No. 21-8006

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISAAC HARRIS, *et al.*,

Plaintiffs-Respondents,

v.

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Defendant-Petitioner.

Appeal from the
U.S. District Court for the District of Columbia
No. 17-CV-01371
(Honorable Amit P. Mehta)

PLAINTIFFS-RESPONDENTS' OPPOSITION TO DEFENDANT-PETITIONER'S PETITION PURSUANT TO FED. R. CIV. P. 23(F) FOR PERMISSION TO APPEAL ORDER GRANTING CLASS ACTION CERTIFICATION

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CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rules 5(a) and 28(a)(1)(A), the undersigned counsel certifies as follows:

Isaac Harris, Darnell Frye, and Leo Franklin are the named plaintiffs and class representatives in Civil Action No. 17-1371 in the district court and are plaintiffs-respondents in this Court. The certified class includes more than 800 individuals.

There are 155 opt-in plaintiffs in the Fair Labor Standards Act collective action before the district court: Judy Acty, Carol R. Adams, Delltonjia Adams, Lenora Gloria Adams, Akinsanya Eyitayo Adubi, Ambroise Agosse, Richard T. Akebe, Maurice A. Alexander, Muhammad Shahid Abdul Ali, David Dacasta Baker, Larry Omega Ball, Michael Lee Banks, Chandra Sharan Bantawa, Bossede Aderanti Bello, Roosevelt Benjamin, Aubrey Ogilvit Bennett, Anthony Bowe, Bianca S. Bowie, Michael Lynn Branch, Ashley Rene Brinkley, John Xavier Briscoe III, Anthony Brockington, Derricke Andre Bronson, Theodora Jamika Brooks, Marguerite Gladys Brown, Eric Keith Brown, Ciera Lorraine Brown, Monique S. Burton, Allan Bussey, Patricia Faye Byrd, Tony Lequinn Chase, Robert Cloutterbuck, Tanya Michelle Collins, Lashonda

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Medical Transportation Management, Inc. is the defendant in the district court and is the defendant-petitioner before this Court.

Star Transportation LLC, MBI Logistics LLC, Generation, Inc., and Kolex Group, Inc., appeared before the district court as third-party defendants.

No amici curiae or intervenors have appeared before the district court or in this Court.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

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INTRODUCTION

Defendant Medical Transportation Management, Inc. (MTM) provides non-emergency medical transportation services to Medicaid participants in the District of Columbia, through contracts with the District. In this case, plaintiffs allege that MTM is the drivers' joint employer and a general contractor and, as such, is liable for the underpayment of the drivers' wages. Below, the district court certified an issue class under Federal Rule of Civil Procedure 23(c)(4) for resolution of the common issues of whether MTM is a joint employer or general contractor. If plaintiffs prevail on either or both of these issues, the case will proceed to a liability and damages phase in which drivers will present individualized evidence to support their wage claims. If MTM prevails on the common issues of whether MTM is a joint employer or general contractor, the case will be over.

In certifying the issues class, the district court correctly recognized that resolution of these threshold issues will materially advance the litigation and that the relevant evidence will be the same for all the drivers. The alternative, the court found, would require the same questions to be litigated over and over again in individual actions that

would be filed in the district court below, where venue is proper, by many of the more than 800 class members whose statutes of limitations for bringing individual lawsuits have been tolled by the pendency of this case.

In this Court, MTM seeks permission to file an interlocutory appeal challenging the district court's certification of an issue class. Yet MTM has neither identified an unsettled and fundamental legal issue likely to evade end-of-the-case review, nor shown that the district court committed manifest error. Moreover, the alternative to issue class certification would be to litigate the same issues in hundreds of individual actions. Indeed, MTM's petition seeks to strip the district court of the discretion to manage this litigation to achieve the economies that Rule 23(c)(4) was designed to promote. The petition should be denied.

BACKGROUND

MTM contracts with the District of Columbia to provide non-emergency medical transportation to District residents eligible for Medicaid. MTM does not employ drivers directly, however; MTM subcontracts with transportation-service providers (TSPs) that directly

employ the drivers required to fulfill MTM's contracts. App. A-32, A-59. MTM controls many important aspects of the drivers' employment. For example, MTM controls the hiring process by requiring drivers to be credentialed and approved by MTM. MTM trains the TSPs on MTM's driver requirements, maintains records on every driver approved to work on MTM trips, and can cancel its contract with a TSP if the TSP uses an unapproved driver. App. A-33. MTM has the authority to remove drivers from service in its sole discretion.[1] MTM provides required training to each driver and requires that drivers submit to periodic retraining. MTM imposes numerous additional requirements on the drivers, including rules regarding appearance, uniforms, and MTM's customer service standards and makes spot inspections of the drivers in the field. App. A-33. As MTM concedes, some TSPs work only for MTM, Pet. 4, making those TSPs and their drivers entirely dependent on MTM.

Plaintiffs are drivers who allege that they were underpaid in violation of federal and D.C. wage laws. On July 13, 2017, plaintiffs filed a class and collective action against MTM, asserting violations of the Fair

[1] *See* Pls. Mem. in Supp. of Class Cert., ECF No. 134, at 11 (quoting MTM Services Agreement, Ex. 5 at MTM 000920).

Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*; the D.C. Minimum Wage Act, D.C. Code § 32–1001 *et seq.*; the D.C. Living Wage Act, D.C. Code § 2–220.01 *et seq.*; and the D.C. Wage Payment and Collection Law, D.C. Code § 32–1301 *et seq.*[2] Plaintiffs assert that MTM is liable for wage violations because MTM is a "joint employer" or "general contractor" under the federal and local wage laws. App. A-34. MTM filed a motion to dismiss, asserting that it is not a joint employer or general contractor which, in relevant part, the district court denied. App. A-35 (citing *Harris*, 300 F. Supp. 3d at 243).

On July 17, 2018, the district court ordered that plaintiffs' FLSA minimum wage and overtime claims be conditionally certified as a collective action and that notice be sent to potential opt-in plaintiffs. App. A-59–A-60 (citing *Harris v. Med. Transp. Mgmt., Inc.*, 317 F. Supp. 3d 421, 424 (D.D.C. 2018)). One-hundred fifty-five current and former drivers joined the collective action as party plaintiffs, each alleging wage and overtime claims against MTM under the FLSA. App. A-60. On July

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[2] Plaintiffs also alleged breach of contract under a third-party beneficiary theory. That claim was dismissed. *See Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234 (D.D.C. 2018).

26, 2019, plaintiffs moved to certify a class of more than 800 drivers with respect to the D.C. wage claims. *Id.*

On September 24, 2020, the district court denied plaintiffs' motion to certify the class under Rule 23(b)(3). The court held that plaintiffs met the requirements of Rule 23(a) by showing numerosity, commonality, typicality, and adequacy of representation, App. A-38–A-43, and that plaintiffs satisfied the superiority requirement of Rule 23(b)(3): "Class-wide resolution of certain central questions—particularly MTM's status as a joint employer or general contractor—is superior to litigating that question in dozens, if not hundreds, of individual actions." App. A-44–A-45. Thus, the court concluded, "deciding the joint liability question in a single case covering an entire putative class is superior to multiple individual actions." *Id.* at A-45. The court also held that plaintiffs satisfied the predominance requirement with regard to whether MTM is a joint employer or general contractor, because evidence common to the class will resolve those issues. Specifically, MTM's policy documents and service agreements with its subcontractors, and testimony by MTM employees regarding the control MTM exercises over the drivers' hiring, training and removal and the rules and standards MTM imposes on the

drivers, "would be applicable to all class members." App. A-48. The court concluded that "the joint liability question can be resolved through the presentation of proof common to the class, and not individualized evidence. That question, at least, meets the predominance requirement of Rule 23(b)(3)." *Id.* Nevertheless, the district court denied class certification under Rule 23(b)(3) because it found that individualized issues would predominate with respect to which class members were underpaid and by how much. App. A-48–A-55.

Although the district court declined to certify a damages class under Rule 23(b)(3), it invited supplemental briefing on whether it should certify an issue class under Rule 23(c)(4):

> Certifying an issue class could "materially advance the resolution" of this case. For instance, certifying a class as to whether MTM is a "joint employer" and/or a "general contractor" for purposes of determining whether it is jointly liable for unpaid wages under federal and District of Columbia wage laws has some appeal. Those questions are potentially dispositive. If MTM is neither a joint employer nor a general contractor, the case would come to an end. But if MTM is found to be a joint employer or a general contractor, it would be liable for the underpayment of wages to an individual class member if that individual can demonstrate a violation of District wage laws.

App. A-57–A-58.

On December 7, 2020, plaintiffs filed a supplemental memorandum in support of certification of an issue class under Rule 23(c)(4). On August 6, 2021, the district court entered an order certifying a (c)(4) class on the issues of whether MTM is a joint employer or a general contractor. App. A-81–A-82. It explained that the certified issues would be determined based on evidence common to the class and that resolving the issues would materially advance the resolution of the case. App. A-77–A-79. The court also confirmed that the statute of limitations for the class members' claims remains tolled, and it denied a motion by MTM to decertify the FLSA collective action. App. A-60.

On August 20, 2021, pursuant to Rule 23(f), MTM filed a petition for permission to appeal the order granting class certification.

LEGAL STANDARD

Rule 23(f) provides the court of appeals with discretion to entertain interlocutory review of an order granting or denying class certification. This Court has held that such review may be appropriate in three circumstances:

> (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account

> the district court's discretion over class certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous.

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002).

ARGUMENT

The Court should deny MTM's petition for interlocutory review. MTM concedes that the Rule 23(c)(4) certification does not present a "death-knell situation." *See* Pet. 8. MTM contends, however, that the Court's other criteria for review are satisfied because the class-certification decision presents an "unsettled and fundamental issue of law … likely to evade end-of-the-case review" and is "manifestly erroneous." *Id.* Neither argument succeeds.

I. The order certifying a Rule 23(c)(4) issue class does not present unsettled issues of law likely to evade end-of-the-case review.

A. The district court's decision reflects a consensus among courts that the certification of an issue class does not require a finding of predominance for the cause of action as a whole.

The district court held that Rule 23(c)(4) permits class certification "even when … predominance [under Rule 23(b)(3)] has not been satisfied

for the cause of action as a whole." App. A-73. It explained that "courts should apply Rule 23(b)(3)'s predominance and superiority prongs *after* common issues have been identified for class treatment under Rule 23(c)(4)." *Id.* (emphasis added). The court rejected the "narrow view," advocated by MTM, that Rule 23(b)(3)'s predominance requirement must be satisfied as to the entire cause of action *before* an issue class may be certified pursuant to Rule 23(c)(4). *See id.* A-74.

1. MTM contends that the interplay between Rule 23(c)(4) and Rule 23(b)(3) is "unsettled" and reflects "a conflict among the circuits and between trial courts in this Circuit." Pet. 9–10. In reality, every court of appeals to consider the question has concluded that Rule 23(c)(4) certification of an issue class does not require a finding that common issues predominate for the cause of action as a whole. *See Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 412 (6th Cir. 2018) ("Rule 23(c)(4) contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution"); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (stating that "district courts may employ Rule 23(c)(4)(A)

to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test" under Rule 23(b)(3)); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (same conclusion); *see also Gonzalez v. Corning*, 885 F.3d 186, 202 (3d Cir. 2018), *as amended* (Apr. 4, 2018) (stating that "the appropriateness of certifying a Rule 23(c)(4) class is analytically independent from the predominance inquiry under Rule 23(b)(3)"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003) (rejecting the argument that an issue class can be certified only if the entire action satisfies Rule 23(b)(3) as having "no support in the law—not in Rule 23 itself nor in any case or treatise").

The view adopted by these courts is supported by the structure and plain language of Rule 23. It "respects each provision's contribution to class determinations by maintaining Rule 23(b)(3)'s rigor without rendering Rule 23(c)(4) superfluous," and it "flows naturally from Rule 23's text." *Martin*, 896 F.3d at 413. It is further supported by the advisory committee notes to Rule 23(c)(4), as well as the Advisory Committee on Civil Rules' rejection of potential amendments to Rule 23(c)(4) that would have incorporated the "narrow view." *Id.* (citations omitted).

Other courts of appeals, while not explicitly ruling on the question, have expressed support for the same position. For example, the Seventh and Eighth Circuits have adopted a functional approach to issue certification that is irreconcilable with MTM's view that Rule 23(b)(3)'s criteria must be assessed with respect to a cause of action as a whole. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008).

No appellate court has a contrary interpretation of Rule 23(c)(4). To be sure, twenty-five years ago, the Fifth Circuit stated in dicta in a footnote that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)," and it characterized (c)(4) as "a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996). But not even the Fifth Circuit adheres to the view set forth in that footnote. More recent Fifth Circuit decisions reflect an approach to Rule 23(c)(4) in line with the views of other circuits. *See In re Rodriguez*, 695 F.3d 360, 369 n.13 (5th Cir. 2012) ("Rule 23(c)(4)

explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." (citation omitted)); *In re Deepwater Horizon*, 739 F.3d 790, 806 (5th Cir. 2014) (holding that certification was "in accordance with … Rule 23(c)(4)" over objections that certification did not comport with Rule 23(b)(3)). Thus, to the extent there once was a circuit "split" caused by the *Castano* footnote, no such split currently exists. The courts of appeals have settled on a uniform interpretation of Rule 23(c)(4).

Accordingly, academic authorities have noted that "there now appears to be universal agreement that the predominance requirement of Rule 23(b)(3) does not apply when certification is only for an issues class." Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 161 (2018); *see also* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 Va. L. Rev. 1855, 1892–93 (2015) (noting the "emerging consensus" on an approach to Rule 23(c)(4) issue certification that does not depend on whether a cause of action as a whole meets the Rule 23(b)(3) criteria). Similarly, the Advisory Committee on Civil Rules observed in 2015 that

the courts are "converging on the view that predominance is required only as to the issues."[3]

This Court has not yet ruled on the issue. In *In re Johnson*, 760 F.3d 66 (D.C. Cir. 2014), the Court declined to rule on "the appropriate use of an issue class" because that question had not been raised or briefed in the case. *Id.* at 75. However, in finding no manifest error in the district court's certification of a Rule 23(b)(3) class "solely to resolve the questions concerning discrimination," this Court discussed issue class certification favorably, explaining that Rule 23(c)(4) "expressly authorize[s]" a district court to "certif[y] a 'class action with respect to particular issues.'" *Id.* at 74–75; *see also id.* at 75 (noting that "in general, a district court has a good deal of discretion in the management of the litigation before it").

Based on a single district court decision—*Little v. Washington Metropolitan Area Transit Authority*, 249 F. Supp. 3d 394 (D.D.C. 2017)—MTM contends that there is a "conflict … between trial courts in this Circuit." Pet. 16. In *Little*, the plaintiffs moved for certification under Rule 23(b)(3) or, in the alternative, "propose[d] certification under (b)(2)

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[3] Advisory Comm. on Civ. Rules, Minutes, April 9, 2015, at 41, https://www.uscourts.gov/sites/default/files/cv04-2015-min_0.pdf.

for liability and injunctive relief determinations and the application of (c)(4) to allow the question of liability to be answered on a class-wide basis." *Id.* at 418. The court held that Rule 23(b)(3) was not satisfied, *id.* at 425, but held that "certification [was] proper under Rule 23(b)(2) and (c)(4)," *id.* at 418. MTM, in its briefing before the district court, quoted *Little*'s statement that "Rule 23(c)(4) gives the Court discretion to certify a class as to particular issues and resolve others on an individual basis, 'so long [as] the proposed class satisfies the requirements of Rule 23(a) and (b) with respect to liability.'" *Id.* at 425 (citation omitted). Reading the sentence in context, however, it is clear that the court did not hold that (b)(3) predominance must be satisfied for certification under Rule 23(c)(4).

2. Interlocutory review is further unwarranted because the question of law on the propriety of Rule 23(c)(4) class certification is not likely to evade end-of-the-case review. MTM claims in conclusory fashion that the issue might escape appellate review following final judgment because certain elements of liability and damages will require trial individually or in small groups of plaintiffs. Pet. 10. But MTM never explains why those potential phases of this case would deprive it of a

final, appealable judgment. In fact, this class action will eventually terminate in a final judgment, and appellate review of the Rule 23(c)(4) class-certification decision may be entertained then. *Cf. In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002) (denying Rule 23(f) petition because "the question of whether district courts may certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims … is not … likely to evade end-of-the-case review").

B. Whether Rule 23(c)(4) allows certification of issues that materially advance the litigation but do not completely resolve liability is not an unsettled question of law evading end-of-the-case review.

MTM likewise errs in contending that there is an unsettled question as to whether Rule 23(c)(4) permits certification of issues that will not completely resolve liability because of the lack of a common policy or practice. Pet. 11–13. MTM does not characterize this question as "fundamental," does not attempt to identify a conflict among courts of appeals or within this Circuit on the question, and does not contend that the issue is likely to evade end-of-the-case review. These concessions alone demonstrate that the issue is not appropriate for interlocutory review.

MTM says that it is unaware of any other case where elements of liability would remain to be determined following adjudication of the certified issues. Pet. 12. As the district court explained, however, "courts within this Circuit and others have rejected a requirement that an issue class fully resolve liability in the context of Rule 23(b)(3) and 23(c)(4) alike." App. A-78 (collecting cases). In addition, the district court in *Russell v. Educational Commission for Foreign Medical Graduates*, 2020 WL 1330699 (E.D. Pa. Mar. 23, 2020), certified a Rule 23(c)(4) class action "to consider the duty and breach elements of Plaintiffs' claims [of negligence and negligent infliction of emotional distress], which are subject to common proof, but [] decline[d] to certify issues about causation and damages, which are not." *Id.* at *1.

MTM's argument that the question is unsettled relies on a single, out-of-circuit district court case—*Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686 (N.D. Cal. 2019). *Adkins*, however, is not inconsistent with the decision here. In *Adkins*, the court denied Rule 23(c)(4) class certification because the proposed issue certification would not "materially advance the overall disposition of the case." *Id.* at 697 (citation omitted). Here, the district court concluded that determining the threshold issues of whether

MTM is a joint employer or general contractor "*would* 'materially advance the litigation.'" App. A-79 (emphasis added and internal citation omitted). That suffices to warrant (c)(4) certification.

II. The district court did not manifestly err in certifying an issue class under Rule 23(c)(4).

"Manifest error requires a showing that the District Court failed to apply the correct legal standard, reached a decision squarely foreclosed by precedent, or otherwise committed an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *In re District of Columbia*, 792 F.3d 96, 97–98 (D.C. Cir. 2015) (cleaned up; citing *In re Johnson*, 760 F.3d at 72, and Manifest Error, *Black's Law Dictionary* (10th ed. 2014)). "To obtain permission for interlocutory appeal of a class certification on the manifest error prong of *In re Lorazepam*, the petitioning party must show not merely that the District Court's decision was wrong, but that the error was plain and indisputable." *In re District of Columbia*, 792 F.3d at 101. MTM's arguments do not come close to meeting "this exacting standard." *Id.*

First, MTM asserts that the district court manifestly erred in finding that "there are questions of law or fact common to the class"

within the meaning of Rule 23(a)(2). Relying solely on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), MTM contends that a common question must address the conduct that caused the class members' injuries to satisfy Rule 23(a)(2). Pet. 14–15. The decision in *Wal-Mart* does not so hold. Rather, commonality under Rule 23(a)(2) requires that the plaintiffs' claims "depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

Here, as the district court explained, MTM's status as a joint employer or general contractor are issues "capable of class-wide resolution 'in one stroke,' as their resolution will depend on common evidence concerning, among other things, MTM's hiring, training, and performance requirements," App. A-40 (quoting *Wal-Mart*, 564 U.S. at 350), as opposed to individualized facts regarding MTM's relationships with specific plaintiffs. "MTM's legal status as joint employer or general contractor thus presents a quintessential 'common question' under Rule 23(a)(2)." *Id.* A-41.

MTM argues that the district court committed manifest error by finding that plaintiffs satisfied Rule 23(a)(2)'s commonality requirement while also finding that the individualized inquiries necessary to determine MTM's liability to each class member for underpayment of wages precluded a finding of predominance under Rule 23(b)(3). Pet. 15–16. Predominance under (b)(3), however, is a more demanding standard than commonality under (a)(2), *see Comcast Corp. v. Behrand*, 569 U.S. 27, 34 (2013). More importantly, the district court did not certify a (b)(3) class. Rather, the district court properly certified a (c)(4) class with respect to the threshold issues that can be resolved with common evidence and that will materially advance the litigation.

Second, MTM argues that certification under Rule 23(c)(4) cannot be granted without satisfaction of Rule 23(b)'s predominance requirement with respect to the cause of action as a whole. As discussed above, every court of appeals to have considered the issue has found that there is no such requirement, and neither the Supreme Court nor this Court has addressed the issue. Thus, the district court's decision to embrace the majority view was neither contrary to directly controlling

precedent nor erroneous on its face, as required to constitute manifest error.

Further, MTM's assertion that the district court did not apply Rule 23(b)(3)'s superiority and predominance prongs to the issues identified for class treatment under Rule 23(c)(4) is wrong. The district court held that "[c]lass-wide resolution of certain central questions—particularly MTM's status as a joint employer or general contractor—is superior to litigating that question in dozens, if not hundreds, of individual actions." App. A-44–A-45. And the court found that the predominance requirement was satisfied with respect to those issues: "But what is clear, however, is that the joint liability question can be resolved through the presentation of proof common to the class, and not individualized evidence. That question, at least, meets the predominance requirement of Rule 23(b)(3)." *Id.* A-48.

Third, MTM's claim that resolution of the issues certified for class treatment "will not materially advance the disposition of this litigation," Pet. 14, is baseless. As the district court explained, App. A-71, A-77, if the issues are resolved in MTM's favor, the case will be over because MTM will not be liable for the drivers' wage violations unless it is

determined to be a joint employer or general contractor. If the issues are decided in plaintiffs' favor, MTM will be liable for the underpayment of required wages, and all that will remain to be tried individually or in small groups is the amount of compensable time worked by each driver and whether any wages received for such work met or exceeded the lawfully required wage rates. Either way, determining whether MTM is liable for the underpayment of wages will necessarily advance the resolution of this case.

MTM attempts to support its argument with citations to two unreported and out-of-circuit district court decisions that denied (c)(4) certification of a joint-employer question. Pet. 19 (citing *Arnold v. DirecTV, LLC*, 2017 WL 1251033 (E.D. Mo. Mar. 31, 2017); *Hinds v. FedEx Ground Package Sys., Inc.*, No. 4:18-cv-01431-JSW (N.D. Cal. Aug. 18, 2021)). *Arnold*'s discussion of the possibility of certifying an issues class is limited to a single footnote stating that (c)(4) certification is not appropriate for the same reasons the court denied (b)(3) certification—the predominance of individual issues. 2017 WL 1251033 at *13 n.9. Similarly, the decision in *Hinds* discusses (c)(4) certification in a single, conclusory paragraph. Slip. Op. 12, App. A-94. Neither decision comes

close to establishing that the district court's decision here is contrary to directly controlling precedent or erroneous on its face.

MTM argues (at Pet. 20–21) that the district court committed manifest error by relying on *In re Nassau County Strip Search Cases*, 461 F.3d at 226 (reversing district court's denial of (c)(4) certification), as one of several authorities cited in support of its conclusion that (c)(4) certification is appropriate when common questions predominate only as to the issues certified. App. A-75. MTM argues that *In re Nassau* is inapposite because the issue certified there would resolve liability, and the issues certified here will not. But that distinction does not determine whether resolution of the questions certified for class treatment in this case will materially advance this litigation, and MTM's focus on a single distinguishing feature of a non-controlling case hardly establishes manifest error.

III. This Court should reject MTM's request for interlocutory review of the decision denying MTM's motion to decertify the FLSA collective action.

Interlocutory review of the district court's decision denying decertification of the FLSA collective action is likewise unwarranted. That decision was based on the FLSA, *not* Rule 23, and Rule 23(f) does

not permit appellate review of questions unrelated to class certification. *See In re James*, 444 F.3d 643, 648 (D.C. Cir. 2006) (stating that appellate review of "non-Rule 23 issues" in a Rule 23(f) petition is an "end run[] around the final judgment rule"); *see also In re Lorazepam*, 289 F.3d at 107 ("What matters for purposes of Rule 23(f) is whether the issue is related to class certification itself."). Indeed, MTM's quotation (at Pet. 23) of *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), is misleading: The cited discussion in *Yamaha Motor Corp.* concerned interlocutory review in the context of 28 U.S.C. § 1292(b), *not* Rule 23(f).

Pendent appellate review over the FLSA decision is not appropriate here. "This court exercises pendent appellate jurisdiction sparingly," and "only when substantial considerations of fairness or efficiency demand it." *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678–79 (D.C. Cir. 1996). None of the cases that MTM cites, *see* Pet. 24, arose where the appellate court's exercise of pendent jurisdiction arose in the context of a Rule 23(f) petition. Moreover, "pendent appellate jurisdiction may be declined if the appealing party has, intentionally or not, circumvented the district court's authority to decide whether to endorse an interlocutory appeal under 28 U.S.C. § 1292(b)." *Gilda Marx*, 85 F.3d at

679. Here, on the same day that MTM filed the instant Rule 23(f) petition, MTM filed a motion in the district court pursuant to 28 U.S.C. § 1292(b) on the *very* issue for which it seeks this Court's pendent appellate review. *See* Def.'s Mot. to Amend and Certify Order of Aug. 6, 2021, for Interlocutory Appeal Pursuant to 28 U.S.C. Section 1292(b), *Harris v. Med. Transp. Mgmt., Inc.*, No. 17-CV-01371 (D.D.C. Aug. 20, 2021), ECF No. 189. Thus, MTM's attempt to use its Rule 23(f) petition to seek interlocutory review of the decision regarding the FLSA collective to evade the district court's role under section 1292(b) should be rejected.

MTM contends that the decision regarding the FLSA collective is "inextricably intertwined" with the decision regarding Rule 23(c)(4) class certification because both the FLSA collective and the Rule 23(c)(4) class involve the merits question of whether MTM is a joint employer. But MTM fails to explain why the mere existence of an overlapping merits question means that the two certification decisions are "inextricably intertwined." And MTM's cursory invocation of "[j]udicial efficiency," *see* Pet. 24, does not weigh in favor of the exercise of pendent review here. Unlike a case where pendent appellate review of an issue may terminate the case entirely, *see KiSKA Constr. Corp.-U.S.A. v. Washington Metro.*

Area Transit Auth., 167 F.3d 608, 611 (D.C. Cir. 1999), this case will not terminate if this Court exercises pendent review over the decision regarding the FLSA collective. Regardless of whether the case proceeds collectively, as a class action, or with hundreds of individual plaintiffs, the question of MTM's liability as a joint employer will have be adjudicated.

CONCLUSION

MTM's Rule 23(f) petition for interlocutory review should be denied.

Dated: August 27, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,990 words. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 Century Schoolbook 14-point font.

/s/ *Michael T. Kirkpatrick*
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on August 27, 2021, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all registered filers in this case. Pursuant to an agreement between the parties consenting to electronic service, all counsel not registered for ECF will be served by email.

s/ *Michael T. Kirkpatrick*
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