NO. 12-851

In the Supreme Court of the United States

DISABILITY RIGHTS ADVOCATES FOR TECHNOLOGY, INC., JERRY KERR, JERRY MILLER, DANIEL M. GADE, ALAN MACCINI AND JAMES OVERBY,

Petitioners,

v.

WALT DISNEY WORLD CO., MAHALA AULT, STACIE RHEA AND DAN WALLACE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

OTHER AUTHORITIES

PETITIONERS' REPLY BRIEF

I. Based on Disagreement Between the Ninth and Eleventh Circuits on Segways at Disney, a District Court Awaits This Court's Ruling.

In the case at bar, the Eleventh Circuit upheld Disney's ban on the use of Segways by people with disabilities. The Ninth Circuit, to the contrary, held that, in maintaining the ban, Disney's failed to apply the required analysis under the Department of Justice regulations. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1132 (9th Cir. 2012).

The *Baughman* district court awaits this Court's ruling; it granted a stay pending this Court's certiorari action. *Baughman v. Walt Disney World Co.,* Order Denying Defendant's Motion to Dismiss and Granting Defendant's Motion to Stay, Dkt. 82, No. 8:07-cv-01108-CJC-MLG (Aug. 22, 2012, C.D. Cal.)[1]

II. Due Process Requires Notice in Rule 23(b)(2) Cases or, at the Least, Where a National Waiver of All State and Local Civil Rights Claims is Omitted From

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[1] Respondent Disney opens its brief in opposition with a superfluous preamble on the alleged "safety" of Segways at Disney. Brief in Opposition at 2-3. The alleged safety is irrelevant to the questions presented on this petition though it is itself the subject of inter-circuit conflict. Wagstaff, *Essay: Make Way for Segways: Mobility Disabilities, Segways and Public Accommodations,* 20 Geo. Mason L. Rev. 347, 357 (2013) (on conflict between 9th Circuit and 11th Circuit on the safety issue).

Class Notice in a Settlement-only Certification.

Class action notice must meet constitutional Due Process standards at all stages of the litigation, but the Court has never defined the minima of that Due Process notice.[2] This vital question has been "much avoided by the Supreme Court," it has been observed.[3] It is squarely presented here.

This case provides the opportunity:

a) in the compelling version of the question presented here in a settlement-only class, to require notice where the absentees' important personal rights are waived, and the absentees are never informed of the waiver or an opt-out right. (Section II.A.), or

b) resolve confusion among the circuits and require Due Process notice of certification in all Rule 23(b)(2) cases, as referenced in *Wal-Mart* and with roots in earlier caselaw and the literature (Section II.B.).

Respondent misses the mark on both points. First, Respondent perversely bends the class notice's language into a shape contrary to its actual text. Second, it has not understood that the Petition seeks

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[2] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) ("But when notice is a person's due, process which is a mere gesture is not due process.").

[3] Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258, 264 (1996).

recognition of a plainly needed change in the law, one with deep roots in the jurisprudence.

A. Due Process Prohibits Keeping a Waiver of Personal Rights Secret from Absentee Class Members.

For whatever reason (the record is silent), both notices to the class in this settlement-only class certification omit any reference to the key national class waiver of all rights under all state and local civil rights laws.

This is a straightforward Due Process matter. The failure to give notice to the absentee class of the settlement's waiver of myriad personal rights under "all state and local" civil rights laws destroys the validity of the settlement. The failure is fundamentally unfair.

Respondent Disney dodges this failure by claiming that the settlement's indefinite general notice that the settlement will bar subsequent suits by class members is the same as a notice of the actual national civil rights law waiver of all state and local claims. In the real world, nobody could mistake one for the other.

The Class Notice	What's Missing from the Notice
No mention of waiver or release. "If the Court grants final approval to the settlement, you will be barred from ever	In a separate lengthy section titled, "RELEASE BY THE CLASS," sets forth release of "all claims" that Disney actions on

contesting the fairness, reasonableness or adequacy of the settlement, or from pursuing any claims against Disney related to the use of Segways or other substantially similar two-wheeled vehicles at the Disney Resorts." Pet. App. A-39-40.	such devices *"do not comply with the ADA or any other federal, state or local law, or similar disability rights statute or regulation."* Pet. App. A-51 (¶13).

A notice must disclose all critical elements of a settlement. *Katrina Canal Breaches Litig. v. Bd. of Comm'rs,* 628 F.3d 185, 198 (5th Cir. 2010) notice did not provide "knowledge critical to an informed decision as to whether to object to class certification and settlement."). The notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." *Grunin v. International House of Pancakes,* 513 F.2d 114, 122 (8th Cir. 1975), cert. den., 423 U.S. 864, (1975). *Cf. Twigg v. Sears*, 153 F.3d 1222 (11th Cir. 1998).[4]

[4] Compare the case at bar to one in which state law remedies were preserved in a settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. Cal. 1998) ("In this case, the notice provided to the absent class members provided each member with the opportunity to opt-out and individually pursue any state law remedies that might provide a better opportunity for recovery.").

In fulfilling their duties to litigants and counsel, courts in class actions exercise their own judgment and also are informed by the reaction of absentee class members to the terms proposed by the parties. Where a key element is entirely omitted from the class notice, and thus kept secret from the absentees, the process is corrupted. The trial court cannot fairly evaluate the settlement.

Approval of the no-notice waiver of all state and local civil rights claims will invite multiple wasteful lawsuits country-wide. Courts will need to interpret the waiver to determine whether a person may sue under a state or local law which is provides greater relief (such as damages) than the Title III ADA statute in the case at bar.

B. Due Process Notice Requirements in Rule 23(b)(2) Cases.

Consider the wacky untenable situation we have today. In one case, a class member who may be entitled to receive a $10 refund or a $1 coupon receives full notice of certification, settlement and an opt-out right. In another case, a class member whose individual rights may be restricted by a vast governmental or corporate restructure, or permanently denied opportunities by an injunction, is not guaranteed any notice at all. That makes no sense.[5]

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[5] Where a settlement-only class is certified, as in this case, the certification and settlement notices are combined, thus compounding the problem. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (heightened scrutiny to settlement-only class certification).

The time has come, however, for the Court to bring Due Process to bear and mandate notice under Rule 23(b)(2).

Following decades of academic attention to constitutional Rule 23 notice issues,[6] *Wal-Mart Stores* observed that there is a "serious possibility" that "absence of notice and opt-out violates due process" where monetary claims do not predominate in a Rule 23(b)(2) class action. *Wal-Mart Stores*, 131 S.Ct. at 2559, citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).[7] We urge the Court to make this "possibility" a reality.

As we demonstrate in the Petition at 24-26, the quest for defining when class notice is required has mired the courts of appeals in intractable conflict.[8] The (b)(2) choice has become litigants'

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[6] *See, e.g.*, Dam, *Class Action Notice: Who Needs It?,* 1974 Sup. Ct. Rev. 97; Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement* Stage of Class Actions, 71 N.Y.U. L. Rev. 258, 272-76 (1996); Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions,* 21 U. Mich. J.L. Reform 347 (1988); Grant, *Comment, The Right Not To Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. Chi. L. Rev. 239 (1996).

[7] Respondent misreads the Court's recognition of the Due Process issue. Brief in Opposition at 15. In fact, the Court observes that the current discretionary notice under 23(b)(2) "(rightly or wrongly)" is thought to comply with Due Process. 131 S.Ct. at 2559.

[8] A good example of how the current system stymies the courts is medical monitoring relief. "Medical monitoring cannot be easily categorized as injunctive or monetary relief." *Gates v. Rohm & Haas Co*., 655 F.3d 255, 262-3 and n. 11 (3d Cir. 2011) ("The remedy of medical monitoring has divided courts on whether plaintiffs should proceed under Rule 23(b)(2) or Rule 23(b)(3).")

"strategy for evading the requirements of *Eisen*…."[9] The result is confusion and inter-circuit conflicts.

The Rule 23(b)(2) Due Process question vexed this Court pre-*Wal-Mart*. [10] Post-*Wal-Mart*, the struggle is not resolved. The relationship between Rules 23(b)(2) and (b)(3) is "both unsettled and fundamental." *In re Veneman,* 309 F.3d 789, 790 (D.C. Cir. 2002). In the absence of this Court's guidance, the circuits have resolved the problem by evading it. The Eighth Circuit calls 23(b)(2) notice a "safety valve" and urges that notice be "utilized 'freely to protect the rights of the absentee members. . .'" [11] The Seventh Circuit suggests discretionary opt-out notice. [12] The Federal Circuit carefully considered what Due Process notice is required in injunctive 23(b)(2) cases, noting *Wal-Mart's* stance on the issue, but reached its decision

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[9] Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. Rev. 258, 271 (1996).

[10] *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120 (1994) (*per curiam* with three dissenting justices) (cert. dism, as improvidently granted). *Per curiam*, the Court stated that the question presented was whether absent class members have a due process right under the Constitution to opt out of any class action which asserts monetary claims on the absent members' behalf; in *Brown* itself, it had been conclusively determined that this was a Rule 23(b)(2) class.

[11] *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 876 (8th Cir. 1977) (citation omitted).

[12] *In re Allstate Ins. Co*., 400 F.3d 505, 508 (7th Cir. 2005) ("Several cases suggest that it might not be necessary to convert such a proceeding to Rule 23(b)(3) because adequate notice and an opportunity to opt out could be provided within the context of a Rule 23(b)(2) proceeding."

on narrower grounds. *Beer v. United States*, 671 F.3d 1299, 1306 (Fed. Cir. 2012), *overruled in part and vacated in part on other grds, ,* 696 F.3d 1174, 1192 (Fed. Cir. 2012).

The instant case is an opportunity for the Court, finally, to establish that notice is not optional under Rule 23(b)(2).

III. Under *Wal-Mart*, a Vague "Eye of the Beholder" Class Definition Cannot Survive Where "Reliance" Varies Immensely Among Class Members.

When a class definition is vague and depends upon subjective "in the eye of the beholder" application, and where no single injunction can resolve the claim, Rule 23(a) commonality is nonexistent.

Respondent Disney gives short shrift to the teachings of *Wal-Mart*, and the court below ignores *Wal-Mart* completely. Disney and the court below wrongly believe that when a policy is challenged, and an injunction against the policy can issue, that concludes the commonality inquiry. *Wal-Mart* holds otherwise; the effect of the policy on the putative class members must be the same for commonality to be established.

Here, the courts below certified the class of those persons who

> *rely upon* a Segway or substantially similar stand-up mobility device for assistance with their mobility, . . . (emphasis added).

Class representative Dan Wallace does not rely on a Segway; he uses it once in a while.[13] In stark contrast, objectors' Segway need is a daily necessity.[14]

Under *Wal-Mart*, Wallace and these exemplar objectors cannot share the same Rule 23(a) class. There is no commonality on the "rely upon" elements of the class definition.[15] The Segway ban, though a single policy, affects each of them quite differently. A single injunction does not resolve the underlying ADA dispute on what accommodations they might need.

The court of appeals in this case ignored *Wal-Mart's* heightened standards for establishing commonality. Instead, that court used a pre-*Wal-Mart* simplistic test ("You challenge a policy; therefore, you're a 23(a)(2) class") which flies in the

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[13] Dan Wallace, named plaintiff, does not use a Segway in "everyday life." Tr. 21. He does not use it for work or daily, just a couple of times a week. Tr. 22-23. It was not physically necessary for him to use the Segway for mobility. Tr. 43-46. Respondent Disney's Brief in Opposition quotes only his deposition testimony which is not part of the record, and the lawyer-driven language of the complaint.

[14] *E.g.,* Tr. 400 (Kerr: goes to bed with the Segway parked nearby and wakes to get on the Segway in the morning); 246 (Lee: will fall down if not standing on the Segway); 380 (Miller: "would not have a life" without it); Tr. 325 (Macini: uses it "about 80 percent of the time"); 227 (Gade: "vastly different" disabilities from the plaintiffs). For objectors, and those in their situation, the use of the Segway is a necessity.

[15] *Cf., Amgen v. Connecticut Retirement Plans and Trust Funds*, 2013 U.S. Lexis 1862 (Feb. 27, 2013) the class "will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.").

face of *Wal-Mart's* demand that each class member must have suffered "the same injury" from the challenged policy. 131 S.Ct. at 2551. Cleverness in drafting a common question does not suffice. The common question must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

The single paragraph on this issue in the decision below reads as if *Wal-Mart* does not exist. It does not cite *Wal-Mart*. The reasoning violates *Wal-Mart*. The scant caselaw cited by the court below is pre-*Wal-Mart*.

There are inter-circuit conflicts and confusion among the courts on *Wal-Mart's* import. It is not too soon after *Wal-Mart* for the Court to elucidate its meaning when faced with such discordance between the Eleventh Circuit and *Wal-Mart's* plain holdings. Some circuits have it wrong, and some have it right. The Eleventh Circuit here and a fractured Third Circuit en banc [16] uphold class certification (mis-reading *Wal-Mart)*, while the Fifth, Seventh and a Third Circuit panel reject class certification due to lack of commonality[17].

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[16] *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 301 (divided en banc Third Circuit) (3d Cir. 2011) (upholding a fractured class, despite *Wal-Mart*; "Furthermore, our precedent provides that "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance.")

[17] *M.D. v. Perry*, 675 F.3d 832 (5th Cir. 2012) (systemic failures in state system to protect children in state custody; "the district court abused its discretion by certifying a class that lacked cohesiveness under Rule 23(b)(2)."); *Jamie S. v. Milwaukee Pub. Schs*, 668 F.3d 481, 485 (7th Cir. 2012) (vacating class

The commonality question was before this Court recently and the Court vacated and remanded in light of *Wal-Mart*. *Wang v. Chinese Daily News, Inc.,* 623 F.3d 743, 753-754 (9th Cir. 2010), *vacated and remanded*, 132 S. Ct. 74 (2011).[18]

IV. Class Representatives Have No Article III Standing to Waive a National Class' Claims under All State and Local Civil Rights Laws, or to Inject California Disney into the Case.

The class representatives, who have standing only in Florida and only under the Americans with Disabilities Act, defend stunning national relief.

There is no legal precedent we have identified – and none are identified by Respondent Disney – for inclusion in a settlement of a waiver of national proportions, under all states' and localities' unspecified civil rights laws. Nor is there any precedent for plaintiffs with standing in Florida (whose injuries were only in Florida) to tack on a California property to a class definition.

Respondent Disney's argument to the contrary is based on three cases which simply do not support standing here, and none of which, in fact, are about standing. *Matsushista Elec. Indus. Co., Ltd., v.*

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certification and settlement in special education case); *Gates v. Rohm & Haas Co*., 655 F.3d 255, 263 (3d Cir. 2011) (medical monitoring; upholding denial of class certification).

[18] Post-remand, the circuit court vacated the district court's findings of commonality under Rule 23(a) and predominance under Rule 23(b)(3) and remanded for reconsideration. *Wang v. Chinese Daily News, Inc*., 2013 U.S. App. LEXIS 4423, 15-16 (9th Cir., Mar. 4, 2013).

Epstein, 516 U.S. 367, 377 (1996) (quoted language is another court's language in dicta discussion; Court rejects the settlement); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) (not a standing case; court can release claims which "could have been alleged" by the plaintiffs); *Nottingham Partners v. Trans-Lux Corporation,* 925 F.2d 29, 34 (1st Cir. 1991) (like *Corrugated*, waived claims must have been "bringable" in original case). In the case at bar, class representatives could not have raised Segway claims in every state in the Union.

Respondents' suggestion that "any class members' claim under state disability rights laws would be based on the same factual predicate" is patently off base. The myriad of such laws have varying factual elements required for their causes of action. An ADA claim here does not mean the same claim over there.

Under this Court's hornbook standing principles, the class representatives had no standing to litigate this case. The settlement must fall.

Conclusion

For the above reasons, and those set forth in the Petition for Certiorari, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

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