No. 24-1158

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The Secretary's[1] Brief in Opposition ("Opp.") cannot overcome Petitioners' three reasons why review should be granted:

- The Panel's Decision defies this Court's holding in *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), that named plaintiffs in a class action retain an Article III interest in representing the class sufficient to appeal a denial of class certification even if their individual claims are made moot after that denial. To let the Decision stand would reward disregard of this Court's precedent and erode the longstanding principle that lower courts must follow such precedent unless this Court holds otherwise.

- The Panel's Decision intentionally creates a circuit split, as the Secretary concedes, which, unless resolved, will leave one law for class actions brought in the D.C. Circuit, including many against the federal Government, and another for everywhere else.

- The Panel's Decision imperils the class action device by allowing defendants, including the federal Government, to negate standing by picking off named plaintiffs over their objection by paying their individual claims.

In suggesting this case is not the right vehicle for correcting these fundamental errors, the Secretary mistakenly

1. This Reply uses terms defined in the Petition.

assumes a) that Petitioners have no continuing personal stake in the litigation, when they retain an independent stake in representing the class and where their counsel retains a contingent fee interest in the outcome; b) that only 17 class members have possible claims, when many thousands indisputably do, because the filing of a class action suspends the statute of limitations for all pending claims of class members as of the filing date, and c) that the case is unimportant because the Government changed its policy (prospectively only), which failed to remedy the harm from its 10-year practice (from 2012-2022) of denying Medicare CGM coverage for Type 1 diabetics on the specious ground that CGMs were not primarily used for a medical purpose.

The Panel's Intentional Disregard Of *Geraghty* Warrants Review

The Secretary's Opposition reinforces the importance of granting review. The Secretary erroneously presumes *Geraghty* does not reflect current law. Because it does unless this Court holds otherwise, the Panel made a grievous error, which will have an outsized impact negating the viability of class actions, particularly those against the federal Government, and should be immediately rectified.

Geraghty recognizes that named plaintiffs in class actions have two Article III interests: *first*, in their individual claim and, *second*, in representing absent members. 445 U.S. at 402. The Panel erroneously declared that *Geraghty*'s recognition of this second interest does not reflect current law. The Secretary strives to identify grounds for letting this erroneous ruling stand. None provide any basis for denying review.

The Panel's holding that Petitioners lack standing to appeal the class certification denial because judgment was subsequently entered in their favor conflicts with *Geraghty*'s holding that "a proposed class representative who proceeds to judgment on the merits may appeal *denial* of class certification." 445 U.S. at 399 (emphasis original). The Secretary posits that *Geraghty* concerned mootness, while Petitioners' claims were satisfied through payment, yet this demonstrates no meaningful distinction because payment is one way to create mootness. *E.g.*, *Mann Const., Inc. v. United States*, 86 F.4th 1159, 1163 (6th Cir. 2023) (IRS refund and abatement of penalties mooted refund claim). *Geraghty*'s reasoning applies to both situations.

The Secretary erroneously argues that Panel's Decision does not conflict with *Geraghty* because this Court's recognition of a "right to have a class certified if the requirements of the Rules are met," allegedly "has been undermined by subsequent case law." (Opp. 10). That premise confirms that the Panel's Decision conflicts with *Geraghty*. Moreover, it presumes the Panel correctly disregarded *Geraghty*'s holding, which assumes the erroneous answer to the question Petitioners are asking this Court to decide.

Geraghty recognized that "[a] plaintiff who brings a class action presents *two separate issues* for judicial resolution. One is the claim on the merits; *the other is that he is entitled to represent the class*." *Id.* at 402 (emphasis added). *Geraghty* stressed these are distinct Article III interests. *Geraghty* explained that "'a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not

follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.'" *Id.* (citing *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333 (1980)). *Geraghty*'s recognition that named plaintiffs retain this interest even after their individual claims were "fully satisfied" shows they need not have their own ongoing economic interest to have standing to appeal a class certification denial, as the Panel erroneously held.

The Secretary acknowledges that *Geraghty* grounded the named plaintiff's standing in the relation-back principle, a traditional Article III concept. (Opp. 11). Under that principle, "when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'related back' to the date of the original denial." 445 U.S. at 404 n.11. Applied here, Petitioners had standing when the District Court denied class certification, because the Secretary only agreed to pay Petitioners' claims and moved for summary judgment after certification was denied.[2]

Instead, the Secretary argues the principle does not apply because *Geraghty* left unresolved whether named plaintiffs who *settle* their individual claims retain standing. (Opp. 11) (citing *Geraghty*, 445 U.S. at 404 n.10). This is a non sequitur: Petitioners did not settle their claims; judgment was entered in their favor over their objection.

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2. In *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013), this Court relied on *Geraghty*'s relation-back analysis to distinguish class actions from FLSA collective actions.

The relation-back principle is particularly relevant to standing, which considers a plaintiff's interest when suit commences. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). Nevertheless, the Secretary argues that *Geraghty* should only apply where claims are "inherently transitory," such as where trial courts lack time to rule on class certification before mootness occurs. (Opp. 9) (citing 445 U.S. at 397). Yet *Geraghty* rejected this limitation, holding "the class action aspect of the mootness doctrine does not depend on the class claim's being so inherently transitory that it meets the 'capable of repetition, yet evading review,' standard." *Id*. at 398 n.6 (citation omitted).

Separate from the relation-back principle, *Geraghty* held that a named plaintiff has an Article III stake in representing the class under the "Private Attorney General" concept, noting the benefits that a named representative receives "generally are byproducts of the class-action device." 445 U.S. at 403. This belies the Secretary's contention that Petitioners would not benefit directly if class members were fully paid, as that would fulfill their mission as class representatives.

While the Secretary characterizes the denial of class certification as a "bare procedural violation divorced from any concrete harm," (Opp. 11), *Geraghty* held otherwise:

> The purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously

> advocating opposing positions. We conclude these elements can exist with respect to the class certification issue notwithstanding the fact that the name plaintiff's claim on the merits has expired.

445 U.S. at 403.[3]

Geraghty reaffirmed *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978) (cited 445 U.S. at 399-400), where this Court rejected the necessity of interlocutory appeal as of right for class certification denials because of the "prospect of prevailing on the merits and reversing" a class certification denial. The Panel Decision eliminates this prospect.

Review should be granted to correct the Panel's departure from this Court's controlling precedent in *Geraghty*.

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3. The cases the Secretary cites to argue that *Geraghty* no longer reflects current law do not concern appeals of class certification denials. *See* Opp. 11-12 (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 433-39 (2021) (finding subset of class suffered no concrete injury and lacked standing); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338-43 (2016) (remanding standing determination where record left unclear whether procedural violation caused named plaintiff concrete injury); *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009) (environmental group member could not show particular timber sale which threatened injury, precluding standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (environmental group showed no risk of imminent harm, precluding standing).

The Panel Misconstrued This Court's Decision In *Roper*, Further Supporting Review

The Secretary tries to drive an illusory wedge between *Geraghty* and *Roper*, wrongly suggesting the latter requires a named plaintiff to retain a personal interest separate from the interest representing the class to appeal a class certification denial. This ignores that they were companion cases, decided the same day and that *Geraghty* relies heavily on *Roper*. Read correctly, *Roper* holds that an individual economic interest is sufficient to support standing to appeal certification denials but not required. Otherwise, as here, defendants can sequentially pick off named plaintiffs by paying their individual claims.

Roper emphasized that "a district court's ruling on class certification is often the most significant decision rendered in these class action proceedings." 445 U.S. at 339.

> To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions.

Id. at 339.

Geraghty echoed this, stating: "And today, the Court holds that named plaintiffs whose claims are satisfied

through entry of judgment over their objections may appeal the denial of a class certification ruling." 445 U.S. at 400. To let the Panel Decision stand would do what *Geraghty* and *Roper* forbid by foreclosing Petitioners' right to appeal because the Secretary "picked off" their individual claims.

Roper recognized there are broad interests "to be considered when questions touching on justiciability are presented in the class-action context," including the named plaintiffs' "right ... to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims," along with a "separate consideration, distinct from [named plaintiffs'] private interests"––"the responsibility of named plaintiffs to represent the collective interests of the putative class." 445 U.S. at 331.

Geraghty held that the interest in representing the class was the same in both cases, stating that "Geraghty's 'personal stake' in the outcome of the litigation is, in a practical sense, no different from that of the putative class representatives in *Roper*." *Id.* at 401. Additionally, both decisions relied on the private attorney general concept in addressing standing, recognizing that the financial incentives offered to the legal profession by class actions under Rule 23 "[are] a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights." 445 U.S. at 338.

Finally, the Secretary suggests *Roper* is distinguishable from *Geraghty* because *Roper* held that a fee-shifting arrangement was sufficient to establish the named plaintiff's continued economic interest in representing

the class. (Opp. 6, 16). However, the Panel rejected that fee-shifting arrangements, alone, can support standing. (Pet.App.9a). Thus, if the Panel Decision stands, the D.C. Circuit will not apply *Roper* as even the Secretary recognizes it should.

This Court Should Resolve The Circuit Split That The Panel Decision Creates

Granting review will resolve the conflict the Panel Decision intentionally creates with *Jin v. Shanghai Original, Inc.*, 990 F.3d 251 (2d Cir. 2021), *Reed v. Heckler*, 756 F.2d 779 (10th Cir. 1985), *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002).[4] The Panel's Decision is a rogue outlier that should not be left enforceable in the D.C. Circuit.

By incentivizing defendants to pick off named plaintiffs, the Panel's Decision makes it easier to thwart appeals of denials of class certification. This will disproportionately affect class actions against the federal Government, which are often filed in D.C. District courts. Because federal agencies often apply policies nationally, the Panel's error will also have nationwide repercussions.

Jin is recent and true to *Geraghty* and *Roper*. There, the Second Circuit held a named plaintiff could appeal denial of class certification despite having no ongoing financial interest because he had already obtained

4. As the Petition notes, both *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1245-49 (11th Cir. 2003), and *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975-80 (3d Cir. 1992), applied *Geraghty* to hold that named plaintiffs lacked standing to appeal and also are in conflict. (Pet. 33, 35).

damages, attorney's fees and costs. 990 F.3d at 259. The court reasoned, "neither we nor the Supreme Court have required that to satisfy personal stake in the context of a named plaintiff appealing the denial of class certification following a favorable judgment on the merits at trial." *Id*. It found that plaintiff had a personal stake "akin to the interest of a private attorney general that sufficed in *Geraghty*." *Id*. The Secretary suggests *Jin* is inconsistent with "modern standing doctrine," (Opp. 14), another way of saying it correctly followed *Geraghty*.

The Secretary acknowledges that *Reed* conflicts with the Panel's decision but tries to distinguish it as extending *Geraghty*. To extend *Geraghty*, *Reed* first had to accept it as good law. Moreover, the alleged "extension" was to circumstances where named plaintiffs received a favorable judgment from an agency. So here, the Secretary agreed to pay Petitioners' claims and moved for summary judgment in their favor.

Culver permitted a named plaintiff whose individual claim was inadequate and moot to appeal decertification. 277 F.3d at 910. The Secretary argues that the mootness of named plaintiff's claim there makes *Culver* inapplicable, because Petitioners' claims were paid, an argument refuted above.

This Court Should Remove The Threat The Panel Decision Poses To Class Actions.

The Court should grant review to negate the critical danger the Decision poses to the viability of the class action device. If the Decision stands, it will imperil all class actions by providing defendants (especially the Government) with a blueprint of how to terminate a class

action over named plaintiffs' objections: pay the named plaintiffs and move for summary judgment on their claims and, if they are replaced, do likewise with every successor. Fee shifting arrangements would not prevent this, and even if they could, a defendant could circumvent this by specifying an intent to pay fees in any motion or offer of judgment, eliminating the prospect of fee recovery as an ongoing economic interest.

This Is The Right Case To Resolve The Questions Presented.

The Secretary urges this Court to ignore the Panel's disregard of this Court's precedent, the Panel's knowing creation of a circuit split, and its assault on the class action device by suggesting this may not the right case for remedying these issues. Because the Panel's Decision is the sole source of these problems, this is the right case to resolve them.

A. Petitioners Have An Ongoing Personal Stake In Representing The Class.

The Secretary erroneously reframes the question presented as involving circumstances where "plaintiffs disclaimed any continuing personal stake in the litigation." (Opp. (I)). Rather, consistent with *Geraghty* and *Roper*, Plaintiffs argued they maintained an Article III interest in representing absent class members that continued after the Secretary obtained judgment for Petitioners after picking off their individual claims over their objection.

While the Secretary argues that Petitioners had no fee-sharing arrangement (Opp. 6), this overlooks that Petitioners' counsel represents the entire class under a contingent fee arrangement, as generally occurs in class actions. The Panel erroneously disregarded this.

B. The Class Has 90,000+ Members, Not 17.

To minimize this case's importance, the Secretary suggests that review be denied because the District Court correctly found the class lacks numerosity because only 17 possible class members exhausted administrative remedies or sued within the statute of limitations. This perpetuates a legal error that Petitioners directly challenged on appeal, but the Panel never considered.

The class consists of 90,000+ Type 1 diabetics whose claims for CGM coverage were denied between 2012 and 2022. In denying class certification, the District Court improperly considered the above "affirmative defenses," even though the Secretary, whose burden it was to plead defenses, pleaded none. The District Court prematurely and erroneously found the affirmative defenses of exhaustion and limitations would bar all claims that had not reached the District Court. However, because the Secretary made false representations to a large percentage of the class about why claims were denied, equitable estoppel could have negated these defenses even had they been properly raised. *See Bowen v. City of New York*, 476 U.S. 467 (1986) (holding "courts may excuse a beneficiary's failure to exhaust"). Moreover, the commencement of a class action suspends the statute of limitations as to all class members, *see American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553-54 (1974), meaning the class properly includes the many thousands of Medicare claimants whose CGM claims were pending at any level of Agency review when suit was filed. *Medellin v. Shalala*, 23 F.3d 199, 202-03 (8th Cir. 1994). The District Court had no discretion to find otherwise.

C. The Panel's Errors Will Undermine Class Actions Unless Redressed

The Secretary cites Judge Pillard's concurrence in denial of rehearing that HHS' 2022 policy change means this case will have only limited precedential impact, yet this was incorrect. *First*, it ignores the negative impact that leaving the Panel's errors unredressed would have on all future class actions in federal court. *Second*, it ignores that there are 90,000+ class members whose CGM claims from 2012-22 remain unpaid here whose injuries deserve redress. Class actions routinely address past rather than ongoing harm. Moreover, virtually all diabetic class members lack the resources to pursue individual Medicare appeals if denial of certification here stands.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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