No. 21-842

In the Supreme Court of the United States

MARK DONELSON,
Petitioner,
v.
AMERIPRISE FINANCIAL SERVICES, LLC, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The originally named corporate defendant in this case, Ameriprise Financial Services, Inc., converted from a Delaware corporation to a Delaware LLC on January 9, 2020, and changed its name to Ameriprise Financial Services, LLC. The parent company of Ameriprise Financial Services, LLC, is AMPF Holding, LLC. AMPF Holding, LLC, in turn, is a wholly owned subsidiary of Ameriprise Financial, Inc., which is a publicly traded company on the New York Stock Exchange with ticker symbol AMP. Ameriprise Financial, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARTICLES AND TREATISES

RULES OF PROCEDURE

DICTIONARIES

REASONS TO DENY THE PETITION

The certiorari petition need not detain this Court for long. In the proceedings below, Petitioner never raised the categorical claim about Rule 12(f) that he now frames as the principal Question Presented. As a result, the briefing in the district and circuit courts contained no discussion—at all—of the arguments Petitioner now wants to put before the Court. The district- and circuit-court opinions, in turn, were focused on distinct points that Petitioner, in his certiorari petition, does not contest. It is difficult to imagine a worse vehicle for this Court to address the new categorical claim about Rule 12(f) that Petitioner now wants to raise. His arguments on this point—though not having received the benefit of briefing or significant discussion in this litigation—are meritless and not the subject of a circuit split in any event. The certiorari petition is due to be denied.

A. Petitioner did not raise his current claim below

The right place to start is with an obstacle to this Court's review that Petitioner has not disclosed. One might have reasonably assumed, from a review of the certiorari petition, that Petitioner previously raised the categorical claim he now makes to this Court—namely, that "'Rule 12(f) is not an appropriate mechanism to challenge class allegations'"—in the District Court and the Eighth Circuit. Pet. 16 (quoting Timothy A. Daniels, *Challenging Class Certification at the Pleading Stage: What Rule Should Govern and What Standard Should Apply?*, 56 S. TEX. L. REV. 241, 245

(2014)). One also might have reasonably assumed, from Petitioners' statement of the procedural history, that the District Court and Eighth Circuit considered and rejected the same categorical arguments Petitioner now makes about Rule 12(f)'s "plain text" and "history." Pet. 6. One even might have reasonably assumed, from the way Petitioner describes the Court of Appeals' opinion, that the Eighth Circuit had noted that "Federal courts are split'" on the textual, historical, and practical arguments Petitioner now attempts to raise. Pet. 5 (quoting Pet. App. 41a).

But as it turns out, not one of those things is true. Petitioner did not make this categorical claim about Rule 12(f) or advance these theories in the lower courts. His failure in this respect amounts to a waiver and, at the very least, a compelling prudential reason why this Court should not consider his claim and theories for the first time on certiorari review.

When Respondents moved the District Court to strike Petitioner's class-action allegations, Petitioner did not make the claim, as he does now, that as a blanket matter "'Rule 12(f) is not an appropriate mechanism to challenge class allegations.'" Pet. 16 (quoting Daniels, *supra*, at 245). Petitioner instead asked the District Court to not strike his class-action allegations on the premise that "motions 'to strike class allegations at the pleadings stage are generally only appropriate where it is clear from the pleadings that the class claims are defective.'" Doc. 52 at 36 (quoting *Damasco v. Clearwire Corp.*, 662 F.3d 891, 897 (3d Cir. 2011)). Petitioner thus conceded that Respondents could prevail on their motion to strike if they

could, in his words, "convince the court that it is nothing less than 'obvious from the pleadings that no class action can be maintained.'" Doc. 52 at 36 (quoting *In re Yasmin & Yaz (Drospirenone) Mktg.*, 575 F.R.D. 270, 274 (S.D. Ill. 2011)). Accordingly, Petitioner urged the District Court to "refuse to strike" the allegations not on his current theory that Rule 12(f) can *never* be used to strike class allegations, but on the fact-bound theory, pressed in his briefs to the District Court, that Respondents had not shown any "inescapable" defect in the specific "class allegations" he made in his complaint. Doc. 52 at 37 (quoting *Pilgrim v. Univ. Health Card, LLC*, 660 F.3d 343, 349-50 (6th Cir. 2011)); *see also* Doc. 52 at 41–50 (arguing the viability of the class action); Doc. 37 at 39–41 (opposing Ameriprise's motion to strike on the ground that the complaint's allegations "satisfied the preliminary requirements of Rule 23(a)" and Petitioner would "seek certification of a class under Rule 23(b)(2)").

The District Court, in ruling in Petitioner's favor, therefore did not consider or address the claim that Petitioner is now attempting to put before this Court. The District Court premised its denial of Respondents' motions to strike on its fact-bound conclusion that Petitioner's complaint did not reveal that his class-action allegations were baseless on their face. App. 39a–41a. That was so, the District Court said, because Petitioner's allegations were "broader and not necessarily unique to" Petitioner, such that Petitioner was "entitled to explore whether class action treatment might be available" through discovery. App. 41a.

Respondents then took an interlocutory appeal of the District Court's order, and Petitioner again, in his briefing to the Eighth Circuit, did not make the broad claims about Rule 12(f) that he now asks this Court to consider. Instead, Petitioner's Eighth Circuit briefing said almost nothing about Rule 12(f). Of the 38 pages in the argument section of his brief following his statements regarding the standards of review, the first 17 were devoted to contesting the Court of Appeals' jurisdiction over the interlocutory appeal. *See* Brief of Appellee, Nos. 19-3691 and 19-3693, Entry ID: 4904549, at 26–45 (8th Cir. Apr. 20, 2020). The next 15 pages addressed arbitrability issues that Petitioner does not now present as questions for this Court's review. *See id.* at 45–61. Only the final four pages of Petitioner's Eighth Circuit brief addressed the motion to strike, and that part of the brief did not argue, as Petitioner does here, that Rule 12(f) can never be used to strike class allegations. *See id.* at 61–65.

Instead, those parts of Petitioner's brief made a remarkable concession. They stated that if the Eighth Circuit were to "proceed so far as to consider the denial of [Respondents'] motions to strike 'on the merits,'" then Petitioner "likely will have 'lost' this appeal already and, in any event, insufficient 'room' remains in this brief to defend those rulings comprehensively." *Id.* at 62. Even though Petitioner thus waved the white flag at the end of his brief, he did make a few arguments defending the District Court's decision not to strike his class-action allegations. But none of those arguments contended that Rule 12(f) categorically

bars a motion to strike allegations of that sort. Petitioner instead argued that the specific class in this case would have been sustainable "under Rule 23(b)(2)." *Id.* at 62, 63.

The Eighth Circuit, correspondingly, did not have before it any of the arguments Petitioner now makes about the "plain text" and "history" of Rule 12(f). Pet. 6. Most of the Eighth Circuit's argument was devoted to addressing jurisdiction and arbitrability. App. 6a–17a. After rejecting Petitioner's arguments on those fronts, the Eighth Circuit also rejected the arguments that Petitioner did make about Rule 12(f), and held that the District Court abused its discretion in not striking the class allegations. App. 20a–24a. Citing Eighth Circuit precedent, the Court of Appeals cautioned that "'[s]triking a party's pleading . . . is an extreme and disfavored measure,'" but also reasoned that "it is sometimes appropriate to strike pleadings, such as when a portion of the complaint lacks a legal basis." App. 18a (quoting *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007)). The Eighth Circuit then held that "it was an abuse of discretion for the district court to deny the motions to strike the class action allegations," because "not only was it apparent from the pleadings that [Petitioner] could not certify a class but also the class allegations were all that stood in the way of compelling arbitration." App. 20a.

In so holding, the Eighth Circuit gave no indication that it had considered the arguments Petitioner now makes about Rule 12(f). The Eighth Circuit did state that in its view "[f]ederal courts are split as to whether

class-action allegations may be stricken under Rule 12(f) prior to the filing of a motion for class-action certification when certification is a clear impossibility." App. 19a (citing *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 444-45 (5th Cir. 2007); *Weske v. Samsung Elecs., Am., Inc.*, 934 F. Supp. 2d 698, 706-07 (D.N.J. 2013)). But the debate in the cases cited by the Eighth Circuit was over the circumstances in which it is proper to grant a motion to strike class actions—not over whether the court has the power to do so at all. The New Jersey district-court decision cited by the Eighth Circuit ruled not that motions to strike are categorically barred, but rather "that they should be used sparingly, and generally are not favored and usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Weske*, 934 F. Supp. 2d at 706–07. None of the cases cited by the Eighth Circuit contemplated the theories Petitioner now raises about whether Rule 12(f) is inapplicable to class-action allegations. The Sixth Circuit opinion cited by the Eighth Circuit, allowing class allegations to be stricken in that case, did not even, as Petitioner has acknowledged, "expressly reference Rule 12(f)." Pet. 6 n1. (citing *Pilgrim*, 660 F.3d 943 (6th Cir. 2011)).

Nor did Petitioner's rehearing application give the Eighth Circuit any reason to consider those theories. It is quite rich for Petitioner to try to make much of the fact that "the full court of appeals refused to address" the "legal issues" in this case at his request "en

banc." Pet. 27. He fails to disclose that his rehearing application did not even mention the Rule 12(f) issue, and was devoted solely to the other arguments he previously had made to the Eighth Circuit panel. The first two of those issues concerned the Eighth Circuit's appellate jurisdiction. *See* Appellee's Petition for Panel and En Banc Rehearing, No. 19-3691, Entry ID 5047345, at 7–17 (8th Cir. June 21, 2021). The third related to the enforceability of Petitioner's arbitration agreement. *See id.* at 7–8, 17–22. The rehearing petition said nothing about the merits of the panel's ruling on the motion to strike.

The upshot is that Petitioner did not raise, at any pertinent stage below, the claim he now wishes to make to this Court. No court below considered his current argument that "[d]ictionaries in use in 1938, when Rule 12(f) was enacted, demonstrate that allegations supporting class certification fall far outside the scope of the Rule." Pet. 8. No court below considered his current argument that "[a]s for historical practice in the federal courts, it decidedly undermines the notion that Rule 12(f) should be used for such purposes." Pet. 13. No court below considered his current argument that "the misuse of Rule 12(f) to strike class allegations presents other problems in class action litigation, and more generally." Pet. 19. Those arguments, as explained in Section C of this Brief in Opposition, are wrong—but Petitioner's failure to raise them is an even more significant reason to deny review.

By conceding in his filings below that Respondents could prevail on their motion to strike if they could

"convince the court that it is nothing less than 'obvious from the pleadings that no class action can be maintained,'" Petitioner affirmatively waived the claim he is now making in this Court. Doc. 52 at 36 (quoting *In re Yasmin & Yaz (Drospirenone) Mktg.*, 575 F.R.D. 270, 274 (S.D. Ill. 2011)). But the problem is not just procedural waiver. It is Petitioner's failure to put this Court in a position to best answer the questions he now presents. He wishes to make a serious claim about the scope and meaning of Rule 12(f)—one that he acknowledges is contrary to rulings issued by "[n]umerous district courts," as well as the Sixth Circuit, the First Circuit, and—now—the Eighth Circuit. Pet. 6 n.1. If a party wants this Court to resolve those issues, it should be in a case in which they have been fully fleshed out in adversarial briefing and the opinions by the lower courts in that litigation. It should not be a case, like this one, in which the matter would be briefed on the merits for the first time in submissions to this Court.

B. The Circuits are not split on the Questions Presented

While Petitioner's failure to adequately raise these questions in the lower courts is reason enough to deny certiorari, it also is relevant that Petitioner cannot claim any meaningful split of authority on this matter. Petitioner does not allege that the Courts of Appeals are divided on this issue, because he cannot. As the Eighth Circuit noted, case law from both the Fifth and Sixth Circuits is consistent with the proposition that "class-action allegations may be stricken under

Rule 12(f) prior to the filing of a motion for class-action certification when certification is a clear impossibility." App. 19a (citing *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011); *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 444-45 (5th Cir. 2007)). So, too, is the case law of the First Circuit. *See Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 59 (1st Cir. 2013) ("If it is obvious from the pleadings that the proceeding cannot possibly move forward on a classwide basis, district courts use their authority under Federal Rule of Civil Procedure 12(f) to delete the complaint's class allegations.").

Variances in district-court jurisprudence are not sufficient to warrant certiorari review, and there is no division of authority at that level that could justify devoting a space on this Court's merits docket to this case in any event. While the Eighth Circuit suggested that one published district court order has gone the other way, that case—*Weske v. Samsung Elecs., Am., Inc.*, 934 F. Supp. 2d 698, 706-07 (D.N.J. 2013)—addressed the issue only peremptorily, does not appear to have adopted Petitioner's categorical approach to Rule 12(f), and did not cite the textual and historical considerations Petitioner now wishes to put before this Court. Almost all of Petitioner's cites, meanwhile, are to unpublished district-court decisions that do not support his request for review. He contends that "[s]everal" of those decisions "have cited the text of Rule 12(f) in declining to use it as the basis for striking class allegations," but his parentheticals show in those cases the courts generally stated that *those de-*

fendants had made no attempt to "tether their argument to the language of the rule." Pet. 12 n.1 (discussing *Barrett v. Vivint, Inc.*, No. 2:19-cv-00568-DBB-CMR, 2020 WL 2558231, at *7 (D. Utah May 20, 2020)). Those courts generally did not decide whether Rule 12(f)'s language could conceivably be applicable if the defendant had made a showing like the one Respondents provided the Eighth Circuit here. There is no indication, that is to say, that any of those defendants made the point that class-action allegations are impertinent for Rule 12(f) purposes when, as the Eighth Circuit found here, it is "not only" apparent that the plaintiff cannot certify a class "but also" the allegations are the only thing standing "in the way of compelling arbitration." App. 20a.

Petitioner also cites three unpublished decisions from federal courts in California, but those courts, too, addressed the issue only in short form. *See* Pet. 15 (citing *Delux Cab, LLC v. Uber Techs., Inc.*, No.: 16cv3057-CAB-JMA, 2017 WL 1354791, at *8 (S.D. Cal. Apr. 13, 2017); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. C–13–1803 EMC, 2014 WL 1048710, at *3 (N.D. Cal. Mar. 14, 2014); *Swift v. Zynga Game Network, Inc.*, No. C 09–05443 SBA, 2010 WL 4569889, at *10 (N.D. Cal. Nov. 3, 2010).) They also relied on a Ninth Circuit decision that answered the different question of whether Rule 12(f) can be used to strike a plaintiff's request for damages. *See Whittlestone, Inc. v. Handi-Craft Co.,* 618 F.3d 970, 974 (9th Cir. 2010). The Ninth Circuit did not decide whether, as the Eighth Circuit found, Rule 12(f) has a unique role to play when facially meritless class

action allegations are made in cases that would, absent the allegations, be subject to arbitration.

There is, accordingly, no lower-court conflict that warrants this Court's review on these matters. Further consideration and development of the relevant legal principles should come through percolation in the lower courts.

C. Other considerations militate against review

Four other considerations would make this Court's review especially improvident at this juncture and in this case.

1. First, Petitioner's request for review is premised almost entirely on merits arguments that are self-evidently wrong. Rule 12(f) allows a court to strike allegations that are, among other things, "impertinent." FED. R. CIV. P. 12(f). "Impertinent" means, according to the most authoritative dictionary reflecting American usage at the time Rule 12(f) became law, "not belonging or related," especially "not significantly related to the matter in hand," and "inappropriate." WEBSTER'S NEW INTERNATIONAL DICTIONARY SECOND EDITION (1934), at 1249 (unabridged ed. 1942). When it is apparent from the face of a complaint that a class cannot be maintained—and when, as here, the plaintiff's obviously meritless class allegations are all that stands in the way of an order compelling arbitration of the plaintiff's claims—then the class allegations are "not significantly related to the matter in hand" and "inappropriate" and, therefore "impertinent." *Id.* Rule 12(f) in those circumstances gives a district court discretion to strike those allegations.

That understanding of the district court's authority is confirmed, as numerous courts have noted, by Rule 23's plain text. Rule 23 states—in a subdivision the certiorari petition mentions only in a footnote and whose language the certiorari petition does not quote—that a court in a putative class action may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." FED. R. CIV. P. 23(d)(1)(D). Rule 23 also requires a district court to determine whether to certify the class "[a]t an early practicable time." FED. R. CIV. P. 23(c)(1)(A). Numerous courts have reasoned that, "[r]ead together, Rules 12(f), 23(d)(1)(D), and 23(c)(1)(A) grant the Court 'authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained.'" *Fishon v. Mars Petcare US, Inc.*, 501 F. Supp. 3d 555, 575 (M.D. Tenn. 2020) (quoting *Hovsepian v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009 WL 5069144, at *2 (N.D. Cal. Dec. 17, 2009)); *accord Doiron v. Cenergy Int'l Servs., LLC*, No. 2:17-CV-01203, 2018 WL 928238, at *1 (W.D. Pa. Feb. 15, 2018); *Gant v. Whynotleaseit, LLC*, No. CV H-13-3657, 2014 WL 12606313, at *1 (S.D. Tex. Dec. 11, 2014), *report and recommendation adopted*, No. CV H-13-3657, 2015 WL 12804529 (S.D. Tex. Jan. 16, 2015); *Whitt v. Seterus, Inc.*, No. CV 3:16-2422-MBS, 2017 WL 1020883, at *2 (D.S.C. Mar. 16, 2017). Although Petitioner suggests in a footnote that this provision can operate only after discovery, he cites no authority supporting his supposition, and the Rule's language contains no such limitation. Pet. 15 n.5.

This issue is sufficiently straightforward as to be a matter of black-letter law, which may explain why Petitioner did not challenge the proposition below. The certiorari petition twice invokes Wright and Miller in supposed support of Petitioner's new categorical claim about Rule 12(f). *See* Pet. 15 n.5; Pet. 25. Yet in a passage the Eighth Circuit quoted but Petitioner does not now acknowledge, Wright and Miller conclude that it is "sensible . . . to permit class allegations to be stricken at the pleading stage" if it is "apparent from the pleadings that the class cannot be certified" because "unsupportable class allegations bring 'impertinent' material into the pleading" and "permitting such allegations to remain would prejudice the defendant by requiring the mounting of a defense against claims that ultimately cannot be sustained." 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1383 (3d ed.).

It thus should come as no surprise that this Court has spoken of lower-court orders "striking class allegations" without remotely suggesting that the practice might be improper. *E.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1711 & n.7 (2017) ("An order striking class allegations is 'functional[ly] equivalent' to an order denying class certification and therefore appealable under Rule 23(f)." (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 388 (1977))).

2. Second, even if it turned out that Wright and Miller (and the implications in this Court's case law) were wrong, the interlocutory posture of this case and the evident lack of merit in Petitioner's class-action

allegations makes this Court's review all the more unwarranted. Petitioner does not make any meaningful claim in his certiorari petition that a class could ever be certified in this case, and—as the Eighth Circuit explained in detail—it is apparent that it never could. That may explain why Petitioner conceded below that if the Eighth Circuit were to "proceed so far as to consider the denial of [Respondents'] motions to strike 'on the merits,'" then Petitioner "likely will have 'lost' this appeal already." Brief of Appellee, Nos. 19-3691 and 19-3693, Entry ID: 4904549, at 62 (8th Cir. Apr. 20, 2020). All Petitioner could possibly hope to obtain from this Court would be a ruling that the class's fate should have been determined later in the litigation. That ruling would have no practical impact on the parties other than to delay this case's inevitable termination. Petitioner is currently proceeding with his arbitration, and he will be able to obtain a ruling on the merits of his underlying claim against Respondents—one way or the other—there.

3. Third, while Petitioner also requests in cursory fashion that the Court grant review to determine "what standards govern whether to strike" class allegations in the event that Rule 12(f) can be used for that purpose, his request on that front is not a serious one. Pet i. Almost every word in the certiorari petition is focused on the first Question Presented, which involves Petitioner's erroneous and non-certworthy argument that Rule 12(f) can never be used in this context at all. Petitioner did not make any relevant arguments to the lower courts about any distinctions be-

tween the standards that would govern in these circumstances, and he shows no meaningful split of authority on these matters. Nor does he allege that the outcome here would have been different if the Eighth Circuit had applied some other, unspecified "standard" when conducting the analysis.

4. Fourth and finally, this case would be an especially poor vehicle for review of the Questions Presented due to the issues Petitioner *did* squarely raise—and that the Eighth Circuit *did* squarely address—below. As noted above, Petitioner spent the bulk of his brief to the Eighth Circuit panel, and the bulk of his rehearing application, challenging the Eighth Circuit's jurisdiction to resolve Respondents' interlocutory appeal. *See supra* at 4–7. The possibility that the parties would need to now brief those complicated threshold issues of appellate jurisdiction—and that this Court would need to address and resolve them before even getting to the Questions Presented—is all the more reason to deny review, to allow further percolation in the lower courts, and to await a better vehicle for these questions' resolution in the future.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

March 24, 2022

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