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

PETITIONER'S REPLY BRIEF

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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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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SUMMARY OF ARGUMENT

As Allstate observes, the parties mainly agree about the fundamental principles of *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that govern this case. Allstate Br. 11. But in this area of law, perhaps more than most, agreement on first principles often yields disagreement on outcomes. In his response to Professor John Hart Ely's influential article *The Irrepressible Myth of Erie*,[1] for example, Professor Abram Chayes remarked that while he had "no quarrel" with Professor Ely's "overall analytic framework," he took "exactly the opposite" view from Ely about its application to particular cases. *The Bead Game*, 87 Harv. L. Rev. 741, 741 (1974).

In this case, as in many, the argument turns on the parties' competing characterizations of rules as procedural or substantive. Allstate's contention that CPLR 901(b) is substantive and does not conflict with Federal Rule of Civil Procedure 23 rests substantially on its description of section 901(b) as a rule making a "particular cause of action" "categorically ineligible" for class treatment. Allstate Br. 2. Allstate argues that section 901(b) and Rule 23 do not conflict because Rule 23 does not address the "eligibility" of "particular causes of action" for class treatment, and that limits on whether "particular causes of action" are amenable to class treatment create substantive rights that trump the federal rules in any event. Allstate Br. 17-18, 21.

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[1] 87 Harv. L. Rev. 693.

Allstate's argument is wrong on its own terms. Section 901(b) does not address "particular causes of action" or, as Allstate elsewhere says, "particular state-law claims." Allstate Br. 3. The rule prohibits New York courts from certifying classes in cases seeking certain *forms of relief* (statutory penalties or minimum recoveries), regardless of whether the claims arise under New York law, federal law, or the laws of other states.

Section 901(b) thus addresses precisely the same issue as Rule 23: Whether claims for various forms of relief may be pursued through class actions. Section 901(b), moreover, addresses that issue in a way that conflicts with Rule 23. Under Rule 23, any claim that satisfies the rule's criteria is eligible for class certification (unless some other *federal* law overrides the rule). But under section 901(b), some forms of relief eligible for class certification under Rule 23 may not be pursued on a class basis.

Given the conflict, the principles of *Hanna v. Plumer*, grounded in the Rules Enabling Act and the supremacy of federal law, require federal courts to apply Rule 23 unless doing so would alter substantive rights. Section 901(b) does not purport to create substantive rights, but only to regulate procedure—including the procedure New York courts follow in cases involving federal law, where the state lacks power to define substantive rights. Allstate's effort to analogize CPLR 901(b) to statutes limiting plaintiffs' recoveries overlooks that that is not what section 901(b) does. Allstate's own alternative description of CPLR 901(b) as a limit on the claims that can be pursued "in a single lawsuit" (Allstate Br. 25) demonstrates the flaw in its argument. The scope of a

"single lawsuit," unlike a cap on liability, is a matter of procedure, not substance. Allstate's argument that the rule was adopted for substantive reasons fails because the reasons it adduces—reflecting legislative balancing of fairness to defendants against the need to vindicate plaintiffs' rights—are the same *procedural* considerations underlying Rule 23 itself.

Even leaving aside the conflict with Rule 23, *Erie* does not require federal courts to apply CPLR 901(b) because it is not a substantive rule, for much the same reasons that it creates no substantive rights under *Hanna* and the Rules Enabling Act. Allstate's invocation of "fairness" and "forum-shopping" as reasons to label section 901(b) substantive is unpersuasive. A choice of forum based on preference for federal procedures—in particular, Rule 23's federal class-action standards—is not only proper, but consistent with the federal policy favoring application of federal class-action standards in cases falling within the original diversity jurisdiction created by the Class Action Fairness Act's amendments to 28 U.S.C. § 1332. Applying that policy to benefit plaintiffs as well as defendants is not unfair. Indeed, applying CAFA one-sidedly to support application of federal procedural standards only when they benefit defendants would belie the Act's very name.

ARGUMENT

I. Allstate's Description of CPLR 901(b), Which Permeates Its Argument, Is Erroneous.

Allstate repeatedly characterizes CPLR 901(b) as a statute making a "particular cause of action" or "particular state-law claims" "categorically ineligible" for class certification. *See, e.g.*, Allstate Br. 2, 3, 8, 12. That characterization, which underlies much of Allstate's argument, is fundamentally wrong.

First, section 901(b) is not limited to any "particular" cause (or causes) of action. It applies to *any* action seeking a certain form of relief (a penalty or minimum recovery) under any statute, state or federal. It is not a part of the law creating any specific right of action, but appears in a general procedural rule that defines, for all actions in New York courts, when classes "may" (section 901(a)) or "may not" (section 901(b)) be certified.

Second, section 901(b) does not render any substantive rights of action categorically ineligible for class treatment. New York courts have held that CPLR 901(b) permits class actions under causes of action created by statutes imposing penalties or minimum recoveries if the class does not seek that relief. *See Cox v. Microsoft Corp.*, 778 N.Y.S.2d 147 (App. Div. 2004). The statute addresses the procedures through which a type of relief may be sought in New York courts, not whether claims based on specific substantive laws are outside the bounds of class certification under CPLR 901.

Third, CPLR 901(b) is not limited to state-law claims, much less claims under *New York* statutes.

The Civil Practice Law and Rules, according to CPLR 101, apply in all "civil judicial proceedings in all courts of the state and before all judges."[2] CPLR 901 as a whole, of which 901(b) is only a part, applies to all class actions in New York state courts regardless of the substantive law on which they are based. Thus, New York courts apply section 901(a) to certification decisions in actions invoking federal statutory and constitutional claims.[3] On its face, section 901(b) applies to any claim for penalties under "a statute," with no indication that the term is reserved for New York statutes rather than federal statutes or those of other states. It would be an odd reading of the law to imply a limitation on section 901(b) that is not found in section 901(a) or the CPLR generally.

Allstate says the provision must apply only to claims based on New York law because of "the background presumption … that the substantive reach of a State's law is limited to matters over which the State has a legitimate sovereign interest." Allstate Br. 36. That contention is circular: It assumes the conclusion that the provision *is* substantive. The argument also overlooks the obvious rejoinder that a state *may* apply nondiscriminatory procedural laws to matters in its courts arising under any substantive law. Thus, state courts regularly apply their class action rules to cases governed by substantive

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[2] *See Ling Ling Yung v. County of Nassau*, 571 N.E.2d 669 (N.Y. 1991) (CPLR 101 requires all New York state courts to apply the CPLR absent contrary statutory law).

[3] *See, e.g., Flushing Nat'l Bank v. Mun. Assistance Corp.*, 393 N.Y.S.2d 873 (S. Ct. 1977) (applying CPLR 901(a) to action raising federal constitutional claims).

law of other states. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The absence of any limitation in section 901(b) to New York statutes, combined with CPLR 101's admonition that the Civil Practice Law and Rules apply to all civil judicial proceedings in New York courts, thus indicates that the rule is *not* one of substantive New York law.[4]

It is, therefore, not surprising that Allstate cannot cite any New York case law limiting CPLR 901(b) to claims under New York statutes. Indeed, Allstate does not contest that every New York decision addressing the application of section 901(b) to federal statutory claims has either permitted or disallowed class actions depending on whether the relief sought was a penalty within the meaning of CPLR 901(b) and, if so, whether the federal statute expressly authorized class relief. Allstate quibbles with how much significance can be drawn from those rulings, but it offers *no* New York authority declining to apply 901(b) to a claim for relief under a federal statute (or a law of another state).

Allstate contends that the New York courts' application of section 901(b) to federal Telephone Consumer Protection Act (TCPA) claims in the leading case of *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005),

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[4] Allstate suggests that the questions presented in the petition for certiorari concede that section 901(b) applies only to state-law claims. Allstate Br. 37 n.7. The question Allstate cites refers to whether section 901(b) applies to *state-law claims in federal courts*, because that is the issue here. The question implies nothing about whether section 901(b) applies to federal claims in state courts.

rested solely on the TCPA's "unusual" features. Allstate Br. 37-38. The TCPA is indeed unusual, but whatever else may be said about TCPA claims, they are governed by substantive federal law. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 n.8 (2d Cir. 2006). *Rudgayzer*'s conclusion that section 901(b) applied to TCPA claims thus was not, and could not have been, based on the view that state substantive law applied. Rather, *Rudgayzer* applied section 901(b) because it was a local "form of practice" or "procedure." 799 N.Y.S.2d at 799-800. The court went on to hold that the application of this "local for[m] of practice" did not defeat the federal right of action under the doctrine of *Felder v. Casey*, 487 U.S. 131 (1988), because Congress anticipated TCPA actions would be subject to state procedural rules when it provided for state-court jurisdiction over them. 799 N.Y.S.2d at 800. But the reason the court applied section 901(b) to begin with was that it was a procedural law applicable to federal as well as state claims in the New York courts.

II. *Hanna v. Plumer* Requires Application of Federal Rule of Civil Procedure 23, Not CPLR 901(b).

Allstate's argument that *Hanna* does not foreclose application of CPLR 901(b) boils down to two propositions: Section 901(b) and Rule 23 do not conflict, and even if they do, section 901(b) creates substantive rights that trump Rule 23. Both propositions are incorrect.

A. CPLR 901(b) and Rule 23 Are Incompatible.

Allstate's contention that Rule 23 and CPLR 901(b) do not conflict rests on its invented distinction between the "*criteria* for class certification" (the sole subject, Allstate contends, of Rule 23) and the "antecedent" question of "the *eligibility* of a particular cause of action for class certification" (Allstate's characterization of CPLR 901(b)'s concern). Allstate Br. 18 (emphasis in original).

Allstate's semantic distinction has no basis in relevant case law, the language of Rule 23 and CPLR 901(b), or reality. For starters, CPLR 901(b) does not address the eligibility of particular "causes of action" for class certification; it concerns the eligibility for certification of actions seeking a broadly defined *form of relief*. That is exactly the ground Rule 23 covers: It sets forth the "prerequisites a plaintiff must satisfy to be *eligible* for a class action treatment." *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 561 (E.D. Mich. 2009) (emphasis added).[5]

Rule 23(b)'s subparts specifically determine the eligibility for certification of actions seeking various forms of relief. As the Fifth Circuit has put it, "[t]he different types of class actions [under Rule 23(b)] are categorized according to the nature or effect of the relief being sought." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 412 (5th Cir. 1998). A case is eligible

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[5] *See also Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006) (referring to "the heavy lifting of showing eligibility for class certification" under Rule 23) (quoting *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir. 2004)).

for certification under one of the two subdivisions of Rule 23(b)(1) if the relief sought would effectively preclude plaintiffs in other individual actions from obtaining relief or threaten to impose inconsistent obligations on the defendant; an action is eligible for certification under Rule 23(b)(2) if it seeks predominantly injunctive relief;[6] and Rule 23(b)(3) makes "all other cases," including damages actions, potentially eligible for certification if they meet that subsection's more demanding requirements of predominance and superiority. *Allison*, 151 F.3d at 412.

Even if the issue addressed by CPLR 901(b) were whether "particular causes of action" are "eligible" for class treatment, Allstate is wrong in saying Rule 23 does not address that "antecedent" question. As this Court held in *Califano v. Yamasaki*, 442 U.S. 682 (1979), Rule 23 provides categorically (to use Allstate's term) that "class relief is appropriate in civil actions brought in federal court" unless *Congress* says otherwise. *Id.* at 700.[7] *Califano* underscored its conclusion by citing Rule 1's sweeping pronouncement that "the Rules 'govern the procedure in the United States district court in all cases of a civil nature.'" 442 U.S. at 700.

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[6] *See, e.g., Allison*, 151 F.3d at 428 (a civil rights action seeking injunctive relief is the "archetype of a case eligible for (b)(2) certification"); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1187 (9th Cir. 2007) (addressing whether an action seeking backpay as well as injunctive relief is "eligible for (b)(2) certification"), *reh'g en banc ordered*, 556 F.3d 919 (2009).

[7] This case is thus unlike *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), where, as construed by this Court, the federal rule at issue did not address the point covered by state law, compliance with statutes of limitations.

To be sure, *Califano* also recognized that Congress can exempt particular actions from Rule 23 by expressing "its intent to depart from the usual course of trying 'all cases of a civil nature' under the Rules established for that purpose." *Id*. Allstate leaps to the conclusion that if *Congress* can exempt an action from Rule 23, then so can a state legislature (and hence, according to Allstate, such a state law does not conflict with Rule 23).

Allstate overlooks the small matter of the Supremacy Clause. The Federal Rules of Civil Procedure, promulgated under authority delegated in the Rules Enabling Act, 28 U.S.C. § 2072, have the force of federal law and prevail over state law under the Supremacy Clause. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995). A state legislature thus has no power to direct a federal court to depart from the requirements of federal rules.

The matter is entirely different if *Congress* makes some category of claims or type of relief ineligible for class treatment. Such legislation is an exercise of Congress's "undoubted power to regulate the practice and procedure of federal courts," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941), which it may exercise either directly or, as in the Rules Enabling Act, by delegation. *Id*. When Congress exercises its power directly, its legislation prevails over rules promulgated by the courts. *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959).

Congress's ability to override Rule 23, moreover, does not depend on the supposition that prohibiting class actions for certain cases would establish "sub-

stantive" rights that cannot be altered by rule under the Rules Enabling Act. Congressional legislation even on purely procedural matters overrides rules promulgated by the courts. *See id.*[8] Thus, an assertion that Congress has exempted a category of cases from class treatment raises only an question of statutory construction: Does the statute require a departure from the default rule that all cases meeting Rule 23 standards are eligible for class treatment? Accordingly, this Court meant exactly what it said in *Califano* when it stated that "Congress" may exempt cases from the application of Rule 23. That principle cannot extend to state legislatures that lack authority to override federal law.

Allstate's citation of cases holding that particular federal statutes preclude class actions thus does nothing to advance its claim that Rule 23 does not address the "eligibility" of actions for class certification. Indeed, Allstate's argument is self-defeating: It underscores that unless Congress acts to regulate federal judicial procedure by limiting the availability of class actions, any action in federal court is potentially eligible for class treatment under Rule 23. *Califano*, 442 U.S. at 700.

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[8] The Rules Enabling Act provides an important exception to the principle that statutes override procedural rules: Promulgation of a federal rule renders *existing* laws that conflict with the rule "of no further force or effect." 28 U.S.C. § 2072(b). That does not disable Congress from later overriding the rule entirely or as applied to particular types of cases. "'[O]ne legislature,' Chief Justice Marshall wrote, 'cannot abridge the powers of a succeeding legislature.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (Scalia, J., concurring) (quoting *Fletcher v. Peck*, 10 U.S. 87, 135 (1810)).

Allstate's argument also fails to distinguish *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), and *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22. Indeed, under Allstate's theory that state "categorical eligibility" rules do not conflict with federal procedural standards, both cases would have come out differently. In *Burlington*, for example, the federal rule providing for discretionary awards of damages and single or double costs in frivolous appeals did not explicitly address whether, as the state law at issue provided, unsuccessful appeals of damages awards were categorically *eligible* for a different type of penalty (10% of the damages award). Nor did the federal change-of-venue law in *Ricoh* address the arguably "antecedent" question whether contractual choice-of-venue provisions were, as state law provided, categorically *ineligible* for enforcement. Nonetheless, the Court found that the state laws in both cases conflicted with the generally applicable federal standards. The Court's decisions repudiated exactly the theory Allstate now advances—that state laws may provide "categorical" rules displacing generally applicable, discretionary federal standards. *Ricoh*, 487 U.S. at 29; *see also Burlington*, 480 U.S. at 7.

Here, the conflict is *more* pronounced than in *Burlington* and *Ricoh*. The federal and state rules cover precisely the same ground, determining whether class actions seeking various forms of relief may be certified. In *Burlington* and *Ricoh*, the federal standards addressed the points covered by state law much less directly. Indeed, the dissent in *Ricoh* argued strongly that while federal law might control the issue of how much weight a *valid* forum selection clause should be given in the change-of-venue calcu-

lus, it did not address the preliminary question whether the clause was valid. *See Ricoh*, 487 U.S. at 35 (Scalia, J., dissenting). Here, there is not even arguably a similar scope for operation of state law, because federal law controls the same issue that the state law addresses: whether classes seeking various forms of relief may, or may not, be certified.

Allstate's reliance on the Seventh Circuit's decision in *S.A. Healy Co.*, 60 F.3d 305, also fails to support its position. There, the question was whether a state law penalizing a defendant if a judgment exceeds a plaintiff's pretrial settlement demand conflicts with Federal Rule of Civil Procedure 68, which penalizes a plaintiff when the judgment is less than a defendant's pretrial offer of judgment. The court held there was no conflict because "the part of the state's offer-of-settlement statute involved in this case governs offers by plaintiffs, while Rule 68 is limited to offers by defendants." *Id.* at 310. Thus, the court said that "enforcing the Wisconsin rule on plaintiffs' demands" would not "tread on the toes of Rule 68," but it observed that "[t]he situation would be different if the case involved defendants' offers of settlement, because then we would have a state rule and a federal rule covering the identical issue." *Id*. at 311. That is the situation here. The federal and state rules cover the identical issue: certification of classes seeking various forms of relief.

More pertinent than *Healy* is the Seventh Circuit's subsequent decision in *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (1997), in which the court considered whether a class action in federal court was barred by a Wisconsin statute providing that class actions under that state's Consumer Act may not be

brought unless the plaintiff gives 30 days' advance notice to the defendant. The court held that the state rule conflicted with Rule 23 because Rule 23 governs class action procedure and "contains no [such] notice requirement." *Id*. at 346. So, too, here, Rule 23 not only contains no categorical limit on the eligibility of particular forms of relief for class treatment, but affirmatively provides that actions meeting its terms are eligible for class certification.

B. CPLR 901(b) Is a Procedural Rule That Creates No Substantive Rights.

Allstate's argument that application of Rule 23 rather than CPLR 901(b) would impair substantive rights fares no better. Allstate's arguments founder on the basic point that CPLR 901(b), like Rule 23 itself, addresses an intrinsically procedural matter—whether claims can be pursued through the class action mechanism.

Allstate concedes that Rule 23 is a facially valid exercise of this Court's power under the Rules Enabling Act to "prescribe general rules of practice and procedure … for cases in the United States district courts." 28 U.S.C. § 2072(a); *see* Allstate Br. 21-22. Thus, Allstate acknowledges that the subject matter of Rule 23 (whether claims may be pursued through a class action) is procedural. Allstate correctly points out that the facial validity of a rule does not mean that the rule can be applied in particular cases to abridge a substantive right, *see* Allstate Br. 22-23, but it fails to appreciate that its concession that Rule 23 is procedural means that a state rule addressing the same subject—whether cases can proceed as class actions—is similarly procedural, and does not

establish "substantive rights" within the meaning of 28 U.S.C. § 2072(b).[9]

Allstate falls back on its mantra that CPLR 901(b) makes particular state-law causes of action categorically ineligible for class treatment and is substantive because it limits the underlying state-created rights. Again, Allstate's argument rests on a characterization of CPLR 901(b) that, as demonstrated above, cannot be squared with its structure, language, or application by the New York courts.[10] To argue that a rule that, like CPLR 901(b), is not limited to actions based on the laws of the enacting state nonetheless creates "substantive rights" amounts to asserting that New York has the power, through a statute defining the circumstances in

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[9] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1995), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which Allstate cites for the proposition that the application of Rule 23 is limited by the need to avoid abridging substantive rights, illustrate the circumstances where such abridgment might occur. In both cases, the rights at issue included the interest of absent class members in recovering damages for personal injuries and the accompanying due process right not to be bound by a judgment that extinguished that interest without notice, opportunity to be heard, or adequate representation by the named class members, whose interests conflicted with those of the absent members. *Amchem*'s and *Ortiz*'s recognition that constitutional due process rights inform the application of Rule 23 does not imply that state rules of procedure prohibiting class certification create substantive rights that limit Rule 23.

[10] CPLR 901(b) is also quite unlike the state statutes listed in Allstate's Appendix B, as those statutes apply to *particular* substantive claims under the laws of the enacting states, and they are part of the state statutes that create those particular substantive rights, not of generally applicable procedural statutes such as the CPLR.

which classes may be certified in its courts, to determine parties' substantive rights *under the laws of other jurisdictions*. That cannot be the law. A rule that attaches procedural conditions to forms of relief provided by statutes from any and all jurisdictions, state and federal, does not define substantive rights. Even one of Allstate's favored authorities, the vacated opinion in *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 241 F.R.D. 77 (D. Me. 2007), *vacated*, 522 F.3d 6 (1st Cir. 2008), made precisely this point, holding that an Alabama law that precluded class actions not only under Alabama consumer protection laws but also under laws of other states was, for that reason, procedural and hence inapplicable in a federal diversity action. *Id.* at 84 n.10.

Allstate's effort to equate CPLR 901(b) with laws imposing caps on damages in class actions brought to enforce particular state and federal statutes also fails to establish that it creates substantive rights. Allstate's citation of *federal* statutes creating damages limits for class actions is irrelevant for reasons already discussed: Such statutes create no *Hanna* (or *Erie*) issue. They control federal claims in federal court not because they are "substantive," but because laws enacted by Congress, whether procedural, substantive, or both, control federal-question cases in federal courts.

State-law class-action damages caps also differ from CPLR 901(b) for *Hanna* purposes in two critical respects. First, unlike CPLR 901(b), which addresses the same subject Rule 23 comprehensively governs (amenability of cases to class treatment), damages caps concern an issue Rule 23 does not directly address: The quantum of recovery a certified class may

be awarded. Thus, such laws arguably do not conflict with Rule 23 and create no *Hanna* issue. Second, a damages cap does not define procedures, but the extent of a defendant's liability, and for that reason may be fairly characterized as "substantive." *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428-29 (1996); *id*. at 464 (Scalia, J., dissenting).[11]

Allstate contends that CPLR 901(b) is functionally equivalent to a damages cap because it limits the amount of liability that can be imposed on a defendant "in a single lawsuit." Allstate Br. 32. Like Allstate's description of CPLR 901(b) as a prohibition on certifying classes asserting "particular causes of action," *see supra* at 4-6, Allstate's assertion that CPLR 901(b) limits the liability that can be imposed "in a single lawsuit" does not accurately characterize the rule. Section 901(b) places *no* limit on the number of claims for statutory penalties that a single plaintiff may join in a "single lawsuit" or on the amount that may be awarded on those claims.[12] Nor does it prevent multiple plaintiffs from joining statu-

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[11] In *Gasperini*, members of the Court differed on whether a state law was analogous enough to a damages cap to merit characterization as "substantive." The majority reasoned that the state rule established a substantive standard requiring that jury awards be set aside if excessive (and defining excessiveness), *see id.* at 437 n.22, even though the rule "contain[ed] a procedural instruction," *id*. at 429—that is, the instruction that the court determine whether the award was excessive. CPLR 901(b) encompasses no similar substantive standard limiting the amount of a defendant's liability, but only limits the procedures through which state courts impose liability.

[12] *See, e.g.*, *Gottlieb*, 436 F.3d 336-37 (asserting diversity jurisdiction over individual action seeking $500,000 in statutory damages for 1,000 separate violations of the TCPA).

tory penalty claims in a "single lawsuit" if permitted by applicable joinder rules.

More importantly, rules governing whether claims must, or may, be brought in one action or in multiple actions are quintessentially procedural. The question of what claims and parties may or must be combined in one lawsuit is the subject of virtually all of Title IV of the Federal Rules of Civil Procedure and a fistful of individual rules, including Rules 18, 19, 20, 21, 22, 23, 23.1, 23.2, and 24 (plus, in Title III, Rules 13 and 14). Federal courts regularly apply those rules in diversity as well as federal-question actions. If the Court adopted Allstate's novel suggestion—that rules about the scope of a "single lawsuit" generate "substantive rights" under *Hanna* and the Rules Enabling Act—all those rules would have to give way to contrary rules or practices of the forum states' courts in diversity cases.

For example, West Virginia Trial Court Rules 26.01-26.12 provide for consolidation of tort actions involving multiple plaintiffs and defendants in "mass litigation" proceedings under circumstances where the Federal Rules of Civil Procedure would allow neither joinder nor class certification. *See, e.g., In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005). If, as Allstate argues, rules establishing what claims may be brought in a single lawsuit create substantive rights, then the Federal Rules could not be applied to prevent such mass litigation in diversity actions, and the West Virginia Trial Court Rules would come to govern mass tort litigation in the federal courts in

West Virginia, and possibly other federal courts in cases governed by West Virginia substantive law.[13]

Finally, Allstate contends that CPLR 901(b) creates "substantive rights" because it reflects substantive policy—namely, protecting defendants against liability. Allstate Br. 24-27. Once again, Allstate overplays its hand in describing section 901(b)'s purpose. Allstate relies on the New York Court of Appeals' description of arguments made by some lobbyists for the provision, who, not surprisingly, favored it because they believed it would reduce their clients' exposure to large damages awards. *See* Allstate Br. 25 (citing *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 211 (2007)). The New York court's own assessment of section 901(b)'s purpose reflected the views not of lobbyists but of the bill's sponsor, who did not focus on protecting defendants against liability, and instead emphasized the supposed lack of a need for class actions where statutory penalties were available to motivate individual plaintiffs to file suit. *See Sperry*, 8 N.Y.3d at 211.[14]

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[13] Allstate might answer that rules *preventing* multiple claims in a single lawsuit establish substantive rights, but not rules *expanding* the scope of a single lawsuit. But substantive rights are not a one-way street, or a one-way ratchet. A state statute repealing a damages cap, or state decisional law establishing the *absence* of a cap on damages for a particular type of action, is as "substantive" as a damages cap. Thus, if limits on the number of claims in a single lawsuit were treated as analogous to a cap on damages, so, too, a rule that placed *no* limit on the number of claims that could be joined would have to be treated the same as a rule that damages are *not* capped.

[14] Allstate cites *Sperry*'s statement that the provision reflected a "*compromise* among competing interests." Allstate Br.

(*Footnote continued*)

Even assuming, however, that the New York legislature's addition of section 901(b) when it enacted CPLR 901 was motivated by a balancing of the perceived need for class actions against concerns about fairness to defendants who might face significant liability in class actions seeking statutory penalties or minimum recoveries, that does not mean the provision creates substantive rights (or that application of the contrary federal rule would abridge or modify substantive rights). Rule 23 itself, which Allstate concedes is procedural, reflects a similar balancing of interests. For example, as Allstate acknowledges, Rule 23(f)'s provision for permissive appeal of certification decisions reflects (among other things) solicitude for defendants for whom class certification may impose a choice between settlement and "ruinous liability." Allstate Br. 29 (quoting 1988 Adv. Comm. Notes to Fed. R. Civ. P. 23). Similarly, in applying Rule 23(b)(3)'s class-certification standards, federal courts have in some cases weighed the potential consequences of class certification for defendants in considering whether a class action is "superior" to other means of adjudication of a dispute. *See, e.g., In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1298-99 (7th Cir. 1995); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

Even by Allstate's account, therefore, CPLR 901(b) reflects only New York's weighing of the same concerns of fair and efficient judicial process that are balanced differently in Rule 23. The balancing of

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26 (quoting 8 N.Y.3d at 211) (emphasis added by Allstate). That is true of most legislation. It says nothing about whether the legislation creates substantive rights.

such considerations, Allstate agrees, is the hallmark of a procedural rule. Allstate Br. 23. Section 901(b), no less than Rule 23 itself, is thus a procedural rule. As such, it creates no "substantive rights" that application of a different procedural rule—Rule 23—could abridge, enlarge, or modify.

III. *Erie* Does Not Require Application of CPLR 901(b) in Federal Diversity Cases.

A. CPLR 901(b) Is Procedural, Not Substantive.

Even leaving the Rules Enabling Act aside, the parties agree that CPLR 901(b) applies in federal diversity actions only if it is "substantive" under the *Erie* doctrine. Allstate characterizes our argument that section 901(b) is not substantive under *Erie* as "halfhearted" based on its count of the number of pages our opening brief devoted to that issue ("only" 17). *See* Allstate Br. 39. The less lengthy discussion of *Erie*, however, flows from the fact—reflected in Allstate's own brief—that many of the same considerations that determine whether CPLR 901(b) creates "substantive rights" under *Hanna*'s Rules Enabling Act analysis also bear strongly on whether the rule is substantive under *Erie*.

As to that question, Allstate does not contest that CPLR 901(b) falls outside the heartland of substantive rules under *Erie*—that is, rules that directly affect primary conduct by determining whether one person is liable to another and, if so, to what extent. *See, e.g., Erie*, 304 U.S. at 70 (holding state common law applicable to whether a railroad owed a duty of

care to a trespasser).[15] To be sure, as Allstate points out, *Erie* has not always been strictly limited to such rules. Nonetheless, that section 901(b) is not such a rule weighs against characterizing it as substantive.

Allstate relies principally on this Court's decision in *Gasperini* to support its contention that section 901(b) is substantive under *Erie*. But *Gasperini* involved a rule that controlled the extent of a defendant's liability under a state-law right of action. As construed by the *Gasperini* majority, the rule reflected a substantive standard: A jury verdict is excessive if it "deviates materially from what would be reasonable compensation" under applicable state substantive law. *See Gasperini*, 518 U.S. at 423 (quoting N.Y. CPLR § 5501(c)). In other words, the rule provided a "standard of excessiveness," *id*. at 437 n. 22, and its procedural implications (that trial and appellate courts must set aside jury verdicts that did not comply with that standard) flowed from the substantive standard. *See id.* at 429 ("§ 5501(c) contains a procedural instruction, … but the State's purpose is manifestly substantive.").

CPLR 901(b) neither contains nor implies any similar substantive limit on the amount of liability for state-created claims. It permits any quantum of liability to be imposed on defendants, but provides only that if the liability sought is for statutory penalties or minimum recoveries—under state or federal law—that liability must be imposed through individ-

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[15] See also the cases discussed in our opening brief at pp. 45-48.

ual actions (or actions involving individually joined plaintiffs), not class actions.

B. "Fairness" and "Forum-Shopping" Do Not Require Categorizing CPLR 901(b) as Substantive.

Beyond its misplaced reliance on *Gasperini*, Allstate invokes two of the policy concerns this Court has invoked in *Erie* cases: fairness and forum-shopping. As to fairness, Allstate argues that it would be unfair to allow a class action in federal court on a state-law claim that could not be certified in a New York state court.

But a federal court's use of procedures different from those used by a state court—even procedures that may affect the outcome—is not by itself unfair. Such differences inhere in a system that grants different court systems jurisdiction over the same cases. Indeed, it is no more unfair that a federal court might entertain a state-law class action that a state court would not certify under CPLR 901(b) than that a state court might refuse to certify a federal-law class action under CPLR 901(b) that a federal court would certify. As long as federal courts "respect the definition of state-created rights and obligations by the state courts," *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958), the most critical fairness concern of *Erie* is satisfied.

Moreover, the "unfairness" Allstate complains of—that the certification of a class could depend on the choice of a federal forum—could also occur even under Allstate's theory that CPLR 901(b) is "substantive" under *Erie*. If, for example, Shady Grove had brought suit on its New York law claim in a fed-

eral court in Illinois (Allstate's principal place of business) or Maryland (Shady Grove's state of citizenship), the court, under Allstate's theory that the "eligibility" of such a case for class treatment is a substantive issue, would have to follow the forum state's choice-of-law rules in determining whether to apply CPLR 901(b). *See Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). State choice-of-law rules need not follow *Erie* principles.[16] Thus, the forum state's choice-of-law rules could require application of its own class-action rules together with New York's substantive requirement that insurers pay interest on late-paid claims. In that situation, even under Allstate's view of *Erie*, the plaintiff's choice of forum would determine whether the same state-law claim could be pursued on a class basis.

As for forum-shopping, Allstate does not take issue with two important propositions. First, the policy against forum-shopping that informs this Court's *Erie* jurisprudence is not absolute. Indeed, the whole point of diversity jurisdiction (and removal jurisdiction) is to allow plaintiffs and defendants a choice of a federal forum based on legitimate reasons they may have for preferring it. Those may include a preference for life-tenured judges, for Seventh Amend-

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[16] For example, because statutes of limitations are "substantive" under *Erie*, state limitations laws apply in federal diversity cases. But state courts often apply their own statutes of limitations even to causes of action as to which another state's law will supply the substantive rules of decision. *See, e.g., Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (considering application of claim preclusion to situation where same claim was barred by one state's statute of limitations but allowed by another's).

ment jury rights, for the location of the courthouse—or for the Federal Rules of Civil Procedure. *Hanna*, 380 U.S. at 475 (Harlan, J., concurring). It is *unfair* forum-shopping that is the principal concern of *Erie*. *Id.* at 467-68 (majority opinion).

Second, Allstate does not contest that the judicially created policy against forum-shopping expressed in *Erie* is subject to congressional modification. Indeed, Congress often authorizes forum-shopping.[17] Nor does Allstate deny that in the Class Action Fairness Act, Congress created a choice of a federal forum for state-law class actions (as long as the required minimal diversity, class size, and amount in controversy are present) precisely because Congress preferred Rule 23's *federal* class-action procedures. *See* Pet. Br. 49-53. As one scholar has put it, "CAFA's policy is to enable jurisdictional manipulation in search of different ('procedural') law, or at least of courts that have different attitudes toward aggregation." Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 Colum. L. Rev. 1924, 1952 (2006). In light of the congressional policy expressed in CAFA, the prospect of forum-shopping on the basis of preferences for federal class-action rules hardly provides a reason for classifying state rules on the subject as "substantive" and requiring federal courts in diversity actions to apply them under *Erie*.

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[17] *E.g.*, 28 U.S.C. § 1346(a)(2) (choice of Court of Federal Claims or district court); 26 U.S.C. § 7422(e) (choice of Tax Court, Court of Federal Claims, or district court); 28 U.S.C. §§1441-1453 (removal).

Allstate offers two answers to this point, both insufficient. First, Allstate repeats that "categorical" class-action rules are inherently substantive, and thus different in kind for *Erie* purposes from other class-action standards. Allstate Br. 47. But the issue here is whether a policy against forum-shopping should be invoked as a reason for labeling CPLR 901(b) substantive under *Erie*. Allstate's argument side-steps the inquiry by assuming the conclusion that the rule is substantive. Without that assumption, forum-shopping to avoid a "categorical" rule is no worse, or better, than forum-shopping to avoid any other state-court class-action standard. Especially in light of Congress's preference for application of federal class-action standards in cases where CAFA confers diversity jurisdiction, CPLR 901(b)'s assertedly "categorical" nature provides no more basis for labeling it substantive than any other state rule that would prohibit (or allow) class actions in circumstances where the federal rules would otherwise produce the opposite result.

Second, Allstate sees "irony" in Shady Grove's reliance on CAFA because CAFA was intended to suppress "abusive class actions." Allstate Br. 47. That an argument may be ironic, however, does not make it wrong. CAFA's supporters may have been *motivated* by a desire to rein in class actions, but that does not mean the resulting legislation always operates against plaintiffs. The statute on its face provides plaintiffs as well as defendants a choice of forum by creating original as well as removal jurisdiction over minimally diverse class actions. And contrary to Allstate's suggestion (for which it cites *no* support), nothing in CAFA "both assumes and presupposes

that a plaintiff could bring a particular class action in state court." Allstate Br. 47. Rather, by defining a class action to include "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure," 28 U.S.C. § 1332(d)(1)(B), and providing for original jurisdiction over any such action meeting diversity, class size, and amount-in-controversy requirements, the statute provides that the primary determinant of whether a case may proceed as a class in federal court is federal procedural law. That CAFA may in some circumstances benefit plaintiffs as well as defendants is no reason to shrink from its clear language, or to apply *Erie*'s forum-shopping concerns in a manner contrary to the congressional mandate that federal standards govern whether a class action may be maintained in a CAFA diversity case.

C. Accepting Allstate's *Erie* Arguments Would Impair Uniformity of Federal Procedural Law.

Finally, Allstate attempts to minimize the adverse consequences of holding that New York's prohibition on class actions in CPLR 901(b) is "substantive" law applicable in federal courts under *Erie*. Contrary to Allstate's suggestion, the holding Allstate advocates—that state-law rules about whether claims may be aggregated are "substantive" or create "substantive rights"—could not logically be confined to "categorical rules," nor to state-law rules that *prevent* aggregation as opposed to those that promote it. The result would be that in any diversity case where a state rule on class actions, or, for that matter, joinder of claims or parties, provided a dif-

ferent result than did the Federal Rules of Civil Procedure, a substantial, litigable issue would arise.[18]

Allstate asserts confidently that *Hanna* would resolve most such disputes in favor of the Federal Rules of Civil Procedure, and thus that a ruling in its favor would not threaten to displace uniform application of federal procedural standards. Allstate Br. 52 & n.10. But given Allstate's narrow view of what constitutes a conflict between state and federal rules, and its correspondingly broad view of what "rights" created by state rules are "substantive," that is small comfort. After all, to return to our starting point, Allstate sees no "conflict" between a federal rule that allows class certification and a state rule that denies it, and its arguments imply that any rule that limits (or expands) the number of claims that may be resolved in a "single lawsuit" creates substantive rights. If that were the law, uniform application of the Federal Rules of Civil Procedure in diversity actions would be seriously threatened.

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[18] Allstate suggests that state-law limitations on class actions often would not apply in federal courts because the "absence of law" is not law for *Erie* purposes. Allstate Br. 51 n.9. Allstate cites no authority for that proposition, which is surely not correct. The "absence" of a right of action under applicable state law is, for example, binding on a federal court sitting in diversity. Moreover, Allstate's "absence of law" theory is *not* the basis on which the courts in the cases Allstate cites held Mississippi's class-action prohibition inapplicable in federal court. They based their holdings on the notion that Mississippi's prohibition was not substantive, a theory fundamentally incompatible with Allstate's position. S*ee, e.g., Ayers v. Thompson*, 358 F.3d 356, 377 (5th Cir. 2004); *New Motor Vehicles*, 241 F.R.D. at 83.

CONCLUSION

The judgment of the court of appeals should be reversed.

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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