No. 24-

IN THE

Supreme Court of the United States

CAROL A. LEWIS AND DOUGLAS B. SARGENT,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

ROBERT F. KENNEDY JR., IN HIS CAPACITY AS
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ANDREW C. GRESIK
FOLEY & LARDNER LLP
150 East Gilman Street,
Suite 5000
Madison, WI 53703

JAMES PISTORINO
PARRISH LAW OFFICE
788 Washington Road
Pittsburgh, PA 15228

DAVID B. GOROFF
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 3000
Chicago, IL 60654
(312) 832-4500
dgoroff@foley.com

Counsel for Petitioners

380135

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether, consistent with the understanding of five circuit courts, but contrary to the D.C. Circuit below, this Court's decision in *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980), remains good law insofar as it holds that named class representatives' right to act on behalf of a class provides a sufficient stake in the litigation under Article III to appeal a denial of class certification after those representatives have prevailed on their own claims.

2. Whether named plaintiffs in a class action retain standing to appeal a district court's denial of class certification on behalf of absent class members when, after that denial, upon defendant's motion, judgment is entered in their favor after the defendant unilaterally agrees to satisfy the individual claims of only the named plaintiffs.

PARTIES TO THE PROCEEDINGS

Petitioners are Carol A. Lewis and Douglas B. Sargent, on behalf of themselves and all others similarly situated.

Respondent is Robert F. Kennedy Jr., in his capacity as Secretary of Health and Human Services.

RELATED PROCEEDINGS

- *Lewis et al. v. Azar*, No. 1:18-cv-02929-RBW, U.S. District Court for the District of Columbia. Judgment entered June 8, 2023.

- *Lewis et al. v. Becerra*, No. 23-5152, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered January 7, 2025.

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Constitutional Provisions

Cited Authorities

Page

Statutes, Rules and Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners Carol A. Lewis and Douglas B. Sargent respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in No. 23-5152.

OPINIONS BELOW

The D.C. Circuit's opinion dated August 2, 2024 (Pet. App.1a), is published at 111 F.4th 65. The D.C. Circuit's denial of Petitioners' Petition for Rehearing En Banc dated January 7, 2025 (Pet.App.95a), is unpublished. The District Court's opinion dated April 28, 2022, denying class certification (Pet.App.20a) is unpublished. The District Court's opinion dated June 8, 2023, holding that judgment should be entered for Petitioners on one count of their complaint because the Secretary agreed to pay their individual claims while ruling that this otherwise mooted the case (Pet.App.56a), is unpublished.

JURISDICTION

The judgment dismissing Petitioners' appeal for lack of jurisdiction was entered on August 2, 2024. (Pet.App.1a). The D.C. Circuit issued its order denying Petitioners' petition for rehearing en banc on January 7, 2025. (Pet.App.95a). This Petition is timely filed within the time established by the Court's order dated April 2, 2025, granting Petitioners' application for extension to May 7, 2025 of the deadline to submit this Petition. This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States," and to certain "controversies."

STATEMENT OF THE CASE

This case presents an important issue concerning whether class representatives who prevail on their individual claims after the denial of class certification retain standing to appeal that denial. In holding that such class representatives lack standing and therefore that it lacked jurisdiction over the appeal, the Panel of the D.C. Circuit ("Panel") expressly disregarded this Court's 45-year-old precedent in *Geraghty* and intentionally created a circuit split, making the D.C. Circuit an outlier from the five other circuits that have properly adhered to *Geraghty*'s reasoning and result. Unless corrected, the D.C. Circuit's erroneous view of *Geraghty* threatens the nationwide viability of the class-action device by authorizing class action defendants to pay off named plaintiffs over their objection *seriatim* at any stage of the litigation.

A. Over 10 Years, The Secretary Denies Claims For CGM Coverage Of 90,000 Type-I Diabetics

Ms. Lewis and Mr. Sargent are Type-I diabetics who seek to represent a class of approximately 90,000 Type-I diabetics whose claims for Medicare coverage of

continuous glucose monitors ("CGMs") were improperly denied by the Secretary between December 13, 2012 and 2022.

Medicare is a voluntary health insurance program for the elderly and disabled. *See* 42 U.S.C. §1395 *et seq.* Part B of Medicare covers "durable medical equipment" ("DME"). 42 U.S.C. §1395x(n).

Diabetes Type-I is an autoimmune disease in which the body does not make enough insulin. Insulin is a hormone the body uses to regulate blood sugar. High, or low, glucose levels for a sustained period cause severe harm and can lead to, *inter alia*, amputations, blindness, brain damage and death. An out-of-range glucose value is called a "hypo/hyperglycemic event." The longer a person has diabetes, the fewer symptoms they experience. Thus, a diabetic may experience no symptoms to alert them to a hypo/hyperglycemic event, a condition known as "hypo/hyperglycemic unawareness."

Certain Type-I diabetics are prone to rapid and wild blood sugar swings, occurring in as little as five minutes, making them "brittle" diabetics who can become direly ill without prompt response. Type-I diabetics average .2-3.2 hypo/hyperglycemic events annually. Type-I diabetics suffering from hypo/hyperglycemic unawareness have a six-times greater risk than this average of a severe hypo/hyperglycemic event.

CGMs are lifesaving devices that help prevent severe episodes by continuously monitoring blood glucose levels, alerting users to issues so that corrective action can be taken either by the patient or, in some cases, automatically by either dispensing insulin or stopping its administration.

Between 2012 and 2017, the Secretary denied claims by putative class members for Medicare coverage of CGMs on the grounds that a CGM was "precautionary" or not the "primary" device to treat diabetes. Multiple lawsuits followed. In each, the Secretary's position was found to lack "substantial justification" and the Secretary was ordered to provide coverage for the CGM and pay plaintiff's attorney's fees.

In January 2017, the Secretary changed rationales and issued a ruling—CMS 1682-R—which excluded from Part B Medicare coverage nearly all CGMs on the ground that CGMs are not DME because they were purportedly not "primarily and customarily used to serve a medical purpose." That ruling did not comply with Medicare's mandatory notice and comment requirements. 42 U.S.C. §1395(h)(h). Under CMS 1682-R, because Medicare Part B was required to reject CGM claims, Medicare Advantage Plans (Part C) were also required to do so. Based on this ruling, hundreds of thousands of Medicare claims for CGM coverage were denied.

In many denials throughout the class period, the Secretary stated falsely that CGM coverage was "statutorily excluded." Rather, 42 U.S.C. §1395x(n) includes "blood glucose monitors."

In late December 2021, CMS promulgated a rule extending Part B coverage to CGMs with a dedicated receiver. 86 Fed. Reg. 73,860 (Dec. 28, 2017). Finally, in May 2022, CMS rescinded the 2017 ruling and instructed administrator adjudicators thereafter to apply the new rule to all still-pending CGM reimbursement claims, while leaving claims denied under the prior ruling unpaid. (Pet. App.3a).

B. Petitioners Pursue Class-Wide Relief For Type-I Diabetics Denied Medicare Coverage For CGMs

Petitioners each had claims denied for Medicare coverage for CGMs in the period 2016-17. On December 13, 2018, Petitioners sued in the District Court on behalf of themselves and the putative class to challenge these denials. Plaintiffs sought relief including 1) an injunction barring the Secretary from enforcing CMS 1682-R; 2) a declaration that CGMs are DME; and 3) an order requiring the Secretary to approve the class members' CGM claims. The Secretary did not answer but instead only moved to dismiss certain causes of action (for reasons immaterial to class certification).

C. The District Court Improperly Denies Class Certification By Deciding And Accepting The Merits Of The Secretary's Unpled Affirmative Defenses

On March 23, 2020, Petitioners moved for class certification. While the Secretary had not answered or pled any affirmative defenses, the Secretary, in opposition, argued against certification because he would succeed on unpled affirmative defenses of exhaustion of administrative remedies and statute of limitations as to all 90,000 class members, save 17 whose CGM claims (like those of Petitioners) had already been ripe for district court review, causing the putative class to lack the requisite numerosity. *See* Fed.R.Civ.P. 23(a). These unpled defenses could never apply to Petitioners who had already exhausted their remedies and timely filed suit in district court.

On January 29, 2021, the District Court denied in part and granted in part the Secretary's motion to dismiss. The District Court simultaneously ordered that certification briefing be restarted, directing the Secretary to file an Answer and plaintiffs to thereafter file a new motion for certification. The Secretary answered on February 16, 2021, but did not respond to the complaint's allegations and raised no affirmative defenses.

Plaintiffs then moved to deem their complaint allegations admitted and re-noticed their motion for certification. The Secretary filed an amended answer on March 9, 2021, that still did not answer the complaint's allegations or include any affirmative defenses.

In opposition to certification, the Secretary again challenged numerosity based on the unpled affirmative defenses of exhaustion and statute of limitations. Plaintiffs' reply argued that, under this Court's controlling authority,[1] unpled affirmative defenses applicable only to absent class members could not defeat certification.

On April 28, 2022, the District Court denied class certification. (Pet.App.55a). While the Secretary had not timely raised, pleaded or proved his affirmative defenses,

---

1. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 465 (2013) (holding that a while a court's class certification analysis may "'entail some overlap with the merits of the plaintiff's underlying claim,' Rule 23 grants courts no license to engage in free-ranging merits inquiries at the class certification stage."); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177-78 (1974) (Rule 23 does not "give[] a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

as was his burden, because Petitioners refused to address the merits of these unpled affirmative defenses, the District Court accepted them as unrebutted and found the class lacked numerosity. (Pet.App.53a). While Petitioners opposed the Secretary's argument based on *Amgen* and *Eisen*, they nevertheless presented facts demonstrating the defenses lacked merit, including that the Secretary discouraged exhaustion by sending notices of denial to thousands of class members misleadingly advising them that there was no statutory basis for CGM coverage. As the D.C. Circuit later acknowledged, while the Medicare Act incorporates the judicial review provisions of the Social Security Act, which require a beneficiary to exhaust administrative remedies and then seek review in district court within 60 days, "[i]n some circumstances, courts may excuse a beneficiary's failure to exhaust, *Bowen v. City of New York*, 476 U.S. 467, 482 (1986), and may equitably toll the 60-day deadline for seeking judicial review. *Id*. at 481." (Pet.App.36a). Moreover, claimants administratively pursuing appeals when a class action is filed may rely on that filing to toll the statute of limitations. *See Marcus v. Sullivan*, 926 F.2d 604, 613-15 (7th Cir. 1991). The District Court did not address these principles in denying certification.

D. *After Certification Is Denied*, The Secretary Pays Petitioners' Individual Claims And The District Court Enters Judgment For Petitioners

Petitioners did not seek interlocutory review of the denial of class certification based on the Court's ruling in *Microsoft v. Baker*, 582 U.S. 23, 34 (2017), that "an order denying class certification is subject to effective review after final judgment."

After the District Court denied class certification, the Secretary tendered payment to Petitioners and moved for summary judgment in their favor on their CGM coverage claims and moved to dismiss their injunction request. On June 8, 2023, the District Court granted that motion and entered final judgment.

E. In Open Disregard Of *Geraghty*, The Panel Holds That Petitioners, By Recovering On Their Individual Claims, Lost Standing To Appeal Denial Of Class Certification

Despite the Secretary paying their individual claims, Petitioners continued to act as class representatives and timely appealed the denial of class certification on August 5, 2023. In their briefs, Petitioners cited *Geraghty* and *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), to demonstrate that the case was not moot and that they had standing to appeal the denial of class certification.[2] Notably, consistent with that controlling law, the Secretary did not challenge either Petitioners' standing or the D.C. Circuit's jurisdiction. (Pet.App.5a).

At oral argument, the Panel *sua sponte* raised whether Petitioners lost standing to appeal the denial of class certification because they had recovered on their individual claims. Petitioners' counsel explained that Petitioners retained standing under *Geraghty*, *Roper* and other precedent. The Secretary did not assert otherwise.

On August 2, 2024, the Panel issued its decision dismissing Petitioners' appeal for lack of standing and did

2. Appellants' Br. at 16–17, *Lewis v. Becerra*, No. 23-5152 (D.C. Cir.).

not reach the class certification denial. (*Id.*). The Panel held that because Petitioners had no ongoing pocketbook harm or other personal injury, they lacked the concrete, particularized injury-in-fact necessary for standing. (*Id.*).

While recognizing that *Geraghty* held that a named plaintiff whose individual claims became moot "could appeal the denial of class certification anyway," the Panel held that *Geraghty* "does not reflect current law" because *Geraghty* purportedly based this holding on rejected reasoning from *Flast v. Cohen*, 392 U.S. 83, 97 (1968). (Pet.App.14a). Citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021), the Panel held that "the Article III analysis of *Flast* and *Geraghty* has been replaced by a more exacting requirement that the party invoking a court's jurisdiction have suffered an injury 'traditionally recognized as providing a basis for a lawsuit in American courts.'" (Pet.App.13a). The Panel also claimed that *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), "repudiate[d] *Flast*," and that "the Supreme Court now views this injury requirement ... as having always been an essential and unchanging part of the case-or-controversy requirement of Article III." (Pet.App.13a).

The Panel emphasized *Roper*'s recognition that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." (Pet.App.6a) (citing *Roper*, 445 U.S. at 333). The Panel acknowledged that *Roper* concerned mootness under Art. III and not standing but construed this Court's subsequent decisions as holding that a prevailing party also needed a personal stake for standing to appeal. (Pet.App.7a). The Panel noted that *Roper* found the named plaintiffs had a personal stake

because they faced a "pocketbook harm" from the denial of certification, because a successful appeal would allow them to shift litigation costs to those who would share in its benefits if the class was certified and ultimately prevailed. (Pet.App.6a-7a).

The Panel acknowledged that *Roper* identified other "interests" that prevailing plaintiffs might have in appealing the denial of certification, including their "right as litigants" to invoke class-certification rules and their duty as named plaintiffs "to represent the collective interests of the putative class." (Pet.App.7a). The Panel also acknowledged that *Roper* emphasized the "substantial advantages" of class actions, including the facilitation of the adjudication of small individual claims, but held such "policy considerations" were "not irrelevant" to the jurisdictional question presented. (Pet.App.8a). The Panel recognized that these precedents, along with *Geraghty*'s reasoning, led "some commentators," including the leading treatise on class actions, to read *Roper* to authorize plaintiffs to appeal denials of class certification even after they prevailed on their individual claims. (*Id.*) (citing 1 *Newberg and Rubenstein on Class Actions* §2:10 (6th ed. Updated June 2024)).

As support for disregarding *Geraghty*, The Panel cited *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66 (2013), where the named plaintiff lost a necessary stake in the litigation after defendant offered judgment, mooting her ability to represent the collective plaintiffs. (Pet. App.9a). However, *Genesis* concerned an FLSA action, not a class action. Nevertheless, the Panel read *Genesis* as underscoring "that *Roper* at most allows prevailing plaintiffs to appeal the denial of class certification when

they have a continuing individual stake in the litigation." (*Id.*).

The Panel explicitly conceded that its Decision created a circuit split with the Second Circuit, which held in *Jin v. Shanghai Original, Inc.*, 990 F.3d 251 (2d Cir. 2021), that a prevailing plaintiff could appeal a decision to decertify regardless of whether they had any continuing, concrete individual injury, but the Panel was "unpersuaded" by *Jin*'s reasoning. (Pet.App.12a).

The Panel dismissed Petitioners' arguments why disregarding *Geraghty* would significantly hamper the class action device as "policy arguments." (Pet.App.17a). The Panel opined that its Decision would not meaningfully affect the class action bar, because it would not apply where a court rules in favor of class certification or finds against named plaintiffs on the merits and believing that in most cases counsel would enter fee-shifting arrangements or seek to recover increased fees under the Equal Access to Justice Act, thus foreclosing named plaintiffs from being "picked off" by defendants that elect to satisfy their individual claims to prevent appeal of a certification denial. (Pet.App.8a). Yet the Panel stated inconsistently that fee-shifting arrangements alone are insufficient to support standing. (Pet.App.9a, citing *Genesis*, 569 U.S. at 78 n.5).

F. While Concurring In The Denial Of Rehearing *En Banc*, Judge Pillard Challenges The Panel's Disregard Of *Geraghty*

Petitioners then petitioned for rehearing/rehearing *en banc*. The D.C. Circuit asked the Secretary to respond.

On January 7, 2024, the D.C. Circuit denied rehearing with a written concurrence by Judge Pillard. She detailed why the Panel's views regarding the continued viability of *Geraghty* were erroneous. (Pet.App.97a). She underscored that *Geraghty* remains law unless and until this Court directs otherwise. (*Id.*). She explained that *Genesis* validated *Geraghty*, noting that, under the Relation Back Principle, a reversal of a denial of class certification relates back to when it was first sought and that "[u]nder that construct, the class's separate legal status and unremedied injury supplies the necessary jurisdiction to support an appeal even when the named plaintiff's claim is mooted after certification is denied." (Pet.App.99a-100a). She expressed concern that defendants in a class action not be allowed to "pick off" named plaintiffs before a class can be certified. (Pet.App.97a). Nonetheless, she concurred in the denial of *en banc* review, believing this case would have only "limited precedential impact" because of a "generally applicable change in policy" in 2022 that she misunderstood as mooting Petitioners' claims. (Pet. App.101a). However, as noted below, no change in policy mooted Petitioners' right to act as class representatives on behalf of the class of approximately 90,000 absent class members whose meritorious claims for CGM coverage filed before that policy change remain unpaid.

This Petition follows.

REASONS FOR GRANTING THE PETITION

In *Geraghty*, the Court decided that a named plaintiff in a class action may, consistent with Article III, pursue an appeal of a denial of class certification, where, after

that denial, the named plaintiff's individual controversy becomes moot:

> [A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a "personal stake" in obtaining class certification sufficient to assure that Art. III values are not undermined.

445 U.S. at 404 (cleaned up). That same "'personal stake' in obtaining class certification" equally supports standing even where, as here, the defendant pays the individual claims of only the named plaintiffs.

Geraghty is anchored in both in traditional principles of Article III standing and in Article III's specific application to a nontraditional litigation device such as a class action. Regarding the former, *Geraghty* holds that the Relation Back Principle "is a traditional equitable doctrine applied to class certification claims." 445 U.S. at 404 n.11. Regarding the latter, *Geraghty* holds that such a named plaintiff has an ongoing interest, *inter alia*, in protecting the interests of absent class members. *Id.* at 402-403. *Geraghty* has been controlling precedent for 45 years.

The Panel, however, despite conceding its obligation to follow *Geraghty*, (Pet.App.13a), did the opposite and held that Petitioners lost standing to appeal the denial of class certification once the defendant satisfied their individual claims after class certification was denied. It justified its departure from *Geraghty* on the erroneous ground that it

"does not reflect current law." (Pet.App.14a). This Court should grant certiorari, first, to correct this intentional and insupportable disregard of Court precedent.

By departing from *Geraghty*, the Panel also created a split with five other circuits, which uniformly hold that a named plaintiff who recovers on their individual claim may still appeal the denial of class certification. The Panel acknowledged the conflict with the Second Circuit's decision in *Jin*., 990 F.3d 251, (Pet.App.12a-17a), but the consensus of contrary authority is much broader. The Court should additionally grant certiorari to resolve this circuit split.

The Panel's reasoning also poses a serious threat to the class action device, as it incentivizes and rewards defendants to disable named plaintiffs from being class representatives by paying their individual claims, which are often small. If such payment destroys the necessary personal stake for a named plaintiff to have standing on behalf of the class, defendants will use this ploy at any stage of class action litigation, not just after class certification is denied. And defendants will not stop with picking off the first named plaintiff but will also pick off each successor seriatim. Faced with this possibility that contingent recoveries—which generally apply in class actions—will be confined to a percentage of only the named plaintiffs' recoveries, few attorneys will agree to be class counsel. That the D.C. Circuit has created such risks particularly endangers class actions against the federal government, which are often litigated in its courts. Moreover, if the D.C. Circuit's misinterpretation of *Geraghty* and mistaken view of standing is allowed to stand, defendants, public or private, will advance this in

all circuits. The Court should further grant certiorari here to avoid these harms.

A. The Petition Should Be Granted Because The Decision Openly Conflicts With *Geraghty*

This Court should grant certiorari, first, because, while a circuit court is obligated to follow this Court's precedent,[3] the Panel instead openly rejects *Geraghty*'s reasoning and result. (*Id.*).

Geraghty, like this case, concerned a named plaintiff whose individual claim was resolved after the district court denied class certification, but who appealed that denial to protect the interests of absent class members. The Court held that he had a sufficient personal stake under Article III to proceed with the appeal.

Geraghty filed a class action challenging the Parole Release Guidelines on behalf of "all federal prisoners who are or will become eligible for release on parole." 445 U.S. at 392. The district court denied class certification. *Id.* at 393-94. After Geraghty appealed on behalf of himself "and on behalf of a class" he was mandatorily released from prison. *Id.* at 394.

---

3. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("Lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Indeed, in *Harris v. Bessent*, 2025 WL 1021435, *1 (D.C. Cir. Apr. 7, 2025), the D.C. Circuit recently reiterated this principle in denying a petition for en banc review, holding, "[t]he Supreme Court has repeatedly told the courts of appeals to follow extant Supreme Court precedent unless and until that Court itself changes it or overturns it."

Petitioners then moved to dismiss Geraghty's appeal as moot, but the Third Circuit disagreed, ruling that "certification of a 'certifiable' class, that erroneously had been denied, *relates back to the original denial and thus preserves jurisdiction*." *Id.* at 395 (emphasis added).

This Court in *Geraghty* identified two independent reasons why Geraghty had a sufficient personal stake under Article III to appeal despite no longer having an individual claim: first, by application of the "Relation Back Principle," a traditional Article III principle, and second, by application of Article III standards applicable to nontraditional litigation devices such as class actions, including the private attorney general concept. *Geraghty* should have been followed by the Panel, not discarded.

1. The Relation Back Principle Satisfies Traditional Art. III Interests

As *Geraghty* explained, the Relation Back Principle "is a traditional equitable doctrine," *id.* at 404 n.11, and thus rests on traditional Article III standards. As applied to denials of class certification, that Principle means that a named plaintiff whose claim, like Petitioners', was "live" when certification was denied, retains standing to appeal:

> This respondent suffered actual, concrete injury as a result of the putatively illegal conduct, and this injury would satisfy the formalistic personal stake requirement if damages were sought. His injury continued up to and beyond the time the District Court denied class certification. We merely hold that when a District Court erroneously denies a

> procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling "relates back" to the date of the original denial.

Id. (cleaned up).

Applying the Relation Back Principle, *Geraghty* rejected dissenters' argument that letting Geraghty proceed with the appeal would cause "[t]he judicial process to become a vehicle for 'concerned bystanders.'" 445 U.S. at 404, n.11. The Court explained: "[the] 'relation back' principle ... serves logically to distinguish this case from the one brought a day after the prisoner is released. If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action." *Id.* (cleaned up).

Geraghty found support for this application of the "relation back approach" in cases rejecting mootness "[w]hen the claim on the merits is 'capable of repetition, yet evading review,'—where "the named plaintiff may litigate the class certification issue despite loss of his personal stake in the litigation." *Id.* at 398.

As one example, *Geraghty* cited *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975), which held that a named plaintiff whose claim expires after certification may still adequately represent the class. (Cited by *Geraghty*, 445 U.S. at 402). *Sosna* held that, after certification, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted

by appellant," which "significantly affect[ed] the mootness determination." Applying the Relation Back Principle, 419 U.S. at 399, *Sosna* concluded:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11. This Court held that principle applied and precluded mootness, stating, "[w]e believe that a case such as this, in which ... the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs." *Id.* at 401. *Sosna* concluded that while a controversy must exist at the time the Court reviews the case, "[t]he controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff even though the claim of the named plaintiff has become moot." *Id.* at 402.

Although class certification had been granted in *Sosna*, there, as in *Geraghty* and here, the named plaintiff's individual claim had been resolved by the time of the appeal.

Geraghty next noted why the same bases for ongoing jurisdiction applied to denials of certification, noting that "the Court in two different contexts has stated that the proposed class representative who proceeds to a judgment on the merits may appeal *denial* of class certification." 445 U.S. at 399 (emphasis original). *First*, *Geraghty* emphasized that "this assumption was 'an important ingredient' in the rejection of interlocutory appeals, 'as of right' of class certification denials' in *Coopers & Lybrand v Livesay*, 473 U.S. 463, 469, 470, n.15 (1978))." 445 U.S. at 400 (citing *Roper*, 445 U.S. at 338). Thus, in *Coopers*, the Court ruled "that denial of class status will not necessarily be the 'death knell' of a small claimant action, since there still remains 'the prospect of prevailing on the merits and reversing an order denying class certification.'" *Geraghty*, 445 U.S. at 399 (citing *Coopers*, 473 U.S. at 463, 469, 470 n.15).

Second, *Geraghty* emphasized that in *United Airlines, Inc., v. McDonald*, 432 U.S. 385, 393-95 (1977), the Court held that a putative class member may intervene for purpose of appealing the denial of class certification, after the named plaintiffs' claims have been satisfied and judgment entered in their favor." *Id.* at 400. *Geraghty* explained that "[u]nderlying that decision was the view that 'refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs.'" (emphasis added). *See also Roper*, 445 U.S. at 338 ("The *McDonald* Court assumed that the named plaintiff would have been entitled to appeal a denial of class certification.").

Geraghty noted that *Roper* itself supported Geraghty's ongoing Art. III interest. 445 U.S. at 399-401. While *Roper* acknowledged "that an individual controversy is

rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment," *id.* at 400 (citing *Roper*, 445 U.S. at 333), it held that named plaintiffs there could appeal the denial of certification. *Id. Geraghty* summarized *Roper*'s holding:

> And today, the Court holds that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling.

Id. at 400. Petitioners similarly objected here.

Geraghty cited *Roper*, *Gerstein v. Pugh*, 402 U.S. 103 (1975), and *McDonald* as three "cases found not to be moot, despite the loss of a 'personal stake' in the merits of the litigation by the proposed class representative" which "demonstrate the flexible character of the Art. III mootness doctrine." 445 U.S. at 400. The Panel's disregard and rejection of this Court's precedents cannot be allowed to take root and become the vehicle for subverting the effectiveness of the class action mechanism.

2. The Private Attorney General Concept Satisfies Art. III Interests Applicable To Non-Traditional Litigation Devices Like Class Actions

Geraghty held that a named plaintiff also has a nontraditional basis for a personal stake in appealing the denial of class certification. Citing *Roper*, it held that "[i]n order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give a proposed class representative the "right" to have a class certified if the

requirements of the Rules are met. 445 U.S. at 403 (citing *Roper*, 445 U.S. at 338). *Geraghty* concluded that "[t]his 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." 445 U.S. at 403 (citing *Roper*, 445 U.S. at 338).

> We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment: however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

Geraghty, 445 U.S. at 401-402 (quoting *Roper* 445 U.S. at 333).

Geraghty explained that "[a] plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent the class." *Id*. at 402. That holding could not be more unambiguous, despite the Panel's refusal to follow it.

Because of Art. III's "'uncertain and shifting contours' with respect to nontraditional forms of litigation, such as the class action," *Geraghty* stressed the need to consider the purposes of the case-or-controversy requirement. *Id*. at 402 (quoting *Flast*, 392 U.S. at 97). Where a named plaintiff's claim on the merits had expired, this required "look[ing] to the nature of the 'personal stake' in the class certification claim." *Id.*

Geraghty then considered the justifications that led to the development of the class action, which went beyond the named plaintiff's individual claim, including "the protection of the interests of absentees" and "the provision of a convenient and economical means for disposing of similar lawsuits." *Id.* at 403.

Geraghty explained that "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution," adding that "[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id*. It concluded:

> these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. The question whether class certification is appropriate remains as a concrete, sharply presented issue.

Id. Geraghty cited *Sosna* as support:

> In *Sosna* [] it was recognized that a named plaintiff whose claim on the merits expires *after* class certification may still adequately represent the class. Implicit in that decision was the determination that vigorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome." (emphasis original).

Geraghty continued:

> We therefore hold that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined. If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.

Id. at 404 (cleaned up).

These reasons equally apply and control here. If the D.C. Circuit recognized its jurisdiction and reversed the denial of certification, the merits of this class action claim too could then be adjudicated. Under this Court's law, that prospect clearly gives Petitioners a sufficient Art. III stake in pursuing appeal.[4]

3. The Panel Improperly Disregarded *Geraghty*

The Panel acknowledged that "we remain bound by *Geraghty*'s specific holding that a plaintiff whose individual claims became moot can appeal a prior denial of class certification." (Pet.App.61a). Yet this was pure lip service, as the Panel declared *Geraghty* "does not

4. The Court has acknowledged *Geraghty*'s ongoing application to class actions. *See U.S. v. Sanchez-Gomez*, 584 U.S. 381, 382 (2018) (*Geraghty*'s holding on mootness belongs "to a line of cases this Court has described as turning on the particular traits of Rule 23 class actions").

reflect current law" regarding constitutional standing. (Pet.App.14a).[5] It audaciously criticized *Geraghty* for "capacious reasoning." (Pet.App.16a). It then dismissed *Geraghty* as "the outlier" based on "over four decades of evidence." (*Id.*). Because there might be instances where new plaintiffs have intervened, or named plaintiffs had lost on the merits or named plaintiffs had an ongoing financial stake in cost or fee shifting, the Panel expressed confidence that "effective review does not require relaxed standing requirements for prevailing plaintiffs with no continuing individual interest in the case." (Pet.App.17a). Yet the Panel was internally inconsistent—suggesting elsewhere that cost-shifting is "insufficient to create an Article III controversy." (Pet.App.9a, quoting *Genesis*, 569 U.S at 78, n.5).

The Panel held that named class representatives must have an ongoing interest in their individual claim to have standing to appeal a denial of class certification. (Pet. App.16a). Because Petitioners "allege only an abstract interest in serving as class representatives, which is insufficient to satisfy Article III," the Panel dismissed the appeal for lack of jurisdiction. (Pet.App.19a). This directly defies *Geraghty*, which holds that a named plaintiff does not need an ongoing interest in their individual claim to appeal where, as here, they had a live interest in that claim when certification was denied. Indeed, Geraghty's counsel had admitted at oral argument that he could "'obtain absolutely no additional personal relief,' in this case." 445 U.S. at 413-14 (Powell, J., dissenting).

For 45 years, a named plaintiff has not needed to show a possibility of personal relief to appeal the denial

5. *Geraghty* addressed mootness and not standing.

of certification. As *Agostini* makes clear, the Panel had no right to impose a standard that *Geraghty* rejected. *Agostini*, 521 U.S. at 207. Indeed, without acknowledging this, the Panel recites *the dissent's arguments* in *Geraghty*, which the majority necessarily rejected. (*Compare* Pet. App.8a-16a, with *Geraghty*, 445 U.S. at 413-417).[6]

The Panel makes multiple other errors. *First*, it assumes incorrectly that *Geraghty* identifies no traditional basis for Article III justiciability. (Pet.App.13a). Again, *Geraghty* relies on the Relation Back Principle, a traditional basis. *See supra* Part A.1. Judge Pillard explained how this Principle prevented mootness:

> Under that [*Geraghty*'s relation back] construct, the class's separate legal status and unremedied injury supplies the necessary jurisdiction to support an appeal even when the named plaintiff's claim is mooted after certification is denied.

(Pet.App.99a-100a).

---

6. *See* 445 U.S. at 413 (dissent urging that "Art. III contains no exception for class actions" and thus that "a putative class representative who alleges no individual injury 'may [not] seek relief on behalf of himself or any other member of the class'" (cleaned up); *id.* at 416-17 (dissent argues that the Court misreads *Gerstein*, *McDonald*, *Roper* and *Coopers*); *id.* at 417 (dissent urging that *Roper* "reaffirms the obligation of a federal court to dismiss an appeal when the parties no longer retain the personal stake in the outcome required by Art. III, adding "there is not even a speculative interest in sharing costs"; *id.* at 421 (dissent urging that "neither Rule 23 nor the private attorney general concept can fill the jurisdictional gap.")

Second, the Panel misreads *TransUnion*, 594 U.S. at 427 and *Lujan*, 504 U.S. at 560, as somehow holding that the interest recognized in *Geraghty* of serving as a "private attorney general" does not support standing because it is not a traditional Art. III basis. (Pet.App.13a,15a). Neither case addressed the standing of named plaintiffs to act for a class. *TransUnion* did not involve an appeal from the denial of class certification. It concerned a challenge to whether certain absent class members ever had standing, without regard to whether a judgment in favor of named plaintiffs negated this standing. *Lujan* did not involve a class action at all or address Article III's application in class actions. It determined that plaintiff lacked standing to challenge a Department of Interior rule limiting applicability of the Endangered Species Act to actions within the United States or on the high seas because its members' professed interest in someday seeing such animals abroad was not an "imminent" injury. Neither *TransUnion* nor *Lujan* mentioned *Geraghty* or *Flast* nor hold that either decision has been "replaced" in Article III jurisprudence.

Third, the Panel erroneously suggested that *Geraghty* "[a]t every turn," "borrowed from" the "pure functionalism" approach of *Flast* regarding constitutional standing. (Pet. App.14a). This overlooks that *Geraghty* also relied on *Roper*, *Sosna, Gerstein* and other authority from this Court in holding Geraghty could appeal the certification denial. The Panel noted that *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996), held that "*Flast* erred in assuming the assurance of 'serious and adversarial treatment' was the only value protected by standing," which also has a separation-of-powers component requiring actual injury. (Pet.App.14a). However, *Lewis* involved no loss of ongoing injury but the lack of one to begin within having a well-equipped prison library. 518 U.S. at 351.

Fourth, the Panel misstates that *Roper* "expressly declined to hold that the prevailing plaintiffs' interest in securing a correct application of Rule 23, or their interest in representing others similarly situated, was sufficient to support continuing Article III jurisdiction." (Pet. App.8a (citing *Roper*, 445 U.S. at 331-32)). Rather, *Roper* held only that "the narrow question presented requires consideration only of the private interests of the named plaintiffs." *Id*. *Roper*'s named plaintiffs had a pocketbook interest—fee and cost shifting—that gave them an individual stake in representing the class. 445 U.S. at 340. But *Roper* did not require this for standing. Rather, *Roper* holds that just because a final judgment satisfying named plaintiffs' private claims would moot appeal "on that aspect of the final judgment" "it does not follow that this circumstance would terminate the named plaintiff's right to take appeal on the issue of class certification." *Id*. at 333. *Geraghty*, its companion case, addressed that separate question and held that the named plaintiff's class-related interest was not mooted by that circumstance.

Roper, too, recognized that named plaintiffs had "[a] separate consideration, distinct from their private interests"—their responsibility "to represent the collective interests of the putative class." 445 U.S. at 331. *Roper* also acknowledged "the increasing reliance on the 'private attorney general' for the vindication of legal rights" that had been facilitated by Rule 23. *Id*. at 338. *Roper* specifically discussed not letting class defendants "buy off" the individual private claims of the named plaintiffs to frustrate class certification, as this "would be contrary to sound judicial administration." *Id*. at 339. *Roper* held these class-related concerns were 'not irrelevant' to the jurisdictional question presented.'" *Id*. at 340. Yet, the Panel rendered them exactly that.

Judge Pillard correctly summarized the Panel's misinterpretation of *Geraghty*:

> The panel deems *Geraghty* not "directly controlling," so disregards *Geraghty*'s holding and less-than-"current" style of reasoning, solely because Geraghty's claim "became moot" upon his release from prison rather than because he "prevailed on the merits." Op. at 12-14. As even the government concedes, Rehearing Opp. at 12-14, the distinction the panel invokes between this case and *Geraghty* is immaterial to the jurisdictional analysis. Indeed, the Court in *Geraghty* rejected that very distinction, holding that the difference between "mootness of [an] individual claim [] caused by 'expiration' of the claim, rather than by a judgment [in the named plaintiffs' favor] on the claim" was not "persuasive." *Geraghty*, 445 U.S. at 401. The Court declared that "Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*." *Id*. That was so notwithstanding Geraghty's lack of an ongoing interest like the shared burden of attorney's fees featured in *Roper*. The panel does not persuasively avoid *Geraghty*'s clear application to this case. (Pet. App.98a).

Indeed, underlying the Panel's mistaken conclusion that *Roper* is "far more consistent with" this Court's current standing jurisprudence than is *Geraghty* is the misconception that they are somehow incompatible, when *Geraghty* was decided as *Roper*'s companion case and liberally cited it throughout.

Moreover, the Panel incorrectly determined that *Genesis*, 569 U.S. 66, supports a retreat from *Geraghty*, (Pet.App.9a), when it does the opposite. *Genesis* recognized that a live controversy may remain for purposes of appealing a denial of class certification even after the named plaintiff's claim becomes moot and that a corrected ruling would relate back to the time of the erroneous denial:

> In *Sosna*, the Court held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified. 419 U.S. at 399. ****Geraghty* narrowly extended this principle to *denials* of class certification motions. **The Court held that where an action would have acquired the independent legal status described in *Sosna* but for the district court's erroneous denial of certification, a corrected ruling on appeal "relates back" to the time of the erroneous denial of the certification motion.** 445 U.S. at 404 and n.11.

Id. at 74 (italics original; bolding added). *Genesis* determined *Geraghty* was "inapposite" solely because *Geraghty* "explicitly limited its holding to cases in which the named plaintiff's claim remains live *at the time the district court denied class certification*." *Id*. at 74-75 (emphasis added). *Genesis* noted:

> [R]espondent had not yet moved for "conditional certification" when her claim became moot, nor had the District Court anticipatorily ruled on any such request. She thus has no certification

> decision to which her claim could have related back.

Id. at 67. Thus, contrary to the Panel's mischaracterization, *Genesis* fully supports *Geraghty*'s applicability here.

Importantly, *Genesis* involved an FLSA action which is "fundamentally different" from a Rule 23 action. *Id.* at 74. *Genesis* held that collective actions under the FLSA, unlike Rule 23 class actions, "do not produce a class with an independent legal status, or join parties to the action." *Id.* at 75.

Judge Pillard further explained why *Genesis* left *Geraghty* undisturbed:

> Nothing in *Genesis Healthcare* suggests the Supreme Court's disagreement with that jurisdictional analysis. And the logic that animates it—that it would be arbitrary to allow the mooted named plaintiff of a certified class to appeal, per *Sosna*, while prohibiting the mooted named plaintiff of an erroneously noncertified class to do so, contra *Geraghty*—has as much force today as it did 45 years ago.

(Pet. App.100a).

Finally, the Panel opined that the difficulty of named plaintiffs pursuing a final judgment appeal "may strengthen their case for discretionary interlocutory review." (Pet.App.19a). This is illogical. Rule 23(f) motions are to be granted only in "exceptional circumstances," *Nutraceutical Corp v. Lambert*, 586 U.S. 188, 196 (2019),

so even if named plaintiffs move for such relief, it is rarely granted. Moreover, Rule 23(f) motions do not stay a case, so while that motion is pending, a defendant could still "pick off" the named plaintiff and have judgment entered on their claim. Moreover, to now channel named plaintiffs toward Rule 23(f) motions as a means to challenge denial of certification is contrary to this Court's admonishment that interlocutory reviews should be the exception, because "an order denying class certification is subject to effective appellate review after final judgment at the behest of the named plaintiff or intervening class members." *Coopers & Lybrand*, 437 U.S. at 469.

Because the Panel was obligated to follow *Geraghty*, it would be highly unjust to let its intentional disregard of *Geraghty* stand. It penalizes those like Petitioners who made litigation decisions based on it being controlling precedent until this Court said otherwise.

B. Certiorari Should Be Granted Because The Decision Creates Clear Circuit Splits

A second reason why this Court should grant certiorari is to resolve the circuit split created between the D.C. Circuit and the five other Circuits that have considered this issue—the Second, Third, Seventh, Tenth and Eleventh. Moreover, the Panel's decision conflicts with the D.C. Circuit's own longstanding position on this issue.[7] Until now, no other Circuit disputes that *Geraghty* "reflect[s] current law." (Pet.App.14a).

---

7. *See Richards v. Delta Airlines*, 453 F.3d 525 (D.C. Cir. 2006) (appeal from class certification denial was not moot because named plaintiff settled her claim).

Because the D.C. Circuit is a common venue for class actions—often, as here, nationwide class actions brought against a federal agency—there should not be one rule for standing in the D.C. Circuit and another rule for class actions filed in all other circuits. This will invariably lead to forum shopping, gamesmanship and unjust results.

1. Second Circuit

The Panel acknowledged that its decision created a conflict with the Second Circuit's 2021 decision in *Jin*, 900 F.3d 251. (Pet.App.12a,16a-17a). *Jin* held that a prevailing plaintiff could appeal a decision to decertify regardless of whether he had any remaining financial interest in class certification, given that he had already obtained damages, attorneys fees and costs. *Id.* at 259. *Jin* found that a fee-shifting interest, while sufficient to establish appellate standing, was not necessary for such standing. *Id.* at 258. *Jin* held that "[e]ven accepting that Jin lacks a financial interest, neither we nor the Supreme Court have required that to satisfy personal stake in the context of a named plaintiff appealing the denial of class certification following a favorable judgment on the merits at trial." *Id.*at 259.

Rather, *Jin* held that "Jin's interest in appealing the decertification of a class is akin to the interest of a private attorney general that sufficed in *Geraghty*." *Id. Jin* added that the private attorney general concept "relates to the objectives of the class action device, which include deterring misconduct through private enforcement of vital public policies." *Id. Jin* noted that *Geraghty* "did not find a meaningful difference between the expiration of a claim and prevailing on the merits." *Id.* Regarding

plaintiff's private attorney general interest, *Jin* concluded that "[t]he circumstances and considerations involved under the facts of this case are closer to *Geraghty* and the cases where courts have found jurisdiction, such that '[t]he question whether class certification is appropriate remains as a concrete, sharply presented issue, capable of judicial resolution." *Id.*

2. Third Circuit

In *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), the Third Circuit found that *Geraghty* did not apply to a plaintiff whose claims, unlike here, were moot before application for class certification. It contrasted this with cases, like here, where a plaintiff had a live claim at the time of the certification decision, holding that "under *Geraghty*'s 'relation back' doctrine, the named plaintiff has the requisite personal stake in class certification ... if 1) he has a live individual claim when the district court decides the class certification issue, or, at the very least he had a live claim when he filed for class certification; *and* 2) appellate review may reverse an erroneous denial of class certification that, 'if correctly decided, would have prevented the action from becoming moot." *Id*. at 977 (quoting *Geraghty*, 445 U.S. at 404-405 n.11).

3. Seventh Circuit

In *Culver v. City of Milwaukee*, 277 F.3d 908, 912 (7th Cir. 2002), the district court had decertified a class of white males challenging discriminatory hiring by the Milwaukee police department and dismissed the class representative's claim as moot, because after obtaining an application

for a job, he accepted a different job with which he was content. Based on *Geraghty*, the Seventh Circuit agreed that "[t]he would-be class representative has standing to appeal" because "otherwise the defendant in a class action could delay appeals indefinitely by buying off successive class representatives." *Id.* at 910. That is what the Panel's decision authorizes here, which will become a standard defendant strategy absent this Court's review.

4. Tenth Circuit

In *Reed v. Heckler*, 756 F.2d 779 (10th Cir. 1985), in a suit against the Secretary of HHS challenging the collection of alleged overpayments of social security benefits by withholding current old age, survivors and disability insurance benefits, the Secretary satisfied the individual plaintiffs' claims and argued this mooted standing because no class had been properly certified. The Tenth Circuit rejected this attempt to buy off the plaintiffs and held that it "should extend *Geraghty* to class claims that have been rendered moot by purposeful action of defendants." *Id.* at 786. It reasoned that "[s]o long as the claims of the unnamed plaintiffs are presented in a sufficiently adversarial relationship to sharpen the issues, the ability of the defendant to moot the claims of the named plaintiffs by favorable judgments should not prevent reexamination of the class certification issue." *Id.* at 787. It stated that "[a]lthough the class certification motion was pending at the time defendants settled the named plaintiffs' individual claims, we find this fact insignificant in light of *Geraghty*" (*id.* at 787 n.10) and remanded with instructions that the district court "reconsider the issue of class certification." That should have happened here.

5. Eleventh Circuit

In *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240 (11th Cir. 2003), the Eleventh Circuit held that *Geraghty* did not apply where a named plaintiff in an FLSA action settled his claim, while distinguishing this from a named plaintiff in a class action who "has a personal stake in the class certification claim so long as '[t]he imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and [there are] self-interested parties vigorously advocating opposing positions.'" *Id.* at 1247 (citing *Geraghty*, 445 U.S. at 403).

6. The D.C. Circuit

Finally, the Panel rejected the D.C. Circuit's own reasoning in *Richards*, 453 F.3d 525, where the District Court denied certification of a 3,000-person class. The named plaintiff then settled her individual claim but appealed that denial. Relying on *Geraghty* and *Roper*, the D.C. Circuit held:

> We know, because the Supreme Court has told us, that when a class representative's claims expire involuntarily, the class representative still retains a personal stake in obtaining class certification sufficient to appeal a denial of class certification entered before the representative's claims expired.

Id. at 529-30 (cleaned up). Moreover, Judge Pillard's concurrence shows that others on the Circuit disagree with the Panel's treatment of *Geraghty*, further demonstrating the benefit of correction by this Court.

C. Certiorari Should Be Granted Because The Case Presents Exceptionally Important Questions

A third reason why this Court should grant certiorari is because this case presents exceptionally important questions—whether named class representatives who prevail on their individual claims after class certification is denied maintain standing to appeal that denial and whether *Geraghty*, which holds they do, remains good law.

Allowing named plaintiffs to remain class representatives after their individual claims have succeeded is essential to maintaining the effectiveness of class actions and fulfilling Rule 23's purposes. This is especially critical for class actions against federal agencies, where decisions often impact thousands nationwide.

Below, after the District Court denied certification, the Secretary moved for summary judgment in favor of Petitioners—his adversaries. Predictably, this ended the suit in the District Court which entered judgment for Petitioners. Based on that Decision, the Panel ruled that judgment now has the effect of preventing Petitioners from appealing the earlier class certification denial. The Secretary did not believe that was the law before the Panel's decision and therefore did not contest jurisdiction, but if the Panel's Decision is allowed to stand, it will become a routine tactic not just by federal agencies in the D.C. Circuit but by all class action defendants upon learning *Geraghty* does not mean what it clearly held. If paying off a named plaintiff's claim deprives them of standing to act for the absent putative class, defendants will use that tacting even at the outset of litigation and every time a successor class representative is named.

Like a game of "Whac-A-Mole," each time a new named plaintiff would appear, the defendant would pay their claim and destroy standing. As Judge Pillard realized, letting defendants "pick off" named plaintiffs is "deeply troubling," (Pet.App.97a), yet the Panel's decision incentivizes such conduct, dealing an unjustified body blow to the class action device.

Letting the Decision stand will have the additional pernicious effect of discouraging attorneys from becoming class counsel. Class actions by their very nature often involve small claims that might not otherwise be brought. As this Court recognized in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (2017):

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. at 617 (cleaned up).

This Court in *Roper*, too, recognized that a "central concept" of class actions is the reliance on contingency representation to spread costs among the class and provide a possibility of sufficient economic upside to recruit class counsel. *Roper*, 445 U.S at 338 n.9. If a class action can be undone simply by paying the named plaintiffs' "relatively paltry" claims, that might limit attorneys' contingency recoveries to a fraction of that. Otherwise meritorious class actions would no longer be worth "an attorney's labor." *Amchem Products*, 521 U.S. at 617 (cleaned up).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 7, 2025

Respectfully submitted,

ANDREW C. GRESIK
FOLEY & LARDNER LLP
150 East Gilman Street,
Suite 5000
Madison, WI 53703

JAMES PISTORINO
PARRISH LAW OFFICE
788 Washington Road
Pittsburgh, PA 15228

DAVID B. GOROFF
Counsel of Record
FOLEY & LARDNER LLP
321 North Clark Street,
Suite 3000
Chicago, IL 60654
(312) 832-4500
dgoroff@foley.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5152

CAROL A. LEWIS AND DOUGLAS B. SARGENT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

XAVIER BECERRA, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02929)

Argued May 7, 2024
Decided August 2, 2024

Before: KATSAS, RAO, and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KATSAS.

Appendix A

KATSAS, *Circuit Judge*: Carol Lewis and Douglas Sargent sued the Secretary of Health and Human Services to obtain reimbursement for the cost of certain medical equipment. They won. But they nevertheless appeal, seeking to challenge the district court's earlier denial of class certification. By itself, their desire to serve as class representatives does not create a cognizable Article III interest. And Lewis and Sargent do not allege that the denial of class certification has caused them any other, concrete individual injury. We therefore dismiss their appeal for lack of constitutional standing.

I

A

The Medicare program provides health insurance for the elderly and disabled. *See* 42 U.S.C. § 1395 *et seq.* Part B of Medicare covers "durable medical equipment." 42 U.S.C. § 1395m(a).

Congress has provided for limited judicial review of Medicare eligibility determinations. The Medicare Act incorporates the judicial-review provisions of the Social Security Act, which require a beneficiary to exhaust administrative remedies and then to seek review within sixty days of the final agency determination. *See* 42 U.S.C. §§ 1395ii, 1395ff(b)(1)(A) (Medicare); *id.* § 405(g) (Social Security); *Am. Hosp. Ass'n v. Azar*, 895 F.3d 822, 825-26, 437 U.S. App. D.C. 180 (D.C. Cir. 2018). In some circumstances, courts may excuse a beneficiary's failure to exhaust, *Bowen v. City of New York*, 476 U.S. 467, 482,

106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), and may equitably toll the sixty-day deadline for seeking judicial review, *id.* at 481.

B

Diabetes is a chronic condition where the body fails to produce or properly respond to insulin, which regulates blood-sugar levels. A blood-sugar level too high or low can cause serious health problems. So, diabetics must monitor their blood-sugar levels.

Continuous glucose monitors provide one means of doing so. A sensor placed under the skin measures glucose levels and transmits the measurements to an external receiver. The Centers for Medicare & Medicaid Services, which administers Medicare for HHS, has taken different positions on whether these monitors are covered "durable medical equipment." In 2017, CMS issued guidance concluding that Part B does not generally cover these monitors. J.A. 693-95. But in 2021, CMS promulgated a rule extending Part B coverage to continuous glucose monitors with a dedicated receiver. 86 Fed. Reg. 73,860 (Dec. 28, 2021). In 2022, CMS rescinded the 2017 guidance and instructed administrative adjudicators to apply the rule to all outstanding reimbursement claims. J.A. 587.

C

Lewis and Sargent are diabetics and Medicare beneficiaries. They sought reimbursement for their continuous glucose monitors and related supplies from

2015 to 2017. After HHS denied reimbursement, Lewis and Sargent timely pursued judicial review of the denials. They also moved to represent a class of "[a]ll persons who submitted claims for coverage of [continuous glucose monitor] equipment or supplies whose claims were denied (and not later reversed on appeal) since December 13, 2012"—regardless of whether these individuals had exhausted administrative remedies or timely sought judicial review. J.A. 48.

The district court denied Lewis and Sargent's motion for class certification. The court noted that the claims of most putative class members were unexhausted, untimely, or both. J.A. 538-39. It then concluded that neither waiver of the exhaustion requirement nor equitable tolling of the limitations period would be appropriate. *Id.* at 539-45. The court therefore excluded individuals with unexhausted or untimely claims, which reduced the putative class to seventeen individuals. *Id.* at 549. Then, the court held that this group was too small to meet the numerosity requirement for class certification. *Id.* at 550.

After CMS issued its 2022 guidance, HHS moved for partial judgment in Lewis and Sargent's favor. Over their objection, the district court granted the motion, set aside the denials of Lewis and Sargent's claims, declared that continuous glucose monitors and their related supplies are durable medical equipment, and dismissed Lewis and Sargent's other claims as moot. J.A. 625-26. Lewis and Sargent then appealed.

II

On appeal, Lewis and Sargent do not challenge any aspect of their favorable merits judgment. Instead, they challenge only the denial of their motion for class certification.

The government does not question our jurisdiction. But "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction" and "must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011). In particular, federal courts of appeals lack jurisdiction if the appellant has not shown standing to pursue the appeal. *See*, *e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 718, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022); *Hollingsworth v. Perry*, 570 U.S. 693, 715, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013). Considering the issue on our own, we hold that Lewis and Sargent lack appellate standing.

A

Article III limits the judicial power of the United States to resolving "Cases" or "Controversies." U.S. Const. Art. III, § 2. "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct.

1249, 108 L. Ed. 2d 400 (1990) (cleaned up). To this end, any party invoking a federal court's jurisdiction must prove its "standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). In a federal district court, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021). Similarly, in a federal appellate court, an appellant must show a concrete and particularized injury "fairly traceable to the *judgment below*" and likely to be redressed by a favorable ruling on appeal. *West Virginia*, 597 U.S. at 718.

In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980), the Supreme Court considered when prevailing plaintiffs may appeal a denial of class certification. The Court first acknowledged that federal appellate courts normally lack jurisdiction to entertain appeals from litigants who obtained favorable judgments: "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Id.* at 333. But the Court also explained that, in some circumstances, the victorious party "retains a stake in the appeal satisfying the requirements of Art[icle] III." *Id.* at 334. In those cases, it may appeal an "adverse ruling collateral to the judgment on the merits." *Id.*; *see also id.* at 336 ("Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal."). In short, the

Court held that prevailing plaintiffs may appeal a denial of class certification if, but only if, they satisfy the ordinary requirements for Article III standing.[1]

In *Roper*, the prevailing plaintiffs alleged that the denial of class certification caused them a pocketbook harm—an "obvious" Article III injury, *see TransUnion*, 594 U.S. at 425. They argued that a successful appeal would allow them to shift part of their litigation costs "to those who [would] share in its benefits if the class is certified and ultimately prevails." *Roper*, 445 U.S. at 336. In other words, the named plaintiffs alleged that the denial of class certification forced them to bear all of the "fees and expenses" incurred during the litigation, whereas absent

1. *Roper* framed its Article III analysis in terms of mootness, asking whether the named plaintiffs' success on their individual claims mooted any ongoing controversy over the denial of class certification. *See* 445 U.S. at 331. Later, the Supreme Court began to describe the requisite personal stake of a prevailing party in terms of standing to appeal. For example, in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997), the Court held that the "standing" requirement of Article III "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* at 64; *accord West Virginia*, 597 U.S. at 718; *Hollingsworth*, 570 U.S. at 715. We think standing is the more precise analytical framework, because any appellant must invoke and establish the jurisdiction of an appellate court at the outset of any appeal, regardless of whether the plaintiff had properly invoked the jurisdiction of the trial court below. *See*, *e.g.*, *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 962 F.3d 576, 580, 447 U.S. App. D.C. 316 (D.C. Cir. 2020). In any event, the analysis that follows does not turn on whether the requisite stake of a prevailing plaintiff is better framed as a question of standing or mootness.

class members would have otherwise picked up part of the tab. *See id.* at 334 n.6. Based on this pocketbook injury, the Court held that the prevailing plaintiffs had a continuing Article III stake in their appeal. *Id.* at 340.

Roper noted other "interests" of the prevailing plaintiffs, including their "right as litigants" to invoke class-certification rules and the duty of named plaintiffs "to represent the collective interests of the putative class." 445 U.S. at 331. *Roper* also noted the "substantial advantages" of class actions, such as facilitating the adjudication of small individual claims, and it described these "policy considerations" as "not irrelevant" to the jurisdictional question presented. *Id.* at 338-40. This language from *Roper*—combined with the reasoning of *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)—has led some commentators to read *Roper* to authorize prevailing plaintiffs to appeal denials of class certification regardless of whether they have any continuing individual interest in the appeal. *See, e.g.*, 1 Newberg and Rubenstein on Class Actions § 2:10 (6th ed. updated June 2024). We will have more to say about *Geraghty* later. For now, we emphasize that *Roper* at the outset expressly declined to hold that the prevailing plaintiffs' interest in securing a correct application of Rule 23, or their interest in representing others similarly situated, was sufficient to support continuing Article III jurisdiction. 445 U.S. at 331-32. And in conclusion, *Roper* expressly based its holding of an ongoing controversy on the plaintiffs' alleged pocketbook injury, *i.e.*, their "*individual* interest in the litigation—as distinguished

from whatever may be their representative responsibilities to the putative class." *Id.* at 340.

Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013), confirms this understanding of *Roper*. *Genesis Healthcare* involved a Fair Labor Standards Act lawsuit filed by one plaintiff on behalf of herself and others "similarly situated." *Id.* at 69. The Court held that the case became moot when the defendant offered judgment to the plaintiff because, with her individual claim satisfied, "she lacked any personal interest in representing others." *Id.* at 73. The Court explained that *Roper*, "by [its] own terms," was "inapplicable." *Id.* at 74. It stressed that "*Roper*'s holding"—that the plaintiffs there had standing to appeal a denial of class certification—"turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment." *Id.* at 78. Likewise, the Court attributed no significance to *Roper*'s broader "dicta" about the salutary "objectives of class actions." *Id.* at 77-78. And it questioned whether even *Roper*'s narrow holding remained good law after an intervening decision held that a plaintiff's "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Id.* at 78 n.5 (quoting *Lewis*, 494 U.S. at 480). *Genesis Healthcare* thus underscores that *Roper* at most allows prevailing plaintiffs to appeal the denial of class certification when they have a continuing individual stake in the litigation.

B

In stark contrast to the prevailing plaintiffs in *Roper*, Lewis and Sargent have alleged no continuing pocketbook or other individual injury. At oral argument, they disavowed any theory of standing based on the possible recovery of costs or fees from absent class members. And they declined to press any theory of standing based on the possible recovery of increased fees from the government under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Instead, they allege only one injury—losing the asserted right to represent the interests of absent class members. Our jurisdiction thus turns on whether the mere desire to serve as a class representative is a concrete Article III injury.

We hold that it is not. If HHS now reimbursed all absent class members, it would benefit Lewis and Sargent "no more directly and tangibly" than it would benefit "the public at large." *Lujan*, 504 U.S. at 574. Their continued discontent with the denial of class certification is thus a "generally available grievance about [the] government" that fails to distinguish Lewis and Sargent from any other citizen. *Id.* at 573-74. And such a generalized grievance "does not state an Article III case or controversy." *Id.* at 574. As the Supreme Court held in *Lujan* and confirmed just weeks ago: "Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381, 144 S. Ct. 1540, 219 L. Ed. 2d 121 (2024). This is not to question the earnestness or intensity of Lewis and Sargent's feelings that the government has wrongfully denied

reimbursement to other diabetic Medicare beneficiaries. But "in order to claim 'the interests of others, the litigants themselves still must have suffered an injury in fact.'" *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 543, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020) (quoting *Hollingsworth*, 570 U.S. at 708). Even "sincere" concern about the government's treatment of others cannot support Article III standing. *All. for Hippocratic Med.*, 602 U.S. at 392-93.[2]

Nor can standing rest on any alleged misapplication of Rule 23. For one thing, Rule 23 creates no substantive right to serve as a class representative. It was promulgated under the Rules Enabling Act, which permits the Supreme Court to "prescribe general rules of practice and procedure" that do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b). So, the "right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Roper*, 445 U.S. at 332. Once unmoored from any real-world consequences for Lewis and Sargent, the district court's alleged misapplication of Rule 23 was a "bare procedural violation, divorced from any concrete harm" to Lewis and Sargent—which cannot support their standing. *Spokeo,*

2. Lewis and Sargent do not claim standing as next friends of other diabetic Medicare beneficiaries, which would require them to show that the other beneficiaries were "unable to litigate" on their own behalf "due to mental incapacity, lack of access to court, or other similar disability." *Whitmore v. Arkansas*, 495 U.S. 149, 165, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). Here, nothing prevented absent putative class members from pursuing their own claims, either in separate actions or as post-judgment intervenors in this one. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977).

Inc. v. Robins, 578 U.S. 330, 341, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016); *see also Microsoft Corp. v. Baker*, 582 U.S. 23, 45, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017) (Thomas, J., concurring in the judgment) ("Class allegations, without an underlying individual claim, do not give rise to a 'case' or 'controversy.'"). In any event, Article III itself requires the plaintiff or appellant to have a "concrete" individual injury in fact. *See Lujan*, 504 U.S. at 560. And just as statutes enacted by Congress may not establish this constitutional requirement of concreteness, *see TransUnion*, 594 U.S. at 426, neither may rules promulgated by courts.

Without any personal stake of the kind identified in *Roper*, Lewis and Sargent have no concrete interest in continuing to seek class certification. We therefore lack jurisdiction over their appeal.

C

We recognize that the Second Circuit has disagreed with our conclusion. In *Jin v. Shanghai Original, Inc.*, 990 F.3d 251 (2d Cir. 2021), that court held that a prevailing plaintiff could appeal a decision to decertify regardless of whether he had any continuing, concrete individual injury. *Id.* at 256-57. The court read *Roper* to hold that a "narrow fee-shifting interest" was "*sufficient*" to establish appellate standing, but not to hold that such an interest was "*necessary*." *Id.* at 258. Freed of *Roper*, the court then based its decision primarily on *Geraghty*. *See id.* at 258-61. In that case, the Supreme Court held that a prisoner could appeal a denial of class certification even after his release had mooted his individual claim. *Geraghty*, 445 U.S. at 390, 407. *Jin* reasoned that *Geraghty* had compared

"the right to have a class certified if the requirements of Rule 23 are met" to "the interest of 'the private attorney general'" and "found that type of interest sufficient to satisfy the personal stake requirement." *Jin*, 990 F.3d at 258-59 (quoting *Geraghty*, 445 U.S. at 403-04) (cleaned up).

With due respect to the considered views of our colleagues, we are unpersuaded. *Geraghty* did not hold that the interest in serving as a "private attorney general," in order to protect the interests of others, is a traditional Article III stake. Quite the opposite: *Geraghty* acknowledged that a "legally cognizable interest ... in the traditional sense rarely ever exists with respect to the class certification claim" and that the "'right'" (with scare quotes in the original) to serve as a class representative is *not* analogous "to the type of interest traditionally thought to satisfy the personal stake requirement." 445 U.S. at 402-03 (cleaned up). In other words, *Geraghty* confirms that an interest in serving as a class representative is *not* a traditional Article III interest. And lawsuits "may not proceed" when the party invoking a court's jurisdiction has no "harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 594 U.S. at 427. This aspect of *Geraghty* cuts *against* appellate standing.

To be sure, the Supreme Court did hold that Geraghty could appeal the denial of class certification anyway. It reasoned that "Art[icle] III's 'uncertain and shifting contours' with respect to nontraditional forms of litigation ... requires reference to the purposes of the case-or-controversy requirement." 445 U.S. at 402 (quoting *Flast v. Cohen*, 392 U.S. 83, 97, 88 S. Ct. 1942, 20 L. Ed. 2d

947 (1968)). It then determined that "the purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution," which requires "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* at 403. Because Geraghty "continue[d] vigorously to advocate his right to have a class certified," the Court held that the question of class certification remained a "concrete, sharply presented issue." *Id.* at 403-04. The Court described its view as reflecting an "erosion of the strict, formalistic perception of Art[icle] III" urged in the *Flast* dissent. *Id.* at 404 n.11.

This aspect of *Geraghty*'s reasoning—reducing constitutional standing to a functionalist concern about adversary presentation—does not reflect current law. At every turn, *Geraghty* borrowed that approach from *Flast*. *See Geraghty*, 445 U.S. at 395-97, 401, 402, 404 n.11. But since *Geraghty*, the Supreme Court has emphatically rejected *Flast*'s pure functionalism. Its "later opinions have made it explicitly clear that *Flast* erred in assuming that assurance of 'serious and adversarial treatment' was the only value protected by standing." *Lewis v. Casey*, 518 U.S. 343, 353 n.3, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (cleaned up). "*Flast* failed to recognize that this doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches, concrete adverseness or not." *Id.* This was no minor oversight, for the "separation of powers" is the "single basic idea" on which all of Article III standing is built, and it often requires a "restricted role for Article III courts." *United States v. Texas*, 599 U.S. 670, 675, 681,

143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (quoting *Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), and *Raines v. Byrd*, 521 U.S. 811, 828, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)). Properly understood as protecting the separation of powers, Article III standing demands an "actual injury," because only "someone who has been *actually injured*" can appropriately "call in the courts to examine the propriety of executive action" (or, in this case, the judicial action of a lower court). *Lewis*, 518 U.S. at 353 n.3. To that end, the Article III analysis of *Flast* and *Geraghty* has been replaced by a more exacting requirement that the party invoking a court's jurisdiction have suffered an injury "traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 594 U.S. at 423, 427. Repudiating *Flast*, the Supreme Court now views this injury requirement, together with the related elements of traceability and redressability, as having always been "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. Applying these principles for some four decades, the Court now routinely denies Article III standing to parties who have suffered no concrete, particularized, and actual or imminent injury in fact—no matter how strongly they feel, how vigorously they advocate, or how well they develop the facts. *See, e.g.*, *All. for Hippocratic Med.*, 602 U.S. at 386 (pro-life advocates); *United States v. Texas*, 599 U.S. at 681 (States); *TransUnion*, 594 U.S. at 417 (6,332 individuals); *Raines*, 521 U.S. at 830 (Members of Congress); *Lujan*, 504 U.S. at 559, 578 (environmental organizations); *Allen v. Wright*, 468 U.S. at 739-40 (parents).

To be sure, we remain bound by *Geraghty*'s specific holding that a plaintiff whose individual claims became moot can appeal a prior denial of class certification. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); *Geraghty*, 445 U.S. at 390, 401-02. But *Roper*—not *Geraghty*—is the directly controlling precedent for assessing whether plaintiffs who have prevailed on the merits may appeal a denial of class certification. And as between the two decisions, *Roper* is far more consistent with the Supreme Court's current standing jurisprudence, despite the case's arguable ambiguity. Ultimately, we must decide whether to read *Roper* broadly (in light of *Geraghty*'s capacious reasoning, rooted in *Flast*) or narrowly (in light of subsequent Article III precedents, including *Genesis Healthcare*). With over four decades of evidence that *Geraghty* is the outlier, we find that choice straightforward.

Jin also invoked a supposed "assumption" in pre-*Roper* decisions that a proposed class representative may appeal the denial of class certification after final judgment. 990 F.3d at 261. Neither of the two relevant cases held that a prevailing plaintiff may appeal even absent any continuing personal stake in the litigation. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978), held only that a denial of class certification is not immediately appealable before final judgment. *Id.* at 468-77. In part, the Court reasoned that such a denial may be effectively reviewed after final judgment, "at the behest of the named plaintiff or intervening class members." *Id.* at 469. By definition, intervening putative class members—who do not benefit when named plaintiffs prevail on their individual claims

following decertification—have a continuing stake in the litigation. So do named plaintiffs who lose on the merits or who, like the prevailing plaintiffs in *Roper*, allege some continuing interest in cost or fee shifting. Thus, effective review after final judgment does not require relaxed standing requirements for prevailing plaintiffs with no continuing individual interest in the case. Likewise, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977), held only that if a named plaintiff prevails on the merits, an absent putative class member may intervene post-judgment in order to appeal the denial of class certification. *See id.* at 387. The Court in *McDonald* did report a concession that the prevailing plaintiffs in that case could have appealed. *See id.* at 393-94. But that issue was neither litigated nor essential to the Court's holding, and a "drive-by jurisdictional ruling[]" is entitled to "no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Moreover, the Court had no occasion even to consider whether the prevailing plaintiffs in that case—who did not try to appeal—could have alleged a fee-shifting stake akin to the one recognized in *Roper*. In sum, neither *Livesay* nor *McDonald* advances the case for standing here.

For their part, Lewis and Sargent offer only policy arguments. At oral argument, they predicted dire consequences from a dismissal of this appeal—including that lawyers will have insufficient financial incentives to represent plaintiffs with relatively small claims. In *Livesay*, the plaintiffs made a similar argument that interlocutory appeals were necessary to protect the "vital public interest" of class actions, yet the Supreme Court declined to relax the jurisdictional requirement of a final

district-court decision. 437 U.S. at 469-70; *see* 28 U.S.C. § 1291. So too here. We decline to relax the jurisdictional requirements of Article III standing based on policy arguments that post-judgment appeals are similarly necessary. For one thing, it is "hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair." *Pereida v. Wilkinson*, 592 U.S. 224, 241, 141 S. Ct. 754, 209 L. Ed. 2d 47 (2021). And the possibility that "no one would have standing" is "not a reason to find standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (cleaned up).

In any event, we doubt that our decision will have any meaningful effect on the financial incentives of the class-action-plaintiffs' bar. For one thing, the problem Lewis and Sargent envision will not arise in cases where the district court grants class certification or rules against the named plaintiffs on the merits. And even in cases where the district court denies class certification and then rules for the named plaintiffs, several possible avenues for appeal remain. In cases involving damages, prevailing plaintiffs will likely retain a personal interest in spreading costs to absent putative class members, which *Roper* described as a "central concept of Rule 23." 445 U.S. at 338 n.9. In cases like this one, involving review of agency action denying financial benefits allegedly without substantial justification, prevailing plaintiffs may retain a personal interest in appealing the denial of class certification in order to increase their expected fee award under EAJA, at least if the additional attorney's fees would reduce the plaintiffs' own financial obligations. Indeed, before declining to pursue in this Court an EAJA-

based interest as the basis for appellate standing, Lewis and Sargent themselves successfully moved the district court to stay their pending fee motion on the ground that "the standards for evaluating an award of attorney's fees will be different" depending on whether this Court were to affirm or reverse the denial of class certification. *Lewis v. Azar*, No. 18-cv-2929, ECF No. 132, at 2 (D.D.C. July 10, 2023). In cases where neither of those options appears likely, the named plaintiffs' possible difficulty in pursuing a final-judgment appeal may strengthen their case for discretionary interlocutory review under Federal Rule of Civil Procedure 23(f). And if all else fails, putative class counsel may seek to represent absent class members to intervene post-judgment in order to pursue the appeal. *See McDonald*, 432 U.S. at 393-94. For all of these reasons, we think it unlikely that our decision, applying the normal standards of Article III standing, will frustrate the normal operation of Rule 23.

III

Lewis and Sargent have standing to pursue this appeal only if they show concrete, individual injuries from the district court's denial of class certification. Yet they allege only an abstract interest in serving as class representatives, which is insufficient to satisfy Article III. We therefore must dismiss their appeal for lack of jurisdiction.[3]

So ordered.

---

3. Lewis and Sargent ask us to reassign their case to a different district judge. Because we lack jurisdiction over this appeal, we may not consider that request.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED APRIL 28, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2929 (RBW)

CAROL A. LEWIS, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA,[1] IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

MEMORANDUM OPINION

The plaintiffs, Carol Lewis and Douglas Sargent, bring this civil action on their own behalf, but also seek to bring it on behalf of all other similarly situated individuals, against the defendant, Xavier Becerra, in his official capacity as the Secretary (the "Secretary") of the United States Department of Health and Human Services (the "Department"), pursuant to Title XVIII of the Social

1. Xavier Becerra is the current Secretary of the United States Department of Health and Human Services, and he is therefore substituted for Alex M. Azar II as the proper party defendant pursuant to Federal Rule of Civil Procedure 25(d).

Security Act, 42 U.S.C. § 1395ff(b), *see* Class Action Complaint ("Compl.") ¶ 8, ECF No. 1; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as modified by 42 U.S.C. § 405(g), *see id.* ¶¶ 146-63; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *see id.* ¶¶ 164-66.[2] Currently pending before the Court is the plaintiffs' class certification motion. *See* Plaintiffs' Re-Notice of Class Certification Motion ("Pls.' Re-Notice"), ECF No. 81. Upon careful consideration of the parties' submissions,[3]

---

2. On May 30, 2019, the defendant filed a partial motion to dismiss for lack of jurisdiction, *see* Partial Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim at 1, ECF No. 22, which the Court granted in part and denied in part on January 29, 2021, *see* Order at 1 (Jan. 29, 2021), ECF No. 78. The Court granted the motion to dismiss to the extent that it sought to dismiss Counts I and II of the Complaint, which alleged violations of 42 U.S.C. § 405(g), and 5 U.S.C. § 706(1). *Id.* The Court denied the motion in all other respects. *Id.*

3. In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) plaintiffs Carol Lewis and Douglas B. Sargent's Motion for Class Certification and Appointment of Class Counsel ("Pls.' Mot."), ECF No. 63; (2) the defendant's Memorandum in Opposition to Class Certification ("Def.'s Opp'n"), ECF No. 65; (3) plaintiffs Carol Lewis's and Douglas Sargent's Reply Re: Motion for Class Certification and Appointment of Class Counsel ("Pls.' Reply"), ECF No. 67; (4) the defendant's Surreply in Opposition to Class Certification ("Def.'s Surreply"), ECF No. 69; (5) plaintiffs Carol Lewis's and Douglas Sargent's Surreply Re: Motion for Class Certification and Appointment of Class Counsel ("Pls.' Surreply"), ECF No. 71; (6) the defendant's Memorandum in Opposition to Plaintiffs' Renewed Motion for Class Certification ("Def.'s 2d Opp'n"), ECF No. 84; and (7) plaintiffs Carol Lewis's and Douglas Sargent's Reply Re: Motion to Certify Class and Appoint Counsel ("Pls.' 2d Reply"), ECF No. 86.

the Court concludes for the following reasons that it must deny the plaintiffs' motion for class certification.

I. BACKGROUND

The Court previously discussed much of the relevant background of this case in detail, *see* Memorandum Opinion at 2-11 (Jan. 29, 2021), ECF No. 77, and therefore will not reiterate that information again here. The Court will, however, briefly discuss the background of this case as it relates to the issues the Court must now consider in deciding the plaintiffs' class certification motion.

A. Statutory and Regulatory Background Relating to CGMs

Medicare "Part B is an optional supplemental insurance program that pays for medical items and services . . . , including . . . durable medical equipment." *Ne. Hosp. Corp. v. Sebelius,* 657 F.3d 1, 2, 398 U.S. App. D.C. 43 (D.C. Cir. 2011) (citing 42 U.S.C. §§ 1395j-1395w4). However, 42 U.S.C. § 1395y excludes from coverage items and services "not reasonable and necessary for the diagnosis or treatment of illness or injury[.]" 42 U.S.C. § 1395y(a)(1)(A). The Secretary has issued regulations clarifying the definition of "[d]urable medical equipment[,]" *see* 42 C.F.R. § 414.202, which states:

> Durable medical equipment means equipment, furnished by a supplier or a home health agency that meets the following conditions:

(1) Can withstand repeated use.

(2) Effective with respect to items classified as [durable medical equipment] after January 1, 2012, has an expected life of at least 3 years.

(3) Is primarily and customarily used to serve a medical purpose.

(4) Generally is not useful to an individual in the absence of an illness or injury.

(5) Is appropriate for use in the home.

Id. The Medicare statute expressly designates "blood-testing strips and blood glucose monitors for individuals with diabetes" as "durable medical equipment" and, therefore, covered under 42 U.S.C. § 1395x(n). However, the Secretary does not consider continuous glucose monitors ("CGMs") as "durable medical equipment."

On January 12, 2017, the Centers for Medicare & Medicaid Services ("CMS") issued CMS 1682-R, a ruling which concluded that "in all [] cases in which a CGM does not replace a blood glucose monitor for making diabetes treatment decisions, a CGM is not considered [durable medical equipment]." Centers for Medicare & Medicaid Services Ruling 1682-R (Jan. 12, 2017) at 15. CMS made this determination primarily because these so-called "non-therapeutic" CGMs serve as "adjunctive

devices" to blood glucose monitors and are therefore "not considered to serve the medical purpose of making diabetes treatment decisions[.]" *Id.* at 6-7. This ruling has applied to all claims for CGMs submitted on or after January 12, 2017, and "[t]hus, after January 12, 2017, all levels of Medicare . . . were required to deny CGM cla[i]ms . . . whenever the presented CGM did not replace [a blood glucose monitor]." *Id.* at 7; Pls.' Mot. at 5.

B. Judicial Review of Medicare Coverage Denial

In order to obtain judicial review, a Medicare beneficiary whose claim has been denied must first exhaust multiple levels of administrative review. Specifically, the beneficiary must first request a "redetermination" by the administrative contractor that issued the initial denial and may subsequently request a "reconsideration" by a "qualified independent contractor," *see Porzecanski v. Azar*, 316 F. Supp. 3d 11, 15 (D.D.C. 2018) (citing 42 C.F.R. § 405.940, § 405.960), then request a hearing with an administrative law judge ("ALJ"), *see id.* (citing 42 C.F.R. § 405.1000(a)), and finally appeal any adverse ruling by the ALJ to the Medicare Appeals Council (the "Appeals Council"), *see* 42 C.F.R. § 405.1102. The Appeals Council may then "decide on its own motion to review a decision or dismissal issued by an [ALJ]," *id.* § 405.1110(a), and the Appeals Council's decision serves as the Secretary's "final" decision regarding the beneficiary's claim, *see id.* § 405.1130. If the Appeals Council—the final arbiter within the Medicare appeals process—"does not issue a decision, dismissal, or remand within [ninety] days of the beneficiary's request for review, the beneficiary

may escalate the appeal to a federal district court." *Porzecanski,* 316 F. Supp. 3d at 15 (citing 42 C.F.R. §§ 405.1132(a), 405.1100(c)). Only beneficiaries who have exhausted this Medicare administrative coverage determination and appeals process may seek "judicial review of the Secretary's final decision[.]" 42 U.S.C. § 1395ff(b)(1)(A).

Additionally, "judicial review shall not be available to [an] individual if the amount in controversy is less than [$1,000]." 42 U.S.C. § 1395ff(b)(1)(E)(i). Because this amount is indexed to inflation, a beneficiary seeking judicial review in 2018 was required to satisfy an amount-in-controversy requirement of $1,600. *See* Adjustment to the Amount in Controversy Threshold Amounts for Calendar Year 2019, 83 Fed. Reg. at 47,620 (Sept. 20, 2018).

C. Factual Background

1. The Named Plaintiffs

The two named plaintiffs in this case, Carol Lewis and Douglas Sargent, are individuals who are Medicare eligible, *see* Compl. ¶¶ 20-21, have Type I brittle diabetes, *see id.* ¶¶ 97, 109, and have been denied coverage for CGMs based on the refusal to classify CGMs as "durable medical equipment" under CMS 1682-R, *see id.* ¶¶ 101-04, 113-25. It is undisputed that the two named plaintiffs have also fully exhausted their administrative remedies. *See id.* ¶ 8 ("Lewis is filing suit after a final decision of the Medicare Appeals Council . . . denying coverage of her Medicare claim (and, therefore, has exhausted her

administrative remedies) . . . . Likewise, [ ] Sargent is filing suit after final decisions of the Medicare Appeals Council . . . denying coverage of his Medicare claim (and, therefore, has exhausted his administrative remedies)[.]"); Def.'s 2d Opp'n at 38 (arguing that the named plaintiffs are not representative of the proposed class in part "because the requirement to exhaust and timely file is no bar to recovery by the named plaintiffs").[4]

---

4. Lewis submitted a claim for a CGM that was denied on March 31, 2016. *See* Compl. ¶ 101. She requested a redetermination by the administrative contractor who issued that decision, but that redetermination was also denied. *Id.* ¶ 102. She then requested reconsideration by the administrative contractor, but the contractor upheld the initial denial "on the grounds that a CGM is 'precautionary' and, therefore, not durable medical equipment." *Id.* ¶ 103. After appealing to an ALJ, the denial of her claim was again upheld for the same reason, and Lewis appealed to the Appeals Council. *Id.* ¶ 104. "When no decision [by the Appeals Council] was received by November 2018 (*i.e.*, more than two years later), [ ] Lewis filed a request for escalation on November 26, 2018[,]" *id.* ¶ 106 (underline added), after which "no response from the Secretary [was] received[,]" *id.* ¶ 107, making the ALJ's decision "the Secretary's final decision[,]" *id.*

Sargent seeks judicial review of two final decisions by the Appeals Council upholding the denial of his CGM claims. *Id.* ¶ 111. First, Sargent submitted a claim for the sensors used by his CGM, but the claim was denied on September 9, 2016, "on the grounds that the items were 'statutorily excluded' and that 'Medicare does not pay for this item or service.'" *Id.* ¶ 113. Sargent made a request for redetermination by the deciding administrative contractor on February 27, 2017, which was denied. *Id.* ¶ 114. Thereafter, he sought redetermination, which was also denied "on the grounds that the sensors did 'not meet Medicare's meaning of medical equipment.'" *Id.* ¶ 115. Sargent appealed to an ALJ, *id.*, who

2. The Putative Class

The plaintiffs seek to certify a class consisting of "[a]ll persons whose claims for Medicare CGM coverage (whether Part B or Part C) were denied on the grounds that a CGMs are not durable medical equipment, and [were] not subsequently reversed on appeal, from December 13, 2012[,] through the conclusion of this case." Pls.' Mot. at 13-14. Thus, the putative class "consists of only those persons/claims that were/are rejected on the grounds that a CGM is not 'durable medical equipment[,]'" *i.e.,* the grounds articulated in CMS 1682-R. *Id.* at 14. The plaintiffs state that "the class of persons whose claims for Medicare CGM coverage has been rejected on the grounds that a CGM is not 'durable medical equipment' is readily ascertainable" because "each claim so rejected was coded by the Secretary using" five specific codes. *Id.* According

---

upheld the denial of his claim, *id.* ¶ 116. Sargent then appealed to the Appeals Council, which rendered a final decision denying his appeal on October 15, 2018, on the grounds "that a CGM is not 'primarily and customarily used to serve a medical purpose.'" *Id.* ¶ 118. Second, Sargent filed another claim for CGM sensors, which was denied on April 21, 2017, on the same grounds as his earlier claim. *Id.* ¶ 121. Sargent again sought redetermination by the administrative contractor, which was denied, *id.* ¶ 122, and subsequent reconsideration, which was also denied, *id.* ¶ 123. Sargent then appealed to an ALJ, who "issued a decision approving [his] claim." *Id.* ¶ 124. The Appeals Council reviewed the ALJ's decision under a process called "own motion review[,]" *id.,* and issued a final decision overturning the ALJ's decision, on the grounds that "a CGM is not 'primarily and customarily used to serve a medical purpose,' unless it replaces finger sticks and is, therefore, 'therapeutic[,]'" *id.* ¶ 125.

to the plaintiffs, this class would consist "of some 90,000 people whose claims for CGM coverage were improperly denied." *Id.* at 15.

D. Procedural Background

On March 23, 2020, the plaintiffs filed their class certification motion. *See id.* at 1. The Secretary filed his opposition on April 21, 2020, *see* Def.'s Opp'n at 1, the plaintiffs filed their reply on May 12, 2020, *see* Pls.' Reply at 1, the Secretary was permitted to file a surreply on May 22, 2020, *see* Def.'s Surreply at 1, and the plaintiffs were also permitted to file a surreply on May 29, 2020, *see* Pls.' Surreply at 1. On January 29, 2021, the Court granted in part and denied in part the Secretary's motion to dismiss, which had been filed a year before the plaintiffs filed their class certification motion on May 30, 2019. *See* Memorandum Opinion at 32 (Jan. 29, 2021), ECF No. 77. The Court dismissed Count I of the Complaint for failure to state a claim for which the plaintiffs would be entitled to relief under § 405(g) of the Medicare statute, finding that, while the plaintiffs had properly alleged violations of the APA later in their Complaint, there was no basis for them to receive relief under § 405(g) itself. *See id.* at 22 ("[B]ecause Count I fails to allege the violation of any federal substantive law, the plaintiffs have failed to demonstrate entitlement to the relief requested."). The Court also dismissed Count II of the Complaint also for failure to state a claim, finding that there was no viable entitlement to relief under § 706(1), "because this is not a case of agency inaction; it is instead a case of an agency's denial of coverage[,]" and "[d]enials are final agency actions

that may be challenged under § 706(2)[,]" not § 706(1), which concerns challenges to agency inaction. *Id.* at 24.

The Court also denied without prejudice the plaintiffs' class certification motion, "with the understanding that the parties can refile their submissions taking into consideration the Court's rulings on the Secretary's motion to dismiss." Order at 2 (Jan. 29, 2021), ECF No. 78. The Court took this approach based on the recognition that its dismissal of certain claims might "affect the parties' briefing on the plaintiffs' [then-]pending class certification motion, and in particular, the parties' analysis of whether the plaintiffs have satisfied the typicality requirement of Federal Rule of Civil Procedure 23(a)(3)." Memorandum Opinion at 2 n.3 (Jan. 29, 2021). The Court then set a briefing schedule for the plaintiffs to renew their class certification motion. *See* Order at 2 (Jan. 29, 2021), ECF No. 78. The plaintiffs subsequently filed their Re-Notice of Class Certification Motion on February 26, 2021,[5] *see* Pls.' Re-Notice at 1, the Secretary filed his

5. The Court intended for the plaintiffs' renewal of their class certification motion to provide a complete analysis of the class certification requirements, taking into account any impact of the Court's ruling on the Secretary's motion to dismiss—particularly pertaining to the typicality requirement of Rule 23(a)(3). *See* Memorandum Opinion at 2 n.3 (Jan. 29, 2021), ECF No. 77. However, instead of filing a complete motion for class certification, the plaintiffs filed a "re-notice" of their original class certification motion, which discussed only "Cause of Action V," *see* Pls.' Re-Notice at 1-2, the Secretary's concessions of class certification issues, *see id.* at 3-5, and the mechanics of class notification, *see id.* at 5-6. Therefore, based on the plaintiffs' language in their Re-Notice that "[f]or all the reasons set forth [in the Re-Notice], and in the motion for class certification

renewed opposition on March 12, 2021, *see* Def.'s 2d Opp'n at 1, and the plaintiffs filed their reply on March 19, 2021, *see* Pls.' 2d Reply at 1.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23 sets forth (1) prerequisites to class certification, *see* Fed. R. Civ. P. 23(a), and (2) three potential categories, under one of which the proposed class action must fall, *see* Fed. R. Civ. P. 23(b). A proposed class must satisfy both sub-sections of Rule 23 to be certified. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529, 372 U.S. App. D.C. 53 (D.C. Cir. 2006) ("[A] class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions."). Rule 23(a) states that "one or more members of a class may sue or be sued as representative parties on behalf of all members only if" the following requirements are satisfied:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

---

previously filed and re-noticed here, the class should be certified[,]" *id.* at 6, the Court must also refer to the arguments presented in the plaintiffs' original class certification motion, although it is no longer actually pending resolution.

> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b) further states that "[a] class action may be maintained if Rule 23(a) is satisfied and if" one of the following situations applies:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate

> over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Fed. R. Civ. P. 23(b). Thus, "[a] class action may be maintained' if two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories described in subdivision (b)." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 559 U.S. 393, 398, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) (quoting Fed. R. Civ. P. 23(b)). To satisfy this dual burden, "a party seeking class certification must affirmatively demonstrate his [or her] compliance with the Rule—that is, he [or she] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) ("Rule 23 does not set forth a mere pleading standard."). And, "[i]n deciding whether class certification is appropriate, a district court must [ ] undertake a 'rigorous analysis' to see that the requirements of the Rule have been satisfied." *R.I.L-R v. Johnson,* 80 F. Supp. 3d 164, 179 (D.D.C. 2015) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

III. ANALYSIS

The plaintiffs argue that they are entitled to class certification because their proposed class satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), and their class allegations fall

within the requirements of either Rule 23(b)(2) or 23(b)(3). *See* Pls.' Mot. at 15-23. In response, the Secretary argues that the "overwhelming" majority of the putative class members have not satisfied the procedural requirements for obtaining judicial review under the Medicare statute—namely, the obligations to (1) exhaust their administrative remedies, (2) file their claims within the limitations period prescribed by the Medicare statute, and (3) satisfy the jurisdictional amount in controversy. *See* Def.'s 2d Opp'n at 6. The Secretary contends that, after accounting for these alleged deficiencies, the putative class is reduced to an insufficiently numerous pool of viable claims under Rule 23(a). *See id.* at 6-7. In response, the plaintiffs argue that the Secretary's arguments are merits-based considerations, *see* Pls.' 2d Reply at 4, which "the Court may not reach . . . at this stage" of the litigation, *id.* at 5. Because the questions regarding these procedural requirements affect the Court's analysis of whether the plaintiffs have met their burden under Rule 23, the Court will proceed with its analysis by: (1) determining whether the Court may consider the procedural issues raised by the Secretary as part of the class certification analysis; (2) if it can, addressing the Secretary's procedural arguments; and (3) considering whether the requirements of Rule 23 have been satisfied.

A. Whether the Court May Consider the Administrative Exhaustion, Statute of Limitations, and Amount-In-Controversy Requirements in Determining Class Certification

The plaintiffs argue that "[t]he Secretary's request for a merits ruling on exhaustion and statute of limitations as part of or prior to class certification is improper[,]"

id. at 4, because "in Rule 23 practice, the [C]ourt may not decide the merits in considering whether to grant class certification[,]" *id.* at 5. Generally, the Court agrees with the plaintiffs that it may not "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974). However, the Supreme Court's express approval of limited merits considerations for the purpose of determining satisfaction of Rule 23, as well as courts' repeated evaluation of the specific procedural issues raised by the Secretary in determining class certification, make apparent that administrative exhaustion, the statute of limitations, and the amount in controversy are proper inquiries in this context.

Although "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage[,]" *In re McCormick & Co.,* 422 F. Supp. 3d 194, 223 (D.D.C. 2019), "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant in determining whether Rule 23 prerequisites for class certification are satisfied[,]" *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013). In fact, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff[s'] cause of action." *Gen. Tel. Co. of Sw.,* 457 U.S. at 160. Additionally, as part of class certification decisions, courts have analyzed administrative exhaustion, *see, e.g., Menominee Indian Tribe of Wis. v. United States,* 614 F.3d 519, 526, 392 U.S. App. D.C. 202 (D.C. Cir. 2010) (considering whether the limitations period for administrative claims should be

tolled for putative class members who did not exhaust administrative remedies); *James v. England,* 226 F.R.D. 2, 6 (D.D.C. 2004) (Walton, J.) ("Here, the Court does not have before it any administratively exhausted class claims, which if it did would permit it to entertain a motion for class certification."); the statute of limitations, *see, e.g., Bowen v. City of New York,* 476 U.S. 467, 476, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986) (affirming the district court's consideration of the statute of limitations prescribed by 42 U.S.C. § 405(g) in determining the composition of the class); and the amount in controversy, *see, e.g., Lindsay v. Gov't Emps. Ins. Co.,* 448 F.3d 416, 423, 371 U.S. App. D.C. 120 (D.C. Cir. 2006) (discussing the district court's authority to consider amount in controversy for putative class members as part of its supplemental jurisdiction determination).

The Court's chief task in determining the certifiability of a putative class is to assess whether the requirements of Rule 23 have been met and "merits questions" or analysis of "factual and legal issues comprising the plaintiff[s'] cause of action[,]" *Gen. Tel. Co. of Sw.,* 457 U.S. at 160, are permissible "to the extent . . . that they are relevant to determining whether Rule 23 prerequisites for class certification are satisfied[,]" *Amgen, Inc.,* 568 U.S. at 466. A general understanding of the composition of the putative class is necessary for an analysis of Rule 23(a) requirements, particularly the numerosity requirement. *See Bowen,* 476 U.S. at 476-77 (affirming the certification of a class where the district court "decided that the class properly included claimants who had not exhausted administrative remedies" in its determination of the "composition of the class"). And in this case, in order to

conduct the "rigorous [Rule 23(a)] analysis[,]" *R.I.L-R,* 80 F. Supp 3d at 179, required to determine class certification, a preliminary consideration of the procedural issues raised by the Secretary, which affect the composition of the putative class, is necessary.[6] Therefore, the Court will consider the procedural issues raised by the Secretary.

---

6. In addition to their arguments regarding the impermissibility of considering these procedural issues at this stage of the litigation, the plaintiffs also rely heavily on *Bowen v. City of New York,* 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986), in asserting that "exhaustion of administrative remedies and statute of limitations are affirmative defenses of the Secretary and neither are jurisdictional." Pls.' Reply at 3; *see id.* at 3 n.2. In *Bowen,* although the Supreme Court opined that the sixty-day statute-of-limitations requirement, which also applies in this case, "is not jurisdictional[,]" *Bowen,* 476 U.S. at 467, it nevertheless affirmed the district court's considerations of administrative exhaustion and the statute of limitations as part of its class certification determination, *see id.* at 468 (affirming the district court's waiver of the administrative exhaustion requirement and use of equitable tolling with respect to the statute of limitations). The additional cases cited by the plaintiffs, *see* Pls.' Reply at 3 n.2, all address administrative exhaustion and statute of limitations as non-jurisdictional affirmative defenses *outside of the class certification context. See Swinomish Indian Tribal Cmty. v. Azar,* 406 F. Supp. 3d 18, 20 (D.D.C. 2019), *aff'd sub nom., Swinomish Indian Tribal Cmty. v. Becerra,* 993 F.3d 917, 451 U.S. App. D.C. 454 (D.C. Cir. 2021) (ruling on cross-motions for summary judgment); *Suarez v. Colvin,* 140 F. Supp. 3d 94, 95 (D.D.C. 2015) (ruling on a motion to dismiss); *Martinez v. P.R. Fed. Affs. Admin.,* 813 F. Supp. 2d 84, 87 (D.D.C. 2011) (Walton, J.) (ruling on a motion for summary judgment). Thus, these cases do not speak to the permissibility of considering these issues in determining the certifiability of a class. Furthermore, although Federal Rule of Civil Procedure 8(c)(1) states that "a party must affirmatively state any avoidance or affirmative defense, including . . . statute of limitations" when "responding to

B. The Secretary's Procedural Arguments

The Secretary argues that the majority of the putative class members cannot be included as part of a class because of procedural deficiencies, therefore rendering the total number of proposed class members with viable claims insufficient to meet the numerosity requirement of Rule 23(a). *See* Def.'s 2d Opp'n at 6-7. Specifically, the Secretary argues that most of the putative class "consists of individuals without any viable claim to judicial review[,]" *id.* at 7, because the putative class "is overwhelmingly composed of individuals" (1) "who did not exhaust their administrative remedies," (2) "whose limitations periods have run[,]" and (3) "[who] also have claims below the minimum amount in controversy for judicial review[,]" *id.* at 10. The plaintiffs do not contest the Secretary's underlying argument that many of the proposed class do not satisfy these procedural prerequisites. *See generally* Pls.' Reply; Pls.' 2d Reply. Instead, as noted earlier, they argue that administrative exhaustion and statute-of-limitations requirements constitute merits determinations, *see* Pls.' 2d Reply at 4, "that the Court may not reach . . . at this stage" of litigation, *id.* at 5.[7]

---

a pleading[,]" Fed. R. Civ. P. 8(c)(1), the plaintiffs do not identify and the Court has been unable to find any authority that supports the proposition that this rule forecloses a party's ability to raise a statute-of-limitations argument at other stages of litigation. *See generally* Pls.' Reply at 3.

7. In their first class certification motion and reply, the plaintiffs argued that judicial waiver of the exhaustion requirement and equitable tolling of the statute of limitations would be appropriate in this case due to the alleged "hidden" or "falsely represented" basis for

Accordingly, because the allegations concerning the proposed class members' failure to meet these procedural requirements is uncontested, the Court will evaluate (1) whether waiver of administrative exhaustion or equitable tolling of the statute of limitations are warranted in this case; and (2) whether the Court may exercise supplemental jurisdiction over claims of proposed class members that do not meet the amount-in-controversy requirement.

1. Whether Waiver of the Administrative Exhaustion Requirement or Equitable Tolling Is Appropriate

The Court now turns to the question of whether waiver of the administrative exhaustion requirement or equitable tolling of the statute of limitations requirement are appropriate to employ in this case. The Secretary argues that "[a]lmost all [of the] putative class members failed to exhaust their administrative remedies," Def.'s

---

the denial of the plaintiffs' and putative class members' claims. *See* Pls.' Mot. at 14-15 (citing *Goodnight v. Shalala*, 837 F. Supp. 1564 (D. Utah 1993)); Pls.' Reply at 5-6 ("Not one of the denials informed the beneficiary that their claim was rejected because the Secretary was taking a position that a CGM was not 'primarily and customarily used to serve a medical purpose.' Instead, various obfuscatory statements were used by the Secretary which prevented the beneficiaries from understanding that their rights were being violated."). The plaintiffs now deny that this was their argument regarding these threshold issues. *See* Pls.' 2d Reply at 4-5 ("The Secretary contends that: '[The p]laintiffs have suggested that this Court should waive exhaustion of administrative remedies and equitabl[y] toll the limitations period, because the Secretary has employed a secret policy[.]' That is not correct. Instead, what [the p]laintiffs have said is that the Court may not reach issues such as that at this stage.").

2d Opp'n at 11, and "[a]ny claim that accrued before October 9, 2018, is time-barred," *id.* at 24, and therefore, "[b]ecause the proposed class has at most fifteen members with live claims, [the] plaintiffs have not established numerosity[,]" *id.* at 34. The plaintiffs do not explicitly contest the Secretary's factual representations regarding how many putative class members have not obtained a final administrative decision—and thus failed to exhaust their administrative remedies—or did not file within the statute of limitations window. *See generally* Pls.' Reply; Pls.' 2d Reply. Instead, the plaintiffs respond that the Secretary's argument "is based on the misguided assumption that the filing of the class action Complaint did not suspend the statute of limitations . . . for any class member[s'] claims pending when the Complaint was filed[.]"[8] Pls.'

8. The Court notes that the plaintiffs' position regarding waiver of the exhaustion requirement and/or equitable tolling of the statute of limitations is unclear. In their first reply, the plaintiffs argued that "the class certification issues in this case are extremely similar to the issues in *Goodnight v. Shalala,*" Pls.' Mot. at 14, a case in which, "[i]n light of [a] secret policy [of claims denials], the court waived the exhaustion/[sixty]-day requirement and certified a class of an estimated 30,000 members, some of whom had failed to exhaust their administrative remedies and file suit within [sixty] days[,]" *id.* at 15 (citing *Goodnight,* 837 F. Supp. at 1573). The plaintiffs argued that "[l]ikewise, in the present case, [the p]laintiff[s] allege a class of some 90,000 people whose claims for CGM coverage were improperly denied[,]" *id.,* and that "for virtually all of those people, the basis for the denial was either hidden from them or the Secretary falsely represented that coverage was 'statutorily excluded[,]'" *id.* However, in their second reply, the plaintiffs state that the Secretary's articulation of their argument that exhaustion should be waived and the limitations period should be equitably tolled because the Secretary has employed a secret policy is "not correct." Pls.' 2d Reply at 4. Instead, the plaintiffs argue that "the

Reply at 9; *see also* Pls.' 2d Reply at 4 (stating that "[w]hile the Secretary . . . present[s] theories regarding exhaustion and [the] statute of limitations (the factual and legal bases of which are mistaken), [the p]laintiffs will not tarry long addressing them[,]" and proceeding to their argument that the Court may not consider these issues at the class certification stage). For the following reasons, the Court concludes that neither waiver of the administrative exhaustion requirement nor tolling of the statute of limitations is warranted.

a. Waiver of the Administrative Exhaustion Requirement

Regarding the appropriateness of waiving the administrative exhaustion requirement, under the Medicare statute, a beneficiary may "file a civil action, 'after any final decision of the Commissioner of Social Security made after a hearing to which he [or she] was a party,' to 'obtain review of such decision in federal district court.'" *Am. Hosp. Ass'n v. Azar,* 895 F.3d 822, 825, 437 U.S. App. D.C. 180 (D.C. Cir. 2018) (quoting 42 U.S.C. § 405(g)); *see supra* Section I.B (explaining which administrative decisions constitute "final decisions" for purposes of § 405(g)). However, the Court has discretion to waive the requirement of administrative exhaustion in two circumstances. "First, waiver can occur when the

---

Court may not reach issues such as that at this stage." *Id.* at 5. Thus, although it is unclear whether the plaintiffs believe that waiver of administrative exhaustion and/or equitable tolling of the statute of limitations are appropriate, the Court will analyze these equitable considerations in turn.

Secretary determines that the only issue before him is one of the constitutionality of a provision of the Act and that he cannot allow or disallow benefits on any ground other than the constitutional ground." *Ryan v. Bentsen,* 12 F.3d 245, 247, 304 U.S. App. D.C. 219 (D.C. Cir. 1993) (citing *Weinberger v. Salfi,* 422 U.S. 749, 765-66, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975)). "Second, the Supreme Court has sanctioned waiver when the claimant's constitutional challenge is collateral to his [or her] claim of entitlement and he [or she] stands to suffer irreparable harm if forced to exhaust his [or her] administrative remedies." *Id.* at 248 (citing *Mathews v. Eldridge,* 424 U.S. 319, 328, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). Here, however, the plaintiffs do not lodge any constitutional arguments regarding the Medicare statute that would warrant waiver under either of the circumstances identified in *Ryan. See generally* Pls.' Mot.; Pls.' Reply; Pls.' Re-Notice; Pls.' 2d Reply. *Cf.* Pls.' 2d Reply at 12 n.6 (noting that, although the plaintiffs "seriously doubt the constitutionality of . . . provisions" in the Medicare regulations governing compensation of attorneys in the administrative adjudication process, "that is a fight for another day"). Therefore, the Court concludes that waiver of the administrative exhaustion requirement is inappropriate for those members of the proposed class who failed to exhaust their claims.

b. Equitable Tolling of the Statute of Limitations

Second, with respect to the appropriateness of invoking equitable tolling to preclude application of the sixty-day statute of limitations requirement of 42 U.S.C.

§ 405(g), which provides that a beneficiary "may obtain a review of [a final] decision by a civil action commenced within sixty days after the mailing to him of notice of such decision," 42 U.S.C. § 405(g), "the date of receipt of notice of the [final] decision" is "presumed to be [five] calendar days after the date of notice, unless there is a reasonable showing to the contrary[,]" 42 C.F.R. § 405.1136(c)(2). This limitations period is suspended for all class members when a class action complaint is filed. *See Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538, 553-54, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the requirement of Rule 23(a)(1) been met[.]"). The Court may also equitably toll a statute of limitations "in extraordinary and carefully circumscribed instances[,]" *Mondy v. Sec'y of the Army,* 845 F.2d 1051, 1057, 269 U.S. App. D.C. 306 (D.C. Cir. 1988), such as where there is secretive conduct on the part of the defendant that would affect a plaintiff's knowledge of wrongdoing and corresponding ability to appreciate the existence of a claim, *see Bowen,* 476 U.S. at 481 ("Where the Government's secretive conduct prevents plaintiffs from knowing a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action."); *Chung v. U.S. Dep't of Just.,* 333 F.3d 273, 279, 357 U.S. App. D.C. 152 (D.C. Cir. 2003) ("One situation in which equitable tolling may apply [is] when a plaintiff knows he has been injured, but is unaware that his injury may be the result of possible misconduct by the defendant[.]"). Conversely, another member of this Court

has declined to apply equitable tolling where the plaintiffs alleged that the defendant agency's "administrative process '[was] defective and meaningless,' and the agency failed to follow its own regulations for the processing of administrative complaints[.]" *Chennareddy v. Dodaro,* 698 F. Supp. 2d 1, 24 (D.D.C. 2009).

Given that the Complaint was filed on December 13, 2018, the Secretary contends that any claim that accrued prior to October 9, 2018—that is, any claim for which notice of a final administrative decision was received prior to October 9, 2018—is time-barred because claims that accrued prior to that date would necessarily fall outside of the sixty-day limitations period. *See* Def.'s 2d Opp'n at 24. The plaintiffs, however, argue by implication that the statute of limitations should be equitably tolled.[9] Pls.' Mot. at 15 (citing *Goodnight v. Shalala,* 837 F. Supp. 1564, 1573 (D. Utah 1993)). The plaintiffs state that "the beneficiaries were affirmatively misled when they were told that their claims for CGM coverage were 'statutorily excluded'—when no such statute exists." Pls.' Reply at 6.

9. The plaintiffs also use this argument as a justification for why waiver of administrative exhaustion should apply in this case. *See* Pls.' Mot. at 15 ("In light of the secret policy, the court [in *Goodnight v. Shalala,* 837 F. Supp. 1564 (D. Utah 1993)] waived the exhaustion/[sixty]-day requirement and certified a class[.]"). However, the plaintiffs' presentation of this argument is cursory and identical to their arguments regarding the tolling of the statute of limitations. *See generally id.* at 14-15. Thus, in addition to the reasoning already articulated regarding waiver of administrative exhaustion, *see supra* Section III.B.1.a, the Court's analysis with respect to the impact of *Goodnight* on its decision whether to equitably toll the statute of limitations also applies to waiver of administrative exhaustion.

Thus, the plaintiffs' sole argument for equitable tolling rests on the manner in which the reasons for the denial of claims were communicated.

The Secretary states that "[w]hen a supplier appends a modifier to a billing code, a short description of that modifier appears on the initial coverage determination, after the description of the item or service that is the subject of the claim." Def.'s 2d Opp'n at 18-19. The Secretary points out that "[a] dictionary of the modifiers is publicly available[,]" *id.* at 19 n.6, and it identifies the modifier to which the plaintiffs refer in their argument for equitable tolling as the "GY modifier," *id.* at 19. The Secretary further notes that

> the GY modifier . . . indicates that the supplier believes the item not to be covered by Medicare. The modifier dictionary glosses GY as 'Item or service statutorily excluded, does not meet the definition of any [M]edicare benefit or, for non-[M]edicare insurers, is not a contract benefit,' which is shortened to 'Statutorily excluded' on initial denial forms. [The p]laintiffs contend that the shortened description of the GY modifier misleads beneficiaries whose item or service is not literally excluded from coverage by the plain text of the Medicare statute.

Id. (internal citation omitted). The Court agrees with the Secretary that a lack of specificity in initial denial codes does not amount to the pervasive "secretive conduct," *Goodnight,* 837 F. Supp. at 1573, or "clandestine policies

and practices," *id.* at 1583, that existed on the part of the government in *Goodnight. Compare* Pls.' Reply at 6 ("[T]he beneficiaries were affirmatively misled when they were told that their claims for CGM coverage were 'statutorily excluded'—when no such statute exists."), *with Goodnight,* 837 F. Supp. at 1583 ("[A]ll class members have had their applications for disability benefits denied, allegedly due to [the d]efendants' maintenance of a system of clandestine policies and practices in numerous areas of the disability determination process, which violate the Social Security Act, federal regulations, federal case law, and the United States Constitution.").

While the court in *Goodnight* justified exercising equitable remedies because "it would be unfair to penalize [that] group of claimants . . . when they could not have known of the alleged secretive conduct and therefore did not know that their rights had been violated[,]" 837 F. Supp. at 1573, the denial of claims in that case were the result of "system[ic]" and "clandestine" practices on the part of the agency, *id.* at 1583. Here, the practice of using initial denial codes condemned by the plaintiffs is not deceptive or opaque, such that the plaintiffs could not have "know[n] that their rights were being violated[,]" *id.,* a situation that, if it were present here, might compel the exercise of an equitable remedy. Specifically, the putative class members in this case were not the recipients of misinformation such that the Secretary's conduct prevented them from having a "reasonable opportunity to learn the facts concerning the cause of action." *Bowen,* 476 U.S. at 481. Given the readily available explanations of

the initial denial codes in the Medicare coding dictionary,[10] Medicare beneficiaries are adequately provided notice of the reason for the denial of their claims. *See* Def.'s 2d Opp'n at 19 n.6 (highlighting the positioning of the GY modifier definition within the Medicare coding dictionary). It may be more convenient for Medicare beneficiaries to have the full explanation of the claims denial listed in an unabbreviated fashion, along with the denial itself. However, there is a short description listed on the denial, the Medicare coding dictionary is publicly available on the CMS website, *see supra* n.10, and the specific coding section on the website is navigable in one click from the CMS Medicare page.[11] Thus, the process for beneficiaries to obtain this information is not so arduous that it affects their ability to reasonably identify a cause of action, and equitable tolling of the statute of limitations is therefore not appropriate.

Accordingly, the Court concludes that neither waiver of administrative exhaustion nor equitable tolling of the statute of limitations is warranted here.

---

10. The Court notes that the Medicare coding dictionary is publicly available on the Internet. *See* Centers for Medicare & Medicaid Services, *HCPCS Quarterly Update,* https://www.cms.gov/Medicare/Coding/HCPCSReleaseCodeSets/HCPCS-Quarterly-Update (last visited Jan. 31, 2022) (listing links to all coding dictionaries from July 1, 2012, to present).

11. The Court notes that the coding section of the CMS website is navigable from the Medicare page. *See* Centers for Medicare & Medicaid Services, *Medicare,* https://www.cms.gov/Medicare/Medicare (last visited Jan. 31, 2022) (showing a "Coding" section, with the link to the coding dictionary page referenced *supra* n.10, on the CMS Medicare page).

2. Amount in Controversy

Finally, the Court considers whether it has supplemental jurisdiction over the claims that do not meet the amount-in-controversy requirement for district court jurisdiction, as the parties agree that certain members of the proposed class do not meet the required amount of $1,600. *See* Def.'s 2d Opp'n at 26-27; Pls.' 2d Reply at 7. The plaintiffs admit that "at least some of the class members (including [ ] Sargent) have claims that, [when] considered individually, do not reach the $1,600 amount required at the time the Complaint was filed[,]" Pls.' 2d Reply at 7, but argue that the Court has supplemental jurisdiction over these claims because "[i]n this case, all of the claims arise out of a common nucleus of operative fact because every denied claim was denied on the frivolous basis that a CGM is not 'primarily and customarily used to serve a medical purpose[,]'" *id.* at 9. In response, the Secretary argues that the Court does not have supplemental jurisdiction because "[t]he claims of beneficiaries who cannot satisfy the amount-in-controversy requirement are not 'such that [they] would ordinarily be expected to try them all in one judicial proceeding' together with the claims of beneficiaries who can satisfy the requirement." Def.'s 2d Opp'n at 26. For the following reasons, the Court concludes that it does have supplemental jurisdiction over the claims that do not meet the statutory amount-in-controversy requirement because they arise from the same "nucleus of operative fact," *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), as the claims that do satisfy the required amount in controversy. Thus, the Court may exercise supplemental jurisdiction over putative class members who have exhausted their

administrative remedies and filed their claims within the statute of limitations, but whose claims do not meet the amount-in-controversy requirement, which totals to seventeen putative class members. *See infra* III.C.

When the plaintiffs filed their Complaint, the Medicare statute dictated that "judicial review shall not be available to the individual if the amount in controversy is less than [$1,600]." 42 U.S.C. § 1395ff(b)(1)(E)(i); *see* 83 Fed. Reg. at 47,620 (showing an adjustment in the amount-in-controversy threshold for judicial review from the $1,000 originally listed in the statute to $1,600 for calendar year 2018). The Supreme Court has stated that to exercise supplemental jurisdiction, "the claims must derive from a common nucleus of operative fact . . . such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding[.]" *United Mine Workers of Am.*, 383 U.S. at 725. This standard was later clarified in 42 U.S.C. § 1367, which states:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.

42 U.S.C. § 1367(a). In the class certification context, the Circuit, as well as other courts, have found a "common

nucleus of operative fact" where the claims arose from the same system of claims or compensation denials. *Cf. Lindsay,* 448 F.3d at 424 (stating that the district court could properly exercise supplemental jurisdiction over putative class members because "both classes performed the same type of work for the same employer and were deprived of overtime compensation as a result of the same action taken by their employer"); *Shahriar v. Smith & Wollensky Rest. Grp., Inc.,* 659 F.3d 234, 245 (2d Cir. 2011) (finding that a common nucleus of operative fact existed for claims "aris[ing] out of the same compensation policies and practices of [the defendant]"); *Pueblo Int'l, Inc. v. De Cardona,* 725 F.2d 823, 826 (1st Cir. 1984) (finding supplemental jurisdiction was properly exercised where "[t]he facts necessary to prove a violation of one are practically the same as those needed to prove a violation of the other").

Here, because all putative class members' claims involve the same basic factual circumstances as the named plaintiffs—namely, that they are Medicare beneficiaries who submitted and were denied claims for CGMs based on CMS 1682-R—the Court concludes that they arise from the same "common nucleus of operative fact," *United Mine Workers of Am.,* 383 U.S. at 725, such that they are "so related to the claims [that meet the amount in controversy] . . . that they form part of the same case or controversy[,]" 42 U.S.C. § 1367(a). Thus, the Court may exercise supplemental jurisdiction over the claims of putative class members who individually do not satisfy the $1,600 minimum amount in controversy required by the Medicare statute.

Accordingly, in assessing whether a class can be certified, the Court concludes that (1) it may consider the procedural issues raised by the Secretary at the class certification stage; (2) neither waiver of administrative exhaustion nor equitable tolling of the statute of limitations are warranted here; and (3) it may exercise supplemental jurisdiction over those putative class members who have exhausted their administrative remedies and filed their claims within the statute of limitations window, but whose claims do not satisfy the amount-in-controversy requirement. With these parameters, the Court will now turn to consider whether this proposed class, as narrowed, meets the requirements of Rule 23.

C. Federal Rule of Civil Procedure 23(a)

Under Federal Rule of Civil Procedure 23(a), the party seeking class certification must satisfy "four requirements—numerosity, commonality, typicality, and adequate representation[,]" *Wal-Mart Stores, Inc.*, 564 U.S. at 349, which "effectively limit the class claims to those fairly encompassed by the named plaintiff[s'] claims[,]" *Gen. Tel. Co. v. Equal Emp. Opportunity Comm'n,* 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980) (internal quotations omitted). *See* Fed. R. Civ. P. 23(a)(1)-(4). "A party seeking class certification must affirmatively demonstrate his [or her] compliance with the Rule[,]" *Wal-Mart Stores, Inc.*, 564 U.S. at 350, and "[f]ailure to adequately demonstrate any of the four [Rule 23(a) requirements] is fatal to class certification[,]" *Garcia v. Johanns,* 444 F.3d 625, 631, 370 U.S. App. D.C. 280 (D.C. Cir. 2006). The first requirement, Rule 23(a)(1) or "numerosity," authorizes class certification where

joinder would be impracticable. *See Coleman v. District of Columbia,* 306 F.R.D. 68, 76 (D.D.C. 2015). Although there are no "hard rules for when joinder will be found impracticable[,] . . . courts have developed helpful rules of thumb for assessing the approximate thresholds at which joinder becomes presumptively impracticable." *Id.* For example, courts in this District have concluded that "[a]bsent unique circumstances, 'numerosity is satisfied when a proposed class has at least forty members.'" *Id.* (quoting *Richardson v. L'Oreal USA, Inc.,* 991 F. Supp. 2d 181, 196 (D.D.C. 2013)); *see Vista Healthplan v. Warner Holdings Co. III Ltd.,* 246 F.R.D. 349, 357 (D.D.C. 2007) (stating that a proposed class of at least forty members will presumptively satisfy the numerosity requirement). On the other hand, "a class that encompasses fewer than [twenty] members will likely not be certified absent other indications of impracticability of joinder." *Coleman,* 306 F.R.D. at 76 (citation omitted). However, ultimately, the determination of impracticability "requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co.,* 446 U.S. at 330.

Having already concluded that the number of putative class members in this case should be reduced to account for those individuals who have not exhausted their administrative remedies and those individuals who did not file their claims within the applicable statute of limitations window, *see supra* Sections III.B.i.a-b, the plaintiffs' proposed class has been reduced to seventeen. The plaintiffs do not contest this number. *See* Pls.' Reply at 7-9; Pls.' 2d Reply at 10. This group of seventeen remaining proposed class members consists of members for whom a final decision was issued by the Appeals

Council on or after October 9, 2018, thus exhausting their administrative remedies, *see* 42 C.F.R. § 405.1130 ("The [Appeals] Council's decision is final and binding all parties unless a [f]ederal district court issues a decision modifying the [Appeals Council's] decision[.]"), and who filed their claims for judicial review within the sixty-day statute of limitations from the time notice of the final decision is presumed to have been received, *see* 42 U.S.C. § 405(g) (stating that a beneficiary "may obtain a review of [a final] decision by a civil action commenced within sixty days after the mailing to him [or her] of notice of such decision[.]"); 42 C.F.R. § 405.1136(c)(2) ("[T]he date of receipt of notice of the [final] decision . . . shall be presumed to be [five] calendar days after the date of notice, unless there is a reasonable showing to the contrary."). This number of potential class members is gleaned from the Secretary's representation that

> [t]he Secretary has identified only twenty-three merits decisions of the [Appeals Council] issued to putative class members on or after [October 9, 2018]. Two of those decisions have been reviewed elsewhere, in cases where the plaintiffs opted out of any class that could be certified here. That leaves twenty-one decisions issued to eighteen beneficiaries, including [ ] Sargent.[12]

12. The Court arrives at the number seventeen, as opposed to the Secretary's eighteen, because Sargent is a named plaintiff and not a putative class member. *See Coleman v. District of Columbia*, 306 F.R.D. 68, 77 (D.D.C. 2015) (using "thirty-four potential class members (*not including the two named plaintiffs)*" as the operative number for the court's numerosity analysis (emphasis added)).

Def.'s 2d Opp'n at 35-36 (internal citations omitted). The Secretary states that he "arrived at this number by reviewing the decisions of the [Appeals Council] that were originally produced in discovery, and the six that have been provided in supplemental productions." *Id.* at 35 n.13.

The remaining number of putative class members is well-below the guiding threshold of forty members and is also below twenty, the number that courts have remarked may qualify at the lower limit for class certification. *See Coleman,* 306 F.R.D. at 76 ("At the lower end, 'a class that encompasses fewer than [twenty] members will likely not be certified[.]'") (citation omitted). Furthermore, the plaintiffs make no argument regarding "other indications of impracticability of joinder," *id.; see generally* Pls.' Mot.; Pls.' Reply; Pls.' Re-Notice; Pls.' 2d Reply, and the Court perceives of no "non-numerical factors affecting the impracticability of joinder [that] would militate in favor of [class] certification[,]" *Hinton v. District of Columbia,* No. 21-1295, 567 F. Supp. 3d 30, 2021 U.S. Dist. LEXIS 187719, 2021 WL 4476775, at *16 (D.D.C. Sept. 30, 2021). Accordingly, because the plaintiffs have not "affirmatively demonstrate[d] [ ] compliance with" the numerosity requirement of Rule 23(a), *Wal-Mart Stores, Inc.,* 564 U.S. at 350, and "[f]ailure to adequately demonstrate any of the four [Rule 23(a) requirements] is fatal to class certification[,]" *Garcia,* 444 F.3d at 631, the Court must deny the plaintiffs' motion.[13]

13. The plaintiffs advance two arguments in their Re-Notice, in addition to their arguments regarding the Rule 23 requirements made in their class certification motion. First, the plaintiffs state that they "do not believe that a separate sub-class comprised of people with claims under Cause of Action V is necessary[,]" Pls.' Re-Notice

IV. CONCLUSION

For the foregoing reasons, the Court concludes that it must deny the plaintiffs' class certification motion.

---

at 2, because "every person who has a claim under that Cause . . . also has a claim under Causes of Action III, IV, VI, and VII. Thus, the [c]lass of people with a claim specifically under Cause of Action V is a subset of the larger [c]lass[,]" *id.* at 1. The plaintiffs appear to use the term "Cause of Action V" to refer to Count V of the Complaint. *See* Compl. §§ 158-60 (reciting the plaintiffs' requests for relief as to Count V). Because numerosity is the ultimate dispositive issue in this case, the Court has calculated the number of proposed class members with viable claims. *See supra* Section III.C. Furthermore, because putative class size is calculated according to the number of members and not the number of claims, *see* Fed. R. Civ. P. 23(a)(1) (requiring that "the class [be] so numerous that joinder of all members is impracticable"), and because, as the plaintiffs state, the proposed class members who have claims under "Cause of Action V" also all have claims based on the other causes of action, *see* Pls.' Re-Notice at 1, these individuals have been accounted for in the Court's analysis.

Second, the plaintiffs argue that the Secretary effectively conceded that each requirement of Rule 23 was satisfied by failing to explicitly deny these allegations in his Answer. *See id.* at 3-5. However, in response to the plaintiffs' Motion to Deem Allegations Admitted, ECF No. 82, filed shortly after the plaintiffs' Re-Notice, the Secretary filed an Amended Answer on March 9, 2021. *See* Am. Answer (Mar. 9, 2021), ECF No. 83. In his Amended Answer, the Secretary remedies what the plaintiffs characterize as admissions by denying all allegations concerning the plaintiffs' satisfaction of Rule 23's requirements. *See id.* ¶¶ 137-45. The Court held a motion hearing on May 21, 2021, after which, in light of the Secretary's Amended Answer, the Court denied the plaintiffs' Motion to Deem Allegations Admitted on May 24, 2021. *See* Order at 1 (May 24, 2021), ECF No. 92. Thus, the question of the Secretary's alleged admissions is rendered moot.

SO ORDERED this 28th day of April, 2022.[14]

REGGIE B. WALTON
United States District Judge

14. The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 8, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2929 (RBW)

CAROL A. LEWIS, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

MEMORANDUM OPINION

The plaintiffs, Carol Lewis and Douglas Sargent, bring this civil action against Xavier Becerra, in his official capacity as the Secretary (the "Secretary") of the United States Department of Health and Human Services (the "Department"), pursuant to Title XVIII of the Social Security Act, 42 U.S.C. § 1395ff(b), *see* Class Action Complaint ("Compl.") ¶ 8, ECF No. 1; the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as modified by 42 U.S.C. § 405(g), *see id.* ¶¶ 146-63; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *see id.* ¶¶ 164-66.[1] Currently pending before the Court is

1. On May 30, 2019, the Secretary filed a partial motion to dismiss for lack of jurisdiction, *see* Partial Motion to Dismiss for

the Defendant's Motion for Partial Entry of Judgment in Plaintiffs' Favor, and to Dismiss Remaining Causes of Action and Claims for Relief on Mootness Grounds ("Def.'s Mot." or the "Secretary's motion"), ECF No. 120. Upon careful consideration of the parties' submissions,[2] the Court concludes for the following reasons that it must grant the Secretary's motion.

I. BACKGROUND

The Court previously set forth the factual background of this case in three prior Memorandum Opinions, which were issued on January 29, 2021, *see* Memorandum Opinion at 2-11 (Jan. 29, 2021), ECF No. 77; January 13, 2022, *see Lewis v. Becerra*, No. 18-cv-2929 (RBW), 2022 U.S. Dist. LEXIS 7016, 2022 WL 123909, at *1-3 (D.D.C. Jan. 13, 2022); and April 28, 2022, *see Lewis v. Becerra*, No. 18-cv-2929 (RBW), 2022 U.S. Dist. LEXIS 77486, 2022 WL 1262122, at *2-4 (D.D.C. Apr. 28, 2022). Thus, the Court will not reiterate it in full again here. The

---

Lack of Jurisdiction and Failure to State a Claim at 1, ECF No. 22, which the Court granted in part and denied in part on January 29, 2021, *see* Order at 1 (Jan. 29, 2021), ECF No. 78. The Court granted the motion to dismiss to the extent that it sought to dismiss Counts I and II of the Complaint, which alleged violations of 42 U.S.C. § 405(g) and 5 U.S.C. § 706(1). *Id.* The Court denied the motion in all other respects. *Id.*

2. In addition to the filings already identified, the Court considered the following submissions in rendering its decision: (1) the Plaintiffs' Opposition to the Secretary's Motion ("Pls.' Opp'n"), ECF No. 124; and (2) the defendant's Reply in Support of Defendant's Motion for Partial Entry of Judgment in Plaintiffs' Favor, and to Dismiss Remaining Causes of Action and Claims for Relief on Mootness Grounds ("Def.'s Reply"), ECF No. 125.

Court will, however, set forth the factual background and procedural history that are pertinent to the resolution of the pending motion.

A. Statutory and Regulatory Background Relating to Continuous Glucose Monitors

Medicare "Part B is an optional supplemental insurance program that pays for medical items and services . . . , including . . . durable medical equipment." *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 2, 398 U.S. App. D.C. 43 (D.C. Cir. 2011) (citing 42 U.S.C. §§ 1395j-1395w-4). The Secretary has issued a regulation clarifying the definition of "[d]urable medical equipment[,]" which states:

> Durable medical equipment means equipment, furnished by a supplier or a home health agency that meets the following conditions:
>
> (1) Can withstand repeated use.
>
> (2) Effective with respect to items classified as [durable medical equipment] after January 1, 2012, has an expected life of at least 3 years.
>
> (3) Is primarily and customarily used to serve a medical purpose.
>
> (4) Generally is not useful to an individual in the absence of an illness or injury.
>
> (5) Is appropriate for use in the home.

42 C.F.R. § 414.202. The Medicare statute, 42 U.S.C. §§ 1395-1395lll, expressly designates "blood-testing strips and blood glucose monitors for individuals with diabetes" as "durable medical equipment" and, therefore, covered under Medicare Part B. 42 U.S.C. § 1395x(n). However, the Centers for Medicare and Medicaid Services ("CMS") has not always applied the "durable medical equipment" designation to continuous glucose monitors ("CGMs"). CGMs are devices that consist of "disposable sensor[s]" which "[are] placed below the skin in the space between tissues (interstitial space) that is filled with fluids going to and from cells" and "last for a week[,] [ ] measur[ing] glucose levels every five to seven minutes (*i.e.*, more than 200 times a day) without requiring patient interaction, including when the patient is sleeping." Compl. ¶ 33.

1. CMS 1682-R

On January 12, 2017, CMS issued CMS 1682-R,[3] a ruling which concluded that "in all [ ] cases in which a CGM does not replace a blood glucose monitor for making diabetes treatment decisions, a CGM is not considered [durable medical equipment]." Centers for Medicare &

3. CMS 1682-R is a "CMS Ruling." *See* Centers for Medicare & Medicaid Services Ruling 1682-R ("CMS 1682-R") (Jan. 12, 2017) at 1. CMS Rulings are "precedent final opinion[s] or order[s] or statement[s] of policy or interpretation that ha[ve] not been published in the Federal Register as a part of a regulation or of a notice implementing regulations, but which ha[ve] been adopted by CMS as having precedent[.]" 42 C.F.R. § 401.108(a). These rulings are "binding on all CMS components[and] on all [United States Department of Health and Human Services] components that adjudicate matters under the jurisdiction of CMS[.]" § 401.108(c).

Medicaid Services Ruling 1682-R ("CMS 1682-R") (Jan. 12, 2017) at 15. This ruling applied to all claims for CGMs submitted on or after January 12, 2017, and "[t]hus, after January 12, 2017, all levels of Medicare . . . were required to deny CGM cla[i]ms . . . whenever the presented CGM did not replace [a blood glucose monitor]." *Id.* at 7. Although CMS's former ongoing classification of CGMs as not constituting "durable medical equipment" formed the basis for all claims denials alleged in this case, CMS's application of CMS 1682-R specifically formed the basis for the Secretary's denial of plaintiff Sargent's second claim referenced in this case. *See infra* Section I.B.

2. Proposed and Final Rules

CMS has since rescinded and replaced CMS 1682-R. On November 4, 2020, CMS issued a proposed rule to, among other things, "classify [all] . . . []CGMs[] as [durable medical equipment] under Medicare Part B[.]" 85 Fed. Reg. 70,358, 70,358 (Nov. 4, 2020); *see id.* at 70,398-70,404. After proceeding through the notice-and-comment rulemaking process, *see* 86 Fed. Reg. 73,860, 73,862-73,863 (Dec. 28, 2021), CMS issued its final rule on December 28, 2021, formally replacing CMS 1682-R and "classify[ing] . . . []CGMs[] as [durable medical equipment] under Medicare Part B[,]" *id.* at 73,860; *see id.* at 73,896-73,902. This final rule went into effect on February 28, 2022. *See id.* at 73,860.

3. TDL-220257

In order to apply the December 28, 2021 final rule to claims for reimbursement which predated the February

28, 2022 effective date, on February 25, 2022, CMS issued a "technical direction letter, TDL-220257,[4] to its Durable Medical Equipment Medicare Administrative Contractors[,]" Def.'s Mot. at 6, instructing contractors to apply the new rule to reimbursement claims submitted prior to February 28, 2022, *see id.*, Exhibit ("Ex.") D (Technical Direction Letter) at 2-3, ECF No. 120-7.

4. CMS Ruling 1738-R

On May 13, 2022, CMS issued CMS Ruling 1738-R, which "rescind[s] . . . []CMS[]1682-R . . . and instead applies the terms of the December 28, 2021 final rule . . . to Medicare Part B and Part C claims for payment of . . . []CGMs[]." Centers for Medicare & Medicaid Services Ruling 1738-R ("CMS 1738-R") (May 13, 2022) at 1. The ruling further provides that

> [i]f a CGM monitor or receiver and/or its necessary supplies and accessories has been furnished to a Medicare beneficiary before the February 28, 2022 effective date of the December 2021 final rule and payment for the CGM is claimed under Part B . . . then the substantive CGM classification, coverage, and payment policies established by the December 2021 final rule and adopted in this Ruling

4. The "technical direction letter" was a letter sent from CMS to all Medicare Administrative Contractors, which "provide[d] instructions . . . regarding Medicare benefit policy classification and payment for . . . []CGMs[]" in light of the December 28, 2021 final rule. *See* Def.'s Mot., Exhibit ("Ex.") D (Technical Direction Letter) at 1, ECF No. 120-7.

> shall be applied to claims for a CGM monitor or receiver and/or its necessary supplies and accessories where . . . a valid CGM claim or valid CGM appeal was pending as of February 28, 2022[.]

Id. at 9.

B. The Plaintiffs

The two plaintiffs in this case are individuals who are Medicare eligible, *see* Compl. ¶¶ 20-21, have Type I brittle diabetes, *see id.* ¶¶ 97, 109, and were denied coverage for CGMs based on CMS's refusal to classify CGMs as "durable medical equipment" under CMS 1682-R, *see id.* ¶¶ 101-04, 113-25. Specifically, three coverage denials form the basis of the plaintiffs' claims against the Secretary—Lewis's coverage claim was denied on March 31, 2016, *see id.* ¶ 101, and Sargent's two coverage claims were denied on September 9, 2016, *see id.* ¶ 113, and April 21, 2017, *see id.* ¶ 121. The Secretary represents—and the plaintiffs do not contest, *see generally* Pls.' Opp'n—that, following issuance of technical direction letter TDL-220257 on February 25, 2022, "CMS directed its Medicare contractor[,] Noridian Healthcare Solutions, LLC ([') Noridian[']),[,] to pay the three Medicare reimbursement claims at issue in this case." Def.'s Mot. at 4. The Secretary further represents—and the plaintiffs again do not contest, *see generally* Pls.' Opp'n—that "[o]n March 28, 2022, Noridian paid [ ] Sargent's August 2016 claim and April 2017 claim[,]" Def.'s Mot. at 4 (citing *id.*, Ex. A (Declaration of Karen Grasso ("Grasso Decl.")) ¶ 6, ECF No. 120-1); and "[o]n June 3, 2022, Noridian sent [ ] Lewis

payment for her October 2015 claim[,]" *id.* (citing *id.*, Ex. A (Grasso Decl.) ¶ 8).

C. Applicable Procedural History

On July 14, 2022, the Secretary filed his motion that is the subject of this Memorandum Opinion. *See* Def.'s Mot. at 1. The plaintiffs then filed their opposition to the Secretary's motion on August 8, 2022, *see* Pls.' Opp'n at 1, and the Secretary filed his reply on August 25, 2022, *see* Def.'s Reply at 1.

II. STANDARD OF REVIEW

"Federal [district] courts are courts of limited jurisdiction[,]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994), and therefore, "[a] motion for dismissal under [Rule] 12(b)(1) 'presents a threshold challenge to the [C]ourt's jurisdiction[,]'" *Morrow v. United States*, 723 F. Supp. 2d 71, 75 (D.D.C. 2010) (Walton, J.) (quoting *Haase v. Sessions*, 835 F.2d 902, 906, 266 U.S. App. D.C. 325 (D.C. Cir. 1987)). Thus, the Court is obligated to dismiss a claim if it "lack[s] [ ] subject-matter jurisdiction[.]" Fed. R. Civ. P. 12(b)(1). And, because "it is presumed that a cause lies outside [ ] [the Court's] limited jurisdiction," *Kokkonen*, 511 U.S. at 377, the plaintiff bears the burden of establishing by a preponderance of the evidence that a district court has subject matter jurisdiction, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

In deciding a motion to dismiss based upon lack of subject matter jurisdiction, the Court "need not limit

itself to the allegations of the complaint." *Grand Lodge of the Fraternal Ord. of Police v. Ashcroft*, 185 F. Supp. 2d 9, 14 (D.D.C. 2001) (citation omitted). Rather, the "[C]ourt may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections and Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citation omitted); *see also Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005) (holding that a "district court may consider materials outside [of] the pleadings" when deciding "to grant a motion to dismiss for lack of jurisdiction"). Additionally, the Court must "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged[.]'" *Am. Nat'l Ins. Co. v. Fed. Deposit Ins. Corp.*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005)). However, "the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a [Rule] 12(b)(1) motion than in resolving a [Rule] 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (alterations in original) (citation and internal quotation marks omitted).

III. ANALYSIS

The Secretary asks the Court to "enter judgment in [the] plaintiffs' favor on Count III of their Complaint . . . and to vacate the three Administrative Law Judge ([']ALJ['])

and Medicare Appeals Council decisions from which [the] plaintiffs appealed[,]" Def.'s Mot. at 1-2, which he argues would obviate the need for the Court to reach the plaintiffs' APA claims, *see id.* at 10-11. Furthermore, the Secretary argues that the "[]proposed partial judgment in [the plaintiffs'] favor, and vacatur of the final agency decisions from which they appealed, provides them with all the judicial relief to which they are entitled[,]" and therefore, the plaintiffs' remaining claims should be dismissed as moot. *Id.* at 11. In response, the plaintiffs do not respond to the Secretary's proposal regarding Count III, but argue that their remaining claims are not moot because the Secretary has failed to satisfy his burden to show that (1) "his alleged 'voluntary cessation' has rendered this case moot[,]" Pls.' Opp'n at 14, and (2) the claims in this case are not "capable of repetition while evading review[,]" *id.* at 20. The Court will first consider whether it should enter judgment for the plaintiffs as to Count III in light of the Secretary's concessions, before determining whether the remaining claims in this case should be dismissed as moot.

A. The Secretary's Request for Entry of Partial Judgment for the Plaintiffs

The Secretary "concedes that the final agency decisions from which the plaintiffs appealed are not in accordance with the agency's current policy regarding CGMs[,]" Def.'s Mot. at 8-9, because "[CMS 1738-R] made the policy of the December 2021 final rule applicable to any pending or properly appealed claim for reimbursement of a CGM device or supplies, regardless of date of service,

including [the] plaintiffs' three reimbursement claims at issue in this case[,]" *id.* at 9. The Secretary therefore states that "the Court should enter judgment in [the] plaintiffs' favor on Count III[,]" *id.*, in which the plaintiffs

> ask the Court to reverse the Secretary's [d]ecisions as arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law, and issue an order finding that a CGM and its related supplies [are] covered durable medical equipment and direct the Secretary to make appropriate payment for the claims that are the subject of this case.

Compl. ¶ 154. The Secretary further "acknowledges that vacatur of the (prior) final agency decisions may provide [the] plaintiffs with some[] nominal relief" and "proposes that the Court . . . vacate the final agency actions from which [the plaintiffs] appealed." Def.'s Mot. at 10 (noting that "[t]he Court may order vacatur even though [the] plaintiffs' Complaint did not explicitly demand it" and "[v]acatur of the ALJ and Medicare Appeals Council decisions is the relief to which [the] plaintiffs are entitled" (citing Fed. R. Civ. P. 54(c)). Finally, the Secretary argues that, based upon this proposal, "there is no need for the Court to reach the plaintiffs' other [APA] causes of action" because "[e]ntering judgment for [the] plaintiffs based on the government's concession with respect to Count III, and vacating the final agency decisions, provides [the] plaintiffs with complete relief on their [APA] claims." *Id.* at 11.

In their opposition, the plaintiffs do not address any of these proposals or arguments put forth by the

Secretary. *See generally* Pls.' Opp'n. And, where "a party files an opposition to a motion and therein addresses only some of the movant's arguments, the [C]ourt may treat the unaddressed arguments as conceded." *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428, 413 U.S. App. D.C. 384 (D.C. Cir. 2014) (interpreting District of Columbia Local Civil Rule 7(b)); *see* LCvR 7(b) (providing that "[i]f [ ] a memorandum [in opposition to a dispositive motion] is not filed within the prescribed time, the Court may treat the motion as conceded"). Accordingly, the Court will treat the Secretary's request and arguments regarding the entry of judgment for the plaintiffs as to Count III, and vacatur of the underlying administrative decisions in this case, as conceded. As a result, the Court will enter judgment in favor of the plaintiffs as to Count III of the Complaint, except to the extent that Count III requests that the Court "direct the Secretary to make appropriate payment for the claims that are the subject of this case[,]" Compl. ¶ 154.[5] *Cf. MCI Communs. Servs. v. FDIC*, 808 F. Supp. 2d 24, 27 (D.D.C. 2011) (entering judgment in favor of the defendant as to one count of the Complaint based solely upon a concession by the plaintiff).

---

5. The Court concludes that, because the Secretary has completed payments for all of the plaintiffs' claims at issue in this case, *see* Def.'s Mot. at 4 (citing *id.*, Ex. A (Grasso Decl.) ¶¶ 6, 8), the plaintiffs' request in Count III that the Court "direct the Secretary to make appropriate payment for the claims that are the subject of this case[,]" Compl. ¶ 154, is rendered moot. *See Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204, 407 U.S. App. D.C. 22 (D.C. Cir. 2013) ("In general, a c[laim] becomes moot . . . when, among other things, the court can provide no effective remedy because a party has already 'obtained all the relief [it has] sought.'" (quoting *Monzillo v. Biller*, 735 F.2d 1456, 1459, 237 U.S. App. D.C. 20 (D.C. Cir. 1984) (third alteration in original)).

Appendix C

Regarding the Secretary's request for voluntary vacatur, the Court questions whether it may vacate an administrative decision based solely upon the Secretary's request and the plaintiff's implicit concession. Other members of this Court have disapproved of vacating agency rules based only upon an agency's request, *see Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 136 (D.D.C. 2010) (concluding that a district court "lacks the authority to grant [an agency's] request for vacatur without a determination of the merits"), because doing so, absent a judicial determination of legal error, "'would allow the [agencies] [ ] to do what they cannot do under the APA[—]repeal a rule without public notice and comment, without judicial consideration of the merits[,]'" *id.* at 135 (quoting *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009)). However, where, as here, the ruling that formed the basis for the administrative decisions has since been *rescinded* based upon the Secretary's admission of legal error, *see* CMS 1738-R (May 13, 2022) at 1, the potential for an agency to bypass these requirements under the APA is not implicated, and the Court therefore concludes that vacatur of administrative decisions made pursuant to the since-rescinded ruling is not inappropriate, *cf. Endangered Species Comm. of Bldg. Indus. Ass'n of S. Cal. v. Babbitt*, 852 F. Supp. 32, 38 (D.D.C. 1994) (vacating an administrative decision based upon a legally erroneous agency rule). *See* Def.'s Mot. at 8-10 (explaining that CMS has rescinded and replaced CMS 1682-R and therefore, administrative decisions based upon the erroneous classification of CGMs in CMS 1682-R are invalid). The Court will therefore vacate the administrative decisions which denied the plaintiffs'

claims for coverage of their CGMs based upon CMS 1682-R.[6] Additionally, the Court will enter judgment for the plaintiffs on Count III of the Complaint, to the extent that it seeks: (1) "revers[al and vacatur of] the Secretary's [d]ecisions as arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law," and (2) "issu[ance of] an order finding that [ ] CGM[s, including those CGMs for which the plaintiffs sought coverage,] and its related supplies [are] covered durable medical equipment[.]" Compl. ¶ 154.

B. Whether the Remaining Claims Must Be Dismissed as Moot

Having entered judgment for the plaintiffs on Count III, the Court will next consider whether the plaintiffs' remaining claims are now moot. The Secretary argues that, "in light of the Secretary's payment of [the] plaintiffs' reimbursement claims and the Secretary's policy changes, [the] plaintiffs' remaining claims for relief beyond vacatur

---

6. As the Secretary correctly notes, *see* Def.'s Mot. at 10-11, in light of the Court's decision to vacate the underlying administrative decisions, which denied the plaintiffs' claims on the basis articulated in Count III of the Complaint, the Court need not reach the plaintiffs' other arguments under alternative provisions of the APA, which request the same relief, *see* Compl. ¶¶ 155-63. *See Dist. Hosp. Partners, L.P. v. Sebelius*, 932 F. Supp. 2d 194, 199 n.5 (D.D.C. 2013) (declining to reach alternative grounds under the APA asserted by the plaintiff in vacating an administrative decision). Therefore, and in light of the plaintiffs' decision not to address the Secretary's argument that the Court need not reach alternative grounds for entry of judgment and vacatur under the APA, *see generally* Pls.' Opp'n, the Court enters judgment for the plaintiffs as to Count III only.

of the ALJ and Medicare Appeals Council decisions are moot[,]" Def.'s Mot. at 12, because "[t]he additional relief requested by [the] plaintiffs—including a Court order directing the Secretary to provide coverage for their CGM claims, the invalidation of the now-rescinded policy CMS[]1682-R, and a declaration that [the] plaintiffs' CGM devices are durable medical equipment—would have no practical effect," *id.* at 12-13. The Secretary further argues that neither the "voluntary cessation" nor the "capable of repetition, yet evading review" exceptions to the mootness doctrine apply to the plaintiffs' remaining claims for relief. *See id.* at 13.

In response to the Secretary's motion, the plaintiffs start by articulating their requests for relief as the following:

> 1) An order setting aside CMS 1682-R;
>
> 2) A finding that CGMs are "durable medical equipment" [ ] under both the statute and the Secretary's regulations;
>
> 3) A specific declaration that the Medtronic MiniMed and Dexcom CGMs are "durable medical equipment"; and
>
> 4) An order directing the Secretary to provide coverage of the claims-in-suit.

Pls.' Opp'n at 13. The plaintiffs argue that, "[o]ther than the last item, these requests are not co-extensive with [the

p]laintiffs' . . . coverage [claims,]" and "[t]he Secretary's proposed order grants none of the above requests for relief." *Id.* Furthermore, the plaintiffs argue that, not only are their claims not moot, but "the Secretary has failed to sustain his burden of showing that his alleged 'voluntary cessation' has rendered this case moot[,]" *id.* at 14, or that the claims in this case are not "capable of repetition while evading review[,]" *id.* at 20.[7]

"Article III of the Constitution restricts the federal courts to deciding only 'actual, ongoing controversies,'" *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349, 323 U.S. App. D.C. 292 (D.C. Cir. 1997) (quoting *Honig v. Doe*, 484 U.S. 305, 317, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)), and "a federal court has no 'power to render advisory opinions [or] . . . decide questions that cannot affect the rights of litigants in the case before

7. The plaintiffs also refer to the Secretary's purported "bad faith" conduct throughout their opposition. *See generally* Pls.' Opp'n at 1-9, 14-20. However, these "bad faith" allegations appear to stem from one district court's ruling that the Secretary acted in bad faith by "micharacteriz[ing] [ ] the justification of the denial of coverage [for CGMs]" and that, based upon this and other determinations made by that court, the Secretary's conduct "meets the high threshold for an award of bad-faith fees." *Olsen v. Becerra*, No. 20-cv-374 (SMJ), 2021 U.S. Dist. LEXIS 159263, 2021 WL 3683360, at *2 (E.D. Wash. Apr. 20, 2021) (internal quotation marks omitted); *see* Pls.' Opp'n at 1 (citing *Olsen*, 2021 U.S. Dist. LEXIS 159263, 2021 WL 3683360, at *2). However, whether or not the Court accepts the plaintiffs' contention that the Secretary's denials of coverage for CGMs were made in bad faith, any such determination would be irrelevant to the question of whether the plaintiffs' claims in this case are moot. Rather, the applicable standards regarding mootness will be addressed *infr*a Section III.B.1-2.

them[,]'" *id.* (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)) (alterations in original) (internal quotation marks omitted) (first and second alterations in original). Moreover, "[e]ven where litigation poses a live controversy when filed, . . . [the C]ourt [must] refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Clarke v. United States*, 915 F.2d 699, 701, 286 U.S. App. D.C. 256 (D.C. Cir. 1990) (quoting *Transwestern Pipeline Co. v. Fed. Energy Regul. Comm'n*, 897 F.2d 570, 575, 283 U.S. App. D.C. 116 (D.C. Cir. 1990)). For example, "[a] party may lack a legally cognizable interest in the outcome [of a case] 'when, among other things, the court can provide no effective remedy because a party has already obtained all the relief it has sought[.]'" *Indian River Cnty. v. Rogoff*, 254 F. Supp. 3d 15, 18 (D.D.C. 2017) (quoting *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204, 407 U.S. App. D.C. 22 (D.C. Cir. 2013)) (internal quotation marks omitted).

There are two exceptions to the mootness doctrine. First, under the "capable of repetition, yet evading review" exception, a case is not rendered moot where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 187, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975) (per curiam)). Second, under the

"voluntary cessation" exception, "voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case," and voluntary cessation will only moot a case if "there is no reasonable expectation . . . that the alleged violation will recur," and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979) (internal quotation marks omitted). "The party seeking jurisdictional dismissal must establish mootness, while the opposing party has the burden to prove that a mootness exception applies." *Reid v. Inch*, 920 F.3d 828, 832, 440 U.S. App. D.C. 210 (D.C. Cir. 2019).

Accordingly, the Court will first analyze whether the Secretary has met his burden to establish mootness, before considering whether the plaintiffs have demonstrated that either of the two exceptions to the mootness doctrine applies.

1. Mootness

The Court must first determine whether the Secretary has satisfied his "initial heavy burden of establishing mootness[,]" *Honeywell Int'l, Inc. v. Nuclear Regul. Comm'n*, 628 F.3d 568, 576, 393 U.S. App. D.C. 340 (D.C. Cir. 2010) (internal quotation marks omitted). The Secretary contends that the relief requested by the plaintiffs through their remaining claims "would have no practical effect" and thus those claims are moot. Def.'s Mot. at 13. Specifically, it is noted that (1) "[t]he Secretary has already provided coverage for [the] plaintiffs' CGM

claims;" (2) "the Secretary has already recognized that [the] plaintiffs' CGM devices are durable medical equipment[;]" and (3) CMS 1682-R "has been rescinded by [ ] CMS[]1738-R and replaced by the December 2021 final rule." *Id.* Based upon these events, the Secretary argues that "[f]urther adjudication would not be proper because it would not result in 'action' or 'cessation of action[,]'" *id.* (quoting *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987)), "[n]or would the grant of declaratory relief achieve a useful objective[,]" *id.*

"A case is moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Akiachak Native Cmty. v. United States DOI*, 827 F.3d 100, 105, 423 U.S. App. D.C. 458 (D.C. Cir. 2016) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)) (internal quotation marks omitted). In other words, for a case to be justiciable, the Court's disposition of the claims must "affect the rights of litigants in the case before [it,]" *Preiser*, 422 U.S. at 401, and "[the C]ourt [must] refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more than speculative chance of affecting them in the future[,]'" *Clarke*, 915 F.2d at 701 (quoting *Transwestern Pipeline Co.*, 897 F.2d at 575). Moreover, where the claims are founded on the invalidity of a policy or regulation and "that regulation no longer exists, [the Court] can do nothing to affect [the plaintiffs'] rights relative to it, thus making th[e] case classically moot for lack of a live controversy." *Akiachak Native Cmty.*, 827 F.3d at 106; *see Larsen v. U.S. Navy*, 525 F.3d 1, 4, 381 U.S. App. D.C. 69 (D.C. Cir. 2008) ("[B]ecause the

[agency has] already eliminated the [challenged p]olicy and [the] plaintiffs never allege that the [agency] will reinstitute it, any injunction or order declaring it illegal would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits."). This rule applies with equal force to claims for declaratory relief. *See Diffenderfer v. Cent. Baptist Church of Mia. Inc.*, 404 U.S. 412, 414-15, 92 S. Ct. 574, 30 L. Ed. 2d 567 (1972) (dismissing as moot a request for a declaratory judgment regarding the unconstitutionality of a statute because the "relief [was], of course, inappropriate [given] that the statute ha[d] been repealed").

Here, as a preliminary matter, the Court notes that it has already granted the plaintiffs' second and third requests for relief—namely, a finding that CGMs are "durable medical equipment" and a specific declaration that the Medtronic MiniMed and Dexcom CGMs are "durable medical equipment[,]" *see* Pls.' Opp'n at 13—through its entry of judgment for the plaintiffs as to Count III of the Complaint, *see supra* Section III.A. Specifically, the Court has concluded that it will enter judgment for the plaintiffs as to Count III of the Complaint to the extent that it seeks the issuance of an order finding that CGMs, including those CGMs for which the plaintiffs sought coverage, and their related supplies are covered durable medical equipment. *See supra* Section III.A. Therefore, the plaintiffs second and third requests for relief, *see* Pls.' Opp'n at 13, have already been granted.

Regarding the plaintiffs' remaining requests for relief—namely, an order setting aside CMS 1682-R and an order directing the Secretary to provide coverage for

the plaintiffs' claims—the Secretary has met his initial burden of establishing that these claims are moot. First, the Secretary has rescinded CMS 1682-R, *see* CMS 1738-R (May 13, 2022) at 1 (explicitly rescinding CMS 1682-R), which renders "[a]n order setting aside CMS 1682-R[,]" as requested by the plaintiffs, *see* Pls.' Opp'n at 13, of no practical effect because "[the Court] can do nothing to affect [the plaintiffs'] rights relative to" the rescinded rule, *Akiachak Native Cmty.*, 827 F.3d at 106 (dismissing as moot a claim challenging a regulation which was subsequently rescinded).

Second, the Secretary has "provide[d] coverage of the claims-in-suit" as requested by the plaintiffs, Pls.' Opp'n at 13; *see* Def.'s Mot. at 4 (stating that "[o]n March 28, 2022, Noridian paid [ ] Sargent's August 2016 claim and April 2017 claim" and "[o]n June 3, 2022, Noridian sent [ ] Lewis payment for her October 2015 claim" (citing *id.*, Ex. A (Grasso Decl. ¶¶ 6, 8)), and thus, with respect to the plaintiffs' individual coverage claims, "the [C]ourt can provide no effective remedy because [the plaintiffs] ha[ve] already obtained all the relief [ ] [they] ha[ve] sought[,]" *Conservation Force, Inc.*, 733 F.3d at 1204 (internal quotation marks omitted).[8]

8. In response to the Secretary's arguments regarding mootness, the plaintiffs argue that (1) "[t]he requested relief . . . would have the effect of []stopping the Secretary from contending [that CGMs are not durable medical equipment] in future claims by [ ] Lewis and [ ] Sargent[,]" Pls.' Opp'n at 13, and (2) because "there is no order that the Secretary provide coverage of the claims-in-suit[,]" *id.*, "the Secretary could seek recoupment of payments made, which he can enforce by automatically deducting it from Social Security

Accordingly, the Court concludes that the Secretary has met his initial burden to establish that the plaintiffs' remaining claims are moot. Having reached this conclusion, the Court must next determine whether the plaintiffs have demonstrated that either of the exceptions to the mootness doctrine apply in this case.

---

payments[,]" *id.* at 14. However, "[a]lthough the voluntary repeal of a regulation does not moot a case if there is reason to believe the agency will reinstitute it, 'the mere power to reenact a challenged [rule] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists' absent 'evidence indicating that the challenged [rule] likely will be reenacted.'" *Akiachak*, 827 F.3d at 106 (quoting *Nat'l Black Police Ass'n*, 108 F.3d at 349) (alterations in original). Here, the plaintiffs have not put forth evidence that the Secretary is *likely* to either reinstate a rule prohibiting classification of CGMs as durable medical equipment or recoup payments made to the plaintiffs. Rather, the plaintiffs have put forth a speculative and conclusory allegation of future bad faith by the Secretary, *see* Pls.' Opp'n at 14, and otherwise rely on the Secretary's *authority* to re-classify CGMs or recoup payments, but without more this is insufficient to create a "reasonable expectation" that these actions will occur, *see Nat'l Black Police Ass'n*, 108 F.3d at 349 (finding the legislature's "power to reenact a challenged law" is an insufficient basis to find a reasonable expectation of recurrence, without "evidence indicating that the challenged law *likely* will be reenacted" (emphasis added)). Thus, these arguments by the plaintiffs do not detract from the Secretary's initial establishment of mootness in this case. The Court will discuss later the plaintiffs' arguments regarding potential recurrence in greater detail in the context of its determinations regarding the "capable of repetition, yet evading review" and "voluntary cessation" exceptions to the mootness doctrine. *See infra* Section III.B.2.

2. Exceptions to the Mootness Doctrine

a. Capable of Repetition, Yet Evading Review Exception

Having concluded that the Secretary has met his initial burden of establishing that the plaintiffs' remaining claims are moot, *see supra* Section III.B.1, the Court must next determine whether the first of two exceptions to the mootness doctrine—the "capable of repetition, yet evading review" exception—applies in this case. In evaluating the application of this exception, the Court is mindful of the fact that the plaintiffs, as "the opposing party[,] ha[ve] the burden to prove that a mootness exception applies." *Reid*, 920 F.3d at 832.

"[E]ven though the specific action that the plaintiff challenges has ceased, a claim for declaratory relief will not be moot" if "the specific claim fits the exception for cases that are capable of repetition, yet evading review." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321, 386 U.S. App. D.C. 406 (D.C. Cir. 2009). "The capable of repetition but evading review exception applies if '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration,'" *i.e.*, "the evading review" prong, and "'(2) there was a reasonable expectation that the same complaining party would be subjected to the same action again[,]'" *i.e.*, the "capable of repetition" prong. *J.T. v. District of Columbia*, 983 F.3d 516, 523, 450 U.S. App. D.C. 213 (D.C. Cir. 2020) (quoting *Weinstein*, 423 U.S. at 149).

Regarding the first prong of the analysis, "[t]o evade review, the challenged action must be incapable of surviving long enough to undergo Supreme Court review." *United Bhd. of Carpenters & Joiners of Am. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Can.*, 721 F.3d 678, 688, 406 U.S. App. D.C. 46 (D.C. Cir. 2013). Generally, "agency actions of less than two years' duration cannot be fully litigated prior to cessation or expiration, so long as the short duration is typical of the challenged action." *Del Monte Fresh Produce Co.*, 570 F.3d at 322 (internal quotation marks omitted). However, "Circuit precedent [also] requires [the Court] to determine whether the activity challenged is *inherently* of a sort that evades review[.]" *Campbell v. Clinton*, 203 F.3d 19, 34, 340 U.S. App. D.C. 149 (D.C. Cir. 2000) (internal quotation marks omitted) (emphasis added). Thus, the challenged action must, in and of itself, be so time-bound that it evades review. *See Grant v. Vilsack*, 892 F. Supp. 2d 252, 258 (D.D.C. 2012) ("The 'capable of repetition[, yet evading review]' exception applies to claims that are inherently short-lived."); *compare, e.g., id.* at 257-58 (concluding that the challenged action did not evade review because "the alleged wrong"—namely, an agency's deregulation decision—was not time-bound), *with Jenkins v. Squillacote*, 935 F.2d 303, 307, 290 U.S. App. D.C. 137 (D.C. Cir. 1991) ("[T]here can be no doubt that a one-year placement order under the [Individuals with Disabilities Education Act] is, *by its nature*, too short [in duration] to be fully litigated prior to its . . . expiration." (internal quotation marks omitted) (emphasis added)). Moreover, this Circuit "also adds in an additional requirement that

a given action must meet before it results in an application of this exception: that 'the short duration is typical of the challenged action.'" *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish & Wildlife Serv.*, 59 F. Supp. 3d 91, 97 (D.D.C. 2014) (quoting *Del Monte Fresh Produce Co.*, 570 F.3d at 322).

Here, the underlying action challenged by the plaintiffs is neither "inherently short-lived[,]" *Grant*, 892 F. Supp. 2d at 258, nor typically short in duration. The plaintiffs argue that "given the Secretary's contention that he can issue 'rulings' at any time that render multi-year cases moot, it is hard to see how a case is capable of surviving through Supreme Court review[,]" and "the matter [at issue in this case] will evade review because, even if the insured survives through the appeal process before the Department, the Secretary could choose to evade review at any time" by rescinding the ruling at issue. Pls.' Opp'n at 20-21. But the mere fact that the Secretary has the power to instate and rescind rulings such as CMS 1682-R does not make the duration of such rulings' applicability to Medicare claims inherently time-bound. *See generally* CMS 1682-R (Jan. 12, 2017) (specifying no time limit to the applicability of the Secretary's ruling). Rather, such rulings remain in place for an indefinite period of time, unless they are replaced, as was the case here. *See* CMS 1738-R (May 13, 2022) at 6 (describing the rescission process as applied to CMS 1682-R). Furthermore, the plaintiffs have submitted no evidence of typicality, *i.e.*, that the alleged "short duration is typical of the challenged action[,]" *Del Monte Fresh Produce Co.*, 570 F.3d at 322. *See generally* Pls.' Opp'n at 20-21. In fact, here, the

challenged ruling was operable for over two years, from January 2017 to December 2021. *See* CMS 1682-R (Jan. 12, 2017) at 16 (designating an effective date of January 12, 2017); CMS 1738-R (May 12, 2022) at 6 (stating that "[t]he December 2021 final rule replaced the 2017 CMS Ruling, CMS 1682-R"). Thus, the plaintiffs have not shown that the alleged wrong in this case—the allegedly invalid ruling and its application to the plaintiffs' claims—lasted for less than two years, *see Del Monte Fresh Produce Co.*, 570 F.3d at 322 (articulating the general rule that "agency actions of less than two years' duration cannot be fully litigated prior to cessation or expiration" (internal quotation marks omitted)), much less that the alleged "short duration is *typical* of the challenged action[,]" *id.* (emphasis added). *See People for the Ethical Treatment of Animals, Inc.*, 59 F. Supp. 3d at 97 (concluding that the plaintiff's challenge to Secretary's issuance of certain permits did not evade review, based upon the plaintiff's failure to establish typicality, even where the plaintiff presented evidence that "21 of [a total of 95 permitting applications] had durations of less than three years").

For the foregoing reasons, the Court concludes that the plaintiffs have not met their burden of establishing that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration[.]" *Weinstein*, 423 U.S. at 149. And, because the "capable of repetition, yet evading review" test "requires that the challenged action be *both* capable of repetition *and* evading review[,]" *People for the Ethical Treatment of Animals, Inc.*, 59 F. Supp. 3d at 97 (citing *Weinstein*, 423 U.S. at 149) (emphasis in original), and "a deficiency in one

area renders the exception itself moot[,]" *id.*, the Court need not reach the second prong of the analysis—namely, whether the challenged action is capable of repetition. *See id.* 97-98 (basing the court's decision as to the "capable of repetition, yet evading review" exception on its dispositive determination regarding the "evading review" prong). Accordingly, the Court concludes that the "capable of repetition, yet evading review" exception does not apply in this case.

b. Voluntary Cessation

Having concluded that the "capable of repetition, yet evading review" exception does not apply in this case, *see supra* Section III.B.2.i, the Court must next considers whether the second exception to the mootness doctrine—the "voluntary cessation" exception—applies. Again, in evaluating the application of exceptions to the mootness doctrine, the Court is mindful of the fact that the plaintiffs, as "the opposing party[,] ha[ve] the burden to prove that a mootness exception applies."[9] *Reid*, 920 F.3d at 832.

The "voluntary cessation" exception to the mootness doctrine "prevent[s] a private defendant from manipulating

9. The Court notes that, although it is the plaintiffs' burden to establish that an exception applies, with respect to the recurrence prong of the "voluntary cessation" exception analysis, the party asserting mootness, *i.e.*, the Secretary, "bears the 'heavy' burden of showing it is 'absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur.'" *Aref*, 833 F.3d at 251 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

the judicial process by voluntarily ceasing the complained of activity, and then seeking a dismissal of the case, thus securing freedom to 'return to his old ways.'" *Clarke*, 915 F.2d at 705. Under this exception, "[a] defendant's voluntary decision to cease the activities that gave rise to the suit extinguishes the live controversy[ ] 'only if (i) there is no reasonable expectation that the alleged violation will recur, and (ii) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Citizens for Resp. & Ethics in Wash. v. Wheeler*, 352 F. Supp. 3d 1, 13 (D.D.C. 2019) (quoting *Aref v. Lynch*, 833 F.3d 242, 251, 425 U.S. App. D.C. 274 (D.C. Cir. 2016)). However, this Circuit has been skeptical of applying this exception to agency actions. *See Alaska v. U.S. Dep't of Agric.*, 17 F.4th 1224, 1227, 454 U.S. App. D.C. 493 (D.C. Cir. 2021) (stating that the Circuit has expressed "'serious doubts' about whether the 'voluntary cessation' rationale appl[ies] to cases . . . [involving agency action]: 'it would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose'" (quoting *Clarke*, 915 F.2d at 705)).

Regarding the first prong of the "voluntary cessation" exception, namely, whether "there is no reasonable expectation [ ] that the alleged violation will recur," *Aref*, 833 F.3d at 251, where "the defendant is a government actor—and not a private litigant—there is less concern about the recurrence of objectionable behavior[,]" *Citizens for Resp. & Ethics in Wash. v. Secs. & Exch. Comm'n*, 858 F. Supp. 2d 51, 61 (D.D.C. 2012). The mere power

to put in place a particular rule or regulation is "not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists." *Nat'l Black Police Ass'n*, 108 F.3d at 349. "Rather, there must be evidence indicating that the challenged [rule] *likely* will be re[instated]." *Id.* (emphasis added). "No entity of the federal government can ever guarantee that a statute, a regulation, or an executive order, after being repealed or withdrawn, will not be reenacted or reissued[,]" but "[c]ourts have noted that structural obstacles to reimposing a challenged law—such as a full repeal and the need to undertake new lawmaking—generally moot a case." *Alaska*, 17 F.4th at 1229 n.5. Similarly, where an agency would have to "proceed through notice-and-comment rulemaking" to reinstate a rescinded rule, courts in this jurisdiction have declined to "impute voluntary cessation where nothing suggests it." *Id.; see, e.g., Citizens for Resp. & Ethics in Wash.*, 352 F. Supp. 3d at 14 (concluding that the "voluntary cessation" exception did not apply to the Environmental Protection Agency's revision of a challenged policy where "to resume its challenged conduct, [ ] it would have to decide to promulgate a new policy"); *Cierco v. Lew*, 190 F. Supp. 3d 16, 23-24 (D.D.C. 2016), *aff'd sub. nom., Cierco v. Mnuchin*, 857 F.3d 407, 429 U.S. App. D.C. 146 (D.C. Cir. 2017) (concluding that an agency's "withdrawal [of the challenged] notices themselves convincingly establish that the 'alleged violation' . . . is not likely to recur"); *cf. Nat'l Black Police Ass'n*, 108 F.3d at 349-50 ("There is no evidence in the record to suggest that the D.C. Council might repeal the new legislation and reenact strict contribution limits. The Council has not 'announced . . . such an intention,' and indeed its enactment of the new legislation evinces an intent to the contrary."

(quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.11, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982) (alteration in original)).[10]

---

10. The plaintiffs rely heavily upon *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017), and *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1983), in arguing to the contrary that "government actors are put to the same heavy burden, formidable burden, and stringent standard as private actors." Pls.' Opp'n at 12. For several reasons, the plaintiffs are incorrect. First, the plaintiffs reference a single footnote from *Trinity Lutheran Church of Columbia, Inc.*, in which the Supreme Court opined that the Missouri governor's voluntary recission of the challenged policy did not moot the petitioners' claims because "[t]he [respondent] ha[d] not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to [the challenged] policy[.]" 137 S. Ct. at 458 n.1 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); see Pls.' Opp'n at 12. However, as the basis for this conclusion, the Supreme Court cited to a letter from the respondent which explicitly stated that "there [was] no clearly effective barrier that would prevent the [respondent] from reinstating [its] policy in the future[,]" *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 458 n.1 (third alteration in original), as well as a letter from the petitioner stating that "[t]he policy change d[id] nothing to remedy the source of the [respondent's] original policy—the Missouri Supreme Court's interpretation of [a Missouri state constitutional provision,]" *id.* Second, the plaintiffs reference the Supreme Court's holding in *City of Mesquite* that the amendment of a challenged city ordinance did not moot the case. *See* Pls.' Opp'n at 12. However, in that case, the Supreme Court noted the city's past conduct of rescinding and then reenacting a challenged ordinance in apparent manipulation of the judicial process. *City of Mesquite*, 102 S. Ct. at 289 ("In this case the city's repeal of the [challenged ordinance provision] would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated. The city followed that course with respect to [another challenged provision;] . . . then, in

Here, the Secretary has "formally rescinded and replaced CMS[]1682-R" and represents that "[t]here is no indication that [he] intends to rescind the re[s]cission of CMS[]1682-R." Def.'s Mot. at 15. Moreover, the Secretary states that "reverting to his prior policy would involve an unlikely sequence of events including rescinding not just CMS[]1738-R but also the December 2021 final rule, and engaging in a new round of notice-and-comment rulemaking." Def.'s Reply at 14. Therefore, based on the Secretary's representations, *see Citizens for Resp. & Ethics in Wash.*, 352 F. Supp. 3d at 14 (finding the agency's affirmation that it would not revert back to the challenged policy was "sufficient to carry [the d]efendant's burden"),

---

obvious response to the state court's judgment, the exemption was eliminated. There is no certainty that a similar course would not be pursued if its most recent amendment were effective to defeat federal jurisdiction."). Furthermore, the Supreme Court noted that "[i]ndeed the city ha[d] announced . . . an intention" to reenact the rescinded provision that was the subject of that litigation. *Id.* at 289 n.11.

Unlike the two cases relied upon by the plaintiffs, here, the Secretary has not stated an intention to, or even the possibility that he will reinstate CMS 1682-R. *See Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 458 n.1; *City of Mesquite*, 102 S. Ct. at 289 n.11. Rather, the Secretary has explicitly conceded that the plaintiffs' coverage denials based upon CMS 1682-R are "not in accordance with law[,]" Def.'s Mot. at 9; *see infra* n.11, and expressly states that "[t]here is no indication that the Secretary intends to rescind the rescission of CMS[]1682-R," *id.* at 15. Furthermore, there have been no allegations that the Secretary has engaged in this type of conduct in the past, *i.e.*, rescinding a ruling in response to litigation only to reinstate it after the litigation has been rendered moot, as was the case in *City of Mesquite*. *See* 102 S. Ct. at 289; *see generally* Pls.' Opp'n. Accordingly, the Court concludes that the cases cited by the plaintiffs are inapposite given the specific facts of this case.

as well as the lack of "evidence indicating that [CMS 1682-R] *likely* will be re[instated,]"[11] *Nat'l Black Police Ass'n*,

11. The plaintiffs argue that the Secretary has failed to show that the challenged decision in this case cannot be reasonably expected to recur because (1) "the timing of the Secretary's change screams mere tactics to avoid judicial review[,]" Pls.' Opp'n at 15; (2) "the Secretary continues to defend his illegal conduct[,]" *id.*; and (3) "the challenged practice is deeply rooted and long[-] standing" because "the Secretary has been denying CGM claims improperly for more than a decade[,]" *id.* at 16. However, the Court concludes for several reasons that the inferences the plaintiffs ask the Court to draw are too attenuated for it to conclude that the Secretary is *likely* to revert to the challenged position in this case.

First, while a finding that the Secretary rescinded and replaced CMS 1682-R "in direct response to this litigation[] . . . [would] make[] it more difficult for the [Secretary] to demonstrate recurrence is unlikely[,]" *DL v. Dist. of Columbia*, 187 F. Supp. 3d 1, 11 (D.D.C. 2016), the Court is without a sufficient basis to make this finding. "Whether the [Secretary's] cessation was timed in anticipation of [or in response to this] lawsuit[,] or motivated by a genuine change of heart is relevant to the voluntary cessation analysis." *Id.* And, in this case, the Secretary's rescission of CMS 1682-R could be a direct response to ongoing litigation, as the plaintiff suggests, *see* Pls.' Opp'n at 15, or it could "reflect[] the Secretary's consistent efforts to expand coverage for CGM devices and supplies," as the Secretary asserts, Def.'s Reply at 7, especially given the lengthy proposal and notice-and-comment rulemaking processes required to rescind and replace an administrative rule. However, without more convincing direct evidence of a manipulative intent, *see, e.g., DL*, 187 F. Supp. 2d at 11-12 (citing to evidence of email correspondence and statements by the defendant indicating that the policy changes at issue were in direct response to pending litigation), the Court cannot definitively conclude that this type of intent played a role in the Secretary's actions. Moreover, as noted earlier, this Circuit has found it "inappropriate for [ ] courts either to impute [ ] manipulative conduct to a coordinate branch of government, or to apply against

that branch a doctrine that appears to rest on the likelihood of a manipulative purpose.'" *Clarke*, 915 F.2d at 705. In fact, the Secretary's rescission of CMS 1682-R may have even been "merely a prudent response to" the rulings of other courts regarding the coverage status of CGMs, a response which the Circuit has condoned. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 742, 268 U.S. App. D.C. 15 (D.C. Cir. 1988).

Second, while the plaintiffs are correct that a defendant's "decision to contest liability also makes it more difficult to show there could be no reasonable expectation of recurrence[,]" *DL*, 187 F. Supp. 2d at 12 (citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012)), the Secretary cannot reasonably be said to have "continue[d] to defend the legality [of the Department's prior decision,]" *Knox*, 567 U.S. at 307, of CMS 1682-R. The Secretary has explicitly conceded that the plaintiffs' coverage denials are "not in accordance with law[,]" and, therefore, requested that judgment be entered for the plaintiffs on Count III of their Complaint. Def.'s Mot. at 9. Thus, the Secretary clearly does not maintain the legality of CMS 1682-R. And, to the extent that the Secretary continues to defend against allegations of bad faith, *see* Pls.' Opp'n at 15 (referencing the Secretary's oral argument in *Smith v. Becerra*, Civ. Action No. 21-47 (D. Utah)), these arguments are distinct from contesting the legality of CMS 1682-R.

Finally, while the plaintiffs are correct that a "long period of uninterrupted [alleged] violations weighs heavily against [a] defendant[,]" *DL*, 187 F. Supp. 2d at 12, CMS 1682-R was effective from 2017 to early 2022, when it was replaced by the December 2021 ruling, *see supra* Section I.A.1-2. However, "[n]ew notice-and-comment rulemaking[] . . . take[s] time." *Alaska*, 17 F.4th at 1229. And, "[i]ntervening events, such as elections or changes in policy priorities, bearing on these processes are unpredictable." *Id.* The Court therefore concludes that merely because CMS 1682-R was in place for approximately three to four years before the Secretary

108 F.3d at 349 (emphasis added); *see id.* (stating that the mere power to reinstate a policy is "not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists"), the Court concludes that the Secretary has met his burden to show that "there is no reasonable expectation [ ] that the alleged violation will recur," *Aref*, 833 F.3d at 251.

Regarding the second prong of the "voluntary cessation" exception, namely, whether "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation[,]" *Aref*, 833 F.3d at 251 (quoting *ABA v. FTC*, 636 F.3d 641, 648, 394 U.S. App. D.C. 344 (D.C. Cir. 2011)), "[t]he determination whether sufficient effects [of the alleged violation] remain . . . will turn on the availability of meaningful relief[,]" *Cierco*,

---

began the process of rescinding it, *see* Def.'s Reply at 7 (stating that "the Secretary's consistent efforts to expand coverage for CGM devices and supplies[] beg[an] with his proposed rule in November 2020, 85 Fed. Reg. 70,358, 70,398, 70,403-70,404 (Nov. 4, 2020)"), does not weigh significantly in favor of finding that recurrence is likely. Moreover, in applying the voluntary cessation exception to agency action, this Circuit has concluded that manipulative intent is the most important consideration. *See Alaska*, 17 F.4th at 1229 ("The established law of this [C]ircuit is that 'the voluntary cessation exception to mootness has no play' when [an] agency did not act 'in order to avoid litigation.'" (quoting *ABA v. FTC*, 636 F.3d at 648 (internal quotation marks omitted)). Accordingly, having discerned no manipulative intent based upon either of the plaintiffs' previous two arguments, the Court also concludes that the plaintiffs' arguments concerning the length of time that the Secretary denied coverage for CGMs does not alone demonstrate voluntary cessation in this case. *See id.* at 1229-30.

190 F. Supp. 3d at 24 (second alteration in original). In other words, "a case is not moot if a court can provide an effective remedy[,]" *Larsen*, 525 F.3d at 4, but "courts may not decide a controversy where post-filing events 'make[ ] it impossible for the court to grant any *effectual* relief whatever[,]'" *Cierco*, 190 F. Supp. 3d at 24 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992)) (internal quotation marks omitted) (alterations and emphasis in original). Thus, this exception to mootness does not apply where an "agency's subsequent actions have given [the] plaintiffs the most they would be entitled to if they won this case." *Midcoast Fisherman's Ass'n v. Blank*, 948 F. Supp. 2d 4, 8 (D.D.C. 2013).

Here, as discussed with respect to the mootness of the plaintiffs' remaining claims in this case, *see supra* Section III.B.1, the Secretary's actions subsequent to the filing of this case have effectively provided the plaintiffs with the ultimate relief "they would be entitled to if they won this case[,]" *Midcoast Fisherman's Ass'n*, 948 F. Supp. 2d at 8. The Secretary's rescission of CMS 1682-R and re-classification of all CGMs as "durable medical equipment" under CMS 1738-R renders any subsequent "order setting aside CMS 1682-R[,]" *see* Pls.' Opp'n at 13, that the Court would issue completely ineffectual.[12] *See Cierco*, 190 F.

12. The Court notes, however, that granting the Secretary's request that judgment be entered for the plaintiffs on Count III of the Complaint and thereby ruling that CGMs constitute durable medical equipment, *see supra* Section III.A, imposes a significant roadblock to any potential reinstatement of CMS 1682-R. That impediment results from the fact that any reinstatement of the

Supp. 3d at 24 ("[C]ourts may not decide a controversy where post-filing events 'make[ ] it impossible for the court to grant any *effectual* relief whatever[.]'" (quoting *Church of Scientology of Cal.*, 506 U.S. at 12) (emphasis in original)). In other words, the plaintiffs have already been "provide[d] coverage of the claims-in-suit[,]" Pls.' Opp'n at 13, and therefore, they "ha[ve] already obtained all the relief that [they] sought[,]" *Conservation Force, Inc.*, 733 F.3d at 1204 (internal quotation marks omitted), with respect to their individual coverage claims. For these reasons, the Court concludes that the Secretary's rescission of CMS 1682-R, re-classification of all CGMs as "durable medical equipment," and reimbursement of the plaintiffs' previously denied coverage claims "have completely and irrevocably eradicated the effects of the alleged violation[,]" *Aref*, 833 F.3d at 251, and the "voluntary cessation" exception to mootness does not apply in this case.[13]

---

rescinded rule—or promulgation of a substantially similar ruling—would be in violation of this Court's Order if it de-classified CGMs as durable medical equipment.

13. The plaintiffs argue that "the Secretary has not shown that the effects of his illegal conduct has been completely and irrevocably eradicated" because (1) "[he] refuses to revisit and grant all the claims for CGM coverage that were denied on the basis of the illegally issued and bad faith CMS 1682-R[,]" Pls.' Opp'n at 19, and (2) many Medicare beneficiaries may not be aware that they may submit coverage claims because "CMS 1738-R is a secret policy[,]" *id.* at 19-20. However, the plaintiffs have previously failed to establish their entitlement to class certification, *see* Order at 1 (Apr. 28, 2022), ECF No. 115, and the Court may not order the Secretary to reimburse individuals who are not parties in this case. Moreover, regardless of the practical effects of the Secretary's rescission of CMS 1682-R and

Accordingly, having concluded that the Secretary has met his burden of establishing that the plaintiffs' remaining claims are moot and that the plaintiffs failed to establish that either of the exceptions to mootness apply in this case, the Court concludes that it must dismiss the plaintiffs remaining claims as moot.

I. CONCLUSION

For the foregoing reasons, the Court concludes that it must grant the Secretary's motion.

SO ORDERED this 8th day of June, 2023.[14]

REGGIE B. WALTON
United States District Judge

---

instatement of CMS 1738-R, the Secretary's actions have effectively satisfied the *named plaintiffs*' requests for relief, *see supra* Section III.B.2, which is the relevant consideration in determining whether their claims are moot, *see Conservation Force, Inc.*, 733 F.3d at 1204 (stating that a case is moot where a party "has already obtained all the relief that [he or she has] sought").

14. The Court will contemporaneously issue an Order consistent with this Memorandum Opinion.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 8, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18-2929 (RBW)

CAROL A. LEWIS, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

ORDER

In accordance with the Memorandum Opinion issued on this same date, it is hereby

ORDERED that the Defendant's Motion for Partial Entry of Judgment in Plaintiffs' Favor, and to Dismiss Remaining Causes of Action and Claims for Relief on Mootness Grounds, ECF No. 120, is **GRANTED**. It is further

ORDERED that summary judgment is **ENTERED** for the plaintiff on Count III of the Complaint, to the extent that it seeks (1) reversal and vacatur of the

Secretary's decisions as arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law, and (2) issuance of an order finding that a continuous glucose monitor ("CGM"), including those CGMs for which the plaintiffs sought coverage, and their related supplies are covered durable medical equipment. It is further

ORDERED that the administrative decisions denying the plaintiffs' coverage claims are **VACATED**. It is further

ORDERED that CGMs, including those CGMs for which the plaintiffs sought coverage, and their related supplies are covered durable medical equipment. It is further

ORDERED that the plaintiffs' remaining claims are **DISMISSED AS MOOT**. It is further

ORDERED that this case is **CLOSED**.

SO ORDERED this 8th day of June, 2023.

REGGIE B. WALTON
United States District Judge

APPENDIX E — DENIAL OF REHEARING AND CONCURRENCE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED JANUARY 7, 2025

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5152

CAROL A. LEWIS AND DOUGLAS B. SARGENT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

XAVIER BECERRA, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-02929)

On Petition for Rehearing En Banc

Filed On: January 7, 2025

Appendix E

Before: SRINIVASAN, *Chief Judge*; HENDERSON, MILLETT, PILLARD*, WILKINS, KATSAS, RAO, WALKER, CHILDS, PAN, and GARCIA, *Circuit Judges*

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

* A statement by Circuit Judge Pillard, concurring in the denial of rehearing en banc, is attached.

Appendix E

PILLARD, *Circuit Judge*, concurring in the denial of rehearing *en banc*: I agree with the decision not to grant *en banc* review in this case. As explained below, the panel's opinion will likely have only limited precedential impact. And because the named plaintiffs' claims were mooted by a generally applicable change in policy, this case does not present the concern that defendants have attempted to "pick off" the named plaintiffs before a class can be certified. Such conduct is deeply troubling and could affect the jurisdictional analysis in another case, but does not appear to be present here. Nonetheless, I write to express reservations about the panel's opinion that we should address in an appropriate future case.

First, as the panel acknowledges, Op. at 13, we are bound by the Supreme Court's decision in *Geraghty*—which answers the jurisdictional question raised here opposite to how the panel does: "We know, because the Supreme Court has told us, that when a class representative's claims expire involuntarily, the class representative still 'retains a "personal stake" in obtaining class certification sufficient' to appeal a denial of class certification entered before the representative's claims expired." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 528, 372 U.S. App. D.C. 53 (D.C. Cir. 2006) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)); *see Geraghty*, 445 U.S. at 404 (holding that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied"). There was no question the controversy in *Geraghty* remained "live" as between defendant and at least some members

of the putative class; the dispute concerned only whether the named plaintiff retained a personal stake to appeal an erroneous denial of class certification.

The panel deems *Geraghty* not "directly controlling," so disregards *Geraghty*'s holding and less-than-"current" style of reasoning, solely because Geraghty's claim "became moot" upon his release from prison rather than because he "prevailed on the merits." Op. at 12-14. As even the government concedes, Rehearing Opp. at 12-14, the distinction the panel invokes between this case and *Geraghty* is immaterial to the jurisdictional analysis. Indeed, the Court in *Geraghty* rejected that very distinction, holding that the difference between "mootness of [an] individual claim [] caused by 'expiration' of the claim, rather than by a judgment [in the named plaintiffs' favor] on the claim" was not "persuasive." *Geraghty*, 445 U.S. at 401. The Court declared that "Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*." *Id.* That was so notwithstanding Geraghty's lack of an ongoing interest like the shared burden of attorney's fees featured in *Roper*. The panel does not persuasively avoid *Geraghty*'s clear application to this case.

However questionable that decision may seem to us, *Geraghty* remains good law until the Supreme Court decides otherwise. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). And, in any event, *Geraghty*'s jurisdictional analysis is not necessarily incompatible with "current law." Op. at 12. *Geraghty* and *Flast* certainly reflect the style and thinking of their day,

but they do not "fail[] to recognize that [standing] has a separation-of-powers component." *Id.* (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)). To the contrary, both cases expressly recognize that one of the "two 'complementary purposes'" served by Article III's "case-or-controversy limitation" is to "define[] the 'role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.'" *Geraghty*, 445 U.S. at 395-96 (quoting *Flast v. Cohen*, 392 U.S. 83, 95, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)).

More to the point, the Supreme Court has recently validated *Geraghty*'s specific holding and analysis. In *Genesis Healthcare Corp. v. Symczyk* the Court explained that, unlike in the FLSA collective action before it, "when a district court certifies a class [under Rule 23], 'the class of unnamed persons described in the certification acquires a legal status separate from the interest asserted by the named plaintiff,' with the result that a live controversy may continue to exist, even after the claim of the named plaintiff becomes moot." 569 U.S. 66, 74, 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399-402, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)); *see also id.* at 75 (reaffirming the "fact" that "a putative class acquires an independent legal status once it is certified under Rule 23"). The Court then explained that *Geraghty* "narrowly extended that principle to *denials* of class certification motions" by "relat[ing] back" an incorrectly denied class's certification to the district court's erroneous denial. *Id.* at 74-75. Under that construct, the class's

separate legal status and unremedied injury supplies the necessary jurisdiction to support an appeal even when the named plaintiff's claim is mooted after certification is denied. Because the individual plaintiff's claim in *Genesis* was mooted before she sought or the court anticipated "conditional certification," *Geraghty* did not apply. *Id.* at 75.

The panel does not explain which developments in standing law invalidate *Geraghty*'s approach. Nothing in *Genesis Healthcare* suggests the Supreme Court's disagreement with that jurisdictional analysis. And the logic that animates it—that it would be arbitrary to allow the mooted named plaintiff of a certified class to appeal, *per Sosna*, while prohibiting the mooted named plaintiff of an erroneously non-certified class to do so, *contra Geraghty*—has as much force today as it did 45 years ago. That arbitrary asymmetry created by the panel's rule also means that, in the unlucky event that the named plaintiff's claim is mooted during the brief window between the district court's denial of certification and the filing of a petition for immediate appellate review under Rule 23(f), the appellate court would lack jurisdiction to determine whether the denial was erroneous.

Separately, the panel's suggestion that this case concerns a question of standing rather than mootness bears clarification. I take the statement that "any appellant must invoke and establish the jurisdiction of an appellate court at the outset of any appeal," Op. at 6 n.1, to mean that, at the threshold of an appeal, appellants must (1) establish that they validly invoked their Article III standing as of

the time they first filed in federal court, *see Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000), and (2) satisfy the distinct requirements of appellate jurisdiction, *see Process & Industrial Developments v. Federal Republic of Nigeria*, 962 F.3d 576, 580, 447 U.S. App. D.C. 316 (D.C. Cir. 2020) (accepting interlocutory appeal from order to brief merits issues before ruling on asserted FSIA immunity). I do not take it to mean that appellants must *re*establish standing as of the time an appeal is commenced—as that would impose a new requirement contrary to decades of established precedent.

All that said, I agree with the panel that this opinion may have little precedential effect. In most cases—unlike in this case—parties owing fees may arrange to share that obligation with the unnamed class members, *see Roper*, and counsel for a proposed class will presumably request interlocutory review of a denial of class certification under Rule 23(f). If no stake in cost recovery persists and interlocutory review is denied, counsel can still recruit other putative class members to substitute or intervene post-judgment to appeal the denial of class certification. I therefore concur in the denial of rehearing *en banc*.