No. 14-577

IN THE
Supreme Court of the United States

CARPENTER CO. *et al*.,
Petitioners,

v.

ACE FOAM, INC. *et al*., individually and on behalf of all others similarly situated,
and
GREG BEASTROM *et al*., individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Amicus curiae DRI—The Voice of the Defense Bar is an international organization composed of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of civil litigation defense attorneys, addressing substantive, procedural, and policy issues that are germane to the defense of civil litigation, and improving the civil justice system by making it more fair, consistent, and uniform.

To help achieve these objectives, DRI participates as *amicus curiae* in carefully selected appeals involving issues that are important to civil litigation defense attorneys, their clients, and the civil justice system. Class-action litigation is one such major category of cases. DRI frequently participates as *amicus curiae* in Supreme Court appeals that present significant issues relating to class-action litigation under Federal Rule of Civil Procedure 23.

This is exactly that type of case. It presents—in an extraordinarily dramatic way—two fundamental

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI—The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than DRI, its members, and its counsel, made a monetary contribution intended to fund preparation or submission of this brief. The parties received advance notice of this brief as required by Sup. Ct. R. 37.2(a). Letters of consent from Petitioners' and Respondents' counsel have been lodged with the Clerk's office.

questions that continue to divide the lower courts in connection with certification of classes under Rule 23. As discussed in the petition for a writ of certiorari, those questions are whether Article III standing requirements apply to all members of a certified class, and whether the predominance of individualized damages issues can preclude class certification.

This case also presents the Court with an ideal and timely opportunity to confirm that its certiorari jurisdiction encompasses review of class-certification decisions even where a circuit court of appeals has denied Rule 23(f) interlocutory review. The granting of certiorari is especially warranted where, as here, a court of appeals has not merely denied a Rule 23(f) petition, but instead, has rendered a substantive decision explicitly embracing the merits of a district court class-certification determination that implicates far-reaching and unsettled issues.

DRI is submitting this brief because class-action defendants' ability to obtain this Court's pretrial review of significant class-certification issues is essential for maintaining fairness in class-action litigation. Certification of a class is almost always the most decisive event in class-action litigation. Without the availability of pretrial appellate review—including, when necessary, Supreme Court review—of class-certification decisions that raise significant, case-dispositive legal issues, class-action defendants face enormous litigation costs, delays, and risks. As a result, they are under intense pressure to settle putative class actions that never should have been filed.

This brief discusses why there is no jurisdictional impediment to the granting of certiorari to review a class-certification decision prior to trial *even if* a court of appeals has denied a Rule 23(f) petition—particularly where, as here, the court of appeals has provided a robust decision discussing its merits-based reasons for denying review. The brief urges the Court not only to grant certiorari here, but also to provide guidance to the courts of appeals concerning their consideration and disposition of Rule 23(f) petitions so that fairness and balance can be maintained in the civil justice system and class-action litigation.

SUMMARY OF ARGUMENT

No aspect of federal class-action litigation is more consequential to both plaintiffs and defendants than a certification determination under Federal Rule of Civil Procedure 23(c). Such an order may ring the "death knell" of the litigation either for the plaintiffs, who may not be able to afford to proceed if class-action status is denied, or for the defendants, who may feel compelled to settle for enormous sums prior to trial if certification is granted. Recognizing the tremendous importance of class-certification decisions, this Court exercised its rule-making authority in 1998 to adopt Federal Rule of Civil Procedure 23(f). That rule authorizes a court of appeals to permit a timely "appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f).

This Court's expansive certiorari jurisdiction, 28 U.S.C. § 1254(1), encompasses cases where, as here, a court of appeals has denied a Rule 23(f) petition for

interlocutory review of a class-action certification order. The need for the Court to exercise its supervisory jurisdiction is especially evident here: A three-judge court of appeals panel not only denied a Rule 23(f) petition seeking review of an unwieldy class-certification decision that implicates crucial, unsettled issues relating to putative class members' standing and damages, but also issued a substantive decision that essentially affirms the district court's class-action determination. Interpreting § 1254(1) in a way that would deprive class-action defendants of the opportunity to seek this Court's pretrial review under these compelling circumstances would defeat the very objectives that this Court sought to achieve by promulgating Rule 23(f). It would enable courts of appeals to insulate their own substantive decisions on class-certification orders from Supreme Court review simply by housing those decisions in an order denying Rule 23(f) review.

The Court should grant certiorari in this appeal, and also provide guidance to the courts of appeals regarding nationally uniform criteria for consideration and disposition of Rule 23(f) petitions. Such guidance should include this Court's strong encouragement that courts of appeals present their substantive reasons—as the Sixth Circuit did here—when denying (or granting) a Rule 23(f) petition.

ARGUMENT

I. This Court Can and Should Grant Certiorari To Review Class-Certification Decisions That Present Important, Unsettled Questions of Law, Including Where a Court of Appeals Has Denied Rule 23(f) Review

If the Sixth Circuit had granted Petitioners' request for permission to appeal and then issued a decision containing exactly the same no-abuse-of-discretion analysis that is presented in its order denying Rule 23(f) review, this Court indisputably would have certiorari jurisdiction under 28 U.S.C. § 1254(1) to review that decision and the district court's underlying class-certification ruling. There is no reason why this Court lacks jurisdiction to review the Sixth Circuit's decision, or should refrain from doing so, merely because the court of appeals chose to provide its analysis in the form of a denial order.

A. Rule 23(f) Is Intended To Foster Pretrial Review of Class-Certification Decisions That Turn On Unsettled Questions of Law

Rule 23(f) was adopted because "'[t]he determination whether or not to certify an action as a class action has enormous implications for all the participants—the named parties, the absent class members, and the court itself.'" Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 Seton Hall Cir. Rev. 27, 28 (2012) (quoting 7AA Charles Alan Wright, Arthur R. Miller et al., Federal Practice & Procedure § 1785 (3d ed. 2014)); *see also* Barry

Sullivan & Amy Kobeleski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 278 (2008) ("Arguably, the most critical stage in a class action is the point at which the court decides whether to certify the class."); Christopher A. Kitchen, *Interlocutory Appeal of Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f): A Proposal For a New Guideline*, Colum. Bus. L. Rev. 231, 232 (2004) ("A court's decision whether to certify a class is often the decisive moment in a class action . . . ."); Kenneth S. Gould, 1 J. App. Prac. & Process 309, 312 (1999) ("The decision is often crucial. . . . [it] can have a life or death impact on the course of class action litigation . . . .").

More specifically, a class-certification decision can "sound the death knell of the litigation" for either the plaintiffs or the defendants. *Blair v. Equifax Check Servs., Inc.,* 181 F.3d 832, 834-35 (7th Cir. 1999); *see also* 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.88[2][a] (3d ed. 2014) (if certification is denied, an individual plaintiff's claim may be "too small to justify the costs of litigation"; if certification is granted, the defendants "may be forced to settle"). Often, "the unwieldiness, the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1212 n.9 (2013) (referring to the "*in terrorem* settlement pressures" that class-certification can impose on class-action defendants); *see generally Eubank v. Pella Corp.*, 753 F.3d 718,

720 (7th Cir. 2014) (discussing the reasons why almost all class actions are settled before trial).

Twenty years prior to adoption of Rule 23(f), this Court held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that a district court ruling on class-action certification was not a "final decision" appealable under 28 U.S.C. § 1291. In 1998, however, the Supreme Court "specifically recognized the critical importance of that decision point," Sullivan & Trueblood, 246 F.R.D. at 278, by exercising its authority under 28 U.S.C. § 1292(e) to promulgate Rule 23(f).

That Rule, as amended, states as follows:

> Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f). The Committee Note explains that Rule 23(f) "establish[es] in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues." *Id.* advisory committee note (1998). Indeed, Rule 23(f) was intended to effect such an "expansion of . . . opportunities to appeal" that a "court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the

Supreme Court in acting on a petition for certiorari." *Ibid.* The Committee Note specifically recognizes that the availability of immediate appellate review of class-certification decisions is desirable because if certification is denied, a plaintiff otherwise would have to proceed "to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation," and if certification is granted, a defendant otherwise would be forced "to settle rather than incur the costs of defending a class action and run the risk of potential ruinous liability." *Ibid.*

Under Rule 23(f) "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive," and "is *most likely to be granted* when the certification decision turns on a novel or *unsettled question of law*, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." *Ibid.* (emphasis added). Although adoption of Rule 23(f) was not intended to encourage interlocutory appeals of "routine issues," *ibid.*, neither the text of the Rule nor the Committee Note accompanying it suggest that interlocutory review of class-certification decisions was intended to be infrequent. In fact, changes were made when the Committee Note was published to *delete* "[s]uggestions that the new procedure is a 'modest' expansion of appeal opportunities, to be applied with 'restraint.'" Fed. R. Civ. P. 23(f) GAP Report (1998).

Instead, where, as here, a district court certification decision turns on fundamental, far-reaching, unsettled questions of law, those questions

are appeal-worthy for purposes of Rule 23(f) interlocutory review. *See Blair,* 181 F.3d at 835 ("[T]he more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f)."); *see also Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) (same); 7B Charles Alan Wright, Arthur R. Miller et al., Federal Practice & Procedure § 1802.2 (3d ed. 2014) (same). The class-certification issues presented here implicate constitutional concerns and are basic to virtually every putative class action.

This Court has not hesitated to review and reverse far-reaching class-certification decisions that fail to comply with the standards of Rule 23. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There is no reason why the Court cannot or should not exercise the same supervisory jurisdiction when a court of appeals declines to upend such an improper class-certification determination.

B. This Court's Certiorari Jurisdiction Encompasses Denials of Rule 23(f) Petitions

The Supreme Court has repeatedly reaffirmed that its certiorari jurisdiction under 28 U.S.C. § 1254(1) is expansive, encompassing any "[c]ases in the courts of appeals." *Id.* § 1254. This includes cases where, as here, a court of appeals, following consideration, has denied a timely petition for discretionary interlocutory review under Rule 23(f).

For example, in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), the Court granted certiorari to review a district court decision to remand a proposed class action that had been removed from state court under the Class Action Fairness Act, 28 U.S.C. § 1453(b). Certiorari was granted even though the Eighth Circuit had denied the defendant's petition for permission to appeal the remand order under § 1453(c)(1). In denying review, the court of appeals—unlike the Sixth Circuit here—issued a one-liner, merely stating that "[t]he Petition for permission to file an interlocutory appeal has been considered by the court and is denied." Petition for a Writ of Certiorari, *Standard Fire Ins. Co. v. Knowles*, No. 11-1450 (U.S. May 30, 2012), at Pet. App. 1. The Eighth Circuit's denial of discretionary review did not deprive this Court of certiorari jurisdiction. Instead, in its ensuing unanimous opinion, this Court simply stated that "the Eighth Circuit declined to hear the appeal. . . . The Company petitioned for writ of certiorari. And, in light of divergent views in the lower courts, we granted the writ." *Knowles*, 133 S. Ct. at 1348.

This Court "has given a broad interpretation of the word 'cases' [in § 1254] so as to include not only a full-blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the inprimatur of the court of appeals or a judge thereof." Stephen M. Shapiro et al., *Supreme Court Practice* 80 (10th ed. 2013). *See, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719, slip op. at 8 (U.S. Dec. 15, 2014) ("The case was 'in' the Court of Appeals because of Dart's leave-to-appeal

application, and we have jurisdiction to review what the Court of Appeals did with that application.") (citing *Hohn v. United States*, 524 U.S. 236 (1998)). In *Hohn* the Court held that it had certiorari jurisdiction in a habeas case despite the Eighth Circuit's denial of a petition for certificate of appealability under 28 U.S.C. § 2253(c). Explaining that its certiorari jurisdiction covers all "'[c]ases in' the courts of appeals," the Court indicated that "[t]here can be little doubt that Hohn's application for a certificate of appealability constitutes a case under § 1254(1)." *Id.* at 241; *see also United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (interlocutory appeal involving Presidential immunity was "in" the court of appeals for § 1254(1) purposes even though the court dismissed the appeal for lack of collateral order jurisdiction); *cf. Forsyth v. Hammond*, 166 U.S. 506, 513 (1897) (certiorari is "not affected by the condition of the case as it exists in the court of appeals [and] may be exercised before or after any decision by that court, and irrespective of any ruling or determination therein").

Although there is no Supreme Court case directly on point, this Court's "precedents and practices . . . suggest that the Court does have certiorari jurisdiction to evaluate a district court class certification ruling once a Rule 23(f) petition has been filed with the court of appeals, regardless of whether that court denies the request or fails to act on it." Scott E. Gant, *The Law of Unintended Consequences: Supreme Court Jurisdiction Over Interlocutory Class Certification Rulings*, 6 J. App. Prac. & Process 249, 264-65 (2004). At the least, this appeal affords the Court a square opportunity to

address the subject of its own jurisdiction to review a Rule 23 class-certification ruling where a court of appeals has issued a substantive opinion purporting to decline interlocutory review.

C. The Sixth Circuit's Decision Provides Ample Basis For Supreme Court Review

By any measure, this is a case that was "in the court[] of appeals" for purposes of 28 U.S.C. § 1254(1). Petitioners filed, in the Sixth Circuit, a timely Petition For Permission To Appeal From Class Certification Order. A supplemental petition and opposition briefs also were filed. Almost five months later, a three-judge Sixth Circuit panel issued an 11-page Order primarily addressing "the merits of the issues raised in the petition." Pet. App. 9a. Noting that the "district court issued an extremely thorough 128-page decision certifying the classes," the court of appeals found that the district court's class-certification order "is not . . . questionable." *Id.* at 10a. In so doing, the court "conclude[d] that neither the general challenges nor the specific challenges" mounted by the Petitioners against the district court's class-certification order "are appropriate for appellate review at this time." *Id.* at 5a. The court of appeals discussed in detail why, in its view, the district court "in defining the classes here, . . . did not abuse its discretion," *ibid.*, including in connection with Article III standing requirements, and with measurement of damages in accordance with *Comcast Corp.*, 133 S. Ct. 1426. *See* Pet. App. at 5a-8a.

Importantly, none of the jurisdictional concerns expressed by the dissenting Justices in *Dart Cherokee Basin Operating* Co. *v. Owens*—or at the October 7, 2014 oral argument in that case—are present here. In *Dart Cherokee*, the Tenth Circuit had denied, *"[w]ithout stating its reasons*," a petition under 28 U.S.C. § 1453(c)(1) for review of a district court order remanding a class action to state court. *See* slip op. at 1 (Scalia, J., dissenting) (emphasis added); *see also* Oral Arg. Tr. at 5:13-14 (Justice Kagan noting that the Tenth Circuit did not indicate "why they acted the way they acted."). But that is not the case here, where the Sixth Circuit explained in its detailed denial decision exactly why it "did what it did," *id.* at 6:15 (Chief Justice Roberts). Here, there is no need for speculation or debate as to whether the Sixth Circuit denied interlocutory review "based on . . . the reasoning of the district court," *id.* at 7:11-13 (Justice Alito). The Sixth Circuit's denial order addressed "the merits of the issues" raised by the district court's class-certification ruling. Pet. App. at 9a. Based on the Sixth Circuit's own substantive analysis of those issues, the court's denial order finds that the district court's ruling is "not . . . questionable," and explicitly and repeatedly concludes that the district court "did not abuse its discretion." *Id.* at 5a, 6a, 7a, 10a; *see also id.* at 8a, 9a.

There is no way, therefore, that the Sixth Circuit's merits-based decision, or the class-certification ruling that it essentially affirmed, are somehow insulated from Supreme Court review. Indeed, the need for this Court's immediate, supervisory review is underscored by the fact that

the court of appeals took a procedural short-cut: Rather than providing the full airing that *granting* the Rule 23(f) petition would have afforded the parties and the court of appeals, the court chose to use the vehicle of a Rule 23(f) *denial* order to issue a substantive ruling on the merits of the district court's decision to certify what apparently is the largest certified class action in Rule 23 history. Petitioners were deprived of the opportunity to fully brief the fundamental, still-unresolved class-certification issues presented by the district court's momentous class-certification order. Instead, they had only the 14 days provided by Rule 23(f) to cram their arguments into the 20-page petition for permission to appeal allowed by Federal Rule of Appellate Procedure 5(a).[2] Petitioners were not even permitted to file a reply brief, *see* Pet. App. 3a, and there was no oral argument on the petition. Those highly abridged appellate proceedings, which left intact the district court's unprecedented decision to certify this super-sized class action, are a compelling reason why the Court should exercise its supervisory jurisdiction in this case. *See* Sup. Ct. R. 10(a), (c).

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[2] Prior to 2009, Rule 23(f) stated that the time for filing a petition for permission to appeal was 10 days. The change to 14 days (including weekend days and legal holidays) was not actually an enlargement of time; it was made to conform to a change in Federal Rule of Civil Procedure 6(a)(1) regarding the method for computing time-periods stated in days.

II. This Court Should Provide Guidance To the Courts of Appeals Regarding Review and Disposition of Rule 23(f) Petitions

The "unfettered discretion" that Rule 23(f) vests in courts of appeals has resulted in less-than-uniform criteria for granting or denying petitions for interlocutory review of district court class-certification rulings. *See* 5 *Moore's Federal Practice* § 23.88[2][c] (collecting cases). Although the circuits have identified several common considerations based on the Committee Note accompanying Rule 23(f), differing criteria among the circuits began to develop soon after the Rule was adopted. *See, e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104 (D.C. Cir. 2002) (discussing "[t]he differences among the circuits" and the D.C. Circuit's own Rule 23(f) criteria). The circuits' differing criteria for granting Rule 23(f) review range from district court class-certification decisions that are "questionable" in death-knell situations, to decisions that are "erroneous," to decisions that are "manifestly erroneous," to decisions that raise "an unsettled and fundamental question of law, regardless whether the district court likely erred." *Id.* at 104, 105; *see also In re Delta Air Lines*, 310 F.3d 953, 957-59 (6th Cir. 2002) (discussing various circuits' case law concerning application of Rule 23(f)); Aimee G. Mackay, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward a Principled Approach*, 96 Nw. U. L. Rev. 755, 793 (2002) ("[A]n ad hoc, non-uniform approach has governed appeals under Rule 23(f).").

Because this situation has persisted—and has been exacerbated by the numerous Rule 23(f) orders that do not reveal the reasons why a petition has been denied—commentators have called for greater uniformity and clarity regarding how Rule 23(f) should be applied. *See, e.g.*, Lori Irish Bauman, *Class Certification and Interlocutory Review: Rule 23(f) In the Courts*, 9 J. App. Prac. & Process 205, 205-06 (2007) ("Building on vague language in the Advisory Committee Notes, the circuits have developed multi-part tests that are hard to understand, hard to apply, and inconsistent with the limited role of the appellate courts."); Sullivan & Trueblood, 246 F.R.D. at 278 ("[M]any questions surrounding the application of Rule 23(f) remain undecided. What standards, if any, are the courts applying?"); Kitchen, Colum. Bus. L. Rev. at 262 (noting that Rule 23(f) "guidelines vary significantly from one circuit to the next" and calling for uniform, less-restrictive guidelines); Flores, 4 Seton Hall Cir. Rev. at 57 ("Although Rule 23(f) may have been designed to encourage experimentation, the time has come for superior standards to emerge.").

This Court should provide guidance to the courts of appeals so that greater uniformity can be achieved regarding the criteria for deciding whether Rule 23(f) interlocutory review of class-certification decisions should be granted or denied. Along the same lines, to facilitate uniformity, clarity, and this Court's consideration of any certiorari petitions that may follow, the Court should strongly encourage the circuits to do what the Sixth Circuit did here—present its reasons for denying (or granting) a Rule 23(f) petition.

According to a survey of Rule 23(f) petitions filed nationwide between 1998-2006, "only about 10% of filed Rule 23(f) petitions were met with an explanation for why the petition was accepted or rejected by the courts." Sullivan & Trueblood, 246 F.R.D. at 285-86; *see also* Flores, 4 Seton Hall Cir. Rev. at 43, 57 ("By far the most concerning development in Rule 23(f) acceptance jurisprudence is this practice of announcing Rule 23(f) decisions without significant legal or factual analysis. . . . courts should take time to always articulate why a particular appeal is rejected or accepted."). Some published cases simultaneously grant Rule 23(f) review, indicate why review is being granted, and resolve the issues raised by the district court's class-certification order without further briefing. *See, e.g.*, *Parko*, 739 F.3d at 1084; *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010). But while there are exceptions, *see, e.g., Chapman v. Wagener Equities, Inc.*, 747 F.3d 489 (7th Cir. 2014), circuit courts rarely provide their substantive reasons for denying review, much less in a published opinion. Failing to explain the basis for denying (or granting) a Rule 23(f) petition undermines the Rule's objective of enabling the courts of appeals to "develop standards for granting review that reflect the changing areas of uncertainty in class litigation." Fed. R. Civ. P. 23(f) advisory committee note (1998); *see* Flores, 4 Seton Hall Cir. Rev. at 42-43 ("The development of accepted categories of appeals takes place only in circuits where courts specifically articulate them in decisions."). Those standards, and the manner in which they are applied on a case-by-case basis,

should be made transparent to this Court as well as to class-action litigants.

CONCLUSION

For the reasons discussed in this brief and in the petition for a writ of certiorari, the Court should grant review and address the important class-certification issues raised by this appeal.

Respectfully submitted,

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