THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

In the Original Jurisdiction

Appellate Case No. 2025-000689

Calvin Henson, Daniel James Collins, Jason Robinson,
Russell Taylor, and All Those Similarly Situated, ... Respondents,

v.

South Carolina Department of Corrections and the
South Carolina Department of Juvenile Justice, ... Petitioners.

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

I. Should South Carolina change the requirements for class certification under Rule 23, SCRCP, to add an independent requirement for ascertainability rather than leaving this as one of the many items a court may consider in its discretion?

II. Should South Carolina adopt a rigid definitional standard for class actions regarding so called fail-safe classes that has proven to be a circular maze in other forums and added no legal benefit?

STANDARD OF REVIEW

The standard of review for circuit court's granting of a class certification order is abuse of discretion. *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) ("[A] trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion."); *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) ("We generally defer to the trial court's discretion in granting class certification absent an error of law."); *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998) ("A trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion.").

ARGUMENT[1]

Absent from Petitioners arguments are that the trial judge abused his discretion when he found the requirements under Rule 23(a), South Carolina Rules of Civil Procedure, were satisfied and he certified the class. Instead, Petitioner asks this Court to adopt new doctrines in an attempt to defeat certification another way. However, even if this Court were to accepts Petitioners arguments and apply these doctrines, which were not developed under any subpart of our Rule 23, SCRCP, Petitioners' position still fails as the Rule 23(a) requirements have been met and that this class is properly certified.

Petitioners' arguments when viewed in their totality are circular in application and would provide a path to nowhere under Rule 23. Petitioners complain that the class definition is a fail-safe class because it requires individual considerations to determine class membership, but at the same time, Petitioners would also argue that the class definition would be too broad if the definition included putative class members that did not suffer alleged damages.

Class actions play a historic and important role in our judicial system. *See Trump v. CASA,*

[1] As a threshold matter before addressing Petitioners arguments, the appeal is interlocutory and class certification orders are not immediately appealable. *Hensley v. SC. Dep't of Soc. Servs.*, 429 S.C. 144, 147, 838 S.E.2d 510, 512 (2020) ("[C]lass certification orders are ordinarily not immediately appealable."); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) ("The general rule established by [the supreme court] is that class certification orders are not immediately appealable."). Additionally, on October 14, 2024, Petitioners attempted to file their notice of appeal and in the alternative a petition for writ of certiorari to address important issues. This Court on October 17, 2024, transferred the notice of appeal to the Court of Appeals and dismissed their petition for writ of certiorari and provided guidance to the Petitioner to refile their petition for writ of certiorari separately if they wished to pursue that petition with the Court. Petitioners chose not to refile the Petition with those important issues. One is left wondering why Petitioners claimed that this "scenario is a novel one, for which immediate guidance from the Supreme Court by way of a writ of certiorari is merited," but waited six months before they refiled their petition only after the Court of Appeals dismissed the notice of appeal recognizing the appeal was interlocutory. *See* Notice of Appeal, or in the Alternative, Petition for Writ of Certiorari, 2024-001727 (Oct. 14, 2024).

Inc., 606 U.S. 831, 145 S. Ct. 2540 (2025) (Discussion by Justice Barrett of lineage of class action). "The class action is a powerful tool." *Id.,* 606 U.S. at 867, 145 S.Ct. at 2566 (J. Alito concurrence) (quotations removed). The path to the Court's use of this powerful tool for efficiency should not be frustrated by circular and confusing standards. South Carolina jurisprudence has provided the trial courts with the tools for analysis and left many of the considerations to the discretion of the trial judge. Rule 23 in South Carolina is, by design, more expansive in its application than its federal counterparts.[2] This Court should reject the Petitioners efforts to narrow the availability of class actions in this state.

I. Rule 23, SCRCP, Does Not Have an "Ascertainability Requirement" Consistent with that of Rule 23(b)(3) or Rule 23(c)(1)(B), FRCP.[3]

The class, as defined by the circuit court, is ascertainable precisely because a court can discern who is a member of the class by objective criteria. Ascertainability, also known as administrative feasibility, is a federal court created requirement for Federal Rule 23, FRCP, classes, not classes certified under South Carolina Rule 23, South Carolina Rules of Civil Procedure (SCRCP). The unsettled legal landscape in the federal courts regarding this doctrine[4]

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[2] *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999).

[3] Petitioners did not raise the ascertainability requirement to the circuit court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the [petitioner], (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. DOT v. First Carolina Corp.*, 372 S.C at 301-02 (citing Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)).

[4] The federal judicial doctrine is unsettled between Circuits and between district courts. Some Circuits like the First, Third, and Fourth require proof of administrative feasibility as a prerequisite for certification. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358-59 (4th Cir. 2014). Others like the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh reject that approach. *In re Petrobras Sec. Litig.*, 862 F.3d 250, 267 (2d Cir. 2017); *Rikos v. P&G*, 799 F.3d 497, 525 (6th Cir.

holds no significance for the state courts in South Carolina. In *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 523 S.E.2d 781 (1999), this court addressed the difference between Federal Rule 23, FRCP, and our Rule 23, SCRCP:

> Our state class action rule differs significantly from its federal counterpart. The drafters of Rule 23, South Carolina Rules of Civil Procedure (SCRCP) intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B), Federal Rules of Civil Procedure (FRCP). By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart.

Littlefield v. S.C. Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81 (2008) ("we are cognizant that our appellate decisions have relied on federal precedent with respect to class action cases, but have also noted the significant differences between the two rules."); *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). Ascertainability in federal court goes to class members being readily identifiable and the administrative feasibility of the proposed class. The circuit court addressed this argument in its class certification order finding Petitioners' own statistics collected regarding sexual assaults in its facilities sets a minimum of prospective class members for the numerosity requirement. (App. 64-65). The identification of the class members in this case at first blush would be those who Petitioners generated reports on those sexual assaults. Beyond that,

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2015); *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 662 (7th Cir. 2015); *Sandusky Wellness Ctr., Ltd. Liab. Co. v. Medtox Sci., Inc.*, 821 F.3d 992, 995-96 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017); *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021); *see also Seeligson v. Devon Energy Prod. Co.*, 761 F. App'x 329, 334 (5th Cir. 2019). Depending on the Circuit or district court, the doctrine may be based on the language of Federal Rule 23(b)(3), *Byrd*, 784 F.3d at 162 ("The ascertainability requirement as to a Rule 23(b)(3) class is consistent with the general understanding that the class-action device deviates from the normal course of litigation in large part to achieve judicial economy."), or Rule 23(c)(1)(B), *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 284 (S.D. W.Va. 2015) ("In 2003, the long-implicit concept of ascertainability was added to Rule 23(c)(1)(B), providing that '[a]n order that certifies a class action must define the class …' Fed. R. Civ. P. 23(c)(1)(B).").

Petitioners have failed to keep accurate records of reported sexual assaults[5] and during the claims process additional class members would have to submit their claims through a currently unknown process to be approved or denied by the court or special master. Identification of the class is no different than other class actions where Defendant failed to keep accurate records of customers or Defendant's environmental contamination resulted in personal injury to a large group of people in an area. Neither scenario requires identification of the full class for certification or for class notice.

Petitioners cite to *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991) to support their argument that in the absence of governing law on a rule of civil procedure, this Court should look to Federal Court's for guidance from federal case law interpreting and applying the equivalent federal rule. In *Newsome*, the issue before the court was the interpretation of Rule 23(a) and specifically "(5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." *Newsome Chevrolet-Buick, Inc.*, 304 at 330, 404 S.E.2d at 201. The Court found that the "phrase 'amount in controversy' as stated in Rule 23(a)(5) is not defined under either the South Caroline Rules or statutes, and we find no South Carolina case law which addresses this phrase." *Id*. This Court recognized that since:

> our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure. *See* H. Lightsey & J. Flanagan, *South Carolina Civil Procedure*, (2d ed. 1985). In the present case, we are solely concerned with the interpretation of the phrase "amount in controversy." We find persuasive the rule set forth by the United States Supreme Court for determining the "amount in controversy."

Id. at 330-31, 404 S.E.2d at 201. This Court then applied the holding in *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 590 (1938), *"the sum claimed by the plaintiff*

[5] *Infra*, p. 13, n. 16.

controls if the claim is apparently made in good faith." *Newsome Chevrolet-Buick, Inc.*, 304 S.C. at 331, 404 S.E.2d at 201 (emphasis in original).

The Petitioners claim that: "Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure," *Newsome Chevrolet-Buick, Inc.*, 304 S.C. at 330, is not supported by this Court's precedent with respect to South Carolina's Rule 23. This Court has repeatedly held that Rule 23, SCRCP, is intentionally distinct from Rule 23, FRCP. Any arguments seeking to impose federal case law determining the applicability of specific language in the Federal Rule 23 that were expressly **NOT** adopted for the South Carolina Rule 23 is ignoring this Court's clear directive that "Rule 23, SCRCP, endorses a more expansive view of class action availability than its federal counterpart." *Littlefield*, 337 S.C. at 354-55. If this Court believes that modifications should be made to the current South Carolina Rules of Civil Procedure, there is a procedure that must be followed to accomplish these changes independent of this case that our current Rule 23, SCRCP, should have additional subparts or language.

a. Even if this Court Accepts Petitioners Arguments, Petitioners Failed to Raise these Arguments to the Circuit Court and a Portion of the Class was Identifiable at Certification.

In this case, Defendants failed to raise any arguments regarding the identification of the class members as a bar to certification in the circuit court. In fact, the South Carolina Department of Corrections ("SCDC") argued that the population of potential class members was finite and that SCDC tracked and compiled data on the inmate population and suggested they have records of all sexual assaults. (App 201-02). Respondents in reply raised the argument that the expanse of the putative class would be more than just those records maintained by SCDC and the South Carolina Department of Juvenile Justice ("SCDJJ") since the South Carolina Legislative Audit Council

found that SCDC failed to maintain accurate records and the U.S. Department of Justice found that SCDJJ failed to maintain accurate records. (App. 211-12). The circuit court implicitly considered that at least a portion of the putative class members in the certification process could be identified from the Petitioners' own records. Petitioners should not be rewarded by allowing them to not maintain accurate records of sexual assault at their facilities and then argue the lack of identifiable class members is fatal to the certification of the class.

The circuit court already considered the potential membership of the class when it granted the class certification. At the bare minimum, the class consists of inmates or residents who reported sexual assaults and Petitioners created records of those incidents. Given that inmates and residents lacked the legal authority to consent to sexual contact by employees and were prohibited by policies and procedures from consensual sexual contact with fellow inmates,[6] the need for individualized fact-finding trials is unnecessary and unwarranted. What the Petitioners are really raising here is a damages argument masquerading as a class identification argument. The issue of a claims procedure or how damages will be address has not been raised to, or addressed by, the circuit court. A court in South Carolina has addressed the claims procedure in sexual abuse class actions in the past by using a damages matrix that listed the type of abuse and assigned a minimum/maximum payment based on specific alleged abuse. *See* Order Certifying Classes and Giving Prelim. Approval to Settlement, *Doe v. The Bishop of Charleston, et. al.*, 2006-CP-18-1310, 2006-CP-18-1311, 2006-CP-18-1636 (Jan. 23, 2007). Respondents are not advocating for any specific approach or value but present this as a hypothetical response to Petitioners' arguments.

The facts of this case do not mirror that of *Cuming v. S.C. Lottery Comm'n*, Civil Action No. 3:05-cv-03608-MBS, 2008 U.S. Dist. LEXIS 26917 (D.S.C. Mar. 28, 2008), cited by

[6] *Infra*, pp. 16-18.

Petitioners, where plaintiffs in that case attempted to certify a class of scratch off lottery ticket purchasers who bought the scratch off tickets after the top prizes were no longer available. In that case, the district court found that:

> To become a member of the class, prospective members would have to show that they purchased SCEL instant scratch-off tickets that offered a chance to win top prizes that were no longer available at the time of sale. In order to determine which of these individuals has standing to sue, the court would have to conduct potentially thousands of individualized inquiries to determine whether the ticket had been purchased after the top prize had been awarded.

Cuming v. S.C. Lottery Comm'n, Civil Action No. 3:05-cv-03608-MBS, 2008 U.S. Dist. LEXIS 26917, at *9 (D.S.C. Mar. 28, 2008). The district court found that each putative class member would have to prove they purchased a ticket to be identified based on when they purchased the ticket. This was "exactly the type of 'extensive factual inquiry' that courts have held to be too administratively burdensome to warrant class certification." *Id*. This is not the case here. As discussed above, the absent class members all suffered similar injuries, the only difference is the degree they suffered which can be determined during the administration of a claim's procedure.

Petitioners seek to limit the breadth of Rule 23 as adopted by overlaying an unsettled federal judicial doctrine that was developed according to language of a rule that was not adopted by our South Carolina Courts. They also seek protection of this Court for their failure to adequately record sexual assaults in their facilities. There is no need for the adoption of an unsettled federal doctrine that is unrelated to the Rule 23 adopted by this state.

b. Identification of Class Membership Before Notice is Not Required for the Certification of Class Actions in South Carolina

Petitioners' arguments that the circuit court must determine which inmates or residents meet the class definition before class notice can be issued, or class certification can be granted, is misguided and mistaken. As a threshold matter, the identification of absent class members for notice is not a requirement for the circuit court to consider when determining if it will certify a class action. Once the trial court ruled that "a class representative has standing, the case is justiciable, and the proponent of the class suit need not demonstrate that each class member has standing." Newberg on Class Actions § 2:3 (5th ed.); *see also Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) ("In a class action matter, we analyze standing based on the allegations of personal injury made by the named plaintiff") (*quoting Beck v. McDonald*, 848 F.3d 262, 269-70 (4th Cir. 2017), *in turn citing Doe v. Obama*, 631 F.3d 157, 160 (4th Cir. 2011)); *see also Neale v. Volvo Cars of North Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015); *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009); *Milbourne v. JRK Residential Am., LLC*, 2016 WL 1071564, at *6 (E.D. Va. Mar. 15, 2016) (Payne, J.); *Lewis v. Casey*, 518 U.S. 343, 395, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Souter, J., concurring).

Identification of the absent class members is not necessary prior to class notification. It never has been. Identification prior to notification would make no logical sense in the face of a robust body of law nationwide concerning the circumstances and propriety of notification to unknown class members by publication.

The Petitioners are correct that "the trial court declined to address procedures for notification of the defined classes in its Amended Order Granting Plaintiffs' Motion to Certify." (Petr. Br. at p. 5). Petitioners seek appellate review of a potential notice issue that has not been subject to any trial court ruling. The procedure of class notification for an opt-out class must be

done in a manner sufficient to satisfy Rule 23, SCRCP, and the due process clause of the state and federal constitutions. The "standard for notice is that it must be 'the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Hosp. Mgmt. Assocs. v. Shell Oil Co.*, 356 S.C. 644, 662, 591 S.E.2d 611, 621 (2004) *(quoting Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S. Ct. 2965, 2974, 86 L.Ed.2d 628 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 70 S.Ct. 652, 94 L.Ed. 865 (1950))). Identifying the complete composition of the class prior to class notice is not required since "[a]dequate and reasonable notice, sufficient to satisfy Rule 23, SCRCP and the due process clauses of state and federal constitutions," may be "given to the class members by publication," if there is "no way personally to notify many of the class members." *S.C. Pub. Serv. Auth. v. Citizens & S. Nat'l Bank*, 300 S.C. 142, 158, 386 S.E.2d 775, 785 (1989). If Petitioners argument regarding identification of absent class members was mandatory for class certification and prior to notification, then notice by publication or other forms of mass media would never be found to pass constitutional due process. *See Id.*; *Premium Inv. Corp. v. Green*, 283 S.C. 464, 475, 324 S.E.2d 72, 78–79 (Ct. App. 1984).

Petitioners suggest that in opt-out class actions "the members of the class must be identified *before* notification of the class can be made" and that "[only] once those class members are identified may notification of the classes even commence". (Petr. Br. at p. 6 (emphasis in original)). Following the Petitioners' arguments to a logical conclusion, this would turn the nature of Rule 23 class actions on its head. Absent class members would have to be identified prior to class certification at the minimum through customer lists or a database compiled by the Defendant. If Defendant's records cannot provide the composition of the requested class, Petitioners' arguments

appear to advocate that unidentified absent class members have to identify themselves to be considered in the class to be certified. This is not the standard for class actions in South Carolina.

Petitioners' arguments appear to seek to reinstitute an opt-in procedure that this Court rejected in *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). In *Salmonsen*, this Court found the transformation of an opt-out class into an opt-in class affected the mode of trial. This mode of trial change was the stated basis for the Court to accept the appeal. Unless this Court were to break with this and other states' precedent as well as the standard federal practice and reverse *Salmonsen* and all of its progeny, no such mode of trial argument exists here. The transformation of the *Salmonsen* class into an opt-in class affected mode of trial because it would bar certain claims of putative class members. *Id*. Unlike *Salmonsen*, this damages class is an opt-out class and none of the absent class members claims would be barred following the notification procedure.

Petitioners' argument, which is really intended to foreclose the use of the class device in its entirety, would create a necessary claims procedure prior to notice. This effectively negates the efficiency advantage of the class action. Petitioner advocates a pre-notice procedure in which absent class members provide proof of their claim. (Petr. Br. at p. 5 ("each putative class member will need to prove both (1) that he/she was a victim of a 'sexual battery' based on that statutory definition and (2) that the sexual battery was nonconsensual.")). Such a procedure would require absent class members to take an active role in the class action prior to the class notice being distributed. Effectively, Petitioners seeks to overrule the finding in *Salmonsen* and asks this Court to adopt the implementation of the 'opt-in' procedure to convert the previously certified class action into an ersatz form of permissive joinder under Rule 20 of the South Carolina Rules of Civil Procedure. *See Salmonsen*, 377 S.C. at 458, 661 S.E.2d at 90. As this Court found in *Salmonsen*,

the "careful reading of Rules 20 and 23 together leads to the conclusion that 'opt-in' class actions should not be allowed." *Id. at* 459, 661 S.E.2d at 91.

In this case, the Petitioners' proposed method is not supported by the facts. Petitioners have at the very minimum, records for some of the absent class members in the form of investigative reports for sexual assaults. For those sexual assaults that were not documented or that the Petitioner chose not to record, upon the court finding the defendant liable for the injuries sustained by the class representatives, there will be a claims period to adjudicate the absent class members' claims and determine the appropriate damages for those claims that are valid. These inquires prior to notification are not necessary. Instead, these issues would be properly considered during a claims process designed to handle the administration of claims that are not well documented in the Petitioners records or subject to a challenge of what is found in the Petitioners' records. The safeguards available to the circuit court to manage the administration of claims is the proper process for addressing the Petitioners' arguments.

This Court should reject the Petitioners' arguments regarding the identification of class members for class notification. This Court has approved adequate and reasonable notice in many forms, including by publication, since complete identification of the absent class members is not required for certification of a class or class notice under Rule 23, SCRCP.

II. The Class Certified by the Circuit Court is Not a Fail-Safe Class.

Petitioners also argue that the circuit court adopted a class definition that created a fail-safe class. As an initial matter, Petitioners waived this argument as it was not raised below. For jurisdictions that have adopted the fail-safe doctrine, a fail-safe class has been defined as a class that requires a court to inquire into the merits of the underlying case to identify the members of a class. The class definition here is not a fail-safe class since the class is definable by an objective

criteria and no inmate or resident can consent to sexual contact while under the custody and control of the Petitioners.[7]

The "fail-safe" class doctrine is a federal judicial doctrine that is unsettled and subject to a circuit split. Furthermore, the so called "fail-safe" debate has not yielded clarity. The most frequent result is yet more proceedings where slight adjustments are made to class definitions to end up practically in the same place. Additionally, these same interests would argue about inclusion of uninjured parties in the class if the class were not tightly confined to those who have been harmed. This Court would not benefit from adopting any version of this federal "doctrine" concerning Federal Rule 23.[8]

The Petitioner cites *EQT Production Co. v. Adair,* 764 F.3d 347 (4th Cir. 2014), to support the adopting of the fail-safe class. The Fourth Circuit has not adopted the fail-safe class prohibition. *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025). In fact, earlier this year the Fourth Circuit addressed this in *Mr. Dee's Inc.*, 127 F.4th at 931, holding:

> "[i]n *EQT Production Co. v. Adair*, we instructed the district court in a footnote to 'consider' on remand whether the classes could be defined 'without creating a fail-safe class.' 764 F.3d at 360 n.9. But we have not expressly recognized an independent prohibition against fail-safe classes as some of our sister circuits have done."

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[7] *Infra*, pp. 16-18.

[8] Petitioners cite *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000), to support their argument regarding fail safe class doctrine. Petitioners fail to address that Rule 42 of the Texas Rule of Civil Procedure (Texas's version of the class action rule) is almost a direct copy of Rule 23 of the Federal Rules of Civil Procedure. *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000) ("Rule 42 of the Texas Rules of Civil Procedure governs class certification. TEX. R. CIV. R. 42. The rule is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."). In discussing the fail-safe doctrine, the Texas Supreme Court did so under the context of a class certified pursuant to Rule 42(b)(4), TXRCP, which has a "predominance requirement" which is "one of the most stringent prerequisites to class certification" under the Texas Rules of Civil Procedure. *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

Federal appellate courts are also divided whether fail-safe class definitions are *per se* impermissible. The First, Sixth, Seventh and Eighth Circuits have endorsed a rule against fail-safe classes, finding that fail-safe classes cannot be certified under Rule 23.[9] The Fifth Circuit and the D.C. Circuit have outright rejected a rule against fail-safe classes.[10] The Third, Fourth, Ninth and Eleventh Circuits have fallen in the middle, by recognizing problems with fail-safe classes without outright issuing a prohibition on them or declaring that fail-safe classes can never be certified.[11] And finally, the Second and Tenth Circuits have not directly weighed in on the issue at all.[12]

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[9] *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) (recognizing "the inappropriateness of certifying what is known as a 'fail-safe class'"); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012) (fail-safe classes are impermissible); *McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) ("A case can't proceed as a class action if the plaintiff seeks to represent a so-called fail-safe class." (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012)); *Orduno v. Pietzrak*, 932 F.3d 710, 716–17 (8th Cir. 2019) (fail-safe classes are prohibited).

[10] *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012) (noting that Fifth Circuit "precedent rejects the fail-safe class prohibition") (citing *Mullen v. Treasure Chest Casino*, 186 F.3d 620 (5th Cir. 1999)); *In re White*, 64 F.4th 302, 315 (D.C. Cir. 2023) ("the textual requirements of Rule 23 are fully capable of guarding against unwise uses of the class action mechanism. So we reject a rule against 'fail-safe' classes as a freestanding bar to class certification ungrounded in Rule 23's prescribed criteria.").

[11] *See, e.g., Byrd*, 784 F.3d at 167 (noting problems with fail-safe classes); *Mr. Dee's Inc. v. Inmar, Inc.*, 127 F.4th 925, 931 (4th Cir. 2025) ("In *EQT Production Co. v. Adair*, we instructed the district court in a footnote to 'consider' on remand whether the classes could be defined 'without creating a fail-safe class.' 764 F.3d at 360 n.9. But we have not expressly recognized an independent prohibition against fail-safe classes as some of our sister circuits have done."); *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (*en banc*) (recognizing that fail-safe class definitions are improper but suggesting that issue should be resolved by "refining the class definition rather than flatly denying class certification"); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276-77 (11th Cir. 2019) (recognizing problems with fail-safe classes without outright prohibiting them); *accord MSP Recovery Claims, Series LLC v. Ace Am. Ins. Co.*, 341 F.R.D. 636, 647 (S.D. Fla. 2022) (explaining that "the Eleventh Circuit has not yet expressly prohibited" fail-safe class definitions); *Cummins v. Ascellon Corp.*, 2020 U.S. Dist. LEXIS 207677, at *22 (D. Md. Nov. 6, 2020) (noting that within the Fourth Circuit, fail-safe class "doctrine generally does not bar certification but counsels for reformation where necessary").

[12] *Sherman v. Trinity Teen Sols., Inc.*, 84 F.4th 1182, 1191 n.6 (10th Cir. 2023) ("We decline to address this issue because Defendants have not adequately briefed it, failing to address the circuit disagreement over whether a fail-safe class definition is an independent bar to Rule 23 class certification.").

The D.C. Circuit recently analyzed the concept of a no fail-safe class rule and rejected the rigid standards that the rule purportedly enforces. In rejecting adopting the rule, the D.C. Circuit stated that:

> a fail-safe class definition is only truly troubling to the extent it hides some concrete defect with the class. Rule 23 is a carefully structured rule that, properly applied, already addresses relevant defects in the class definition. And enforcing the Rule's written requirements is greatly preferred to deploying a textually untethered and potentially disuniform criterion, the contours of which can vary from case to case.

In re White, 64 F.4th 302, 313 (D.C. Cir. 2023). The Court in *White* focused on the perquisites of Rules 23(a) and found that the "protocol for determining if a class definition is proper is to apply the terms of Rule 23 as written … should eliminate most, if not all, genuinely fail-safe class definitions." *Id.* at 314. That is what the circuit court did in this case when it analyzed the class under the South Carolina Rule 23(a) prerequisites and found that the class fulfilled the requirements for numerosity, commonality, typicality, and adequacy.

Even if this Court was convinced to consider adopting the fail-safe class doctrine, the class definition in this case is not a fail-safe class because you can tell by objective criteria who is in the class. At a minimum, Petitioners maintain records of sexual assaults in their facilities which identify members of the class. Not all class members are captured through the Petitioners own records due to the failure of both SCDC and SCDJJ to keep accurate records of sexual assaults in their facilities.[13] The fact that these additional class members are not readily available for identification does not make this case a fail-safe class since the circuit court found that the class

[13] *See* South Carolina General Assembly Legislative Audit Council, *A Limited Review of the S.C. Department of Corrections, South Carolina General Assembly Legislative Audit Council*, p. 133-35 (August 2019) (available at https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/SCDC_2019.pdf); South Carolina General Assembly Legislative Audit Council, *A Limited Review of the S.C. Department of Juvenile Justice*, p. 80 (January 2017) (available at https://lac.sc.gov/sites/lac/files/Documents/Legislative%20Audit%20Council/Reports/A-K/DJJ.pdf).

satisfies the Rule 23(a), SCRCP, requirements. To allow this fact to inure to the benefit of a Defendant incentivizes and rewards record keeping failures. Petitioners will receive the discharge of liability for those class members who suffered sexual battery after the conclusion of this case, either through the dismissal of the claims of the class or through a judgment and the paying of damages to accepted claims of class members.

Further, under South Carolina law and under SCDC and SCDJJ policy, inmates and residents under the custody and control of state agencies, cannot consent to sexual contact. South Carolina statutory law and SCDC and SCDJJ policies prohibit sexual activity for inmates and residents, including prohibiting sexual contact among inmates leading to referral through the inmate disciplinary system.

Pursuant to S.C. Code § 44-23-1150 (A)(2), a "victim is not capable of providing consent for sexual intercourse or sexual contact with an actor." That code section defines victim to mean "an inmate or patient who is confined in or lawfully or unlawfully absent from a prison, jail, or mental health facility, or who is an offender on parole, probation, or other community supervision programs." S.C. Code § 44-23-1150(A)(2). S.C. Code §44-23-1150 is only applicable to an actor who is defined as an "employee, volunteer, or contractor of a public entity that has statutory or contractual responsibility for inmates or patients confined in a prison, jail, or mental health facility." *Id*. The conduct prohibited is defined as "an act of sexual intercourse, whether vaginal, oral, or anal," S.C. Code § 44-23-1150(C)(1), or involving "other sexual contact which is engaged in for sexual gratification," S.C. Code § 44-23-1150(2). If sexual misconduct involves employees, volunteers, agents, or contractors of a public entity, there can never be any consensual sexual intercourse or sexual contact with an inmate, resident, or patient.

Under SCDC policies, sexual contact between inmates is prohibited and results in referral

to inmate disciplinary system. SCDC Policy OP-21-12 (Issued Oct. 29, 2014). When SCDC adopted updated polices in 2020, the prohibition against sexual contact between inmates continued. SCDC Policy GA-06.11B 7.10 (Issued Nov. 23, 2021). Most residents in the SCDJJ facilities were unable to consent to sexual activity since the age of consent in South Carolina is sixteen. S.C. Code § 16-3-655. Therefore, all sexual contact when under the custody and control of the Petitioners is nonconsensual and falls into the definition of the class by the circuit court. The class definition cannot be a fail-safe class because every inmate who suffered sexual battery must be a member of the class.

The claims administration and the damages claimed by each class member will obviously be varied based on the type of sexual battery inflicted on that class member. That is not a consideration at the class certification stage of the litigation. While all inmates and residents cannot consent to sexual contact, sexual contact of someone suffering sexual assault from a staff member or inmate could have different damages calculations from someone who consented to the sexual contact.

According to the Petitioners, if the definition is not specific enough, the class would fail on typicality, adequacy, or standing grounds, and if it is specific enough, it would be an impermissible fail-safe class. "For those rare cases (if any) in which a truly 'fail-safe' class hurdles all of Rule 23's requirements, then the problem will in all likelihood be one of wording, not substance. After all, a class of human beings cannot itself be circular. Only a class definition attempting to describe them can." *In re White*, 64 F.4th at 314. If this Court determines this is one of those rare cases, it should direct the circuit court to adopt an alternative class definition.

III. Circuit Court's Ability to Define and Refine Class Definition is Manageability

The sum of the Petitioners arguments is that the circuit court cannot manage this class action and that adjudicating these claims as individual cases is the more judicially efficient approach. With all due respect to Petitioners, those arguments fail. Petitioners do not challenge that the circuit court improperly certified the class, they only argue to have this Court adopt unsettled federal judicial concepts that have been developed on the language of the Federal Rules of Civil Procedure. The circuit court already addressed these arguments when it determined the case fulfilled the prerequisites for class actions under Rule 23(a), SCRCP. As this Court has recognized regarding the superiority of class actions involving numerous plaintiffs advancing the same theory of liability, one court can hear the cases of the class representatives and determine common issues of law and fact that allow for judicial economy in the resolution of the claims of the absent class members. In this process, after the determination of liability in the class representatives' cases, the cases of the absent class members are then reduced to a claim procedure. The court, or a special master if appointed, will be presented absent class member's claims and supporting evidence for those claims before making findings on allowing those claims and the damages for each allowed claim. Differences in damages do not prevent class certification under South Carolina Rule 23, SCRCP. *McGann v. Mungo*, 287 S.C. 561, 569, 340 S.E.2d 54, 158 (Ct. App. 1986) ("The mere fact that the plaintiffs may be entitled to different amounts of damages does not prevent them from banding together and asserting their rights jointly in one action."). The circuit court has the tools and the discretion to manage this class.

CONCLUSION

The Petitioners' have failed to argue how the circuit court abused its discretion certifying this class under the requirements of Rule 23(a), SCRCP. This Court should not adopt unsettled judicial doctrines of federal courts that have been developed to address specific language in those federal rules that South Carolina expressly chose not to adopt for their Rule 23, SCRCP. For these reasons stated above, this court should affirm the Amended Order Granting Plaintiffs' Motion to Certify issued by Circuit Court Judge Heath P. Taylor.

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