No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner

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QUESTION PRESENTED

Does a state statute limiting the availability of class actions in state courts restrict a federal court's power to certify a class under Federal Rule of Civil Procedure 23 in an action where jurisdiction is based on diversity of citizenship?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court and in the court below are set forth in the caption. One other party, plaintiff Sonia E. Galvez, appeared in the district court but was not a party in the court of appeals and is not a party in this Court.

RULE 29.6 STATEMENT

Petitioner Shady Grove Orthopedic Associates, P.A., has no corporate parent, and no publicly held company owns ten percent or more of its stock.

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OPINIONS BELOW

The United States District Court for the Eastern District of New York dismissed petitioner's complaint in an opinion dated December 15, 2006, and reported at 466 F. Supp. 2d 467. The district court's opinion is reproduced in the appendix to the petition for a writ of certiorari at 19a-36a. The United States Court of Appeals for the Second Circuit affirmed on November 19, 2008, in an opinion reported at 549 F.3d 187 and reproduced in the appendix to the petition at 1a-18a.

JURISDICTION

The complaint in this action invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Specifically, the complaint alleged jurisdiction under 28 U.S.C. § 1332(d)(2), as the action was filed as a class action under Federal Rule of Civil Procedure 23, and the named class representatives, Shady Grove Orthopedic Associates and Sonia E. Galvez (citizens of Maryland) were citizens of different states from the named defendant, Allstate Insurance Company (a citizen of Illinois). JA 7-8.

The district court's dismissal of the action for lack of subject-matter jurisdiction, based on its conclusion that a class could not be certified under New York state law, was a final order, and the court of appeals had jurisdiction over Shady Grove's timely appeal under 28 U.S.C. § 1291.

The court of appeals issued its decision on November 19, 2008. Shady Grove's timely petition for a

writ of certiorari was filed on February 6, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Supremacy Clause of the Constitution of the United States, Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Federal Rule of Civil Procedure 23 provides, in pertinent part:

> **Class Actions**
>
> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members 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.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) 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; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

New York Civil Practice Law and Rules § 901 provides:

Prerequisites to a class action.

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Pertinent parts of the following statutes also involved in this case are reprinted in the appendix to this brief: the Rules Enabling Act, 28 U.S.C. § 2072; the Rules of Decision Act, 28 U.S.C. § 1652; the diversity jurisdiction statute, 28 U.S.C. § 1332; section 2 of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 28 U.S.C. § 1711 note; New York Civil Practice Law and Rules § 101; and New York Insurance Law § 5106(a).

STATEMENT OF THE CASE

New York's insurance laws require that automobile insurers provide first-party coverage to their insureds for losses and injuries arising out of their use of insured vehicles, including medical expenses of up to $50,000 per person. New York Ins. Law §§ 5103(a), 5102. The New York statutory scheme further provides that an insurer must pay such first-party benefits within 30 days of the submission of a properly documented claim and that overdue payments bear interest at a rate of 2% per month. *Id.* § 5106(a).

On May 30, 2005, Sonia E. Galvez (a citizen of Maryland) was injured in a collision while driving her automobile, which was registered in New York

and insured under a policy issued by respondent Allstate Insurance Company. She received medical treatment from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland medical practice, and assigned to Shady Grove her rights to payment for that care under the Allstate policy. JA 12.

Through Shady Grove, Ms. Galvez submitted claims for payment of first-party benefits under her policy, but Allstate failed to make timely payments to Shady Grove and said that it had not received the claims. Allstate refused to pay the interest on its late payments called for by New York Insurance Law § 5106(a). JA 13.

On April 20, 2006, Ms. Galvez and Shady Grove filed this action in the United States District Court for the Eastern District of New York. Their complaint alleged that Allstate had a practice of routinely failing to pay first-party claims within the 30 days required by New York law, failing to pay the resulting interest, and claiming as an excuse that it had not received the insureds' proof of loss. JA 11-12. The complaint accordingly brought claims not just on behalf of Ms. Galvez and Shady Grove, but also on behalf of a proposed class of Allstate insureds who had similarly been denied the required interest payments, and it sought compensatory damages for the class in the amount of the interest wrongfully withheld. JA 13, 22.

The complaint invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(d)(2), which permits a district court to exercise jurisdiction over a class action in which one or more members of the plaintiff class is a citizen of a different state from one or more defendants, provided that the class includes

at least 100 members and the amount in controversy for the class as a whole exceeds $5 million. Because both Ms. Galvez and Shady Grove are citizens of Maryland and Allstate is a citizen of Illinois, the action met § 1332(d)(2)'s minimal diversity requirement. JA 7-8. The complaint alleged that the size of the class exceeded 1,000 members, JA 14, and the plaintiffs sought damages exceeding $5 million. Pet. App. 20a.

Allstate moved to dismiss the action on two grounds. First, it contended that Ms. Galvez was not a real party in interest and lacked standing because she had assigned her rights to Shady Grove. Second, Allstate contended that the action must be dismissed in its entirety because a New York statute, Civil Practice Law & Rules ("CPLR") § 901(b), provides that a class action may not be maintained to recover statutory penalties unless the statute providing the penalties specifically authorizes class proceedings. Allstate argued that CPLR 901(b) is applicable to diversity proceedings in federal courts, that the interest entitlement under New York's insurance law is a "penalty" within the meaning of section 901(b), and that, as a result, section 901(b) precludes maintenance of this case as a class action. Because Shady Grove's individual claim would not meet the $75,000 amount-in-controversy requirement for ordinary diversity jurisdiction (28 U.S.C. § 1332(a)), Allstate contended that the district court lacked subject-matter jurisdiction over the case.

The district court accepted both of Allstate's arguments.[1] With respect to the applicability of CPLR 901(b), the court stated that "[a]lthough certification in class actions brought under diversity jurisdiction is governed by the requirements set forth under Rule 23 of the Federal Rules of Civil Procedure, the right to bring a class action in New York, in both federal and state court, is subject to the limitation imposed by § 901(b) of the C.P.L.R." Pet. App. 27a. The court based this assertion principally on its view that failure to apply the statute would be "patently unfair." *Id*. (citation omitted). The court went on to conclude that the interest entitlement asserted by the complaint was a penalty because its purpose was "punitive," *id.* 32a, and it accordingly dismissed the complaint.

Shady Grove appealed, challenging the ruling that CPLR 901(b) applies in federal diversity actions and also arguing that a New York insurance regulation that expressly contemplates that a class action may be brought to enforce Insurance Law § 5106(a) provided the specific authorization for a class action that would be necessary were section 901(b) applicable in federal court.[2] The Second Circuit affirmed. According to the court, there was no "conflict" between Federal Rule of Civil Procedure 23's authori-

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[1] The court's holding that Ms. Galvez was no longer a real party in interest and lacked standing was not appealed and is not now at issue.

[2] Shady Grove also challenged the characterization of the interest requirement as a statutory penalty and requested that the issue be certified to the New York Court of Appeals, but the Second Circuit declined to consider these arguments because they were made in Shady Grove's reply brief. Pet. App. 6a n.3.

zation of class actions and section 901(b)'s prohibition, so the holding of *Hanna v. Plumer*, 380 U.S. 460 (1965), that validly promulgated federal rules trump state laws in diversity actions was inapplicable. Pet. App. 10a-13a. Invoking instead the general rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that diversity actions are governed by state "substantive" and federal "procedural" law, the court concluded that section 901(b) was substantive because its application was "outcome-affective," Pet. App. 9a, and, in the view of the court, it was intended to serve the substantive policy of limiting the deterrent effect of statutory penalties. *Id*. 14a. Moreover, the court asserted, failure to apply CPLR 901(b) in federal court would encourage "forum-shopping" in violation of what the court considered to be the primary objective of the *Erie* doctrine. Pet. App. 15a-16a.

Having found section 901(b) applicable, the court held that the New York regulation that recognized the availability of class actions to recover interest under Insurance Law § 5106(a) did not qualify as a *statutory* authorization for class actions. Pet. App. 17a-18a. Accordingly, the court held that Shady Grove's claims could not be pursued in a class action and that the district court had, therefore, correctly dismissed the action for want of subject-matter jurisdiction.

SUMMARY OF ARGUMENT

This case is controlled not by *Erie*, but by *Hanna v. Plumer*. *Hanna* holds that, under the Rules Enabling Act, 28 U.S.C. § 2072, a valid rule of civil procedure—that is, one that is reasonably understood as regulating matters of practice and procedure and that does not infringe or expand substantive rights—

must be applied by a federal court in a diversity action regardless of contrary state law.

In this case, Federal Rule of Civil Procedure 23 provides the federal courts with discretionary authority to certify a class action, while New York's CPLR 901(b), if applicable in the federal courts, would deny that discretion. Under such circumstances, the federal rule, if valid, prevails.

Allstate has not argued in this case that Rule 23 is not valid, but, in any event, such an argument would be unavailing. Rule 23 is a proper exercise of this Court's power under the Rules Enabling Act to regulate the practice and procedure of the federal courts, and its application would not enlarge or abridge substantive rights. From the standpoint of class members, certification of a class under Rule 23 would not enlarge their rights because it would not permit any class member to recover anything from Allstate that the member could not recover in an individual action. From the standpoint of Allstate, class certification would not abridge substantive rights, because CPLR 901(b) does not create a substantive right not to face a class action. Rather, it provides a *procedural* entitlement not to be subject to a class action seeking certain forms of relief *in the New York courts*. This limitation on the availability of class actions is not part of the definition of substantive rights of action under New York law; indeed, CPLR 901(b) is applied by the New York courts to rights of action under both state and federal law, precisely because it is only procedural.

Hanna and the decisions of this Court following it provide a sufficient basis for resolving this case without regard to the intricacies of *Erie*. But even if

application of *Erie* were necessary in this case, it, too, would foreclose application of CPLR 901(b) in federal court, because the statute is not "substantive" within the meaning of *Erie*. CPLR 901(b) does not define the rights and duties of the parties toward one another, regulate primary conduct, or deny any member of the prospective class the right to recover the damages sought in this case from Allstate. It governs only the mode of enforcing substantive rights, which is a matter properly considered procedural under *Erie*.

Moreover, the concerns about forum-shopping that animated *Erie* do not apply here. Those concerns have never been aimed at forum choices that are driven by a preference for superior rules of federal practice and procedure. And critically, in enacting the Class Action Fairness Act ("CAFA"), Congress has recently expressed a policy that explicitly authorizes and endorses the choice of a federal forum precisely to ensure the application of federal class certification standards under Rule 23. Applying state class action rules in an action brought in federal court under CAFA would run counter to that congressional policy.

The application of state law here would also have other unfortunate consequences, including infringement of the inherent power of federal courts to govern their own procedures and disruption of the uniformity of federal practice that is a principal objective of the Rules Enabling Act and the Federal Rules of Civil Procedure. A decision that state law applies, moreover, could not logically be limited to state laws that restrict the availability of class actions, but would also necessarily mean that more expansive

state class action procedures would also be imported into federal courts. The combination of such a result with CAFA's great expansion of federal jurisdiction over class actions based on state rights of action would mean that the federal courts would plunge heavily into the business of certifying classes under state procedural standards—which is exactly the opposite of Congress's purpose in enacting CAFA.

ARGUMENT

I. Federal Rule of Civil Procedure 23 Is a Valid Exercise of the Court's Rulemaking Power Under the Rules Enabling Act, and, Under *Hanna v. Plumer*, the Rule Forecloses Application of CPLR 901(b) in a Federal Diversity Action.

A. Federal Courts Apply Federal Procedural Rules in Diversity and Federal Question Cases Alike.

Since this Court's decision in *Erie*, generations of first-year law students have learned that "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). But the Court's decision in *Hanna v. Plumer*, 380 U.S. 460, added that where a federal rule is on point, the question whether state law governs an issue in a diversity case is not, properly speaking, an "*Erie*" question at all, nor one implicating the Rules of Decision Act, 28 U.S.C. § 1652, which provides the analytical basis for the *Erie* doctrine. Rather, as Professor Ely has explained, "*Hanna*'s main point … was that when the application of a Federal Rule is at issue, the Rules Enabling Act—and not the Rules of Decision

Act as construed by *Erie R.R. Co. v. Tompkins* and other cases—should determine whether federal or state law is to be applied." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718 (1974).

In the first decades after it decided *Erie*, this Court struggled to define the line between substance and procedure, and the Court has frankly acknowledged that "classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini*, 518 U.S. at 427. As Justice Frankfurter wrote in *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945):

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems.

See also id. at 115 ("The words 'substantive' and 'procedural' or 'remedial' are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance.") (Rutledge, J., dissenting).

In its landmark decision in *Hanna*, the Court simplified matters greatly by recognizing that valid rules of procedure promulgated under the Rules Enabling Act, 28 U.S.C. § 2072, must be applied by federal courts sitting in diversity regardless of contrary state law, and regardless of whether that contrary state law might otherwise be characterized as procedural or substantive under *Erie*. As *Hanna* explained:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471.

The Court made the point just as definitively in *Gasperini*:

> Concerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic. It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.

518 U.S. at 428 n.7 (citing *Hanna*, 380 U.S. at 469-74; *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)).

Underlying *Hanna*'s command that federal courts apply federal procedural rules is the Supremacy Clause, which provides that valid federal laws such as the Rules Enabling Act and the procedural rules promulgated under its authority, where they apply, displace state standards that would yield a different result. *See Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988). Under *Hanna*, applicable federal rules preclude federal courts from applying state law not only when the conflict between them is such that

they explicitly command opposite resolutions of precisely the same question, but also, and more generally, when the federal rule "is 'sufficiently broad' to cause a 'direct collision' with the state law *or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law.*" *Burlington Northern*, 480 U.S. at 4-5 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 640, 749-50 & n. 9 (1980), and *Hanna*, 380 U.S. at 471-72) (emphasis added).[3] Thus, for example, if a federal procedural rule grants a district court discretion about how to resolve a particular issue, while state law would impose a categorical rule, the federal rule must govern. *See Ricoh*, 487 U.S. at 29-31; *Burlington Northern*, 480 U.S. at 7.

Hanna's direction that federal courts apply the federal rules authorized by the Rules Enabling Act is limited by the terms of the Act, which requires that the rules must govern "practice and procedure," 28 U.S.C. § 2072(a), and that they "shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). The first requirement is satisfied if a rule is an exercise of the court's "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna*, 380 U.S. at 472.[4] The second limitation is honored if the rule

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[3] *See also Ricoh*, 487 U.S. at 26 n.4 (holding that federal law controls if it is "sufficiently broad to cover the point in dispute").

[4] The Court's opinion in *Hanna* makes clear that a rule may satisfy this test even if in the absence of a governing federal rule the Court might deem the matter "substantive" under *Erie* and apply state law. *See id.* at 469-73.

does not alter "the rules of decision by which th[e] court will adjudicate [a party's] rights," *id.* at 465 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 445-46 (1946)), even though the federal rule may substantially "alte[r] the mode of enforcing state-created rights," *id.* at 473, and thus "incidentally affect litigants' substantive rights." *Burlington Northern*, 479 U.S. at 5. Ultimately, "[t]he test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941).

B. The Federal Rule and the New York Rule Are Incompatible.

1. Rule 23 Specifies When Federal Courts May Certify Class Actions.

Federal Rule of Civil Procedure 23 "deals comprehensively with class actions." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978). The rule defines the circumstances under which a federal court may certify a class action and sets forth factors the court must consider in determining whether class certification is appropriate. Rule 23(a) begins by establishing threshold requirements that all federal class actions must satisfy: numerosity of the class, commonality and typicality of claims, and adequacy of representation. Rule 23(b) then sets forth the types of cases in which federal courts are authorized to certify a class.

Under Rule 23(b)'s subdivisions, the type of relief sought by the class is a critical consideration in determining the action's amenability to class treat-

ment. Rule 23(b)(1) provides for class actions when the form of relief sought by class members is such that individual adjudications would threaten to impose inconsistent obligations on defendants (Rule 23(b)(1)(A)) or to impair the ability of other class members to obtain relief (Rule 23(b)(1)(B)).[5] Rule 23(b)(2) authorizes certification when an action seeks declaratory or injunctive relief on behalf of the class as a whole. Finally, Rule 23(b)(3), the subdivision applicable here, grants a district court discretion to certify a class in a case seeking monetary relief if the class satisfies the threshold requirements of Rule 23(a) and the court determines that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1995).[6]

The Rule 23(b)(3) criteria are "[f]ramed for situations in which 'class action treatment is not as clearly called for'" as in suits seeking injunctive and similar forms of relief, but where a "class suit 'may

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[5] A classic example of the (b)(1)(B) situation is when plaintiffs seek relief against a "limited fund." *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999).

[6] Because the nature of the relief sought in (b)(1) and (b)(2) class actions involves greater interests in having only a single adjudication and a correspondingly decreased potential interest on the part of individual plaintiffs in controlling their own litigation, (b)(1) and (b)(2) classes are "mandatory," in contrast to (b)(3) classes, in which class members must be permitted to opt out of the class. *See Ortiz*, 527 U.S. at 833 n.13.

nevertheless be convenient and desirable.'" *Amchem*, 521 U.S. at 615 (quoting 1966 Adv. Comm. Notes to Rule 23). Rule 23(b)(3) seeks to "cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Id.* (quoting 1966 Adv. Comm. Notes). The rule directs courts determining whether a class action is the "superior" method for adjudicating a case to consider, among other things, the following:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Both this Court and the federal courts of appeals have recognized the broad discretion that Rule 23 grants district courts to determine whether class litigation is appropriate. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[M]ost issues arising under Rule 23 … [are] committed in the first instance to the discretion of the district court."); *Keele v. Wexler*, 149 F.3d 589, 592 (7th Cir. 1998) ("The Federal Rules of Civil Procedure provide the federal district courts with

'broad discretion' to determine whether certification of a class-action lawsuit is appropriate."). Federal courts applying the discretionary Rule 23 criteria have found that class actions seeking statutory penalties for a common course of unlawful conduct may be particularly appropriate for class treatment because of the predominance of common questions and the reduced significance in such cases of individualized damages assessments. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d. 832, 836 (7th Cir. 1999). Indeed, class certification was recently granted by another district court in a case identical to this one. *Bulmash v. Travelers Indem. Co.*, 257 F.R.D. 84, 87-92 (D. Md. 2009) (certifying class in action to recover statutory interest for overdue no-fault insurance benefits under Maryland statute).

2. CPLR 901 Regulates Class Actions Differently Than Does Rule 23.

New York's CPLR 901 is at odds with Rule 23 because it addresses the same subject matter but imposes inconsistent standards. Section 901 is similar to Rule 23 in that it sets forth the criteria under which the New York courts may certify a class action. Indeed, section 901's title echoes that of Rule 23(a) in stating that the section defines the "prerequisites" to maintenance of a class action. However, section 901 defines those prerequisites differently than does Rule 23. First, in its subsection (a), section 901 provides for only one type of class action, similar to that provided for in Rule 23(b)(3), requiring that common questions "predominate" and that the class action be the "superior" method for adjudicating the case; unlike Rule 23, section 901 does not provide for certification of class actions seeking injunctive or de-

claratory relief or limited fund class actions without satisfaction of the predominance and superiority tests.[7] Second, section 901(b) sets forth a categorical rule depriving New York courts of the authority to certify class actions seeking statutory penalties or "minimum measure[s] of recovery" unless the statute creating the penalty "specifically authorizes the recovery thereof in a class action."

When a plaintiff seeks to certify a federal class action seeking the recovery of statutory penalties, Rule 23 on its face is "sufficiently broad to cover the point in dispute." *Ricoh*, 487 U.S. at 26 n.4. Such a putative class seeking monetary relief falls within the scope of Rule 23(b)(3), which sets forth the criteria governing the district court's discretionary decision whether to certify the class. That decision turns on the questions of predominance of common issues and superiority of the class mechanism for resolving the case. Rule 901(b), by contrast, takes a markedly different approach, denying New York courts the discretion to certify a class that lies at the heart of the federal rule. Under *Hanna* and the precedents following it, such incompatibility between a controlling federal procedural rule promulgated under the Rules Enabling Act and a state law "leaves no room for the operation of [state] law" in the federal courts. *Burlington Northern*, 480 U.S. at 5.

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[7] As a result, New York courts have sometimes declined to certify classes seeking injunctive relief in circumstances when application of Rule 23(b)(2) would likely result in certification. *See, e.g., Legal Aid Soc'y v. New York City Police Dept.*, 713 N.Y.S.2d 3 (App. Div.), *app. dism'd*, 745 N.E.2d 389 (N.Y. 2000).

3. Federal Courts Must Apply Rule 23's Discretionary Approach Rather Than CPLR 901(b)'s Categorical Rule.

This Court's decisions in *Burlington Northern* and *Ricoh* teach that the discrepancy between the federal and state rules at issue here is precisely the type of "conflict" that calls, under *Hanna*, for application of the federal rule. *Burlington* involved an Alabama statute providing for a mandatory 10% penalty when a money judgment that had been stayed pending appeal was affirmed by an appellate court. The question before this Court was whether this state law applied to appeals in diversity cases in the federal courts. The Court held that because Federal Rule of Appellate Procedure 38 addressed the same general issue—damages for unsuccessful appeals—but provided that such damages were available on a *discretionary* basis in *frivolous* appeals, the state standard conflicted with the federal rule; thus, under *Hanna*, the applicable federal rule excluded operation of the state law. *Id.* at 4-7. The Court explained:

> Rule 38 affords a court of appeals plenary discretion to assess "just damages" in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment. Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies

> the statute's field of operation so as to preclude its application in federal diversity actions.

Id. at 7.

Similarly, in *Ricoh*, the Court considered the possible application to venue determinations in federal diversity actions of principles of Alabama law categorically disfavoring contractual choice-of-forum clauses. By contrast, federal decisional law under the change-of-venue statute, 28 U.S.C. § 1404(a), which provides for broad discretion to transfer cases "for the convenience of parties and witnesses, in the interest of justice," *id*., recognized that a contractual forum selection clause "is a significant factor that figures centrally in the district court's calculus" under § 1404(a). *Ricoh*, 487 U.S. at 29. As in *Burlington Northern*, the Court held that state law was inapplicable because the federal procedural standard was "sufficiently broad to control the issue before the court" and, within its "field of operation," its "discretionary mode" conflicted with the state's "categorical policy." *Id*. at 29, 30.

Significantly, the Court recognized that the federal standard precluded operation of state law even though the state and federal standards were "not perfectly coextensive." *Id.* at 30. What was dispositive was that the federal standard called for a "flexible and multifaceted analysis," while the state standard "focus[ed] on a single concern or a subset of the factors" that were relevant under the federal rule; thus, application of the state policy would "defeat th[e] command" of federal law. *Id.* at 31

Just as in *Burlington* and *Ricoh*, the federal standard at issue here "controls the issue" and "occupies the field" of operation of the competing state law.

And just as in *Burlington* and *Ricoh*, the federal rule's "discretionary mode of operation" does not allow for the "mandatory" or "categorical" approach of the state statute, which would seize on one of the many factors relevant to class certification under the federal rule—the type of relief sought—and make it dispositive. As in *Burlington* and *Ricoh*, the controlling federal rule "leaves no room for the operation" of the entirely different approach to the issue that state law would, if applicable, require. Thus, the principles of *Hanna v. Plumer* and the authority of the Rules Enabling Act require application of normal Rule 23 standards rather than the conflicting approach of CPLR 901(b).

4. The Lower Court's "Direct Conflict" Standard Contradicts This Court's Decisions.

The Second Circuit held that there was no "direct conflict" between Rule 23 and CPLR 901(b) because "Rule 23 does not make reference to whether any particular state statutory cause of action can be brought as a class action or otherwise evidence an intent to occupy the field on this question." Pet. App. 12a. But CPLR 901(b) also does not address whether "any particular state statutory cause of action can be brought as a class action"; it refers not to particular causes of action, but generically to forms of relief sought by the class, and it does not even purport to limit itself to *state-law* statutory penalties. Rule 23 emphatically *does* address the manner in which the form of relief sought affects the class certification determination, by providing different standards for class actions seeking injunctive and declaratory relief (Rule 23(b)(2)), for actions seeking forms of relief

that might impose inconsistent obligations on defendants or preclude plaintiffs proceeding separately from obtaining relief (Rule 23(b)(1)), and for actions seeking other forms of relief, including monetary relief (Rule 23(b)(3)). In short, Rule 23 occupies exactly the field in which CPLR 901(b) operates.

More fundamentally, the Second Circuit's decision misconceived the meaning of "conflict" and failed to grasp the relevance to this case of *Burlington Northern* and *Ricoh*. *Ricoh*, in particular, shows that the kind of exact congruence between the subjects of federal and state rules that the Second Circuit demanded is not necessary to a determination that the federal rule must prevail under *Hanna*. As *Ricoh* emphasized, federal and state standards may conflict even if they are not "perfectly coextensive and equally applicable to the issue at hand," 487 U.S. at 26 n.4.[8] Here, the federal rule grants the district courts discretion to certify a class upon a determination that Rule 23(a)'s criteria are satisfied, that common issues predominate, and that class resolution is the superior way of deciding the case. No type of relief is categorically excluded from the scope of the rule, which is applicable "across the entire range of legal questions." *Snyder v. Harris*, 394 U.S. 332, 341 (1969). Indeed, courts construing the rule have specifically applied it to actions seeking statutory penalties. *See* cases cited *supra*, at 19.

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[8] Specifically, in *Ricoh*, the federal statute did not by its terms address choice-of-forum clauses, but merely set forth a broad discretionary standard that was sufficient to encompass consideration of such clauses.

More broadly, this Court has emphasized that absent a *congressional* decision to preclude class actions, Rule 23 authorizes class treatment of any federal action that satisfies the rule's criteria:

> Federal Rule Civ. Proc. 1 … provides that the Rules "govern the procedure in the United States district courts in *all* suits of a civil nature." (Emphasis added.) … In the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose, class relief is appropriate in civil actions brought in federal court ….

Califano, 442 U.S. at 700. That holding is more than enough to establish that the federal rule is "sufficiently broad to cover the point in dispute," *Ricoh*, 487 U.S. at 26 n.4, and that the state law's approach of categorically excluding cases seeking certain types of relief from class treatment is incompatible with the federal rule's discretionary approach.

C. Federal Rule of Civil Procedure 23 Is a Valid Exercise of Authority Under the Rules Enabling Act.

1. Rule 23 Is Reasonably Classified as Procedural.

Under *Hanna v. Plumer*, Rule 23 must be applied in diversity actions notwithstanding variant state law "if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act, 28 U.S.C. § 2072." *Burlington*, 480 U.S. at 5. Allstate has not argued in this litigation that Rule 23 is outside the scope of the Rules

Enabling Act—and with good reason.[9] This Court has emphasized that "the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect … give the Rules presumptive validity under both the constitutional and statutory constraints." *Id.* at 6; *see also Hanna*, 380 U.S. at 471; *Sibbach*, 312 U.S. at 14-15. And even without the benefit of this presumption, Rule 23's terms easily satisfy the requirement that they be "rationally capable of classification" as procedural. *Hanna*, 380 U.S. at 472.[10] Thus, if Rule 23's validity were challenged in this case, it would readily pass muster.

At bottom, a procedural rule is "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 724. That exactly describes the purpose of Rule 23 in general and of Rule 23(b)(3) in particular: The rule is designed to select a "method of handling the litigious situation" that has the greatest possible "practical advantages," including "economies of time, effort, and expense," "uniformity of decision," and "procedural fairness." 1966 Adv. Comm. Notes to Rule 23, subdivision (b)(3). The promulgation of a rule serving such purposes fits comfortably within the Rules

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[9] *Cf. Sibbach*, 312 U.S. at 11 (noting petitioner's admission that challenged rules were procedural).

[10] *See also Burlington Northern*, 480 U.S. at 8 (A Federal Rule of Civil Procedure is valid if it "can reasonably be classified as procedural.").

Enabling Act's "authorization of a comprehensive system of court rules" aimed at ensuring "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth." *Sibbach*, 312 U.S. at 14.

Not surprisingly, then, this Court has repeatedly recognized the procedural nature of Rule 23 and the class-action mechanism it creates. As the Court explained in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880, 881 (1984), "[t]he class-action device was intended to establish a procedure for the adjudication of common questions of law or fact," and "Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions."

The essentially procedural nature of the class action stems from the fundamental principle that although it allows aggregation of claims and their pursuit on behalf of a class by a named representative, it does not provide any class member with any right to recovery that he or she does not, as a matter of substantive law, possess individually. *See Califano v. Yamasaki*, 442 U.S. at 701 ("Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding."). Thus, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation

of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).[11]

The Court's recognition of the procedural nature of Rule 23's authorization of class actions is evident in its repeated references to the class action as a "device" or "mechanism."[12] The Court has, moreover, emphasized that the justifications for the rule lie in essentially procedural policy choices based on considerations of fairness, efficiency, and appropriate management of the federal courts' caseload. Soon after Rule 23 took its present general shape in the 1966 amendments to the Federal Rules of Civil Procedure, the Court recognized that its underlying rationale was that "the class action device serves a useful function across the entire range of legal questions." *Snyder v. Harris*, 394 U.S. at 341.

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[11] *See also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) (describing assertion of "the right to represent a class" as "a procedural claim.").

[12] *See Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 n.1 (2006) ("device"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 87 (2006) ("device"); *Gratz v. Bollinger*, 539 U.S. 244, 267-68 & n.17 (2003) ("device" and "mechanism"); *Amchem*, 521 U.S. at 617 ("device"); *Cooper*, 467 U.S. at 880, 881 ("device" and "mechanism"); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 n.5 (1983) ("mechanism"); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) ("device"); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 n.15 (1981) ("device"); *Roper*, 445 U.S. at 331, 339 ("device" and "mechanism"); *Geraghty*, 445 U.S. 388, 403 ("device"); *Califano v. Yamasaki*, 442 U.S. at 700, 701 ("device"); *Johnson v. Ry. Exp. Agency*, 421 U.S. 454, 475 (1975) ("mechanism"); *Ross v. Bernhard*, 396 U.S. 531, 540-41 (1970) ("device"); *Snyder v. Harris*, 394 U.S. at 338 ("device"); *Flast v. Cohen*, 392 U.S. 83, 94 (1968) ("device").

In particular, the Court has repeatedly recognized that "efficiency and economy of litigation … is a principal purpose of the [class action] procedure." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974). Those procedural benefits flow from consolidated litigation in cases where the criteria of subdivision (b) of the rule are satisfied:

> Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." … For in such cases, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23."

Gen. Tel. Co. v. Falcon, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. at 701).

The Court elaborated on these justifications for Rule 23 in *United States Parole Commission v. Geraghty,* 445 U.S. at 402-03:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.

In short, Rule 23 creates a procedural device to serve procedural ends. In so doing, it follows in a long tradition of the use of class litigation by federal

courts. Class action procedures were developed by the federal courts sitting in equity to allow adjudication of rights common to groups of litigants too numerous for joinder, and the principles developed in such cases were later incorporated into the Federal Equity Rules. *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363-64 (1921). This Court long ago recognized that the Equity Rules' provision for class actions was a valid exercise of the federal courts' inherent (as well as statutorily conferred) power to regulate their own procedures:

> Equity Rule 38, 28 U.S.C.A. following section 723, providing that in a class suit "one or more (of a class) may sue or defend for the whole," was adopted in the exercise of the authority conferred on this Court by Rev. St. § 913, 28 U.S.C.A. § 723, and of its own inherent power to regulate by rules "the … modes of proceeding in suits of equity." Their purpose was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts ….

Christopher v. Brusselback, 302 U.S. 500, 505 (1938).

With the merger of law and equity authorized by the original Rules Enabling Act[13] and effected by the adoption of the Federal Rules of Civil Procedure in 1937, class action procedures "applie[d] to all actions whether formerly denominated legal or equitable." 1937 Adv. Comm. Note to Fed. R. Civ. P. 23, subdivi-

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[13] Act of June 19, 1934, c. 651, § 2, 48 Stat. 1064 ("The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both ….").

sion (a). Since that time, the criteria for certification of classes and the procedures required in connection with the certification decision, notice to class members, appointment and compensation of counsel, and settlement of class actions have evolved in successive amendments of the rule, most notably in 1966 and 2003, but the rule remains fundamentally what it has always been: an exercise of the power to regulate "practice and procedure … for cases in the United States district courts." 28 U.S.C. § 2072(a).

2. Applying Rule 23 in This Case Would Not Abridge, Enlarge, or Modify Substantive Rights.

a. Class Treatment Does Not Enlarge Class Members' Substantive Rights.

The application of Rule 23 to permit a class action in this case would not violate the Rules Enabling Act's command that rules not "abridge, enlarge or modify substantive rights," 28 U.S.C. § 2072(b), because class certification would "affect[t] only the process of enforcing litigants' rights and not the rights themselves." *Burlington Northern*, 480 U.S. at 8. Class certification would permit claims possessed by each class member to be pursued in an aggregated action by a representative plaintiff, but would only permit recovery to the extent that class members had valid claims that would support an individual action against Allstate for the interest provided under New York law. A class action allows "various individual claims" to be adjudicated "in a single proceeding." *Califano*, 442 U.S. at 701. It does "not operate to abridge, enlarge or modify the rules of decision by which th[e] court will adjudicate [the parties']

rights." *Hanna*, 380 U.S. at 465 (quoting *Miss. Pub. Corp. v. Murphree*, 326 U.S. at 445-46).

The absence of any impermissible enlargement or modification of class members' substantive rights in this situation is illustrated by the Court's decision in *American Pipe*. There, the Court specifically rejected the argument that interpreting Rule 23 to toll an applicable statute of limitations for all class members upon the filing of a class action complaint would violate the Rules Enabling Act by abridging, enlarging, or modifying substantive rights. 414 U.S. at 556-59.[14] The Court held that substantive rights would not be altered so long as each class member could have brought a non-time-barred claim as of the date of the class complaint. *See id.* at 554-55. The same is true here: Class adjudication will not lead to a recovery by any class member who did not have a valid claim for relief under New York law as of the filing of the complaint, and, therefore, it does not change the substantive rights of either the plaintiffs or Allstate.[15]

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[14] The statute of limitations at issue in *American Pipe* was prescribed by federal rather than state law, *see* 414 U.S. at 767-68, but the Rules Enabling Act's prohibition on abridgment, enlargement, or modification of substantive rights applies equally to substantive rights created by state and federal law.

[15] In light of *American Pipe*, the Second Circuit's statement that section 901(b) is "analogous to a statute of limitations, which is substantive for *Erie* purposes" (Pet. App. 12a) is, even if accurate as far as it goes, not sufficient to establish that section 901(b) creates "substantive rights" for *Hanna*/Rules Enabling Act purposes. Indeed, in holding that the application of Rule 23 to toll a statute of limitations did not alter substantive rights, *American Pipe* necessarily concluded that any rights created by statutes of limitations do *not* necessarily trump the operation of applicable federal rules.

b. CPLR 901(b) Does Not Create a Substantive Right Not to Face a Class Action.

Nor can CPLR 901(b) be said to confer on Allstate a "substantive right" not to be subject to a class action seeking statutory penalties. This Court has more than once characterized the "right" to maintain a class action as a procedural rather than substantive right. *Roper*, 445 U.S. at 332; *Geraghty*, 444 U.S. at 402. Any purported "right" *not* to be subject to a class action is, logically, equally procedural. And the Rules Enabling Act does not prohibit alteration of procedural rights, however "important" they may be. *Sibbach*, 312 U.S. at 13-14. Indeed, this Court has long recognized that the Federal Rules of Civil Procedure legitimately "altered and abolished old rights … and created new ones *in connection with the conduct of litigation*." *Id.* at 14 (emphasis added).

Moreover, to the extent that the authorization for class actions is, as this Court has repeatedly held, a matter of procedure, and hence within the scope of the Rules Enabling Act, *see supra* at 25-31., it would be anomalous to hold that a state law that would purport to regulate the same matter establishes "substantive" rights that trump the federal rule. Properly understood, the Enabling Act's authorization of the issuance of rules of "practice and procedure" and its caveat that such rules may not change substantive rights are two sides of the same coin. *See Sibbach*, 312 U.S. at 10 (noting that the Rules Enabling Act's "proviso" that rules may not alter substantive rights exists to "emphasize" that the Act is "restricted in its operation to matters of pleading and court practice and procedure").

The notion that CPLR 901(b) creates "substantive" rights is further undermined by the structure of the New York procedural laws in which it is embedded. New York's Civil Practice Law and Rules, of which section 901(b) is a part, are introduced by CPLR 101, which provides that "[t]he civil practice law and rules shall govern the *procedure* in civil judicial proceedings *in all courts of the state* and before all judges, except where the procedure is regulated by inconsistent statute" (emphasis added). By its own express terms, then, the statute regulates procedure, and it does not purport to do so beyond the state's own courts. Labels may not be dispositive in this area, but CPLR 101's definition of the scope of the Civil Practice Law and Rules is no mere label, and a statute that limits itself to governing "procedure" in a particular court system is an unlikely source of "substantive rights" that must be respected outside that system.[16]

Moreover, CPLR 901(b) is not a stand-alone statute, but a subsection in a provision that sets forth the "prerequisites to a class action" and that, like Rule 23, establishes criteria for the certification of class actions that are applicable to actions of any and all types. Just as Rule 23 is itself procedural, CPLR 901, its New York counterpart, is most reasonably characterized as procedural. Surely, for example, CPLR 901 could not be said to create a "substantive right" enforceable in federal court to be exempt from class treatment in a matter that does not satisfy the

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[16] *Cf. American Pipe*, 414 U.S. at 558 n.29 (placing weight on legislative history characterizing a statute of limitations as "procedural").

criteria of CPLR 901(a) but does meet the standards of, say, Federal Rule of Civil Procedure 23(b)(2). *See supra* n.7. Nor would it be plausible to assert that CPLR 901(a) created a "substantive right" to *maintain* a class action in federal court if New York state courts interpreted section 901(a) to allow class certification in circumstances where federal courts construing Rule 23 did not allow certification. That section 901(b) modifies section 901(a)'s criteria by specifying that New York courts may not certify actions seeking particular forms of relief does not transform a rule governing procedure into one of substance.

c. CPLR 901(b) Is Not Part of the Definition of Substantive State-Law Rights of Action.

Despite section 901(b)'s location as a subsection of a procedural rule defining criteria for certification of class actions, which itself is part of a broader set of laws and rules governing procedure in the New York courts, Allstate has argued that section 901(b) is "substantive" because it is somehow part and parcel of the definition of state-law rights of action—that it is "a *state*-law limitation on a *state*-law cause of action." Brief in Opp. 5; *see also id*. at 7-8, 9. The notion that New York's rule against certification of classes seeking statutory penalties is an integral part of the substantive definition of state-law rights of action, however, is contradicted by the text of section 901(b) itself and by the New York state courts' interpretation of it.

To begin with, nothing in section 901(b) suggests that it is limited to rights of action based on New York state law, as opposed to federal law or the law of other states. On its face, section 901(b) applies to

actions seeking penalties under *any* statute. Because New York has no power to determine the substantive rights of litigants under federal statutes, or statutes of other states, the facial applicability of section 901(b) to actions brought under such statutes is incompatible with the notion that it defines substantive rights.

Moreover, in keeping with its language, the New York courts have repeatedly applied section 901(b) to federal rights of actions brought in the courts of the state, based on the only permissible rationale for that result: that section 901(b) is a procedural rule. In *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005), the Appellate Division held that section 901(b) precluded a class action under the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*., reasoning that "although the TCPA creates a minimum measure of recovery and imposes a penalty for willful or knowing violations, and the plaintiff is seeking the same, the TCPA does not specifically authorize a class action [as required under section 901(b)]." *Id.* at 798. The court specifically rejected the argument that "CPLR 901(b) is substantive in nature and, therefore, should not be applied" to a federal cause of action. *Id.* Rather, the court held that the application of this "for[m] of local practice" was not incompatible with the goals of the TCPA, *id.* at 800, and thus was permissible in light of this Court's recognition that "States may establish the *rules of procedure* governing litigation in their own courts" as long as they do not "defeat" federal rights. *Id.* at 799 (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (emphasis added).

The Appellate Division has likewise looked to section 901(b) in determining whether to allow class actions to proceed on other purely federal claims. In *Vickers v. Home Federal Savings & Loan Association*, 390 N.Y.S.2d 747 (App. Div. 1977), the court allowed a class action to proceed under the federal Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, on the ground that the Act's provisions expressly authorize class actions as required under section 901(b). 390 N.Y.S.2d at 748. Similarly, the court in *Felder v. Foster*, 421 N.Y.S.2d 469 (App. Div. 1979), *app. dism'd*, 49 N.Y.2d 800 (1980), found that a class action under 42 U.S.C. § 1983 passed muster under CPLR 901(b), precisely because the plaintiffs' § 1983 remedies were consistent with section 901(b)'s procedural requirements. *Felder*, 421 N.Y.S.2d at 471 ("CPLR 901(b) does not preclude a class action where plaintiffs seek punitive damages under section 1983 . . . since such damages are not a 'penalty' or 'minimum measure of recovery created or imposed by statute.'") (citations omitted).

A statute that applies to class actions in *federal* cases brought in state court because the state deems it a rule of procedure or a "local form of practice" cannot simultaneously apply in the federal court on the theory that it establishes "substantive rights." A rule that the state courts themselves deem procedural and defend on the basis of the state's power to regulate its "own courts," *Rudgayzer*, 799 N.Y.S.2d at 799, does not magically become "substantive" when an action is brought in another court system with its own forms of practice.

d. CPLR 901(b) Serves Procedural Rather Than Substantive Interests.

CPLR 901(b) is not analogous to a damages cap or a substantive limit on the amount of a defendant's liability for a statutory violation.[17] It does not restrict the number of times a defendant may be sued for penalties, the number of plaintiffs who may sue, or the amount of penalties each plaintiff may recover. It addresses only whether plaintiffs may seek such recoveries through a class action or through individual actions or other means of aggregation (such as joinder or intervention).

The Second Circuit, citing statements in the New York Court of Appeals' decision in *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007), nonetheless concluded that section 901(b) reflected a substantive policy choice to "offset the deterrent effect of statutory penalties by eliminating the class action device as a means of enforcement of those penalties." Pet. App. 14a. *Sperry*'s description of the purpose of section 901(b) and the legislative history on which *Sperry* relied, however, paint a very different picture.

As set forth in *Sperry*, the stated rationale for the New York legislature's inclusion of section 901(b) when it enacted section 901 to govern class-action procedures in 1975 was as follows:

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[17] In this respect, this case differs greatly from *Gasperini*, in which one aspect of the state law involved—the standard for determining whether damages were excessive—was deemed by the Court to be substantive because it provided the measure of the plaintiff's right to recover in much the same way that a cap on damages would. *See Gasperini*, 518 U.S. at 429-30.

> "The bill … precludes a class action based on a statute creating or imposing a penalty or minimum measure of recovery unless the specific statute allows for a class action. These penalties or 'minimum damages' are provided as a means of encouraging suits where the amounts involved might otherwise be too small. Where a class action is brought, this additional encouragement is not necessary. A statutory class action for actual damages would still be permissible."

Sperry, 8 N.Y.3d at 211 (quoting Sponsor's Mem., Bill Jacket, L. 1975, ch. 207). Based on its review of the terms of the law and the history of its enactment, the *Sperry* court went on to summarize its own view of the purpose of section 901(b):

> It is evident that by including the penalty exception in CPLR 901(b), the Legislature declined to make class actions available where individual plaintiffs were afforded sufficient economic encouragement to institute actions (through statutory provisions awarding something beyond or unrelated to actual damages), unless a statute expressly authorized the option of class action status. This makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred.

Id. at 213.

To say that class actions may not be "necessary" in a given set of circumstances is far different from saying a defendant has a "substantive right" not to

face them in those circumstances. Notably absent from the New York court's description of the purposes served by section 901(b) is any reference to a desire on the part of the state (as opposed to some of those who lobbied for the legislation) to limit the deterrent effect of statutory penalties, to shield defendants from liability, or to place a cap on recoveries.

Rather, the court's account of section 901(b)'s evident purpose reflects a balancing of the same procedural considerations going to the utility and importance of the class mechanism that underlie Rule 23. *See supra* at 26-29. To be sure, the New York rule reflects a different judgment about *when* the interest in facilitating aggregation of small claims justifies use of the class mechanism than the judgment incorporated in Rule 23, which includes no similar limitation on the types of claims eligible for class certification. But the very essence of a state procedural rule that must bow to a contrary federal rule is that it merely reflects a different judgment about how best to achieve procedural objectives. By contrast, "[t]he most helpful way … of defining a substantive rule—or more particularly a substantive right, which is what the [Rules Enabling] Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 725. Thus, CPLR 901(b) is not the source of "substantive rights" that must be given effect under *Hanna* and the Rules Enabling Act. Rather, it "represents only a procedural disagreement with the federal rulemakers respecting the fairest and most efficient way of conducting litigation." *Id.* at 722.

II. *Erie*, Even If Applicable, Would Not Require a Federal Court Sitting in Diversity to Follow CPLR 901(b).

Only if there is no federal rule on point need the Court grapple with the question whether state law is procedural or substantive in *Erie*'s terms. Even then, *Hanna* teaches, the question must be addressed with the recognition that no one factor in isolation (such as whether the rule would be "outcome determinative" or stimulate "forum-shopping") is dispositive. *See Hanna*, 380 U.S. at 466-69. Here, even if the Court must resort to *Erie* analysis, that analysis, too, forecloses application of the state-law rule.

A. *Erie* Does Not Require Federal Courts to Follow State Rules of Practice.

Absent an applicable federal rule, state law applies in diversity actions only to the extent that it is substantive rather than procedural. *Gasperini*, 518 U.S. at 427; *see also Hanna*, 380 U.S. at 466-72. The Rules of Decision Act, on which the *Erie* doctrine rests, provides only that state law provides the "rules of decision … in cases where they apply," 28 U.S.C. § 1652—a phrase that this Court has held refers to the decision of a case on the merits, not to matters of practice, procedure, or case management. *See Sibbach*, 312 U.S. at 9-10.

The *Erie* doctrine must be applied with recognition that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 537 (1952). When, as a result of diversity jurisdiction, "'a [state-created] right is enforceable in a federal as well as in a State court, the

forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic.'" *Hanna*, 380 U.S. at 474 (quoting *Guar. Trust Co. v. York*, 326 U.S. at 108). Indeed, absent congressional authorization, the states lack the power to dictate the procedures used by a federal court. *See Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931) (cited in *Hanna*, 380 U.S. at 473).[18]

The distinction between matters of substance and procedure under *Erie* cannot be reduced to "any automatic, 'litmus paper' criterion." *Hanna*, 380 U.S. at 460. The most fundamental command of *Erie* is that "the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts." *Byrd*, 356 U.S. at 535. Although the effect of rules on litigation outcomes is a relevant consideration in determining whether they are substantive in this sense, ""[o]utcome-determination' analysis was never intended to serve as a talisman," *Hanna*, 380 U.S. at 466-67, in part because "every procedural variation is 'outcome-determinative'" when an issue over its application arises in the course of an action. *Id.* at 468; *see also Gasperini*, 518 U.S. at 427-28; *Byrd*, 356 U.S. at 537. At least since *Byrd* and *Hanna*, it has been clear that courts must avoid "the classic *Erie* mistake of regard-

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[18] Before the Rules Enabling Act, Congress had, under various iterations of the "Conformity Act," required federal courts to follow the forms of practice and procedure of state courts. Even under that regime, this Court recognized that state law was powerless to regulate the "function of a federal court," *Herron*, 283 U.S. at 94, and that application of state rules of procedure was permissible only because Congress had authorized it. *See Wayman v. Southard*, 23 U.S. 1, 49-50 (1825).

ing whatever changes the outcome as substantive." *Gasperini*, 518 U.S. at 465 (Scalia, J., dissenting).

Hanna instead emphasized that the categorization of any rule as procedural or substantive for *Erie* purposes must reflect "the policies underlying the *Erie* rule." 380 U.S. at 467. Those policies include avoiding "unfair" differences in the character of federal and state litigation, and the "inequitable administration of laws," *id*. at 468, that resulted when one party, but not the other, could select a forum that would apply "materially" different rules of decision. *Id.* at 467.[19] The policy of discouraging "forum-shopping" based on such material differences bears on the application of the substance/procedure distinction for *Erie* purposes, *see Hanna*, 380 U.S. at 468; *Gasperini*, 518 U.S. at 428, but it is no more talismanic than outcome-determinacy. Indeed, as Justice Harlan pointed out, "a simple forum-shopping rule also proves too much; litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more

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[19] At the time of *Erie*, and of *Hanna* as well, a diverse plaintiff had a choice of forum unavailable to the defendant because a defendant sued in state court in its home state could not remove the action to federal court. As discussed further below, this inequality, which was critical to the Court in *Erie*, *see* 304 U.S. at 74-75, has been eliminated with respect to most class actions involving even the most minimal diversity between the plaintiff class and the defendants, as defendants sued in state court in such actions can remove them to federal court without regard to the state in which they are filed. *See* 28 U.S.C. § 1453(b).

favorable judge." *Hanna*, 380 U.S. at 475 (Harlan, J., concurring).

B. CPLR 901(b) Is Not "Substantive" Under *Erie*.

1. Section 901(b) Involves the Mechanism for Enforcing Rights, Not the Definition of Those Rights.

Even if *Erie* rather than *Hanna* provided the correct test of CPLR 901(b)'s applicability in a federal diversity action, a proper application of *Erie* principles would yield the same result as does *Hanna* in this case: CPLR 901(b) does not apply in a federal diversity action because it is procedural, not substantive. Indeed, many of the same considerations that demonstrate that class action rules are reasonably classed as "procedural" for *Hanna* purposes and that the application of Rule 23 rather than section 901(b) does not alter "substantive rights" also support the characterization of CPLR 901(b) as procedural under *Erie*. *See Hanna*, 380 U.S. at 471 (noting that Rules Enabling Act and *Erie* are parallel, though not identical).

Although the category of "substantive" rules under *Erie* is broader than those that create "substantive rights" under the Rules Enabling Act, *see Hanna*, 380 U.S. at 471-72, the application of CPLR 901(b) is not a matter of substance. Unlike other state-law rules that this Court has held to be substantive for *Erie* purposes, CPLR does not define or limit the duties owed by one person or entity to another,[20] determine whether a person possesses a

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[20] *E.g., Erie*, 304 U.S. at 80.

right of recovery for the breach of such duties,[21] bar any person from asserting such a right (as under a statute of limitations) or otherwise provide a defense to a claim,[22] determine the proper amount of recovery for a breach of duty,[23] or decide what substantive law will be selected to resolve such issues.[24] Certification of a class in federal court that would be barred in state court under CPLR 901(b) would not allow any class member to recover on any claim for which that class member could not successfully sue in state court. The state rule is thus not one that would "bar any recovery" to any plaintiff, but would only "alte[r] the way" in which recovery was sought. *Hanna*, 380 U.S. at 469.

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[21] *E.g., Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (holding that a state law denying an unregistered corporation the right to sue to recover for injuries was applicable to a federal diversity action under *Erie*).

[22] *E.g.*, *Guar. Trust Co. v. York*, 326 U.S. 99 (holding that state statutes of limitation apply in diversity actions); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (holding state law governs the running of statutes of limitations in diversity actions); *Walker v. Armco Steel Corp.*, 446 U.S. 640 (same); *Palmer v. Hoffman*, 318 U.S. 109 (1943) (holding that state-law principles governing the burden of proving a defense are substantive under *Erie*).

[23] *E.g., Gasperini*, 518 U.S. at 429-31 (holding that principles of state law limiting the amount of damages to be awarded a plaintiff are substantive and apply in diversity cases, but that state procedures for determining whether damages are excessive do not apply in federal courts).

[24] *E.g., Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that state conflicts of laws principles govern diversity cases).

This case is also quite unlike *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90 (1991), in which the Court held that state law determines the conditions under which a shareholder may bring a derivative action on behalf of a corporation (and also, in *Cohen*, controls the issue of the shareholder's liability to the corporation in the event that the derivative action is unsuccessful). Those cases turned on the idea that, as the Court said in *Kamen*, "delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of 'substance,' not 'procedure.'" 500 U.S. at 96-97. *See Cohen*, 337 U.S. at 549 ("[I]nternal relations between management and stockholders are dependent upon state law."). In short, the rules at issue in *Cohen* and *Kamen* defined the respective duties and rights of corporate shareholders and directors.

The state rule here does not similarly define substantive rights and duties, nor is it otherwise aimed at regulating "primary conduct"—that is, the way people behave out of court—which is perhaps the truest hallmark of a "substantive" rule. As Justice Harlan stated in his influential concurring opinion in *Hanna*:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.

380 U.S. at 475. The rule in *Erie* itself was such a rule, defining when a railroad owed a duty of care toward trespassers on its right-of-way. *See* 304 U.S. at 70. Section 901(b), by contrast, does not excuse defendants in whole or in part from their duties under statutes that impose penalties—here, the duty to make timely payments or pay interest—nor does it excuse defendants from liability to any plaintiff who might, absent the rule, seek a recovery through participation in a class action. It only governs, in state court, the mechanism by which plaintiffs may seek the recoveries to which each is entitled as a matter of state law.

Even under its most expansive iteration in *Guaranty Trust Co. v. York*, which for a time appeared to usher in a rigid "outcome-determinative" test from which the Court later retreated,[25] *Erie* has never limited federal courts to the mechanisms state courts offer for the vindication of state-created rights. The *Erie* doctrine has instead recognized the power of federal courts to use available equitable means to provide a "remedy for a substantive right recognized by a State even though a State court cannot give it." *York*, 326 U.S. at 106. As the Court there explained:

> [T]he body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in

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[25] *See Byrd*, 356 U.S. at 537-38; *Hanna*, 380 U.S. at 466-69; Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. at 708-09.

> so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law.

Id. Class actions, as noted above at 29-30, are a part of the traditional body of equitable practice and procedure. So long as they are used only to enforce rights created by state law, they are procedural under *Erie* and thus are not governed by state law.

2. *Erie*'s Concerns About Fairness and "Forum-Shopping" Do Not Compel Application of State Class Action Rules by Federal Courts.

For many of the reasons just explained, the inapplicability of CPLR 901(b) does not give rise to the sort of "unfairness" that has concerned the Court in the line of cases running from *Erie* through *Hanna* to the present. The fundamental unfairness that drove the Court's decision in *Erie* was that under the doctrine of *Swift v. Tyson*, 41 U.S. 1 (1842), in which federal courts in diversity actions applied "general common law" rather than the common law of particular states, "rights enjoyed under the unwritten 'general law' var[ied] according to whether enforcement was sought in the state or in the federal court." *Erie*, 304 U.S. at 74-75. Here, by contrast, application of CPLR 901(b) is not necessary to ensure that the state-law rights of each class member and each defendant remain unchanged regardless of whether the action is brought in state or federal court.

Nor does *Erie*'s concern with forum-shopping dictate application of CPLR 901(b) by a federal court. To begin with, the type of forum-shopping that is of principal concern under *Erie* occurs when a plaintiff

who could not obtain a recovery in state court brings an action in federal court to obtain a different result, *see Hanna*, 380 U.S. at 469, which will not be the case for any class member here. Rather, if the availability of class relief motivates the filing of an action in federal rather than state court, that merely reflects a legitimate preference for "the advantages of the Federal Rules of Civil Procedure." *Id*. at 475 (Harlan, J., concurring).

Moreover, any judicial antipathy to litigants' forum preferences in these circumstances must yield to the contrary policy expressed by Congress in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. In CAFA, Congress amended the diversity jurisdiction statute, 28 U.S.C. § 1332, to provide for jurisdiction over class actions involving minimal diversity of citizenship between any class member and any defendant if the class consists of at least 100 members and the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (5) & (6). CAFA created not only original jurisdiction over such actions, but also expansive removal jurisdiction over any action within the scope of § 1332(d)(2), by abrogating the usual rules that all defendants must consent to removal and that a defendant sued in the courts of its home state may not remove on diversity grounds. *See* 28 U.S.C. § 1453(b). Thus, CAFA provided both class plaintiffs and each defendant in a class action meeting the minimal diversity, size, and amount-in-controversy requirements the option to choose a federal forum. In this case, it was the plaintiffs who invoked the diversity jurisdiction created by CAFA to select a federal forum.

Congress enacted CAFA with the specific intent of allowing parties, whether plaintiffs or defendants, to choose a federal forum for class actions based on a preference for the application of federal procedural rules. In enacting CAFA, Congress found that "[c]lass actions are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." CAFA § 2(a)(1), 28 U.S.C. § 1711 note. However, Congress also found that class actions had been subject to "abuses" by state courts, *id.* § 2(a)(4), and it stated that the purposes of CAFA included both "assur[ing] fair and prompt recoveries for class members with legitimate claims," and "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(1)-(2).

Prominent among the "abuses" that supporters of CAFA invoked was the perceived willingness of state courts to certify classes in circumstances where the application of standards developed by the federal courts under the Federal Rules of Civil Procedure would call for denial of certification:

> A fourth type of class action abuse that is prevalent in state courts in some localities is the "I never met a class action I didn't like" approach to class certification. Some state courts with this permissive attitude have even certified classes that federal courts had already found uncertifiable. In one case, for example, a state court judge certified a nationwide class of persons who claimed that the house siding they had pur-

> chased was defective. Later, a federal district court judge presented with the same case rejected any prospect of certifying a class in that manner ….

S. Rep. No. 109-14, at 22 (Feb. 28, 2005).

CAFA sought to remedy these perceived abuses by moving class actions involving diverse parties into federal court, where federal class certification standards would apply. Thus, CAFA's supporters advocated the law based on their view that "'federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly.'" *Id*. at 53 (quoting Deborah Hensler et al., *Class Action Dilemmas, Pursuing Public Goals for Private Gain* 28 (1999)). At the same time, CAFA's supporters contended that it would not unduly inhibit the use of class actions, because federal courts applying federal standards would certify classes in appropriate cases. *Id*. at 64. Indeed, they emphasized, "federal courts invented class actions and have led the way in using the device to redress grievances, particularly in the civil rights and consumer protection context." *Id.* Moreover, while repeatedly acknowledging that the class actions moved to federal courts under CAFA would continue to be governed by "substantive" state law under *Erie*, the Act's backers acknowledged that CAFA could lead to different outcomes as federal courts applied different standards in determining whether to certify classes. *Id.* And they made clear their expectation that Rule 23, "the rule governing federal court class actions," *id.* at 6, would apply to cases brought in or removed to federal courts under CAFA. *See id.* at 54. In short,

CAFA's backers fully expected that by determining "the procedural rules regarding which courts can hear class actions," CAFA would, "consequently," determine "which procedural law will apply to such cases." *Id* at 7.

Although the "abuses" CAFA's supporters invoked principally involved state-court certification of classes that might not have been certified by federal courts, the legislation grants both plaintiffs and defendants the ability to choose a federal forum and purports to encourage the certification of classes where plaintiffs have "legitimate claims." See CAFA § 2(b)(1), 28 U.S.. § 1711 note. Moreover, as this Court has noted, class action procedures must deal even-handedly with both plaintiffs and defendants. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (declining to apply the collateral order appealability doctrine to class certification decisions in a way that would favor only plaintiffs).[26] A policy favoring a federal forum for class actions because of the perceived superiority of federal procedural rules is no less applicable where those rules support use of class actions than where they do not.

CAFA, in short, reflects a congressional policy to enable both class plaintiffs and defendants to choose a federal forum based explicitly on a preference for application of federal class certification standards. By allowing plaintiffs and defendants alike to choose the federal forum—even when the defendants have been sued in the courts of their own states—

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[26] *Cf.* Fed. R. Civ. P. 23(f) (allowing permissive appeals by both plaintiffs and defendants from class certification rulings).

Congress addressed the problem of unfairness that *Erie* saw in giving plaintiffs only a choice of forum that was denied to in-state defendants. *See Erie*, 304 U.S. at 74-75.

The congressional policy, reflected in CAFA, of encouraging federal jurisdiction over class actions because of the perceived superiority of federal certification standards displaces any policy that might otherwise favor application of state class-action standards to deter "forum-shopping" under CAFA's jurisdictional provisions. *Erie*'s policy of discouraging "forum-shopping" is a judicial creation, and like all judge-made policies, it is subject to modification by Congress. *Cf. City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (congressional policies displace federal common law); *Williams v. Austrian*, 331 U.S. 642, 661 (1947) (statutory policies "should not be hedged by judge-made principles not in accord with those aims"). [27]

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[27] *Erie* is based in part on constitutional limits on Congress's power to enact substantive law governing conduct that is not subject to federal regulation under Article I of the Constitution. *See Erie*, 304 U.S. at 78. But neither *Erie* nor any other opinion of this Court suggests that Congress may not exercise powers that it undoubtedly possesses, such as the power to regulate practice and procedure in the federal courts, in ways that might encourage forum-shopping. *See Hanna*, 380 U.S. at 471-72; *see also Sibbach*, 312 U.S. at 9-10 (noting that although Congress may only impose "a right or duty … in a field committed to Congress by the Constitution," it "has undoubted power to regulate the practice and procedure of federal courts").

C. Requiring Federal Courts to Apply State Rules Governing Class Certification Would Be Unworkable and Unwise.

A holding that federal courts must apply a state procedural rule determining whether a class may be certified would not only be contrary to this Court's teachings in *Hanna* and *Erie* and the many cases following them; it would also generate a host of negative consequences.

First, such a ruling would permit states, by adopting restrictive class-action rules, to deprive federal courts and litigants of the benefits of a procedural device that, as both this Court and Congress have recognized, promotes the fair and efficient adjudication of claims that present common issues affecting large numbers of litigants.[28] States could, by eliminating class actions for particular types of claims or across the board (as Mississippi and Virginia have already effectively done[29]), determine how federal courts must allocate resources and manage matters before them, to the detriment of both sound judicial practice and the federal courts' inherent authority to govern their own procedures. *See Herron*, 283 U.S. at 94; *Wayman v. Southard*, 23 U.S. at 1, 49-50. That in some cases the result of applying state law forbidding class actions might be that a case would not proceed in federal court at all (because the federal court's CAFA jurisdiction depends on

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[28] *See* CAFA § 2(a)(1), 28 U.S.C. § 1711 note; *see also* cases cited *supra* at 26-29.

[29] *See Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999); *Janssen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092 (Miss. 2004).

whether the case is a class action) would not diminish the detrimental impact of such state interference with sound judicial management. As this Court has noted, "[t]hat small individual claims otherwise might be limited to local and state courts rather than a federal forum does not justify ignoring the overall problem of wise use of judicial resources." *Roper*, 445 U.S. at 340.

Furthermore, if this Court were to hold that whether a case may proceed as a class action is an issue of substantive law as to which state law controls in a federal diversity action, that legal principle could not logically be limited to cases in which state law would *deny* class treatment. If an entitlement not to be a defendant in a class action is a substantive right, then the entitlement to bring an action as a class is, equally, a substantive right. And if that is the case, then courts in all diversity class actions must look to state rules and decisional law rather than to Rule 23 and the case law applying it in making their class certification decisions. Such a regime would pose great practical difficulties for the federal district courts, which would have to become familiar with multiple procedural standards governing class actions. That result would run headlong into what this Court has called "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure." *Burlington Northern*, 480 U.S. at 5.

Moreover, if state law governs the circumstances under which claims may be aggregated under Rule 23, it would presumably also displace other federal rules addressing similar topics, such as joinder and

intervention. For instance, if CPLR 901(b) were also to preclude joinder of, say, more than 20 claims seeking statutory penalties, the logic of the decision below would preclude a federal district court from applying Rule 20(a) to permit joinder of 25 plaintiffs in an action seeking such relief.

Application of state class-action rules in diversity actions would also turn CAFA on its head. From a grant of jurisdiction aimed at making a uniform body of federal law governing class certification applicable to all diversity class actions satisfying the statute's criteria, CAFA would be transformed into a font of jurisdiction compelling the federal courts to accept jurisdiction over and apply unfamiliar state procedural standards to class actions based on state substantive law. Federal courts in such cases would be compelled to follow the very state precedents *allowing* class certification that the supporters of CAFA said they were creating federal jurisdiction to avoid. *See, e.g.,* S. Rep. No. 109-14, at 24-26.

It is no answer to observe that some state class action rules use language similar if not identical to Rule 23. Other states, including not only New York but also California,[30] have rules that differ significantly from Rule 23, and, as noted earlier, two states (Mississippi and Virginia) do not generally permit class actions in their courts. Moreover, each state's judicial interpretation of its own rule establishes the law of that state, and to the extent state courts interpret their rules—however close their language is to Rule 23—to allow class actions where the federal

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[30] *See* Cal. Code. Civ. P. § 382.

courts would not, or vice versa, state law and federal law are different.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State. … This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules.

Johnson v. Fankell, 520 U.S. 911, 916 (1997). A ruling that state class action standards are applicable in federal diversity actions would thus necessarily require federal courts to canvass and apply divergent state decisional law on class certification.

CONCLUSION

Federal courts have long led the way in developing the class action as a procedural device for use in adjudication of rights, regardless of the substantive law that is their source. First as a general tool of equity jurisprudence, then as a product of the Equity Rules, and ultimately as a procedure laid out in original Federal Rule of Civil Procedure 23 and its innovative and extensive revisions in 1966 and 2003, the class action has been recognized as a mechanism available for use in diversity and federal question cases alike. Substituting state-law limitations on the use of class actions for the flexible approach offered by Rule 23 would upset generations of settled practice and violate the fundamental principle that federal authority to regulate procedures in federal courts is exclusive and that absent permission by Congress, the states have no power to dictate federal

judicial procedure. *Wayman v. Southard*, 23 U.S. at 1, 49-50.

For these reasons, the judgment of the court of appeals affirming the district court's dismissal of the complaint should be reversed and the case should be remanded for further proceedings.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
BRIAN WOLFMAN
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road
Suite 375
Hockessin, DE 19707
(302) 235-7745

Attorneys for Petitioner

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APPENDIX

STATUTES AND RULES

The Rules Enabling Act, 28 U.S.C. § 2072, provides:

> **Rules of procedure and evidence; power to prescribe**
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> **State laws as rules of decision**
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Title 28 U.S.C. § 1332 provides, in pertinent part:

Diversity of citizenship; amount in controversy; costs

* * *

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

* * *

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

Section 2 of the Class Action Fairness Act of 2005, Pub. L. 109–2, 119 Stat. 4, 28 U.S.C. § 1711 note, provides, in pertinent part:

> (a) FINDINGS.—Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
>
> (2) Over the past decade, there have been abuses of the class action device that have—
>
> (A) harmed class members with legitimate claims and defendants that have acted responsibly;
>
> (B) adversely affected interstate commerce; and
>
> (C) undermined public respect for our judicial system.
>
> * * *
>
> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES.—The purposes of this Act are to—

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

New York Civil Practice Law and Rules § 101 provides:

Short title; application.

This chapter shall be known as the civil practice law and rules, and may be cited as "CPLR." The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute. The civil practice law and rules shall succeed the civil practice act and rules of civil practice and shall be deemed substituted therefor throughout the statutes and rules of the state. Reference to a provision in the civil prac-

tice law and rules may, except when such provision is being enacted or amended, be made without indicating whether it is a rule or section.

New York Insurance Law § 5106(a) provides:

Fair claims settlement

(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained. If proof is not supplied as to the entire claim, the amount which is supported by proof is overdue if not paid within thirty days after such proof is supplied. All overdue payments shall bear interest at the rate of two percent per month. If a valid claim or portion was overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations.