No. _____

In The
Supreme Court of the United States

HILTON HOTELS RETIREMENT PLAN, HILTON WORLDWIDE, INC., GLOBAL BENEFITS ADMINISTRATIVE COMMITTEE, MARY NELL BILLINGS, S. TED NELSON, CASEY YOUNG, AND UNNAMED MEMBERS OF GLOBAL BENEFITS ADMINISTRATIVE COMMITTEE,

Petitioners,

v.

VALERIE WHITE, EVA JUNEAU, AND PETER BETANCOURT,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN K. YOUNGWOOD
Counsel of Record
JANET A. GOCHMAN
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
212.455.2000
jyoungwood@stblaw.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Federal Rule of Civil Procedure 23(f) sets a "purposefully unforgiving" fourteen-day deadline to file a petition for permission to appeal from an order "granting or denying class-action certification." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715-16 (2019). Although *Nutraceutical* held that there could be no equitable tolling applied to this rule, it left open the question as to when, if ever, the Rule 23(f) fourteen-day time period could, following an initial ruling on class certification, be restarted by a subsequent class certification motion.

The question presented is: Do successive motions for class certification restart the fourteen-day period under Federal Rule of Civil Procedure 23(f) for seeking permission to appeal an order granting or denying class certification?

2. Federal courts use the term "fail-safe" to describe a class whose individual membership only includes those found to have a valid claim against the defendants on the merits.

The question presented is: Does Federal Rule of Civil Procedure 23 permit certification of a "fail-safe" class?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Hilton Hotels Retirement Plan, Park Hotels & Resorts Inc. (formerly known as Hilton Worldwide, Inc.) ("Park Hotels"), Global Benefits Administrative Committee, Mary Nell Billings, S. Ted Nelson, Casey Young, and Unnamed Members of the Global Benefits Administrative Committee.

Respondents are Valerie White, Eva Juneau, and Peter Betancourt, individually and on behalf of all others similarly situated.

In accordance with Supreme Court Rule 29.6, it is hereby stated that Park Hotels & Resorts Inc. is a publicly held company. As a publicly traded company, Park Hotels' stockholders and ownership amounts are constantly changing; however, as of March 2023, the only publicly held entities known to the undersigned to beneficially own 10% or more of Park Hotels (based solely on those entities' most recent Schedule 13G/A filings with the U.S. Securities and Exchange Commission) are The Vanguard Group, Inc., and BlackRock, Inc. Hilton Hotels Retirement Plan is a benefit plan and is not a publicly traded company. Hilton Domestic Operating Company Inc. ("HDOC") is sponsor of the Hilton Hotels Retirement Plan. HDOC is an indirect subsidiary of Hilton Worldwide Holdings Inc. No publicly owned company is known to the undersigned to beneficially own more than 10% of Hilton Worldwide Holdings Inc.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

White v. Hilton Hotels Ret. Plan, Civ. No. 16-856 (Mar. 22, 2022)

United States Court of Appeals (D.C. Cir.):

In re White, No. 22-8001 (Apr. 4, 2023)

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INTRODUCTION

More than three years after the district court first denied class certification and one-and-a-half years after it denied certification for a second time, it rejected Respondents' third attempt to define a class, finding that their definition was (still) unacceptably premised on an eventual merits determination and was thus an impermissible "fail-safe" class. Although the strict fourteen-day window under Federal Rule of Civil Procedure 23(f) for seeking leave to appeal a denial of class certification had long since passed as to both of the first two class certification rulings, the D.C. Circuit granted Respondents leave to appeal from this third order denying certification. It then reversed the district court on the certification issue, holding that a proposed class's fail-safe nature does not inherently bar class certification.

Those holdings deepen two circuit splits on important, recurring questions of class action law, each of which was dispositive to the decision below and each of which warrants this Court's review.

First, the panel held that the district court's third order denying class certification created a fresh fourteen-day window for Respondents to seek leave to appeal under Rule 23(f). In an opinion authored by Judge Millett and joined by Chief Judge Srinivasan and Judge Edwards, the court reasoned that even though class certification had first been denied more than three years earlier, the Rule 23(f) petition was nonetheless timely because the district court had continued

to "wrestl[e] with [the] issue," and the third order reflected that the court had finally "finishe[d] its class-certification decisionmaking," albeit by reiterating its earlier denials. Pet.App.16a.

That decision cannot be squared with the approaches to Rule 23(f) timeliness taken in other circuits. Courts have long recognized that plaintiffs cannot simply evade the fourteen-day deadline by filing successive motions. And although circuits have held that the fourteen-day clock can *sometimes* be restarted by a sufficiently material change to an earlier ruling, the decision below is alone in holding that an order that does no more than *confirm an earlier denial* creates a new chance to seek leave for appeal under Rule 23(f). In so holding, the D.C. Circuit contradicts both the text and the purpose of the Federal Rules, which offer a strictly limited opportunity to seek leave to appeal from a class certification decision and expressly provide that the fourteen-day appeal window cannot be extended. In effect, the decision below allows the Rule 23(f) deadline to be extended repeatedly and indefinitely—an unwarranted interpretation of the Rule's strict wording and intent.

Second, on the merits of class certification, the decision below places the D.C. Circuit on the wrong side of a lopsided split regarding whether Rule 23 categorically forbids "fail-safe" classes. The panel decision did not dispute that the proposed class was a "fail-safe" class, in that its membership could not be determined without resolving the merits of Respondents' individual ERISA claims. And it acknowledged both the

practical and theoretical concerns with such classes. Nonetheless, the panel joined the Fifth Circuit in leaving the door open to fail-safe classes, in direct conflict with eight other circuits that have expressly recognized or spoken favorably of a freestanding prohibition on such classes.

On this issue, too, the D.C. Circuit's decision is incorrect. Fail-safe classes are always impermissible under Rule 23 because they are not sufficiently definite, are inherently unfair to defendants (since putative class members would not be bound by an adverse judgment), and present insurmountable manageability and notice problems for courts.

Both of the panel's holdings raise questions of exceptional importance to class action litigation nationwide. And both issues are squarely presented here, given that reversal of the D.C. Circuit on either issue would be dispositive. This Court should grant certiorari.

OPINIONS BELOW

The D.C. Circuit's order denying Hilton's petition for rehearing en banc (Pet.App.113a) is unreported but available at 2023 WL 3587792. The D.C. Circuit's opinion (Pet.App.1a-30a) is reported at 64 F.4th 302. The March 2022 opinion and order of the district court denying class certification (Pet.App.38a-52a) is unreported but available at 2022 WL 1050570. The October 2020 opinion and order of the district court denying

class certification (Pet.App.53a-76a) is unreported but available at 2020 WL 5946066. The September 2018 order of the district court denying class certification (Pet.App.107a-112a) is unreported.

JURISDICTION

The court of appeals entered judgment on April 4, 2023 (Pet.App.31a-32a), and denied a timely petition for rehearing en banc on May 19, 2023. Pet.App.113a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure are set forth at Pet.App.114a-118a.

STATEMENT

This putative class action was commenced on May 6, 2016, by three former employees or putative beneficiaries of Hilton's retirement plan (the "Plan") alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA") with respect to determinations by the Plan regarding certain vested rights. Over the course of nearly three years, Respondents filed

three successive motions to certify a class, each of which the district court (Kollar-Kotelly, J.) denied.

1. Respondents first moved to certify the class on January 16, 2018. Pls.' Mot. for Class Certification, *White v. Hilton Hotels Ret. Plan*, Civ. No. 16-856 (D.D.C. Jan. 16, 2018), ECF No. 44. On September 28, 2018, the district court denied that motion without prejudice because Respondents had since moved to amend their complaint and, the court reasoned, the decision on the motion to amend would "facilitate [its] inquiry" into whether one of the proposed class representatives satisfied Rule 23. Pet.App.111a.

Respondents did not file a Rule 23(f) petition for permission to appeal this first order denying class certification.

2. In January 2020, Respondents renewed their motion to certify three subclasses of "former or current employees of" Hilton "or the surviving spouses or beneficiaries of former Hilton employees" who "[h]ave vested rights to retirement benefits that have been denied." Pls.' Proposed Order on Class Certification at 1, *White*, Civ. No. 16-856 (D.D.C. Jan. 31, 2020), ECF No. 74-1. On October 7, 2020, the district court denied the renewed motion for class certification without prejudice because Respondents impermissibly sought to establish a fail-safe class in which "membership for each proposed subclass manifests only upon an affirmative merits ruling from the Court." Pet.App.62a. As the court explained, class membership could be ascertained only after a holding on the merits because

"Plaintiffs' class include[d] only those persons who '*have vested rights to retirement benefits that have been denied*.'" Pet.App.60a. And "the question of whose rights have vested is central to the merits of this action." Pet.App.61a.

Again, Respondents chose not to seek permission to appeal under Rule 23(f).

3. Respondents instead filed a third motion for class certification on November 20, 2020, this time proposing a class consisting of persons who "have been denied vested rights to retirement benefits." Pls.' Proposed Order on Class Certification at 1, *White*, Civ. No. 16-856 (D.D.C. Nov. 20, 2020), ECF No. 83-2. The full (proposed) definition is below, blacklined to show Respondents' minor wording changes relative to the prior version:

"[A]ny and all persons who:

(a) Are former or current employees of Hilton Worldwide, Inc. or Hilton Hotels Corp., or the surviving spouses or beneficiaries of former Hilton employees;

(b) Submitted a claim for vested retirement benefits from Hilton under the claim procedures ordered by the District Court and the Court of Appeals in *Kifafi, et al., v. Hilton Hotels Retirement Plan, et al.*, C.A. 98-1517; and

(c) Have **been denied** vested rights to retirement benefits ~~**that have been denied**~~ by the Hilton Defendants':

> (1) [u]se of 'fractional' years of vesting service under an 'elapsed time' method to count periods of employment before 1976 with no resolution of whether the fractions constitute a 'year of service' under ERISA;
>
> (2) [r]efusal to count 'non-participating' service for vesting purposes notwithstanding that the service was with ~~**the 'employer' under ERISA § 3(5)**~~ **a hotel property that Hilton operated under a management agreement**, that the Hilton Defendants counted service at the same 'Hilton Properties' in *Kifafi* and represented to this Court and the D.C. Circuit in *Kifafi* that Hilton had counted 'non-participating' service with Hilton for vesting, and that the 'records requested and received from Defendants [do] not identify any non-participating property that is also not a Related Company'; and
>
> (3) Denial of a retroactive/back retirement benefit payments to heirs and estates on the ~~**sole**~~ basis that the claimants are 'not the surviving spouse' of deceased vested participants."

Pet.App.8a-9a.

The district court denied Respondents' third motion on March 22, 2022. Pet.App.38a-52a. The court explained that the fail-safe "problem remain[ed] the same" because the class was still "defined so that whether a person qualifies as a member depends on whether the person has a valid claim." Pet.App.46a-47a. The court stated that opposition to fail-safe

classes is "rooted in compelling principles of fairness and common-sense" and that to permit them would "contravene the notions of efficiency critical to Rule 23 and the class action mechanism." Pet.App.50a. "Having offered Plaintiffs three opportunities to remedy this problem, each to no avail, the Court shall deny class certification." Pet.App.51a.

4. After failing three times to propose a certifiable class, Respondents filed a Rule 23(f) petition on April 5, 2022. Pls.' Notice of Pet. For Interlocutory Review, *White*, Civ. No. 16-856 (D.D.C. Apr. 5, 2022), ECF No. 89. The district court stayed its proceedings pending resolution of the petition on the ground that the question of "whether a fail-safe class definition is permissible is likely an 'unsettled and fundamental issue of law relating to class actions' " likely to justify appellate review. Pet.App.36a-37a.

Respondents' petition was referred to a merits panel (Pet.App.33a-34a), which heard oral argument focused largely on the timeliness and fail-safe issues. On April 4, 2023, the D.C. Circuit (Millett, J., joined by Srinivasan, C.J. and Edwards, J.) issued its decision finding the petition timely and reversing the denial of class certification. Pet.App.1a-30a.

At the threshold, the panel held the appeal to be timely under Rule 23(f). Pet.App.12a-16a. According to the panel, the third order denying class certification had changed the "status quo" because—given that the first two orders were made without prejudice—"no definitive decision on class certification was made

until the final order on March 22, 2022." Pet.App.14a. In the D.C. Circuit's view, this meant that the March 2022 order marked the moment the district court had "finishe[d] its class-certification decisionmaking." *Id*. The court also observed that Respondents' third motion for class certification had offered a revised class definition that was "considered and rejected for the first time in the March 2022 order." *Id*. As such, the panel held that the March 2022 order restarted Rule 23(f)'s fourteen-day clock for filing a petition. And that, in turn, rendered timely Respondents' petition for appeal. Pet.App.15a-16a.

Turning to the merits, the D.C. Circuit reversed the denial of class certification and remanded the case for further proceedings because the district court "based its denial of class certification entirely on the class's 'fail-safe' character." Pet.App.30a. The panel decision did not question the premise, *viz.*, that the class definition was indeed fail-safe. And the panel recognized the problems other courts have identified with a fail-safe class: "First, if membership in a class depends on a final resolution of the merits, it is administratively difficult to determine class membership early on" and "[s]econd, if the only members of fail-safe classes are those who have viable claims on the merits, then class members either win or, by virtue of losing, are defined out of the class, escaping the bars of *res judicata* and collateral estoppel." Pet.App.26a.

Although the D.C. Circuit found these concerns "understandable," it declined to hold that fail-safe classes are impermissible. Pet.App.26a. Instead, the

court held out the possibility that, in "rare cases," a "truly 'fail-safe' class" could nonetheless "hurdle[] all of Rule 23's requirements." Pet.App.28a-29a. Having ruled on this "important, recurring, and unsettled question of class action law" (Pet.App.17a-18a), the panel remanded to the district court for further proceedings regarding whether the proposed class satisfied Rule 23.

REASONS FOR GRANTING THE PETITION

The decision below breaks with holdings of other circuits on two important and recurring questions of class action law—one procedural, the other substantive. *First*, in sharp contrast with the approaches taken in other circuits, the D.C. Circuit panel found timely a Rule 23(f) petition filed years after the district court first denied class certification, because it was filed within fourteen days of an order denying a successive motion asking the court to revisit the issue. *Second*, the D.C. Circuit reversed the district court for applying a categorical rule against "fail-safe" classes, even though that rule applies in the vast majority of circuits to have considered the issue. This Court should grant certiorari to bring uniformity to these unsettled questions, both of which are cleanly presented here and both of which were incorrectly decided by the D.C. Circuit.

I. This Court Should Resolve Whether Parties Can Restart Rule 23(f)'s Clock By Filing Successive Certification Motions.

Rule 23(f) states that a "court of appeals may permit an appeal from an order granting or denying class-action certification" if "[a] party . . . file[s] a petition for permission to appeal with the circuit clerk within 14 days after the order is entered." Pet.App.118a. The fourteen-day window is mandatory, strict, and "purposefully unforgiving" in order to minimize the disruption caused by interlocutory appeals. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 715-16 (2019) (holding that Rule 23(f)—taken together with Fed. R. App. P. 26(b)—demonstrates "a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline").

Courts generally resist interpretations of the Rule that would allow parties to extend its timeline. The Seventh Circuit, for example, has stated categorically that the time to appeal "under Rule 23(f) cannot be extended by making another motion for class certification." *Asher v. Baxter Int'l Inc.*, 505 F.3d 736, 739 (7th Cir. 2007) (Easterbrook, J.). "The time limit would not be worth anything," that court reasoned, if it could be restarted so easily. *Id*. Other courts have likewise agreed that "the time for appeal will not reset when a court rules on certification motions filed subsequent to the original ruling," at least if "the later rulings do not alter the original ruling." *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291 (11th Cir. 2007) ("[I]n enforcing the deadline of Rule 23(f), what counts

ordinarily is the original order denying or granting class certification, not a later order that maintains the status quo.").

The panel below broke from these other circuits by holding in this case that a new fourteen-day period under Rule 23(f) was triggered by virtue of the district court *reiterating* that it would not certify a class—for the very same reason it had refused to certify on Respondents' previous attempt. At most, other circuits allow a fresh appeal period "[o]nly where the district court certifies a class it previously declined to certify, decertifies an existing class, or changes the composition of an existing class." *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 637 (9th Cir. 2020). The district court here did none of those things; it simply stuck to a decision and reasoning that it had previously labeled as being "without prejudice," this time as applied to a barely modified class definition. By liberalizing the Rule 23(f) timeline to an unprecedented degree, the panel below thus adopted a timing rule that cannot be reconciled with the holding of any other court. That square circuit split is ripe for resolution.

Review here is also warranted. The timeliness of a Rule 23(f) petition is a recurring issue—indeed, the Third Circuit issued a published opinion on the same question just last week. It is also an important issue, as the legal system depends on clear rules to govern deadlines. Such a split will lead to significant uncertainty, leaving parties across the country unsure as to when they should file their 23(f) petitions. There is no doubt that the decision below cleanly presents the

question. And the D.C. Circuit also answered the question incorrectly: A decision that merely adheres to an earlier denial is not itself an order "granting or denying" certification. The panel's contrary ruling is based on flawed reasoning that would permit any party to restart the fourteen-day clock merely by re-filing an already denied class certification ruling. Such permissiveness would defeat the point of this "purposefully unforgiving" deadline. *Nutraceutical*, 139 S. Ct. at 715-16.

A. This Petition Presents a Circuit Split on the Question Presented.

1. The Seventh Circuit's decision in *Asher* dismissed a Rule 23(f) petition in circumstances materially identical to those here.

Asher involved a Rule 23(f) petition filed only after the district court's third denial of class certification. 505 F.3d at 740. Although, as here, the first two denials were without prejudice,[1] the Seventh Circuit concluded that plaintiffs' time to file a Rule 23(f) petition was triggered by the first order denying class certification and "cannot be extended by making another motion for class certification." *Id*. at 739.

Plaintiffs in *Asher* argued that the first and second decisions denying class certification were not

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[1] *See* Minute Entry, *Asher v. Baxter Int'l, Inc.*, No. 02-5608 (N.D. Ill. Nov. 6, 2005), ECF No. 118; Minute Entry, Memorandum and Order, *Asher*, No. 02-5608 (N.D. Ill. Sept. 7, 2006), ECF Nos. 165, 166; *see also Asher*, 505 F.3d at 738-40.

"definitive" and therefore the 23(f) window for appeal had not expired. *Id*. at 740. The Seventh Circuit rejected these arguments, explaining that whether an order was formally a final decision could not be dispositive because "no interlocutory decision is 'definitive'; classes may be certified, modified, or decertified as the case progresses." *Id*. Thus, a rule based on the purported finality of prior orders would "embroil[] circuit courts "in questions such as whether the district judge's ruling was tentative, definitive, or something in between." *Id*. Ultimately, "that would be a formula for paralysis." *Id*.

Nor was the Seventh Circuit any more persuaded by the argument that there were some differences, including a different set of class representatives, among the three certification motions. *Id*. at 738. Although "[d]oubtless the motions were different enough that the district court could not have invoked the law of the case to reject any of them," the court concluded that "the ability to extend the debate about certification in the district court does not mean that the window of opportunity for appellate review must be open indefinitely." *Id*. To the contrary, "[t]he longer this process takes in the district court, the less appropriate is interlocutory review that will prolong the litigation even further." *Id*. at 739.

2. While other circuits have been less categorical than *Asher* in rejecting the prospect that successive class certification motions could restart the Rule 23(f) clock, these courts impose strict limits that cannot be reconciled with the decision below.

The Ninth Circuit, for example, has held that "[o]nly where the district court certifies a class it previously declined to certify, decertifies an existing class, or changes the composition of an existing class—usually by increasing or decreasing its size—will a reconsideration order become appealable." *Walker*, 953 F.3d at 637. In *Walker*, after the district court certified a narrow class but not a broader class, the plaintiffs moved for reconsideration, asking the court to adopt the broader definition. *Id*. at 629. The court denied that motion without prejudice based on a local meet-and-confer requirement that had not been followed, and directed plaintiffs to renew it after complying. *Id*. Plaintiffs filed a renewed motion for reconsideration eight days later. *Id*. The court denied the second motion for reconsideration, this time on the merits, and plaintiffs filed a Rule 23(f) petition fourteen days after this final decision. *Id*.

The Ninth Circuit dismissed that petition as untimely, explaining that plaintiffs' time to appeal was triggered by denial of the first motion for reconsideration and could not be extended by renewing that motion. *Id*. at 635. That was so even though the district court's initial denial of the motion for reconsideration was expressly non-final and was based on a technical procedural rule rather than any consideration of the merits—"that the district court permitted Plaintiffs to re-notice their motion . . . does not translate into the additional right to file a Rule 23(f) appeal petition beyond the fourteen-day period." *Id*. Nor did it matter that "the district court in its reconsideration order

changed its legal analysis," because "it declined to change its original certification order in any way." *Id*. at 636.

In taking this approach, the Ninth Circuit "formally join[ed] [its] sister circuits" by adopting a narrow "material-change/status-quo test" for evaluating when a successive order on class certification could trigger a new appeal window under Rule 23(f). *Id*. The court further explained that "[t]he cases subscribing to that test demonstrate that our sister circuits concern themselves not with the words used in the reconsideration order, but rather with the order's practical effect on the class." *Id*. Changes in legal reasoning or in the degree of "finality," then, are irrelevant under the test applied in these circuits.

Just last week, the Third Circuit addressed this issue, holding "that a modified class certification order triggers a new 23(f) petition period *only when* the modified order *materially alters* the original order." *Wolff v. Aetna Life Ins. Co*., No. 22-8056, 2023 WL 5082238, at *1 (3d Cir. Aug. 9, 2023) (emphasis added). "In assessing materiality," the court elaborated, "substance is more important than form, and our focus is on a revision's 'practical effects on the class.'" *Id*. at *5 (quoting *Walker*, 953 F.3d at 636). A change would be sufficiently "material," then, if "a district court changes the class definition to account for a new theory of liability or decertifies a broad segment of the class." *Id*. If, however, the order "merely reaffirms its prior ruling, . . . then there is no material change," and no

new Rule 23(f) window. *Id*. (alteration and internal quotation marks omitted).

Decisions in the other circuits follow suit, requiring a material and practical change in the scope or certification status of a class before permitting a Rule 23(f) appeal. In the Eighth Circuit, for example, a Rule 23(f) appeal was deemed untimely where "the district court emphatically left the status quo" of "no class certification" as "untouched," even though the plaintiffs had sought consideration of a "much narrower" class than they had originally proposed. *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 765-66 (8th Cir. 2017). As the court reasoned, "if a dissatisfied party could reset the clock simply by coming up with a new way of defining a class and having the district court reject it, Rule 23(f)'s strict time limit for seeking interlocutory review of a class-certification decision would be so easily circumvented as to be practically meaningless." *Id*. at 766.

The Fourth Circuit, too, holds that "the time for appeal will not reset when a court rules on certification motions filed subsequent to the original ruling so long as the later rulings do not *alter the original ruling*." *Nucor*, 760 F.3d at 343 (emphasis added). It is not enough that the court might apply new legal reasoning; the outcome of the order must be a difference in "class-action status." *Id.*; *see also Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (Rule 23(f)'s deadline would be "toothless" if parties could "easily circumvent [the] deadline by filing a motion to amend or decertify the class at any time after the

district court's original order"); *Jenkins*, 491 F.3d at 1290-92 ("If appeal were allowed after later motions, any litigant could effectively defeat the function of [Rule 23(f)'s] limit[.]"); *Carpenter v. Boeing Co.*, 456 F.3d 1138, 1190-91 (10th Cir. 2006) (district court's "refusal to reconsider its prior rulings" on class certification were not appealable orders under Rule 23(f) because "[a]n order that leaves class-action status unchanged . . . is not an order 'granting or denying class action certification' ").

3. The D.C. Circuit permitted a Rule 23(f) petition in circumstances that clearly would not be allowed elsewhere. No other circuit has held that there was a change in the status quo of the class because a subsequent class certification order followed a prior order (or orders), which was non-definitive or entered without prejudice.

Even setting aside Judge Easterbrook's categorical statements in *Asher*, other circuits have made clear that a new Rule 23(f) appeal window is opened only if the district court materially changes the status quo by certifying a class, decertifying a class, or altering the class definition in a material way. *See*, *e.g.*, *Walker*, 953 F.3d at 637; *Wolff*, 2023 WL 5082238, at *5; *Nucor*, 760 F.3d at 343. Other circuits have also made clear that a new period to appeal is not triggered simply by an order that "leaves class action status unchanged from what was determined by a prior order," *Carpenter*, 456 F.3d at 1191, or "merely reaffirms its prior ruling," *Wolff*, 2023 WL 5082238, at *5. Indeed, Respondents acknowledge that the March 2022 order denied class

certification on the *same grounds* as the October 2020 order, despite their immaterial modifications to the class definition. Br. for Pls.-Pet'rs-Appellants at 13-14, *In re White*, No. 22-8001 (D.C. Cir. Aug. 22, 2022) ("The March 22, 2022 Opinion . . . reiterated its discussion of the introductory 'fail safe' language definition from the October 2020 decision.").

To be sure, the D.C. Circuit panel purported to find a change in the "status quo"—but what it meant by that phrase is very different from what the other circuits mean by it. The panel below thought there was a change in the status quo simply because the earlier orders were "without prejudice." Pet.App.13a. As Judge Easterbrook explained, however, *every* class certification order is "without prejudice" in the sense that it is subject to revisitation throughout the case. *See Asher*, 505 F.3d at 740. When other courts have required a change in status quo, they have clarified that they mean a newly certified class, or a decertified class, or a material change to class composition—not just a reaffirmation of an earlier determination. *See*, *e.g.*, *Wolff*, 2023 WL 5082238, at *5. By expanding the notion of a change in status quo to cover any order that revisits and *leaves intact* a prior certification decision, the D.C. Circuit vastly liberalized the inquiry.

B. The Timeliness of a Rule 23(f) Petition Is an Important, Recurring Question.

The D.C. Circuit's novel approach to Rule 23(f) timeliness creates uncertainty as to the appropriate

time to file a Rule 23(f) petition. Under the approach adopted by every other circuit to have considered the issue, a party who is disappointed by the result of an order on class certification is on notice that it must file a Rule 23(f) petition within fourteen days, regardless of the purported finality or basis of the decision. In the D.C. Circuit, however, parties must now guess whether they are better off attempting an immediate appeal from a district court's decision or waiting to see if the district court's ruling can be changed. Litigants in other circuits without clear decisions on this issue also will be left to guess as to when they should file their petitions.

Courts too, will be "embroiled in questions such as whether the district judge's ruling was tentative, definitive, or something in between." *Asher*, 505 F.3d at 740. For example, an order may not expressly state that it is entered "without prejudice," but, nonetheless, a district court may in some other manner indicate its openness to revisit the order at a later date. Under the D.C. Circuit's loose standard, even an offhanded comment by a district court may well affect the timeliness of a petition for appellate review.

Such uncertainty is particularly untenable for a mandatory claims-processing rule like Rule 23(f), where "the most important requirement . . . is not that [the rule] appeal to common sense but that it be clear." *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012, 1013 (7th Cir. 2006). As this Court has explained, "[t]he time of appealability . . . should above all be clear." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). Such

clarity is all the more important for Rule 23(f) given that the time limit is not subject to equitable tolling—a party that makes a mistake, even through no fault of its own, will have no recourse. *Nutraceutical*, 139 S. Ct. at 715.

This issue arises frequently. Even since the D.C. Circuit's decision below, the Third Circuit has addressed this issue, clarifying its rule (and further exposing the circuit conflict). *See Wolff*, 2023 WL 5082238, at *5. Allowing the D.C. Circuit's ruling to stand would only increase the frequency with which this issue will arise, as its approach gives parties an incentive to file successive motions in the district court for the sake of potentially restarting the Rule 23(f) window.

These considerations underscore why the Court should grant review and establish a clear, nationwide rule to govern the timeliness of Rule 23(f) petitions.

C. This Case Is an Ideal Vehicle to Consider the Timeliness of a Rule 23(f) Petition.

This case presents an ideal vehicle for considering the timeliness of a Rule 23(f) petition following a successive class certification motion.

As set forth above, Respondents filed a Rule 23(f) petition after the third denial of class certification, and the D.C. Circuit found the petition timely solely on the basis that the prior denials of class certification were without prejudice and that the third motion had

involved a slightly different class definition. The timeliness issue was argued both in opposition to the Rule 23(f) petition and again before the merits panel. And the issue was squarely addressed by the panel in a published opinion, and resolved as a necessary threshold matter before reaching the underlying merits of the appeal. A ruling in Petitioners' favor on this issue would thus require dismissal of Respondents' Rule 23(f) petition, returning the case to the district court to proceed on the merits consistent with that court's orders on class certification (*i.e.*, as an individual action, without a certified class).

Finally, this case's interlocutory posture should be no barrier to granting certiorari. The issue of whether a Rule 23(f) petition for interlocutory appeal is timely necessarily *always* arises in an interlocutory posture. This Court, too, will necessarily need to adjudicate the timeliness issue in the course of an interlocutory appeal if it ever wishes to resolve this circuit split.

D. The Decision Below Was Incorrectly Decided and Contravenes Rule 23(f).

Although certiorari is warranted regardless, the D.C. Circuit panel got this question wrong.

1. Rule 23(f) provides a strict and "purposefully unforgiving" fourteen-day time limit to appeal from a decision on class certification. *Nutraceutical*, 139 S. Ct. at 716. In *Nutraceutical*, this Court recognized that Rule 23(f) is not subject to equitable tolling, given the "clear intent to compel rigorous enforcement of Rule

23(f)'s deadline." *Id.* at 715. Such rigorous enforcement makes sense, as "interlocutory appeal is an exception to the general rule that appellate review must await final judgment," and thus is ordinarily sharply limited. *Id.* at 716.

The decision below rejects this approach. Rather than being strictly limited by a timeline that courts cannot extend even for compelling equitable reasons, parties could restart the clock at any time by simply filing additional motions—even frivolous motions or those proposing only trivial changes to the class definition. Yet "if a dissatisfied party could reset the clock simply by coming up with a new way of defining a class and having the district court reject it, Rule 23(f)'s strict time limit for seeking interlocutory review of a class-certification decision would be so easily circumvented as to be practically meaningless." *In re Wholesale Grocery*, 849 F.3d at 766.

Rule 23(f)'s text is not designed to allow such gamesmanship. It permits appeal only from an order "granting or denying class-action certification," not from orders that merely *refuse to modify or reconsider* a grant or denial of class certification. Pet.App.118a. However a successive motion is denominated, then, "[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification.'" *Nucor*, 760 F.3d at 343. Here, for example, class certification had *already* been denied long before the March 2022 order—that final order simply *refused to reverse*

the earlier denial. Properly construed, Rule 23(f) does not allow for interlocutory appeal from such a decision.

The situation might be different if the order at issue actually reversed course in some material way—if, for example, the district court initially denied class certification but later granted a renewed motion to certify. Under those circumstances, the order would be one "granting . . . class-action certification" as a matter of substance, not just form. And the potential for abuse would be greatly lessened—parties could not restart the clock with trivial motions, and a party that successfully obtains a material change in a class certification order is unlikely to be the party seeking to appeal it. But here, the district court's March 2022 order simply reaffirmed its own prior decision to deny class certification. For all practical purposes, then, the order was not an order denying class certification, but instead was an order refusing to reconsider the denial of class certification.

2. In its holding to the contrary, the panel offered four primary rationales, none of which is persuasive.

First, the court noted that the first two class certification denials in this case were issued "without prejudice," and thus not definitive. But this ignores the reality that class certification orders are *never* definitive while the case remains pending—classes can be certified, modified, or decertified at any time prior to final judgment. Pet.App.116a (Fed. R. Civ. P. 23(c)(1)(C)). And, as a practical matter, certification orders are often revisited pursuant to Rule 23(c)(1)(C),

regardless of whether they are formally entered with prejudice. That a district court's order granting or denying class certification was not "definitive," then, cannot justify allowing successive motions to reopen the Rule 23(f) petition window, unless *every* successive motion reopens the window meaning that the D.C. Circuit's "exception" swallows the rule. *See Asher*, 505 F.3d at 740.

Second, the court noted that "it was a new class definition that the district court considered and rejected for the first time." Pet.App.14a. But the change to the class definition was not material (a fact that was not disputed by the panel) and, as such, should not have impacted the time to appeal.[2] *See supra* pp.14-19.

Third, the court suggested it would have been premature for Respondents to have appealed from the *first* order denying class certification, because that order lacked reasoning. Of course, that does not explain why they could not appeal from the *second* order, which denied the class on the same fail-safe basis as the third order. In all events, as Judge Easterbrook explained in rejecting this same argument in *Asher*: "[T]hat the district judge failed to supply 'adequate legal analysis' . . . amounts to saying that the time for appeal does not begin until the judge has *cured* all errors! The thing being appealed is the order; a paucity of legal analysis may be a reason to reverse an order

[2] Respondents also revised the definitions of the second and third subclasses, *see supra* pp.4-10, but these revisions were not the basis of the D.C. Circuit's decision. *See* Pet.App.1a-30a; 52a.

but is not a reason to pretend that the judge never entered an order." 505 F.3d at 740. Indeed, there is no guarantee a court will eventually enter an order with detailed reasoning, and there is no way for a litigant to predict whether an initial order on class certification contains "adequate" reasoning to trigger the Rule 23(f) period.

Fourth, the panel reasoned that Rule 23(f) is not intended to intrude on the district court's ability to manage its own docket. That is a non-sequitur for several reasons. For one, the district court never purported to extend the time to file a Rule 23(f) petition. For another, this Court squarely held in *Nutraceutical* that district courts have no authority to "enlarge the period for taking an appeal." 139 S. Ct. at 715; *see also Gutierrez v. Johnson & Johnson*, 525 F.3d 187, 194 n.6 (3d Cir. 2008) ("[T]he District Court . . . did not have the authority to extend the time to file a Rule 23(f) petition."); *Jenkins*, 491 F.3d at 1291-92 (district court had no authority to circumvent the deadline for Rule 23(f) review by vacating and reentering its order denying class certification).

It is no answer that, as the D.C. Circuit claims, neither "Rule 23 nor logic supports requiring the filing of petitions for review before the district court finishes its class-certification decisionmaking." Pet.App.16a (requiring "interlocutory appeal before the district court is even done wrestling with an issue . . . would make little sense"). To the extent a district court has truly not yet reached a decision on class certification, the proper course is simple: do not issue an order on the

motion. District courts are free to "wrestl[e]" with a motion for as long as they need to prior to issuing an order resolving it, but once the judge issues an order, the window for Rule 23(f) appeal opens—and it does not reopen simply because the judge later decides she was right the first time.

In any event, given that Rule 23(c)(1)(C) expressly authorizes the district court to modify class certification decisions throughout the course of litigation, neither parties nor circuit courts can ever be assured that a district court is truly done with its class-certification decision-making—at least, not until final judgment, when the window for appeal does reopen. "Arguments pro and con about class certification then can be made on appeal from the final decision." *Asher*, 505 F.3d at 739. And, of course, if they need to be raised earlier, litigants can seek appeal under 28 U.S.C. § 1292(b), with approval of both the district court and the circuit court. *Id.* at 740.

That the district court in this case may have been "work[ing] through . . . difficult class-certification questions" and intended to give Respondents "a final opportunity" to fix their class definition (Pet.App.14a, 16a) does not change the fact that the court chose to issue an order denying class certification years ago and never altered that decision in any material way. That fact should have been dispositive for purposes of Rule 23(f) timeliness, and the D.C. Circuit erred by reaching the merits of Respondents' appeal.

II. This Court Should Resolve Whether Rule 23 Prohibits Fail-Safe Classes.

Certification of a fail-safe class—one that defines its membership by an ultimate finding on the merits—violates both Rule 23 and fundamental principles of class action litigation. After all, Rule 23(c)(1)(B) provides that an order certifying a class action must, among other things, "define the class." Pet.App.116a. It is hard to imagine a more basic Rule 23 requirement. And Rule 23(c)(1)(A) requires that the court must determine "[a]t an early practical time . . . whether to certify the action as a class action." Pet.App.115a-116a; *see also Mullins v. Direct Digit., LLC*, 795 F.3d 654, 659 (7th Cir. 2015) ("[C]lasses [must] be defined clearly and based on objective criteria."). By definition, though, a "fail-safe" class "cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *see also Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 623 (8th Cir. 2021).

For these reasons, many circuit courts have held that fail-safe classes are categorically impermissible, and others have signaled their disapproval. Prior to the D.C. Circuit's decision below, only the Fifth Circuit had expressly held that fail-safe classes could be certified. This Court should grant certiorari to resolve this circuit split.

A. The Decision Below Exacerbates a Circuit Split on This Issue.

1. At least five circuits expressly prohibit the certification of fail-safe classes.

The Sixth Circuit has long recognized that a class definition's fail-safe nature provides an "*independent ground* for denying class certification" that obviates the need for further analysis of the proposed class. *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (emphasis added). As that court explained, such classes "shield[ ] the putative class members from receiving an adverse judgment" since "[e]ither the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Id*. Because such classes are not "sufficiently definite" to satisfy the requirements of Rule 23(a), they are necessarily "prohibited." *Young*, 693 F.3d at 538.

The First Circuit has adopted the same reasoning, citing the Sixth Circuit's decision in *Young* to explain "the inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015).

In the Seventh Circuit, too, it is "well-settled" that class definitions fail Rule 23 "when class membership [is] defined in terms of success on the merits (so-called 'fail-safe' classes)." *Mullins*, 795 F.3d at 657. Such classes are prohibited in part because, by losing the case, "a class member [may be] defined out of the

class and . . . therefore not bound by the judgment." *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 825 (7th Cir. 2012). Moreover, "[u]sing a future decision on the merits to specify the scope of the class makes it impossible to determine who is in the class until the case ends," *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 895 (7th Cir. 2012), presenting a particular problem where the court is required by Rule 23 to provide notice, or where the court otherwise determines that notice is appropriate.[3]

The Eighth Circuit has also expressly rejected the possibility of fail-safe classes, describing them as "prohibited" and affirming that the fail-safe nature of a class provided "an alternative basis to affirm the denial of class certification." *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019). In acknowledging this rule, the *Orduno* court further noted that a "fail-safe class is also unmanageable, because the court cannot know to whom notice should be sent." *Id.* at 717.

The en banc Ninth Circuit recently reiterated this principle in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, explaining that "[a] court may not . . . create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct." 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc). "Such a class definition is improper

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[3] Notice is required for a class certified under Rule 23(b)(3), but courts also may (and often do) direct appropriate notice to a class certified under Rule 23(b)(1) and (b)(2). *See* Pet.App.114a-115a; *see also*, *e.g.*, *UAW v. GMC*, 497 F.3d 615, 629 (6th Cir. 2007).

because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Id*.

2. Three additional circuits, while not expressly holding that fail-safe classes are prohibited, have implied or signaled as much.

The Eleventh Circuit has declined to require district courts "to ensure that the class definition does not include any individuals who do not have standing before certifying a class" because "[s]uch a rule would run the risk of promoting so-called 'fail-safe' classes." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276-77 (11th Cir. 2019). The section of the class action treatise that the *Cordoba* court relied on in support of this proposition itself opines that a "class cannot be defined solely in terms of the injury being litigated." 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 2:3 (6th ed. 2022). The plain implication is that fail-safe classes are impermissible.

Similarly, the Third Circuit rejected a proposed rule regarding "underinclusiveness" of class definitions in part because "requiring such specificity may be unworkable in some cases and approaches requiring a fail-safe class." *Byrd v. Aaron's Inc*., 784 F.3d 154, 167 (3d Cir. 2015), *as amended* (Apr. 24, 2015). The court cited the Seventh Circuit's decision in *Messner*, which applied a categorical rule against fail-safe classes, to support the undesirability of such classes. *Id*.

Finally, the Fourth Circuit noted when a district court had failed to "address whether it is possible to

define the classes without creating a fail-safe class." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 n.9 (4th Cir. 2014). And like the Third Circuit, it cited the Seventh Circuit's decision in *Messner* to explain the fail-safe issue. *Id*. It then directed the district court to consider the "issue as part of its class-definition analysis." *Id*.

3. Before the decision below, the Fifth Circuit was the lone circuit to have squarely held that a district court can properly certify a fail-safe class. In *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (Higginson, J.), the defendant argued that the bankruptcy court improperly certified a fail-safe class. *Id*. at 369. The Fifth Circuit did not dispute that the "class definition [was] framed as a legal conclusion." Nonetheless, the court concluded that its "precedent rejects the fail-safe class prohibition" recognized in other circuits, and so affirmed the certification order. *Id*. at 370. According to the Fifth Circuit, the objection that such classes are "not defined with sufficient specificity" is "meritless and, if accepted, would preclude certification of just about any class of persons alleging injury from a particular action." *Id*. Thus, so long as the class members were "linked by [a] common complaint," the fail-safe nature of the class was irrelevant. *Id*.

Unlike the Fifth Circuit, the decision below acknowledges the real concerns with certifying a fail-safe class: namely, the administrative hurdles to providing class notice, and the one-way ratchet for putative class members on preclusion. Pet.App.25a-30a. Yet, notwithstanding these concerns, the D.C. Circuit reasoned that "a fail-safe class definition is only truly

troubling to the extent it hides some concrete defect with the class" under some other requirement of Rule 23. Pet.App.26a. It thus rejected a rule against fail-safe classes, concluding it was at least theoretically possible that "a truly 'fail-safe' class [could] hurdle[ ] all of Rule 23's requirements." Pet.App.28a.

B. This Question Warrants Review.

As the D.C. Circuit acknowledged, the question presented is "a fundamental issue of law relating to class actions" and of exceptional legal importance. Pet.App.10a. Decisions on class certification are often critical to the outcome of a case. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 29 (2017) ("Just as a denial of class certification may sound the death knell for plaintiffs, '[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.' "). Given the extreme importance of a class certification, the legal principles governing lower courts' certification decisions, including the question presented here, are of substantial significance.

Whether a class is impermissibly fail-safe is also an issue confronted frequently by courts throughout the country. Since *Rodriguez* in 2012, there have been no less than sixteen circuit court decisions discussing fail-safe classes, each of which has approvingly referenced a rule prohibiting such classes. District courts, which regularly confront the issue of a fail-safe class,

thus routinely issue decisions that turn on the conflicting rules of their respective circuits. *Compare, e.g.*, *Beck v. Cuyahoga Cnty*., No. 19-CV-818, 2022 WL 4363562 (N.D. Ohio Sept. 16, 2022) (denying class certification solely because Plaintiff proposed fail-safe definition), *with ODonell v. Harris Cnty*., No. 16-CV-1414, 2017 WL 1542457 (S.D. Tex. Apr. 28, 2017) (certifying a proposed fail-safe class over defendant's objections because the class members were "similarly linked by a common complaint"). This patchwork of results can and will promote forum shopping; plaintiffs will have the opportunity to select a district court based on the circuit's view of fail-safe classes.

C. This Case Presents an Ideal Vehicle for Considering Fail-Safe Classes.

This case is an ideal vehicle for the Court to consider whether Rule 23 permits certification of fail-safe classes. The issue was undoubtedly dispositive here: The district court rejected the proposed class based on its understanding that fail-safe classes are impermissible, and the D.C. Circuit reversed after rejecting that legal premise. In its decision, the D.C. Circuit never questioned the district court's ruling that the class at issue qualifies as a fail-safe class; instead, its holding focuses entirely on the legal question whether such classes are ever permissible.

The interlocutory posture of this decision should again serve as no bar to reaching the question presented. As the D.C. Circuit explained below, "the fail-

safe concern—however cogent at the class certification stage—becomes muddied, or, at minimum, substantially diluted" by the time of final judgment. Pet.App.22a. Thus, virtually every circuit court decision addressing the fail-safe issue has done so "on interlocutory appeals from grants or denials of class certification." Pet.App.23a.

C. The Decision Below Is Incorrect.

The D.C. Circuit concluded that identifying a class as fail-safe is not enough to deny certification; such a class could still "hurdle[] all of Rule 23's requirements" and thus be certified. Pet.App.28a-29a. That is incorrect. No fail-safe class can satisfy Rule 23's requirements, and identifying a class as fail-safe is therefore enough to deny certification in its own right.

1. Rule 23(c)(1) requires that, at "an early practicable time," the court determine whether to certify a class and, if it does so, "must define the class." Pet.App.115a-116a. A fail-safe class, however, cannot be defined until a final resolution on the merits. *See*, *e.g.*, *Bolden*, 688 F.3d at 895 ("Using a future decision on the merits to specify the scope of the class makes it impossible to determine who is in the class until the case ends."). Such classes are thus not "sufficiently definite" to satisfy Rule 23(c)(1). *Young*, 693 F.3d at 538.

Further, a fail-safe class definition deprives a court of the ability to comply with Rule 23(c)(2), which mandates notice to members of Rule 23(b)(3) classes upon certification and allows for notice to members of

Rule 23(b)(1) and (b)(2) classes. After all, if a class's membership is defined by a merits decision, "the court cannot know to whom notice should be sent." *Orduno*, 932 F.3d at 717.

Fail-safe classes also violate Rule 23(c)(3), which requires that "[w]hether or not favorable to the class, the judgment in a class action must" include and describe those "whom the court finds to be class members." Pet.App.117a. Rule 23(c)(3) was proposed in 1966 to exclude "one-way intervention" in "'spurious' actions." Fed. R. Civ. P. 23(c)(3) advisory committee note to 1966 amendment. Prior to that time, some courts had allowed individuals to intervene and join a class action "after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision." *Id*. (emphasis omitted). A fail-safe class presents precisely the same issues as one-way intervention, and thus contravenes both the letter and spirit of Rule 23(c)(3).

In addition to being required by the text of Rule 23, the rule against fail-safe classes furthers its purposes. The goal of a class action is to provide an efficient mechanism to adjudicate a substantial number of similar claims. *See* Pet.App.114a-115a (Fed. R. Civ. P. 23(b)(3)). A fail-safe class undermines the efficiencies that a class action seeks to generate. A merits ruling against a fail-safe class would not resolve any claims. By virtue of losing on the merits, the fail-safe class would contain zero members and, therefore, no person would be bound by the adverse judgment. Any person

who could have been included in the class (had they prevailed on the merits) would be free to bring a new lawsuit. Not only would this reveal the entire fail-safe class litigation as a waste of judicial resources, but it would also be "palpably unfair" to defendants, who would not get the benefit of *res judicata*. *Kamar v. Radio Shack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010). There would be no way for a defendant to win against a fail-safe class—either they lose on the merits or, by winning on the merits, hollow out the class and eliminate any beneficial preclusive effect. *Messner*, 669 F.3d at 825.

2. The D.C. Circuit's contrary reasoning is unpersuasive. The court faulted the district court for purportedly relying "on a stand-alone and extra-textual rule against 'fail-safe' classes, rather than applying the factors prescribed by" Rule 23(a). Pet.App.24a-25a. But that reflects a misunderstanding of the role of a categorical rule against fail-safe classes: far from being an "extra-textual rule" "untethered" from the requirements of Rule 23, the categorical rule applied in other circuits simply recognizes the *necessary consequences* of applying Rule 23's requirements. *See supra* pp.29-32.

The D.C. Circuit's concern that the rule against fail-safe classes would provide "potentially disuniform criterion, the contours of which can vary from case to case," makes no sense. Pet.App.26a-27a. A bright-line rule prohibiting certification of fail-safe classes provides a concrete and clear principle, and has not resulted in confusion in the circuits that have long

recognized such a rule. The contours of a fail-safe class are simple—courts are readily able to discern if a class definition requires resolving the merits to determine membership. *See*, *e.g.*, *Randleman*, 646 F.3d at 352 (denying certification for a class of individuals "entitled to relief"); *Ford*, 995 F.3d at 624 (denying class certification for a class of customers "who were harmed" by defendants' business practices).

If anything, it is the D.C. Circuit's approach—one that recognizes the shortcomings of fail-safe classes, and encourages but does not require district courts to exercise their jurisdiction to consider redefining them—that will sow disuniformity and confusion.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

NICHOLAS J. PRENDERGAST*
SIMPSON THACHER & BARTLETT LLP
900 G Street NW
Washington, DC 20001

JONATHAN K. YOUNGWOOD
Counsel of Record
JANET A. GOCHMAN
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
212.455.2000
jyoungwood@stblaw.com

Counsel for Petitioners

* Admitted in Maryland. Practice in the District of Columbia supervised by members of the D.C. Bar as required by D.C. App. R. 49(c)(8).