No. 24-1158

In the Supreme Court of the United States

CAROL A. LEWIS, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, JR.,
SECRETARY OF HEALTH AND HUMAN SERVICES

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed an appeal of an order denying class certification for lack of jurisdiction where the named plaintiffs' claims had been resolved in their favor and plaintiffs disclaimed any continuing personal stake in the litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules:

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 111 F.4th 65. The opinion of the district court (Pet. App. 20a-55a) is available at 2022 WL 1262122. A subsequent opinion of the district court (Pet. App. 56a-92a) is available at 2023 WL 3884595.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2024. A petition for rehearing was denied on January 7, 2025 (Pet. App. 95a-101a). On April 1, 2025, the Chief Justice extended the time to file a petition for a writ of certiorari until May 7, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Medicare is a federal health-insurance program for the elderly and disabled that is administered by the Centers for Medicare & Medicaid Services (CMS) in the Department of Health and Human Services (HHS). See 42 U.S.C. 1395 *et seq.*; *Becerra* v. *Empire Health Foundation*, 597 U.S. 424, 428-429 (2022). A Medicare beneficiary dissatisfied with a benefits determination may, after exhausting administrative remedies, seek judicial review by filing a civil action within 60 days of a final administrative decision. See 42 U.S.C. 405(g), 1395ff(b)(1)(A); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976).

This case concerns Medicare coverage of continuous glucose monitors for diabetic patients. Petitioners are two Medicare beneficiaries with diabetes whose claims for continuous glucose monitors between 2015 and 2017 were denied. See Pet. App. 3a-4a, 25a-26a & n.4. After exhausting administrative review, petitioners timely filed suit in 2018, and in 2020 moved to certify a class of "'all persons who submitted claims for coverage of continuous glucose monitor equipment or supplies whose claims were denied (and not later reversed on appeal) since December 13, 2012'—regardless of whether these individuals had exhausted administrative remedies or timely sought judicial review." *Id.* at 4a (brackets and citation omitted); see *id.* at 25a, 28a.

The district court denied class certification. Pet. App. 20a-55a. The court held that categorically waiving the exhaustion requirement or tolling the limitations period for claimants was unwarranted given the circumstances. *Id.* at 40a-46a; see *Bowen* v. *City of New York*, 476 U.S. 467 (1986). As a result, the court found that the class would include only 17 putative class members

(not including the two named plaintiffs) with claims that were both administratively exhausted and timely, and that petitioners "do not contest this number." Pet. App. 51a. The court explained that the class was therefore too small to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). Pet. App. 50a-53a.

b. After the denial of class certification, the government moved for partial entry of judgment in petitioners' favor, based on intervening developments. See Pet. App. 4a. In November 2020, while the case was pending, CMS published a proposed rule that would allow Medicare coverage of continuous glucose monitors. 85 Fed. Reg. 70,358 (Nov. 4, 2020). The proposed rule was finalized in December 2021 and became effective in February 2022. 86 Fed. Reg. 73,860 (Dec. 28, 2021). And in May 2022, the CMS Administrator issued a ruling formally rescinding a prior 2017 ruling that had excluded continuous glucose monitors from coverage. See Pet. App. 3a. In light of the new regulation and CMS ruling, the government paid petitioners' claims in full. See *id.* at 62a-63a. The district court thus entered judgment in favor of petitioners on their individual claims challenging the denial of coverage, vacated the administrative decisions denying coverage, and dismissed petitioners' remaining claims as moot. *Id.* at 93a-94a.

Petitioners appealed, but "d[id] not challenge any aspect of their favorable merits judgment" or the dismissal of their remaining claims. Pet. App. 5a. Instead, they sought to "challenge only the denial of their motion for class certification." *Ibid.*

2. The court of appeals dismissed the appeal for lack of jurisdiction, holding that petitioners lacked Article III standing to challenge the denial of class certification

given the judgment in their favor on the individual claims. Pet. App. 1a-19a.

The court of appeals observed that "in a federal appellate court, an appellant must show a concrete and particularized injury 'fairly traceable to the *judgment below*' and likely to be redressed by a favorable ruling on appeal." Pet. App. 6a (citation omitted). The court concluded, however, that petitioners' "abstract interest in serving as class representatives" was "insufficient to satisfy Article III." *Id.* at 19a. The court explained that in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), this Court held that named plaintiffs whose individual claims were resolved favorably on the merits had appellate standing to challenge the denial of class certification because they retained a "'personal stake in the appeal'" arising from their desire "to shift part of their litigation costs" to the class. Pet. App. 6a-7a (citation omitted).

The court of appeals explained that unlike in *Roper*, petitioners had no such personal stake in appealing the denial of class certification. The court observed that petitioners had expressly "disavowed any theory of standing based on the possible recovery of costs or fees from absent class members"; "declined to press any theory of standing based on the possible recovery of increased fees from the government"; and "d[id] not claim standing as next friends of other diabetic Medicare beneficiaries." Pet. App. 10a-11a & n.2. Instead, the court noted, petitioners "allege[d] only one injury—losing the asserted right to represent the interests of absent class members." *Id.* at 10a. The court explained that petitioners' alleged injury was "a 'bare procedural violation, divorced from any concrete harm' to [petitioners]," and thus insufficient to support Article III standing. *Id.* at

11a (quoting *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 341 (2016)).

The court of appeals acknowledged this Court's holding in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), that "a prisoner could appeal a denial of class certification even after his release had mooted his individual claim." Pet. App. 12a. But the court of appeals explained that unlike the prisoner's claim in *Geraghty*, petitioners' claims here were not mooted, but instead resolved in their favor. The court thus concluded that "*Roper*—not *Geraghty*—is the directly controlling precedent." *Id.* at 16a. The court also observed that "*Geraghty*'s reasoning—reducing constitutional standing to a functionalist concern about adversary presentation—does not reflect current law." *Id.* at 14a. Accordingly, the court acknowledged that though it "remain[ed] bound by *Geraghty*'s specific holding," *Roper* was the more relevant precedent. *Id.* at 16a.

The court of appeals acknowledged (Pet. App. 12a-13a) that its decision departed from the Second Circuit's decision in *Jin* v. *Shanghai Original, Inc.*, 990 F.3d 251 (2021), which held that a named plaintiff who prevailed on his individual claim at trial had standing to appeal a pretrial order decertifying the class because he had an interest "akin to the interest of a private attorney general" in "deterring misconduct through private enforcement of vital public policies," *id.* at 259. But the court viewed *Jin* as unpersuasive because the Second Circuit improperly read *Roper*'s reliance on the plaintiff's independent personal stake in the class (namely, the interest in shifting the costs of litigation) as setting forth merely a *sufficient* condition of standing to appeal a denial of class certification, rather than a *necessary* one. Pet. App. 12a-13a.

3. The court of appeals denied rehearing en banc with no noted dissents and no calls for a vote. Pet. App. 95a-101a. Judge Pillard concurred in the denial of rehearing, observing that the panel's decision "will likely have only limited precedential impact." *Id.* at 97a. She explained that "[i]n most cases—unlike in this case—parties owing fees may arrange to share that obligation with the unnamed class members" such that the named plaintiffs would have appellate standing under *Roper*; counsel for a proposed class could "request interlocutory review of a denial of class certification under Rule 23(f)"; or counsel could "recruit other putative class members to substitute or intervene post-judgment to appeal the denial of class certification." *Id.* at 101a. Judge Pillard further observed that because petitioners' claims "were mooted by a generally applicable change in policy," this case "does not present the concern that defendants have attempted to 'pick off' the named plaintiffs before a class can be certified." *Id.* at 97a.

ARGUMENT

Petitioners ask this Court to review their contention (Pet. 12-37) that they have standing to appeal the denial of class certification notwithstanding the entry of judgment in their favor and the lack of any continuing personal stake in the class's claims. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court, including *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980). Petitioners also overstate the conflict with decisions of other courts of appeals. And the decision below lacks prospective importance because petitioners failed to avail themselves of longstanding and well-known methods to preserve putative class repre-

sentatives' ability to seek appellate review of an order denying class certification. This Court's review is unwarranted.

1. a. The Constitution "denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' and confines them to resolving 'real and substantial controversies admitting of specific relief.'" *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (brackets and citations omitted). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). The standing requirement must therefore "be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id.* at 64. An appealing litigant "must demonstrate that it has suffered an actual or imminent injury that is 'fairly traceable' to the judgment below" and that "a favorable ruling from [the appellate court] would redress [that] injury." *Food Marketing Institute* v. *Argus Leader Media*, 588 U.S. 427, 432-433 (2019) (citation omitted).

This Court most relevantly addressed the standing of plaintiffs to challenge the denial of class certification in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980). There, after the district court denied class certification, the defendant tendered the maximum amount that each of the putative class representatives could have recovered in the suit, and on that basis the court entered judgment in the plaintiffs' favor, over their objection. See *id.* at 327-330. This Court explained that where "appropriate," a prevailing party may appeal "an adverse ruling collateral to the judgment on the merits, * * * so long as that party retains

a stake in the appeal satisfying the requirements of Art[icle] III." *Id.* at 334. The Court observed that the plaintiffs in *Roper* had such a "personal stake in the appeal"—namely, "their desire to shift the successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Id.* at 334 n.6; see *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 78 (2013) (explaining that the plaintiffs in *Roper* "possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment").

The court of appeals here correctly applied *Roper* in holding that petitioners lack appellate standing because they have no cognizable stake in appealing the denial of class certification, given the favorable judgment on their individual claims. Pet. App. 10a-12a. Unlike the plaintiffs in *Roper*, petitioners have expressly "disavowed any theory of standing based on the possible recovery of costs or fees from absent class members." *Id.* at 10a. Petitioners likewise have "declined to press any theory of standing based on the possible recovery of increased fees from the government." *Ibid.* And they "do not claim standing" under third-party standing doctrines. *Id.* at 11a n.2.

Instead, each petitioner asserted only "the mere desire to serve as a class representative" as the relevant interest. Pet. App. 10a. The court of appeals correctly rejected that interest as a cognizable "stake in the appeal satisfying the requirements of Art[icle] III," *Roper* 445 U.S. at 334. As the court observed, even "[i]f HHS now reimbursed all absent class members, it would benefit [petitioners] 'no more directly and tangibly' than it would benefit 'the public at large,'" thus rendering their "continued discontent with the denial of class certifica-

tion" simply "a 'generally available grievance about the government.'" Pet. App. 10a (brackets and citations omitted). The court likewise appropriately rejected any interest in correcting an "alleged misapplication of Rule 23" to establish appellate standing. *Id.* at 11a. As the court explained, any "alleged misapplication of Rule 23 was a 'bare procedural violation, divorced from any concrete harm' to [petitioners]—which cannot support their standing." *Ibid.* (quoting *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 341 (2016)).

b. Contrary to petitioners' assertion, the decision below does not conflict with *Geraghty*, *supra*. There, the Court held that a prisoner had standing to appeal the denial of class certification even after his own claim had become moot during the pendency of the appeal because of his release from prison. 445 U.S. at 397-407. The Court relied on two rationales, both of which it justified on the ground that the Court no longer adhered to a "strict, formalistic perception of Art[icle] III," as evidenced by the decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968). *Geraghty*, 445 U.S. at 404 n.11.

First, the Court noted that *Sosna* v. *Iowa*, 419 U.S. 393 (1975), had already "held that mootness of the named plaintiff's individual claim *after* a class has been duly certified does not render the [class] action moot." *Geraghty*, 445 U.S. at 397. The Court explained that under "a 'relation back' approach," the same should be true if the named plaintiff's claim becomes moot after class certification is erroneously denied, especially when (as in *Geraghty*) the claims are "inherently transitory," such that "the trial court [might] not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Id.* at 398-399; see *id.* at 406-407 n.11.

Second, the Court stated that the putative class representative has a sufficient personal stake in the class claims in the form of a procedural "right to have a class certified if the requirements of the Rules are met." *Geraghty*, 445 U.S. at 403. The Court acknowledged that "[t]his 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Ibid.* The Court also acknowledged that "[a] 'legally cognizable interest' * * * in the traditional sense rarely ever exists with respect to the class certification claim." *Id.* at 402 (citation omitted). But the Court justified its holding on the ground that *Sosna* "[i]mplicit[ly]" determined that "vigorous advocacy can be assured through means *other than* the traditional requirement of a 'personal stake in the outcome.'" *Id.* at 404 (emphasis added).

Neither rationale is applicable here, and the second one in particular has been undermined by subsequent case law. Unlike *Sosna* or *Geraghty*, this case does not involve a named plaintiff's claim that became moot after the certification decision, much less an inherently transitory claim. Instead, like *Roper*, it involves a claim that was resolved in the plaintiff's favor on the merits. The court of appeals thus correctly determined that "*Roper*—not *Geraghty*—is the directly controlling precedent for assessing whether plaintiffs who have prevailed on the merits may appeal a denial of class certification." Pet. App. 16a.

After all, there is a meaningful difference between an individual claim that has been resolved favorably on the merits and one that has become moot. This Court has held that mootness is less stringent than Article III standing, see *Friends of the Earth, Inc.* v. *Laidlaw En-*

vironmental Services (TOC), Inc., 528 U.S. 167, 192 (2000), and *Geraghty*'s reference to inherently transitory claims and well-known exceptions to mootness, see 445 U.S. at 398-399, suggest that the Court in *Geraghty* might have viewed a named plaintiff as still having a sufficient cognizable personal stake in the lawsuit even where his individual claim is no longer viable because of happenstance. Cf. *id.* at 400 (relying on "the flexible character of the Art[icle] III mootness doctrine"). No analogous circumstance or flexibility would justify finding a continuing personal stake where the plaintiff has prevailed on the merits and received all the relief that was requested on the individual claim, absent an independent interest like the financial one in *Roper*.

Petitioners thus err in attempting to extend *Geraghty*'s "relation back" rationale to this case. Indeed, *Geraghty* itself disclaimed addressing situations where the named plaintiff "settles the individual claim after denial of class certification," 445 U.S. at 404 n.10—even though as a logical matter the relation-back principle would seem to apply equally there (especially since the denial of class certification itself may have induced the settlement). *A fortiori*, *Geraghty* should not be extended to situations directly covered by *Roper*, which was decided on the same day.

As for *Geraghty*'s second rationale, the court of appeals correctly determined that it "does not reflect current law." Pet. App. 14a. Since *Geraghty*, the Court has repeatedly made clear that a "bare procedural violation, divorced from any concrete harm," does *not* "satisfy the injury-in-fact requirement of Article III." *Spokeo*, 578 U.S. at 341; see *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 440 (2021) (same); *Summers* v. *Earth Island Institute*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a proce-

dural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing."); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) (only a "person who has been accorded a procedural right to protect his concrete interests" can rely on that right for standing; "persons who have no concrete interests affected" cannot rely on procedural rights).

Geraghty itself acknowledged that the bare procedural "'right'" to have a class certified is *not* "the type of interest traditionally thought to satisfy the 'personal stake' requirement" of Article III, 445 U.S. at 403, and the Court's subsequent case law has confirmed that the requirement cannot be dispensed with. *E.g.*, *TransUnion*, 594 U.S. at 440; *Spokeo*, 578 U.S. at 341; *Summers*, 555 U.S. at 496. *Geraghty* thus cannot be read to support petitioners' standing to vindicate a bare procedural interest in "the asserted right to represent the interests of absent class members," Pet. App. 10a. Petitioners rely (Pet. 28) on *Geraghty*'s dictum that the prisoner's "'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*," 445 U.S. at 401. But that dictum is plainly incorrect, given that the class representatives in *Roper* had a direct financial stake in shifting litigation costs, while the prisoner in *Geraghty* asserted only the procedural injury.

At all events, *Geraghty* acknowledged that "the approach to take in applying Art[icle] III is issue by issue"; that "[a]pplication of the personal-stake requirement to a procedural claim, such as the right to represent a class, is not automatic or readily resolved"; and that a "'legally cognizable interest'" "in the traditional sense rarely ever exists with respect to the class certi-

fication claim." 445 U.S. at 401-402 (citation omitted). The Court in *Geraghty* may have viewed the prisoner's claim as one of those "rare[]" cases, *id.* at 402, and the court of appeals here recognized that it was "bound by *Geraghty*'s specific holding," Pet. App. 16a. But that does not justify extending *Geraghty* to different situations and thereby converting what *Geraghty* itself thought would be a rare occurrence into a commonplace.

2. Petitioners contend (Pet. 31-35) that the decision below conflicts with decisions from other courts of appeals. Although petitioners significantly overstate the conflict, they are correct that the decision below conflicts with decisions from the Second and Tenth Circuits. Nevertheless, that minor conflict does not warrant this Court's review.

As the court of appeals here acknowledged (Pet. App. 12a-17a), the decision below conflicts with the Second Circuit's decision in *Jin* v. *Shanghai Original, Inc.*, 990 F.3d 251 (2021), which held that a named plaintiff could appeal from a pretrial order decertifying a class after prevailing on his individual claims at trial. *Id.* at 256, 259-260. But as the court explained (Pet. App. 12a), *Jin* erroneously read *Roper*'s reliance on the named plaintiff's personal stake in class certification as merely setting forth a sufficient, rather than necessary, condition of standing. See *Jin*, 990 F.3d at 258. At the same time, *Jin* incorrectly relied on the plaintiff's supposed "'right to have a class certified if the requirements of Rule 23 are met,'" which it viewed as being "akin to the interest of a private attorney general" in "deterring misconduct through private enforcement of vital public policies." *Id.* at 259 (brackets and citation omitted). As noted, that purely procedural interest is incompatible

with modern standing doctrine. At a minimum, the narrow circuit conflict created by *Jin*'s outlier holding and reasoning would benefit from further percolation.

In addition, the Second Circuit in *Jin* pointed out that the district court there had *sua sponte* decertified the class on the eve of trial, and that although the named plaintiff proceeded to trial (and prevailed) on his individual claims, he *also* timely filed a Rule 23(f) petition for interlocutory review of the decertification order. 990 F.3d at 256, 260 n.13. Had the Second Circuit granted that petition, nobody doubts that it would have had jurisdiction to address the plaintiff's challenge to the decertification order. But the Second Circuit denied the petition as "unnecessary" and instead construed it as a notice of appeal from the final judgment. *Id.* at 260 n.13. The Second Circuit did not deem those circumstances to be "determinative," *ibid.*, but they further indicate that *Jin* is an outlier that does not give rise to a square conflict warranting this Court's review.

Nor does the conflict with the Tenth Circuit's 40-year-old decision in *Reed* v. *Heckler*, 756 F.2d 779 (1985), warrant further review. *Reed* forthrightly acknowledged that it was "extend[ing] *Geraghty*," not merely applying it. *Id.* at 786. *Reed*, moreover, reasoned that Article III was satisfied "[s]o long as the claims of the unnamed plaintiffs are presented in a sufficiently adversarial relationship to sharpen the issues," irrespective of the named plaintiff's personal stake in the matter. *Id.* at 787. That reasoning is flatly inconsistent with modern standing doctrine. See, *e.g.*, *Spokeo*, *supra*. Petitioners offer no basis to believe that, if presented with the issue afresh, the Tenth Circuit would adhere to *Reed*. Cf. *Belveal* v. *Heckler*, 796 F.2d 1261,

1265 (10th Cir. 1986) (acknowledging that *Reed* "extended *Geraghty*" and refusing to "further extend[]" it).

Petitioners err in asserting any broader conflict beyond *Jin* and *Reed*. Contrary to petitioners' assertion (Pet. 33-35), the decision below does not conflict with decisions from the Third, Seventh, Eleventh, or D.C. Circuits. *Lusardi* v. *Xerox Corp.*, 975 F.2d 964 (3d Cir. 1992), and *Cameron-Grant* v. *Maxim Healthcare Services, Inc.*, 347 F.3d 1240 (11th Cir. 2003) (per curiam), cert. denied, 541 U.S. 1030 (2004), held that plaintiffs who settled their claims could *not* challenge the denial of class certification and the denial of a motion to proceed as a collective action, respectively. *Lusardi*, 975 F.2d at 973-984; *Cameron-Grant*, 347 F.3d at 1244-1249. Neither holding conflicts with the decision below. *Culver* v. *City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), simply applied *Geraghty* in a case where the named plaintiff's claim had become moot—not, as here and in *Roper*, where the plaintiff's claim was favorably resolved on the merits. See *id.* at 910. And in *Richards* v. *Delta Air Lines, Inc.*, 453 F.3d 525 (D.C. Cir. 2006), the court of appeals relied on the named plaintiff's continued "interest in shifting attorney fees and other litigation costs" to the class, *id.* at 529—*i.e.*, the very interests on which *Roper* relied and which petitioners in this case have expressly *disclaimed*, see Pet. App. 10a. Besides, any intracircuit conflict would not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. At all events, the question presented does not warrant this Court's review because it is of "only limited precedential impact." Pet App. 97a (Pillard, J., concur-

ring in the denial of rehearing en banc). The decision below acknowledged that, under *Roper*, named plaintiffs will have standing to appeal the denial of class certification if they retain a monetary interest in the case, such as "in spreading costs to absent putative class members" or, possibly, "increas[ing] their expected fee award" under the Equal Access to Justice Act. *Id.* at 18a.

Judge Pillard explained that "[i]n most cases," named plaintiffs "owing fees may arrange to share that obligation with the unnamed class members," thereby ensuring that they have the type of personal stake in the denial of class certification that *Roper* recognized. Pet. App. 101a. At the same time, if the named plaintiffs do not retain that kind of personal stake, their "possible difficulty in pursuing a final-judgment appeal may strengthen their case for discretionary interlocutory review under Federal Rule of Civil Procedure 23(f)." *Id.* at 19a; see *id.* at 101a (Pillard, J., concurring in the denial of rehearing en banc). And if that fails, counsel may seek to represent absent class members to intervene post-judgment in order to appeal the denial of class certification. *Ibid.*; see *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394-396 (1977) (holding that the district court should have granted a putative class member's motion to intervene filed after final judgment for the purpose of appealing the earlier denial of class certification). As Judge Pillard observed, those longstanding, well-known, and easily employed methods for putative class representatives to retain a sufficient personal stake in the class certification decision, even when their individual claims are resolved on the merits, greatly minimize the prospective importance of the decision below. See Pet. App. 97a, 101a.

Petitioners' policy concerns (Pet. 36-37) are misplaced. The decision below will not discourage attorneys from becoming class counsel; rather, it will ensure that counsel take one or more of the steps just outlined to ensure that some party, whether a named plaintiff or an absent plaintiff-intervenor, has standing to appeal any order denying class certification (or decertifying a previously certified class). The failure of petitioners' counsel in this case to take such readily available steps is hardly a reason for this Court to step in to address a policy concern that will rarely if ever materialize in the future.

Additionally, "because the named plaintiffs' claims were mooted by a generally applicable change in policy, this case does not present the concern that defendants have attempted to 'pick off' the named plaintiffs before a class can be certified." Pet. App. 97a (Pillard, J., concurring in the denial of rehearing en banc). Under the new policy, HHS paid the Medicare claims of all beneficiaries whose claims had been denied under the prior policy and whose Medicare claims or appeals were still pending. See C.A. App. 602-603. As a result, any unnamed plaintiffs with pending claims or appeals, or whose claims were fully exhausted and for whom the time to seek judicial review had not yet run, were entitled to the same payments as petitioners.

4. Finally, this case is a poor vehicle in which to address the question presented because petitioners would not obtain any meaningful benefit even if that question were resolved in their favor. The district court was plainly correct in denying class certification. The proposed class fell far short of meeting the numerosity requirement of Rule 23(a)(1) because it contained only 17 unnamed class members whose claims were exhausted

and timely. Pet. App. 51a. Petitioners "d[id] not contest this number." *Ibid.* Instead, petitioners previously argued that the district court should have certified a class that included individuals with unexhausted or untimely claims. See *id.* at 37a. But such claimants could not possibly satisfy the commonality and typicality requirements of Rule 23(a)(2) and (3), and petitioners have established no basis to suggest that exhaustion should categorically be waived or the limitations period categorically tolled. Cf. *Bowen* v. *City of New York*, 476 U.S. 467 (1986) (class including individuals with untimely or unexhausted claims could be certified only because, in the circumstances of that case, exhaustion was waived and the limitations period tolled for all members).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2025