No. 24-628

In the Supreme Court of the United States

BNP PARIBAS SA, A FRENCH CORPORATION, ET AL.,
PETITIONERS,

v.

ENTESAR OSMAN KASHEF, ET AL.

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

REPLY BRIEF FOR PETITIONERS

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There is an acknowledged circuit split on the question whether a court of appeals has discretion to grant interlocutory review under Rule 23(f) to correct a district court's manifest class-certification error. The Second Circuit champions the wrong side of the split, limiting Rule 23(f) review to "death knell" situations or unresolved legal issues requiring immediate resolution—while excluding the possibility of error correction, even for the most glaring mistakes. That is the rule the court of appeals followed here, when it denied Rule 23(f) review and cited the narrow criteria set forth in *Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001).

Respondents assert that the Second Circuit in fact applies a more generous standard, and deny that there is any circuit split. But that would be news to the Second Circuit, which has contrasted its practice with that of other courts of appeals; to the many disappointed litigants in the Second Circuit, who have *never* achieved Rule 23(f) review to correct a manifest error; and to at least five courts of appeals and the leading federal treatise, all of which have commented on the circuit split.

Respondents also object that this case presents a poor vehicle because the Second Circuit did not describe at length the reasons for its denial. But courts rarely explain Rule 23(f) denials, the order here cited the *Sumitomo* standard, and the severity of the district court's error confirms the narrowness of the Second Circuit's test. If this vehicle is not good enough, there may never be a better one for resolving this persistent circuit split.

I. THE SECOND CIRCUIT APPLIES THE WRONG RULE 23(f) STANDARD, AND DID SO IN THE DECISION BELOW

Respondents' central arguments are that the Second Circuit sometimes considers manifest error, and may have done so in the decision below. Br. in Opp. 8-17. Neither is correct. The Second Circuit has improperly cabined its discretion under Rule 23(f) to *Sumitomo*'s two narrow prongs. And this case is no exception.

A. Courts of appeals may not categorically abdicate their authority to grant Rule 23(f) review to correct manifest errors. Rule 23(f) gives courts "unfettered" authority to grant review "on the basis of *any* consideration," *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 31-33

(2017) (citations omitted), and they may not "curtail" their own power "indiscriminately," *W. Pac. R. Corp.* v. *W. Pac. R. Co.*, 345 U.S. 247, 261 (1953). Respondents do not argue otherwise. They do not distinguish *Western Pacific* and appear to accept that Rule 23(f) permits courts to grant review solely to correct a district court's manifestly erroneous class-certification order.

B. Instead, respondents' primary defense (at 14-17) is that the Second Circuit has not cabined its Rule 23(f) authority. Respondents argued otherwise below, emphasizing the narrowness of *Sumitomo*. Kashef C.A. Opp. to Mot. for Permission to Appeal 2, 6, 7, 14, ECF No. 31. Despite their backtracking now, *Sumitomo* remains inflexible. *See* Pet. 14-16. It says that "petitioners seeking leave to appeal pursuant to Rule 23(f) *must* demonstrate either" (1) a "questionable" order that presents a "death knell" situation, or (2) a "legal question about which there is a compelling need for immediate resolution." 262 F.3d at 139, 143 (emphasis added). Both prongs require some showing that an order is likely to evade review after final judgment; manifest error alone does not suffice. *See id.* at 140, 142.

Respondents seize (at 10-11) on some couching language in *Sumitomo* and a footnote in a follow-on case. In both instances, the Second Circuit declined to rule out the theoretical "possibility" that some other unspecified "special circumstances" "may" warrant Rule 23(f) review. *Sumitomo*, 262 F.3d at 140; *see Hevesi* v. *Citigroup, Inc.*, 366 F.3d 70, 76 n.4 (2d Cir. 2004). But that "possibility" has never materialized, and it plainly does not encompass the correction of manifest errors. *See* Pet. 15-16. Even in cases like this one—where BNPP faces serious reputational harm and respondents barely defend the district court's decision—the

Second Circuit still has never granted review based on "special circumstances."

Respondents also cite (at 11-12) *Weber* v. *United States*, 484 F.3d 154 (2d Cir. 2007), but they misread its dicta. *Weber* did not concern a Rule 23(f) petition; the question was whether to accept a certified appeal under Section 1233 of the Bankruptcy Abuse Prevention and Consumer Protection Act, 28 U.S.C. § 158(d)(2). *Weber* observed that the "purposes underlying Rule 23(f)"—including "afford[ing] the courts of appeals an opportunity to intervene early to correct lower-court errors"—shed light on "[the purposes] underlying § 1233." 484 F.3d at 159. *Weber* then cited a handful of Rule 23(f) decisions adopting a variety of standards. *Ibid.* (citing *Sumitomo*, 262 F.3d at 139; *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 144 (4th Cir. 2001); and *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001)). The court did not purport to resolve the circuit conflict or to overturn *Sumitomo*'s two-pronged framework.

In the end, respondents are unable to identify a single case where the Second Circuit has ever granted Rule 23(f) review to correct a manifest error. They highlight (at 14-17) three Rule 23(f) petitions that the Second Circuit granted. But every one of those petitions made out a case under *Sumitomo*, in addition to arguing that the underlying order was erroneous. Pet. 12, 22, 23, *Tchrs. Ins. & Annuity Ass'n of Am.* v. *Haley*, No. 20-4117 (2d Cir. Dec. 8, 2020); Pet. 11, *In re Goldman Sachs Grp.*, No. 21-3105 (2d Cir. Dec. 22, 2021); Pet. 10, *City of Phila.* v. *Bank of Am. Corp.*, No. 23-7328 (2d Cir. Oct. 5, 2023). If those petitions

show anything, it is that parties in the Second Circuit facing manifestly erroneous certification orders still must tailor their arguments to fit *Sumitomo*'s two prongs. The Second Circuit's restrictive standard compels it to reject standalone arguments that a district court got a basic class-certification question glaringly wrong.

C. Respondents also contend (at 9) that there is no way to know whether the order in this case resulted from the Second Circuit's too-constrained view of Rule 23(f). But there is no need to read tea leaves here: the panel cited *Sumitomo*'s faulty standard as the sole rationale for denying review. Pet. App. 2a. That is not an unreasoned denial.

Even if the order were less clear, it would not insulate the decision from this Court's review. When a panel issues an unreasoned order, this Court can look to other "signals" that clarify the court's rationale, including the parties' submissions, the separate comments of individual judges, and the lower court's consistent practice. *See Dart Cherokee Basin Operating Co., LLC* v. *Owens*, 574 U.S. 81, 91-95 (2014).

Those other signals all confirm the panel's stated reasoning. The parties' filings below teed up this issue. Respondents argued that the Second Circuit could grant review only if BNPP could establish one of *Sumitomo*'s two narrow prongs, and that manifest error was not an independent ground for review. Kashef C.A. Opp. to Mot. for Permission to Appeal 2, 6-7, 14. Then, at oral argument, one judge questioned how the panel could grant review when the Second Circuit had never allowed a Rule 23(f) appeal outside the *Sumitomo* prongs. Oral Arg. 2:51-3:22; *see id.* at 3:46-3:55

(focusing on whether BNPP's alleged "$3 trillion of assets" would protect it from "a death-knell situation").

The magnitude of the district court's error underscores the panel's incorrect legal view that it could not intervene to correct even the most fundamental error. *See* Pet. 24-28. Respondents offer no defense of the district court's single-paragraph conclusion that common classwide issues would predominate at trial. To the contrary, in a recent conference in the district court, respondents' counsel captured the problems with trying this case as a single class:

> [G]iven the campaign of persecution was across our country—a very large country[—]in the cities in the south and in the north, the campaign was played out in different ways. . . . [T]o be very specific, the Janjaweed campaign in the north in Darfur did not exist in the south. The Janjaweed were particularly brutal when it came to rape and sexual assault. That is very different than what would happen, for example, in Khartoum. Also, in the north there were more Antonovs and bombings of the villages, and that did not happen in the city, so we have those types of injuries.

Conference Tr. 14:11-15:10 (Jan. 13, 2025). Given those undisputed differences among class members, there should be little doubt that class certification was improper here—yet the *Sumitomo* standard nonetheless constrained the panel to deny review.

Respondents strain for some other explanation for the panel's decision, but to no avail. First, they point out (at 11) that if the panel was guided only by *Sumitomo*'s two-pronged standard, the order could have

cited just page 139, instead of pages 139 and 140. But both pages of *Sumitomo* discuss the Second Circuit's restrictive view of Rule 23(f): page 139 lays out the two-pronged standard and emphasizes the narrowness of prong 1, while page 140 emphasizes the narrowness of prong 2 and stresses that "the standards of Rule 23(f) will rarely be met." 262 F.3d at 139-140. Second, respondents highlight (at 13-14) questions at oral argument about whether *Sumitomo* has an exception for "egregious error" and whether, if the panel was "convinced . . . that class certification was incorrect," it would "waste everyone's time and money to proceed." Oral Arg. 3:06-3:26, 7:38-8:05. But those comments support BNPP's view, not respondents': the panel was not asking whether there *was* error, but only whether it *could correct* that error now.

In the Rule 23(f) context, unargued and unreasoned decisions are standard fare. By contrast, this case presents numerous indicia of the panel's rationale: the district court's error is clear; the panel held a rare oral argument on the Rule 23(f) petition, in which it addressed *Sumitomo*'s constraints; and the panel issued a brief order citing *Sumitomo*. If this Court cannot tell why the panel denied review in this case, no clearer example is likely to come along.

II. THERE IS AN ESTABLISHED CIRCUIT SPLIT

A. Respondents deny (at 17-19) the existence of a circuit split. But the First, Second, and Seventh Circuits have cabined their Rule 23(f) discretion in ways that the Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have not. This Court need not take BNPP's word for it: courts and commentators alike

have observed—and taken sides on—the circuit split that respondents call "mythical" (at 10).

Five courts of appeals have acknowledged the split. The D.C. Circuit, for example, has described a "difference[] among the circuits" on whether to "permit appeal if the district court's decision is erroneous." *Lorazepam*, 289 F.3d at 104. Four other courts of appeals have expressly rejected the constraints imposed by the First, Second, and Seventh Circuits. *See Laudato* v. *EQT Corp.*, 23 F.4th 256, 260 (3d Cir. 2022) ("Contrary to the more limited approaches some other circuits utilize, this Court exercises our 'very broad discretion' using a more liberal standard.") (citation omitted); *Lienhart*, 255 F.3d at 145 (4th Cir.) (comparing the First Circuit to the Eleventh Circuit and noting that the latter "add[s] the weakness of the district court's certification decision as an independent factor"); *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (per curiam) ("Unlike the [First Circuit] in *Mowbray* and [the Seventh Circuit in] *Blair*, we view interlocutory review as warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor."); *Prado-Steiman ex rel. Prado* v. *Bush*, 221 F.3d 1266, 1273-1275 (11th Cir. 2000) (adding manifest error as an "additional consideration[]" beyond the criteria laid out by the First and Seventh Circuits).

Commentators, too, recognize that the circuits are at odds. *See, e.g.*, 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1802.2 (3d ed.) (describing the circuits' "difference in approach"); Tanner Franklin, Note, *Rule 23(f): On the Way to Achieving Laudable Goals, Despite Multiple*

Interpretations, 67 Baylor L. Rev. 412, 430 (2015) (noting that "the circuits are split"). Respondents ignore all of this authority.

B. Respondents instead insist (at 18-20) that there is no circuit split because "neither the First nor Seventh Circuit[] bars manifest error review." That is incorrect. *See Chamberlan*, 402 F.3d at 959; *Prado-Steiman*, 221 F.3d at 1273-1275.

The First Circuit has adopted three criteria for granting Rule 23(f) review, which do not include correcting manifest errors. *See Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000). Respondents observe (at 18-19) that two cases also describe a "special circumstances/manifest injustice" exception. *See id.* at 294; *Tilley* v. *TJX Cos., Inc.*, 345 F.3d 34, 38 (1st Cir. 2003). But there is no reason to think that the correction of manifest errors meets that bar. *Mowbray* involved an unusual circumstance where the court for the first time set out restrictive Rule 23(f) standards, then relaxed those standards for the case already pending before it. *See* 208 F.3d at 292. And *Tilley* conceived of "special circumstances" as essentially "death knell" arguments for defendants rather than plaintiffs. *See* 345 F.3d at 38. Neither decision supports respondents' assertion that the First Circuit is open to Rule 23(f) review to correct manifest errors.

The same is true in the Seventh Circuit. There, the *Blair* criteria govern the availability of Rule 23(f) review and do not include manifest error. *See Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-835 (7th Cir. 1999). Respondents note (at 19-20) that the Seventh Circuit has professed some flexibility in applying these criteria. *See Blair*, 181 F.3d at 834; *Reliable*

Money Ord., Inc. v. *McKnight Sales Co.*, 704 F.3d 489, 497 (7th Cir. 2013). But again, there is no indication that such flexibility encompasses error correction, and the court continues to deny petitions that do not meet *Blair*'s express terms. *See, e.g.*, *Arnold Chapman & Paldo Sign & Display Co.* v. *Wagener Equities Inc.*, 747 F.3d 489, 491 (7th Cir. 2014); *Howard* v. *Pollard*, 814 F.3d 476, 478 (7th Cir. 2015) (per curiam). In the two other cases respondents cite, at least one of the *Blair* criteria was satisfied. *See Allen* v. *Int'l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004); *Am. Honda Motor Co.* v. *Allen*, 600 F.3d 813, 814 (7th Cir. 2010) (per curiam).

In short, there is no indication that the First, Second, or Seventh Circuit permits panels to grant Rule 23(f) review solely to correct manifest error—no matter how egregious or costly. By contrast, seven courts of appeals have adopted a more flexible approach, and most of them have criticized the restrictions present in the First, Second, and Seventh Circuits.

III. THE QUESTION PRESENTED WARRANTS THIS COURT'S REVIEW HERE

A. The conflicting standards in the courts of appeals should trouble this Court. When courts artificially constrain their Rule 23(f) authority, it "disturb[s] the settlement" that Congress and this Court reached with the adoption of Rule 23(f). *Microsoft*, 582 U.S. at 42; *see* Pet. 17. It imposes tremendous financial and reputational pressure on defendants, who must either settle frivolous claims or suffer through expensive and pointless class-action proceedings. Pet. 31. And it

burdens courts and encourages forum shopping. Pet. 31-32.

Respondents have no real answer to these concerns. At most, they suggest (at 17) that this Court should not care about conflicting approaches to discretionary procedures. But this Court can and does step in when courts erroneously conclude that they lack discretion over procedural matters. *E.g.*, *W. Pac. R. Corp.*, 345 U.S. at 250, 265-267 (reviewing the scope of courts' discretion to grant rehearing en banc); *Parrish* v. *United States*, cert. granted, No. 24-275 (Jan. 17, 2025) (reviewing whether the district court could reopen the time for filing a notice of appeal).

B. Respondents further contend (at 21-22) that review of the question presented is at a minimum not warranted here. They first assert (at 21) that BNPP can afford to litigate this class action until the bitter end. That misses the point. Respondents' argument parrots the Second Circuit's "death knell" prong, which wrongly limits review for defendants perceived to have deep pockets. Although the imminent termination of a case may be one justification for immediate review, it should not be a universal prerequisite. That is the question presented: whether correction of manifest error can be enough.

This case could not be a more compelling vehicle for resolution of that question. BNPP is facing the burden of litigating an unusually sprawling class action. The accusation that BNPP has aided and abetted human-rights violations poses serious reputational risk. And the class plainly fails to satisfy Rule 23's requirements of commonality and predominance: the up to 23,000 class members are so differently situated that the district court has proposed dividing the proceedings for

the single certified "class" into individual trials initially involving three to five plaintiffs, each with different sets of proof. Conference Tr. 12:13-13:8 (Jan. 13, 2025). If multiple trials are necessary because the class is not uniform enough, that is a strong reason not to have a class in the first place—and a strong reason for a court of appeals to intervene under Rule 23(f) to enforce the fundamental requirements of commonality and predominance.

Respondents finally suggest (at 22) that review is unnecessary here because lifting the *Sumitomo* restrictions would still leave the Second Circuit with discretion to deny BNPP's Rule 23(f) petition for other reasons. But that is unremarkable: this Court often decides the correct standard of review, and leaves to the court of appeals the task of applying it. The Court can do the same here by vacating the denial of Rule 23(f) review and remanding for the Second Circuit to exercise its unfettered discretion.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted.

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