No. 23-166

IN THE

Supreme Court of the United States

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

Petitioners,

v.

VALERIE WHITE, EVA JUNEAU, AND PETER BETANCOURT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

JONATHAN K. YOUNGWOOD
Counsel of Record
JANET A. GOCHMAN
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
jyoungwood@stblaw.com

Counsel for Petitioners

November 21, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The D.C. Circuit's decision presents two important and recurring questions of class-action law, each of which creates or deepens a circuit split and warrants review by this Court.

First, the panel held that successive motions for class certification restart the fourteen-day deadline to seek an appeal of a class certification order under Federal Rule of Civil Procedure 23(f). Respondents mischaracterize the decision as merely a "case-specific application of a test around which the courts of appeals have uniformly coalesced." Opp.2. In fact, other circuits uniformly agree that the time to seek appeal will *not* reset when a district court rules on a successive motion for class certification—unless the court materially alters its class certification order or changes the status quo (*e.g.*, by certifying a class it previously declined to certify, rescinding certification, or materially changing a class's size).

The decision below does not apply this "material-alteration/status-quo" test; it transforms it. Under the D.C. Circuit decision, the fourteen-day clock will restart after successive certification motions, even if the second (or third) order simply reiterates a prior order (*e.g.*, confirms a prior denial), and even if a proposed change to the class definition is minor and immaterial. Indeed, the panel allowed the appeal here on precisely those facts. That is not simply a factual misapplication of the consensus test. It is a fundamentally different test entirely. And it conflicts with how every other court of appeals approaches the issue.

The decision below is not just out-of-step; it is wrong. Respondents argue that the D.C. Circuit's rationale was "manifestly sensible" (Opp.2) because parties

should not be encouraged to seek interlocutory appeal until a district court makes a final decision on class certification. But that entirely ignores that Rule 23(f) is inflexible by design—in this Court's words, "purposefully unforgiving"—because interlocutory appeals disrupt the litigation process. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 716 (2019).

Respondents do not contest that this case is an ideal vehicle to address the issue (because it is), or that the D.C. Circuit's approach will create confusion among the circuits and incentivize gamesmanship among litigants (because it will). Pet.22-27. This Court should therefore grant review to resolve the circuit conflict and correct the panel's legal error.

Second, the panel held that Rule 23 does not bar fail-safe classes. While Respondents try to minimize the contrary authority (Opp.19), five Circuits have expressly held that certification of fail-safe classes is prohibited. *See* Pet.29-33. Respondents suggest that the D.C. Circuit did not decide the question presented. Opp.18. But if fail-safe classes are improper, then the district court's order denying class certification on that basis would have been affirmed, since the D.C. Circuit did not dispute that the class at issue was fail-safe.

On the merits, Respondents dismiss concerns about fail-safe classes as "theoretical." Opp.26-28. But the concerns are quite real, having led to over seven years of litigation in this case alone. This Court should therefore also grant certiorari on the second question presented.

ARGUMENT

I. The Timeliness of a Rule 23(f) Petition Merits Review.

Rule 23(f)'s fourteen-day deadline is certain, strict, and "purposefully unforgiving." *Nutraceutical*, 139 S. Ct. at 715-16. Circuits nationwide faithfully apply it. In the decision below, the D.C. Circuit chose not to. Instead, it applied an unrecognizable test to this common issue, disregarding the "consensus standard" and obviating Rule 23(f) altogether. Opp.11. The D.C. Circuit's outlier approach will create confusion and introduce unnecessary uncertainty into an already complex class-action process. It warrants review.

A. The Circuits Are Divided.

1. Respondents admit that all the other circuits have adopted a material-alteration/status-quo test to determine when Rule 23(f)'s fourteen-day clock can be restarted. Opp.11-12. They argue, however, that the D.C. Circuit adopted the same test, and characterize the petition as merely quibbling with the lower court's application of that test. Opp.11. That is wrong. The D.C. Circuit, in result and reasoning, adopted a fundamentally new and far more lax approach than any other circuit.

Under the rule applied in other circuits, a material alteration to the status quo exists only "where the district court certifies a class it previously declined to certify, decertifies an existing class, or changes the composition of an existing class—usually by increasing or decreasing its size." *Walker v. Life Ins. Co. of the Sw.*, 953 F.3d 624, 637 (9th Cir. 2020). That allows a new appeal window when "a district court changes the class definition to account for a new theory of liability or decertifies a broad segment of the class." *Wolff v.*

Aetna Life Ins. Co., 77 F.4th 164, 172 (3d Cir. 2023). But some substantive change to "class-action status" is required. *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014). Conversely, where a district court leaves prior class certification status "untouched," Rule 23(f)'s timeline is not restarted. *In re Wholesale Grocery Prods. Antitrust Litig.*, 849 F.3d 761, 765 (8th Cir. 2017). Overall, the material-alteration/status-quo test considers "substance [over] form." *Wolff*, 77 F.4th at 172.

Under those principles, there is no question that the petition here was untimely. The district court's third order denying class certification did not materially alter the status quo—it did not certify, decertify, or change the scope of a class. Nor did it even deny the certification of a materially different class. Rather, in denying class certification a third time, "the district court emphatically left the status quo . . . untouched." *In re Wholesale Grocery*, 849 F.3d at 765. It simply confirmed that the class would not be certified. That is the opposite of a *material change* to the status quo; it is *preservation* of the status quo. Both before and after the third class certification denial, Respondents remained classless.

Nonetheless, the D.C. Circuit deemed the petition timely. It did so by introducing and considering two factors: (i) the procedural status of the first two class certification denials (as without prejudice) and the fact that the district court thus did not "close[ ] the door on class certification" (Pet.App.15a) until its third denial, and (ii) an immaterial change to the proposed class definition. But neither factor would have mattered under the material-alteration/status-quo standard that every other circuit applies.

First, the definitiveness of an order has no "practical effect on the class" and thus does not bear on the

material-alteration/status-quo analysis. *E.g.*, *Walker*, 953 F.3d at 636. After all, "classes may be certified, modified, or decertified" at any point during litigation. *Asher v. Baxter Int'l, Inc.*, 505 F.3d 736, 740 (7th Cir. 2007); Pet.App.116a (Fed. R. Civ. P. 23(c)(1)(C)). The D.C. Circuit's focus on definitiveness therefore devastates the Rule's strict and inflexible deadline; it would *never* prevent a successive motion from starting a fresh fourteen-day clock, because *no* denial of class certification is truly definitive until final judgment.

Second, while the D.C. Circuit emphasized—and Respondents reiterate—that the third failed attempt at class certification presented "a new class definition that the district court considered and rejected for the first time" (Pet.App.14a), neither the D.C. Circuit nor Respondents deny that the change was *immaterial*. It merely tweaked a few words. That slight reworking of the class definition would have had no impact on the Rule 23(f) timeliness analysis under the test that every other circuit applies (especially when, as here, the ultimate status of the class remained untouched). *E.g.*, *Asher*, 505 F.3d at 738-39. And here too, the D.C. Circuit's contrary approach effectively nullifies the Rule 23(f) deadline. "[I]f a dissatisfied party could reset the clock . . . by coming up with a new way of defining a class"—which is always possible—then "Rule 23(f)'s strict time limit for seeking interlocutory review of a class-certification decision would be . . . practically meaningless." *In re Wholesale Grocery*, 849 F.3d at 766.

Respondents also point to the fact that the district court "invit[ed] submission of a new motion," further signaling that the district court had not yet "made up its mind." Opp.13, 17. But that does not matter either under the test applied by the other circuits. In *Walker*,

too, the district court asked that plaintiffs submit a revised motion after an initial failed attempt to modify the class definition; the Ninth Circuit still held that the 23(f) petition following the latter motion was untimely. 953 F.3d at 629, 635-37; *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007).

In short, had the D.C. Circuit applied the consensus standard rather than a completely new test, it would have arrived at the opposite result.

2. Respondents also try to poke holes in the circuit conflict by arguing that several of the cases cited involved motions for *reconsideration* of the denial of certification, rather than successive motions to *certify*. But that distinction is irrelevant; these courts applied the same material-alteration/status-quo test and looked to substance over form.

In *Walker*, for example, plaintiffs timely moved for reconsideration of the district court's certification order; the reconsideration motion was then denied solely on a technicality. 953 F.3d at 629. The district court permitted (invited) Plaintiffs to re-notice their motion for reconsideration, which they did; it was denied again. *Id.* The plaintiffs then sought an appeal under Rule 23(f). *Id.* The Ninth Circuit held that the Rule 23(f) timeline ran from, at latest, the *initial*, non-substantive order, not the second, because there had been no change in status quo following the two rulings. *Id.* at 636. Only when a subsequent order "materially changes the original certification decision" does the subsequent order itself "become appealable," and only then would a party be "entitled to more time to petition for appeal." *Id.* at 635. The D.C. Circuit here rejected that logic.

Contrary to Respondents argument, in assessing the timeliness of a Rule 23(f) appeal, courts thus do not draw artificial lines based on motion styling. In *Carpenter v. Boeing Co.*, the Tenth Circuit was, in fact, considering a renewed motion following an initial order denying certification. 456 F.3d 1183, 1188-89, 1192 (10th Cir. 2006). But the court described the renewed motion as a "motion for reconsideration" because it sought certification of effectively the same class that had already been rejected. *Id.* at 1190-91. And regardless of the motion's denomination, "[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'" for purposes of Rule 23(f). *Id.* at 1191; *see also Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1077 (7th Cir. 2014) (finding the same).

At bottom, whether a motion seeks reconsideration in form or only in substance, other courts do not allow a new appeal window. Only the D.C. Circuit does.

B. This Case Presents an Ideal Vehicle to Address this Important Issue.

Respondents do not challenge the importance of this issue, likely because its importance goes without saying. The D.C. Circuit's expanded approach introduces vast uncertainty as to the time to file a Rule 23(f) petition. And for mandatory claims processing rules like Rule 23(f), clarity is paramount. Pet.20-21. As such, Rule 23(f)'s deadline is meant to be "purposefully unforgiving," not purposefully imprecise. *Nutraceutical*, 139 S. Ct. at 716. And if *any* successive motion could restart the Rule 23(f) clock, Rule 23(f)'s deadline would cease to serve any procedural purpose.

Nor do Respondents challenge that this case is an appropriate vehicle to address the timeliness issue. Timeliness was the focus of the decision below. And a ruling in Petitioners' favor would necessitate dismissal of Respondents' Rule 23(f) petition, return the case to the district court, and allow the action to proceed consistent with that court's prior denials of class certification. Pet.22.

C. The D.C. Circuit Was Wrong.

Apart from breaking with every other circuit, the D.C. Circuit's holding is flatly incorrect and contrary to Rule 23(f)'s "clear intent to compel rigorous enforcement of [its] deadline." *Nutraceutical*, 139 S. Ct. at 715. That Respondents find the holding "manifestly sensible" (Opp.2) is inapt—the flexibility district courts enjoy to manage their own docket does not affect the mandatory, deliberately short time limit to seek review under the Rule. *See, e.g.*, *id.* at 713, 715; *Jenkins*, 491 F.3d at 1291-92; *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 194 & n.6 (3d Cir. 2008).

Moreover, because Rule 23(f) will *always* apply to non-definitive orders, a test grounded in finality obviates the Rule's very purpose. A test rooted in materiality may be logical, but the D.C. Circuit did not and could not suggest the class alteration here was sufficiently material to revive the time to appeal. *Cf. Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824 (7th Cir. 2012) (finding material alteration where class size decreased by between 57% and 71%).

II. Whether Rule 23 Prohibits Fail-Safe Classes Merits Review.

Numerous other circuits have recognized that fail-safe classes are by their very nature inconsistent with

Rule 23 and cannot be certified. The D.C. Circuit held otherwise when it vacated the denial of certification of an admittedly fail-safe class. Respondents attempt to minimize both the decisions of other circuits and the holding below, but neither effort is successful. This important issue has divided the circuits. The D.C. Circuit got it wrong. It warrants certiorari.

A. The Circuits Are Divided.

Respondents deny the circuit conflict, pointing out that some courts have indicated that fail-safe classes violate various of Rule 23's requirements, as opposed to serving as an independent bar to class certification. Opp.19-25. But this misses the point. The upshot of these cases is that, one way or another, a fail-safe class will *always* violate Rule 23. The D.C. Circuit below (in accord with the Fifth) held otherwise.

In *Randleman v. Fidelity National Title Insurance Co.*, the Sixth Circuit held that a class definition failed to satisfy Rule 23(b)(3)'s predominance requirement, but also that the class's fail-safe nature provided an "independent ground for denying class certification." 646 F.3d 347, 352 (6th Cir. 2011). The same is true in the Eighth Circuit, which has held that, while a class definition may fail to satisfy Rule 23(b)(3), the fail-safe rationale is a sufficiently "alternative basis" for reaching the same conclusion. *Orduno v. Pietrzak*, 932 F.3d 710, 717 (8th Cir. 2019). The First Circuit, too, has held that "excluding all uninjured class members at the certification stage is almost impossible," given that such a class would be fail-safe. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015). In the Seventh Circuit, the prohibition against fail-safe classes is "well-settled" as violative of Rule 23. *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 657 (7th Cir. 2015). And in the Ninth Circuit, "[a] court may not . . . create a 'fail-

safe' class." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc).

It is of no matter that these cases identify various grounds on which to reject a given class definition. That only underscores that a rule prohibiting fail-safe classes is a particularly effective and efficient tool in a judge's toolbox. The common thread is that a fail-safe class will *always* violate Rule 23's requirements.

Accordingly, the district court in this case denied certification because the class, as defined, was an improper fail-safe class. Pet.App.45a-51a. The D.C. Circuit did not refute that premise, but nonetheless reversed. Pet.App.30. But if fail-safe classes are improper under Rule 23 (as other circuits have held), then the district court's order would have been affirmed. Instead, the D.C. Circuit explicitly held that a fail-safe class *could*, in some instances, "hurdle[ ] all of Rule 23's requirements." Pet.App.28a. Indeed, the basis for the remand was to see if *this particular* fail-safe class somehow comported with Rule 23.

Contrary to Respondents' assertion, the question whether Rule 23 permits certification of a fail-safe class (*see* Pet.i) was thus squarely decided below and is presented here. Unlike the other circuits that have recognized the inevitable incompatibility of a fail-safe class with Rule 23, the D.C. Circuit denied that they are mutually exclusive. There is a square split on that question, even if the D.C. Circuit left open that the class here might be properly denied on some other Rule 23 ground.

B. This Case Presents an Ideal Vehicle to Address this Important Issue.

The fail-safe issue was undoubtedly dispositive, as the D.C. Circuit flatly rejected the legal premise that fail-safe classes are necessarily impermissible under Rule 23. Pet.App.20a. The D.C. Circuit's decision was entirely centered on the question whether fail-safe classes can ever be permissible. The issue is ripe for resolution by this Court.

C. Fail-Safe Classes Never Satisfy Rule 23.

The decision below fails to appreciate the insurmountable disconnect between Rule 23's requirements and the very nature of a fail-safe class. Instead, the D.C. Circuit held that a fail-safe class may surmount all of Rule 23's hurdles (Pet.App.24a), thus leaving litigants to hope that an enterprising district court will take remedial measures (of the inevitably resulting complications) into its own hands.

The D.C. Circuit's decision is incorrect. A fail-safe class can never satisfy Rule 23's requirements. *See* Pet.35-38. Among its other unavoidable flaws, a fail-safe class interferes with Rule 23(c)(2), which requires notice be given to all class members upon certification of the class, and Rule 23(c)(3), which requires that a class-action judgment include and describe all members of the class. Pet.37-38.

Respondents misunderstand the issue by claiming that a rule against fail-safe classes would be an amorphous, extra-textual hurdle in the certification process. This is wrong. It is instead a means by which courts can quickly identify and prevent obviously deficient class definitions from proceeding through a more granular Rule 23 analysis, avoiding a waste of valuable judicial resources. Contrary to Respondents'

contention, Petitioners would have "this Court direct district courts to flatly bar [fail-safe] class certification [*because*] the proposed class [*cannot*] satisf[y] . . . Rule 23's requirements." Opp.26. Fail-safe classes are categorically and necessarily inconsistent with Rule 23's factors.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JONATHAN K. YOUNGWOOD
Counsel of Record
JANET A. GOCHMAN
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
jyoungwood@stblaw.com

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

Counsel for Petitioners

November 21, 2023