No. _____

In The
Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23(f), are subject to equitable exceptions, because the issue was not raised below. *See, e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Nutraceutical Corporation ("Nutraceutical"). In the proceeding below, Nutraceutical was the defendant-appellee. The parent corporation of Nutraceutical is HGGC, LLC. No publicly held company owns 10% or more of Nutraceutical's stock.

The Respondent is Troy Lambert. In the proceeding below, Lambert was the plaintiff-appellant. He filed a class action on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Nutraceutical Corporation ("Nutraceutical") respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 870 F.3d 1170, and reprinted at Appendix 1. The District Court's order granting Nutraceutical's motion to decertify the class is not published in the *Federal Supplement*, but it is available at 2015 WL 12655388, and reprinted at Appendix 52. The District Court's order denying Respondent Troy Lambert's motion for reconsideration is not published in the *Federal Supplement*, but it is available at 2015 WL 12655392 and reprinted at Appendix 27. The Ninth Circuit's order denying Nutraceutical's petition for rehearing en banc is reprinted at Appendix 67.

JURISDICTION

The Ninth Circuit entered judgment in this case on September 15, 2017. Appendix 1. On November 3, 2017, the Ninth Circuit denied Nutraceutical's petition for rehearing en banc. Appendix 67. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> (f) 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.

Federal Rule of Appellate Procedure 26(b)(1) provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> > (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
> >
> > (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

INTRODUCTION

This case presents a recognized circuit split, as well as an important and frequently occurring issue that this Court has not yet had the opportunity to address: whether equitable exceptions apply to non-jurisdictional claim-processing rules. On numerous occasions, this Court had to leave that issue undecided because it was not properly raised below. *See*, *e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017); *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004). This case presents the proper vehicle to address this important question.

The specific rule at issue in this case is Federal Rule of Civil Procedure 23(f), which establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. In the decision below, the Ninth Circuit found that Rule 23(f) is not jurisdictional, and then broadly held that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1177 (9th Cir. 2017). Relying on that holding, the Ninth Circuit excused Respondent Troy Lambert's failure to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window.

The Ninth Circuit acknowledged that its decision conflicts with other United States Circuit Courts of Appeals. *Id.* at 1179 ("We recognize that other circuits would likely not toll the Rule 23(f) deadline in Lambert's

case."). In fact, every other circuit to consider this issue – *i.e.*, the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits – has held that the Rule 23(f) deadline is "strict and mandatory." *See, e.g.*, *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (collecting cases).

The Ninth Circuit's decision is also at odds with this Court's precedent. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005) ("These claim-processing rules [] assure relief to a party properly raising them.") (per curiam).

The decision below also conflicts with Federal Rule of Appellate Procedure 26(b)(1), which states that courts "may not extend the time to file . . . a petition for permission to appeal." Fed. R. App. P. 26(b)(1). As the Second, Third, and Tenth Circuits have recognized, this rule expressly prohibits extensions of the Rule 23(f) deadline. *See, e.g*., *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.") (per curiam); *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (per curiam); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (per curiam).

Finally, the Ninth Circuit's decision contravenes Rule 23(f)'s purpose. Because interlocutory appeals

are inherently disruptive, expensive, and time-consuming, Rule 23(f) established a "deliberately small" filing window. *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *see also* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment). By applying equitable exceptions to Rule 23(f), the Ninth Circuit exacerbated the delay and disruption caused by petitions for permission to appeal.

Despite the importance of these issues, as noted above, this Court has not yet decided whether claim-processing rules like Rule 23(f) are subject to equitable exceptions because the issue was not addressed below. This case is different. It presents a timely opportunity for this Court to resolve an important question of federal procedure and resolve a recognized circuit split.

STATEMENT OF THE CASE

Respondent Troy Lambert ("Lambert") filed the underlying class action against Nutraceutical on March 14, 2013 for alleged violations of California's false advertising and unfair competition laws arising out of Nutraceutical's sale of a dietary supplement. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The District Court initially certified the class on June 19, 2014. Following the close of discovery, on February 20, 2015, the District Court granted Nutraceutical's motion to decertify.

The District Court decertified the class because Lambert failed to "demonstrate that damages [were] measurable on a classwide basis through use of a 'common methodology' " as required by this Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013). Appendix at 56. Among other things, Lambert failed to produce evidence necessary to calculate what class members actually paid – *i.e.*, the average retail price – which he needed to proceed under his "full-refund" damages model. *Id.* at 60-65.

Pursuant to the fourteen-day deadline in Federal Rule of Civil Procedure 23(f), Lambert's deadline to file a petition for permission to appeal the District Court's decertification order was March 6, 2015.

Lambert did not file a petition or a motion for reconsideration by the deadline. Lambert also did not inform the District Court that he intended to file a petition for permission to appeal.

Instead, at a March 2, 2015 status conference, Lambert requested permission to file a "renewed motion for class certification." Appendix at 71. The District Court denied Lambert's request to file a renewed motion for class certification, but acknowledged Lambert could, pursuant to the court's local rules, file a motion for reconsideration and set a March 12 deadline. *Id.* at 73-76. Lambert filed his motion for reconsideration

on March 12, and the District Court denied the motion on June 24.

On July 8, 2015, Lambert finally filed a Rule 23(f) petition for permission to appeal with the Ninth Circuit. The petition was thus filed more than four months late.

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's petition and instructed the parties "[i]n addition to all other issues the[y] wish to raise in their briefs in the appeal, [to] . . . address the timeliness of this petition." *Lambert*, 870 F.3d at 1175.

The case was then assigned to a Ninth Circuit merits panel (the Hon. Richard A. Paez, Marsha S. Berzon, and Morgan Christen), which heard oral argument on March 9, 2017. On September 15, 2017, the Ninth Circuit issued an opinion holding that Lambert's Rule 23(f) petition was timely and reversing and remanding the District Court's order.

The Ninth Circuit noted that "[u]nder the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen days of the district court's initial order decertifying the class." *Lambert*, 870 F.3d at 1176. Nevertheless, the court held that equitable exceptions applied. The Ninth Circuit reached that decision in three steps:

First, the Ninth Circuit held that Rule 23(f) is a non-jurisdictional claim-processing rule. *Id.* at 1177. Second, the Ninth Circuit joined its sister circuits in

holding that a motion for reconsideration filed in the District Court within Rule 23(f)'s fourteen-day deadline will toll the deadline. *Id.* at 1177-78.

Third, the Ninth Circuit held that equitable exceptions also apply. Citing this Court's decision in *Bowles v. Russel*, 551 U.S. 205 (2007),[1] the Ninth Circuit concluded that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert*, 870 F.3d at 1177.

The Ninth Circuit held that "in determining when equitable circumstances beyond a motion for reconsideration filed within the fourteen day Rule 23(f) deadline can toll that deadline, we look to equitable factors such as whether the litigant 'pursued his rights diligently,' [] whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Id.* at 1178.

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[1] As explained below, *Bowles* did not decide whether equitable exceptions apply to mandatory claim-processing rules. Even after *Bowles*, this Court has had to "reserve[] whether mandatory claim-processing rules may be subject to equitable exceptions," because the issue was "unaddressed" below. *Hamer*, 138 S. Ct. at 18 n.3, 22.

Applying those factors, the Ninth Circuit held that Lambert tolled the deadline because he "informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a motion for reconsideration with which Lambert complied." *Id.* at 1179.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

This case presents a clear and undisputed circuit split. As the Ninth Circuit acknowledged in its decision, "other circuits would likely not toll the Rule 23(f) deadline" in this case. *Id.* The Ninth Circuit's decision conflicts with all seven United States Circuit Courts of Appeals (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh) (the "other circuits") that have considered this issue.

As the other circuits have recognized, the Rule 23(f) deadline is "strict and mandatory" because its purpose is to reduce the inherent disruption caused by interlocutory appeals. *See, e.g.*, *Gutierrez*, 523 F.3d at 192; *see also Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of

review is deliberately small."); *Fleischman*, 639 F.3d at 31 ("It is well-established that Rule 23(f)'s fourteen day filing requirement is a rigid and inflexible restriction.") (citations omitted).

The other circuits have only adopted one "narrow exception" to the Rule 23(f) deadline – a litigant can "postpone" the time to file a petition for permission to appeal by filing a motion for reconsideration in district court *before* the fourteen-day deadline in Rule 23(f) expires. *Gutierrez*, 523 F.3d at 192-93.

The Ninth Circuit adopted that exception but then departed from the other circuits by holding that Rule 23(f)'s deadline is also subject to broad equitable exceptions. *Lambert*, 870 F.3d at 1177 (holding that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations"). Even if a litigant fails to timely file a Rule 23(f) petition or a motion for reconsideration within fourteen days, the Ninth Circuit held that courts must consider whether (i) the litigant "pursued his rights diligently," (ii) "external circumstances, such as a deadline imposed by the district court, affected the litigant," or (iii) the "litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration." *Id.* at 1178.

None of the other circuits have applied equitable exceptions to the Rule 23(f) deadline or otherwise excused a party's failure to file a petition or motion for

reconsideration within the fourteen-day deadline. Instead, the other circuits uniformly agree that "[a]n out-of-time motion for reconsideration . . . cannot 'restart the clock for appellate review' under Rule 23(f)." *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (citations omitted); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [fourteen] days after the order . . . appeal must wait until the final judgment."); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll the [] period within which to seek permission to appeal.").

As the Second Circuit explained in *Fleischman*, a contrary holding "would eviscerate [Rule 23(f)'s] deliberate and tight restriction on interlocutory appeals." 639 F.3d at 31. It would also violate Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal. *Id.* ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

Indeed, the Third, Tenth, and Eleventh Circuits have rejected untimely Rule 23(f) petitions in situations that closely resemble the facts before the Ninth Circuit. In the Third Circuit case, *Gutierrez*, the petitioners filed their Rule 23(f) petition and motion for reconsideration late, however they did the things necessary to obtain equitable tolling under the Ninth Circuit's decision. They had requested, by letter, an extension of time to file a motion for reconsideration

within ten days of the order denying certification, the district court granted the request, and they filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. *Gutierrez*, 523 F.3d at 190-91.

In contrast to the Ninth Circuit, the Third Circuit rejected the untimely petition. Even assuming equitable exceptions could apply, a decision the court did not reach, the Third Circuit explained that Rule 23(f) "is clearly a strict and inflexible time limit" that cannot excuse petitioner's mistaken reliance on the district court's scheduling order. *Id.* at 198 ("Petitioners cannot use the District Court's approval of the extension of time to save their untimely petition.").

In addition, the Third Circuit rejected the Ninth Circuit's reasoning that a letter filed in district court indicating the petitioner's intent to file a motion for reconsideration could toll the Rule 23(f) deadline. The Third Circuit held that allowing a mere letter to serve that purpose "would be inconsistent with the generally rigid, strict approach courts have taken when construing the Rule 23(f) time limit." *Id.* at 195 n.7.

The Eleventh Circuit came to a similar conclusion in *Jenkins v. BellSouth Corp.*, 491 F.3d 1288 (11th Cir. 2007). There, the court held that a Rule 23(f) petition was untimely because the plaintiffs missed the filing deadline, even though the deadline was on the eve of Thanksgiving Day, the petition was only two days late, the plaintiffs had instructed a courier to file the petition before the deadline, and the district court vacated

and reentered its order to restart the deadline. *Id.* at 1289-92. The court held that the "single opportunity for seeking interlocutory review of the denial of class certification expired on November 22, 2006, and . . . the district court was without the authority to circumvent the [] deadline." *Id.* at 1292.

Similarly, in *Delta Airlines*, 383 F.3d at 1145, the Tenth Circuit rejected a Rule 23(f) petition that was filed only two days late even though the petitioner's counsel had miscalculated the filing deadline by mistakenly relying on the grace period in Fed. R. Civ. P. 6(e) and Fed. R. App. P. 26(c) and, in response, the district court had granted an extension of time to file the petition. The Tenth Circuit held that the district court lacked authority to extend the deadline and petitioner's counsel's ignorance of the rules could not excuse the untimely filing. *Id.* The Tenth Circuit also noted that Federal Rule of Appellate Procedure 26(b) "specifically foreclose[s] appellate courts from granting an extension of time to file a petition for permission to appeal." *Id.*

For the foregoing reasons, the Ninth Circuit's decision presents a clear and undisputed circuit split.

II. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE

The question presented is of critical legal and practical significance. As this Court is aware, decisions on class certification can effectively end a lawsuit. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707-08

(2017). Interlocutory appeals of class certification decisions, however, have profound negative consequences. They are "disruptive, time-consuming, and expensive . . . add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (citations omitted). Resolution of the question presented will therefore affect the ability of both plaintiffs and defendants to obtain meaningful review of class certification decisions while also deciding the extent to which this type of review can disrupt district court proceedings.

While these issues are significant, the Ninth Circuit's decision raises even broader and weightier concerns. As noted above, the Ninth Circuit did not limit its holding to Rule 23(f). The Ninth Circuit held that equitable tolling applies to any non-jurisdictional deadline. *Lambert*, 870 F.3d at 1177 ("Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.").

These types of mandatory claim-processing rules are abundant in the federal rules and procedure. Consider, for example, the sheer number of rule-based deadlines in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Bankruptcy Procedure. Absent intervention by this Court, the Ninth Circuit's decision will change how all of these claim-processing rules are enforced in the largest circuit in the country.

III. THIS CASE IS THE PROPER VEHICLE TO ADDRESS THIS IMPORTANT ISSUE

This Court has not yet had an opportunity to address whether mandatory claim-processing rules are subject to equitable exceptions. In numerous cases, this Court had to leave that issue undecided because it was not properly presented below.

In *Hamer*, for example, the Court held that the thirty-day limitation on extensions of time to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(5)(C) was a mandatory claim-processing rule. 138 S. Ct. at 22. The Court "reserved whether mandatory claim-processing rules may be subject to equitable exceptions," however, because the issue was "unaddressed" below. *Id.* at 18 n.3, 22.

Likewise, in *Kontrick* the Court concluded that Federal Rule of Bankruptcy Procedure 4004 is a mandatory claim-processing rule. 540 U.S. at 454. Because the case "involve[d] no issue of equitable tolling or any other equity-based exception," however, this Court did not reach the question of whether claim-processing rules "despite their strict limitations, could be softened on equitable grounds." *Id.* at 457-58; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 442 n.4 (2011) (not deciding whether a non-jurisdictional rule setting the deadline to appeal a denial of veteran benefits is subject to equitable tolling because the parties did not ask the Court to address that issue).

These obstacles to review are not present here. There is no question the Ninth Circuit concluded that

equitable exceptions apply to mandatory claim-processing rules like Rule 23(f). And there is no question that the Ninth Circuit's decision conflicts with the other circuits. This case presents a timely opportunity for this Court to resolve this important issue.

IV. THE DECISION BELOW WAS INCORRECT

This Court's intervention is also needed because the decision below is wrong. Among other issues, the Ninth Circuit's decision (i) is inconsistent with this Court's precedent; (ii) violates Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal; and (iii) contravenes the purpose behind Rule 23(f)'s deadline, which was "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment).

A. The Decision Below is Inconsistent with this Court's Precedent

Although this Court has not squarely addressed whether mandatory claim-processing rules are subject to equitable exceptions, its precedent suggests that they are not. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique*, 137 S. Ct. at 1271 (2017).

For example, in *Eberhart*, this Court held that Federal Rule of Criminal Procedure 33(b)(2), which establishes the deadline to file a motion for a new trial on any reason other than newly discovered evidence, is a mandatory claim-processing rule. 546 U.S. at 13. The Court held that claim-processing rules are "unalterable on a party's application." *Id.* at 15 (quoting *Kontrick*, 540 U.S. at 456). In other words, "these claim-processing rules [] assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19.

Importantly, *Eberhart* rejected an argument that claim-processing rules are subject to equitable exceptions when addressing the Court's decision in *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court reversed the Seventh Circuit's ruling that an "excusable neglect" exception applied to untimely notices of appeal. *Eberhart*, 546 U.S. at 17. As *Eberhart* explained, "*Robinson* is correct not because the District Court lacked subject-matter jurisdiction, but because district courts ***must observe*** the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* (emphasis added).

The Court reaffirmed *Eberhart*'s holding in *Manrique*. There, this Court held that a rule requiring a party to file a notice of appeal of an amended judgment is "at least a mandatory claim-processing rule." 137 S. Ct. at 1271. The Court explained that mandatory claim-processing rules, unlike jurisdictional rules, can be forfeited if they are not timely asserted. If a party "properly raise[s] them," however, they are

"unalterable." *Id.* at 1272. Because the Government had timely raised the petitioner's failure to timely file a notice of appeal from an amended judgment, the Court held that the lower "court's duty to dismiss the appeal was ***mandatory***." *Id.* (emphasis added).

In addition, this Court has already decided, in a closely analogous context, that a district court's scheduling order cannot toll an appeal deadline. In 2016, the Court resolved a circuit split by amending Federal Rule of Appellate Procedure 4(a)(4) to clarify that the time to file a notice of appeal may be tolled by the filing of certain post-judgment motions – but only if they are timely filed pursuant to deadlines in the Federal Rules of Civil Procedure. As the advisory committee notes explain, that rule "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules." Fed. R. App. P. 4 advisory committee's note (2016 Amendment).

As these cases and rules make clear, mandatory claim-processing rules must be enforced if they are properly raised. The Ninth Circuit's holding that equitable exceptions apply to mandatory claim-processing rules is inconsistent with this Court's precedent.

B. The Decision Below Violates the Federal Rules of Appellate Procedure

In addition, the Ninth Circuit's holding violates Federal Rule of Appellate Procedure 26(b)(1). That rule plainly states:

> For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court ***may not extend*** the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) ***or a petition for permission to appeal***. . . .

Fed. R. App. P. 26(b)(1) (emphasis added).

The Second, Third, and Tenth Circuits have held that this rule prohibits courts from extending the time to file a Rule 23(f) petition for permission to appeal. *Fleischman*, 639 F.3d at 31 ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal."); *Eastman*, 736 F.3d at 677 (rejecting Rule 23(f) petition because Fed. R. App. P. 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal"); *Delta Airlines*, 383 F.3d at 1145 (same); *see also Houston v. Lack*, 487 U.S. 266, 281 (1988) (Scalia, J., dissenting) (noting that Fed. R. App. P. 26(b) makes "explicit" that courts are "without power to waive" appeal deadlines, "no matter what the equities of a particular case").

Indeed, Federal Rule of Appellate Procedure 26(b)(1) closely parallels Federal Rule of Criminal Procedure 45(b)(2), which this Court relied upon in *Eberhart* to hold that the mandatory claim-processing rule at issue in that case is "unalterable." As *Eberhart* explained, Federal Rule of Criminal Procedure 45(b)(2)

provides that courts "may not extend the time to take any action under [Fed. R. Crim. P. 33], except as stated" in the rule itself. 546 U.S. at 13. As a result, the Court concluded that the deadline is "rigid" and "unalterable on a party's application." *Id.* at 13, 15, 19. Because Federal Rule of Appellate Procedure 26(b)(1) provides a similar prohibition against extensions of time to file a petition for permission to appeal, this Court's analysis of Rule 23(f) should be the same.

Despite the above, the Ninth Circuit adopted equitable exceptions to the Rule 23(f) deadline that did and, in future cases, will extend the time to file a petition for permission to appeal. Federal Rule of Appellate Procedure 26(b)(1) is a rule promulgated by this Court to "govern procedure in the United States courts of appeals." Fed. R. App. P. 1(a)(1); *see also* 28 U.S.C. § 1292(e). The Ninth Circuit had no authority to abrogate it, and that error warrants correction by this Court.

C. The Decision Below Contravenes the Purpose of an Interlocutory Appeal Deadline

The Ninth Circuit's decision also contravenes the very purpose behind Rule 23(f)'s short deadline. It is well recognized that petitions for permission to appeal, like other interlocutory appeals, are "generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan*, 402 F.3d at 959; *Microsoft*, 137 S. Ct. at 1712 (final judgment rule "minimizes

the harassment and delay that would result from repeated interlocutory appeals").

To address these concerns, Rule 23(f) establishes a "deliberately small" fourteen-day filing window. *Gary*, 188 F.3d at 893. The short deadline, as the advisory committee notes explain, is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment); *see also Jenkins*, 491 F.3d at 1290 ("[T]he [] deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Chamberlan*, 402 F.3d at 959 ("Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule.").

Departing from its sister circuits, the Ninth Circuit adopted a rule that disregards the concerns noted above and exacerbates the delay and disruption caused by interlocutory appeals. Under the Ninth Circuit's rule, litigants have no incentive to diligently pursue petitions for permission to appeal or motions for reconsideration within fourteen days of a district court's order. Instead, litigants can preserve their right to appeal by simply writing a letter or orally informing the district court that they *intend* to file a motion for reconsideration. District courts will undoubtedly see an influx of such communications and, at the least, this will add months to the already significant delays associated with Rule 23(f) petitions.

Relatedly, the Ninth Circuit replaced a simple, bright-line rule with a vague and impractical standard. Courts can no longer rely on the fourteen-day deadline to quickly deny untimely petitions for permission to appeal. Instead, they will need to scour the district court record, including transcripts, to determine whether the petitioner engaged in any conduct that would entitle him to equitable tolling. This type of review will add even more work to the already heavy court dockets.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are highly fact-dependent. Under the Ninth Circuit's standard, courts will be forced to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline. Courts should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter v. Boeing*, 456 F.3d 1183, 1191 (10th Cir. 2006).

Likewise, the Ninth Circuit's reliance on the district court's briefing schedule will require courts to consider whether a petitioner has complied with a district court's schedule. This defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across the district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within 28 days. C.D. Cal. L.R. 7-18; S.D. Cal. Civil

L.R. 7.1(i); *see also* N.D. Cal. Civil L.R. 7-9 (requiring leave of court); D. Ariz. LRCiv 7.2(g) (fourteen-day deadline). Courts must now take the local rules (and their differences) into account.

Finally, and for similar reasons, the standard will inject uncertainty into, and prolong, district court proceedings. Although a district court need not enter a stay when a Rule 23(f) petition is pending, very few district courts will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, for example, district court proceedings were stayed for over *two years*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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