24-86

In the Supreme Court of the United States

CAREER COUNSELING, INC.,
PETITIONER,

v.

AMERIFACTORS FINANCIAL GROUP, LLC,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that Petitioner's proposed class could not be certified because members of the class could not be readily identified.

2. Whether the court of appeals erred in concluding that an online fax service is not a "telephone facsimile machine" under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

CORPORATE DISCLOSURE STATEMENT

Appellee AmeriFactors Financial Group, LLC is not a publicly held corporation. The parent corporation of AmeriFactors Financial Group, LLC is Gulf Coast Bank and Trust Company. No publicly held corporation owns 10% or more of the stock of AmeriFactors Financial Group, LLC.

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INTRODUCTION

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). To keep these exceptional suits from devolving into an unmanageable morass, parties seeking to certify a class must "affirmatively demonstrate," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), that they comply with Federal Rule of Civil Procedure 23's "stringent requirements," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013). Petitioner failed to meet those requirements below. As the Fourth Circuit correctly explained,

Petitioner never identified a reliable way to separate those who were within its proposed class from those outside it.

In its first question presented, Petitioner seeks review of this eminently sensible decision, claiming that the Fourth Circuit required Petitioner to show that identifying class members would be "administratively feasible." For multiple reasons, this question does not warrant this Court's review. Contrary to Petitioner's claims, the decision below did not rest on a requirement that a proposed class be administratively feasible. The Fourth Circuit's decision does not even use the words "administrative feasibility." Instead, the decision affirmed the denial of class certification based on a requirement that the identity of proposed class members be *ascertainable*—a requirement that most circuits have recognized and that Petitioner does not challenge in this Court. The Fourth Circuit's decision therefore does not implicate the question on which Petitioner seeks certiorari.

In its efforts to obtain review of the Fourth Circuit's decision, Petitioner also overstates the extent of any disagreement in the lower courts over whether an administrative feasibility requirement exists. Although circuits sometimes use different words to describe Rule 23's mandates, any differences in analytical approach have narrowed over time. Moreover, circuits are united on the requirement that was critical here: there must be a realistic way to identify members of the proposed class. And in any event, even if the fatal flaw in Petitioner's proposed class is framed as one of administrative feasibility, such a requirement is well-founded in the text of Rule 23 and this Court's precedents interpreting it.

This Court has denied multiple previous petitions asking it to consider the first question presented. It should do the same here, particularly because, even if there were a split among the courts of appeals with respect to these issues, this case presents a poor vehicle to resolve any purported conflict.

Petitioner's second question presented is likewise unsuited for the Court's review. Courts are not split on the narrow question of whether an online-only fax service is a "telephone facsimile machine" under the Telephone Consumer Protection Act, 47 U.S.C. § 227. And the Fourth Circuit—the only circuit to have considered that question—correctly answers in the negative. Online-only fax services do not perform the functions that define a "telephone facsimile machine." This Court should not grant review of this issue when Petitioner lacks any credible argument to support a contrary interpretation.

STATEMENT

1. Respondent AmeriFactors is a financial services firm based in Florida. It specializes in accounts receivable financing, also called "factoring." Factoring is one of the oldest forms of corporate finance and involves "purchasing another company's accounts receivable of unpaid invoices for a discounted price with the intention of collecting the full value of the unpaid invoices at a later date." Pet. App. 3a n.1.

In 2016, Respondent engaged a third party, AdMax, to provide marketing services. C.A. Dkt. 15 at 4. Among the services AdMax promoted was the practice of "fax broadcasting," in which a large number of faxes would be sent to a target list of intended business recipients. *Id.* at 4-5. Respondent previously had never conducted any marketing by fax. C.A. App. 476. Given that AdMax held

itself out to be knowledgeable regarding fax-based marketing, Respondent relied on AdMax's expertise in that area. C.A. App. 481-86. Although AdMax's website advertised that its practices were consistent with the law, AdMax's president in fact understood—but did not tell Respondent—that fax broadcasting could in some circumstances violate the Telephone Consumer Protection Act (TCPA). C.A. App. 483-84, 500-01, 509-10.

As relevant here, the TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). A "telephone facsimile machine" is defined in the TCPA as:

> equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

Id. § 227(a)(3).

On June 28, 2016, AdMax hired another third party to send a one-page fax concerning Respondent's services. C.A. App. 264-66. Since the transmission of that fax, Respondent has not had any further involvement with any marketing faxes. C.A. App. 487.

2. In September 2016, Petitioner Career Counseling, an employment staffing agency that is also a repeat TCPA litigant, filed a putative class action complaint against Respondent in the United States District Court for the District of South Carolina. The complaint, purportedly brought on behalf of all who received the June 28 fax, alleged that Respondent's fax was an unsolicited advertisement in violation of the TCPA.

Petitioner sought discovery to identify potential class members. Although fax logs indicated that over 50,000 unique fax numbers were sent the fax at issue, those logs were silent as to the identities of those who owned the fax numbers and—critically—the means by which the fax had been received. C.A. App. 269, 275-78, 301. That meant that Petitioner had no way to tell whether a fax had been received by a traditional stand-alone fax machine, a computer connected to a fax modem and printer, or one of many entirely Internet-based fax services. *See* C.A. App. 68-74.

In an effort to answer the questions left open by the fax logs, Petitioner served over 400 subpoenas on telephone carriers that were purportedly associated with the phone numbers found in the logs. C.A. App. 200, 308-09. The subpoenas asked each telephone carrier to (1) provide the name and address for each subscriber associated with each fax number in the logs; and (2) determine whether it had been providing online fax services to that subscriber when it purportedly received the fax at issue. C.A. App. 310. Fewer than half of the subpoenaed telephone carriers responded at all. C.A. App. 200-01. Of the fraction that did respond, many did not have information for all of the telephone numbers from the logs to which their telephone services had been linked. C.A. App. 201.

Moreover, as Respondent's expert explained, many online fax services allow their subscribers to use their phone carrier's call forwarding feature to forward incoming "calls" to the online fax service. *See* C.A. App. 314-17. A telephone carrier's response that it was not providing online fax services to a specific subscriber at the time of the June 28 fax therefore did not rule out the possibility that the subscriber had obtained online fax

services from a third party using their telephone number. Many telephone carriers raised this same issue in their objections to Petitioner's subpoena. *Id.* Verizon, for example, stated that it "does not have information available to allow it to determine whether the customer associated with the telephone numbers used the number with a fax or online service." C.A. App. 202.

3. Petitioner moved to certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure. *See* Pet. App. 36a. Rule 23 requires plaintiffs to demonstrate that their proposed class satisfies the four threshold requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460 (2013). The proposed class must also satisfy the additional requirements of one of the categories listed in Rule 23(b), including the requirements of predominance and superiority. *See Amgen*, 568 U.S. at 460; Fed. R. Civ. P. 23(b)(3).

Respondent contended that Petitioner's proposed class failed the Rule 23 requirements on a myriad of grounds, including because it was not ascertainable—that is, because there was no reliable, feasible method for identifying those who had received the June 28 fax on a "telephone facsimile machine," as required by the TCPA. Respondent also argued that these same problems defeated Rule 23(b)(3)'s predominance requirement because individualized issues of how the fax at issue was received would predominate over any purportedly common questions. In response, Petitioner argued that it did not need to distinguish between recipients of traditional faxes and online faxes because unsolicited faxes in either format would violate the TCPA.

The district court denied the motion for class certification. The court first concluded that Petitioner's position that it need not distinguish between traditional and online-only fax services contradicted a recent declaratory ruling from the Consumer and Governmental Affairs Bureau of the FCC. Pet. App. 42a-48a. That ruling had determined that an online fax service that sends faxes "'as email over the Internet' . . . is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition" on unsolicited faxes. *In re AmeriFactors Fin. Grp. Pet. for Expected Declaratory Ruling*, 34 F.C.C.R. 11950, 11950-51 (2019). The district court determined that this decision was a final legislative ruling of the FCC and therefore entitled to deference under the Hobbs Act, 28 U.S.C. § 2342; *see also PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 6-7 (2019). Pet. App. 48a. As a result, the district court held that the putative class could not include individuals "who received a fax from [Respondent] by means of an online fax service." Pet. App. 48a.

Next, the district court turned to the question of whether to certify a class solely composed of individuals who had received the fax at issue on a stand-alone fax machine. Pet. App. 48a-58a. Citing circuit precedent, the district court explained that "implicit within Rule 23" is the requirement that "members of a class must be ascertainable." Pet. App. 49a. "This does not mean every member of the class needs to be identified at the time of certification; rather, that there must be a[n] 'administratively feasible [way] for the court to determine whether a particular individual is a member' at some point." *Id.* (second alteration in original) (quoting *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 658 (4th Cir. 2019)).

After reviewing the evidence, including testimony that service providers could not "identify whether [a] subscriber used 'a stand-alone fax machine or any other technology to receive faxes,'" Pet. App. 56a-57a, the district court found that the proposed class was not ascertainable because the court "would need to make an individualized inquiry of each class member to determine if the fax number identified in the fax log actually was linked to a stand-alone fax machine on June 28, 2016." Pet. App. 58a.

Having determined that Petitioner could not satisfy the requirements of Rule 23(a), the district court declined to consider whether Petitioner had met the additional requirements of Rule 23(b)(3). Pet. App. 58a.

4. The Fourth Circuit affirmed the district court's denial of class certification.

The court first rejected Petitioner's request to abandon circuit precedent recognizing Rule 23's implicit ascertainability requirement. Pet. App. 9a-10a. The court explained that, as a three-judge panel, it was "simply unable to rule as [Petitioner] proposes." Pet. App. 10a.

The court next rejected Petitioner's interpretation of the TCPA. Unlike the district court, however, the court of appeals declined to decide whether the FCC's ruling in *AmeriFactors* was entitled to any kind of deference—whether under the Hobbs Act, *Chevron*, or *Skidmore*. Pet. App. 11a-12a; *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Instead, the court reviewed the question "de novo" and concluded that, "pursuant to its plain statutory language, the TCPA prohibits the sending of unsolicited advertisements to

what the district court labelled as 'stand-alone fax machines,' but not to what the court accepted to be 'online fax services.'" Pet. App. 12a.

The court explained that the TCPA prohibits use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." *Id.* (quoting 47 U.S.C. § 227(b)(1)(C)). In light of the "meaningful variances" between the two halves of § 227(b)(1)(C), the court concluded that even though the TCPA prohibits *sending* unsolicited advertisements from a variety of devices, the TCPA only applies when the advertisement is *received* through a "telephone facsimile machine." Pet. App. 12a-13a, 15a. Thus, an unsolicited fax received through an online fax service may give rise to a TCPA claim only if an online fax service qualifies as a "telephone facsimile machine." Pet. App. 12a-13a. The court further concluded that online fax services do not satisfy that requirement because they do not "receive[] an electronic signal 'over a regular telephone line,'" or have "the capacity to transcribe text or images 'onto paper.'" Pet. App. 14a. "Rather, online fax services receive faxes over the Internet and cannot themselves print any faxes." *Id.*

Finally, the court held that the district court had not "abused its discretion in ruling that Career Counseling failed to meet its burden of demonstrating the ascertainability of the class." Pet. App. 18a. Like the district court, the court of appeals reasoned that the evidence "refute[d] the premise of [Petitioner's] identification method: that recipients who were not using online fax services from the subpoenaed carriers were necessarily using stand-alone fax machines." *Id.*

REASONS FOR DENYING THE PETITION

This Court has repeatedly denied petitions presenting Petitioner's first question. *See infra* pp. 19-20. This petition should meet the same fate, for multiple reasons.

To start, this case is an exceedingly poor vehicle to address the first question. Petitioner asks the Court to resolve a purported circuit split over a requirement that class plaintiffs prove the "administrative feasibility" of their proposed class. But in the decision below, the Fourth Circuit imposed no such requirement. Instead, the Fourth Circuit affirmed the district court's denial of class certification because Petitioner failed to present a reliable method of ascertaining class members. Pet. App. 18a. Petitioner does not contest that such an "ascertainability" requirement exists and is broadly applied, and Petitioner's failure to satisfy that requirement here is fatal to class certification, regardless of whether this Court endorses an administrative feasibility requirement.

In any event, to the extent differences exist between the circuits on the first question presented, those differences do not merit review. Although the circuits sometimes use varied formulations to articulate the standard for class certification, all courts to consider the issue have agreed that under Rule 23 class members must be readily identifiable based on objective criteria. Petitioner's unwieldy proposed class would therefore fail with or without an administrative feasibility prerequisite.

Petitioner's second question presented, concerning the interpretation of the TCPA, is not suitable for review, either. What Petitioner describes as a circuit split reflects only the unremarkable point that different cases involving

different technology sometimes come out differently. And the Fourth Circuit correctly resolved this case. The TCPA is clear that the entirely digital fax services at issue here—which do not have the ability to receive telephone signals or print faxes—do not qualify as fax machines and therefore cannot give rise to a cause of action under the TCPA.

I. This Case Is an Unsuitable Vehicle for Considering the First Question Presented

This petition is unfit for review of the first question presented because the Court's disposition of that question would not affect the outcome of this case. The Court has long maintained that it does not grant a writ of certiorari to "decide abstract questions of law . . . which, if decided either way, affect no right" of the parties. *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882); *see The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the [c]ourts of [a]ppeals is judicial, not simply administrative or managerial."). That well-settled practice weighs decisively against considering Petitioner's arguments on the first question presented.

1. Petitioner's request for certiorari starts from a false premise. It asks (at i) this Court to review the decision below to decide "[w]hether there is an implied 'administrative feasibility' prerequisite for class certification." But the Fourth Circuit's decision did not rest on the existence of any such prerequisite. Indeed, although the words "administrative feasibility" appear repeatedly in *the petition*, they do not appear at all in the decision below. The court of appeals instead affirmed the

denial of class certification based on its conclusion that the proposed class was not "ascertainable." Pet. App. 18a.

Ascertainability requires that the members of "the class can be ascertained by objective criteria." William Rubenstein *et al.*, *Newberg & Rubenstein on Class Actions* § 3.3 (6th ed. 2024). Petitioner does not dispute that such a requirement exists, and for good reason. *See* Pet. 10-11. The courts of appeals long have recognized "that Rule 23 contains an implicit threshold requirement that the members of a proposed class be 'readily identifiable.'" *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.* (*Medtox*), 821 F.3d 992, 995 (8th Cir. 2016) (quoting *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)); *see also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (describing requirement as "elementary").[1]

In this Court, Petitioner does not seek to overturn the general consensus among most courts of appeals that recognizes an ascertainability requirement. Petitioner instead confines its arguments to whether there exists a further requirement that identification of class members

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[1] *See also, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *In re Petrobras Sec.*, 862 F.3d 250, 264 (2d Cir. 2017); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012); *EQT Prod. Co.*, 764 F.3d at 358; *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 639 (5th Cir. 2012); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537-38 (6th Cir. 2012); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *Evans v. Brigham Young Univ.*, No. 22-4050, 2023 WL 3262012, at *5 (10th Cir. May 5, 2023); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021). *But see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th Cir. 2017) (declining to decide whether Rule 23 contains an ascertainability requirement); *J.D. v. Azar*, 925 F.3d 1291, 1320 (D.C. Cir. 2019) ("[O]ur court has not addressed whether Rule 23 contains an ascertainability requirement for class certification . . . .").

be administratively feasible. But as explained above, the Fourth Circuit's decision was not premised on the existence of any "administrative feasibility" requirement. The Fourth Circuit simply recognized that Petitioner had not provided a reliable method of identifying class members. *See* Pet. App. 18a (explaining that discovery "refute[d] the premise of [Petitioner's] identification method: that recipients who were not using online fax services from the subpoenaed carriers were necessarily using stand-alone fax machines"). This case accordingly does not present any question about the propriety of an administrative feasibility requirement.

2. Even assuming the decision below rested on administrative feasibility, this would be an unsuitable case in which to explore the contours of that doctrine because Petitioner's putative class still would fail at least Rule 23(b)(3)'s predominance and superiority requirements for certification.

As relevant here, Rule 23 requires 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)(3). And "[o]ver and over, courts have explained that elusive class composition often undermines efforts to meet" those requirements. *Tarrify Props., LLC v. Cuyahoga County, Ohio*, 37 F.4th 1101, 1106 (6th Cir. 2022). Wherever in the analysis these concerns are considered, the result, generally speaking, is the same. The same administrative barriers to ascertainability that some courts have located in an administrative feasibility requirement also "sound[] in definitional deficiencies, numerosity questions, predominance problems, and

management difficulties—issues that all implicate other class certification criteria." *Briseno*, 844 F.3d at 1126 n.6.

An example from the Ninth Circuit proves the point. That court has not endorsed "a freestanding administrative feasibility prerequisite to class certification." *Id.* at 1126. But a district court in the Ninth Circuit considering a TCPA junk fax case nearly identical to this one recently denied class certification because "it is impossible to determine on a class-wide basis whether recipients received the fax on a standalone fax machine." *Jeffrey Katz Chiropractic, Inc. v. Diamond Respiratory Care, Inc.*, 340 F.R.D. 383, 389 (N.D. Cal. 2021). Citing the experience of another court in the same district, the court found that "any common answer to this question is indeterminate at *any* stage, even after a year of subpoenas, declarations, and expert testimony"—the same type of evidence the district court weighed here. *Id.* at 390 (citing *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219-HSG, 2021 WL 4818945, at *1 (N.D. Cal. Oct. 15, 2021)).[2] The court therefore held that "[c]ommon issues do not predominate over the question of whether the fax was received on an online fax service, and the class action is not a 'superior' vehicle for this dispute." *Id.* The same result would obtain here, for exactly the same reasons.

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[2] The Ninth Circuit affirmed the district court's class decertification decision in *True Health*. *See True Health Chiropractic Inc. v. McKesson Corp.*, Nos. 22-15710, 22-15732, 2023 WL 7015279 (9th Cir. Oct. 25, 2023). This Court recently granted *certiorari* in that case, *see True Health Chiropractic, Inc. v. McKesson Corp.*, No. 23-1226, 2024 WL 4394119 (Oct. 4, 2024) (mem.), but on different grounds that, as explained below, should not affect the disposition of this case.

In contending otherwise, Petitioner points to a single district court decision certifying a class of persons or entities who received a fax on a stand-alone fax machine. Pet. 12-13 (citing *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-CV-41-JLB-MRM, 2021 WL 6105590 (M.D. Fla. Dec. 23, 2021)). The plaintiffs in that case "propose[d] a three-step process to identify individuals who received faxes via a stand-alone machine." *Scoma Chiropractic*, 2021 WL 6105590, at *11. The first two steps of that process were to serve a series of subpoenas to third parties "to identify the subscriber of each phone number." *Id.* The third step was then simply to designate for class membership "all subscribers that are not an online fax service provider." *Id.*

As the district court in this case explained, that third step is far easier said than done. After poring through reams of declarations and expert opinions, the district court reached an inexorable factual conclusion: that there is no practical way to determine whether a particular phone number is associated with a stand-alone fax machine or an online fax service provider without conducting individualized inquiries. *See* Pet. App. 17a-18a, 50a-57a. Given this "individualized factual issue," "[c]ommon issues do not predominate" and class certification is not appropriate. *Jeffrey Katz Chiropractic*, 340 F.R.D. at 390.

It therefore would serve no practical purpose for the Court to take up the present case. Whatever guidance the Court might provide on the ascertainability requirement, given that "mini-trials" will be "necessary to determine who is in and who is out," the district court inevitably would conclude again that "the class-action vehicle imposes inefficiencies rather than ameliorates them." *Tarrify Props.*, 37 F.4th at 1106. Whether considered as

a threshold requirement on ascertainability, or a factor to be weighed in deciding superiority, the administrative difficulties in identifying class members preclude certification here. The precise framing the district court should have used to reach the same result is irrelevant.

II. Petitioner Overstates the Disagreement in the Courts of Appeals on the First Question.

Petitioner contends that the First, Third, and Fourth Circuits "radically diverge" from the other courts of appeals with respect to a purported "implied requirement that the party seeking class certification prove that it is 'administratively feasible' to identify class members." Pet. 11. Petitioner is incorrect. Any divergence is far from "radical[]," and the courts of appeals are working to close the gap. This Court has no reason to weigh in when the lower courts are still refining the law.

1. In the Third Circuit, a plaintiff seeking class certification must "show that: (1) the class is 'defined with reference to objective criteria'; and (2) there is 'a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'" *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (quoting *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013)). Petitioner is correct that other circuits have declined to adopt the "administrative feasibility" prong of this two-part test. *See, e.g.*, *Cherry*, 986 F.3d at 1303-04; *Briseno*, 844 F.3d at 1126-27; *Mullins*, 795 F.3d at 662; *see also* Pet. 11-12. But Petitioner gives short shrift to subsequent developments in Third Circuit law, which have mitigated that difference considerably.

The Third Circuit's 2013 decision in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), represented "the high-water mark of its developing ascertainability doctrine,"

Mullins, 795 F.3d at 662. In *Carrera*, the court considered a putative class of retail purchasers of weight-loss supplements, but there was "no evidence that retailers even ha[d] records for the relevant period." 727 F.3d at 309. It therefore remanded for the district court to determine whether purchasers could be identified through sales records, while cautioning that affidavits of class members were not a reliable substitute. *Id.* at 308-12. That was the context in which *Carrera* required a plaintiff to "demonstrate his purported method for ascertaining class members is reliable and administratively feasible," as "[a] plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." *Id.* at 307-08.

Since *Carrera*, however, the Third Circuit has clarified that the requirement is directed to whether class members can be identified at all, not just whether it would be difficult to do so. On that basis the Third Circuit has reversed or vacated multiple district court decisions denying class certification. *See, e.g.*, *Kelly v. RealPage Inc.*, 47 F.4th 202, 222-24 (3d Cir. 2022); *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 480-81 (3d Cir. 2020); *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*, 867 F.3d 434, 440-43 (3d Cir. 2017); *Byrd*, 784 F.3d at 169-72. The Third Circuit has summarized these cases as standing for the proposition that a "review of existing records to identify class members is administratively feasible even if it requires review of individual records with cross-referencing of voluminous data from multiple sources." *Kelly*, 47 F.4th at 224. As a result, the concern that other courts have expressed regarding the Third Circuit's approach—that it could "erect a nearly insurmountable hurdle at the class certification stage," *Mullins*, 795 F.3d at 662—has not materialized.

2. Petitioner suggests that the First and Fourth Circuits have adopted wholesale the strongest version of the Third Circuit's administrative feasibility test. Pet. 11. That is not the case. Although these "circuits have cited the Third Circuit's administrative feasibility standard," they "have not actually imposed" it in the way that *Carrera* suggested. *Briseno*, 844 F.3d at 1126 n.6.

For example, Petitioner cites the First Circuit's decision in *In re Nexium Antitrust Litigation* for the proposition that that court "continue[s] to impose an 'administrative feasibility' requirement." Pet. 11. Petitioner is mistaken. In the case in question, the First Circuit simply noted that "the definition of the class must be 'definite,' that is, the standards must allow the class members to be ascertainable." *In re Nexium Antitrust Litigation*, 777 F.3d at 19 (citing Rubenstein, *supra*, §§ 3:1, 3:3). Although the First Circuit cited *Carrera* without elaboration, its holding was that "[t]he class definition here satisfies these standards by being defined in terms of purchasers of Nexium during the class period (with some exceptions that also satisfy objective standards)." *Id.* The decision subsequently required "plaintiffs to propose a mechanism for eventually determining whether a given class member is entitled to damages," but that is different from the Third Circuit's class-certification requirement. *Briseno*, 844 F.3d at 1126 n.6 (citing *In re Nexium Antitrust Litig.*, 777 F.3d at 19-20). Nothing in the decision suggests that the First Circuit adopted any version of the Third Circuit's administrative feasibility requirement. To the contrary, Judge Kayatta argued in dissent that the panel majority had not given sufficient weight to "the persuasive force of" *Carrera*. *In re Nexium Antitrust Litig.*, 777 F.3d at 33 (Kayatta, J., dissenting).

Petitioner similarly misunderstands the Fourth Circuit's case law, as exemplified in *EQT Production*, 764 F.3d 347. The district court there had certified five different classes of people who had not received royalties they were owed for natural gas interests they claimed to own. *Id.* at 355. The Fourth Circuit noted the "implicit threshold requirement that the members of a proposed class be 'readily identifiable,'" which it described "as an 'ascertainability' requirement." *Id.* at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972); *Marcus*, 687 F.3d at 592-94).

The Fourth Circuit framed the critical question as whether the "court can readily identify the class members in reference to objective criteria." *Id.* Although "plaintiffs need not be able to identify every class member at the time of certification," if "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate." *Id.* (quoting *Marcus*, 687 F.3d at 593). Because the proposed classes were "defined to include both former and current gas estate owners," and because "resolving ownership based on land records can be a complicated and individualized process," the Fourth Circuit remanded to the district court to "reconsider the ascertainability issues posed by the ownership classes." *Id.* at 359-60. As in the decision below, the Fourth Circuit did not suggest that it was adopting a position like the one the Third Circuit suggested in *Carrera*.

III. The First Question Is Oft-Denied and Does Not Demand Intervention

Over the past decade, at least six petitions have been filed asking the Court to address the administrative feasibility requirement; the Court has rejected them all. *See Petroleo Brasileiro S.A. v. Univs. Superannuation*,

140 S. Ct. 338, 338 (Oct. 15, 2019) (mem.); *Leyse v. Lifetime Ent. Servs., LLC*, 138 S. Ct. 637, 637 (Jan. 8, 2018) (mem.); *ConAgra Brands, Inc. v. Briseno*, 138 S. Ct. 313, 313 (Oct. 10, 2017) (mem.); *Procter & Gamble Co. v. Rikos*, 136 S. Ct. 1493, 1493 (Mar. 28, 2016) (mem.); *Direct Digital, Inc. v. Mullins*, 136 S. Ct. 1161, 1162 (Feb. 29, 2016) (mem.); *Martin v. Pac. Parking Sys., Inc.*, 135 S. Ct. 962, 962 (Jan. 12, 2015) (mem.). Denial remains appropriate here. The gap between the circuits has only continued to narrow, particularly given that the percolation to date has permitted the circuits to bring their substantive standards into alignment.

As explained above, the Fourth Circuit has focused on whether individualized fact-finding is necessary to ascertain the members of a class. *EQT Prod. Co.*, 764 F.3d at 358; Pet. App. 6a, 18a. Circuits on the other side of Petitioner's purported split have done much the same thing. In *In re Petrobras Securities*, for example, the Second Circuit reaffirmed its prior holding that "a proposed class: (1) must be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member'; and (2) must be 'defined by objective criteria that are administratively feasible,' such that 'identifying its members would not require a mini-hearing on the merits of each case.'" 862 F.3d at 266 (quoting *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015)). "These requirements operate in harmony: 'the use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.'" *Id.* (quoting *Brecher*, 806 F.3d at 25).

Although the Second Circuit noted that it does not require administrative feasibility as "an independent

element of the ascertainability test," a class still must be "'defined by objective criteria' *so that* it will not be necessary to hold 'a mini-hearing on the merits of each case.'" *Id.* at 266-67 (quoting *Brecher*, 806 F.3d at 24). That language closely mirrors the Fourth Circuit's standard: "The goal is . . . to define a class in such a way as to ensure that there will be some 'administratively feasible [way] for the court to determine whether a particular individual is a member' at some point." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (alteration in original) (quoting *EQT Prod. Co.*, 764 F.3d at 358).

The Sixth Circuit has engaged in a similar inquiry despite rejecting a freestanding "administrative feasibility" requirement. *See Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015). In *Tarrify Properties*, the court explained that a "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." 37 F.4th at 1106 (quoting *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.* (*ASD Specialty Healthcare*), 863 F.3d 460, 471 (6th Cir. 2017)). "If 'mini-trials' become necessary to determine who is in and who is out, the class-action vehicle imposes inefficiencies rather than ameliorates them." *Id.* (citing *ASD Specialty Healthcare*, 863 F.3d at 471-74).

These cases reflect convergence, not divergence. As the Third Circuit noted recently, even in circuits that have criticized its approach to ascertainability, "some version of an administrative feasibility test is applied, albeit under a different name." *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 133-34 (3d Cir. 2023). "Instead of having a separate administrative feasibility requirement, those

courts often address administrative concerns through a rigorous analysis of Rule 23's 'superiority' requirement." *Id.* at 134. The lower courts' agreement that administrative concerns matter belies Petitioner's claims that this Court's intervention is necessary.

IV. The Court of Appeals Correctly Affirmed the Denial of Class Certification

As explained above, *supra* pp. 11-16, the Fourth Circuit's decision in this case did not turn on a requirement of administrative feasibility. But even assuming the Fourth Circuit had denied class certification based on such a requirement, that result would be correct.

Petitioner derides any consideration of feasibility as "extratextual" because the phrase "administrative feasibility" does not appear in Rule 23(a) or Rule 23(b)(3). Pet. 13-15. But such a rigid mode of interpretation is incompatible with Rule 23. The Rule leaves many questions to the courts; it does not say how large a class must be to consider it "so numerous that joinder of all members is impracticable," nor does it specify how many "questions of law or fact" must be "common to the class." Fed. R. Civ. P. 23(a). Rule 23 is even "silent as to what constitutes a class" in the first place. Wright & Miller, 7A *Fed. Prac. & Proc. Civ.* § 1760 (4th ed. 2024).

Instead of setting rigid benchmarks, Rule 23 affords district courts "broad power and discretion . . . with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). In exercising that discretion, courts—including this one—have required evidentiary showings for class certification that, while not explicitly stated in Rule 23, are implicit in the rule. Although Rule 23 does not set an express evidentiary standard for class certification, this

Court has recognized that "sometimes it may be necessary to probe behind the pleadings before coming to rest on the certification question." *Wal-Mart Stores*, 564 U.S. at 350-51, 353 (internal quotation marks omitted) (decertifying a class alleging sex discrimination because plaintiffs failed to produce "[s]ignificant proof" of a "general policy of discrimination"). Likewise, Rule 23's requirement that "claims or defenses of the representative parties are typical of the claims or defenses of the class" implies that the class representative be "part of the class and possess the same interest and suffer the same injury as the class members." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal quotation marks omitted).

Along those lines, even though Rule 23 does not expressly require a class to be ascertainable, "[i]t is axiomatic that in order for a class action to be certified, a class must exist." 5 *Moore's Federal Practice - Civil* § 23.21 (2024). Thus, as discussed above, the circuits have agreed that "[t]he existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of [Rule 23]." *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007); *see also Mullins*, 795 F.3d at 659 ("Rule 23 requires that a class be defined, and experience has led courts to require that classes be defined clearly and based on objective criteria.").

To determine whether a class is ascertainable, some review for administrative feasibility is necessary. "[M]ere speculation is insufficient to determine whether a plaintiff has established the prerequisites of Rule 23(a)." *In re Niaspan Antitrust Litig.*, 67 F.4th at 132 (internal quotation marks omitted); *cf. Wal-Mart Stores*, 564 U.S. at 351 ("Actual, not presumed, conformance with Rule

23(a) remains . . . indispensable." (internal quotation marks omitted)); *see also* Wright & Miller § 1760 (collecting cases). An inquiry into administrative feasibility simply determines "whether the proposed class is based on objective criteria, not speculation, by looking at administratively feasible methods of defining the class, consistent with the text of Rule 23." *In re Niaspan Antitrust Litig.*, 67 F.4th at 133.

This administrative feasibility requirement preserves the efficiencies inherent to class actions. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."). The "serious administrative burdens" inherent to an unidentifiable class "are incongruous with the efficiencies expected in a class action." *Marcus*, 687 F.3d at 593 (internal quotation marks omitted).

Administrative feasibility also protects a defendant's due process right to "litigate its statutory defenses to individual claims." *Wal-Mart Stores*, 564 U.S. at 367. A defendant cannot exercise that right if those individual claims are unidentifiable. *Id.* Petitioner cannot trade due process for lax certification standards; the Rules Enabling Act instructs that the rules of procedure "shall not abridge . . . any substantive right." 28 U.S.C. § 2072(b).

Petitioner extols the benefits of class actions and implies that an administrative feasibility requirement would spell their demise. Pet. 15-16. But as discussed *supra*, most circuits review for administrative feasibility to some extent, yet class actions continue to be certified.

Moreover, contrary to Petitioner's assertions, there is no need for the Court to "clarify" the contours of Rule 23 to the lower courts. Pet. 16. Rule 23 instructs courts to conduct a "rigorous analysis" as to whether "the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores*, 564 U.S. at 350-51 (citation omitted). Requiring identification of supposed class members to be administratively feasible fulfills this directive while ensuring adequate protections for defendants' and opt-out plaintiffs' rights.

Finally, as discussed above, there is no dispute that Rule 23(b)(3) contains an explicit requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." Given the evidentiary record here, which establishes that individualized inquiries are required to determine the method in which putative class members received the fax at issue, denial of class certification is appropriate on this basis as well. *Jeffrey Katz Chiropractic, Inc.*, 340 F.R.D. at 389.

V. There Is No Reason for This Court to Review the Second Question Presented

Petitioner also asks this Court to review the Fourth Circuit's decision that an online fax service is not a "telephone facsimile machine" under the TCPA. Pet. 16-22. This Court has no reason to do so—there is no circuit split; this case does not involve the Hobbs Act deference question at issue in *McLaughlin Chiropractic Associates, Inc. v. McKesson*, No. 23-1226, 2024 WL 4394119 (Oct. 4, 2024) (mem.); and the Fourth Circuit's well-reasoned opinion needs no correction.

1. The circuits are not split on whether an online-only fax services is a "telephone facsimile machine" under the Telephone Consumer Protection Act, 47 U.S.C. § 227.

The decision below does not conflict with the Sixth Circuit's opinion in *Lyngaas v. Curaden AG*, 992 F.3d 412, 426 (6th Cir. 2021). Pet. 16-19. In *Lyngaas*, the Sixth Circuit determined that a "telephone facsimile machine," as defined in the TCPA, "encompasses more than traditional fax machines." 992 F.3d at 425-26. Specifically, the panel discussed "efaxes," which it described as faxes "sent over a telephone line" and then "received on a computer," assuming that the computer was "connected to a printer and to a modem capable of receiving faxes." *Id.* at 426-27. As the Fourth Circuit recognized below, efaxes differ from the online fax services at issue here, because "online fax services receive faxes over the Internet and cannot themselves print any faxes." Pet. App. 14a. The Fourth Circuit correctly concluded that, in light of those differences, *Lyngaas*'s discussion of efaxes had no bearing on this case. *Id.* at 14a n.5.[3]

2. As the Fourth Circuit correctly found, online fax services do not meet the TCPA's definition of a "telephone facsimile machine." Pet. App. 14a. Online fax services cannot "transcribe text or images 'onto paper,'" nor do they have the capacity to receive electronic signals "over a regular telephone line." Pet. App. 14a (quoting 47 U.S.C. § 227(a)(3)(B)).

Contrary to Petitioner's claims, the Fourth Circuit's ruling does not contradict "precedent established by the FCC that the TCPA covers faxes sent to computers in addition to traditional fax machines." Pet. 20 (internal

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[3] Petitioner claims that *Lyngaas*'s reference to the FCC's *AmeriFactors* ruling means that *Lyngaas* extends to online fax services. But *Lyngaas* merely "note[d]" the *AmeriFactors* ruling "[f]or the sake of completeness." 992 F.3d at 427. *Lyngaas* did not say that its discussion of efaxes would apply to online fax services.

quotation marks omitted). Like *Lyngaas*, the FCC's prior ruling addressed faxes received by computers "equipped with, or attached to, modems and to computerized fax servers" and did not "extend to facsimile messages sent as email over the Internet." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14133 (2003). But even if the Fourth Circuit's holding had contravened FCC precedent, Petitioner does not explain why that FCC precedent should receive any deference.

Meanwhile, Petitioner's interpretation of the TCPA is untenable. Petitioner suggests that it does not matter whether online faxes are "telephone facsimile machines" because "[t]he TCPA is not concerned with how the recipient receives the fax." Pet. 21. But Petitioner cannot ignore the TCPA's unambiguous language specifying that, to violate § 227(b)(1)(C), an unsolicited fax must be sent "*to* a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C) (emphasis added); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting." (internal quotation marks omitted)).

3. Finally, it would make little sense to take up the second question presented in light of the Court's grant of certiorari in *McKesson*, 2024 WL 4394119. As Petitioner notes, Pet. 17 n.4, that case looks at whether the FCC's *AmeriFactors* ruling is entitled to deference under the Hobbs Act. Here, the Fourth Circuit based its decision "on the plain statutory language, rather than any sort of deference to the *AmeriFactors* FCC Ruling." Pet. App. 16a. And if the Court decides that the *AmeriFactors* ruling is entitled to Hobbs Act deference, it would moot this question.

Nor is there any reason to hold this petition pending the outcome of *McKesson*. Even if the Court were to hold that deference under the Hobbs Act is inappropriate in that case, it would not affect the decision below, which did not rest on any kind of deference.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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