No. 13-1779

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUINTON **BROWN**, JASON GUY, RAMON ROANE, ALVIN SIMMONS, SHELDON SINGLETARY, GERALD WHITE, and JACOB RAVENELL, individually and on behalf of the class they seek to represent,
Plaintiffs - Appellants,

v.

NUCOR CORPORATION and NUCOR STEEL-BERKELEY,
Defendants - Appellees.

On appeal from the U.S. District Court for the District of South Carolina

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APPELLANTS' RESPONSE IN OPPOSITION TO THE PETITION FOR REHEARING EN BANC

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INTRODUCTION

Defendants Nucor Corp. and Nucor Steel-Berkeley (collectively "Nucor") have not come close to meeting the standard for en banc review. Notwithstanding Nucor's heated rhetoric, the panel decision is a narrow, fact-based application of well-established principles to a small class of approximately 100 individuals in one plant in the small town of Huger, South Carolina. En banc rehearing is disfavored unless "necessary to secure or maintain uniformity of the court's decisions" or the case raises "a question of exceptional importance." Fed. R. App. P. 35(a). Because neither criterion is met here, the petition should be denied.

First, rehearing is not needed to preserve the uniformity of this Court's decisions. Nucor does not even try to meet this criterion; it points to no Fourth Circuit decision with which the panel decision conflicts.

Second, Nucor has not shown that the case presents a "question of exceptional importance." Nucor's main contention, that the panel decision conflicts with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is flatly incorrect. *Wal-Mart* reversed certification of a class of 1.5 million employees who worked at more than 3,000 different stores nationwide, where the plaintiffs' statistical evidence applied at the regional and national levels but not the local level and their anecdotal evidence pertained to the experiences of less than .01% of the class. By contrast, this case involves certification of a class of approximately 100 employees

at a single plant, based on overwhelming statistical and anecdotal evidence of pervasive racial discrimination at the specific plant.

Nucor's claim of a circuit split is easily refuted, as each of the cases cited by Nucor cites is readily distinguishable from this case.

Finally, Nucor complains that the panel misapplied the standard for appellate waiver — a heavily case-specific question based on a well-established legal standard. This issue is far from one of "exceptional importance."

BACKGROUND

Seven employees at a single Nucor steel plant in Huger, South Carolina brought this Title VII class action on behalf of themselves and approximately 100 workers alleging race discrimination in promotions and a hostile work environment. The Nucor plant has approximately 600 employees working in six departments. *Brown v. Nucor Corp.*, No. 13-1779, slip op., at 4 (*Brown II*). At issue in this appeal is whether the promotion claims should proceed as a class action; the hostile work environment claim is already certified.

As described in detail in the panel's opinion, the record demonstrates a rampant culture of racism at the Huger plant. In support of certification, plaintiffs provided plant-wide statistical evidence of a racial disparity in promotions, anecdotal evidence of racial discrimination in promotions, and anecdotal evidence of pervasive racial discrimination throughout the Huger plant. *Id.* at 5-7. The

statistical evidence included testimony by an expert witness, who used Nucor's job-bidding data where available and used change-of-status forms where Nucor failed to retain actual bidding data. *Id.* at 5, 17-18. The expert concluded that although black employees comprised 19.24% of those who applied for relevant promotions from 1999-2003, only 7.94% of promotees were black. *Id.* at 5, 28-29. This disparity "is statistically significant at 2.54 standard deviations from what would be expected if race were a neutral factor." *Id*. at 28.

The plaintiffs also provided anecdotal evidence of discrimination throughout the plant, including sixteen instances of discrimination in specific promotion decisions; complaints of discrimination made to and ignored by the General Manager; retaliation against those who complained of discrimination in promotions; testimony that a department manager stated, "I don't think we'll ever have a black supervisor while I'm here"; supervisors' routine use and toleration of racial epithets including "dumb ass nigger," "yard ape," and "porch monkey"; and inaction by supervisors and the General Manager when white workers displayed a hangman's noose or the Confederate flag, or wore a KKK hood. *Id.* at 6-7.

In 2009, this Court ordered class certification on all claims. *Brown v. Nucor Corp.*, 576 F.3d 149, 160 (4th Cir. 2009) (*Brown I*). In 2011, after the Supreme Court decided *Wal-Mart*, the district court de-certified the promotions class (but not the hostile work environment class). *Brown II*, slip op., at 3 & n.1.

On plaintiffs' appeal, this Court reversed the decertification order. The panel found that the district court committed clear error when it discarded relevant data by confusing one set of evidence with another and then applying the view of the wrong evidence stated in the *Brown I* dissent. *Id.* at 20-21. The panel held that the district court abused its discretion in failing to recognize the myriad respects in which the facts distinguish this case from *Wal-Mart* and establish commonality. Applying the *Wal-Mart* standard, the panel held that the plaintiffs' evidence showed that racial hostility "provided a 'common mode of exercising discretion that pervade[d]'" the entire plant. *Id.* at 51 (quoting *Wal-Mart*, 131 S. Ct. at 2554-55; alteration in *Brown II*). The panel held that the plaintiffs' expert's statistical assumptions were reasonable and that the data used were reliable and probative of discrimination. *Id.* at 17-30. The panel detailed the "substantial evidence of unadulterated, consciously articulated, odious racism throughout the Nucor plant" and concluded that promotion decisions could not remain insulated from such a discriminatory environment. *Id.* at 38. The panel explained how the anecdotal evidence was "substantially more probative than that in *Wal-Mart*," *id*. at 39-40, and, when combined with the statistical evidence, demonstrated commonality under *Wal-Mart*, *id*. at 51. Finally, the panel held that *Brown I* did not permit the district court to revisit the issue of predominance, and the panel rejected Nucor's argument that plaintiffs waived this issue on appeal. *Id*. at 52-62.

REASONS TO DENY THE PETITION

Nucor argues that rehearing is warranted because of exceptional importance based on a purported conflict with *Wal-Mart* and a purported conflict with other courts of appeals. Nucor also attacks the panel's holding regarding waiver without explaining why this issue satisfies any criterion for rehearing. Each argument fails.

I. The Panel Opinion Is Consistent With *Wal-Mart*.

Nucor begins with a key mischaracterization: that plaintiffs alleged discrimination in promotions "*solely* due to Nucor's policy of delegating promotions decisions to the discretion of dozens of decision-makers." Pet. for Reh'g En Banc ("Pet.") 1 (emphasis added). In fact, plaintiffs charged, and presented evidence of, a "pattern or practice of unlawful discrimination" in promotion decisions. *Brown II*, slip. op, at 31. Beyond supervisor discretion, plaintiffs rely on extensive statistical and anecdotal evidence of pervasive discriminatory decisionmaking at the plant. To the extent Nucor complains that plaintiffs have not conclusively established discrimination in particular promotions by individual supervisors, Nucor is confusing plaintiffs' class certification burden with their case on the merits. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."). Indeed, under *Teamsters v. United States*, 431 U.S.

324 (1977), "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiffs are] not required to offer evidence that *each person* for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." *Id.* at 360 (emphasis added); *accord Brown II*, slip. op, at 44. Subsequently, when determining individual damages, "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief," *id.* at 361, with the inquiry informed by the pattern or practice established at the initial stage, *id.* at 362. *Wal-Mart* explicitly reaffirmed the *Teamsters* approach. 131 S. Ct. at 2561.

As to each of plaintiffs' claims, the panel applied *Wal-Mart* correctly. *Wal-Mart* reversed certification of a class of 1.5 million employees, spread over approximately 3,400 stores across the country, where plaintiffs provided anecdotal evidence of discrimination from 1 out of every 12,500 class members (less than .01% of the class), provided statistical evidence pertaining only to the national and regional levels but not the local level, and alleged a common policy of permitting supervisors to exercise discretion without showing a common way that discretion was exercised. 131 S. Ct. at 2547, 2554-56. Here, by contrast, the plaintiffs used plant-specific statistics and extensive plant-specific anecdotal evidence to show that about 100 employees at a single steel plant were subjected to a common

regime of discrimination and that their supervisors exercised discretion in promotion decisions in a common, racially discriminatory way.

A. For the disparate treatment claim, the panel properly applied *Wal-Mart* to hold that the class demonstrated commonality.

Wal-Mart recognized that pattern-and-practice disparate treatment claims can be established with the type of showing the plaintiffs made here: "substantial statistical evidence" of discrimination along with sufficient "specific accounts of racial discrimination from particular individuals." *Id.* at 2556. The statistics here are more specific and persuasive than the statistics presented in *Wal-Mart*, as the panel explained. *Brown II*, *slip* op., at 32-33. In *Wal-Mart*, the plaintiffs attempted to use nation- and region-wide statistics to prove store-specific disparities. By contrast, and in line with *Wal-Mart*'s observation that store-specific disparities should be proven with store-specific data, 131 S. Ct. at 2555, plaintiffs here provided plant-specific data to prove their plant-specific disparity.

Nucor criticizes the panel for not requiring department- or manager-specific data. Pet. 10. However, *Wal-Mart* does not require a single location to be broken down into component parts, only proof that discrimination was the "'regular rather than the unusual practice.'" *Wal-Mart*, 131 S. Ct. at 2552 n.7 (quoting *Teamsters*, 431 U.S. at 358). Plaintiffs made this showing through three kinds of evidence: descriptions of how the plant's departments were connected, statistics showing a racial disparity in promotions, and specific accounts of discrimination.

First, the evidence showed that the steel plant included shared common spaces where employees across departments were regularly in contact with each other. *Brown II*, slip op., at 33. The evidence showed that the General Manager, who had plant-wide authority, ignored complaints of racial discrimination. *Id*. at 34. And the evidence showed that the plant's policies allowed employees to bid on promotions across departments, *id.* at 35 (quoting the district court's prior certification order), and required promotions to be approved by supervisors from both the "originating and destination" departments as well as the General Manager, *id.* at 36-37. The evidence in support of the hostile work environment claim also showed an "overall pattern or practice" affecting the whole plant. *Id*. at 37.

Second, plaintiffs provided statistical evidence showing a disparity in promotions of 2.54 standard deviations — well within the range of disparities that courts find probative of discrimination. *Id.* at 28. Nucor attacks these statistics, but the panel's thorough review demonstrates that they were "methodologically sound." *Id.* at 17. Nucor criticizes the use of extrapolated data for the period when Nucor failed to retain exact records, but such extrapolation is grounded in "[m]ore than two decades of this Court's precedent," *id.* at 18, that Nucor provides no reason to revisit here. Nucor's quarrel about the interpretation of the particular data presented here neither demonstrates a conflict with *Wal-Mart* nor otherwise qualifies as an issue of "exceptional importance" justifying en banc review.

Third, plaintiffs provided extensive anecdotal evidence of pervasive discrimination throughout the plant. *Id.* at 6-7. That evidence, outlined above (at 3), included specific accounts of discrimination in promotions and descriptions of inaction by the plant's General Manager in the face of blatant racial harassment and of retaliation for complaining about discrimination. *Id.* at 6, 34-35, 50. Although most of the anecdotes came from the Beam Mill, where the majority of the plant's staff was assigned, the anecdotes — as well as Nucor's own evidence — described racial discrimination in other departments also. *Id*. at 34-35. Additionally, many anecdotes pertain to the creation of a hostile work environment, which pervaded the entire plant, and to the plant-wide General Manager, who oversaw all departments. *Id.* at 6, 36-37. Because the anecdotes captured the experiences of 1 in 6.25 members — 16% of the class — throughout the plant, the panel rightly found this evidence to be "substantially more probative than that in *Wal-Mart*," where the plaintiff's anecdotes captured the experiences of only 1 in 12,500 members (less than .01% of the class). *Id.* at 40. The panel noted that the 1-to-6.25 ratio is similar to the one permitted by the Supreme Court in *Teamsters*, where plaintiffs provided one anecdote for every 8 class members. *Id.* at 40-41 (discussing *Teamsters*, 431 U.S. at 331, 338). Accordingly, the panel held, the plaintiffs' "statistical and anecdotal evidence, especially when combined . . . provide precisely the 'glue' of commonality that *Wal-Mart* demands." *Id.* at 44.

B. For the disparate impact claim, the panel properly applied *Wal-Mart* to hold that the class demonstrated commonality.

Wal-Mart recognized that a policy of "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory" as long as that discretion is tied to a common "specific employment practice." 131 S. Ct. at 2555. Plaintiffs here provided evidence of pervasive racism — including anecdotes of racist comments, displays of racist paraphernalia, and ignored complaints to management — and policies that channeled racism into promotion decisions. Plaintiffs thus showed precisely what *Wal-Mart* requires: "a common mode of exercising discretion that pervades the entire company." *Id*. at 2554-55.

Plaintiffs identified plant-wide policies that translated a racially hostile environment into racially hostile decision-making in promotions. Specifically, promotions required approval from three levels of management: the supervisor, department manager, and General Manager. *Brown II*, slip op., at 49. Contrary to Nucor's assertion that 60 supervisors make decisions independently, Pet. 7, the three-person sign-off policy means that one supervisor's racism would unlawfully harm opportunities for everyone transferring out of or into that department. And the General Manager who approves all promotions is the same individual who ignored evidence of and complaints regarding discrimination at the plant, *Brown II*, slip op., at 6, 50, who ratified the promotion decisions that produced the statistically significant disparity, *id.* at 49-50, and who threatened to retaliate

against employees who complained of discrimination, *id.* at 6, 50. Coupled with evidence of pervasive racial hostility throughout the plant as reflected in evidence supporting the hostile work environment claim, the panel rightly characterized this practice as providing "ample evidence supporting [plaintiffs'] allegation of a common, racially-biased exercise of discretion throughout the plant." *Id*. at 51.

Nucor provocatively contends that the panel's decision transformed Rule 23 into a pleading requirement that would allow any group of plaintiffs to obtain class certification by "append[ing] hostile-work-environment allegations to every discretionary decision-making complaint." Pet. 9. However, the panel expressly disavowed the notion that "Rule 23 is a mere pleading standard," *Brown II*, slip op., at 17, and the panel did not treat it as such. Quite the contrary: the panel conducted a detailed analysis of the workers' anecdotal and statistical evidence, as well as evidence submitted by Nucor.

Nucor characterizes the panel's fact-intensive, holistic analysis as creating a "single-facility exception" and an isolated-managerial-failure exception to *Wal-Mart*'s requirements. Pet. 9. However, nowhere did the panel indicate that all single-facility classes should be certified — if it had, then the bulk of its analysis would have been superfluous and the opinion could have ended after the panel found that only a single plant was at issue. Nor did the panel hold that an isolated managerial failure alone would be sufficient — instead, the evidence showed a

"practice of inaction" by the General Manager and other supervisors in the face of harassment and discrimination. *Brown II*, slip op., at 50 (emphasis omitted).

Finally, Nucor repeatedly attacks the panel for its rhetorical flourish using the phrase "simple justice" in the penultimate paragraph of its opinion. However, the decision's legal analysis in no way turns on that closing characterization, but instead on a systematic and detailed application of the law to the facts and a comprehensive inventory of the many ways in which this case differs from *Wal-Mart*. What is exceptional here is not a legal issue concerning class certification, but the quantity and strength of the evidence supporting certification in this record. Because the panel correctly applied Rule 23 in a manner that is entirely consistent with *Wal-Mart*, en banc review is unwarranted.

II. Nucor Has Shown No Circuit Conflict.

Nucor relies mainly on *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011), which affirmed a denial of certification to a class of black employees at Nucor's plant in Blytheville, Arkansas. The different result there does not demonstrate a circuit conflict; rather, it reflects the fact-sensitive nature of class certification decisions. *Bennett* involved facts substantially different from those here. All the named plaintiffs in *Bennett* worked in one particular department and, with the exception of a single email, their evidence pertained to that department only. 656 F.3d at 816. Nucor presented substantial evidence that departments

operated entirely separately at that particular plant. *Id.* In contrast, the plaintiffs here came from multiple divisions, provided evidence of plant-wide discrimination and inaction in the face of discrimination and harassment (including by the General Manager of the whole plant), and explained how promotion decisions required cross-department approval. *Brown II, slip* op., at 6-7, 36-37. In fact, looking to the decision in *Brown I*, the *Bennett* court explicitly distinguished the evidence there from the evidence here, noting that in Huger, unlike in Blytheville, "the plaintiffs introduced direct evidence of discrimination throughout a Nucor facility" and that there was "scant, if any, evidence that the various departments at the South Carolina plant were autonomous and separate." *Bennett*, 656 F.3d at 816 n.2 (citations and internal quotation marks omitted). Thus, the Eighth Circuit itself has essentially already found no conflict between *Bennett* and this case.

Tabor v. Hilti, Inc., 703 F.3d 1206 (10th Cir. 2013), does not conflict with the panel decision, either. The *Tabor* plaintiffs unsuccessfully sought certification for 294 people (roughly three times the size of the class here), based on a record that included just two anecdotes complaining of different fact patterns. *Id.* at 1228-29. As in *Wal-Mart*, the plaintiffs challenged a system of discretionary decisionmaking but did not show that the defendant "maintained 'a common mode of exercising discretion that pervade[d] the entire company.'" *Id.* at 1229 (quoting *Wal-Mart*, 131 S. Ct. at 2554-55; alteration in *Tabor*). Unlike in *Tabor*, the

plaintiffs here have provided extensive statistical and anecdotal evidence detailing plant-wide discrimination and showing a common, racially discriminatory mode of exercising discretion. Nucor characterizes *Tabor* as "categorically stat[ing] that where the challenged employment practice is the exercise of 'broad discretion' and 'each employment decision' involves 'highly individualized facts and circumstances . . . we cannot say that the proposed class presents common issues.'" Pet. 14 (quoting *Tabor*, 703 F.3d at 1229; ellipsis added by Nucor). However, the *unedited* quote observes only that the "broad discretion *involved in Hilti's* alleged discriminatory employment practice" rendered class certification inappropriate in that case. *Tabor*, 703 F.3d at 1229 (emphasis added).

Bolden v. Walsh Construction Co., 688 F.3d 893 (7th Cir. 2012), is even further afield. That decision reversed certification of a group of thousands of employees who worked on 262 different projects at separate locations throughout the greater Chicago area. *Id.* at 895, 897. Nucor likens this case to *Brown* because both groups of plaintiffs alleged a similar kind of racial discrimination. Pet. 14. However, the *Bolden* class included far more individuals, who worked at hundreds of different sites, whereas the 100-member class here all worked at one plant. In fact, the Seventh Circuit specifically approved of classes like this one, suggesting that the *Bolden* plaintiffs might be able to cure their commonality problem by proposing "site- or superintendent-specific classes." 588 F.3d at 899.

Finally, Nucor mischaracterizes *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538 (9th Cir. 2013), as illustrating that "[t]he Ninth Circuit does not accept the panel's 'single facility' exception to *Wal-Mart*." Pet. 13. Even if the panel here had created a "single facility exception" — which it did not, as explained — *Wang* did not opine on such a theory; it simply remanded a class certification to the district court for reconsideration in light of *Wal-Mart*. 737 F.3d at 544.

III. The Waiver Question Does Not Merit En Banc Review.

Nucor complains that the panel misapplied waiver principles to plaintiffs' predominance arguments. The law of waiver is "'well-settled.'" *A Helping Hand, LLC v. Balt. County*, 515 F.3d 356, 369 (4th Cir. 2008) (quoting *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004)). This question is thus far from a question of "exceptional importance" warranting en banc review. Nucor does not even claim that the issue is one of exceptional importance. Moreover, as the panel explained, the plaintiffs' briefs raised the issue of predominance by contesting the denial of "certification" (not just "commonality," which by itself is necessary but not sufficient for certification) and by discussing the issues in precisely the same manner as the district court did in finding that the plaintiffs had shown *neither* commonality *nor* predominance. This issue is unsuited for further review.

CONCLUSION

The Court should deny the petition for rehearing en banc.

Dated: June 15, 2015

Respectfully submitted,

/s/ Scott Michelman

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CERTIFICATION OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman 14-point type.

/s/ Scott Michelman

CERTIFICATION OF SERVICE

I certify that on June 15, 2015, I served this brief by ECF on all registered counsel for appellees.

/s/ Robert L. Wiggins, Jr.