No. _____

In the Supreme Court of the United States

IN RE AMC ENTERTAINMENT HOLDINGS, INC. STOCKHOLDER LITIGATION

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the due process clause of the 14th Amendment of the Constitution require courts to give objecting stockholders the right to opt-out in a monetary settlement of a class action litigation?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Rose Izzo (Objector Below).

Respondents are AMC Entertainment Holdings, Inc., Adam M. Aron, Denise Clark, Howard W. Koch, Kathleen M. Pawlus, Keri Putnam, Anthony J. Saich, Philip Lader, Gary F. Locke, Lee Wittlinger, and Adam J. Sussman (Defendants Below)

- and -

Anthony Franchi and Allegheny County Employees' Retirement System (Plaintiffs Below).

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the Court of Chancery of the State of Delaware:

In re AMC Entm't Holdings, Inc. Stockholder Litig., Consol. C.A. No. 2023-0215-MTZ, 2023 WL 5165606 (Del. Ch. Aug. 11, 2023);

and in the Delaware Supreme Court:

In re AMC Entm't Holdings, Inc. Stockholder Litig., No. 385, 2023, --- A.3d ---, 2024 WL 2305792 (Del. May 22, 2024) (TABLE).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rose Izzo respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Delaware Supreme Court.

OPINIONS BELOW

On August 11, 2023, the Court of Chancery of the State of Delaware approved a settlement of a class action litigation. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, Consol. C.A. No. 2023-0215-MTZ, 2023 WL 5165606 (Del. Ch. Aug. 11, 2023). Pet. App. 2a. On May 22, 2024, the Delaware Supreme Court affirmed the decision of the Court of Chancery of the State of Delaware. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, No. 385, 2023, --- A.3d ---, 2024 WL 2305792 (Del. May 22, 2024) (TABLE). Pet. App. 1a.

JURISDICTION

Ms. Izzo appealed the August 11, 2023, decision of the Court of Chancery of the State of Delaware to the Delaware Supreme Court, which court is the highest court of the State of Delaware. On May 22, 2024, the Delaware Supreme Court affirmed the ruling of the Court of Chancery. Ms. Izzo invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this Petition for a Writ of Certiorari within ninety days of the Delaware Supreme Court's decision affirming the ruling of the Court of Chancery.

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

The question presented is of long-standing significance. Twice before this Court has granted review of the question and twice the Court has had to dismiss those cases after oral argument as a result of vehicle flaws. Those previous grants stem from an entrenched and long-standing 2-5 circuit split that has only widened over time. The question's importance is also patent, given the critical nature and number of shareholder class actions that are central to issues of corporate governance and shareholder recovery. The rights of shareholders to optout of such class actions and to pursue their own actions for recovery should no longer be dependent on the accident of geography. This particular case also arises from a particularly significant jurisdiction, the Delaware Court of Chancery and the Delaware Supreme Court.

STATEMENT OF THE CASE

A. The Dispute

In summer 2023, the Court of Chancery of the State of Delaware became the epicenter for a dispute involving the stockholders of AMC Entertainment

Holdings, Inc. ("AMC"). AMC is the largest movie exhibition company in the United States and the largest throughout the world with approximately 900 theaters and 10,000 screens. However, when the COVID-19 pandemic shuttered movie theaters around the world, AMC's stock became the target of short sellers anxious to take advantage of the falling stock price. A group of retail stockholders—affectionately referred to as "Apes" (based on the movie *Planet of the Apes*)—banded together to combat the short sellers. Coordinating through social media, retail stockholders purchased shares and refused to sell, triggering a "short squeeze" and launching AMC's stock to a meteoric level.

AMC's leadership cheered on the Apes, and AMC was able to keep the movie theater chain alive. *See* Verified Stockholder Class Action Complaint, *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, No. 385, 2023 (Del. 2023), Del. Supr. Ct. Dkt. 13, Appendix Vol. 1 at A145, ¶ 6 ("AMC was saved from bankruptcy by an unlikely hero: retail investors banding together and buying massive amounts of AMC stock, beginning in January 2021."); *id.* at A159, ¶ 56 ("In less than 72 hours, AMC went from impending bankruptcy to seeing its stock price rise 467%, with the hashtag #SaveAMC going viral.").

Things, however, began to sour between the Apes (retail stockholders) and corporate leadership when leadership sought to issue more shares of AMC in early 2021 after AMC ran out of issuable shares. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 299 A.3d 501, 509 (Del. Ch. 2023). Knowing that the issuance of more shares would only dilute their holdings, retail stockholders strongly opposed the issuance of additional shares. *See id.* at 509-510.

While AMC was out of common stock, its charter purportedly allowed for the issuance of "blank check" preferred stock. In July 2022, AMC announced a special equity dividend of one preferred equity unit for each share of Class A common stock. *Id.* at 511-13. The new equity (called "APEs" or AMC Preferred Equity units—purportedly so-named in honor of the retail "Apes") held the same voting power as the common shares—*i.e.*, one vote each. *Id.*

What was not prominently disclosed, however, was that the APE units had proportionate (or "mirrored") voting instructions for AMC's transfer agent—meaning that the transfer agent was required to vote *all units* in proportion to the instructions received. *Id.* The effect of the mirrored voting requirement was dramatic—greatly amplifying the voting power of the APE units. *See id.* at 512 (providing example of voting amplification mechanism resulting from mirrored voting requirement). APE units began to trade in the market, but despite having the same voting power as the common stock, the APE units traded at a steep discount. *Id.* at 513.

In December 2022, the AMC board approved two amendments to its Certificate of Incorporation, both of which required stockholder approval: (i) an increase in the authorized number of shares of common stock (the "Share Increase Proposal"); and (ii) a 1-for-10 reverse stock split (the "Reverse Split Proposal") (together, the "Proposals"). *Id.* Following approval of the Proposals, once the authorized number of shares were increased, the APE units would convert to common stock (the "Conversion"). *Id.* Because APE units were trading at a steep discount to AMC common stock, the effect of the

Conversion would be to transfer a significant amount of AMC's market capitalization from holders of common stock to former holders of APE units.

To ensure the vote on the Proposals would pass, AMC's Board approved a sale of $110 million APEs to Antara Capital LP ("Antara"). *Id.* at 513-14. Critically, AMC secured Antara's advance approval of the Proposals (*id.* at 514), meaning that AMC's leadership rigged the vote. Using this mechanism, AMC's board would be able to overcome the common stockholders' prior refusals to approve issuance of additional shares.

B. Plaintiffs File Class Actions

After AMC called a Special Meeting to approve the Proposals (*id.*), three plaintiffs filed two class actions in the Delaware Court of Chancery seeking to block the transaction: *Usbaldo Munoz and Anthony Franchi v. Adam M. Aron,* et al., C.A. No. 2023-0216-MTZ (Del. Ch. Feb. 20, 2023) and *Allegheny County Employees' Retirement System v. AMC Entertainment Holdings, Inc.*, et al., C.A. No. 2023-0215-MTZ (Del. Ch. Feb. 20, 2023). *Id.* at 514-15. One week later, on February 7, 2023, the Court of Chancery issued an order expediting the litigation and a status quo order which permitted the Special Meeting to go forward but prohibited the implementation of any changes to the Certificate of Incorporation pending a preliminary injunction hearing. *Id.* at 516.

On March 14, 2023, AMC held its Special Meeting, and the vote on the Proposals took place. *Id.* While both the Share Increase Proposal and the Reverse Split Proposal passed, as the Court of Chancery later concluded, "[t]he Proposals passed only because of the

APEs' mirrored voting feature and Antara's promised APE votes." *Id.* at 517.

The Court of Chancery ultimately concluded that AMC's board "manipulated the corporate machinery to rig the Special Meeting vote to overcome common stockholder opposition and the defeating presence of nonvotes." *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 2023 WL 5165606, at *31 (Del. Ch. Aug. 11, 2023); Pet. App. 82a.

C. Plaintiffs Reach a Settlement

Two weeks after the Special Meeting, the litigation parties reached a settlement and executed a term sheet. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 299 A.3d at 517. Plaintiffs then filed a motion to lift the status quo order, arguing that defendants should be permitted to convert the APEs to common stock even before the settlement was approved and thus before notice had been given to stockholders. *Id.* at 517-18. The Court of Chancery denied the request. *Id.*

On April 27, 2023, the litigation parties filed a stipulation of settlement. *Id.* at 518. The settlement was a monetary settlement in the form of freely-tradeable shares: AMC agreed to distribute 6,922,565 shares of freely tradeable common stock to existing common stockholders, at a ratio of one share of common stock for every 7.5 shares of common stock held, ***after*** the 10-for-1 reverse split. *Id.* (So, a stockholder who owned 75 shares before the split would receive one additional settlement share, in addition to the 7.5 shares she would hold after the Reverse Split.) In turn, Plaintiffs agreed to not challenge any of the efforts by AMC's leadership to force the vote and stuff the ballot box. Moreover,

following the transaction, AMC would have a blank check to dilute AMC stockholders on a going-forward basis.

Although the settlement was purely monetary in nature (*i.e.*, a settlement of claims for freely-tradeable stock with no injunctive relief)—***it contained no opt out provision***. In short, the only option for stockholders who disagreed with the settlement was to oppose approval of the settlement in the Court of Chancery. Stockholders holding anywhere from a few shares to millions of dollars' worth of shares of AMC stock would be bound by the settlement if approved.

As the court acknowledged, the reaction by stockholders was "unprecedented." *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 2023 WL 5165606, at *18 (Del. Ch. Aug. 11, 2023); Pet. App. 45a. Between May 1, 2023, and May 31, 2023, "[a]pproximately 2,850 purported stockholders submitted more than 3,500 communications, many of which were styled as objections …." *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 299 A.3d at 520. A settlement hearing was set by the Court of Chancery for June 29 and June 30, 2023. *Id.* at 520-21. In advance of the hearing, a formal objection was filed by counsel for Ms. Izzo. Moreover, a special master was appointed to sift through the myriad other objections, and a report and recommendations were prepared by the special master. *Id.*

The Court of Chancery issued an opinion on July 21, 2023, concluding that the release as drafted in the proposed settlement was overly broad, and the settlement could not be approved. *Id.* at 533-34.

D. The Court of Chancery Approves the Non-Opt-Out Settlement.

Any celebration by opponents of the settlement was short lived. The day after the Court of Chancery issued its July 21 opinion finding the release problematic, "the parties cut the offending provision from the release and asked the Court to consider the settlement as revised." *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, 2023 WL 5165606, at *1 (Del. Ch. Aug. 11, 2023); Pet. App. 3a.

The Court of Chancery approved the revised settlement (*see id.* at *44; Pet. App. 117a), holding that it could approve the settlement as a non-opt-out settlement under Court of Chancery Rule 23—a rule which is modeled upon and largely mirrors Federal Rule of Civil Procedure 23.[1] The Court of Chancery concluded that it would approve the settlement as a non-opt-out class under Court of Chancery Rules

[1] *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 371 (1996) (noting that Chancery Rule 23 "is modeled on Federal Rule of Civil Procedure 23"). *See also Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989) (noting that, given the similarity between Chancery Rule 23 and Fed. R. Civ. P. 23, Delaware courts "find persuasive authority in the Advisory Committee's Note on the federal rule and the interpretation of that rule by the federal courts.").

23(a),[2] 23(b)(1), and 23(b)(2).[3] The Vice Chancellor specifically "decline[d] to afford the right to opt out." *Id.* at *1; Pet. App. 4a.

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[2] Court of Chancery Rule 23(a), as of August 11, 2023 (the date of the opinion at issue), provided:

> (a) **Requisites to Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[3] Court of Chancery Rule 23(b)(1) and (2), as of August 11, 2023, provided:

> (b) **Class Action Maintainable.** An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:
> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

In the Court of Chancery's decision, the court, quoting the Delaware Supreme Court's decision *In re Celera Corp. Shareholder Litigation*, 59 A.3d 418, 432 (Del. 2012) (among other cases), held:

> "If a class is certified under [Chancery] Rule 23(b)(3), class members have an unqualified right to opt out of the class. There is no corresponding *mandatory* opt-out right for class certified under [Chancery] Rule 23(b)(1) or (b)(2)." The Delaware Supreme Court "ha[s] recognized that circumstances may arise where discretionary opt-out rights should be granted, such as where the class representative does not adequately represent the interests of particular class members, triggering due process concerns." "Occasions where courts have granted discretionary opt-out rights include: when the claims of an objector seeking to opt out are sufficiently distinct from the claims of the class as a whole and an opt out is appropriate to facilitate the fair and efficient conduct of the action." But "[t]he propriety of a director action should be adjudicated, if it is to be adjudicated, once with respect to all similarly situated shareholders." In such a situation, no opt-out right is warranted.

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injunctive relief or corresponding declaratory relief with respect to the class as a whole.

In re AMC Entm't Holdings, Inc. Stockholder Litig., 2023 WL 5165606, at *13 (citations omitted); Pet. App. 33a.[4]

While the Court of Chancery recognized that the Ms. Izzo had raised the due process concerns with the failure to provide an opt out, *id.*, the court dismissed those concerns and determined that "an opt-out right is not feasible." *Id.* at *14; Pet. App. 35a. As the court reasoned, that was because the settlement notice "did not provide for such opt-out procedures; nor was it required to do so." *Id.* Instead, "[a]n opt-out class would require another notice with a higher distribution rate before class members could opt out." *Id.*

Second, the court determined that "for an opt-out right to be meaningful, class members who wanted to opt out would have to accurately follow the noticed

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[4] Court of Chancery Rule 23(b)(3), as of August 11, 2023, provided:

> (3) The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matter pertinent to the findings include:
>
> (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) The extent and nature of any litigation concerning the controversy already commenced by or again members of the class;
>
> (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) The difficulties likely to be encountered in the management of a class action.

procedures; stockholder procedural compliance has been a challenge in this case." *Id.*

Third, the court determined that "permitting an opt-out right would further delay the effective date, which as this opinion explains would be detrimental to AMC and the class's interest in it." *Id.*; Pet. App. 35a-36a.

The Court of Chancery concluded its analysis of the right to an opt out, stating:

> More fundamentally, as discussed in the Rule 23(b) analysis above, the claims and the relief sought are class-wide. If Plaintiffs had prevailed and the Court granted injunctive relief, the entire class would have benefitted from that relief. The Proposed Settlement releases those claims and allows the Reverse Split and the Conversion to go forward with stock consideration to each member of the class. It is impossible to split that bargain by permitting the Reverse Split and the Conversion to go forward, while excluding certain class members from the consideration and permitting them to maintain their claims against, and requests to enjoin, the Reverse Split and the Conversion. I decline to certify a discretionary opt-out class.

Id.; Pet. App. 36a. Ironically, by this point, however, Plaintiffs had advised the Court that they had no desire to seek an injunction, and in fact viewed an injunction as harmful to AMC. Instead, the only relief that they were seeking by this point was monetary relief. The right to opt out was nonetheless denied.

E. Appeal to the Delaware Supreme Court

Following the issuance of the Court of Chancery's decision, Ms. Izzo filed an expedited appeal to the Delaware Supreme Court on August 16, 2023, and sought a stay of the Court of Chancery's August 11, 2023 decision permitting the transaction to close. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, No. 290, 2023 (Del. Aug. 16, 2023). The Delaware Supreme Court denied the stay on August 21, 2023, and Ms. Izzo dismissed her appeal without prejudice. As Ms. Izzo predicted, AMC's market capitalization cratered after the settlement was permitted to proceed, falling from $4.5 billion to $1.97 billion immediately after the Delaware Supreme Court denied the stay.

Following the entry of final orders in the Court of Chancery, Ms. Izzo filed her appeal of the August 11, 2023, Court of Chancery opinion to the Delaware Supreme Court on October 13, 2023. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, No. 385, 2023 (Del. Oct. 13, 2023). The appeal was fully briefed, and oral argument was held on May 8, 2024. On May 22, 2024, the Delaware Supreme Court issued a one-page affirmance. *In re AMC Entm't Holdings, Inc. Stockholder Litig.*, No. 385, 2023, --- A.3d ---, 2024 WL 2305792 (Del. May 22, 2024) (TABLE). Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE AN INTRACTABLE AND LONG-STANDING CONFLICT

The question presented is both important and recurring. SUP. CT. R. 10. Twice before this Court has granted petitions on the precise question presented here and twice dismissed them as improvidently granted because of preservation issues. In both cases, the Supreme Court dismissed the writs of certiorari as improvidently granted. *See Adams v. Robertson*, 520 U.S. 83 (1997) (*per curiam*) (dismissing writ because federal constitutional issue was not properly presented to state supreme court); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (*per curiam*) (dismissing writ because the posture of the case meant that "deciding [the] case would require [the Court] to resolve a constitutional question that may be entirely hypothetical"). This petition suffers from no such vehicle flaws and comes to this Court following a decision of one of the most significant courts in the nation as regards class action stockholder litigation.

Underlying those earlier petitions is a still-extant, broad, and entrenched split. The Ninth Circuit's pro opt-out opinion in *Ticor* was joined by the Seventh Circuit in *Jefferson* v. *Ingersoll Int'l Corp.*, 195 F.3d 894, 899 (7th Cir. 1999) ("class members' right to notice and an opportunity to opt out should be preserved whenever possible"). *See also Carter v. City of Los Angeles*, 224 Cal. App. 4th 808 (2014) (holding that "certification of a non-opt-out class violated due

process" because the monetary relief was not "an incident of the equitable relief sought").

At least five other circuits, however, permit the certification of substantial damages claims into mandatory classes. Indeed, the Third, Fourth, Sixth, and Eighth Circuits go further than merely permitting such certification—they encourage mandatory class certification even when damages claims are present and opt-out certification is available. *See Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989); *Cheng v. Liu*, 2024 WL 3579606, at *3 (4th Cir. July 29, 2024) (refusing to certify a (b)(2) class in a case where injunctive relief was sought, those claims were simply a predicate for a monetary judgment); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("When either subsection (b)(1) or (b)(2) is applicable (b)(3) should not be used). *See also Crystian v. Tower Loan of Mississippi Inc.*, 91 Fed. Appx. 952 (5th Cir. 2004) (affirming district court opinion (216 F.R.D. 338 (2003)) holding that the Due Process Clause imposes no limits on mandatory class certification under Rule 23(b)). A state appellate court in Minnesota has also approved mandatory classes where plaintiffs are retirement plans. *Bacon v. Board of Pensions of the Evangelical Lutheran Church in America*, 930 N.W.2d 437, 443 (Mn. App. 2019) (broadly approving all (b)(2) mandatory classes where the class seeks "monetary recovery … on behalf of a retirement plan, rather than on behalf of individual participants").

This case therefore presents a substantial question is which this Court long-ago expressed "continuing interest," *Adams*, 520 U.S. at 92 n.6. *See*

also Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 609 (2015) (since the prior petitions, "the Court has not had occasion to conclusively resolve" the question but it has "repeatedly hinted at an understanding of the constitutional foundations of the opt-out right"). Even those who think that due process does not broadly require opt-outs recognize that the "courts are in disarray" about what due process requires. Robert H. Klonoff, *Class Actions for Monetary Relief under Rule 23(b)(1)(A) and (b)(1)(B)*, 82 GEO. WASH. L. REV. 798, 801 (2014).

II. THE EXISTING LIMITS ON OPT OUTS CONTRAVENE EARLIER DECISIONS OF THIS COURT

The Due Process Clause has long since required notice to stockholders of an opt-out right. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out,' satisfies due process."); *see also id.* at 814 ("The interests of the absent plaintiffs are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court.").

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Court expanded its analysis of the interface between class certification and due process rights. In *Wal-Mart*, the Court determined that a claim for employee backpay was improperly certified under FED R. CIV. P. 23(b)(2). *Id.* at 360. The Court found: "Permitting the combination of individualized and classwide relief in a (b)(2) class is … inconsistent

with the structure of Rule 23(b)." *Id.* at 361. While the rules under (b)(1) and (b)(2) classes do not provide an opt-out right or notice obligations, (b)(3) "class members are entitled to receive 'the best notice that is practicable under the circumstances' and to withdraw from the class at their option." *Id.* at 362 (quoting FED. R. CIV. P. 23(c)(2)(B). The Court noted, "Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* In short, "[i]n the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process." *Id.* at 363 (citing *Shutts*, 472 U.S. at 812).

Turning to the question of whether claims could be appropriately certified under (b)(2) "because those claims do not 'predominate' over their requests for injunctive and declaratory relief," the Court ruled, "We fail to see why the Rule should be read to nullify these [due process] protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction." *Id.* at 363-64. *See also Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846 (1999) (recognizing due process and Seventh Amendment implications of mandatory class actions aggregating damages claims).

III. DELAWARE'S HOLDING IS ENTRENCHED

Delaware courts have long followed this contrary path with respect to the right to opt out of class litigation. In *In re Celera Corp. Shareholder Litigation*, the Delaware Supreme Court wrote:

> Delaware courts "repeatedly have held that actions challenging the propriety of director conduct in carrying out corporate transactions are properly certifiable under both subdivisions (b)(1) and (b)(2)." The availability of potential damages alone does not automatically require certification under Rule 23(b)(3).

59 A.3d 418, 432-33 (Del. 2012) (quoting *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *8 (Del. Ch. May 6, 2010) and citing *Joseph v. Shell Oil Co.*, 1985 WL 21125, at *5 (Del.Ch. Feb. 8, 1985)). *In re Cox Radio* cites *In re Countrywide Corp. Shareholders Litig.*, 2009 WL 2595739, at *2 (Del. Ch. Aug. 24, 2009); *Turner v. Bernstein*, 768 A.2d 24, 30 (Del. Ch. 2000); *In re Mobile Communications Corp. of Am., Inc., Consolidated Litigation*, 1991 WL 1392, at *15 (Del. Ch. Jan. 7, 1991); and *Nottingham Partners v. Dana*, 564 A.2d 1089, 1096-97 (Del. 1989).

In *Nottingham Partners*, the Delaware Supreme Court wrestled with how to handle certification of mixed cases involving both monetary claims and demands for injunctive relief. *See* 564 A.2d at 1096-97. The Delaware Supreme Court found that "the fact that damages are sought, in addition to a request primarily for injunctive or declaratory relief, does not necessarily preclude a certification pursuant to subsection (b)(2)." *Id.* at 1096.

With *Nottingham Partners* preceding the Court's decision in *Wal-Mart v. Dukes* by nearly two decades, the Delaware Supreme Court attempted to divine how this Court would analyze due process in the hybrid scenario under Federal Rule of Civil Procedure 23(b)(2) where both monetary and injunctive relief

was sought. *Id.* at 1098-99. Turning to the Fifth Circuit Court of Appeals' decision in *Penson v. Terminal Transport Co.*, 634 F.2d 989, 994 (5th Cir. 1981), *cert. denied*, 479 U.S. 883 (1986), the Delaware Supreme Court ruled: "a member of a class certified under Rule 23(b)(2) has a Constitutional due process right to notification ***but not a right to opt out of the class***." *Nottingham Partners*, 564 A.2d at 1101 (emphasis added and citations omitted).[5]

Following *Nottingham Partners*, the Court of Chancery was emboldened to ignore damages claims and focus on "the nature of the claims to be released" as regards the director actions. *In re Mobile Commc'ns Corp. of Am., Inc., Consol. Litig.*, 1991 WL 1392, at *15-16, *aff'd sub nom. In re Mobile Commc'ns Corp. of Am., Inc. Consol. Litig.*, 608 A.2d 729 (Del. 1992). *See also Turner*, 768 A.2d at 30-31 (following rationale of *In re Mobile Communications*); *In re Countrywide Corp. S'holders Litig.*, 2009 WL 2595739, at *2 (same).

After this Court's decision in *Wal-Mart v. Dukes*, the Delaware Supreme Court in *In re Celera*, 59 A.3d at 433, directly addressed whether a 23(b)(2) class could include a claim for monetary damages together with a claim for injunctive relief. Citing *Nottingham Partners*, the Delaware Supreme Court said that it could so long as the claim for equitable relief predominates. *Id.* (citing *Nottingham Partners*, 564 A.2d at 1095). The Delaware Supreme Court

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[5] *But see Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994) ("The United States Supreme Court has held that, in an action primarily for money damages, such as this (b)(3) action, the requirements of notice and the opportunity to opt-out are of a constitutional due process magnitude.") (citing *Shutts*, 472 U.S. at 812 and *Nottingham Partners*, 564 A.2d at 1098).

concluded in a footnote, "*Wal-Mart Stores, Inc. v. Dukes* does not require otherwise." *Id.* at 433 n.40.

In reaching this decision, the Delaware Supreme Court appears to have been persuaded by the Court of Chancery's rationale in the case that it was reversing, *In re Celera Corp. Shareholder Litigation*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012). There, the Court of Chancery stated: "Nothing in *Wal-Mart*" requires shareholders to be given an opt out right *even where* they have brought a fiduciary duty claim which "potentially entitling the shareholder class to monetary relief." 2012 WL 1020471, at *18.

It was in accord with these precedents that the Court of Chancery determined that Ms. Izzo and other AMC stockholders did not have a right to an opt out. Despite the fact that the settlement was a monetary settlement—with plaintiffs' claims for injunctive relief having been expressly abandoned—the Court of Chancery permitted the settlement class to be certified under Court of Chancery Rules 23(b)(1) and (b)(2) and not (b)(3). Requests for even a discretionary opt out were denied. The class was certified, the settlement approved, and Ms. Izzo (and thousands like her) lost her right to pursue relief against AMC and its board.

IV. THIS CASE IS AN IDEAL VEHICLE

No obstacles prevent reaching the question presented here. The judgment below is final and reflects the long-entrenched holdings of the Delaware Supreme Court and the Delaware Court of Chancery. Delaware is the corporate home to over two million business entities and more than two-thirds of the

Fortune 500.[6] With so many corporate entities calling Delaware their home, Delaware's Court of Chancery and Supreme Court are "widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations."[7]

The relevant facts here are undisputed, and the question is purely one of law. Ms. Izzo has preserved that question throughout this litigation. As a class member and putative opt-out, Ms. Izzo held a significant number shares in AMC. The class representatives, by contrast, had comparatively few. Under such circumstances, and in accord with *Dukes* and *Shutts*, class members like Ms. Izzo have especially strong due process interests in having their day in court.

CONCLUSION

Petitioner Rose Izzo respectfully requests that the Court grant the petition for a writ of certiorari.

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[6] *See* Delaware Division of Corporations, *Why Businesses Choose Delaware*, available at https://corplaw.delaware.gov/why-businesses-choose-delaware (last visited Aug. 16, 2024).

[7] Court of Chancery, *Who We Are* https://courts.delaware.gov/chancery (last visited Aug. 16, 2024). Justice Kavanaugh recognized in a constitutional challenge to Delaware's judiciary selection process that Delaware has an "excellent, widely respected judiciary." Transcript of Oral Argument at 55, *Carney v. Adams*, 592 U.S. 53 (2020) (No. 19-309). Delaware courts are often expected to resolve multi-billion dollar disputes on extremely expedited schedules. Nothing in this petition should be read as any effort to downplay the usual extraordinary work of these courts, other than to challenge what is a fundamental error in their due process analysis.

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August 20, 2024

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