No. 24-197

IN THE

Supreme Court of the United States

ROSE IZZO,

Petitioner,

v.

AMC ENTERTAINMENT HOLDINGS, INC., *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* INCLINE GLOBAL MANAGEMENT, LLC IN SUPPORT OF PETITIONER

RICHARD A. BODNAR
ROLNICK KRAMER SADIGHI LLP
PENN 1, Suite 3401
One Pennsylvania Plaza
New York, NY 10119
(212) 597-2810
rbodnar@rksllp.com

SHEILA A. SADIGHI
Counsel of Record
ROLNICK KRAMER SADIGHI LLP
300 Executive Drive
West Orange, NJ 07052
(973) 996-4991
ssadighi@rksllp.com

130460

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(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Statutes and Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Incline Global Management, LLC ("Incline Global") is an SEC registered investment adviser. Funds advised by Incline Global purchase and sell various securities. As an investor, Incline Global has an interest in robust and well-functioning capital markets, as well as in investors' ability to recover and bring about reform when corporate misconduct occurs. Incline Global and funds advised by Incline Global are well aware of, and have exercised, opt-out rights in connection with federal securities class actions. Conversely, funds advised by Incline Global have been included in Delaware class action settlements originally seeking corporate reform that have ended with purely monetary relief and no opt-out rights. Incline Global has an interest in this Court determining the relevant test for when opt-out rights must be provided and in ensuring that all courts, including Delaware courts, adhere to that test.

SUMMARY OF ARGUMENT

This Court has settled the issue that due process requires opt-out rights in class actions for monetary relief but not those for injunctive relief. But this Court's precedent on cases involving mixed relief has remained unclear and resulted in divergent approaches. While

1. Pursuant to this Court's Rule 37.2, *Amicus* provided timely notice to all parties of its intent to file this *amicus* brief. Further, pursuant to this Court's Rule 37.6, *Amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *Amicus* or its counsel, made any monetary contribution to fund the preparation or submission of this brief.

the federal appellate courts have differed on the precise formulation and application of this Court's decisions involving mixed cases, they have attempted to apply those precedents.

The Delaware state courts have not made such an attempt. With respect to breach-of-fiduciary-duty cases, the Delaware courts have not followed this Court holdings and instead have developed an extreme and nearly mechanistic approach. Perhaps because of the historical split between courts of equity and law, long eliminated in the federal courts but famously remaining in Delaware, an entrenched lineage of Delaware case law instructs that injunctive relief effectively predominates *per se* in breach-of-fiduciary-duty classes, even where only monetary relief is available. This view arises from a line of Delaware case law that splits from this Court's relief-based test to focus on the substantive nature of the claims rather than the relief available at the time of class certification. This line of cases, springing from Delaware's long history of viewing breach-of-fiduciary-duty suits as equitable actions, splits from this Court's required test. This case is a vehicle for this Court to review the test for when due process requires opt-out rights and to either change the focus of the test to claims, or to re-affirm the focus on relief.

Delaware's effectively *per se* approach results in cases like this one, where class certification was sought in connection with a money-only settlement but no opt-out rights were provided. In such cases, injunctive *relief* cannot sensibly be said to "predominate" because such relief is expressly abandoned by the terms of the class settlement and connected certification. But the effectively *per se* rule in Delaware, focused on claims, seems to command this result, despite this Court's prior holdings.

This Court should grant the Petition and hear this issue on the merits. At a minimum, this Court should call for a response from Respondents to have the benefit of their views on why this case is either an improper vehicle to resolve an unsettled area of law, or why Delaware law's embrace of a test other than the relief-based test required by this Court does not require correction and clarification.

ARGUMENT

I. Due Process Requires Opt-Out Rights for Monetary Claims

Monetary claims are property interests subject to due process protections. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *see also* Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599, 604 (2015) ("Like virtually all property, this property interest entails a right to exclude others from unauthorized use."). This Court has been clear, therefore, that the class action mechanism is constitutionally compliant only insofar as absent class members with monetary claims have the right to opt out of the class and directly prosecute their own claims. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see also N. Sound Cap. LLC v. Merck & Co.*, 938 F.3d 482, 492 (3d Cir. 2019) ("[W]here damages are at stake, the class-action device passes constitutional scrutiny only because putative class members can easily extricate themselves from the proceedings."); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1058 (2002) ("To the extent

that we may identify a legal entitlement in an individual's ability to assert and control the prosecution of a cognizable legal claim, the state sponsorship of the class mechanism must, at the very least, implicate due process issues."). Where a class seeks only monetary relief, this means that opt-out rights are mandatory. *Shutts*, 472 U.S. at 812.

In contrast, this Court has also been clear that due process does not require opt-out rights where a class seeks purely injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362-63 (2011) ("When a class seeks an indivisible injunction benefiting all its members at once . . . it is thought (rightly or wrongly) . . . that depriving people of their right to sue in this manner complies with the Due Process Clause.").

Where a class seeks a mix of both monetary and injunctive forms of relief, the contours of the test have been left comparatively unclear.

II. The Court's Current Test for Whether Opt-Out Rights Are Required in Classes Seeking Mixed Monetary and Injunctive Relief Warrants Clarification

This Court has not articulated a clear standard for whether opt-out rights are required in cases seeking mixed relief. This Court expressed skepticism at the jettisoning of the procedural protections of the opt-out class regime merely because some injunctive relief is requested in *Wal-Mart*, writing "[w]e fail to see why [Rule 23] should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an

injunction."[2] 564 U.S. at 364. But in *Wal-Mart*, this Court was only called upon to consider a relatively narrow analysis of Federal Rule of Civil Procedure 23 and did not provide further guidance on the issue of mixed cases for relief more generally.

Rather, this Court explicitly left the door open for further consideration of mixed cases, writing with reference to a Fifth Circuit standard allowing certification of non-opt-out cases under Rule 23(b)(2) that "[w]e need not decide in this case whether there are any forms of 'incidental' monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause." *Wal-Mart*, 564 U.S. at 366. Thus, the test for when mixed cases must have opt-out rights, or may not, has remained murky.

The lack of clarity has "[left] ambiguous the precise nature and scope of the opt-out right recognized in *Shutts*" and "[s]ince that time, the Court has not had occasion to conclusively resolve the ambiguities left open by its *Shutts* opinion." Williams, *supra* at 609. Divergent applications of the law among federal and state courts have developed, including a circuit split. As set forth in the Petition, the Ninth and Seventh Circuits' formulations of the relevant test are far more favorable to opt-out rights for individual damages claims—*to wit*, requiring opt-out rights wherever feasible—than the formulations of the Third, Fourth, Sixth, and Eighth Circuits, which

2. As noted in the Petition, the Court has twice granted *certiorari* in order to clarify this issue and the scope of the *Shutts* holding, but each case failed to reach a merits resolution due to procedural infirmities. (Petition at 14.)

promote mandatory class certification even in the presence of excisable damages claims. (*See* Petition at 14-15 (contrasting *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) and *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 899 (7th Cir. 1999) with *Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981), *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989), *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989), and *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995)).) Accordingly, clarification of the correct test in mixed cases is warranted to foster uniformity among the nation's courts.

III. Delaware's Precedent in Breach-of-Fiduciary-Duty Actions Runs Counter to a Relief Based Test

Whereas the federal courts disagree about where to draw the line in mixed cases, Delaware courts refuse to draw a line at all. Instead, Delaware case law instructs that all breach-of-fiduciary-duty classes seek predominantly injunctive relief effectively *per se*, regardless of the actual relief sought at the time of class certification. In the context of a class settlement for only money—where all injunctive relief is *expressly abandoned*—such refusal to actually weigh the nature of the relief sought or received is an affront to this Court's precedents and a violation of due process.[3] This case arises under this effectively *per se*

3. As recent cases demonstrate, it is the Court's prerogative to ensure that states are properly applying the Court's precedents rather than crafting their own meaning of constitutional due process. *See*, *e.g.*, *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122 (2023); *Cruz v. Arizona*, 598 U.S. 17 (2023); *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402 (2017); *Nelson v. Colorado*, 581 U.S. 128 (2017); *Wearry v. Cain*, 577 U.S. 385 (2016).

rule and presents a proper vehicle for this Court to clarify the due process requirements for class certification.

Delaware courts' refusal to apply a relief based test to breach-of-fiduciary-duty classes stems from Delaware's historic recognition that claims for breach of fiduciary duty inherently sound in equity and thus invoke the Delaware courts' equitable jurisdiction.[4] But a state's internal jurisdictional doctrines cannot usurp this Court's interpretation of the Constitution, which recognizes that the "equitable" nature of a claim is "irrelevant" to the due process implications of class certification. *Wal-Mart*, 564 U.S. at 365. Rather, the constitutional compliance of the class action mechanism (and associated procedural protections required by due process) focuses only on the *relief* sought at the time of class certification, *see id.*—regardless of how a state court may have first obtained jurisdiction over the case.

A. Delaware Courts Hold That Injunctive Relief Predominates Effectively *Per Se* in Breach-of-Fiduciary-Duty Cases

Under Delaware law, claims for breach of fiduciary duty sound in equity and are redressable by "equitable" (*i.e.*, injunctive) relief—even if such relief is simply an order that the defendant pay money. *See*, *e.g.*, *Turner v. Bernstein*, 768 A.2d 24, 33 (Del. Ch. 2000); *In re Mobile Commc'ns Corp. of Am., Inc., Consol. Litig.*, 1991 WL

4. Whereas the federal system collapsed the distinction among monetary and equitable causes of action long ago, Delaware maintains that distinction. *See*, *e.g.*, *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 113 (Del. Ch. 2017).

1392, at *16 (Del. Ch. Jan. 7, 1991), *aff'd*, 608 A.2d 729 (Del. 1992). The result of this approach is a now-entrenched rule that injunctive relief predominates over monetary relief effectively *per se* in breach-of-fiduciary-duty classes.

Notably, this rule became entrenched over a now-forsaken minority view that earnestly attempted to weigh the predominance of monetary relief versus injunctive relief, as expressed in *Dieter v. Prime Computer, Inc.*, 681 A.2d 1068 (Del. Ch. 1996). There, the court thoughtfully considered the question of whether "the thrust [is] *primarily* equitable or declaratory relief for the class as a whole, or is it *primarily* compensatory relief," as well as the "'practical differences' between certification under one as opposed to another subsection [of Rule 23]." *Id.* at 1075-76. Those practical considerations rightfully included the "risk of inconsistent results which would establish incompatible standards of conduct" for the fiduciary-defendants. *Id.* at 1075. Absent those risks associated with injunctions against actual *conduct*, however, the *Dieter* court concluded that merely wrapping the collection of *money* "in equitable terms" does not satisfy due process because the "effect would [still] be, quite simply, an award of additional damages." *Id.* at 1074.

In contrast to the *Dieter* court's application of a balancing test, and its focus on the actual relief sought, the now-entrenched view among Delaware courts is that injunctive relief predominates effectively *per se* in breach-of-fiduciary-duty classes. As expressed by the Delaware Court of Chancery in *In re Mobile Communications Corp. of America, Inc., Consolidated Litigation*, 1991 WL 1392, at *15-16 (Del. Ch. Jan. 7, 1991), *aff'd*, 608 A.2d 729 (Del. 1992), this rule arises from Delaware courts' focus on the

nature of the *claim*—*i.e.*, that a breach of fiduciary duty is a uniform wrong against all shareholders—rather than the nature of the *relief* sought:

> [Breach-of-fiduciary-duty claims] involve one set of actions by defendants creating a uniform type of impact upon the class of stockholders. The Constitution does not require, nor do prudential considerations, in my opinion, commend the granting of an opt-out right in stockholder actions attacking the propriety of director conduct in connection with a corporate merger. The propriety of director action should be adjudicated, if it is to be adjudicated, once with respect to all similarly situated shareholders.

Id. at *16 (citation omitted). Hence, in *Mobile Communications*, the Delaware Court of Chancery emphasized that—because breach-of-fiduciary-duty claims address a uniform course of conduct—breach-of-fiduciary-duty classes should effectively *always* be certified without opt-out rights, even where the only available *post hoc* remedy for such conduct is simply payment of money and not any truly injunctive relief:

> Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because [1] plaintiff seeks equitable relief (injunction); [2] because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages; and [3] because to litigate the

> matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action.
>
> The argument has been made that once a preliminary injunction is denied a (b)(2) action should be treated as a (b)(3) action because, practically speaking, damages are the likely remedy if plaintiff prevails. This argument has been rejected, in part, I suggest, because of concerns reflected in the second and third of the reasons stated above.

Id. at *15 (citation omitted).

This view was echoed and further cemented in *Turner v. Bernstein*, 768 A.2d 24 (Del. Ch. 2000), where the Delaware Court of Chancery denied opt-out rights even though (1) "the only question left [wa]s the remedy for the defendant-directors' already-declared breach of fiduciary duties" and (2) "the plaintiffs' preferred remedy [wa]s quasi-appraisal rights or rescissory damages, i.e., monetary damages." *Id.* at 30. In doing so, the Delaware Court of Chancery invoked *Mobile Communications* and similar Delaware precedents focusing on the nature of the claim rather than the relief. *Id.* at 30-32. Hence, in the Delaware Court of Chancery's view, because "the defendant-directors either did or did not breach their fiduciary duty of disclosure to all or none of the [ ] stockholders in the Proposed Class"—such that the claims "involve[ ] 'one set of actions by defendants creating a uniform type of impact upon the class of stockholders'"—and "thus any monetary remedy due to the Proposed Class will be calculated on a per share,

rather than per shareholder, basis," opt-out rights could be denied *even though the only remedy available to those stockholders was purely monetary*. *Id.* at 31 (quoting *Mobile Communications*, 1991 WL 1392, at *16).

Delaware courts' focus on the *claims* rather the *relief* in breach-of-fiduciary-duty class cases is further evident in *In re Activision Blizzard, Inc. Stockholder Litigation*, 124 A.3d 1025 (Del. Ch. 2015). There, the Delaware Court of Chancery stated that, "because Delaware corporate law claims are tied to the shares themselves, they are certified under Rules 23(b)(1) and (b)(2)"—*i.e.*, without opt-out rights—*regardless* of the predominance of monetary or injunctive relief at the time of class certification. *Id.* at 1056.

The foregoing cases illustrate the lineage of Delaware decisions culminating in the entrenched view that injunctive relief predominates effectively *per se* in breach-of-fiduciary-duty classes. The case law, and this case in particular, demonstrates that Delaware has strayed from the relief-oriented test that this Court has set out, has explicitly rejected the minority position (the position consistent with this Court's holdings), and has placed itself outside even the most extreme end of relevant tests for mixed cases in adopting an effectively *per se* rule.

B. Delaware Courts, Including in This Case, Find That Injunctive Relief Predominates *Per Se* in Breach-of-Fiduciary-Duty Settlements Even Where Such Relief Is Expressly Abandoned

Delaware's effective *per se* rule for certifying breach-of-fiduciary-duty classes without opt-out rights persists even in the context of money-only settlements where

injunctive relief is expressly abandoned, as occurred in the case underlying the Petition:

> This Court may certify a class under Rule 23(b)(2), even though the remedy may be a monetary or a monetary equivalent settlement, if the "action was commenced with a focus on injunctive or other equitable relief."
>
> Here, the class also satisfies Rule 23(b)(2). Plaintiffs brought a breach of fiduciary duty claim alleging the defendants' breach harmed the class as a whole. And "[a]lthough the remedy achieved" in the settlement is stock consideration, "this action was commenced with a firm focus on injunctive relief."

In re AMC Ent. Holdings, Inc. S'holder Litig., 2023 WL 5165606, at *12 (Del. Ch. Aug. 11, 2023) (quoting *CME Grp., Inc. v. Chicago Bd. Options Exch., Inc.*, 2009 WL 1547510, at *5 (Del. Ch. June 3, 2009)), *aff'd sub nom. In re AMC Ent. Holdings, Inc.*, 319 A.3d 310 (Del. 2024). That is not an aberration and simply conforms with the entrenched view among Delaware courts that classes bringing breach-of-fiduciary-duty claims do not require opt-out rights because of the nature of the claim, as opposed to the actual relief at stake at the time of class certification.

IV. At Minimum, Delaware's Approach in the Money-Only Settlement Context Offends Due Process

Such application of an effectively *per se* rule to certify money-only settlement classes without opt-out

rights cannot be squared with this Court's precedents or any sensible relief-based test. As this Court has instructed, the predominance of potential injunctive *relief*—that is, the possibility that the trial court may mandate conforming conduct by the defendant—is the only due process justification for stripping would-be opt-outs of their monetary claims. Where class certification is sought in conjunction with a money-only settlement, however, the possibility of an injunction does not exist at all. Instead, the parties have stipulated that injunctive relief is entirely off the table. The result, then, is that the class representative is purporting to settle its claim for money—*instead of injunctive relief*—and forcing absent class members to do the same, all on the theory that the relief sought is injunctive. This violates due process. The need for a uniform injunction against the defendant cannot justify forced settlement of monetary claims where the defendant, by the very terms of the settlement, *will never be subject to any injunction*.

V. This Court Should Call for a Response to the Petition

This Court in *Wal-mart* warned about the risk of gamesmanship by plaintiffs who are incentivized by a larger class's increased leverage to seek class certification without opt-out rights, and thereby "place at risk potentially valid claims for monetary relief" of absent class members who cannot "decide for themselves whether to tie their fates to the class representatives' or go it alone." *Wal-Mart*, 564 U.S. at 364. These "perverse incentives," *id.*, are doubled in the money-only settlement context because both the lead plaintiff (seeking maximum leverage and fees) *and* the defendant (seeking global peace

and to avoid corporate reforms) are incentivized to prevent absent class members from opting out. Indeed, this Court has recently condemned the use of absent parties' claims as bargaining chips in settlement negotiations without their consent. *See Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 2084 (2024) (rejecting a bankruptcy debtor's attempt to "bargain[ ] away without the consent of those affected" claims that belonged to absent parties "as if the claims were somehow [the debtor's] own property").

Under current Delaware law, neither plaintiffs nor defendants in a money-only settlement situation have any incentive to actually litigate the issues raised in the Petition. The gamesmanship of these deals is on display here as well, where neither the plaintiffs nor defendants in this matter responded to the Petition of the objectors. Neither of the settling parties has provided this Court with any reason to conclude that a relief based test is not the correct standard, nor any defense of the effectively *per se* Delaware rule focused on the nature of the claims and not the relief requested. But it is *objectors'* claims that have been bargained away without their consent.

This Court should call for a response to the Petition from Respondents, if it is not inclined to grant the Petition outright.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully urges the Court to grant the Petition, or at minimum call for a response to the Petition from Respondents.

Respectfully submitted,

Richard A. Bodnar
Rolnick Kramer
Sadighi LLP
PENN 1, Suite 3401
One Pennsylvania Plaza
New York, NY 10119
(212) 597-2810
rbodnar@rksllp.com

Sheila A. Sadighi
Counsel of Record
Rolnick Kramer
Sadighi LLP
300 Executive Drive
West Orange, NJ 07052
(973) 996-4991
ssadighi@rksllp.com