No. 24-628

IN THE

Supreme Court of the United States

BNP PARIBAS SA AND B.N.P. PARIBAS US WHOLESALE HOLDINGS CORP. (F/K/A BNP PARIBAS NORTH AMERICA, INC.),
Petitioners,

v.

ENTESAR OSMAN KASHEF, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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February 5, 2025

QUESTION PRESENTED

Whether this Court should grant certiorari to review a brief court of appeals order denying a petition for interlocutory review under Federal Rule of Civil Procedure 23(f), where the Rule gives courts of appeals "unfettered discretion to grant or deny a petition (Fed. R. Civ. P. 23, Advisory Committee's Notes to 1998 amendment), where Petitioners' can only guess as to the reason for denial, and where the case law belies Petitioners' reading of Second Circuit law.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

STATEMENT 3

REASONS FOR DENYING THE WRIT 8

I. This case is an exceedingly poor vehicle to review Petitioners' question presented. 8

A. Petitioners' reading is unsupported by the Second Circuit's order. 8

B. Petitioners incorrectly describe Second Circuit precedent. 10

C. Petitioners err in relying on an oral comment of one judge. 13

D. Petitioners fail to accurately describe Second Circuit practice under Rule 23(f). 14

II. No conflict exists among the Circuits on the question presented. 17

III. Petitioners fail to identify an important question warranting this Court's review. 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Allen v. Int'l Truck & Engine Corp.,
358 F.3d 469 (7th Cir. 2004)..... 20

Am. Honda Motor Co., Inc. v. Allen,
600 F.3d 813 (7th Cir. 2010)..... 20

Apache Corp. v. Rhea,
No. 19-503, 140 S. Ct. 906 (2020)..... 1

Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.,
2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015) 16

Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.,
2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018)..... 16

Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.,
879 F.3d 474 (2d. Cir. 2018) 16

Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.,
955 F.3d 254 (2d Cir. 2020) 16

Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc.,
747 F.3d 489 (7th Cir. 2014)..... 20

Blair v. Equifax Check Services, Inc.,
181 F.3d 832 (7th Cir. 1999)..... 19, 20

Carpenter Co. v. Ace Foam, Inc.,
No. 14-577, 574 U.S. 1190 (2015)..... 1

Chamberlan v. Ford Motor Co.,
402 F.3d 952 (9th Cir. 2005)..... 9

ConAgra Brands, Inc. v. Briseno,
No. 16-1221, 583 U.S. 914 (2017)..... 1

Direct Digital, LLC v. Mullins,
No. 15-549, 577 U.S. 1138 (2016)..... 1

FCA U.S. LLC v. Flynn,
No. 18-398, 586 U.S. 1108 (2019) 1

Hevesi v. Citigroup, Inc.,
366 F.3d 70 (2d Cir. 2004) 11, 15

In re Lorazepam & Clorazepate Antitrust Litig.,
289 F.3d 98 (D.C. Cir. 2002) 9, 12

Kashef v. BNP Paribas SA,
316 F. Supp. 3d 770 (S.D.N.Y. 2018) 4

Kashef v. BNP Paribas SA,
442 F. Supp. 3d 809 (S.D.N.Y. 2020) 5

Kashef v. BNP Paribas SA,
No. 16 CIV. 3228 (AKH), 2024 WL 1676355
(S.D.N.Y. Apr. 18, 2024) 5

Kashef v. BNP Paribas SA,
No. 16-CV-3228 (AJN), 2021 WL 603290 (S.D.N.Y.
Feb. 16, 2021) 5

Lienhart v. Dryvit Sys., Inc.,
255 F.3d 138 (4th Cir. 2001) 12

Microsoft Corp. v. Baker,
582 U.S. 23 (2017) 21

Newton v. Merrill Lynch, Pierce, Fenner & Smith,
Inc., 259 F.3d 154 (3d Cir. 2001) 12

Procter & Gamble Co. v. Rikos,
No. 15-835, 577 U.S. 1241 (2016) 1

Reliable Money Order, Inc. v. McKnight Sales Co.,
Inc., 704 F.3d 489 (7th Cir. 2013) 20

Sumitomo Copper Litig. v. Credit Lyonnais Rouse,
Ltd., 262 F.3d 134 (2d Cir. 2001) .....*passim*

Teachers Ins. & Annuity Ass'n v. Haley,
No. 20-4117 (2d Cir. Dec. 9, 2020) 14

Tilley v. TJX Cos., Inc.,
345 F.3d 34 (1st Cir. 2003) 18

Waste Management Holdings, Inc. v. Mowbray,
208 F.3d 288 (1st Cir. 2000) 18, 19

Weber v. United States Trustee,
484 F.3d 154 (2d Cir. 2007) 11, 12

Rules:

Fed. R. Civ. P. 23(f) .....*passim*

U.S. Sup. Ct. R. 10. 19

Other Authorities:

Wright & Miller, Federal Practice and Procedure
§ 1802.2 (3d ed.) 12

BRIEF IN OPPOSITION

Petitioners invite this Court to micromanage an appellate court's discretionary decision to deny interlocutory appeal of a class certification order under Federal Rule of Civil Procedure 23(f). But there are powerful reasons not to engage in such oversight. The Committee Note accompanying Rule 23(f) states that, in considering such interlocutory appeals, the courts of appeals are to enjoy "unfettered discretion … akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23 Advisory Committee Notes to 1998 Amendments, Subdivision (f).

Accordingly, this Court has repeatedly denied petitions seeking certiorari review of a court of appeals' discretionary denial of a Rule 23(f) petition. *See Apache Corp. v. Rhea*, No. 19-503, 140 S. Ct. 906 (2020); *FCA U.S. LLC v. Flynn*, No. 18-398, 586 U.S. 1108 (2019); *ConAgra Brands, Inc. v. Briseno*, No. 16-1221, 583 U.S. 914 (2017); *Procter & Gamble Co. v. Rikos*, No. 15-835, 577 U.S. 1241 (2016); *Direct Digital, LLC v. Mullins*, No. 15-549, 577 U.S. 1138 (2016); *Carpenter Co. v. Ace Foam, Inc.*, No. 14-577, 574 U.S. 1190 (2015). The same outcome is warranted here.

Indeed, here there are particularly strong reasons to deny certiorari. Petitioners' contrived claim of a circuit split does not withstand scrutiny. And this case would not be a proper vehicle for considering the Petition's question presented in any event, because the Petition rests on a tendentious interpretation of the Second Circuit's order in this case. In fact, the operative portion of the order denying interlocutory appeal consisted of a total of thirteen words, followed

by a case citation adopting the very legal standard that Petitioners insist the Second Circuit has abandoned. The Petition thus rests on the shaky premise that the Second Circuit's order should not be taken at face value. Petitioners grasp to reinterpret the Second Circuit's order based on comments and questions of the Circuit Judges at a hearing held on Petitioners' Rule 23(f) petition, but actually those comments undercut Petitioner's arguments here. This gambit in reinterpreting – indeed, rewriting – the order is not an appropriate basis for granting certiorari.

Moreover, this case involves a criminally convicted bank that conspired with the state sponsor of terrorism and genocidal Sudanese regime to violate U.S. sanctions; it offers a perfect illustration why interlocutory review is highly disfavored. The Petition makes extensive objections to class certification in this case. *See* Petition at 9, 24-28. Putting aside the non-meritorious nature of those objections, the limited question on which Petitioners seek this Court's review is whether the circuit court abused its broad discretion in denying a Rule 23(f) petition for interlocutory review — not whether class certification was appropriately granted by the district court. The Petition is not a proper vehicle for reviewing Petitioners' substantive objections to class certification.

The Second Circuit's order denying interlocutory appeal neither froze in place the district court's underlying class certification ruling, nor halted further proceedings. Thus, this case is proceeding in the district court, with respect to both the merits and class certification issues, which will produce a fuller record that will aid any subsequent appellate review.

The district court itself recognized that it would develop a strategy involving a mix of individual and class trials, so that Petitioners' predictions as to the precise complexion of future proceedings in this case are inherently speculative. After any final judgment by the district court in favor of the certified class, Petitioners can appeal the judgment as a matter of right and raise any challenge to class certification at that time, on the basis of a complete record. After the court of appeals resolves that appeal, Petitioners have the right to file a petition for certiorari seeking review of the certification issues that they now seek to smuggle into the instant Petition, without the benefit of a full record.

The Petition should be denied.

STATEMENT

In 1997 and 2006, the United States imposed sanctions on Sudan were aimed at stopping ongoing genocide and state support for terrorism. BNP Paribas S.A. is a French bank and financial services company with a number of subsidiaries around the world. "[F]rom 2002 to 2007, [BNP Paribas] conspired with numerous Sudanese banks and entities as well as financial institutions outside of Sudan to violate the U.S. embargo by providing Sudanese banks and entities access to the U.S. financial system." (internal quotation marks omitted).

In 2015, BNP Paribas admitted its conspiracy with the government of Sudan and pled guilty to several federal and state felonies pertaining to its violation of sanctions. It also "admitted that its central role in providing Sudanese financial institutions access to the U.S. financial system, despite the Government of Sudan's role in supporting terrorism and committing

human rights abuses, was recognized by [its] employees." *Id.* at 56 (internal quotation marks omitted). As part of its plea deals, it was required to pay nearly $9 billion in forfeitures and fines, the largest criminal penalty levied against a bank at that time.

In this civil follow-on suit, Respondents are victims and survivors of the Sudanese government's internationally recognized campaign of genocide who now lawfully reside in the United States as either citizens or permanent residents. They were the victims of atrocities including mass rape, torture, deliberate infection with HIV, and being forced to watch the murder and rape of their family members. They sued BNP Paribas and several of its subsidiaries (collectively, Petitioners) for a variety of claims under New York tort law. Following the outline of the criminal charges, they alleged that the bank financed the government of Sudan, assisted it in circumventing sanctions, and thereby allowed the government to continue its campaign of genocide. The district court held that Respondents "have plausibly alleged that BNPP consciously cooperated with the Sudanese regime, either knew or should have known that its assistance was contributing to the Regime's human rights abuses, and that this assistance was the natural and adequate cause of Plaintiffs' injuries." Pet. App. 44a.

Nevertheless, the district court initially dismissed all of Respondents' claims, principally based on (1) the act of state doctrine, and (2) its conclusion that some claims were time-barred. *Kashef v. BNP Paribas SA*, 316 F. Supp. 3d 770, 779 (S.D.N.Y. 2018). The Second Circuit reversed on each point and remanded. On remand, the district court held that Swiss law

governed. *Kashef v. BNP Paribas SA*, 442 F. Supp. 3d 809, 813 (S.D.N.Y. 2020). It then subsequently granted in part and denied in part Petitioners' final motion to dismiss for failure to state a claim, permitting twelve claims to go forward. *Kashef v. BNP Paribas SA*, No. 16-CV-3228 (AJN), 2021 WL 603290, at *9 (S.D.N.Y. Feb. 16, 2021).

Petitioners then attempted and failed to dismiss the case on the grounds of forum non conveniens and later moved for summary judgment, and Respondents moved for class certification. The district court denied the motion for summary judgment except that it dismissed BNP Paribas's New York branch and Respondents' claim for punitive damages. *Kashef v. BNP Paribas SA*, No. 16 CIV. 3228 (AKH), 2024 WL 1676355, at *6 (S.D.N.Y. Apr. 18, 2024).

The district court then certified a class of U.S. citizens and permanent residents defined by their lawful immigration status: "[a]ll refugees or asylees admitted by the United States who formerly lived in Sudan or South Sudan between November 1997 and December 2011." Pet. App. 3a–4a. It found four common questions, including "[w]hether the Government of Sudan persecuted class members, or caused them to have reasonable fear of persecution, because of their race, religion, or ethnicity between November 1997 and December 2011" and "[w]hether the BNP Paribas Defendants … consciously aided, abetted, and enabled the Government of Sudan to carry out such acts." Pet. App. 4a.

As to predominance, the district court stated that "[a]lthough each individual member has an interest in prosecuting their own damages claims, and success with regard to the class issues may require[] them to

do so, proceeding by a class action should substantially shorten individual trials and avoid inconsistent determinations." Pet. App. 5a. It also recognized that it may use a "combination of common and individual trials" to manage the case. *Id.*

Petitioners filed a Rule 23(f) petition, and a Second Circuit panel heard oral argument on whether to grant the petition. The XX-minute hearing included the following questions, among many others:

> JUDGE SUSAN L. CARNEY: So, what's your strongest case for allowing interlocutory appeal? You don't seem satisfied that the death-knell standard or, you know, effectively concluding the litigation. And there's a little additional language in *Sumitomo* that suggests maybe if there's an egregious error in the District Court – but I wasn't able to find any case, and you seem to make an argument that it just would be very costly. So, what's your strongest case for our exercise of – allowing exercise of jurisdiction?
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> JUDGE SUSAN L. CARNEY: But *Sumitomo* also notes that interlocutory review is appropriate when it promises to spare the parties and the court the expense and burden of litigating the matter to final judgment only to have inevitably reversed by this court on appeal after final judgment. If we were to be convinced at this juncture that class certification was incorrect given the nature of the claims, wouldn't we waste everyone's time and money to proceed?

Oral Arg. Tr. 5:6-17, 9:20-10:5, Sept. 3, 2024.

On September 6, 2024, the court issued a one-paragraph order granting leave to file a reply and denying the petition. The relevant portion of the order states in full: "the Rule 23(f) petition is DENIED because an immediate appeal is not warranted. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139–40 (2d Cir. 2001)." Pet. App. 2a.

The case then returned to the district court, where it is now proceeding with respect to both the merits and class certification issues. The district court ordered class notice to begin on January 17, 2025. The court-appointed notice administrator effectuated notice pursuant to a detailed notice plan submitted to the district court on December 18, 2024. The district court also ordered the parties, with the assistance of the court-appointed special master, to submit on January 13, 2025, for the court's approval, an agreed-upon questionnaire to elicit relevant information as to damages suitable for incorporation in a database. The district court also ordered the parties to identify a technical specialist who will be in charge of the creation of this database. These ongoing proceedings in the district court will result in the creation of a fuller and more complete record on certification issues, in the event Petitioners pursue an appeal as of right from any final judgment in this case.

REASONS FOR DENYING THE WRIT

I. This case is an exceedingly poor vehicle to review Petitioners' question presented.

A. Petitioners' reading is unsupported by the Second Circuit's order.

When Rule 23 was amended to add subsection (f), the Advisory Committee explained: "Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals." Reiterating the point, the Advisory Committee stated: "The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. … Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive."

Exercising that broad discretion, the Second Circuit's in this case denied Petitioners' Rule 23(f) petition. The relevant portion of the order denying Petitioners' Rule 23(f) Petition provides in its entirety:

> Upon due consideration, it is hereby ORDERED that … the Rule 23(f) petition is DENIED because an immediate appeal is not warranted. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139-40 (2d Cir. 2001).

Pet. App. 2a.

The Petition is premised on the assumption that, in issuing the brief order denying the Rule 23(f) petition, the Second Circuit held that it lacked

discretion under Rule 23(f) to grant interlocutory review because the district court's class-certification order was (supposedly) manifestly erroneous. But nothing in the Second Circuit's Order or Second Circuit precedent supports Petitioners' interpretation. Instead, the Order stated only that an immediate appeal is "not warranted." It gives no indication which of many possible reasons served as the basis for the Second Circuit's denial of Petitioners' request for an interlocutory appeal, or whether denial had anything to do with "manifest error."

Petitioners acknowledge that leave to appeal under Rule 23(f) "is sparingly given." Pet. 12. The cases cited by Petitioners acknowledge that many factors may militate against interlocutory review, and that interlocutory appeal under Rule 23(f) is "rare" and intended "to be the exception rather than the rule" because such appeals are "disruptive, time consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104 (D.C. Cir. 2002) (observing that "interlocutory appeals are generally disfavored" and "the more so in a complex class action," especially since "granting a petition for interlocutory appeal 'add[s] to the heavy workload of the appellate courts, require[s] consideration of issues that may become moot, and undermine[s] the district court's ability to manage the class action'") (citation omitted). As the drafters of Rule 23(f) noted, "many class certification decisions present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), Advisory Committee Notes to 1998 Amendment.

If this Court were to take this case to resolve the mythical circuit split asserted by Petitioners, it would have to read into the Second Circuit's Order a new rationale unsupported by the Order's actual text—that the denial of the Rule 23(f) petition rested solely on the ground that the Court of Appeals believed it lacked the authority to consider claims of manifest error by the trial court. This Court would have to assume there was no other basis on which the Second Circuit could have reached its decision. Further, this Court would have to review the Second Circuit's decision without the benefit of any actual analysis or legal reasoning by the Second Circuit as to the supposed limits of its authority to consider claims of manifest error. In short, the court's brief order, exercising its "unfettered discretion" under Rule 23(f), Fed. R. Civ. P. 23, Advisory Committee's Notes to 1998 amendment, presents no basis for certiorari.

B. Petitioners incorrectly describe Second Circuit precedent.

To support its interpretation of the Second Circuit's order, the Petition (at 14-16) relies on *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001). That case, however, did not adopt a rule barring the consideration of "manifest error" in Rule 23(f) petitions. Rather, *Sumitomo* held "that petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Id*. at 139. The Second Circuit added an important caveat: "In so

holding, however, we leave open the possibility that a petition failing to satisfy either of the foregoing requirements may nevertheless be granted where it presents special circumstances that militate in favor of an immediate appeal." *Id.* at 140. Notably, the order in this case (Pet. App. 2a) cited both page 139 of the opinion setting forth the two factors for 23(f) petitions and the subsequent page, where *Sumitomo* refused to adopt a bright-line rule.

The Second Circuit also noted in *Sumitomo* that Rule 23(f) review is particularly appropriate where the district court's ruling is "questionable." 262 F.3d at 138. On that point, the court cited decisions from the First, Seventh, and Eleventh Circuits, which the Second Circuit described as "not foreclos[ing] the possibility that special circumstances may lead us either to deny ... or grant leave to appeal" and as "refusing to adopt a 'bright-line' or 'catalog of factors' approach." *Id.* (citations and internal quotation marks omitted). As the court noted, its approach was "[i]n line with [its] sister circuits." *Id.* at 139.

The Second Circuit reiterated *Sumitomo's* "special circumstances" language in *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 76 n.4 (2d Cir. 2004). *Hevesi* added that "[d]espite laying out [a] two-part test," *Sumitomo* "emphasized … that the Rule 23(f) standard is a flexible one that should not be reduced to any bright-line rules." *Id.* at 76.

In a subsequent decision, the Second Circuit again confirmed the flexible standard that Petitioners claim that court has rejected. *See Weber v. United States Trustee*, 484 F.3d 154, 159 (2d Cir. 2007) ("Rule 23(f) affords the courts of appeals an opportunity to intervene early to correct lower-court errors in class

certification, which, if not corrected at that stage, would result in wasteful proceedings, often requiring re-litigation." (citing *Sumitomo*, 262 F.3d at 139)). The Second Circuit cited a D.C. Circuit case, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002), for the proposition that "[w]here a district court class certification decision is manifestly erroneous ... that error ... should not entirely be ignored." *See Weber*, 484 F.3d at 160. It also cited a Fourth Circuit case, *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001), as "[r]ecognizing that Rule 23(f) was explicitly promulgated to replace the use of mandamus in reviewing manifestly erroneous class certifications." *See Weber*, 484 F.3d at 160. And the court cited a Third Circuit decision, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001), for the same point. *See Weber*, 484 F.3d at 160.

Tellingly, Petitioners cite the D.C. Circuit's decision in *In re Lorazepam & Clorazepate Antitrust Litig.*, the Fourth Circuit's decision in *Lienhart*, and the Third Circuit's decision in *Newton* as part of its supposed "circuit conflict." Pet. 20-23. Yet the Second Circuit has favorably cited all three of those decisions – indicating that it does not perceive any difference in the legal standards followed by these circuits.

Thus, Second Circuit precedent indicates that the court follows the very legal standard that Petitioners advocate. *See also* Wright & Arthur R. Miller, Federal Practice and Procedure § 1802.2 (3d ed.) (describing the Second Circuit as one of many courts that "have recognized that there may be other factors or special circumstances that may serve as grounds for accepting an appeal"). Petitioners suggest that the

Second Circuit has silently abandoned the "special circumstances" caveat and refuses to consider manifest error in its Rule 23(f) analysis. Pet. 15. But the Court of Appeals has repeatedly reiterated that it may consider special circumstances, such as manifest error, in its consideration of Rule 23(f) petitions. Petitioners' unsupported suggestion to the contrary is a wholly inadequate basis for certiorari.

C. Petitioners err in relying on an oral comment of one judge.

Petitioners seek to bolster their interpretation of the Second Circuit's Order by relying on comments made by Judge Carney at the hearing on the Rule 23(f) petition. But oral comments and questions are not part of a judicial holding. Moreover, the comments at most reflect the views of the one judge who asked the questions, not the basis for panel decision.

In any event, Judge Carney's comments undermine Petitioners' argument. Judge Carney commented that "there's a little additional language in *Sumitomo* that suggests maybe if there's an egregious error in the District Court." Oral Arg. Tr. 5. She also explained that *Sumitomo* "notes that interlocutory review is appropriate when it promises to spare the parties and the court the expense and burden of litigating the matter to final judgment only to have inevitably reversed by this court on appeal after final judgment." *Id*. at 9. Therefore, she continued, "If we were to be convinced at this juncture that class certification was incorrect given the nature of the claims, wouldn't we waste everyone's time and money to proceed?" *Id*. at 10. These comments display an understanding that Second Circuit precedent

permits a Rule 23(f) petition to be granted on the basis of manifest error.

Petitioners focus on Judge Carney's comment that she "wasn't able to find any case" in the Second Circuit granting a Rule 23(f) petition for manifest error. Pet. 15. But that comment occurred in the context of her question, "So, what's your strongest case for allowing interlocutory appeal?" She did not state that manifest-error review was barred by Second Circuit law. Given the summary nature of most orders in Rule 23(f) proceedings (just like orders of this Court denying certiorari), the absence of any express reference to manifest error in orders granting Rule 23(f) petitions is not surprising.

D. Petitioners fail to accurately describe Second Circuit practice under Rule 23(f).

Petitioners claim to have canvassed every Rule 23(f) petition that the Second Circuit has decided in the last five years and represent that they have not located any orders "granting an appeal to fix a manifest error, or any other 'special circumstance' beyond the two *Sumitomo* factors." Pet. 15. In fact, parties regularly seek Rule 23(f) review in the Second Circuit (and sometimes succeed in obtaining it) by citing allegedly egregious or manifest errors in district court certification decisions.

For example, in *Teachers Ins. & Annuity Ass'n v. Haley*, No. 20-4117 (2d Cir. Dec. 9, 2020), the Second Circuit granted a Rule 23(f) petition in which the section entitled "Reasons for Granting the Petition" began with a broad statement of the Court of Appeals' authority to grant review based on manifest error:

> This Court may grant review based on "any consideration that [it] finds persuasive." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (quoting Fed. R. Civ. P. 23(f), advisory committee's notes). Particularly "appropriate for review under Rule 23(f)" are … manifestly erroneous decisions that could result in wasteful proceedings.

Rule 23(f) Petition, No. 20-4117, ECF 1, at 12 (citation omitted). The petition made extensive arguments about the need to grant review to address the district court's alleged errors:

> This case presents this Court with the opportunity to resolve numerous issues of central importance to the law of class actions, and it provides that opportunity in the context of an erroneous decision that fails to apply the "rigorous analysis" Rule 23 requires. Such a clear circumvention of Supreme Court and Circuit precedent has previously animated Rule 23(f) review and should here as well.
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> * * *
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> Correcting the district court's errors would provide much-needed guidance to future litigants and lower courts. … Furthermore, 23(f) review on this basis is particularly appropriate where the district court's ruling is "questionable." *Sumitomo*, 262 F.3d at 138.

Id. at 12, 22, 23.

In several cases, the Second Circuit has granted Rule 23(f) petitions to address perceived legal errors in district court certification decisions. For instance, the Second Circuit granted Rule 23(f) petitions *three*

times in one securities class action that raised important legal questions. After the district court certified a class in *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.*, 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015), the Second Circuit granted an interlocutory appeal under Rule 23(f) and reversed on the ground that the district court had committed legal error. *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.*, 879 F.3d 474, 485-86 (2d. Cir. 2018). On remand, the district court again certified a class, *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.*, 2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018), and the Second Circuit again granted interlocutory appeal under Rule 23(f). *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp.*, 955 F.3d 254 (2d Cir. 2020). After yet another remand and district court order certifying a class, the Second Circuit granted interlocutory appeal for a third time, on the basis of a Rule 23(f) petition that expressly argued that review was needed to correct the district court's legal errors. The petition stated: "This Court has already granted two Rule 23(f) petitions in the case, and Defendants do not lightly file a third. But as both this Court (in granting the two prior petitions) and the Supreme Court (in granting certiorari) have recognized, this case, in which Plaintiffs seek billions of dollars in damages, raises important questions." Rule 23(f) Petition, *In re Goldman Sachs Grp.*, No. 21-03015, ECF 1-1, at 3 (2d Cir. Dec. 22, 2021). The Petition made extensive arguments about the district court's alleged errors: "The district court's legal errors will cause confusion among public companies and securities litigants in this circuit," Rule 23(f) "[r]eview is warranted to address the district court's two fundamental legal errors," and "[t]he Court should

grant this Rule 23(f) petition to correct both legal errors." *Id*. at 3, 10, 11. The Second Circuit responded by granting the Rule 23(f) petition. Certified Order, *In re Goldman Sachs Grp.*, No. 21-03015, ECF 69 (2d Cir. Mar. 9, 2022); *see also* Rule 23(f) Petition, *City of Phila. v. Bank of Am. Corp*., No. 23-7328, ECF 1, at 11-23 (2d Cir. Oct. 5, 2023) (petition devoting over 12 pages to cataloguing the alleged errors of the district court); Certified Order, *City of Phila. v. Bank of Am. Corp*., No. 23-7328, ECF 69 (2d Cir. Feb. 5, 2024) (granting Rule 23(f) petition).

In short, the Second Circuit has repeatedly granted interlocutory appeal where Rule 23(f) petitions have argued that certification decisions are manifestly erroneous or otherwise legally flawed. The Petition presents an inaccurate picture of relevant Second Circuit practice.

II. No conflict exists among the Circuits on the question presented.

Petitioners argue that there is a circuit split as to how the Court of Appeals should exercise their discretion to hear appeals under Rule 23(f). Pet. 17-23. But as an initial matter, Petitioners fail to address whether a circuit split over an inherently discretionary standard merits this Court's review. After all, the Circuits vary as to a wide variety of discretionary matters (local rules, proclivity for oral argument, and frequency of en banc review, for example). Such variations are not inherently problematic.

In any event, Petitioners' claimed circuit split does not withstand scrutiny. Petitioners maintain that the First and Seventh Circuits (as well as the Second) refuse to recognize manifest error review under Rule

23(f). Pet. 17-23. The Circuits' cases show that Petitioners are wrong.

To start, the First Circuit has not adopted the legal standard ascribed to it by Petitioner. Indeed, the First Circuit has expressly opined that interlocutory appeal may be granted under Rule 23(f) where "an interlocutory appeal is a desirable vehicle either for addressing special circumstances or for avoiding manifest injustice." *Tilley v. TJX Cos., Inc.*, 345 F.3d 34, 29 (1st Cir. 2003).

In *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), the First Circuit similarly rejected a rigid or bright-line requirement for interlocutory appeal under Rule 23(f). The petitioner in *Mowbray* "suggest[ed] that appellate review is proper whenever the court of appeals suspects that the trial court may have committed an error of law," while the respondent suggested "that a Rule 23(f) application should be granted only if the applicant makes out a compelling case that the district court … manifestly abused its discretion." *Id.* at 292. The First Circuit "chart[ed] a middling course" between the parties' positions, indicating that its approach would permit review both in cases presenting "manifest[]" errors and in a subset of other cases. *Id.* at 293. Applying that standard, the First Circuit granted the petition, although (i) denial of class status would not effectively end the case, (ii) grant of class status would not create irresistible pressure on the defendant to settle, and (iii) the appeal would not lead to clarification of a fundamental issue of law. *Id.* at 294. The court explained that, given all these defects, it "normally would deny the application for leave to appeal." *Id.* It exercised its "discretion to accept the application and

hear th[e] appeal," however, because of "special circumstances"—namely, that review would "at little cost, clarify some imprecision in the case law, while at the same time giving the parties (and the lower court) a better sense as to which aspects of the class certification decision might reasonably be open to subsequent reconsideration." *Id.*

The First Circuit's flexible approach is precisely the kind that Petitioners advocate for and insist that other circuits have adopted. Petitioners do not cite any case in which the First Circuit has stated that a Rule 23(f) petition granted based on manifest error cannot be granted.

Likewise, the Seventh Circuit decisions do not bear out the claimed conflict. With its opinion in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the Seventh Circuit was the first circuit to consider Rule 23(f) following its adoption in 1998. In *Blair*, the Seventh Circuit articulated three circumstances where interlocutory appeal may be warranted: (1) so-called "death knell" cases; (2) cases where the grant of class status "put[s] considerable pressure on the defendant to settle"; and (3) cases where an immediate appeal "may facilitate the development of the law." *Id.* at 833-35. However, in so doing, the Seventh Circuit stressed this list was in no way meant to be exhaustive:

> Although Rule 10 of the Supreme Court's Rules identifies some of the considerations that inform the grant of certiorari, they are "neither controlling nor fully measuring the Court's discretion." Likewise it would be a mistake for us to draw up a list that determines how the power under Rule 23(f) will be exercised.

> Neither a bright-line approach nor a catalog of factors would serve well—especially at the outset, when courts necessarily must experiment with the new class of appeals.

Id. at 833-34.

Following Blair, the Seventh Circuit has remained faithful to this approach and has continued to expressly refuse to adopt a "bright-line test." *See Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 497 (7th Cir. 2013). That court has never stated that manifest error is not a basis for granting a Rule 23(f) petition. To the contrary, on at least two occasions the Seventh Circuit has referred to the lower court's error when granting a 23(f) petition, *see Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010) ("Since this is the type of question that Rule 23(f) was designed to address, and because the district court's analysis was incomplete, we accept the appeal."); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004) (noting that the parties' submissions show that immediate review would promote the development of law and also that the district court committed an error best handled by prompt remand). In *Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities, Inc.*, 747 F.3d 489 (7th Cir. 2014), the Seventh Circuit underscored the appropriateness of focusing on the correctness of a district court's certification decision, opining that a Rule 23(f) petition must demonstrate "a significant probability that the order was erroneous." *Id.* at 491.

Accordingly, neither the First nor Seventh Circuits bars manifest error review, and Petitioners' claimed circuit split does not exist.

III. Petitioners fail to identify an important question warranting this Court's review.

Petitioners' assertion that the question presented is sufficiently important to merit review (Pet. 30-32) also falls flat. The Second Circuit did not decide whether to affirm or to reverse the certification of the class, but only whether to grant Petitioners permission to take a Rule 23(f) interlocutory appeal of the district court's class-certification order. That decision—the one actually before this Court—does not warrant this Court's review, and Petitioners' arguments against certification (Pet. 3-4, 9, 24-28) are premature.

Petitioners do not contend that the certification decision in this case will be effectively unreviewable from any final judgment at the end of this case. Petitioners do not argue that certification will exert such hydraulic pressure on Petitioners that they will be forced to settle. And Petitioners' conduct belies any such suggestion. Petitioners did not seek a stay in the district court or Second Circuit, and they have continued to litigate this case in the district court. Before this Court, Petitioners complain only that the certification decision will cause the expenditure of defense costs and the continued devotion of judicial resources to this case, Pet. 31, but the same could be said of such interlocutory rulings, including denials of motions to dismiss or for summary judgment. This Court has noted the Rules Committee's "careful calibration" of Rule 23(f) governing interlocutory appeals, *Microsoft Corp. v. Baker*, 582 U.S. 23, 30 (2017), and the Committee wisely vested wide discretion in the Courts of Appeals to decide Rule 23(f) petitions.

Any subsequent review in this Court will be limited to the question whether an interlocutory appeal was appropriately denied on the particular facts of the present case, where Respondents offered many reasons for denying the Rule 23(f) petition, and where Rule 23(f) gives the court of appeals "unfettered discretion" to make that decision. This Court is loath to engage in case-by-case error correction. That hesitancy should be at its zenith here, where Petitioners essentially invite this Court to substitute its discretion for the discretion conferred by Rule 23(f) on the circuit courts.

CONCLUSION

The Petition for writ of certiorari should be denied.

Respectfully submitted,

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February 5, 2025