No. 21-842

IN THE
SUPREME COURT OF THE UNITED STATES

MARK DONELSON,

Petitioner,

v.

AMERIPRISE FINANCIAL SERVICES, INC., ET AL.,

Respondents.

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

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The Petition concerns an important and recurring legal issue. The use of Federal Rule of Civil Procedure 12(f) to strike allegations supporting class certification is foreclosed by its plain text, and lacks support from the history of the Rule. However, such misuse of Rule 12(f) is a tactic increasingly pursued by defendants, and accepted by lower courts. The Eighth Circuit's embrace of that misuse warrants this Court's immediate attention. The lower court's precedential decision in this case is binding on ten district courts, across seven states—and district courts are already adhering to its erroneous view of Rule 12(f). When a federal court of appeals fundamentally misapprehends a Rule, this Court should intervene to ensure it is properly construed and faithfully applied, as it has done numerous times in the past. *See* Petition at 24-25.

I. Respondents Are Unable to Refute That the Eighth Circuit's Holding Conflicts With the Text and History of Rule 12(f), and With Numerous Decisions By This Court

Respondents do not dispute that a Federal Rule is "as binding as any statute duly enacted by Congress." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988); *see also* Petition at 6.

Respondents also do not dispute that courts are "bound to follow" a Federal Rule as understood "upon its adoption" and "are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 861 (1999); *see also* Petition at 6-7.

Rule 12(f) authorizes a federal court to strike from a pleading any "redundant, immaterial, impertinent, or scandalous matter." The Petition explains in detail how dictionaries in use in 1938, when Rule 12(f) was enacted, demonstrate that allegations supporting class certification fall far outside the scope of the Rule. *See* Petition at 8-10; *see also* Hayden Coleman & Justin Kadoura, *Why Rule 23 Is The Better Choice For Early Class Challenges*, LAW360 (March 31, 2022) (Although "Defendants challenging the propriety of a putative class often preemptively move to strike the class allegations at the pleading stage pursuant to Federal Rule of Civil Procedure 12(f)," the Rule's "text is a poor fit for motions to strike class allegations.").

Respondents do not contend that class allegations are "redundant," "immaterial," or "scandalous." Instead, they attempt to rescue the Eighth Circuit's analysis-free decision by arguing that class allegations can be "impertinent" if "obviously meritless." BIO at 11. But that is not what "impertinent" meant in 1938—or means now. If allegations were rendered "impertinent" merely by lacking merit, then every allegation ultimately deemed legally insufficient would be subject to striking under Rule 12(f). Nothing in the history of the Rule supports Respondents' expansive view of the term. Respondents' thesis also conflicts with authoritative legal dictionaries in use when Rule 12(f) was enacted, which make clear an impertinent matter is one "not properly before the court for decision." *See* Petition at 9 (citing BLACK'S LAW DICTIONARY 923 (3d ed. 1933) and BOUVIER'S LAW DICTIONARY 1509 (8th

ed. Vol. II 1914). Even an "obviously meritless" claim may be "properly before the court for decision."

Scarcely able to muster even a flimsy textual argument based on Rule 12(f) itself, Respondents quickly pivot to arguing that Rule 12(f) should be "read together" with Rule 23(d)(1)(D). BIO at 12. But this too makes little sense. Rule 23(d)(1)(D) was enacted in 1966—nearly three decades after Rule 12(f)—and makes no reference to Rule 12. Contrary to Respondents' suggestion, Rule 23(d)(1)(D) was not an implicit amendment of Rule 12(f). As the Petition explains, Rule 23(d)(1)(D) is "a procedural mechanism for amending pleadings after the propriety of class certification is decided—not means for an end-run around proper adjudication of the issue." Petition at 15 n.5.

Respondents also imply the Court has already aligned itself with the Eighth Circuit's view of Rule 12(f), with comments in prior decisions. BIO at 13. That is nonsense. *See* Petition at 23 n.7. To the contrary, abandoning the textual limits of Rule 12(f) to strike class allegations is directly contrary to numerous decisions of this Court, which make clear courts may not expand a Rule "by disregarding plainly expressed limitations," *Schlagenhauf v. Holder*, 379 U.S. 104, 121 (1964), and "have no power to rewrite the Rules by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969). "The text of a rule . . . limits judicial inventiveness," and courts "are not free to amend a rule outside the process Congress ordered . . . ." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

The Eighth Circuit's misuse of Rule 12(f) effectively amends it while bypassing Congress's prescribed role in the rulemaking process. This poses a serious separation of powers problem (Petition at 17-19)—one Respondents fail to even address.

Ignoring the incompatibility of the Eighth Circuit's holding with decisions by this Court, Respondents predictably suggest review is unwarranted because the circuits "are not split" on the Questions Presented. Respondents know, of course, that the Court can and does review decisions presenting important questions even without a circuit split—as it has done in several cases decided this Term. *See*, *e.g.*, *United States v. Zubaydah*, 142 S. Ct. 959 (2022); *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022). The Eighth Circuit's erroneous precedential decision is binding on ten district courts, across seven states—and lower courts are already adhering to its atextual and ahistorical view of Rule 12(f). *See*, *e.g.*, *Drew v. Lance Camper Mfg. Corp.*, 2021 WL 5441512 (W.D. Mo. Nov. 19, 2021) (using Rule 12(f) to strike class allegations, citing *Donelson*). That alone is sufficient reason to warrant review of the Eighth Circuit's anomalous holding.

II. Respondents' Vehicle Objections Are Unavailing, and the Eighth Circuit's Erroneous Decision Should Not Be Left Unaddressed

Unable to seriously defend the Eighth Circuit's view of 12(f), Respondents spend most of their Brief in Opposition mounting facile vehicle objections to this Court's review.

Respondents' primary effort to shield the Eighth Circuit's decision from review is based on their misleading contention that Petitioner's "categorical claim about Rule 12(f)" was not raised below. However, the Petition is a direct response to the Eighth Circuit's holding about Rule 12(f), which broke new ground in that court, and disregards prior decisions by this Court. Contrary to Respondents' suggestion, there was no need—and certainly no requirement—to have anticipatorily objected to an inventive use of Rule 12(f) not previously embraced by the Eighth Circuit.

But Respondents' argument about the briefing below is also disingenuous: it fails to disclose that Respondents never asked the Eighth Circuit to adopt the view of Rule 12(f) challenged here. To the contrary, Respondents ***never once*** mentioned Rule 12(f) in the four briefs they collectively filed in the Eighth Circuit. Instead, the Eighth Circuit adopted an unprecedented, atextual, and ahistorical view of Rule 12(f), on its own initiative. Respondents admit as much when noting the Eighth Circuit did not have "the benefit of briefing or significant discussion" about Rule 12(f), and "gave no indication that it had considered the arguments Petitioner now makes about Rule 12(f)." BIO at 1, 5.[1] Thus, Petitioner's lower court briefs are no "obstacle" to review of the

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[1] In light of this concession by Respondents, the Court should consider granting the Petition, vacating the decision below, and remanding for full briefing and consideration in the Eighth Circuit of the questions presented in the Petition.

Eighth Circuit's adventurous use of Rule 12(f),[2] and what Respondents acknowledge is a "serious claim about the scope and meaning of Rule 12(f)." BIO at 8.

Respondents next make the self-serving argument that the Court should decline to review the Eighth Circuit's holding with respect to Rule 12(f) because they would *eventually* defeat class certification in the district court, and the Petition did not argue otherwise. BIO at 13-14. That argument is makeweight. The Petition does not argue the merits of class certification because they are irrelevant to the Questions Presented, and not properly before this Court.

Respondents also concoct a vehicle objection concerning appellate jurisdiction—an issue not raised in the Petition, and about which Respondents prevailed below. To be clear, Petitioner is not asking this Court to address the question of appellate jurisdiction decided by the Eighth Circuit, and Respondents have not filed a cross-petition or otherwise presented any such questions for this Court's review.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[2] Thus, Respondents are wrong that Petitioner waived any of the arguments contained in the Petition. BIO at 8.

Respectfully submitted,

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