UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

PLANNED PARENTHOOD OF MARYLAND, INC., *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, in his official capacity, *et al.*,

Defendants.

Civil Action No. CCB-20-00361

CONSUMER PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Defendants devote less than two pages of their brief to addressing Consumer Plaintiffs' satisfaction of the requirements for class certification under Federal Rule of Civil Procedure 23. They make no attempt to contest numerosity and adequacy under Rule 23(a). Nor do they dispute Consumer Plaintiffs' showing that certification is appropriate under Rule 23(b)(2). And their dispute with Rule 23(a)'s typicality and commonality requirements—which centers only on Consumer Plaintiffs' challenge to the Separate-Billing Rule's Opt-Out Policy—is largely a recitation of the same meritless standing argument already made (and refuted) during summary judgment briefing.

Instead, Defendants conjure up a series of additional, inapplicable barriers to certification of the proposed class. Defendants contend that the class cannot be certified because its members are not ascertainable. That argument is wrong: There is no ascertainability requirement applicable to cases like this one, where Plaintiffs seek only declaratory and injunctive relief under Rule 23(b)(2), and either way, class members could easily be identified here using the objective criteria in the class definition. Defendants also argue that Consumer Plaintiffs' claims as to the Opt-Out Policy are not typical of those of the class and do not share common questions of law or fact with those of the class, but those arguments are similarly misguided. Three of the four Consumer Plaintiffs live in states where the Opt-Out Policy would permit issuers to allow opt-outs from their plans, and these plaintiffs are similarly situated to class members in the same or comparable states. Moreover, there are clearly common questions of law and fact among the class members. Consumer Plaintiffs and the proposed class are challenging a single federal rule (the Separate-Billing Rule) on the basis that it violates a single federal statute (the Administrative Procedure Act) and harms all class members in ways that are similar and redressable through the same declaratory and injunctive relief. Finally, Defendants are wrong to contend that the Consumer

Plaintiffs' motion for class certification is improper under the one-way intervention rule, which does not apply in Rule 23(b)(2) cases. In any event, Plaintiffs have never asserted that this Court should decide summary judgment before class certification, only that this Court, in the interest of efficiency, may resolve both motions simultaneously. Because Defendants have put forth nothing to undermine Consumer Plaintiffs' clear showing that they satisfy the requirements of Rule 23(a) and Rule 23(b)(2), and have identified no other compelling reason why the proposed class should not be certified, Consumer Plaintiffs respectfully request that their motion be granted.

ARGUMENT

I. ASCERTAINABILITY IS NOT A BAR TO CERTIFICATION.

A. The Ascertainability Requirement Does Not Apply Here.

Defendants assert that class certification should be denied because the class members are not "ascertainable." *See* Defs.' Mem. of Law in Opp'n to Consumer Pls.' Mot. for Class Certification (hereinafter "Opp'n") 5–8, ECF No. 53. This argument, which hinges on Defendants' claim that there is no way to identify class members who have "opted out" of abortion coverage in their plans, is plainly wrong.

This Circuit has imposed an ascertainability requirement in certain Rule 23(b)(3) cases. *See, e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).[1] But whatever the merits of engrafting an "ascertainability" requirement onto that portion of the rule, the law is clear that there

[1] Many other circuits have held that an ascertainability requirement "is not supported by the text of Rule 23 and [have] rejected it accordingly." 1 William B. Rubenstein, *Newberg on Class Actions* § 3:2 (5th ed. 2020); *see Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125–1133 (9th Cir. 2017) ("[T]he language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to class certification, . . . We therefore join the Sixth, Seventh, and Eighth Circuits in declining to adopt an administrative feasibility requirement."); *see also Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc.*, 821 F.3d 992, 995–96 (8th Cir. 2016) (declining to impose an administrative feasibility requirement); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015) (same); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 658 (7th Cir. 2015) (rejecting the administrative feasibility requirement as incompatible with Rule 23 and "the balance of interests that Rule 23 is designed to protect").

is no ascertainability requirement for Rule 23(b)(2) class actions. *See, e.g.*, *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 328 (3d Cir. 2019) ("A (b)(2) class therefore does not . . . even require that individual class members be ascertainable."); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."), *cert. denied*, 137 S. Ct. 2220 (2017); *Shelton v. Bledsoe*, 775 F.3d 554, 562 (3d Cir. 2015) ("The ascertainability requirement ensures that the procedural safeguards necessary for litigation as a (b)(3) class are met, but it need not (and should not) perform the same function in (b)(2) litigation."); *Shook v. El Paso Cty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is *not* readily ascertainable; for instance, in a case where the plaintiffs attempt to bring suit on behalf of a shifting prison population.") (emphasis added).

This is with good reason. As Newberg explains:

> [I]n Rule 23(b)(2) class actions, notice is not obligatory, and it is often the case that any relief obtained on behalf of the class is injunctive and therefore does not require distribution to the class. Because defendants are legally obligated to comply [with any relief the court orders] . . . it is usually unnecessary to define with precision the persons entitled to enforce compliance.

1 William B. Rubenstein, *Newberg on Class Actions* § 3:7 (5th ed. 2020) (internal quotation marks omitted); *see also Manual for Complex Litigation* § 21.222 (4th ed. 2004) ("[B]ecause individual damage claims are likely, Rule 23(b)(3) actions require a class definition that will permit identification of individual class members, while Rule 23(b)(1) or (b)(2) actions may not"). The 1966 Advisory Committee notes to Rule 23 also make clear that Rule 23(b)(2) class actions are designed for suits "where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration*." Fed. R. Civ. P. 23 Advisory Committee's note to 1966 amendment (emphasis added).

While Defendants imply that the United States Court of Appeals for the Fourth Circuit

follows a different rule, they do not cite a single case from the Fourth Circuit where an ascertainability requirement was imposed on a 23(b)(2) class action.[2] Indeed, the Fourth Circuit's opinion in *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), strongly suggests that it would reject Defendants' position here. In that case, the Fourth Circuit held that a district court had abused its discretion by failing to certify a Rule 23(b)(2) class of patients seeking access to abortion on the basis that the plaintiff failed to demonstrate numerosity. *Id.* at 645. As the Fourth Circuit explained, "[w]here the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are *not specifically identifiable* supports rather than bars the bringing of a class action, because joinder is impracticable." *Id*. (emphasis added). If specific identities are unnecessary in 23(b)(2) class actions to satisfy numerosity, then it would make no sense to separately require (b)(2) plaintiffs to prove ascertainability. Here, Consumer Plaintiffs have shown (and Defendants do not contest) that the Separate-Billing Rule will impact a proposed class of millions of individual consumers in various states across the country. *See* Mem. in Supp. of Consumer Pls.' Mot. for Class Certification (hereinafter "Class Cert. Mem.") 4–5, ECF No. 40-1. Having demonstrated that the proposed 23(b)(2) class "exists," *Doe*, 528 F.2d at 645, and meets all other requirements of Rule 23, Consumer Plaintiffs do not need to specify how they would go about identifying individual putative class members.

B. Even If Ascertainability Is Required, the Proposed Class Members Are Readily Identifiable.

Even assuming, *arguendo*, that Consumer Plaintiffs were obligated to satisfy an "ascertainability" requirement in a 23(b)(2) class action, they can do so here. As the Fourth Circuit

[2] *See EQT*, 764 F.3d at 357, Opp'n at 6 (plaintiffs sought certification under 23(b)(2) *and* (b)(3) and classes certified as a Rule 23(b)(3) class action); *Spotswood v. Hertz Corp.*, No. RDB-16-1200, 2019 WL 498822, at *4 (D. Md. Feb. 7, 2019), Opp'n at 6 (plaintiff sought certification under 23(b)(3)); *Piotrowski v. Wells Fargo Bank, NA*, No. DKC 11-3758, 2015 WL 4602591, at *19–20 (D. Md. July 29, 2015), Opp'n at 6–7 (plaintiffs sought certification under 23(b)(1) or (b)(3)).

has explained, the "goal" of an ascertainability requirement, assuming one applies, "is not to identify every class member at the time of certification." *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 658 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 676 (2019) (internal quotation omitted). Rather, a class would be ascertainable if it is defined "in such a way as to ensure that there will be some administratively feasible way for the court to determine whether a particular individual is a member at some point." *Id.* at 658 (internal quotation omitted). Plaintiffs need only provide "objective criteria" by reference to which the class can be determined. *Id.* at 655.

Consumer Plaintiffs have done so. The proposed class members are all enrollees in individual-market Affordable Care Act ("ACA") exchange plans whose plans: (1) include coverage of abortion services for which federal funds appropriated to the Department of Health and Human Services ("HHS") may not be used; and (2) are subject to the Separate-Billing Rule's segregation and separate-billing requirements, exclusive of any enrollees who have "opted out" of abortion coverage in such plans, pursuant to the Separate-Billing Rule's Opt-Out Policy. Consumer Pls.' Mot. for Class Certification (hereinafter "Class Cert. Mot.") 1, ECF No. 40.

Defendants largely concede that these criteria are objective and sufficient to identify individual class members, but they contend that it will be impossible to determine which individuals have opted out of abortion coverage under the Separate-Billing Rule's Opt-Out Policy. Opp'n at 7–8. Not so. As an initial matter, the fact that the identities of the issuers who will offer an opt-out and the enrollees who will avail themselves of that option are currently "unknown," Opp'n at 7, is irrelevant. Consumer Plaintiffs do not need to be able to identify all of the class members right *now*. As explained above, the standard is whether the class is defined "in such a way as to ensure that there will be some administratively feasible way for the court to determine whether a particular individual is a member *at some point*." *Krakauer*, 925 F.3d at 658 (emphasis added). The class definition clearly meets that standard here.

Moreover, because all of the proposed class members seek the same thing—vacatur of the Separate-Billing Rule and a declaration of its invalidity—the only reason that this Court or any other might ever need to identify a member of the class is to determine whether that person is bound by this Court's judgment or has the power to enforce non-compliance with the judgment. And in that scenario, there will be an actual person before the Court and an objective criterion to determine whether the person in fact "opted out" of abortion coverage offered through their ACA plan. Should an issuer's records become relevant, the Separate-Billing Rule requires regulated entities to create and maintain records identifying enrollees who have "opted out" of abortion coverage for purposes of future billing and compliance with the Rule.[3] *See* Patient Protection and Affordable Care Act; Exchange Program Integrity, Final Rule, 84 Fed. Reg. 71,674, 71,686 (Dec. 27, 2019) (to be codified at 45 C.F.R. pts. 155, 156); *id.* at 71,687. Defendants offer no compelling reason why variations in issuers' record-keeping methods, Opp'n at 8, would necessarily render the information contained in those records unusable or unsearchable. Nor do they provide any support for their blank assertion that the Court would be precluded from accessing these records because the issuers are not parties to this suit. *See Romig v. Pella Corp.*, No. 2:14-CV-00433-DCN, 2016 WL 3125472, at *4 (D.S.C. June 3, 2016) (where defendants' records were insufficient to identify class members, plaintiffs could obtain the necessary information from the records of third parties and publication of notice). Thus, even if the ascertainability requirement were applicable here (which it is not), Consumer Plaintiffs have satisfied it by providing an "administratively feasible" way to identify class members "at some point." *Krakauer*, 925 F.3d at 658.

[3] There is no reason to think that issuers would not comply with these requirements, especially given Defendants' suggestion that an issuer that fails to do so could face an HHS enforcement action. *See* Defs.' Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Defs.' Cross Mot. for Summ. J. ("Defs.' MSJ") 15, ECF No. 35-1.

II. CONSUMER PLAINTIFFS SATISFY ALL THE CLASS CERTIFICATION REQUIREMENTS OF FEDERAL RULE OF CIVIL PROCEDURE 23.

Defendants do not contest Consumer Plaintiffs' satisfaction of Rule 23's numerosity or adequacy requirements. *See* Opp'n at 4–5. With the exception of Plaintiffs' challenge to the Opt-Out Policy, they do not contest that the class meets the typicality and commonality requirements. *Id.* Defendants also do not dispute that the Proposed Class satisfies the requirements of Rule 23(b)(2) because Defendants have "act[ed] on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). By failing to respond to Plaintiffs' arguments on these factors, Defendants have conceded these issues. *Clemestine C. v. Berryhill*, No. TMD 17-2314, 2019 WL 296705, at *3 n.6 (D. Md. Jan. 23, 2019) (citing *High v. R & R Transp., Inc.*, 242 F. Supp. 3d 433, 446 n.12 (M.D.N.C. 2017)).

Accordingly, Defendants' sole argument that Consumer Plaintiffs do not satisfy the factors identified in Rule 23 is limited to typicality and commonality grounds, and focuses *only* on Consumer Plaintiffs' ability to satisfy those factors for the purpose of challenging the Separate-Billing Rule's Opt-Out Policy. Here, Defendants repurpose the same stale standing argument they already made in their motion for summary judgment: that the named Plaintiffs (and therefore the putative class members) lack standing to challenge the Separate-Billing Rule's Opt-Out Policy because they cannot show that they will be harmed by it. Opp'n at 9–10. Plaintiffs have already explained at length why this argument is meritless in prior briefing, *see* Pls.' Opp'n to Defs.' Mot. Summ. J. & Reply in Supp. of Pls.' Mot. for Summ. J. 21–24, ECF No. 42, and it is, in any event, irrelevant to the question of whether there are "questions of law or fact common to the class" and whether the claims or defenses of Consumer Plaintiffs are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(2), (a)(3); *see Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 367–68, n.5 (3d Cir. 2015) (refusing to "shoehorn [Rule 23] questions into an

Article III analysis," which is a jurisdictional question, and noting that "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23."); *id.* at n. 3 ("Once threshold individual standing by the class representative is met, a proper party to raise a particular issue is before the court; there is no further, separate 'class action standing' requirement." (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 2:8 (5th ed. 2012)).

Defendants also contend that the class cannot satisfy typicality and commonality because it remains unclear whether "any of the States in which the named Plaintiffs reside will permit opt-outs" and whether any plans in those States will in turn permit enrollees to opt out of abortion coverage. Opp'n at 10. This argument, which Defendants make in two sentences, is misplaced. Typicality does not require that claims of plaintiffs and class members be "perfectly identical or perfectly aligned." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006). Moreover, even if the Court were to look only at the claims related to the Opt-Out Policy, three of the four Consumer Plaintiffs live in jurisdictions that permit but do not require abortion coverage in individual-market exchange plans,[4] and the Opt-Out Policy therefore threatens to injure them in the same way it injures class members in all other states where an issuer could permit such opt-outs. As a result, the named Consumer Plaintiffs' claims are unquestionably typical of those in the class; to the extent Defendants believe those claims are not meritorious, that is an argument for summary judgment, not class certification. As to the commonality requirement, "[a] single common question will suffice." *EQT*, 764 F.3d at 360; *Ganesh, LLC v. Computer Learning Ctrs., Inc.*, 183 F.R.D. 487, 489 (E.D. Va. 1998) (for commonality and typicality "[i]t is enough for a lawsuit to raise questions that are substantially related to the resolution of the case and that link the class members together, even though the individuals themselves are not identically

[4] *See* Decl. of K. Hambrick ¶ 1, ECF No. 29-3 (Maryland); Decl. of R. Barson ¶ 1, ECF No. 29-4 (D.C.); Decl. of M. DiDato ¶ 1, ECF No. 29-5 (New Jersey).

situated"). Consumer Plaintiffs have shown that the claims brought by them on behalf of the class turn on many other common questions of law, Class Cert. Mem. at 7–8, arise from the same course of conduct (Defendants' failure to follow the substantive and procedural mandates of the APA in promulgating the Separate-Billing Rule), *id.* at 9–10, and are based on the same legal theory (that the Rule violates the APA), *id*. Thus, they have clearly met the commonality requirement.

III. THE PROPOSED CLASS IS NOT OVERBROAD.

Unable to undermine Consumer Plaintiffs' showing that they are entitled to certification under Rule 23, Defendants resort to attacking the class definition. They assert that the proposed class is overbroad and ask that it be narrowed to exclude consumers residing in States that have separately challenged the Rule, on the basis that those consumers will "likely" be covered by any relief obtained in the other two suits. Opp'n at 10–11. Defendants cite no law supporting this request, and there are compelling reasons to deny it.

At the threshold, the U.S. Supreme Court has rejected the "extreme position that [] a [nationwide] class may never be certified" where litigation is proceeding in other districts and reaffirmed that certification of a nationwide class is "committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 702–03 (1979); *see also id.* at 702 ("Nothing in Rule 23, however, limits the geographical scope of a class action that is brought in conformity with that Rule. . . . Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.").

Several courts have exercised this discretion to certify multi-state or nationwide classes in cases when there were similar suits pending in other courts, especially where there was no indication that certification would interfere with the other proceedings and the alleged violations

were based on practices that were national in scope. *See, e.g.*, *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th Cir. 2000) (nationwide class appropriate even where lawsuit challenging same Immigration and Naturalization Service policy had been filed in another circuit because nationwide relief would be proper where policy impacts citizens across the country); *Lynch v. Rank*, 604 F. Supp. 30, 38–39 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984), *opinion amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985) (certifying nationwide class under 23(b)(2) even where similar issues were being litigated in other districts based in part on determination that equity favored certification); *Mayburg v. Heckler*, 574 F. Supp. 922, 928 (D. Mass. 1983), *aff'd in part*, *vacated in part sub nom. Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100 (1st Cir. 1984) (certifying region-wide class despite "[t]he pendency of a similar lawsuit in another federal court").

The Court should certify the proposed class here. Doing so will not interfere with other pending litigation that challenges the Separate-Billing Rule, which proceeds apace. To the extent Defendants allege such interference because this Court might issue a judgment before the Northern District of California, that dynamic is common in our judicial system and provides no basis for denying class certification. *See, e.g.*, *supra.* To avoid conflicting judgments, Congress has provided in some circumstances for the consolidation in a single court of all challenges to a federal rule, *see, e.g.*, 28 U.S.C. § 2112, but it tellingly has not done so here. Moreover, neither the named plaintiffs in this case, nor any class member, is currently a party to any other litigation challenging the Separate-Billing Rule pending in other jurisdictions. Particularly after the Defendants have argued that the Separate-Billing Rule should be vacated, if at all, only as to the specific parties before the Court, *see* Defs.' MSJ at 40–41, it would be patently unfair to deny class certification, and class-wide relief, on the ground that some other litigant, in some other jurisdiction, might be able to obtain relief that ultimately accrues to the benefit of the class here.

Defendants' citation to *Fisher v. Rite Aid Corporation*, Opp'n at 11, is not to the contrary. In *Fisher*, the court addressed whether the named plaintiff's state wage claims on behalf of a class should be dismissed under the "first-to-file" rule because he was also a plaintiff in another, duplicative Fair Labor Standards Act action against the same defendants in another district. No. RDB-09-1909, 2010 WL 2332101, at *2 (D. Md. June 8, 2010). The court granted dismissal "because the parties and issues in the instant matter and the [other] action [we]re substantially similar." *Id.* The same cannot be said here because no consumer around the country, including those before this Court, has brought suit elsewhere.

Furthermore, as Consumer Plaintiffs have already shown, *see generally* Class Cert. Mem., this case is particularly appropriate for a multi-state class action because it would "permit[] an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Califano*, 442 U.S. at 701; *see also Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471 (7th Cir. 2004) ("[T]he need for, if not inevitability of, class-wide treatment when injunctive relief is at stake is what Rule 23(b)(2) is about."). The issues involved are common to the class as a whole, the "challenge is directed at a specific, discrete [HHS rule] that affects [enrollees] nationwide" and "[t]he claims of individual plaintiffs do not turn on the facts of their case." *Gorbach*, 181 F.R.D. at 644. Indeed, "anything less than a nationwide class" would potentially result in "an anomalous situation" wherein HHS's Separate-Billing Rule would be applied to (and harm) some members of the proposed class, but not others, "depending on which district they reside in." *Id.*; *see also Lynch*, 604 F. Supp. at 38–39 (finding equity to favor certification of nationwide class where defendant would likely limit the effect of single-state judgment to that state, and thus "pit plaintiffs against the far greater resources of the federal government in a state-by-state battle" re-litigating the same issues).

Simply put, Defendants are asking this Court to preclude relief to millions of consumers who face harm as a result of the Separate-Billing Rule (including those located in this very state)[5] based solely on Defendants' claim that some of them *may* end up not needing relief provided through this class action. But "need" is not a requirement for class certification under Rule 23. *Cf. Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (finding that a necessity requirement "would effectively eviscerate Rule 23(b)(2), which was specifically designed with the benefits of collective action in mind"). Consumer plaintiffs have "succeed[ed] in showing a practice that exists throughout the country," so "a nationwide class and nationwide relief are appropriate." *Anderson v. Cornejo*, 199 F.R.D. 228, 244 (N.D. Ill. 2000).

IV. CONSUMER PLAINTIFFS' CLASS CERTIFICATION MOTION IS PROCEDURALLY PROPER.

Finally, Defendants assert that Consumer Plaintiffs' motion is "procedurally improper" because it violates the rule against "one-way intervention," Opp'n at 2–4, a disfavored practice in the Rule 23(b)(3) context where potential class members wait on the sidelines to see how the lawsuit turns out before opting into the class, so as to avoid the risk of being bound by an unfavorable ruling while preserving their ability to intervene to take advantage of a favorable ruling. *White v. Bank of Am., N.A.*, No. CCB-10-1183, 2012 WL 1067657, at *4 (D. Md. Mar. 27, 2012). Defendants argue that the Court should therefore rule on the Consumer Plaintiffs' motion for class certification before proceeding to the merits. Opp'n at 2. This argument fails on multiple fronts.

[5] Notably, three of the named plaintiffs in this case reside in states Defendants seek to exclude, including Maryland, the state where this case is being litigated. *See* Decl. of K. Hambrick ¶ 1, ECF No. 29-3 (Maryland); Decl. of R. Barson ¶ 1, ECF No. 29-4 (D.C.); Decl. of T. Hollander ¶ 1, ECF No. 29-6 (Maine).

First, Defendants' argument in this respect is irrelevant because Consumer Plaintiffs never asked the Court to delay ruling on class certification until *after* it decides the cross-motions for summary judgment. Rather, to further judicial economy, they suggested that the Court certify the proposed class "in the event that [it] is inclined to rule for Plaintiffs on the merits but finds they are not entitled to the presumptive remedy of nationwide vacatur." Class Cert. Mot. at 3; Class Cert. Mem. at 2. In other words, Plaintiffs have urged this Court to rule on the summary judgment and class certification motions, both of which are now fully briefed, at the same time. The cases that Defendants cite do not bar such an approach.[6] To the contrary, they make clear that "the rule against one-way intervention" does not preclude the Court from deciding class certification and summary judgment at the same time, especially where (as here) briefing on both was submitted contemporaneously. *See, e.g.*, *Costello*, 810 F.3d at 1058 (rule against one-way intervention does not preclude district court from ruling on class certification and summary judgment in a single order); *Campbell*, 311 F. Supp. 3d at 311 (ruling on certification and motion for partial summary judgment in single order).

Second, Defendants ignore that Consumer Plaintiffs' seek certification only under Federal Rule of Civil Procedure 23(b)(2). As numerous courts have held, the rule against one-way intervention is never implicated in the Rule 23(b)(2) context because, in contrast to Rule

[6] *See White,* 2012 WL 1067657, at *4 (risks associated with one-way intervention arise where court issues "ruling on dispositive motions *prior to* class certification"); *Taha v. County of Bucks*, 862 F.3d 292, 298 (3d Cir. 2017) (same); *Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057–58 (7th Cir. 2016) (same); *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir. 2012) (same); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1252 (11th Cir. 2003) (same); *Koehler v. USAA Cas. Ins. Co.*, No. 19-715, 2019 WL 4447623, at *5 (E.D. Pa. Sept. 17, 2019) (same); *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997) (same). *Cf. Campbell v. Nat'l R.R. Passenger Corp.*, 311 F. Supp. 3d 281, 311 n.5 (D.D.C. 2018) (recognizing that Rule 23 advisory committee notes make clear that "a decision on summary judgment may be appropriate prior to a certification ruling in certain circumstances"); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001) (holding that a district court was not obliged "to determine whether [] suit could proceed as a class action *before* it could consider the merits") (emphasis added).

23(b)(3), (b)(2) class members "may not opt out [of an unfavorable decision]." *Gooch*, 672 F.3d at 433 (finding "no support for applying the prohibition on one-way intervention to Rule 23(b)(2) class certifications"); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 558–59 (8th Cir. 1982) (stating that one-way-intervention rule is intended to "protect defendants from putative class members who can 'opt-out' of an unfavorable decision rendered simultaneously with class certification but can choose to be bound by a favorable decision" and emphasizing that Rule 23(b)(2) suits "from which class members cannot 'opt-out' do not present the same" concerns); *Jimenez v. Weinberger*, 523 F.2d 689, 697–702 (7th Cir. 1975) (holding that one-way intervention concerns do not apply in Rule 23(b)(2) context and affirming post-judgment certification); *Williams v. Lane*, 129 F.R.D. 636, 642 (N.D. Ill. 1990) (one-way intervention concern "legitimately arises only where monetary relief is the sole relief sought, not where [] injunctive relief was and is so importantly at stake").

Again, the cases that Defendants cite to support this argument are inapposite. Nearly all of these cases involved plaintiffs who sought to certify a class seeking damages under Rule 23(b)(3), occasionally along with other requested relief, in contrast to this case, where Consumer Plaintiffs seek only declaratory and injunctive relief on behalf of a Rule 23(b)(2) class. *See, e.g.*, *White*, 2012 WL 1067657, Opp'n at 2, (certification sought under 23(b)(1), (b)(2) and (b)(3)); *Costello*, 810 F.3d at 1049, Opp'n at 3, 4 (certification sought under 23(b)(3)); *Campbell*, 311 F. Supp. 3d 281, Opp'n at 3 (certification sought under Rule 23(b)(2) and (b)(3)); *Koehler*, 2019 WL 4447623, at *6, Opp'n at 4 (complaint included class claim for monetary relief under Rule 23(b)(3) in addition to individual claim for declaratory relief under Rule 23(b)(2)); *Taha*, 862 F.3d at 298, Opp'n at 4 (certification sought under Rule 23(b)(3)); *Wal-Mart Stores, Inc.*, 340 F.3d at 1252–53, Opp'n at 4 (certification sought under Rule 23(b)(3)). And in *Gooch v. Life Investors Insurance Company of America*, Opp'n at 4, where the plaintiffs *did* seek class certification under Rule 23(b)(2), the

court of appeals in fact recognized that the "rule against one-way intervention [was] inapplicable to the district court's order certifying the class under Rule 23(b)(2)." 672 F.3d at 432–33.

Third, even if the one-way intervention rule were implicated here, it would not proscribe the adjudication of the parties' summary judgment motions prior to class certification. Defendants focus heavily on the 1966 amendments to Rule 23 but, as they acknowledge, Opp'n at 3, the 2003 amendments—which reflect "the standard today," *Taha*, 862 F.3d at 299,—state that any class certification decision should be made "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). This language has been interpreted to provide courts with significant "flexibility" in deciding whether to "rule on motions to dismiss or for summary judgment before ruling on class certification." *Managing Class Action Litigation: A Pocket Guide for Judges* (3d ed. 2010); *Curtin*, 275 F.3d at 92 (explaining that "the word 'practicable' [in Rule 23] allows for wiggle room—enough to make the order of disposition of motions for summary judgment and class certification a question of discretion for the trial court"). Accordingly, as confirmed by many of the cases in Defendants' own brief, Opp'n at 2–4,[7] courts

[7] Notably, the rule of one-way intervention was only applied in *one* of the cases Defendants cite—*Koehler*, 2019 WL 4447623, at *5–6, an out-of-circuit case where the class was also seeking monetary relief. In every other case, the court either exercised its discretion to consider dispositive motions before class certification, did not reach the issue of one-way intervention, or determined that the rule was not even implicated. *See White*, 2012 WL 1067657, at *4 (exercising discretion to "consider[] substantive motions first, rather than proceeding with class certification"); *Hyman*, 982 F. Supp. at 11 (addressing motion for summary judgment before considering class certification issues where defendants waived any right to have certification motions decided first); *Costello*, 810 F.3d at 1057–58 (holding that one-way intervention rule did not apply where court issued class certification and summary judgment in one order); *Campbell*, 311 F. Supp. 3d at 318 (denying plaintiffs' motion for class certification and granting defendant's partial motion for summary judgment together in one order); *Curtin*, 275 F.3d at 92 (finding no abuse of discretion in district court's resolution of merits before considering class certification); *Taha*, 862 F.3d at 298 (holding that defendants waived objection to district court's ruling on summary judgment motions prior to class certification); *Gooch*, 672 F.3d at 432 (holding that the rule against one-way intervention was inapplicable for a class certified under Rule 23(b)(2)); *Wal-Mart Stores, Inc.*, 340 F.3d at 1252–53 (not addressing issue of one-way intervention where class certification reversed on other grounds).

can and routinely do exercise their discretion under Rule 23 to rule on dispositive motions before motions for class certification. Should this Court wish to do so here, there is ample authority to support that approach.

CONCLUSION

For the reasons set forth above, and in Consumer Plaintiffs' opening memorandum, Consumer Plaintiffs respectfully request that, in the event this Court is inclined to rule for Plaintiffs on the merits but finds they are not entitled to nationwide vacatur, the Court grant their motion for class certification and issue an order certifying the proposed class.

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Respectfully submitted,

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