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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KERRY ALAN SCANLON
Counsel of Record
JEREMY M. WHITE
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005
Telephone: (202) 682-3500
kscanlon@kayescholer.com

Attorneys for Respondent Walt Disney World Co.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court review, on notice and due process grounds, a decision by the court of appeals affirming an order certifying a Rule 23(b)(2) settlement class and approving a settlement agreement, reached after more than a year of vigorously contested litigation, that resolved "any and all claims for injunctive or declaratory relief," where clear notice of the settlement was given under Rule 23(e) and class members were advised that because the complaint sought injunctive and declaratory relief only, they could not opt out of the settlement?

2. Should this Court review Petitioners' claim, rejected by the lower courts, that the requirements of Rule 23 are defeated by factual differences among individual members of the class, where the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, the same injury alleged, the same relief sought, and the same legal theory, and where Petitioners – in their proposed complaint in intervention – conceded that a nearly identical proposed class action met all the requirements of Rule 23(a) and 23(b)(2)?

3. Should this Court review Petitioners' claim, rejected by the court of appeals, that the named plaintiffs – who asserted a federal claim against the Walt Disney World Resort ("WDW") in Florida – do not have Article III standing to assert claims with the same nucleus of operative facts against the Disneyland Resort ("Disneyland") in California under state

QUESTIONS PRESENTED – Continued

and federal law, even though both Disneyland and WDW (collectively, the "Disney Resorts") have the same Segway policy and every class member has suffered the same injury?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Walt Disney Parks and Resorts U.S., Inc., formerly known as Walt Disney World Co., makes the following disclosure of parent corporations and publicly held companies that own 10% or more of its stock:

Disney Enterprises, Inc., which itself is a wholly-owned subsidiary of The Walt Disney Company, a publicly held corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Walt Disney Parks and Resorts U.S., Inc., formerly known as Walt Disney World Co. ("Worldco") respectfully opposes the Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case, issued on August 30, 2012, reproduced in the appendix to the Petition ("App.") at A-1 to A-11, and reported in *Ault v. Walt Disney World Co.*, 692 F.3d 1212 (11th Cir. 2012). The district court opinions are reported in *Ault v. Walt Disney World Co.*, 07-1785, 2011 U.S. Dist. LEXIS 45268 (M.D. Fla. Apr. 4, 2011), reproduced in the appendix to the Petition at A-16 to A-27, *Ault v. Walt Disney World Co.*, 07-1785, 2009 U.S. Dist. LEXIS 92911 (M.D. Fla. Oct. 6, 2009), and *Ault v. Walt Disney World Co.*, 254 F.R.D. 680 (M.D. Fla. Jan. 5, 2009).

INTRODUCTORY STATEMENT

This Petition arises from Petitioners' dissatisfaction with a class action settlement that was approved by the district court in the Middle District of Florida and later affirmed by the Eleventh Circuit. Although Petitioners, as objecting class members, had several opportunities to convince the lower courts that the settlement should not be approved, they failed to do so and for good reason. As emphasized by the Eleventh Circuit, "[i]f Disney prevails at trial, the class will be left with no remedy at all. This settlement

precludes such a Draconian result and ensures that a stand-up mobility device is available at Disney Resorts." Pet. App. A-11.

The Petition does not challenge the underlying merits of that decision. Instead, Petitioners claim that their due process rights were violated because the district court failed to provide, in connection with its class certification order under Rule 23(b)(2), notice to the class and an opportunity to opt out. They also assert that class certification was improper because of factual differences in plaintiffs' degree of reliance on a Segway and because plaintiffs, who asserted a federal claim against WDW in Florida, do not have Article III standing to assert claims based on the same nucleus of operative facts against Disneyland in California under state and federal law. As discussed further below, none of these arguments has any merit. The lower courts properly followed the requirements of Rule 23 in every respect, and Petitioners do not provide any cases that support their arguments, much less a justification for review by this Court. Accordingly, the Petition should be denied.

RESTATEMENT OF THE CASE

A. Worldco's Safety Policy Regarding Segways

Worldco has a policy which prohibits the unrestricted guest use of all two-wheeled vehicles, including Segways, within the Disney Resorts, but it

permits guests to use wheelchairs and scooters.[1] Worldco's policy prohibiting Segways equally applies to both Disney resorts. Worldco's restriction on the use of Segways stems from a safety determination. Worldco's chief safety officer, Greg Hale, carefully considered whether the device could be used by guests at the Disney Resorts and after a thorough review, he ultimately decided with others at Worldco that the safety risks posed to other guests in the unique environment of the resorts were simply too great. *See* Doc. 82 at 12. The record below clearly demonstrates that there are serious safety risks involved in allowing unrestricted guest use of Segways at the Disney Resorts.

B. The Underlying Lawsuit

On November 9, 2007, three individuals, Mahala Ault, Stacie Rhea and Dan Wallace, who have mobility impairments, filed a complaint, on behalf of

[1] Segways are two-wheeled, gyroscopically-balanced motorized transportation devices upon which an individual must stand in order to ride. They can travel up to 12.5 mph and have no steering wheel or brakes. According to Worldco's chief safety officer, the Segway is inherently unstable (due to its unique tilt sensors and powerful motor) and thus poses significant safety risks to Worldco's guests, particularly in crowded environments where there are small children, persons with disabilities and older guests. *See, e.g.*, *Ault* District Court Docket (hereinafter "Doc.") 72, Exhibit 2, Hale Dep. Tr. at 170:13-18; *Ault* Settlement Fairness Hearing Transcript, Docs. 208 and 209 (hereinafter "Hr'g Tr.") at 77:15-79:6.

themselves and others similarly situated, alleging that Worldco violates Title III of the Americans with Disabilities Act ("ADA") by prohibiting its guests from using Segways within WDW, and sought an injunction directing Worldco to permit such use. Doc. 1 at 1. Plaintiffs alleged they represented a class of individuals "(1) [who] suffer from a mobility disability; (2) who rely on a Segway PT for assistance with their mobility; and (3) who have or who intend to visit" one or more of the theme parks at WDW. *Id*. at 38.

Plaintiff Dan Wallace lost part of his left foot in an accident and uses a prosthetic device built into his shoe. Doc. 72-2, Exhibit 1 at 7-8. At his deposition, he discussed his reliance on a Segway, explaining "I use[ ] it all the time. I use it in [my] real estate office, actually indoors." Doc. 220, Wallace Dep. Tr. at 24:24-25:1; *see also* Doc. 81-2, Second Amended Compl. ¶ 40 ("Wallace relies solely upon his Segway as a mobility device."). Plaintiff Mahala Ault was diagnosed in 1997 with multiple sclerosis and needs assistance walking in most circumstances. *See* Doc. 72-7, Exhibit 6 at 5-6, 8. She bought her own Segway in 2006 and at her deposition, she discussed her Segway use, explaining that "there's only limited things that I can do" and therefore when "I use the Segway, it is for long walks, if we're going to amusement parks or things like that." Doc. 220, Exhibit 2, Ault Dep. Tr. at 121:17-18, 122:12-14; *see also* Doc. 81-2, Second Amended Compl. ¶ 20 ("As a result of her multiple sclerosis, Ault's physical mobility is very limited. Ault utilizes a Segway as her mobility device."). Clearly

the plaintiffs rely upon a Segway for assistance with their disability.[2]

For more than a year, this litigation was vigorously contested. The parties engaged in extensive motion practice and substantial class discovery, including the exchange of documents and interrogatory answers, subpoenas to non-parties, and four all-day depositions. When the plaintiffs took the deposition of Worldco's chief safety officer, he explained that Worldco had given the question of allowing Segways a great deal of thought and that company officials were extremely familiar with the design, development and operation of the device, as well as the safety risks involved in allowing Segways at the Disney Resorts. *See* Doc. 82 at 14.

Plaintiffs were impressed by Mr. Hale's testimony and the parties began discussing a potential settlement. *Id*. Worldco, as part of these settlement discussions, then caused the design, construction and testing of a prototype device that would offer the benefits allegedly provided by a Segway while meeting Worldco's concern for the safety of its thousands

[2] In 2007, Plaintiff Stacie Rhea was diagnosed with Amyotrophic Lateral Sclerosis (ALS or Lou Gehrig's Disease). Three years later, she died from complications due to her disease. Doc. 245. Prior to that time, she relied upon a Segway. *See* Doc. 81-2, Second Amended Compl. ¶¶ 28-29 ("Rhea's ALS greatly limits her mobility and does not allow her to walk more than very short distances without the assistance of a mobility device. Rhea relies upon a Segway as her mobility device.").

of daily guests. *Id*. at 3-4. As a result of these negotiations, which took place over several months, the parties reached an agreement to settle the case.

C. The Settlement Provides Important Benefits to Class Members

The parties entered into a classwide settlement agreement under which Worldco would (1) maintain its policy against unrestricted guest use of two-wheeled vehicles, including Segways, and (2) develop a new, four-wheeled, electric stand-up vehicle ("ESV") for use at its resorts by persons meeting the settlement class definition. Pet. App. A-47, A-49. As part of the settlement, Worldco agreed to acquire at least 15 of the newly designed ESVs for use at the Disney Resorts by persons with a mobility impairment or disability. *Id*. at A-47.

The ESV is intended to replicate in dimension, purpose and operation a common wheelchair or motorized scooter while allowing individuals with a mobility impairment or disability to stand upright instead of sitting down. Doc. 82 at 4. It is specifically designed to meet the requirements of the Disney Resorts in size, speed, safety features, durability, and compatibility with the routes of travel. It is undisputed that the ESV is a safe and stable device within the Disney Resorts. Hr'g Tr. at 143:22-23. After Plaintiff Wallace tested a prototype ESV, the named plaintiffs, on behalf of themselves and settlement class members, agreed that the new ESV satisfies their claims

by providing the same psychological and physiological benefits which a Segway allegedly provides.[3]

D. Absent Class Members Received Two Notices of the Settlement

On January 5, 2009, the district court granted conditional class certification and preliminary approval of the settlement. *See* Doc. 83. After an in-depth analysis of Rule 23's requirements, the court concluded that "certification of a settlement-only class is proper in this case." *Id*. at 5. Specifically, the court held, *inter alia*, that the named plaintiffs "clearly met the typicality requirement" because their claims – that "Disney's prohibition on Segways precludes them from the full use and enjoyment of the Parks" – are *identical* to the claims of every class member. *Id*. at 7-8 (emphasis added). The court further explained that "because both the putative class representatives and absent class members rely upon Segways for their mobility, the differences in the representatives' and absent class members' disabilities are irrelevant." *Id*. at 8.

In accordance with the January 5, 2009 order, plaintiffs sent the court-issued notice of class action

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[3] Mr. Wallace is a strong advocate of the Segway but after using the ESV within WDW, he found it was more comfortable than his Segway (Hr'g Tr. at 36:14-20) and offered several features, such as a backrest, "that are actually better than [his] Segway." *Id*. at 31:17-23.

settlement to individual settlement class members and to organizations who support persons with mobility impairments. Doc. 90. In fact, the settlement notice was sent directly to each Petitioner and was posted on Petitioner Disability Rights Advocates for Technology's ("DRAFT") website. The notice stated, *inter alia*, that class members would be releasing all claims for injunctive and declaratory relief against Worldco related to its Segway policy:

> The Plaintiffs have not sought, nor are they entitled to, any monetary relief in this case. Because this class action is for injunctive and declaratory relief only, you may not opt-out of this settlement.
>
> * * *
>
> **If the Court grants final approval to the settlement, you will be barred from ever 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-38 to A-40 (emphasis in original).

The settlement notice also indicated that a copy of the settlement agreement – which repeated that the release was limited to claims for injunctive and declaratory relief – could be obtained from the clerk's office or via the federal court's electronic filing

system. *Id*. at A-41, A-42.[4] When the hearing was postponed, the court issued a second notice – which merely updated the hearing date – and this notice was again sent to absent class members, including Petitioners. Pet. App. A-32.

E. Petitioners' Legal Challenge in the Proceedings Below

Shortly after receiving the court's initial notice of the class action settlement, DRAFT and absent class members connected to DRAFT, filed objections to the class action settlement.[5] In their 22-page brief, Petitioners made many of the same arguments which they make in this Petition – that "the class representatives have no standing," that "the settlement may not be certified under Rule 23(b)(2)" and that "the settlement waives and releases all state and local law claims of absent class members, without payment of damages." Doc. 97 at 2.

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[4] The release in the settlement agreement is limited to all past, present and future claims "that [class members] now have, claim to have, or had against Worldco *for injunctive or declaratory relief* that relate to any issue ever raised in the case." Pet. App. A-51 (emphasis added).

[5] The U.S. Department of Justice ("DOJ" or "Department") and 23 State Attorneys General also filed objections to the settlement. While DOJ filed an *amicus* brief in the Eleventh Circuit focused almost entirely on the validity of its newly adopted Title III regulation, the 23 State Attorneys General did not pursue their initial objections and have not been involved in this litigation for more than three years.

Petitioners also moved to intervene in the case. Doc. 128. In support of their motion, Petitioners submitted a proposed complaint in intervention, alleging that they and the original named plaintiffs "share the same claims under the ADA and attack [Worldco's] same policy." Doc. 128-2 at 3. They also alleged that their proposed class action – worded nearly identically to plaintiffs' Second Amended Complaint – "satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of the Federal Rules of Civil Procedure 23(a) and 23(b)(2)." *Id*. at 17.

While the court subsequently denied Petitioners' motion to intervene as "untimely and unwarranted," it did not impose any restrictions on Petitioners' participation in the settlement proceedings. Doc. 148. In fact, after objecting to the settlement, Petitioners filed numerous procedural and discovery motions and were provided the same opportunity as the named parties to call witnesses and offer evidence at the settlement fairness hearing, which was conducted on June 3 and 4, 2009. The two-day fairness hearing involved 13 witnesses (including four experts), more than eight hours of live testimony from both parties and objectors, hundreds of pages of written exhibits, video exhibits and in-court demonstrations. Pet. App. A-17.

On October 6, 2009, the court vacated its prior order conditionally certifying the class and granting preliminary approval of the settlement, and dismissed the case without prejudice for lack of prudential

standing. *See* Doc. 228. The named plaintiffs appealed the district court's decision and the Eleventh Circuit reversed and remanded after finding that plaintiffs' interests were "arguably within the zone of interest" protected by Title III of the ADA. Pet. App. A-28, A-29. The Eleventh Circuit did not disturb the district court's underlying factual determinations. *Id*. While this case was pending on appeal, DOJ issued a new Title III regulation, 28 C.F.R. § 36.311, designed to force public accommodations to allow individuals with disabilities to use Segways unless the company could prove certain safety risks. On remand, the court permitted the parties, objectors and *amici* to submit supplemental briefs on the applicability of the new regulation. Doc. 244.

On April 4, 2011, the court granted final class certification and final approval of the settlement. Pet. App. A-18. The court found that "any differences in the class members' degree of reliance [on a Segway] has little or no relevance to the claims presented by the named Plaintiffs, which are identical to the claims of every class member." *Id*. at A-18, A-19. The court further explained that the "similarity of legal theories shared by the Plaintiffs and the class at large dictates a determination that the named Plaintiffs' claims are typical of those of the members of the putative class." *Id*. at A-19. On April 29, 2011, Petitioners appealed the court's fairness and class certification rulings to the Eleventh Circuit.

The Eleventh Circuit upheld the district court's decision granting class certification and final approval

of the class action settlement. Pet. App. A-2. On class certification, it concluded that "the district court clearly did not abuse its discretion by finding that the claims of the class representatives and class members are typical and warrant class certification." Pet. App. A-8. As the court explained, the class members' claims "all stem from the same policy prohibiting the use of Segways within Disney Resorts" and "are all based upon liability pursuant to Title III." *Id*. at A-7, A-8. Rejecting Petitioners' "degree of reliance" argument, the court concluded that "[w]hile each class member may have a stronger or weaker claim depending upon his or her degree of reliance . . . this alone does not make class representatives' claims atypical of the class as a whole." The court also found Petitioners' arguments that the district court improperly certified the class pursuant to Rule 23(b)(2) unpersuasive and summarily rejected them. *Id*. at A-6 n.2, A-11 n.5. The instant Petition followed.

REASONS FOR DENYING THE PETITION

I. The Petitioners' Notice and Due Process Rights Were Fully Protected Consistent with Rule 23

Petitioners claim that the decision to certify a settlement class in this case must be viewed in light of this Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), which, unlike this case, was a class action that was "not intended to be litigated" and in which the complaint, a proposed

settlement agreement, and a joint motion for conditional class certification were all filed on the same day. *Amchem*, 521 U.S. at 601. Here, the case was vigorously litigated for more than a year, including discovery related to class certification, before a settlement was reached. *Amchem* held that heightened scrutiny is necessary to protect against the risk of abuse when the proposed settlement and motion for class certification are filed at the same time as the complaint because the court "lack[s] the opportunity, *present when a case is litigated*, to adjust the class, informed by the proceedings as they unfold." *Id.* at 620 (emphasis added). That risk was not present in this case and Petitioners are incorrect in stating that the lower courts "disregarded this Court's mandate in *Amchem*," Pet. at 19-20, because it simply does not apply to the facts in this case.

A. Notice and Opt-Out Rights Are Not Required in a Rule 23(b)(2) Class Action

Petitioners are mistaken in asserting that the district court was required to provide, in connection with the class certification order, notice to the class and an opportunity to opt out. The class was certified in this case under Rule 23(b)(2) because the claims of all class members were the same, the conduct complained about was the same, and the relief sought – an injunction barring Worldco from enforcing its policy against unrestricted guest use of Segways and other two-wheeled vehicles – was the same. Under

Rule 23(b)(2), a class action may be maintained if the four prerequisites of Rule 23(a) are satisfied and if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The notice provision of Rule 23 provides that for any class certified under (b)(2), the district court is not required to provide notice of class certification to the class. Fed. R. Civ. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class.") (emphasis added).

While Petitioners admit that absentee class members in an injunction case like this one "receive no notice" of class certification, Pet. at 21-22,[6] they argue that "[t]he current system is distorted" and that "Due Process principles" require that a notice and opt-in requirement be read into Rule 23(b)(2) class certification, particularly when "important rights are waived." *Id.* In a gross mischaracterization of this Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Petitioners assert that the Court acknowledged in that case "the

[6] Petitioners themselves knew about the district court's order conditionally certifying the class in this case. Indeed, they made both written and oral arguments to the court in opposition to that order, sought to intervene in the case, and were granted nearly the same opportunity to participate in the litigation as the parties.

possibility that Due Process requires notice in all Rule 23(b)(2) cases." Pet. at 26. To the contrary, the Court in *Wal-Mart* referred to (b)(2) classes as "mandatory classes" because "[t]he Rule provides no opportunity for . . . (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action." *Wal-Mart*, 131 S. Ct. at 2558.

What Petitioners are referring to in *Wal-Mart* is "the serious possibility" that the absence of notice and opt-out violates due process where the complaint includes monetary claims even though those claims "do not predominate." *Id.* at 2559.[7] The issue there was whether due process requires notice and opt-out in every class action that includes monetary claims (even ones that do not predominate), which would then fall outside the scope of Rule 23(b)(2) which does not afford those rights. Clearly this "serious possibility" has nothing to do with a class action like this case which involves injunctive and declaratory relief only and no claim for monetary damages.

In a case involving injunctive and declaratory relief only, *Wal-Mart* and every other case is crystal clear: "(b)(2) does not require that class members be

[7] The full quotation is: "In the context of a class action predominantly for money damages, we have held that absence of notice and opt-out violates due process. While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here." *Id*. (citation omitted).

given notice and opt-out rights." *Ibid.*; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) (stating that the notice requirements under Rule 23(c)(2) are "inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)"). Given that this Court has uniformly held that notice of class certification and the opportunity to opt out are not required for Rule 23(b)(2) classes like this one, there is no important question to be resolved by this Court and *certiorari* is not warranted.

Nowhere do the federal rules provide that Rule 23(b)(2) class members have an opportunity to opt out. Instead, they only impose that requirement on Rule 23(b)(3) classes. *Compare* Rule 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court *must* direct to class members the best notice . . . that the court will exclude from the class any member who requests exclusion. . . .") (emphasis added). Moreover, Rule 23(e) – which requires that absentee class members receive notice of the settlement as they did here – does not provide class members with an opportunity to opt out of the settlement unless the class was certified under Rule 23(b)(3). *See* Fed. R. Civ. P. 23(e)(4). Because this case involved a Rule 23(b)(2) class, the lower court properly followed the settlement approval process under Rule 23(e) when it provided notice of the class action settlement to absentee class members without permitting them to opt out of the settlement.

B. Petitioners Were Provided Clear Notice That the Settlement Waives All Claims for Injunctive and Declaratory Relief

Arguing in the alternative, Petitioners assert that "[e]ven if Due Process does not require notice in all 23(b)(2) cases, it certainly requires notice when important rights are waived." Pet. at 22. Petitioners claim that important rights were waived in this case because the settlement agreement "waive[d] and release[d], for the entire national class, 'any and all claims' under any 'state or local law or similar disability rights statute or regulation.'" *Id*. at 23. They call it a "secret" waiver for which no notice was provided. *Id*. at 23, 26. This claim is unfounded.

First, Paragraph 13 of the settlement agreement clearly limits the release to claims "against Worldco *for injunctive or declaratory relief* that relate to any issue ever raised in this case." Pet. App. A-51 (emphasis added). The language Petitioners cite does not broaden the release but simply describes one type of claim for injunctive or declaratory relief that is included in the release.[8]

[8] That the settlement released only injunctive claims and not monetary claims is confirmed by Paragraph 8 of the settlement agreement which clearly states the parties' intent to settle "any and all claims *for injunctive or declaratory relief* under federal, state and local disability rights laws." Pet. App. A-46 (emphasis added).

Second, the waiver of all claims for injunctive and declaratory relief was not hidden at all, even for absentee class members who, unlike Petitioners, were not participating in the litigation. The court-issued notice of settlement sent to class members made it clear, in bold letters, that in return for the substantial benefits provided in the settlement, class members were giving up the right to challenge Worldco's ban on Segway use at the Walt Disney World and Disneyland Resorts: **"If the Court grants final approval to the settlement, you will be barred . . . 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-38 (emphasis in original). The settlement notice also expressly stated that "because this class action is for injunctive and declaratory relief only, [absent class members] may not opt-out of this settlement." *Id*.

Finally, Petitioners had as much notice and due process as any party to the case. After objecting to the settlement, they filed numerous procedural and discovery motions, and called witnesses and offered evidence at the settlement fairness hearing. Petitioners' claim that their notice and due process rights were violated is wholly unsupported by the record.

C. The Eleventh Circuit's Decision Does Not Conflict with Any Decisions of Other Circuits

Contrary to Petitioners' suggestions, there is no circuit split in this case. In fact, every appellate decision cited by Petitioners as evidence of a circuit split involved the issue whether the damages claimed were sufficiently incidental to the injunctive relief requested in order to be certified under Rule 23(b)(2).[9] As shown above, this case does not present that issue because damages were neither sought nor available in this case. As such, the Eleventh Circuit's decision on class certification does not conflict with the decisions of any other circuit court.

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[9] *Compare Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 155 (2d Cir. 2001) (seeking injunctive and equitable relief, back and front pay and compensatory damages); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 316 (4th Cir. 2006) (seeking future premiums on insurance policies, restitution, injunctive relief and punitive damages); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 407 (5th Cir. 1998) (seeking "every available form of injunctive, declaratory, and monetary relief"); *Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst.*, 435 F.3d 639, 640 (6th Cir. 2006) (seeking declaratory and injunctive relief, as well as compensatory and punitive damages); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 579 (7th Cir. 2000) (same); *Cooper v. S. Co.*, 390 F.3d 695, 702 (11th Cir. 2004) (same).

II. The Class Was Properly Certified Because the Class Claims Involve the Same Conduct, Injury and Legal Theory

A. Differences in How Much Class Members Rely on Their Segways Do Not Establish a Lack of Typicality

Petitioners argue that because the Settlement Class is defined to include all persons who, *inter alia*, "rely upon a Segway . . . for assistance with their mobility," the differences in *how much or how often* individual class members rely upon their Segways for mobility assistance defeat the typicality requirement of Rule 23(a). As the district court properly found, any alleged factual differences in plaintiffs' degree of reliance on a Segway (*i.e.*, whether they use the device for four or eight hours per day) "has little or no relevance to the claims presented by the named Plaintiffs, which are identical to the claims of every class member." Pet. App. A-18, A-19. The Eleventh Circuit similarly determined that "[w]hile each class member may have a stronger or weaker claim depending upon his or her degree of reliance . . . this alone does not make class representatives' claims atypical of the class as a whole." Pet. App. A-7.

Because the claims of the class members (including plaintiffs) "all stem from the same policy prohibiting the use of Segways within Disney Resorts" and "are all based upon liability pursuant to Title III," the Eleventh Circuit correctly concluded that "the district court clearly did not abuse its discretion by finding that the claims of the class representatives and class

members are typical and warrant class certification." Pet. App. A-7, A-8.

Courts in other cases have explained that typicality "may be satisfied even if some factual differences exist between the claims of the named representatives and the claims of the class at large" and that "a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences." *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 n.14 (11th Cir. 2000) (internal quotation marks omitted); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001) ("If the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences."); *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) (stating that if "the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality"); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (finding that the "typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members"); *Penn v. San Juan Hosp., Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975) (recognizing that "there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory").

Petitioners do not offer any authority to support their argument that differences in the plaintiffs' and absent class members' degree of reliance on a Segway could defeat the typicality requirement. Nor do they dispute that, as the district court recognized, "[e]very class member has suffered the same injury and is requesting the same injunctive relief." Doc. 83 at 9; Doc. 252 at 3. Therefore, consistent with this Court's holding in *Wal-Mart* that all class members must "have suffered the same injury" (*see Wal-Mart*, 131 S. Ct. at 2551), any alleged differences in the degree of reliance on a Segway are not relevant to whether the claims satisfy Rule 23(a), because every class member has suffered the same alleged injury and is requesting the same relief.

B. A Single Injunction Can Resolve This Case

As the district court correctly stated, "[e]very class member has suffered the same injury and is requesting the same injunctive relief." *See* Doc. 83 (finding that "this is precisely the sort of situation for which certification under Rule 23(b)(2) is appropriate"). Because every class member has an identical claim and has suffered the same injury, there is no need for individualized injunctions, as Petitioners contend.

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that

final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This rule was recently examined by the Supreme Court in *Wal-Mart*, 131 S. Ct. at 2557, where the Court determined that a class of 1.5 million female employees seeking "individualized money damages" did not meet the requirement under Rule 23(b)(2) because "the key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted." *Id*.[10] However, where "a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry." *Id*. at 2558.[11]

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[10] While Petitioners claim that class certification can also be denied under *Wal-Mart* in cases like this one seeking purely injunctive relief (Pet. at 29 n.66), the cases they cite are inapposite because they involve multiple individualized injunctions that were either requested by the plaintiffs or ordered by the court. *See, e.g.*, *M.D. v. Perry*, 675 F.3d 832, 845-47 (5th Cir. 2012) (finding that plaintiffs' request for twelve, broad classwide injunctions established that certain individual injuries were not uniform across the class); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012) (holding that there could be no single injunction to satisfy Rule 23(b)(2) because of the court-ordered remedial scheme which required "thousands of individual determinations of class membership, liability, and appropriate remedies").

[11] Petitioners contend that "[t]his is a classic unmanageable Rule 23 class." Pet. at 30. However, the cases cited to support that contention (*see* Pet. at 30 n.67 & 32 n.69) only address whether a damages class satisfies Rule 23(b)(3)'s predominance and superiority requirements. Because those standards are not relevant in a 23(b)(2) class seeking only injunctive and declaratory relief, none of these cases is applicable here.

In the instant case, plaintiffs sought a single injunction directing Worldco "to modify its prohibition against the use of two-wheeled vehicles, including Segway[s]" at the Disney Resorts by guests with a mobility disability who rely upon a Segway for assistance with their mobility. Doc. 81-2 at 11. As the district court explained, "[t]he very nature of the rights which Plaintiffs seek to vindicate requires that the relief they request run to the benefit of not only the named plaintiffs, but also to all those similarly situated." Doc. 83 at 9. Therefore, plaintiffs' request for injunctive relief, which necessarily inures to the benefit of all class members, satisfies the requirements of Rule 23(b)(2).

C. Petitioners' Prior Concessions Are Fatal to Their Current Arguments

When Petitioners sought to intervene in plaintiffs' case and replace the class representatives, they filed a proposed complaint in intervention seeking "injunctive relief that would mandate that Worldco abolish their ban on the use of two wheeled mobility devices, including Segways, and permit the use of their own two-wheeled devices, including Segways." Doc. 128-2 at 3. In that complaint, Petitioners conceded that their proposed class action – which was nearly identical to plaintiffs' certified class action – "satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of the Federal Rules of Civil Procedure 23(a) and 23(b)(2)." *Id*. at 17. Yet their Petition repeatedly

attacks the lower court's class certification decision on those same grounds.

Petitioners also previously admitted that they "share the same claims under the ADA and attack the same policy of the Defendant" as the plaintiffs, and that their allegations "are substantially similar to those of other potential class members in all respects related to their challenge to Defendant's policies and practices." *Id*. at 17. While Petitioners contend now that "it was the parties who chose to use the words 'rely upon' in the class definition" (Pet. at 28), their complaint in intervention included the same "rely upon" language. Doc. 128-2 at 17. When it suited Petitioners' purpose in trying to intervene in this case, they did not argue that plaintiffs' degree of reliance on a Segway had any impact on class certification. This prior admission is another reason to reject Petitioners' argument that plaintiffs cannot satisfy Rule 23(a) because there are alleged factual differences in their degree of reliance on a Segway.

Moreover, Petitioners sought the exact same classwide injunctive relief as the plaintiffs – directing Worldco to "void its prohibition against the use of two-wheeled vehicles, including Segways" – and, in doing so, conceded that a single injunction "would apply to all named and unnamed class members equally." *Id*. at 18-19. These concessions completely undermine Petitioners' present claims that the class is unmanageable and are fatal to the argument that class certification was improper because no single

injunction can resolve all of the class members' claims.

III. The Issue Whether Plaintiffs Have Article III Standing Does Not Warrant Review

Petitioners argue that the release in the settlement agreement is improper because the plaintiffs – who only asserted a federal ADA claim against Worldco in Florida – do not have standing to represent a class with claims under all states' disability rights laws. Pet. at 31. This argument is without merit.

It is well settled that "a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 377 (1996); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991) (holding that a release of federal claims stemming from the same nucleus of operative fact as the state law claims was valid and enforceable "even though the state court could not adjudicate claims arising under such statute"); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) (finding that a federal court can approve a settlement releasing state claims not before it). Thus, if the factual predicate is the same, state law claims can be

released whether or not they were asserted in the federal class action.

Nothing in the decision below changes the rules of Article III standing as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). As this Court has repeatedly held, "a class representative must be a part of the class" in order to have standing; that is, he must "'possess the same interest and suffer the same injury' as the class members." *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)). Here, every class member – regardless of whether they intended to visit WDW in Florida or Disneyland in California – suffered the same alleged injury. Moreover, it is undisputed that the alleged injury suffered by class members is based on allegations that Worldco's policy prohibited them from using a Segway within the Disney Resorts. Given that any class members' claim under state disability rights laws would be based on the identical factual predicate as the federal ADA claim alleged in the underlying suit, plaintiffs' release of state law claims for injunctive and declaratory relief is permissible.

The cases cited by Petitioners are inapposite because they all involve class representatives who sought to litigate multiple claims that involved significantly different types of conduct, not all of which they had personally experienced, and that were subject to different laws in different states. *See Prado-Steiman*, 221 F.3d at 1281 (noting that ten different classwide claims had "obvious and important differences" in the

"type of conduct challenged and the type of injury suffered"); *In re Terazosin Hydrochloride Antitrust Litig.*, 160 F. Supp. 2d 1365, 1371 (S.D. Fla. 2001) (involving "dozens of state law claims" in states where the named plaintiffs did not reside and had not purchased defendants' products, under distinct statutes prohibiting antitrust conspiracies affecting commerce within those states).

Contrary to Petitioners' argument that the class action should not have been certified because it involves the examination of the laws of 50 states, there are only two states, Florida and California, where the individual state's law could apply. And in both of those states, the challenged practice – Worldco's prohibition of Segways – is exactly the same.[12] The Eleventh Circuit summarily rejected Petitioners' arguments regarding the nationwide waiver of claims. Pet. App. A-11. There is also no conflict among the circuits, nor have the Petitioners claimed that any such conflict exists, as to how Article III should be applied to absent class members in this situation. Because the Eleventh Circuit's opinion is not in conflict with any other circuit, the Court

[12] While Petitioners argue that the plaintiffs lacked standing to support amending the class definition to include Disneyland (*see* Pet. at 31), they have failed to show that there are any factual differences in the application of Worldco's policy in the two resorts. There are none.

should deny the Petition as to the third question presented.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of *Certiorari* should be denied.

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Respectfully submitted,

KERRY ALAN SCANLON
Counsel of Record
JEREMY M. WHITE
KAYE SCHOLER LLP
901 Fifteenth Street, N.W.
Washington, DC 20005
Telephone: (202) 682-3500
kscanlon@kayescholer.com

Attorneys for Respondent Walt Disney World Co.