELOPMENT, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court, undersigned counsel state as follows:

BP America Production Company is not publicly traded. BP America Production Company is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

BP Exploration & Production Inc. is not publicly traded. BP Exploration & Production Inc. is an indirect wholly owned subsidiary of BP p.l.c., which is the only publicly owned company in that chain of ownership.

BP p.l.c. is a company incorporated under the laws of England and Wales. Shares of BP p.l.c. are publicly traded via American Depositary Shares (ADS) on the New York Stock Exchange and via ordinary and preference shares on the London Stock Exchange. As of September 26, 2014, JPMorgan Chase Bank N.A. held 28.13% of the total issued share capital of BP p.l.c. (excluding shares held in treasury) in its capacity as ADS depositary via its nominee Guaranty Nominees Limited; the beneficial ownership interest in the underlying BP p.l.c. shares is held by the third-party owners of the corresponding ADS interests, not by JPMorgan Chase Bank N.A. or Guaranty Nominees Limited. No publicly held corporation is the beneficial owner (whether through ownership of ordinary shares, preference shares, and/or ADS interests) of 10% or more of the stock of BP p.l.c.

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

I. THE FIFTH CIRCUIT'S DECISIONS DEEPEN A CIRCUIT CONFLICT ON THE QUESTION PRESENTED 2

II. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRECEDENTS 5

III. THE FIFTH CIRCUIT'S DECISIONS RAISE IMPORTANT QUESTIONS THAT THIS COURT SHOULD RESOLVE 7

IV. BP CAN PROPERLY RAISE THE QUESTION PRESENTED 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

44 Liquormart, Inc. v. *Rhode Island*,
517 U.S. 484 (1996).....6

Butler v. *Sears, Roebuck & Co.*,
727 F.3d 796 (7th Cir. 2013).....4

California v. *LaRue*,
409 U.S. 109 (1972).....6

Cobb v. *BSH Home Appliances Corp.*,
No. 13-80000, 2013 WL 1395690
(9th Cir. Apr. 1, 2013).....4

Comcast Corp. v. *Behrend*,
133 S. Ct. 1426 (2013).....5

Denney v. *Deutsche Bank AG*,
443 F.3d 253 (2d Cir. 2006) 3

Deposit Guar. Nat'l Bank v. *Roper*,
445 U.S. 326 (1980).....10

Greenlaw v. *United States*,
554 U.S. 237 (2008).....10

In re Deepwater Horizon,
732 F.3d 326 (5th Cir. 2013).....8

*In re Whirlpool Corp. Front-Loading
Washer Prods. Liab. Litig.*,
722 F.3d 838 (6th Cir. 2013).....4

Kohen v. *Pacific Inv. Mgmt. Co.*,
571 F.3d 672 (7th Cir. 2009).....3

Lexmark Int'l, Inc. v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).....6

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992).....5

Three Affiliated Tribes of Fort Berthold Reservation v. *Wold Eng'g, P.C.*, 467 U.S. 138 (1984).....7

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011).....5, 6

CONSTITUTIONAL PROVISION

U.S. Const., art. III, § 2.....*passim*

RULE

Fed. R. Civ. P. 23.....*passim*

REPLY BRIEF FOR PETITIONERS

The Claims Administrator does not oppose certiorari, and Class Counsel barely contest the heart of BP's petition: that the decisions below deepen a well-developed circuit conflict on the frequently recurring and important question whether a district court can, consistent with Rule 23 and Article III, certify a class that includes numerous members who have suffered no injury caused by the defendant. Class Counsel never dispute that this issue warrants the Court's review.

Instead, Class Counsel argue that BP seeks review of a narrow contractual dispute. As the petition makes plain, however, BP has asked this Court to decide only a pure question of law regarding the limits of class certification. The Fifth Circuit's holding that the settlement class could be certified even though the class had been interpreted to include members who have suffered no injury caused by BP was the legal predicate for its decision to uphold the district court's interpretation of the agreement. If the Court agrees with BP that Rule 23 and Article III preclude certification of a class containing thousands of members that lack any colorable claim against the defendant, then the Fifth Circuit will be required on remand to reconsider its contractual interpretation in light of this Court's ruling. This Court need not address that question at all. Thus, the lengthy discussion of the settlement agreement by Class Counsel and the Claims Administrator, apart from being incorrect, sheds no light on the question presented.

For similar reasons, respondents err in asserting that this case involves factual disputes related to

contract interpretation. Opp. 31-37. The Claims Administrator has *admitted* that the class, as interpreted, contains numerous members who cannot claim any injury caused by BP. Respondents' efforts to inject purported factual disputes—such as their assertions regarding the parties' settlement negotiations—have no bearing on the legal question whether such a class can be certified consistent with Rule 23 and Article III. The lower courts can resolve, if necessary, any remaining disputes between the parties once this Court has addressed the question that has divided the circuits and is presented in the petition.

I. THE FIFTH CIRCUIT'S DECISIONS DEEPEN A CIRCUIT CONFLICT ON THE QUESTION PRESENTED.

The Fifth Circuit's decisions exacerbate a circuit conflict on the question whether a class can appropriately be certified where it contains numerous members that have not suffered any injury caused by the defendant.

A. Class Counsel's principal response to the conflict is to mischaracterize it, arguing that "[n]o circuit has held" that a settlement class "must be drawn to include only those to whom a settlement payment will ultimately be made." Opp. 21. But that is not the question presented. There may be any number of members in a given settlement class who do not ultimately satisfy the requirements for recovery. The problem here, however, is that the class has been interpreted to encompass numerous claimants that have indisputably suffered *no* injury caused by BP's actions. *See* Pet. 6, 32. *That* issue, not Class Counsel's mischaracterization of it, has divided the circuits and merits review. *See id.* at 15-23.

Having ignored the question presented, Class Counsel fail to meaningfully contest BP's showing that the courts of appeals are deeply and intractably divided. Of the eight federal appellate decisions cited in BP's petition as implicating the circuit conflict, Class Counsel cite only two of them—*Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), and *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009)—and discuss only *Denney* at any length.

Class Counsel argue that *Denney* concerned only whether a settlement class may include "persons who might ultimately not recover damages." Opp. 23. But entitlement to ultimate recovery is not the issue; the relevant holding of *Denney* is that "no class may be certified that contains members lacking Article III standing," 443 F.3d at 264, and certification was upheld in *Denney* because *all* class members' "injuries" were "fairly traceable to the alleged conduct of defendants," *id.* at 265-66. Similarly, Class Counsel ignore *Kohen*'s holding that "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677. That approach to class certification has also been adopted by the Eighth, Tenth, Eleventh, and D.C. Circuits, but rejected by the Third Circuit and the court below. *See* Pet. 22-23. Class Counsel's refusal to confront the actual question on which the circuits are divided provides no basis for denying review.

B. Class Counsel suggest that certiorari is unwarranted because the Court has denied review in other cases purportedly raising the question whether "Article III standing [is] a bar to class certification unless the *entitlement to recovery* of each class mem-

ber is established." Opp. 24 (emphasis added). Class Counsel again misstate the question presented here, and the premise of their argument is incorrect in any event.

In two of the cases cited by Class Counsel, the courts of appeals upheld certification because all members of the classes had colorable claims against the manufacturers, in that all members of the class had purchased the purportedly defective product. *See Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 797, 799-801 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 849-50, 855-56 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Indeed, respondents in those cases successfully urged this Court to deny review precisely because those courts of appeals had concluded that "all purchasers" could "assert time-tested state law breach of warranty claims." Opp. 1, Nos. 13-430 & 13-431 (emphasis omitted). Those cases therefore did not raise the Rule 23 and Article III concerns present here, where the class, as interpreted, contains many members who lack *any* injury caused by BP.

Class Counsel's remaining case arose from an unpublished order declining to review a class-certification order under Rule 23(f), and thus involved no appellate ruling on the merits. *See Cobb* v. *BSH Home Appliances Corp.*, No. 13-80000, 2013 WL 1395690, at *1 (9th Cir. Apr. 1, 2013), *cert. denied*, 134 S. Ct. 1273 (2014).

* * *

Respondents have no serious response to BP's arguments that the circuits are divided on the question presented, and that this deep division of author-

ity warrants this Court's attention. This Court should grant review to establish a single, nationally uniform rule.

II. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRECEDENTS.

Class Counsel similarly fail to rebut BP's showing (Pet. 23-29) that the decisions below conflict with this Court's precedents. Indeed, they do not even cite *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), or the numerous cases rejecting the view that Rule 23 and Article III impose mere pleading requirements. The arguments that Class Counsel do make are meritless.

Class Counsel argue that the Fifth Circuit's decisions are consistent with this Court's precedents because the class as interpreted "'include[s] only persons and entities who can *allege* causation and injury in accordance with Article III.'" Opp. 25 (quoting Pet. App. 18a) (emphasis added). But that argument simply reemphasizes the Fifth Circuit's error. This Court has squarely held that the elements of Article III standing are not "mere pleading requirements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The same is true for Rule 23, which "does not set forth a mere pleading standard." *Dukes*, 131 S. Ct. at 2551. Class Counsels' attempt to defend the decisions below by arguing that the complaint "properly alleged standing under Article III" (Opp. 25) simply highlights the conflict with this Court's precedent.

It similarly restates the problem for Class Counsel to argue that the parties established an "'agreed-upon methodology'" for evaluating eligibility to recover. Opp. 28 (quoting Pet. App. 372a). Parties

"may not confer jurisdiction either upon this Court or the District Court by stipulation," *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972), *abrogated in part on other grounds by 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996), and class certification is "proper only 'if the trial court is satisfied, after a rigorous analysis,'" that the proponent of class certification has "affirmatively demonstrate[d] his compliance" with Rule 23, *Dukes*, 131 S. Ct. at 2551 (citation omitted). It would thus be immaterial even if the parties had agreed to forgo any causation determination (which they did not do, *see infra* at 11 n.2). Once again, Class Counsel's arguments confirm that the decisions below cannot be reconciled with this Court's precedents.

Finally, Class Counsel argue that *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), demonstrates that the class's survival of a motion to dismiss satisfied all causality requirements. *See* Opp. 26. But *Lexmark* was decided at the motion-to-dismiss stage, where plaintiffs need only *allege* that they suffered injury traceable to the defendant's conduct. 134 S. Ct. at 1391 n.6. This case is well beyond the pleading stage. To satisfy the requirements of Article III and Rule 23 at the class-certification stage, the class representative must *prove* that all class members have suffered the same injury and that common issues predominate over individual ones. *See* Pet. 23-24. Whatever showing might have been appropriate at the motion-to-dismiss stage, Class Counsel cannot meet their burden on class certification merely by pointing to their allegations. The Fifth Circuit departed from this Court's precedents in concluding otherwise.

III. THE FIFTH CIRCUIT'S DECISIONS RAISE IMPORTANT QUESTIONS THAT THIS COURT SHOULD RESOLVE.

This Court should also grant review because the Fifth Circuit's holdings raise issues of exceptional importance. *See* Pet. 29-32. As *amici* emphasize, the Fifth Circuit's decisions "endanger the certainty Rule 23 and Article III should provide in *every* class action," Chamber Br. 6, thus "threaten[ing] the continued viability of the entire class-action device itself," WLF Br. 7.

A. Class Counsel do not argue that the *actual* question presented (Pet. i) is unimportant. Instead, they assert that the parties' dispute "turns on the terms of the intricate settlement." Opp. 30. But the question presented turns on Rule 23 and Article III, not contract interpretation.

The Fifth Circuit held that a district court can, consistent with Rule 23 and Article III, certify a class settlement that includes numerous members who have suffered no injury caused by the defendant's actions, and the BEL Panel upheld the district court's interpretation of the settlement agreement on this basis. *See* Pet. App. 89a n.1. BP has asked this Court to review the antecedent Rule 23 and Article III issues, which it can cleanly resolve without addressing whether the BEL Panel's decision is correct as a "matter of contract interpretation." Opp. 4.

If this Court agrees with BP that class certification is inappropriate in these circumstances, the remedy would be to "vacate the [underlying] judgment[s]" and "remand the case so that the court may reconsider" the contract-interpretation question "free of misapprehensions about" "federal law." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold*

Eng'g, P.C., 467 U.S. 138, 152 (1984). Thus, the Fifth Circuit would determine on remand whether to "rende[r] the Settlement lawful by adopting [BP's] interpretation," *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013) (opinion of Clement, J.).

B. Class Counsel also assert that this case does not involve many claimants who have no injury caused by BP. Even if true, that would not undermine the importance of the question presented for class-action litigation generally. But Class Counsel are mistaken. Indeed, the Claims Administrator *concedes* that he has paid claims "'for losses that a reasonable observer might conclude were not in any way related to the Oil Spill.'" Juneau Br. 15 (citation omitted). That is precisely why Judge Clement criticized the court below for becoming a "party to this fraud." Pet. App. 389a.

Class Counsel attempt to gloss over this point by noting that some of the uncontroverted evidence establishing the absence of causal nexus was provided in a "declaration by one of BP's own lawyers." Opp. 32. But they ignore expert evidence confirming that conclusion, *see* C.A. Doc. 00512449474, Exs. E, R (No. 13-30315) (Nov. 21, 2013), and they cannot identify even a *single* piece of contrary record evidence. Instead, they simply repeat their *legal* argument that the parties "stipulated" to the agreements' revenue tests. Opp. 34. But this ignores the undisputed fact that large numbers of claimants have received awards totaling more than half a billion dollars despite the evident absence of any injury caused by BP. *See* Pet. App. 416a-48a. That is, moreover, precisely what would be expected given that causation is *presumed* as to many claimants (*id.* at 123a), and awards issue "with no further factual investigation"

into causation once specified post-spill reductions in revenue are shown. Opp. 34. There is no doubt—and the court below did not dispute—that large numbers of class members lack any plausible claim of injury caused by BP.

IV. BP CAN PROPERLY RAISE THE QUESTION PRESENTED.

Unable to muster any convincing response to BP's arguments, Class Counsel instead argue that BP is "ill-suited" to raise those issues. Opp. 21. Their arguments are meritless.

A. Class Counsel contend that BP was an appellee in the Certification Appeal, and that the only "question in the one case in which BP did appeal" (*i.e.*, the BEL Appeal) was "how the terms of one provision of a massive Settlement Agreement should be applied." Opp. 2. This is incorrect.

As an initial matter, *both* of the decisions before this Court addressed the class-certification issue presented in BP's petition. In the BEL Appeal, BP argued (as appellant) that Rule 23 and Article III preclude certification of classes containing numerous members with no injury caused by the defendant, and urged the BEL Panel to reverse the district court's interpretation of the agreement to avoid imperiling class certification. *See*, *e.g.*, C.A. Doc. 00512484163, at 16-28 (No. 13-30315) (Dec. 30, 2013). The BEL Panel majority rejected these arguments, holding that there was no "basis for saying" that Article III and Rule 23 were violated by failing to require proof of causation. Pet. App. 89a n.1; *see id.* at 371a-78a. Class Counsel are therefore mistaken to claim that the Rule 23 and Article III issues arose only in the Certification Appeal.

In any event, it is irrelevant that BP was an appellee in the Certification Appeal. BP did not argue, as Class Counsel contend, that the district court's order certifying the class should be "set aside." Opp. 2. Instead, BP's consistent position was that the order should be affirmed, but only after the district court's erroneous interpretation of the agreement had been corrected. *See*, *e.g.*, C.A. Doc. 00512449474, at 16-33 (No. 13-30315) (Nov. 21, 2013) (injunction motion to BEL Panel); C.A. Doc. 00512405186, at 6-9 (No. 13-30095) (Oct. 11, 2013) (letter brief to Certification Panel). That argument, if accepted, would not have "alter[ed] a[ny] judgment" at issue in the Certification Appeal, *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008), but would simply have necessitated adoption of BP's contract-interpretation position to avoid the Rule 23 and Article III problems that the court below ultimately confronted and incorrectly resolved.[1]

B. Class Counsel also claim that BP is judicially estopped from "switching its position on the settlement." Opp. 20. But BP's position has never varied.

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[1] Class Counsel suggest that certiorari is unwarranted because BP was a "prevailing party" in the Certification Appeal. But a party may seek certiorari from any "adverse ruling"—whether "on" or "collateral to" the merits of the underlying appeal—so long as that party "retains a stake in the appeal satisfying the requirements of Art[icle] III." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 334 (1980). BP has standing to challenge the Certification Panel's rejection of BP's argument that the settlement can be upheld only if interpreted to include a causal-nexus requirement for class membership—BP was indisputably not the prevailing party as to that ruling, which directly harms BP, and gave rise to the subsequent decision by the BEL Panel to affirm the district court's misinterpretation of the settlement agreement.

BP has consistently argued that Rule 23 and Article III preclude certification of a class that includes thousands of members with no plausible claim of injury caused by the defendant, and accordingly that the settlement should be construed to avoid that result.

Class Counsel point to the district court's estoppel ruling below (Pet. App. 317a), but that ruling did not address the Rule 23 and Article III issues raised in the petition, and instead related to the separate issue of contract interpretation that is not the question presented. It is thus of no relevance for purposes of this Court's review. And, in any event, the BEL Panel did not accept the district court's estoppel ruling, but instead addressed BP's arguments on the merits. *Id.* at 86a-94a. Thus, with respect to the only issue that BP has asked this Court to resolve, Class Counsel have no colorable judicial-estoppel argument.[2]

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[2] Class Counsel's efforts to portray BP's interpretive position as a "change of heart" is inaccurate. Opp. 20. Class membership is a necessary precondition to applying the agreement's revenue tests and other formulas. *See* Agreement Ex. 4B (ROA.13-30315.4260) (providing that Exhibit 4B "does not apply" to "Entities, Individuals or Claims not included within the Economic Class definition"). The class definition by its plain terms limits class membership to claimants who experienced loss "as a result of" the spill. Agreement § 1.3.1.2 (ROA.13-30315.4071). Although BP has supported—and still supports—the settlement agreement as written, BP has consistently opposed the district court's subsequent modification of the agreement, which effectively nullifies the causal-nexus requirement for class membership and permits awards to numerous claimants that have sustained no injury "as a result of" the spill. *See* Pet. App. 66a (Garza, J., dissenting) (observing that the district court's implementation of the agreement "renders Section 1.3.1.2's causation language nugatory").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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