No. 23-166

IN THE

Supreme Court of the United States

HILTON HOTELS RETIREMENT PLAN, ET AL.,

Petitioners,

v.

VALERIE WHITE, EVA JUNEAU, AND PETER BETANCOURT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly applied the standard uniformly adopted in the courts of appeals in holding that respondents' Federal Rule of Civil Procedure 23(f) petition for permission to take an interlocutory appeal from an order denying class certification was timely.

2. Whether the court of appeals correctly held that a district court considering a motion for class certification should start by asking whether the proposed class satisfies the "specified terms and criteria" of Federal Rule of Civil Procedure 23, Pet. App. 2a, and not by imposing a "stand-alone and extra-textual" requirement that the proposed class definition not be "fail-safe," *id.* at 24a.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT 3
REASONS FOR DENYING THE WRIT 11
I. Review is unwarranted to consider whether respondents' Rule 23(f) petition was timely. 11
A. The court of appeals used the same test uniformly used in other circuits. 11
B. The court below properly applied the settled test to the facts to determine that respondents' Rule 23(f) petition was timely. 16
II. Review of the second question presented is unwarranted. 18
A. The court below did not decide the "fail-safe" question that Hilton presents. 18
B. There is no split of circuit authority on the issue decided below. 19
C. The decision below correctly held that a district court's certification analysis should begin with Rule 23's textual requirements. .. 25
D. This case is a poor vehicle to address theoretical concerns about fail-safe classes. . 26
CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page(s)**

Asher v. Baxter International Inc.,
505 F.3d 736 (7th Cir. 2007) 13, 14

Bolden v. Walsh Construction Co.,
688 F.3d 893 (7th Cir. 2012) 20

Byrd v. Aaron's Inc.,
784 F.3d 154 (3d Cir. 2015)..... 23

Carpenter v. Boeing Co.,
456 F.3d 1183 (10th Cir. 2006) 12, 14

Cordoba v. DIRECTV, LLC,
942 F.3d 1259 (11th Cir. 2019) 24

EQT Production Co. v. Adair,
764 F.3d 347 (4th Cir. 2014) 24

Fleischman v. Albany Medical Center,
639 F.3d 28 (2d Cir. 2011)..... 11, 14

Ford v. TD Ameritrade Holding Corp.,
995 F.3d 616 (8th Cir. 2021) 22

In re DC Water & Sewer Authority,
561 F.3d 494 (D.C. Cir. 2009) 12, 16

In re Nexium Antitrust Litigation,
777 F.3d 9 (1st Cir. 2015)..... 23

In re Rodriguez,
695 F.3d 360 (5th Cir. 2012) 25, 27

In re Wholesale Grocery Products Antitrust Litigation,
849 F.3d 761 (8th Cir. 2017) 12, 15

In re: Advanced Rehab & Medical, P.C.,
No. 20-0506, 2021 WL 3533492
(6th Cir. Apr. 27, 2021) 12

Jenkins v. BellSouth Corp.,
491 F.3d 1288 (11th Cir. 2007) 12

Matz v. Household International Tax Reduction Investment Plan,
687 F.3d 824 (7th Cir. 2012) 12

McNamara v. Felderhof,
410 F.3d 277 (5th Cir. 2005) 12

Messner v. Northshore University HealthSystem,
669 F.3d 802 (7th Cir. 2012) 20

Mullins v. Direct Digital, LLC,
795 F.3d 654 (7th Cir. 2015) 20

Nucor Corp. v. Brown,
760 F.3d 341 (4th Cir. 2014) 11, 14

Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC,
31 F.4th 651 (9th Cir. 2022)..... 22, 23

Orduno v. Pietrzak,
932 F.3d 710 (8th Cir. 2019) 21, 22

Phillips v. Sheriff of Cook County,
828 F.3d 541 (7th Cir. 2016) 12, 14

Randleman v. Fidelity National Title Insurance Co.,
646 F.3d 347 (6th Cir. 2011) 21

Walker v. Life Insurance Co. of the Southwest,
953 F.3d 624 (9th Cir. 2020) 12, 14, 15

Wolff v. Aetna Life Insurance Co.,
77 F.4th 164 (3d Cir. 2023) 11, 12, 14

Young v. Nationwide Mutual Insurance Co.,
693 F.3d 532 (6th Cir. 2012) 21, 27

Rules

Federal Rule of Civil Procedure 23(f)..... 11, 16

Supreme Court Rule 10 13

INTRODUCTION

Respondents are three individuals whose claims for retirement benefits were denied by petitioner Hilton Hotels Retirement Plan (Hilton) for reasons that respondents allege are unlawful. In the district court, respondents moved for certification of a class of 220 people whose claims Hilton denied for those same reasons. The district court denied the certification motion without prejudice or discussion of the merits, on the ground that the court wanted first to rule on a pending motion to amend the complaint. After ruling on the motion to amend, the court considered a renewed class-certification motion. In denying that motion, the court expressly stated that it wanted to give respondents an opportunity to revise the class definition in response to the court's concerns. At the court's invitation, respondents revised the definition and filed a new certification motion. But the district court later entered an order "definitively" denying class certification, Pet. App. 47a, based solely on its view that the class definition remained "fail-safe"—in other words, that the proposed class definition could be read to include only those plaintiffs who would prevail on the merits. The district court did not address whether the proposed class satisfied the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(2).

Within fourteen days of the court's decision, respondents filed a petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the order denying class certification. The court of appeals rejected Hilton's argument that the petition was untimely and exercised its discretion to grant the petition. On the merits, the court reversed and

instructed the district court to analyze the proposed class definition under the textual requirements of Rules 23(a) and 23(b)(2) and, if the district court's fail-safe concerns remained, to consider whether they derived from "curable misarticulations" that could be addressed by revising the proposed class definition. *Id.* at 30a. The district court has not yet conducted this analysis.

The D.C. Circuit's finding that the Rule 23(f) petition was timely does not warrant review. That finding involves the case-specific application of a test around which the courts of appeals have uniformly coalesced. The court's decision is, moreover, manifestly sensible. Instead of encouraging parties to seek interlocutory review of certification orders when the district court has expressly invited the plaintiffs to revise a proposed definition and refile, the decision permits the parties to wait until the district court makes a final decision on certification.

Hilton's second question presented, concerning so-called "fail-safe" classes, is also unworthy of review. Indeed, Hilton's second question is not presented here. The court of appeals did not decide that fail-safe classes may be certified, and Hilton has not identified any appellate decision that conflicts with what the D.C. Circuit *did* hold: that a district court may not deny class certification on the basis of a fail-safe concern without first considering whether the class definition complies with Rule 23 and, if so, whether redefining the class would cure the concern. Review of Hilton's second question presented is particularly inappropriate in this case because the court of appeals did not resolve the parties' dispute over whether the class definition "remains" fail-safe,

id. at 38a, and ongoing proceedings on remand may eliminate any issue.

STATEMENT

A. In 2010, a federal district court ordered Hilton to remedy decades-long violations of the Employee Retirement Income Security Act of 1974 (ERISA) by recalculating former and current employees' retirement benefits to end an unlawful practice that reduced those benefits. The district court also ordered Hilton to redetermine the years of service used to decide eligibility for vested retirement benefits. *See Kifafi v. Hilton Hotels Ret. Plan*, 736 F. Supp. 2d 64, 86–87 (D.D.C. 2010), *aff'd*, 701 F.3d 718 (D.C. Cir. 2012).

Thousands of former Hilton employees received increased benefits and became vested as a result, and a claims procedure was put in place for those who slipped through the review. Respondents Valerie White, Eva Juneau, and Peter Betancourt were among the people who submitted claims for vesting pursuant to the procedures that Hilton established to comply with the orders in *Kifafi*. *See* Second Am. Compl. ¶¶ 32–36; Pet. App. 40a. Hilton rejected each of the three respondents' claims: White's, because Hilton's method for counting "fractional" years of service worked prior to 1976 did not use "hours of service" standards; Juneau's, because Hilton excluded employment at "non-participating" Hilton properties from its vesting determinations; and Betancourt's, because Hilton refused to award retroactive benefits to any claimant who was not a designated beneficiary or a plan participant's surviving spouse. Pet. App. 4a–5a. Hilton's methods of calculating years of employment left White and

Juneau short of the number of years of service needed to be vested. *See id.* For Betancourt, Hilton's policy meant he could not collect the back retirement benefits that his deceased father—a former Hilton employee of more than thirty years—had never received in life. *See id* at 5a.

After Hilton rejected respondents' claims, respondents' attorney asked the district court that presided over *Kifafi* to review those denials (and those of over two hundred other people who had been denied benefits on identical grounds). The district court, however, ruled that such review would be outside the scope of the limited jurisdiction it retained over that case. Second Am. Compl. ¶ 37.

B. Respondents then filed a class-action complaint in the same district court, alleging that Hilton was withholding their retirement benefits in violation of ERISA and the orders in *Kifafi*. Pet. App. 5a & n.1. Seeking declaratory and injunctive relief, they moved for certification of a Rule 23(b)(2) class consisting of (1) current or former Hilton employees and surviving spouses or beneficiaries of former employees, (2) who submitted claims through *Kifafi*'s remedial procedures, and (3) whose claims were denied for one of the three reasons given for denying the claims of White, Juneau, and Betancourt. *See id.* at 6a–9a. The class consists of 220 people who fall into one of the three subclasses. Second Am. Compl. ¶ 12.

The district court denied an initial motion for class certification without reaching the merits and without prejudice, explaining that the court wanted first to rule on a pending motion to add a fourth named plaintiff to the complaint. Pet. App. 111a–

112a. The court explained that resolution of the motion to amend would affect its class-certification analysis and that "[f]urther briefing" of a renewed class-certification motion would "assist the [c]ourt's review." *Id.* at 111a.

After the court resolved the motion to amend, respondents moved for class certification in accordance with a schedule established by the court. After briefing, the court denied the renewed motion without prejudice. *Id.* at 54a. The court decided that the proposed class definition was "impermissibly fail-safe" because the class was "defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Id.* at 60a (citation omitted). The court explained that it was concerned with the language in the proposed class definition covering those who "have vested rights to retirement benefits that have been denied," because "the question of whose rights have vested is central to the merits of th[e] action." *Id.* at 60a–61a (italics omitted). Believing respondents might be able to remedy the fail-safe issue, however, the court decided to "permit [them] a final opportunity" to renew their motion for class certification. *Id.* at 65a–66a.

In accordance with the district court's ruling, respondents revised the class definition and filed a renewed motion for class certification. *See id.* at 8a–9a. On March 22, 2022, the district court denied the renewed motion. *Id.* at 52a. The court ruled that the revised class definition "remain[ed] impermissibly 'fail-safe.'" *Id.* at 45a–46a. Relying exclusively on a "rule against fail-safe classes," the court did not address any of the Rule 23(a) or 23(b) requirements. *Id.* at 51a.

In contrast to its earlier ruling, which expressly invited respondents to revise the class definition and file a new class-certification motion, the court stated that this decision "definitively settle[d]" the issue of class certification. *Id.* at 47a.

C. Within fourteen days of the order denying class certification, respondents petitioned for permission to appeal pursuant to Federal Rule of Civil Procedure 23(f). The D.C. Circuit granted the petition and reversed.

1. The court of appeals began by explaining that "grants and denials of class certification are interlocutory orders, the likes of which appellate courts do not typically review prior to final judgment," Pet. App. 10a, but that, pursuant to Rule 23(f), a "court of appeals may exercise its discretion to hear [an] appeal 'on the basis of any consideration that the court of appeals finds persuasive,'" *id.* at 11a (quoting Fed. R. Civ. P. 23(f) advisory committee's note). The court determined that interlocutory review was warranted in this case, finding that "the question raised involves an important and recurring issue of law, the issue will likely evade end-of-case review for all practical purposes, and the circumstances taken as a whole warrant interlocutory intervention." *Id.* at 12a; *see id.* at 24a.

The court of appeals considered, and rejected, Hilton's argument that the Rule 23(f) petition was untimely. *Id.* at 12a. Hilton did not dispute that respondents had filed their Rule 23(f) petition within fourteen days of the district court's March 2022 order denying class certification. Hilton argued, though, that the March 2022 order did not open the fourteen-

day period to file a petition because the district court had denied earlier motions for class certification. In making that argument, Hilton acknowledged that the D.C. Circuit applies the same test as other circuits. Hilton explained:

> Multiple federal appellate courts, including this Court, are in agreement that "[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" subject to an interlocutory appeal, as that language is used in Rule 23(f). *See In re DC Water & Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (internal quotations omitted) (quoting *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191–92 (10th Cir. 2006)); *see also Asher v. Baxter Int'l Inc.*, 505 F.3d 736, 739 (7th Cir. 2007).

Hilton D.C. Cir. Br. 17.

Applying the standard that Hilton identified, the court of appeals held that the Rule 23(f) petition was timely. The court explained that, although the district court had denied two earlier motions for class certification, "the district court was explicit in those orders that it had not yet conclusively resolved the class certification question." Pet. App. 12a. The first order simply held that it was premature to consider class certification because a motion to amend the complaint was pending. *Id.* at 12a–13a. The second order "came as part of an ongoing dialogue between the district court and [respondents] over potential problems with the class definition" and included "an express invitation to reformulate the class definition in a way that would address the court's concerns." *Id.*

at 13a. The court observed that the district court had "made clear that it was not yet done deciding the class certification question." *Id.* Accordingly, the court explained, the March 2022 order denying class certification "significantly changed the litigation status quo by definitively ending the prospect of class action status." *Id.* at 14a. Whereas the district court had previously ruled "only that the definition of the class needed to be adjusted and some other concerns addressed before a class could be certified," the March 2022 order "confronted a new proposed class definition and, in rejecting it, the court closed the door on class certification." *Id.* at 14a–15a.

In rejecting Hilton's argument that respondents had forgone their opportunity to file a Rule 23(f) petition by awaiting the district court's conclusion on certification, the court of appeals observed that "[n]othing in Rule 23(f)'s time limit suggests it was meant to intrude prematurely on the district court's judgment about how best to manage the progress of the case." *Id.* at 13a. The D.C. Circuit summed up:

> Think about it: Had [respondents] appealed after the first order denying certification, there would have been no reasoning by the district court for us to review and any ruling would have been hopelessly premature. Had [respondents] appealed after the second certification order, the district court's constructive efforts to work through the difficult class-certification questions and to fully consider the possible class definitions would have been derailed. Neither the text of Rule 23 nor logic supports requiring the filing of petitions for review before the district court finishes its class-certification decisionmaking.

Id. at 16a.

2. Reaching the merits, the court of appeals held that the district court had erred by applying a "stand-alone and extra-textual rule against 'fail-safe' classes" without first analyzing the proposed class under the factors set forth in Rule 23, which "provide[ ] strong protections against circular or indeterminate class definitions." Pet. App. 24a–25a. The court explained that, "[i]n practice," a fail-safe class definition is "only truly troubling to the extent it hides some concrete defect with the class." *Id.* at 26a. If there is no underlying Rule 23 defect, any "problem will in all likelihood be one of wording, not substance," such that it can be cured by the parties or the district court. *Id.* at 28a.

As the court explained, the best way of guarding against the practical ills of fail-safe classes and "ensur[ing] the proper definition of a class early in the litigation that will be bound by a final judgment in the case" is "faithful enforcement of Rule 23's specified terms and criteria for class actions." *Id.* at 2a. Because Rule 23's express requirements "already address[ ] relevant defects" in class definitions, *id.* at 26a, applying those requirements should "eliminate most, if not all, genuinely fail-safe class definitions," *id.* at 28a. Grounding a denial of class certification in Rule 23, the court explained, is "greatly preferred to deploying a textually untethered and potentially disuniform criterion, the contours of which can vary from case to case." *Id.* at 26a–27a.

As for "those rare cases (if any) in which a truly 'fail-safe' class hurdles all of Rule 23's requirements," the court explained, the problem is likely semantic rather than substantive. *Id.* at 28a. For example, the

court noted that if a class were defined as "workers … who were unlawfully denied promotion," deleting the word "unlawfully" would remove any possible fail-safe problem. *Id.* at 28a–29a. Other times, rephrasing an assertion as a counterfactual would address the issue. *Id.* at 29a. In such cases, "rather than reject[ing] a proposed class definition for a readily curable defect based on an unwritten criterion," the district court should either "work with counsel to eliminate the problem" or simply "define the class itself." *Id.*

Because the district court had "bypassed Rule 23's requirements and based its denial of class certification entirely on the class's 'fail-safe' character," the D.C. Circuit remanded for further proceedings so that the trial court could analyze the proposed class under the factors set forth in Rule 23 and assess whether any fail-safe issue that remained was curable. *Id.* at 30a.

3. The district court has not yet ruled on class certification on remand. Instead, it stayed the case pending disposition of Hilton's petition for certiorari. The district court has thus not yet determined, pursuant to the D.C. Circuit's directions, whether the proposed class action should be certified or denied under the standards set forth in Rules 23(a) and 23(b), or whether any "fail-safe" issue that remains in the wording of the class definition is "readily curable." Pet. App. 29a.

REASONS FOR DENYING THE WRIT

I. Review is unwarranted to consider whether respondents' Rule 23(f) petition was timely.

A court of appeals may hear an appeal from an interlocutory "order granting or denying class-action certification" if a petition for permission to appeal is filed within fourteen days of that order. Fed. R. Civ. P. 23(f). All parties agree that respondents' Rule 23(f) petition for interlocutory review was filed within fourteen days of the district court's March 2022 order denying class certification.

Hilton argues, however, that the petition was not timely because the district court denied two earlier motions for class certification, albeit without prejudice. In addressing this issue, the court of appeals—using the same test that other circuits apply—held that respondents' petition was timely. The case-specific application of that consensus standard is not a matter that warrants this Court's review. And the court of appeals properly held that the petition was timely under that standard.

A. The court of appeals used the same test uniformly used in other circuits.

Every circuit to have addressed the applicability of Rule 23(f) to successive orders related to a motion for class certification has used the same approach: An appeal filed within fourteen days of an order granting or denying class certification is timely so long as the order alters the status quo as to class certification, including by materially altering a prior order. *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31–32 (2d Cir. 2011) (per curiam); *Wolff v. Aetna Life Ins. Co.*, 77 F.4th 164, 172 (3d Cir. 2023); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014); *In*

re: Advanced Rehab & Med., P.C., No. 20-0506, 2021 WL 3533492, at *1 (6th Cir. Apr. 27, 2021); *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 559 (7th Cir. 2016); *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 765–66 (8th Cir. 2017); *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 636–37 (9th Cir. 2020); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291–92 (11th Cir. 2007); *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496–97 (D.C. Cir. 2009); *see also McNamara v. Felderhof*, 410 F.3d 277, 280–81 (5th Cir. 2005) (denying appeal as untimely where successive order "merely reaffirmed" prior ruling).

To start the fourteen-day period under Rule 23(f), an order need not "chang[e] a grant into a denial or a denial into a grant." *Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012). But the order must have some "practical effect on the class." *Walker*, 953 F.3d at 636. In conducting this analysis, courts of appeals "equate[ ]" the "materiality requirement" with a change in the "status quo," *Wolff*, 77 F.4th at 172, and some circuits now refer to the inquiry as the "material-change/status-quo test," *Walker*, 953 F.3d at 636.

In holding that respondents' Rule 23(f) petition was timely, the D.C. Circuit applied the same material-change/status-quo test uniformly applied in other circuits and already established in the D.C. Circuit. The court held that the March 2022 order denying certification "did change" the status quo and made a "material difference" in the litigation because, at the district court's request, respondents had "changed the class definition after the [prior] order" and that "[i]t was that new class definition

that the district court considered and rejected for the first time in the March 2022 order of which White seeks review." Pet. App. 14a; *see id.* (stating that the March 2022 order "significantly changed the litigation status quo").

Hilton cannot, and does not, argue that the D.C. Circuit applies a different rule than the other circuits do. Indeed, while its petition alludes to a "circuit split," Pet. 12, Hilton concedes that the D.C. Circuit was applying the material-change/status-quo test that Hilton identifies as the consensus standard. *Id.* at 19; *see id.* at 8–9. Hilton claims, however, that the court's decision misapplied the rule on the facts of this case, thereby permitting an appeal "in circumstances that clearly would not be allowed elsewhere." *Id.* at 18. This Court, however, "rarely grant[s]" a petition for a writ of certiorari "when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10.

Moreover, Hilton identifies no case where any other court of appeals has held that the status quo is not materially altered when a court "definitively" closes the door on class certification after previously *inviting* submission of a new motion with a new class definition to address concerns expressed by the court. *See* Pet. App. 14a–15a. For instance, Hilton's petition focuses on *Asher v. Baxter International Inc.*, 505 F.3d 736 (7th Cir. 2007). There, plaintiffs' counsel in a putative securities class action twice proposed inadequate lead plaintiffs under the Private Securities Litigation Reform Act (PSLRA), and the district court twice denied class certification as a result. *Id.* at 737–38. After the district court rejected a third set of proposed PSLRA lead plaintiffs, plaintiffs' counsel asked the district court to issue an

order denying another motion for class certification to "set up the possibility of [an] interlocutory appeal." *Id*. at 738. The Seventh Circuit held the Rule 23(f) petition was untimely, implicitly finding no change in the status quo from the district court's denial of the earlier motion. Although Hilton reads *Asher* to establish a "categorical" rule that an order denying a second class-certification motion can never start the Rule 23(f) period, Pet. 14, the Seventh Circuit has, to the contrary, made "clear" that it, "in concert with [its] sister circuits," applies the material-change/status-quo test. *Phillips*, 828 F.3d at 559.

Hilton also purports to see a conflict with appeals from orders refusing to reconsider a prior order on certification. *See Fleischman*, 639 F.3d at 31–32; *Nucor Corp.*, 760 F.3d at 343; *Walker*, 953 F.3d at 636; *Carpenter*, 456 F.3d at 1190; *see also Wolff*, 77 F.4th at 172–73 (holding that an order partially granting a motion to reconsider by making minor changes to the class definition does not change the status quo). These cases stand for the point that when a district court "simply … refus[es] to reconsider its prior rulings," there is no change to the status quo. *Carpenter*, 456 F.3d at 1190. That principle is fully consistent with the decision below and D.C. Circuit case law. In fact, several of Hilton's cases cite D.C. Circuit case law. *Fleischman*, 639 F.3d at 31–32 (citing *In re DC Water & Sewer Auth.*, 561 F.3d at 496); *Nucor Corp.*, 760 F.3d at 343 (same); *Walker*, 953 F.3d at 636 (same).

Hilton twice quotes one sentence from *Walker* for the proposition that the status quo changes only when a court certifies a class that it previously declined to certify, decertifies a class, or materially changes a class definition. Pet. 12, 15. But *Walker*

concerned a different situation: the circumstances under which "a *reconsideration order* become[s] appealable." 953 F.3d at 637 (emphasis added). Where a district court revisits an earlier certification order but "decline[s] to change" it "in any way" in response to new legal arguments, *Walker* held, "the status quo remains unchanged." *Id.* at 636. *Walker* did not consider a district court order denying a renewed motion for class certification, expressly invited by the district court, that "close[s] the door on class certification" after the plaintiffs had "changed the class definition" in response to the district court's concerns. Pet. App. 14a–15a.

In re Wholesale Grocery Products likewise does not support Hilton's claim that other circuits would disagree with the D.C. Circuit's application of the material-change/status-quo test. In that case, after the district court denied class certification, a defendant sought clarification of whether certain plaintiffs could seek certification of a narrower class. 849 F.3d at 764–65. The court issued an order "refusing to consider certifying" a narrower class. *Id.* at 765. Within fourteen days of that ruling, a plaintiff filed a Rule 23(f) petition, which the court of appeals held was untimely. *Id.* Citing cases from other circuits, including the D.C. Circuit, *id.* at 765–66, the Eighth Circuit explained that the district court's order on the defendant's request for clarification was not and "did not purport to be 'an order granting or denying class-action certification,'" *id.* at 765 (quoting Fed. R. Civ. P. 23(f)). *In re Wholesale Grocery Products* presents no conflict with the decision in this case.

B. The court below properly applied the settled test to the facts to determine that respondents' Rule 23(f) petition was timely.

The plain text of Rule 23(f) permits appeals from "order[s] granting or denying class-action certification." As the court below recognized, the March 2022 order was "indisputably" such an order. Pet. App. 15a. The court of appeals properly applied the settled material-change/status-quo test to the facts of this case to determine that the Rule 23(f) petition was timely.

1. Consistent with earlier D.C. Circuit case law emphasizing that courts must not allow artfully styled pleadings to "leave Rule 23(f)'s deadline toothless," *In re DC Water & Sewer Auth.*, 561 F.3d at 496–97, the court below satisfied itself that the March 2022 order "significantly changed the litigation status quo." Pet. App. 14a. As the court explained, the district court's first order on certification denied the motion to certify only because the district court wanted first to rule on a different pending motion. Had respondents filed a Rule 23(f) petition within fourteen days of that decision, "there would have been no reasoning by the district court for [the court of appeals] to review and any ruling would have been hopelessly premature." *Id.* at 16a.

In the second class-certification-related order, the district court did "not decide[ ] … that a class could not be certified or that the problems with [respondents'] proposed class definition could not be cured." *Id.* at 14a. Rather, "[i]t ruled in that order only that the definition of the class needed to be adjusted and some other concerns addressed before a

class could be certified." *Id.* The district court made no definitive decision on class certification until March 2022. And when it did, "the March 2022 order … confronted a new proposed class definition and, in rejecting it, … closed the door on class certification." *Id.* at 14a–15a.

2. Misreading the decision below, Hilton claims that the court of appeals held that the status quo is materially changed by "any order that revisits and *leaves intact* a prior certification decision." Pet. 19. This is not a plausible reading of the opinion. The court of appeals granted the petition where previously "the district court had not yet made up its mind whether a proper class could be certified in the case." Pet. App. 14a. Rather than "*leav[ing] intact* a prior certification decision," Pet. 19, the order "material[ly]" changed the status quo, Pet. App. 14a.

As the court of appeals recognized, "to require an interlocutory appeal before the district court is even done wrestling with an issue … would make little sense." *Id.* at 15a–16a. If respondents had filed a Rule 23(f) petition seeking review of one of the district court's earlier orders involving class certification, and the court of appeals had granted it, the court of appeals would have been jumping ahead of the district court and interfering with the district court's management of its docket. As the court of appeals explained, "[t]he disruption occasioned by interlocutory appeals would increase tenfold were parties obligated to petition for review from every non-prejudicial and expressly non-conclusive ruling on class certification issued by the district court, out of fear of losing the chance to appeal later the one ruling that actually resolves the matter." *Id.* at 16a. The reading Hilton advances neither "promote[s] the

district court's sensible management of litigation" nor the appellate court's "efficient handling of interlocutory appeals." *Id.* There is no need for review of the sensible decision below determining, on the facts of this case, that respondents' Rule 23(f) petition was timely.

II. Review of the second question presented is unwarranted.

A. The court below did not decide the "fail-safe" question that Hilton presents.

In its second question presented, Hilton asks this Court to grant review to decide whether "Federal Rule of Civil Procedure 23 permit[s] certification of a 'fail-safe' class"—that is, "a class whose individual membership only includes those found to have a valid claim against the defendants on the merits." Pet. i. That question is not presented here. The decision below does not purport to resolve whether, or under what circumstances, a "fail-safe" class may be certified. The decision does not even resolve whether the district court correctly viewed the proposed class definition as "remain[ing]" fail-safe after respondents revised it specifically to address the district court's concerns. Pet. App. 17a.

Far from resolving the question that Hilton presents, the court below held that a district court abuses its discretion by denying class certification based "entirely" on a perceived fail-safe issue without first deciding whether the proposed class satisfies the "carefully calibrated requirements" set out in Rule 23's text and whether any remaining "fail-safe" issue in the proposed class definition is a "curable misarticulation[ ]." *Id.* at 30a. As the court explained, "faithful enforcement of Rule 23's specified terms and

criteria for class actions," without recourse to the "extra-textual limitation on class actions" that the district court applied here, will "ensure the proper definition of a class early in the litigation that will be bound by a final judgment in the case." *Id.* at 2a; *see id.* at 25a (recognizing that "Rule 23 provides strong protection against circular or indeterminate class definitions"). And as for "those rare cases (if any) in which a truly 'fail-safe' class hurdles all of Rule 23's requirements," *id.* at 28a, the court of appeals continued, the district court should work with the parties to determine whether revising the class definition could eliminate any fail-safe wording. *See id.* at 28a–30a. Hilton's second question presented does not address the D.C. Circuit's actual rulings.

B. There is no split of circuit authority on the issue decided below.

Hilton claims that review is warranted because the courts of appeals are divided on "whether Rule 23 prohibits fail-safe classes." Pet. 28 (formatting altered). To reiterate, the court of appeals here did not answer this question but held that a "fail-safe" class definition generally either masks a failure to satisfy one of Rule 23's requirements or reflects a curable wording problem. Pet. App. 28a–30a. Hilton identifies no appellate decision that conflicts with that holding. And it cites no appellate decision where an alleged fail-safe issue defeated certification of a proposed class that otherwise complied with Rule 23. The absence of cases in which class certification was defeated "entirely," *id.* at 30a, by a "stand-alone and extra-textual" fail-safe bar, *id.* at 24a, underscores that the court of appeals below was correct in observing that "the terms of Rule 23 as written"

already work to "eliminate most, if not all, genuinely fail-safe class definitions," *id.* at 28a.

1. Hilton maintains that the First, Sixth, Seventh, Eighth, and Ninth Circuits "expressly prohibit the certification of fail-safe classes." Pet. 29. However, none of the decisions Hilton cites create a conflict with the decision below.

Each of the Seventh Circuit cases that Hilton cites is consistent with the decision below. Those cases recognize that a district court should, where possible, work with the parties to reword fail-safe class definitions that otherwise hurdle Rule 23's requirements. Indeed, the court below expressly relied on *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012), for its holding that a fail-safe problem "can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis." Pet. App. 29a. *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), which Hilton also cites, affirmed the certification of a class that "satisfie[d] the explicit requirements of Rule 23(a) and (b)(3)." *Id.* at 657. In dicta, the court noted the "problem" of "[d]efining the class in terms of success on the merits," but—like the decision in this case—counseled that "[t]he key to avoiding this problem is to define the class so that membership does not depend on the liability of the defendant." *Id.* at 660; *accord Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 895 (7th Cir. 2012) (identifying a potential fail-safe problem to which the parties had "paid little attention," but noting that the problem "could be fixed by changing the language" of the class definition and ultimately reversing class certification on Rule 23(a)(2) commonality grounds).

As for the Sixth and Eighth Circuit decisions that Hilton cites, those cases generally address fail-safe issues that are tied to the proposed class's inability to satisfy one or more of Rule 23's requirements. None of them are in conflict with the decision below, which directs the district court to ensure that the proposed class satisfies Rule 23's requirements.

Thus, *Randleman v. Fidelity National Title Insurance Co.*, 646 F.3d 347, 352 (6th Cir. 2011), affirmed a district court's decision to decertify a class for failure to satisfy Rule 23(b)(3)'s predominance requirement. In affirming, the court noted that "[t]he class the district court initially certified" was fail-safe because "it only included those who [were] 'entitled to relief.'" *Id.* The court suggested that this flaw could have been "an independent ground for denying class certification," *id.*, but because the district court decertified the class on predominance grounds, the court of appeals neither rested its holding on fail-safe grounds nor considered class counsel's argument that the class could be "redefine[d]" in a way that would avoid the fail-safe problem, *id.* at 352 & n.2. *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012), also described concerns with fail-safe classes, but it held that the class definition at issue was *not* fail-safe and therefore did not explain what the district court should have done if the definition had been fail-safe, let alone curably so. *See id.* at 538.

In the Eighth Circuit, Hilton cites *Orduno v. Pietrzak*, 932 F.3d 710 (8th Cir. 2019). Pet. 30. *Orduno* affirmed a district court ruling that a proposed class of individuals whose personal information the defendant had unlawfully obtained failed to satisfy Rule 23(b)(3)'s predominance requirement because "[t]he circumstances of each obtainment will

vary from class member to class member." 932 F.3d at 716. In rejecting the plaintiff's argument that there was "no need for case-by-case determinations" because the proposed class "included *only* individuals whose information" had been "impermissibly" obtained, the court held that this qualification could not "solve the predominance problem." *Id.* And even if it could, the court explained, the proposed class still would have failed to satisfy Rule 23(b)(3)'s manageability requirement because the district court "[could not] know to whom notice should be sent." *Id.* at 716–17. Because the proposed class definition failed Rule 23's requirements, the court did not consider how a district court should address the wording of a fail-safe class definition that otherwise complies with Rule 23 and is capable of curative revision.[1]

Finally, the cases Hilton cites from the First and Ninth Circuits do not involve fail-safe classes at all. Instead, Hilton points to dicta in cases addressing the converse question of whether a district court may approve "over-inclusive" class definitions that include individuals who have *not* been harmed. *See* Pet. 29–31 (citing *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015)). In answering "yes" to that question, *Olean Wholesale* and *In re Nexium* both observe that requiring class definitions to

[1] The same is true of *Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 621–24 (8th Cir. 2021) (explaining how the aspects of the class definition that made the class fail-safe also defeated Rule 23(b)(3)'s predominance requirement).

include only persons who have suffered the same legal injury could raise fail-safe concerns. *In re Nexium*, 777 F.3d at 22 & n.19; *see also Olean Wholesale*, 31 F.4th at 669 n.14. These dicta do not answer Hilton's second question presented, and neither decision conflicts with the D.C. Circuit's well-reasoned decision here.

2. Hilton concedes that the Third, Fourth, and Eleventh Circuits have "not expressly h[eld]" either way on the question presented, but Hilton nonetheless claims that those circuits have "implied or signaled" their views. Pet. 31. Implications and signals do not create a circuit split with the D.C. Circuit's decision. Nor do the dicta Hilton cites speak to whether those circuits would hold that a curable fail-safe issue, independent of any underlying Rule 23 defect, can be the sole basis for definitively denying class certification.

For the Third Circuit, Hilton cites *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), which rejects a rule against underinclusive classes that would "[r]equir[e] a putative class to include all individuals who may have been harmed by a particular defendant." *Id.* at 167. The court explained that such a rule could "severely undermine [a] named class representative's ability to present typical claims" as Rule 23(a)(3) requires, and that the proposed rule would "approach[ ] requiring a fail-safe class." *Id.* To the extent that *Byrd* is relevant here, it reinforces the D.C. Circuit's recognition that enforcement of Rule 23's typicality requirement will "ensure the proper definition of a class." Pet. App. 2a; *see id.* at 28a.

For the Fourth Circuit, Hilton cites *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014). Pet. 31–32. But *EQT Production* is a case reversing a district court's class certification order for failing to adequately address Rule 23's predominance requirement. *See* 764 F.3d at 366–67. In a footnote instructing the district court how to proceed "[o]n remand," the court of appeals directed that the district court "should consider" a fail-safe issue that the parties had initially "briefed and argued" but that the district court had "not address[ed]." *Id.* at 360 n.9. The court of appeals gave no hint of its view on the merits, and the footnote cannot be read to pose a conflict with the decision below.

For the Eleventh Circuit, Hilton cites *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019), which is another decision addressing an allegedly over-inclusive class definition, not a fail-safe one. There, the court declined to require a district court to "ensure that [a] class definition does not include *any* individuals who do not have standing before certifying a class," observing that "[s]uch a rule would run the risk of promoting so-called 'fail-safe' classes." *Id.* at 1276–77. The court did not suggest that a definition with any fail-safe language is fatal to certification independent of whether the definition would otherwise satisfy Rule 23 or could be cured through rewording.

3. Hilton concedes that the decision below is consistent with Fifth Circuit case law. Pet. 32. More than thirty years ago, that circuit "rejected a rule against fail-safe classes" when "the class is similarly linked by a common complaint," such as a systemic complaint about an "overestimation of … Social Security benefits" that has reduced the class

members' pension benefits. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) (citations omitted) (discussing *Forbush v. J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993)).

Hilton errs in asserting that the decision below decided whether "a district court can properly certify a fail-safe class." Pet. 32. As explained above, the decision below does not reach the issue whether a district court should certify a class that manages to comply with Rule 23's requirements but has a fail-safe issue in the class definition that cannot be cured through rewording in one of the ways the court below illustrated. *See* Pet. App. 28a–30a. The Fifth and the D.C. Circuit's decisions are consistent, however, in that both circuits hold that a district court will abuse its discretion if it refuses to certify an otherwise appropriate class "entirely" because of a fail-safe issue that can be cured. *Id*. at 30a.

C. The decision below correctly held that a district court's certification analysis should begin with Rule 23's textual requirements.

The decision below reverses and remands for the district court to adhere to the requirements of Rule 23, and, if the proposed class complies with those requirements, to determine whether any fail-safe problem with the class definition is "readily curable." Pet. App. 29a. As Hilton recognizes, Pet. 38, the decision is sensitive to the policy concerns that may be associated with "fail-safe" class definitions. But the decision holds that "enforcement of Rule 23's specified terms" will address them. Pet. App. 2a. Far from disagreeing with the court on this point, Hilton effectively concedes that the court is correct. *See, e.g.*,

Pet. 35–36 (stating that "[n]o fail-safe class can satisfy Rule 23's requirements" and that "the text of Rule 23" precludes certification of fail-safe classes).

The primary disagreement that Hilton has with the court of appeals below appears to be what happens in "those rare cases (if any) in which a truly 'fail-safe' class hurdles all of Rule 23's requirements." Pet. App. 28a. The court below recognized that such cases will generally present issues of "wording, not substance," *id.*, such that "[t]he solution … is for the district court either to work with counsel to eliminate the problem or for the district court to simply define the class itself," *id.* at 29a. Hilton would instead have this Court direct district courts to flatly bar class certification even if the proposed class satisfies all of Rule 23's requirements and the problem in the proposed definition is based on "readily curable defect[s]." *Id*. The decision below properly rejects this extreme position, which no court of appeals has adopted, and for which Hilton has offered no rationale.

D. This case is a poor vehicle to address theoretical concerns about fail-safe classes.

Hilton claims that the decision below is worthy of review because it could be read to suggest that "it [is] at least theoretically possible" that a fail-safe class definition could satisfy Rule 23. Pet. 33. But Hilton does not explain how this theoretical possibility warrants review in light of the remote odds that a truly fail-safe class definition will satisfy all of Rule 23's textual requirements and yet be incapable of curative revision. After all, it has been more than

three decades since the Fifth Circuit rejected a categorical rule against fail-safe classes, *see In re Rodriguez*, 695 F.3d at 370 (citing *Forbush*, 994 F.2d 1101), and Hilton points to no evidence that the circuit's longstanding approach has led to the certification of problematic classes.

Even if the theoretical possibility that a fail-safe class could be certified in the future were an issue that warranted this Court's review, this case is a poor vehicle for considering it. To begin, the D.C. Circuit has not ruled on whether the class definition respondents have proposed is actually fail-safe, and it is not clear that the courts of appeals that have spoken against fail-safe classes would reject the proposed definition. *See*, *e.g.*, *Young*, 693 F.3d at 538 (6th Cir.) (holding that a class defined in part as "persons 'who were charged local government taxes … which were either not owed, or were at rates higher than permitted'" was *not* fail-safe). Respondents argued to the court of appeals that their amended class definition is not fail-safe because it uses the objective criterion of whether Hilton has "denied" class members the benefits they claim and does not embed any legal determination that class members "[h]ave" a right to those benefits. *See* Pet. App. 8a–9a. In support of their position, respondents cited two dozen district and circuit court cases that rejected arguments that class definitions like the one proposed by respondents are fail-safe. *See* Appellants' Opening D.C. Cir. Br. 38–41. Review of theoretical questions about fail-safe classes would be inappropriate in the context of a case that might not involve a fail-safe class at all.

This case is a poor vehicle for the additional reason that proceedings on remand could obviate

Hilton's second question presented entirely. The court of appeals has remanded for the district court to decide whether the proposed class satisfies Rule 23's requirements and, if so, whether any fail-safe issue that the district court believes remains in the class definition is "curable." Pet. App. 29a. The district court's answers to these questions could lead to a revised class definition that does not even arguably present fail-safe concerns. This Court's intervention at this time would accordingly be premature.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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