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 RESPONDENT

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QUESTIONS PRESENTED

The petition for certiorari presented the following three questions:

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?

2. Can state legislatures dictate procedure in the federal courts?

3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes and Rules

State Statutes

Other Authorities

INTRODUCTION

This case presents the question whether a plaintiff can transform a dispute over a five *hundred* dollar penalty into a dispute over a five *million* dollar penalty by simply filing in federal rather than state court. Petitioner Shady Grove contends that respondent Allstate violated a New York insurance statute and is thus liable for a statutory penalty under state law. Shady Grove has no interest, however, in pursuing an individual penalty from Allstate, which (by Shady Grove's own reckoning) would amount to no more than $500. Rather, Shady Grove is intent on maximizing Allstate's potential liability (as well as its own settlement leverage and attorneys' fees) by pursuing a class action seeking an aggregate penalty of no less than $5 million. The problem for Shady Grove is that the New York Legislature decided to prevent the aggregation of penalties in a single lawsuit by enacting the provision at issue here, N.Y. C.P.L.R. § 901(b), which forbids the recovery of state statutory penalties in class actions absent express statutory authorization.

There is no question, thus, that Shady Grove could not bring this putative class action in the courts of New York; rather, the only question is whether Shady Grove can evade § 901(b) by filing in federal court. The answer to that question, as the courts below recognized, is no. Nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, and a refusal to apply § 901(b) in federal court would not only thwart New York's interest in defining and limiting its own causes of action but also promote forum-shopping and the inequitable administration of the laws.

Shady Grove devotes the bulk of its brief to arguing that § 901(b) does indeed conflict with Rule 23. That argument boils down to the proposition that Rule 23 gives a district court discretion to certify a class in each and every case litigated in federal court, even where the legislative body that created the underlying cause of action has specified that it is categorically ineligible for class certification. That proposition is manifestly incorrect: Rule 23 establishes the *criteria* for class certification in federal court, but does not speak to the antecedent question whether any particular cause of action is eligible for class certification in the first place. Indeed, a variety of federal causes of action are categorically ineligible for class certification under Rule 23. Shady Grove's interpretation of Rule 23 to override substantive policy decisions that certain claims are categorically ineligible for class certification would take the Rule into forbidden territory beyond the bounds of the Rules Enabling Act.

Shady Grove tries to get around this point by insisting that § 901(b) must be procedural, and hence inapplicable in federal court, because a class action itself is procedural. That argument is a *non sequitur*. A legislature may impose substantive limitations on a procedural device, and indeed both the Federal Government and most States have done so by either limiting the amount that can be recovered for particular claims in class actions, or (as New York has done here) by rendering certain claims categorically ineligible for class certification in the first place. Section 901(b) effectively caps a defendant's liability in a particular lawsuit—the maximum penalty that may be imposed in that

lawsuit is the penalty available to an individual plaintiff.

At the end of the day, this is a case about federalism and fairness. Section 901(b) in no way alters the procedural criteria for class certification; rather, it represents a substantive policy choice to limit the liability that may be imposed in a particular lawsuit. Under the Rules of Decision Act, the federal courts are constrained to respect such substantive policy choices: a State's power to create liability under its own laws surely includes the power to limit such liability, and a State may limit liability either by capping the amount that may be recovered in a class action or by precluding class certification for particular claims. Were state-law prohibitions on class actions for particular state-law claims inapplicable in federal court, as this case highlights with crystal clarity, litigants would be drawn to federal court like metal to a magnet, and a State's efforts to limit liability for those claims effectively thwarted. The Class Action Fairness Act, which extended federal jurisdiction over state-law class actions to curb state-court abuses, would ironically be transformed into an engine for evading state-law prohibitions on class actions. Because nothing in federal law either requires or permits that result, this Court should affirm the judgment.

RELEVANT STATUTORY PROVISIONS

The Rules of Decision Act 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.

28 U.S.C. § 1652.

The Rules Enabling Act 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 magistrate judges 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.

28 U.S.C. § 2072.

Section 901 of New York's Civil Practice Law and Rules provides as follows:

§ 901. 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.

N.Y. C.P.L.R. § 901.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of a May 2005 automobile accident in which Sonia Galvez was injured. Joint

Appendix (JA) 12. The car driven by Ms. Galvez was registered in New York, carried New York license plates, and was insured under a "New York Private Passenger Auto Insurance Policy" issued by respondent Allstate Insurance Company. *Id.*

After the accident, Ms. Galvez sought medical treatment for her injuries from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland orthopedic clinic. JA7-8. As part of her payment for those services, Ms. Galvez assigned Shady Grove certain rights to payment from Allstate under her automobile insurance policy. JA8 & n.1.

Shady Grove sought and received payment for those services from Allstate. JA7. Nonetheless, Shady Grove took the position that Allstate should have made those payments sooner, and that its failure to do so violated a New York insurance statute, N.Y. Ins. Law § 5106(a). Under that statute, if an insurer fails to either deny or pay claims arising out of an automobile accident within 30 days, it is subject to a statutory interest penalty of 2% per month. *See id.* Shady Grove thus claimed that it was entitled to a statutory 2% monthly interest penalty, which in this case (by Shady Grove's own reckoning) amounted to no more than $500. Pet. App. 4a.

B. Procedural History

Shady Grove filed this putative class action against Allstate in federal court in April 2006. JA6-23. Although the complaint raised only state-law claims, Shady Grove invoked federal jurisdiction under a provision of the Class Action Fairness Act (CAFA) that extends federal jurisdiction over state-law class actions involving at least $5 million in

controversy and minimal diversity of citizenship between the parties. JA7 (invoking federal jurisdiction under 28 U.S.C. § 1332(d)(2)(A)). Shady Grove conceded that there was no basis for federal jurisdiction other than CAFA, given the modest size of Shady Grove's individual claim against Allstate. Pet. App. 4a, 34a, 36a.

Allstate moved to dismiss the action, and the district court (Gershon, J., E.D.N.Y.) granted the motion. Pet. App. 19-36a. Because § 901(b) by its plain terms precludes Shady Grove from bringing a class action to recover statutory penalties under New York law, the court explained, the only question was whether that statute applies in federal as well as state court. Pet. App. 26-29a, 33-34a. Concluding—as have other federal courts—that it does, the court granted the motion to dismiss. *See id.* at 36a.

A unanimous panel of the Second Circuit affirmed. Pet. App. 1-18a. The Second Circuit agreed with the district court that § 901(b) is "substantive," rather than "procedural," because it would lead to very different results in federal than in state court, and thus encourage forum-shopping. Pet. App. 11-12a, 15-16a. The court also emphasized that nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, which establishes the criteria for class certification in federal court. Pet. App. 10-14a. And the court rejected the notion that applying § 901(b) in federal court would offend basic tenets of federalism, noting that § 901(b) is a *state*-law limitation on a *state*-law cause of action. Pet. App. 16-17a.

SUMMARY OF ARGUMENT

This Court should join the courts below by holding that N.Y. C.P.L.R. § 901(b) applies in federal as well as state court. The basic point here is simple: § 901(b) represents a substantive policy choice by New York to limit the state statutory penalty that may be imposed in a single lawsuit. Congress and many other States have made similar substantive policy choices by either limiting the liability that may be imposed in a class action (*see infra* Appendix A) or by rendering certain claims categorically ineligible for class certification (*see infra* Appendix B). At least since this Court's seminal decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it has been clear that the federal courts must give effect to such substantive state policy choices in cases arising under state law.

There is no merit to Shady Grove's argument that Rule 23 of the Federal Rules of Civil Procedure covers the same ground as § 901(b), and thereby forecloses the application of the state statutory provision in federal court. There is no conflict whatsoever between Rule 23 and § 901(b). Rule 23 sets forth the criteria governing class certification in federal court, but does not address the antecedent question whether a given claim is eligible for class certification in the first place. Where, as here, a legislature has declared particular claims categorically ineligible for class certification for reasons unrelated to the certification criteria, those criteria never come into play. Indeed, any contrary interpretation of Rule 23 that would allow federal courts to override a substantive policy decision that a particular cause of action is categorically ineligible

for class certification would violate the Rules Enabling Act.

Nor is there any merit to Shady Grove's alternative argument that § 901(b) does not apply in federal court because that provision is procedural, rather than substantive, in nature for *Erie* purposes. In essence, that argument boils down to the proposition that any limitation on class actions must be procedural because class actions themselves are procedural. But that proposition is incorrect: as noted above, New York—like the Federal Government and many other States—has simply made a substantive policy decision to limit the liability that can be imposed in a particular lawsuit. Under § 901(b), the maximum state statutory penalty that can be imposed in a particular lawsuit is the penalty that can be recovered by an individual. This limitation prevents class certification from distorting statutory penalties by creating a threat of massive liability for a technical violation of law that did not inflict any actual injury.

Indeed, a refusal to apply § 901(b) in federal court would thwart *Erie*'s twin aims of preventing both inequitable administration of the laws and forum-shopping. There is no question that § 901(b) prevents Shady Grove from bringing a class action in New York state court. Thus, if § 901(b) does not apply in federal court, Shady Grove can transform this dispute over a penalty of no more than $500 into a dispute over an aggregate penalty of no less than $5 million by simply crossing the street from state to federal court. Nothing in *Erie* either requires or tolerates that result. Accordingly, this Court should affirm the judgment.

ARGUMENT

The Courts Below Correctly Held That N.Y. C.P.L.R. § 901(b) Applies In Federal Court.

The courts below correctly held that N.Y. C.P.L.R. § 901(b), which categorically precludes class actions seeking "to recover a penalty, or minimum measure of recovery created or imposed by statute," applies in federal court and requires dismissal of this lawsuit. Pet. App. 1-18a, 19-36a.[1] As those courts recognized, that provision represents a substantive policy decision to limit the state statutory penalty that may be imposed in a particular lawsuit. Pet. App. 11-12a, 15-16a, 26-29a. And because that substantive policy decision is in no way inconsistent with any Federal Rule of Civil Procedure, it applies in federal court to prevent unfairness and forum-shopping. Pet. App. 7-17a, 26-29a.[2]

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[1] Section 901(b) creates a single exception to its categorical rule: a plaintiff may pursue a class action to recover a penalty or minimum measure of recovery where "a *statute* creating or imposing a penalty, or a minimum measure of recovery *specifically authorizes* the recovery thereof in a class action." N.Y. C.P.L.R. § 901(b) (emphasis added). Shady Grove argued below that a state administrative regulation brought this case within the scope of that exception, but both the district court and the Second Circuit rejected that state-law argument, *see* Pet. App. 17-18a, 32-34a, and Shady Grove did not preserve the argument in its petition for certiorari, *see* Pet. i.

[2] *See also In re Onstar Contract Litig.*, 600 F. Supp. 2d 861, 875 (E.D. Mich. 2009); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10 (W.D.N.Y. Nov. 25, 2008); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007); *In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. (cont'd ...)

As might be expected more than seventy years after this Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the parties are in general agreement about the analytical framework governing this case. The Rules of Decision Act, as interpreted and applied in *Erie* and subsequent cases in its wake, mandates 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). Accordingly, the core inquiry under *Erie* is whether a particular state law is best classified as "substantive" or "procedural" for purposes of the Rules of Decision Act. *See id.* That inquiry is "usually unproblematic" where the state statute "[c]oncern[s] matters covered by the Federal Rules of Civil Procedure": "if the Rule in point is consonant with the Rules Enabling Act … and the Constitution, the Federal Rule applies regardless of contrary state law." *Id.* at 427 n.7 (citing *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965)).

2007); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185-86 (E.D.N.Y. 2007); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 (E.D.N.Y. Dec. 20, 2006), *aff'd*, 547 F.3d 497 (2d Cir. 2008); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290-91 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004); *United States v. Dentsply Int'l, Inc.*, No. 99-005, 2001 WL 624807, at *16 (D. Del. Mar. 30, 2001); *Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y. 1999); *but see G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07 C 5953, 2009 WL 2581324, at *3 (N.D. Ill. Aug. 20, 2009) (concluding, without analysis or recognition that this issue is pending before this Court, that § 901(b) does not apply in federal court because "federal procedural rules govern cases once they are removed to federal court").

Shady Grove relies primarily on the latter point, devoting the bulk of its brief to arguing that Rule 23 validly covers the ground occupied by § 901(b), and thus overrides the state statute under *Hanna*. *See* Shady Grove Br. 12-40. In the alternative, Shady Grove also argues that § 901(b) is best classified as procedural, rather than substantive, for *Erie* purposes. *See id.* at 41-57. As explained in detail below, Shady Grove is wrong on both scores.

A. Section 901(b) Does Not Conflict With Rule 23 Of The Federal Rules Of Civil Procedure.

1. Rule 23 Establishes The Criteria For Class Certification, Not The Eligibility Of Particular Claims For Certification.

Shady Grove first argues that § 901(b) conflicts with Rule 23 because "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." Shady Grove Br. 10; *see also id.* at 20 (arguing that § 901(b) would impermissibly deny federal courts "the discretion to certify a class that lies at the heart of the federal rule"). That argument is manifestly incorrect. Rule 23 establishes the *criteria* for class certification in federal court, but does not address the antecedent question whether any particular cause of action is eligible for the application of those criteria in the first place. Where, as here, a particular cause of action is categorically ineligible for class certification, Rule 23 does not—and, under the Rules Enabling Act, could not—authorize a district court to certify a class.

The "discretion" provided by Rule 23, in other words, is the procedural discretion to apply the class certification criteria set forth in the Rule to eligible causes of action, not the substantive discretion to decide whether a particular cause of action is eligible for class certification in the first place. *See, e.g.*, *Wade v. Danek Med., Inc.*, 182 F.3d 281, 290 (4th Cir. 1999) ("Rule 23 … merely establishes the procedures for pursuing a class action in the federal courts."). The question whether a particular cause of action is eligible for class certification is legally and logically antecedent to the application of the class certification criteria. A court has no discretion under Rule 23 to apply those criteria to causes of action that are categorically ineligible for class certification.

Shady Grove thus errs by insisting that "the federal rule and the New York rule are incompatible." Shady Grove Br. 16 (capitalization modified). To the contrary, the two provisions are entirely compatible: § 901(b) simply "*removes* a category of claims from the realm in which a federal court may exercise its discretion," but does not interfere with the exercise of that discretion with respect to claims eligible for class certification. *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290 (S.D.N.Y. 2005); *see also In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549 (E.D. Pa. 2007); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004). The application of the Rule 23 criteria presupposes that a particular cause of action is eligible for class certification. Where it is not, Rule 23 gives a court no discretion to certify a class.

Not surprisingly, Shady Grove identifies nothing in Rule 23 that either explicitly or implicitly gives a

federal court discretion to certify a class in each and every case. To the contrary, Congress itself has categorically precluded class certification under Rule 23 for particular cases and causes of action. *See*, *e.g.*, 8 U.S.C. § 1252(e)(1) (Illegal Immigration Reform and Immigrant Responsibility Act) ("[N]o court may … certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection."); 29 U.S.C. § 206(d) (Equal Pay Act); *Ameritech Benefit Plan Comm. v. Commc'ns Workers of Am.*, 220 F.3d 814, 820-21 (7th Cir. 2000) (interpreting same to preclude Rule 23 class certification); 29 U.S.C. § 216(b) (Fair Labor Standards Act); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916-17 (5th Cir. 2008) (interpreting same to preclude Rule 23 class certification); 29 U.S.C. § 626(b) (Age Discrimination in Employment Act); *Grayson v. KMart Corp.*, 79 F.3d 1086, 1106 (11th Cir. 1996) (interpreting same to preclude Rule 23 class certification); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975) (*per curiam*) (same). These statutes, needless to say, refute the unstated premise of Shady Grove's argument: that Rule 23 gives federal courts discretion to certify a class in each and every case litigated in federal court.

This case is thus a far cry from *Hanna*, on which Shady Grove places such heavy reliance. That case involved the question whether a state statute requiring in-person service on a defendant applied in a diversity action filed in federal court. At that time, Rule 4(d)(1) of the Federal Rules of Civil Procedure specified that service "'shall be made … [1] by delivering a copy of the summons and of the

complaint to [the defendant] personally or [2] *by leaving copies thereof at his dwelling house ….*'" *Hanna*, 380 U.S. at 461 (quoting Fed. R. Civ. P. 4(d)(1); emphasis added). The plaintiff in that case left copies of the summons and the complaint at the defendant's residence, which "concededly" complied with the Federal Rule but not with the state service law. *Id.* at 461-62. Thus, a "clash" between federal and state law was "unavoidable": the federal rule did not require in-person service, while the state law did. *Id.* at 470. Under such circumstances, this Court held, an on-point Federal Rule governs unless it transgresses either the Rules Enabling Act or the Constitution, and a court need not engage in "the typical, relatively unguided *Erie* Choice." *See id.* at 471, 473-74.

Hanna applies, in other words, only where the relevant federal and state laws cover the same ground. *See id.* at 473; *see also Gasperini*, 518 U.S. at 427 n.7; *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.4 (1988); *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980). But nothing in *Hanna* requires or permits courts to expand the scope of the Federal Rules. To the contrary, this Court has emphasized—in language tellingly missing from Shady Grove's brief—that federal courts must interpret the Federal Rules "with sensitivity to important state interests and regulatory policies." *Gasperini*, 518 U.S. at 427 n.7 (citing *Walker*, 446 U.S. at 750-52, and *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310-12 (7th Cir. 1995)).

Thus, in *Walker*, this Court held that state law rather than federal law governed the question when a diversity action was commenced in federal court for purposes of a state-law statute of limitations. *See* 446 U.S. at 748-53. Although Rule 3 of the Federal Rules of Civil Procedure specifies that "'[a] civil action is commenced by *filing* a complaint with the court,'" *id.* at 750 (emphasis added; quoting Fed. R. Civ. P. 3), the Court held that the Rule did not override a state law specifying that an action is not commenced for purposes of tolling the statute of limitations until the defendant is *served*, *see id.* at 751-52. The Federal Rule, the Court explained, "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751. Because the Federal Rule did not cover the same ground as the state law, the Court held, "the *Hanna* analysis does not apply." *Id.* at 752.

Similarly, in *S.A. Healy*—also cited with approval in *Gasperini*, *see* 518 U.S. at 427 n.7—the Seventh Circuit held that federal courts must apply a state law governing offers of judgment, even though Rule 68 of the Federal Rules of Civil Procedure also governs offers of judgment. *See* 60 F.3d at 310-12. Rule 68, the court explained, governs only offers of judgment by *defendants*, and does not implicitly prevent the application of the state statute to the extent it governs offers of judgment by *plaintiffs*. *See id.* "We cannot find anything in the history or structure of [Rule 68] to justify" an interpretation that it sweeps beyond its text to occupy the entire field of offers of judgment. *See id.* at 312.

Here too federal and state law do not cover the same ground. Because Rule 23 gives a district court no "discretion" to certify a class to pursue a cause of action that is categorically ineligible for certification, Shady Grove's reliance on *Stewart* and *Burlington* is misplaced. Both of those cases involved federal laws that gave federal courts discretion that would have been restricted by the application of state law in federal court. *Stewart* involved a federal statute giving district courts discretion to transfer cases based on a variety of factors, including contractual forum selection clauses. *See* 487 U.S. at 29 (citing 28 U.S.C. § 1404(a)). This Court held that an Alabama statute that categorically nullified such clauses would impermissibly interfere with that discretion and thus did not apply in federal court. *See id.* at 30-32. *Burlington* involved Rule 38 of the Federal Rules of Appellate Procedure, which gives courts of appeals discretion to impose sanctions for frivolous appeals. *See* 480 U.S. at 4 (citing Fed. R. App. P. 38). This Court held that an Alabama statute that imposed a mandatory affirmance penalty of 10% would impermissibly interfere with that discretion and thus did not apply in federal court. *See id.* at 7-8. Neither *Stewart* nor *Burlington* has any bearing where, as here, the application of state law in federal court would *not* impinge upon any discretion conferred by federal law.

Shady Grove insists, however, that "just as in *Burlington* and [*Stewart*], 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* … and make it dispositive." Shady Grove Br. 23

(emphasis added). The problem with that argument is that a categorical prohibition on class certification is not "one of the many factors relevant to class certification under the federal rule," *id.*; it is the predicate for the application of those factors in the first place. Nothing in § 901(b) in any way alters the criteria for class certification in federal court. Shady Grove, in a nutshell, is trying to blur the critical distinction between Rule 23's *criteria* for class certification and the antecedent *eligibility* of a particular cause of action for class certification.

Thus, Shady Grove argues that "Section 901 is similar to Rule 23 in that it sets forth the *criteria*" for class certification. Shady Grove Br. 19 (emphasis added). That argument is disingenuous at best. The criteria for class certification in New York are set forth in § 901***(a)***, *see supra* p. 5, and have no bearing here. There is no dispute that the criteria for class certification under state law do not apply in federal court; that is the ground squarely occupied by Rule 23. *See, e.g.*, 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 3d* § 1758 (3d ed. 2005) (noting that in a diversity action, "[f]ederal and not local standards ... will determine the various procedural elements of the class action"); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 1707923, at *5 (E.D. La. June 16, 2009) (state criteria for class certification inapplicable in federal court), *recon. denied*, 2009 WL 2447846, at *3-5 (E.D. La. Aug. 6, 2009); *cf. Hanna*, 380 U.S. at 473-74. This case is all about § 901***(b)***, which has nothing to do with the criteria for class certification. Shady Grove cannot sidestep that inconvenient point by simply ignoring the distinction between the

subsections and arguing globally against the application of § 901 in federal court.

It is not true, in other words, that § 901(b) "modifies Section 901(a)'s criteria" by specifying that certain causes of action are categorically ineligible for class certification. Shady Grove Br. 35. Where the categorical prohibition of § 901(b) applies, the criteria of § 901(a) do not. Contrary to Shady Grove's argument, § 901(b) does not address the "predominance" of common issues or the "superiority" of a class action; rather, those considerations are squarely addressed by § 901(a), which concededly does not apply in federal court.

Nor can Shady Grove inflate the scope of Rule 23 by quoting snippets from cases to the effect that "Federal Rule of Civil Procedure 23 'deals comprehensively with class actions.'" Shady Grove Br. 16 (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 354 (1978)); *see also id.* at 24 (quoting *Snyder v. Harris*, 394 U.S. 332, 341 (1969), for the proposition that Rule 23 "is applicable 'across the entire range of legal questions'"). This Court has never held nor hinted that Rule 23 overrides a legislative decision to render a particular cause of action categorically ineligible for class certification.

To the contrary, this Court has recognized that Rule 23 applies only "[i]n the *absence*" of legislative intent "to depart from the usual course" of allowing class certification in appropriate cases. *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (emphasis

added).[3] In other words, the default rule is that causes of action litigated in federal court are eligible for class certification under the criteria set forth in Rule 23, but that rule is by no means absolute. *See, e.g.*, *Sandoz*, 553 F.3d at 916-17 (interpreting federal statute implicitly to preclude class certification under Rule 23); *Ameritech*, 220 F.3d at 820-21 (same); *Grayson*, 79 F.3d at 1106 (same); *LaChappelle*, 513 F.2d at 288-89 (same). Where, as here, there is no question that the very legislative body that created a particular cause of action has decided that it is categorically ineligible for class

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[3] *Califano* presented the question whether Congress had implicitly rendered a particular cause of action ineligible for class certification by authorizing "'[a]ny individual'" to seek judicial review of particular administrative decisions. *See* 442 U.S. at 698-99 & n.12 (quoting 42 U.S.C. § 405(g)). This Court held that this language did not provide "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Id.* at 700. Because that case involved federal legislation, it is not surprising that the Court stated that a "direct expression *by Congress*" was necessary to overcome the background presumption that claims litigated in federal court are eligible for class certification under the Rule 23 criteria. *Id.* (emphasis added). In context, it is clear that the reference to "Congress" was simply a shorthand for the legislature that created the underlying cause of action, not an attempt to distinguish between the *federal* legislature and a *state* legislature. Shady Grove thus errs by describing *Califano* as establishing a blanket rule that "absent a *congressional* decision to preclude class actions, Rule 23 authorizes class treatment of any federal action that satisfies the rule's criteria." Shady Grove Br. 25 (emphasis in original; citing *Califano*, 442 U.S. at 700). *Califano* did not involve a state cause of action, and thus had no occasion to draw any such distinction.

certification, Rule 23 does not allow a federal court to override that decision.

2. If Construed To Establish The Eligibility Of Particular Claims For Class Certification, Rule 23 Would Violate The Rules Enabling Act.

Indeed, any interpretation of Rule 23 that would allow federal courts to override a legislative decision that a particular cause of action is categorically ineligible for class certification would violate the Rules Enabling Act, 28 U.S.C. § 2072. Under that statute, the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." *Id.*; *see generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982). Interpreting Rule 23 to encompass not only the procedural criteria for class certification but also the antecedent decision whether a particular cause of action is eligible for class certification in the first place would take the Rule squarely into forbidden substantive territory. Accordingly, this Court should avoid any such interpretation. *See, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (construing Fed. R. Civ. P. 41(b) to avoid an "arguabl[e] violat[ion]" of the Rules Enabling Act); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (construing Fed. R. Civ. P. 23(b)(1) to avoid "potential conflict with the Rules Enabling Act"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997) ("Rule 23 … must be interpreted with fidelity to the Rules Enabling Act.").

Shady Grove tries to circumvent this point by asserting that "Allstate has not argued in this case that Rule 23 is not valid, but, in any event, such an

argument would be unavailing" because class actions are procedural. Shady Grove Br. 10. But that assertion misses the point. Allstate does not contend that Rule 23 in all its applications transgresses the bounds of the Rules Enabling Act, but only that the Rule would transgress the Act if interpreted (as Shady Grove would have it) to override legislative decisions that particular causes of action are categorically ineligible for class certification. *See, e.g.*, *Semtek*, 531 U.S. at 503; *Ortiz*, 527 U.S. at 842; *Amchem*, 521 U.S. at 613-19, 629.

Shady Grove proves nothing, in other words, by arguing generically that "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." Shady Grove Br. 10; *see also id.* at 25-31. Even if the Rule is facially valid, the Act still prevents courts from interpreting or applying the Rule in particular cases in a way that abridges, enlarges, or modifies any substantive right. *See, e.g.*, *Ortiz*, 527 U.S. at 842-45*; Amchem*, 521 U.S. at 614-19. Thus, the Act necessarily lurks beneath every interpretation and application of the Rule, *see, e.g.*, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998), and courts always must be "mindful" of the Act in interpreting and applying the Rule, *Amchem*, 521 U.S. at 612-13. Shady Grove's argument that Rule 23 does not facially violate the Rules Enabling Act, in short, by no means sweeps the Act out of this case.

The basic point here is simple: Rule 23 would "abridge, enlarge or modify" substantive rights if

interpreted to override a legislative decision, like the one reflected in § 901(b), that a particular cause of action is categorically ineligible for class certification. Shady Grove responds with the syllogism that a class action is a procedural device, § 901(b) is a limitation on class actions, so therefore § 901(b) by definition is procedural and can freely be overridden by Rule 23 without raising any concerns under the Rules Enabling Act. *See* Shady Grove Br. 25-40.

The problem with that syllogism is that a limitation on a procedural device can be substantive. As a threshold matter, some clarification of the concepts represented by the terms "procedural" and "substantive" is in order. Although this Court has often noted that distinguishing between these two concepts can be a challenging endeavor that depends on context, *see, e.g.*, *Jinks v. Richland County*, 538 U.S. 456, 465 (2003); *Gasperini*, 518 U.S. at 416; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988); *Hanna*, 380 U.S. at 471; *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), "the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all," John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724 (1974). And, after all, "they are the terms the Enabling Act uses." *Id.*

On this point, at least, the parties are in agreement: "At bottom, a procedural rule is 'one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes.'" Shady Grove Br. 26 (quoting Ely, *Irrepressible Myth*,

87 Harv. L. Rev. at 724); *see also id.* at 33 (procedural rules govern "'the conduct of litigation'") (quoting *Sibbach v. Wilson*, 312 U.S. 1, 14 (1941); emphasis omitted). And conversely, as the parties also agree, "'[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.'" Shady Grove Br. 40 (quoting Ely, *Irrepressible Myth*, 87 Harv. L. Rev. at 725).

Returning to Shady Grove's syllogism, the key point here is that a legislature can restrict a procedural device such as a class action for substantive reasons, *i.e.*, reasons that have nothing to do with the conduct of the litigation process itself, as opposed to the outcome of that process. And that is precisely what the New York Legislature did by enacting § 901(b).

Fortunately, this Court need not speculate on this score: the New York Court of Appeals recently described the history and purpose of § 901(b) in great detail. *See Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 210-11 (2007). The question in that case was whether § 901(b) applied to prohibit class certification of claims seeking treble damages under New York's general antitrust statute, the Donnelly Act. In answering that question in the affirmative, the New York court detailed how and why that provision came to be adopted.

As *Sperry* explained, § 901(b) was enacted in 1975 as a part of a complete overhaul of New York's class action laws. *See* 8 N.Y.3d at 210. The initial

legislative proposal, which eventually became § 901(a), was limited to the procedural criteria for class certification (which largely mirror the federal criteria set forth in Federal Rules 23(a) and 23(b)(3)): "the five prerequisites of numerosity, predominance, typicality, adequacy of representation and superiority." 8 N.Y.3d at 211. In response to that proposal, "various groups advocated for the addition of a provision that would prohibit class action plaintiffs from being awarded a statutorily-created penalty or minimum measure of recovery, except when specifically authorized in the pertinent statute." *Id.* "These groups feared that recoveries beyond actual damages could lead to excessively harsh results, particularly where large numbers of plaintiffs were involved. They also argued that there was no need to permit class actions in order to encourage litigation by aggregating damages when statutory penalties and minimum measures of recovery provided an aggrieved party with a sufficient economic incentive to pursue a claim." *Id.*

The New York Legislature responded to these concerns by adding § 901(b) to the bill. *See id.* That provision has nothing to do with the criteria for class certification; rather, it limits the liability that may be imposed in a single lawsuit by prohibiting class actions to recover aggregate penalties. As the bill's sponsor, Assemblyman Stanley Fink, explained:

> 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.

Id. (citing Sponsor's Mem., Bill Jacket, L. 1975, ch. 207). Hence, "the final bill, which was passed by the Legislature and approved by the Governor on June 17, 1975, was the result of a *compromise* among competing interests," *id*. (emphasis added)—the Legislature created a new class action mechanism but protected defendants from being subjected to aggregate statutory penalties in a single lawsuit.

There can be no doubt, then, that § 901(b) is substantive in nature: the provision is not concerned with the conduct of the litigation process itself, but instead with the outcome of that process. *See*, *e.g.*, Pet. App. 11-12a ("CPLR 901(b) … is a substantive rule that eliminates statutory penalties under New York law as a remedy for class action plaintiffs."); *Relafen*, 221 F.R.D. at 285 ("C.P.L.R. 901(b) expresses a state interest in avoiding 'annihilatory punishment' by discouraging multiple recoveries of statutory penalties.") (quoting *Lennon v. Philip Morris Cos.*, 734 N.Y.S.2d 374, 380 (N.Y. Sup. Ct. 2001)). As the New York Attorney General noted in an *amicus curiae* brief in *Sperry*: "C.P.L.R. 901(b) … *was added to preclude aggregating, via the class action mechanism*, *statutorily prescribed penalties and minimum levels of recovery*." Br. of the N.Y. Attorney General in Support of Mot. for Permission to Appeal, at 10 (Apr. 19, 2006), reprinted at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/OAG_CA_Sperry_Brief_to_appeal.pdf (emphasis

added). As that brief further explains, "[t]he concern with excessive liability was thought to be particularly grave because 'New York statutory law contained many "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance.'" *Id.* at 11 (quoting Bill Jacket, L. 1975, ch. 207, N.Y.S. Bar Association Legislation Report No. 15 at 2 (1975); emphasis omitted).

It is simply not true, thus, that § 901(b) was adopted "to achieve procedural objectives." Shady Grove Br. 40. A desire to prevent the aggregation of statutory penalties in a single lawsuit is by no stretch of the imagination a "procedural" objective. Shady Grove concludes otherwise only by reiterating its circular argument that class actions are procedural, so any limitations on class actions must be procedural. *See id.*

For all intents and purposes, § 901(b) operates as a cap on the statutory penalty that can be recovered in a class action. It would be no different if New York had specified that the maximum statutory penalty to which a defendant could be subjected in a class action was the penalty available to an individual plaintiff. Indeed, the Federal Government and many States have enacted precisely such laws capping a defendant's liability for particular claims in class actions. *See infra* App. A.

Shady Grove asserts, however, that "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" because "[i]t 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."

Shady Grove Br. 38. Again, that assertion is a *non sequitur*. Like the statutes listed in Appendix A, § 901(b) caps a defendant's liability in a particular lawsuit. It is no answer for Shady Grove to insist that the defendant may still be subjected to the same (or even greater) liability in a multiplicity of *other* lawsuits: the fact remains that § 901(b) limits the penalty that can be imposed in a particular lawsuit.

The statutes listed in Appendix A, like § 901(b), reflect a widespread legislative recognition that the aggregation of massive liability in a single class action can create an intolerable risk of overdeterrence and abuse even where the defendant could be subjected to the same or greater overall liability in multiple individual lawsuits. The incentives for filing multiple individual lawsuits, after all, are far different than the incentives for filing a single class action. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting "the financial incentive that class actions offer to the legal profession"); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 960 (9th Cir. 2009) (noting "considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement") (internal quotation omitted); *Hartford Accident & Indem. Co.*, 466 F.3d 1289, 1294 (11th Cir. 2006) (noting "th[e] basic truth about class action litigation: the fight over class certification is often the whole ball game" in light of plaintiffs' enhanced settlement leverage); *cf. Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (holding that an amendment to the False Claims Act could not be applied retroactively in part because of the very different incentives for suits

brought by the U.S. Government and private *qui tam* relators). And of course the effect on a defendant of a single massive class action is different in kind than the effect of multiple individual lawsuits—the stakes (and accordingly the settlement pressure) are vastly multiplied. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). Indeed, "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Id.* at 1298 (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

There is a reason, after all, why this Court adopted Rule 23(f) of the Federal Rules of Civil Procedure, which authorizes interlocutory review of class certification decisions and thereby represents a departure from the ordinary rules governing appellate review: "An order granting certification … may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23, Advisory Committee Note (1998 Amendments). And there is a reason why Congress adopted the Class Action Fairness Act, which expanded federal jurisdiction over state-law class actions, but not over other state-law actions, *see* 28 U.S.C. § 1332(d): the settlement leverage provided by such lawsuits "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits," S. Rep. No. 109-14, at p. 20 (Feb. 28, 2005). Representative actions, in short, can impose a unique "burden" on defendants that multiple individual actions do not. *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

And, as the New York Legislature recognized by enacting § 901(b), a class action creates a *special* danger of abuse when applied to a cause of action that establishes a penalty or minimum measure of recovery unrelated to any actual injury suffered by a plaintiff. *See Sperry*, 8 N.Y.3d at 210-11. Under these circumstances, a class action creates the possibility of massive liability for a technical violation of law that did not inflict any actual injury. *See id.*; *see also Developments in the Law—Class Action*, 89 Harv. L. Rev. 1329, 1361 & n.148 (1976) ("Particularly acute problems of distortion are likely to arise where class actions are brought to enforce causes of action imposing a penalty for statutory violations. … The increased deterrent effect class actions create may intensify the already heightened deterrent effect of a penalty provision, to a point perhaps counterproductive to statutory policies.") (citing § 901(b)). It is not surprising, thus, that New York is hardly alone in seeking to address the interplay between class actions and penalty or minimum-recovery claims by either prohibiting class actions for such claims or by limiting the recovery available to a class—the Federal Government and many other States have done likewise.[4]

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[4] *See*, *e.g.*, 15 U.S.C. § 1640(a)(2)(B) (Truth in Lending Act) ("[I]n the case of a class action … no minimum recovery shall be applicable."); 15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act) (same); Cal. Civ. Code § 2988.5(a)(2) ("[A]s to each member of the class no minimum recovery shall be applicable."); Colo. Rev. Stat. § 12-14.5-235(d) ("In a class action …, the minimum damages … do not apply."); Conn. Gen. Stat. § 36a-683(a) ("[I]n the case of a class action, … as to each member of the class no minimum recovery shall be (cont'd ...)

Shady Grove thus errs by insisting that § 901(b) cannot be substantive because a class-action defendant could still face multiple individual actions seeking the same relief in the aggregate, and a class-action plaintiff could not recover more in a class action than in an individual action. *See*, *e.g.*, Shady Grove Br. 10, 31-32, 38. A statute limiting the liability that can be imposed in a class action gives the defendant a substantive right not to be subjected to liability beyond that limit in that action—even if the defendant could be subjected to liability beyond that limit in multiple individual actions. And a statute limiting a defendant's liability by rendering certain substantive claims categorically ineligible for class certification gives the defendant that same right not to be subjected to aggregated class-action liability for those claims—again, even if the

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applicable."); Haw. Rev. Stat. § 489-7.5(b)(1) ("The minimum $1,000 recovery … shall not apply in a class action."); Ind. Code § 24-4.5-5-203(a)(2) ("[A]s to each member of the class no minimum recovery is applicable"); Ky. Rev. Stat. § 367.983(1)(c) ("In the case of a class action," a court may award "no minimum recovery as to each member"); Mass. Gen. Laws ch. 167B § 20(a)(2)(B) ("[A]s to each member of the class no minimum recovery shall be applicable."); Mich. Comp. Laws § 493.112(3)(c) ("Recovery in class actions shall be limited to actual damages," as opposed to minimum recoveries); N.M. Stat. § 58-16-15(B) ("In the case of a class action, no minimum recovery for each member of the class shall be applicable."); Ohio Rev. Code § 1351.08(A) ("[A]s to each member of the class no minimum recovery is applicable."); Okla. Stat. tit. 14A, § 5-203(1) ("[A]s to each member of the class no minimum recovery shall be applicable."); Wyo. Stat. § 40-19-119(a)(iii) ("In the case of a class action, … no minimum recovery as to each member" shall apply).

defendant could be subjected to the same total liability in multiple individual actions. The fact that a class action is a procedural device, in short, does not mean that any limitations on liability in class actions are procedural in nature.

It does not follow, in other words, that § 901(b) cannot be deemed substantive for purposes of the Rules Enabling Act because it "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." Shady Grove Br. 11. As Shady Grove recognizes elsewhere in its brief, that is not the correct test; instead, a substantive right is one "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." Shady Grove Br. 40 (internal quotation omitted). Section 901(b) protects defendants from excessive and unwarranted liability by preventing them from being subjected to aggregate statutory penalties, or aggregate minimum recoveries unrelated to any actual injury, in a single lawsuit.

Shady Grove insists, however, that an interpretation of Rule 23 that would override § 901(b) cannot violate the Rules Enabling Act in light of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). *See* Shady Grove Br. 32. That case recognized class-action tolling for federal claims. But *American Pipe* does not speak to the relationship between Rule 23 and the Rules Enabling Act, *see* 414 U.S. at 556-59, much less support Shady Grove's argument that Rule 23 would not violate the Act if

construed to override § 901(b).[5] Indeed, that argument cannot be squared with this Court's constant admonition that courts must eschew any "adventurous" reading of Rule 23 precisely to avoid any issues under the Rules Enabling Act. *See*, *e.g.*, *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 617-18. Given that nothing in Rule 23 remotely purports to dictate that all causes of action litigated in federal court must be eligible for class certification under its criteria, that admonition should be the beginning and the end of the matter.

Nor does anything in New York law alter the conclusion that § 901(b) creates substantive rights

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[5] Shady Grove errs by characterizing *American Pipe* as "holding that the application of Rule 23 to toll a statute of limitations did not alter substantive rights." Shady Grove Br. 32 n.15; *see also id.* at 32 (asserting that *American Pipe* "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"). Nothing in Rule 23 speaks to class-action tolling, and *American Pipe* did not hold otherwise. *See* 414 U.S. at 556-59. Rather, *American Pipe* "recogniz[ed] *judicial* power to toll statutes of limitations in federal courts" for federal claims. 414 U.S. at 558 (emphasis added). The *American Pipe* tolling rule, in other words, is an exercise of federal common law to fill in the interstices of federal law, not an interpretation of Rule 23. *See, e.g.*, *Wade*, 182 F.3d at 290; Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's 'Substance' and 'Procedure' in the Rules Enabling Act*, 1989 Duke L.J. 1012, 1027-28 (1989). That point makes sense: it would be odd to conclude that statutes of limitations are substantive in this context, *see, e.g.*, *Guaranty Trust*, 326 U.S. at 109-12, while the rules governing the tolling of those very statutes are not, *see, e.g.*, *Chardon v. Soto*, 462 U.S. 650, 660-62 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980).

for purposes of the Rules Enabling Act. Shady Grove first suggests that § 901(b) must be procedural for all purposes because it is located in New York's Civil Practice Law and Rules, which "'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.'" Shady Grove Br. 34 (quoting N.Y. C.P.L.R. § 101; emphasis omitted). As noted above, however, this Court has often stressed that characterization of a given law as "substantive" or "procedural" is highly context-specific. *See, e.g.*, *Jinks*, 538 U.S. at 465; *Gasperini*, 518 U.S. at 416; *Sun Oil*, 486 U.S. at 726; *Hanna*, 380 U.S. at 471. Thus, a State's characterization of its law is by no means dispositive of the federal issue. *See, e.g.*, *Guaranty Trust*, 326 U.S. at 108. And because the New York Legislature (unlike Congress) enacts the rules governing procedure in the courts as well as substantive laws, the New York Legislature has no reason to concern itself over the placement of a particular provision in the state code.[6]

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[6] To the extent that Shady Grove relies upon N.Y. C.P.L.R. § 101 to argue that § 901(b) applies only in state court as a matter of *state* law, *see* Shady Grove Br. 35, that argument is neither correct nor properly presented here. As a threshold matter, it is simply not true that the provisions of New York's Civil Practice Law and Rules are categorically inapplicable in federal court. To the contrary, this Court held in *Gasperini* that N.Y. C.P.L.R. § 5501(c), which governs the scope of appellate review of damages awards, applies in federal court. *See* 518 U.S. at 439. And the lower federal courts routinely apply substantive provisions of New York's Civil Practice Law and Rules, including provisions governing statutes of limitations and prejudgment interest. *See, e.g., Tom Rice*

(cont'd ...)

Shady Grove proves nothing, thus, by focusing on "[§] 901(b)'s *location* as a subsection of a procedural rule defining criteria for certification of class actions." Shady Grove Br. 35 (emphasis added). As noted above, this placement in the New York statute books reflects the provision's genesis in the substantive concerns raised at the time that New York adopted its current class-action regime in 1975. Given that New York had many laws authorizing penalties or minimum recoveries, the Legislature chose to enact a single provision specifying that such remedies were categorically unavailable in class actions "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class

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Buick-Pontiac GMC Truck, Inc. v. GMC, 551 F.3d 149, 154 n.4 (2d Cir. 2008) (applying N.Y. C.P.L.R. § 214(2)); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 485-86 (6th Cir. 2007) (applying N.Y. C.P.L.R. § 5001(b)); *Van Buskirk v. New York Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003) (applying N.Y. C.P.L.R. § 215(3)); *Plitman v. Leibowitz*, 990 F. Supp. 336, 337-41 (S.D.N.Y. 1998) (applying N.Y. C.P.L.R. §§ 207, 203(g), 213(2), and 213(8)) (Sotomayor, J.).

In any event, Shady Grove never made any such state-law argument at any stage of the proceedings below, or in its petition for certiorari to this Court. Indeed, this case would not even present a federal question if § 901(b) did not apply in federal court as a matter of *state* law. *But see* Pet. 6 (asserting that the decision below "raises compelling federal questions"). Shady Grove, accordingly, is in no position to ask this Court to rule in its favor as a matter of state law, and of course this Court is not in the business of deciding cases on the basis of state law. *See, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *The Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 532 U.S. 588, 596 (2001).

action." N.Y. C.P.L.R. § 901(b). The Legislature instead could have chosen to comb through the statute books and amend each and every one of the provisions that created a penalty or minimum measure of recovery—and to write itself a reminder to revisit this issue each and every time it decided to enact a penalty or minimum measure of recovery in the future. Instead, the Legislature simply chose to enact § 901(b) as a global default rule. The substantive limitation set forth in § 901(b) is no less an integral part of each substantive cause of action to which it applies than if it were embedded in each provision creating such a cause of action.

Shady Grove tries to avoid that point by arguing that "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." Shady Grove Br. 35. But that argument frames things precisely backwards. The key point here is that nothing in § 901(b) suggests that it applies to causes of action *other* than those created by New York law. The background presumption, of course, is that the substantive reach of a State's law is limited to matters over which the State has a legitimate sovereign interest. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930). Indeed, as Shady Grove itself points out, "New York has no power to determine the substantive rights of litigants under federal statutes, or statutes of other states." Shady Grove Br. 36. Nothing on the face of § 901(b) remotely suggests

that the provision is anything other than a *New York* limitation on *New York* causes of action.[7]

Undeterred, Shady Grove asserts that "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." Shady Grove Br. 36. In support of that assertion, Shady Grove cites three intermediate appellate cases. But none of those cases analyzed whether (much less held that) "section 901(b) is a procedural rule" for purposes of state law, *id.*—much less for purposes of deciding whether Rule 23 could override § 901(b) consistent with the Rules Enabling Act.

The first case cited by Shady Grove, *Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc.*, 799 N.Y.S.2d 795 (App. Div. 2005), involves an unusual federal statute, the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. That statute creates a federal cause of action that may be brought in state court "'if otherwise permitted by the laws or rules of the court of a State.'" *Rudgayzer*, 799 N.Y.S.2d at 150 (quoting 47 U.S.C. § 227(b)(3)). Precisely because the statute by its express terms "provide[s] for … private rights of action only if, and then only to the extent, permitted by state law," *Rudgayzer* applied § 901(b) to preclude a class action. *Id.* at

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[7] Indeed, the fact that § 901(b) is limited to state-law claims is implicit in the first Question Presented in this case (as framed by Shady Grove itself): "Can a state legislature properly prohibit the federal courts from using the class action device *for state law claims*?" Pet. i (emphasis added).

155. Contrary to Shady Grove's suggestion, *Rudgayzer* neither held nor hinted that § 901(b) was generally applicable to *all* federal causes of action litigated in New York state courts.

The other two New York cases on which Shady Grove relies provide, if possible, even less support for Shady Grove's position. *See Felder v. Foster*, 421 N.Y.S.2d 469 (App. Div. 1979), *app. dism'd*, 49 N.Y.2d 800 (1980); *Vickers v. Home Fed. Sav. & Loan Ass'n*, 390 N.Y.S.2d 747 (App. Div. 1977). In both cases, the state intermediate appellate court held that § 901(b) would *not* preclude a class action involving a federal claim from proceeding in state court. *Felder* concluded that punitive damages under 42 U.S.C. § 1983 "are not a 'penalty' or 'minimum measure of recovery created or imposed by statute,'" so that § 901(b) would not apply by its own terms. 421 N.Y.S.2d at 471 (quoting N.Y. C.P.L.R. § 901(b)). And *Vickers* concluded that the Truth in Lending Act, 15 U.S.C. § 1640, "'specifically authorized'" class actions to recover penalties, so that the general prohibition of § 901(b) again would not apply by its terms. 390 N.Y.S.2d at 748 (quoting N.Y. C.P.L.R. § 901(b)). Because § 901(b) would not preclude class certification in either case, neither court had any occasion to (and did not) decide whether § 901(b) was generally applicable to federal claims litigated in state court. *See Vickers*, 390 N.Y.S.2d at 748 ("We need not decide this question."); *see also* Vincent C. Alexander, *Practice Commentaries*, 7B McKinney's Consol. Laws of New York, C.P.L.R. § 901, C901:11 at 105 (2006) ("Courts have not resolved whether CPLR 901(b) can properly be invoked to block a class action in New York state court based on a federal statute that imposes a

penalty-like remedy and yet fails to expressly authorize a class action.").

At the end of the day, if the Rules Enabling Act means anything, it means that a Federal Rule of Civil Procedure cannot be interpreted to override a legislature's decision to limit liability in particular actions. Accordingly, this Court need not and should not interpret Rule 23 to override § 901(b), and thus should reject Shady Grove's argument under *Hanna* that Rule 23 governs this case.

B. The Rules of Decision Act, As Interpreted And Applied In *Erie*, Requires The Application Of § 901(b) In Federal Court.

Although Shady Grove devotes the bulk of its brief to arguing that Rule 23 governs this case under *Hanna*, it nonetheless advances a half-hearted alternative argument that "even if the Court must resort to *Erie* analysis, that analysis, too, forecloses application of the state-law rule." Shady Grove Br. 41; *see generally id.* at 41-57.[8] In particular, Shady Grove asserts that (1) § 901(b) is not "substantive" under *Erie*, *see id.* at 44-48; (2) applying § 901(b) in federal court would not serve the policies underlying

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[8] As an analytical matter, Shady Grove errs by characterizing *Hanna* as a doctrine distinct from *Erie*. *See, e.g.*, Shady Grove Br. 9 ("This case is controlled not by *Erie*, but by *Hanna v. Plumer*."); *id.* at 10 ("*Hanna* … provide[s] a sufficient basis for resolving this case without regard to the intricacies of *Erie*."); *id.* at 44 ("Even if *Erie* rather than *Hanna* provided the correct test ….."). *Hanna* is not a separate doctrine, but simply an application of the *Erie* doctrine to "matters covered by the Federal Rules of Civil Procedure." *Gasperini*, 518 U.S. at 427 n.7; *see also Walker*, 446 U.S. at 749.

Erie, *see id.* at 48-53, and (3) applying § 901(b) in federal court would be "unworkable and unwise," *id.* at 54; *see generally id.* at 54-57. As explained below, these alternative arguments have no more merit than Shady Grove's main argument.

1. Section 901(b) Is Substantive, Not Procedural, For *Erie* Purposes.

Shady Grove first argues that § 901(b) "is procedural, not substantive" under *Erie*. Shady Grove Br. 44. Shady Grove quickly concedes, as it must, that "the category of 'substantive' rules under *Erie* is *broader* than those that create 'substantive rights' under the Rules Enabling Act." Shady Grove Br. 44 (emphasis added; citing *Hanna*, 380 U.S. at 471-72). It follows *a fortiori* that, if this Court rejects Shady Grove's argument that § 901(b) is procedural for purposes of the Rules Enabling Act, then this Court should reject Shady Grove's argument that § 901(b) is procedural for *Erie* purposes.

And this Court should indeed reject that argument, for all of the reasons described in Part A.2 above. Like a statutory cap on damages, § 901(b) limits a defendant's potential liability in a particular lawsuit. If anything, the analogy to a statutory cap on damages is even stronger here than in *Gasperini*, where that analogy proved decisive. *See* 518 U.S. at 429. The New York statute at issue in *Gasperini*, N.Y. C.P.L.R. § 5501(c), governed the standard of judicial review of an award of money damages, and required the reviewing court to assess whether such an award "'deviates materially from what would be reasonable compensation.'" 518 U.S. at 423 n.4 (quoting § 5501(c)). *Gasperini* held that this standard of judicial review, which is more searching

than the standard generally applicable in federal court, nonetheless applied in federal court because "it was designed to provide an analogous control" to a cap on damages. *Id.* at 429; *see also id.* ("[N.Y. C.P.L.R.] § 5501(c) contains a procedural instruction, but the State's objective is manifestly substantive.").

If a heightened standard of judicial review of damages awards is sufficiently analogous to a statutory cap to qualify as substantive under *Erie*, it follows that a categorical ban on class actions for particular claims is also sufficiently analogous to a statutory cap to qualify as substantive under *Erie*. Heightened judicial review simply increases the likelihood that excessive damages will not be awarded in a particular case; a categorical ban on class actions for certain claims ensures that a defendant's maximum liability for those claims in a particular case is the amount that an individual (as opposed to a class) may recover. Shady Grove makes no real attempt to deal with *Gasperini*, other than to observe in a footnote that the heightened standard of judicial review at issue in that case "was deemed by the Court to be substantive" by analogy to a cap on damages. Shady Grove Br. 38 n.17.

Shady Grove thus misses the point by insisting that § 901(b) must be characterized as procedural for *Erie* purposes because it is not "aimed at regulating 'primary conduct'—that is, the way people behave out of court." Shady Grove Br. 46. This Court has never limited *Erie* to state laws that regulate "primary conduct," and indeed, has consistently applied state laws in federal court that do *not* regulate "primary conduct." *See, e.g.*, *Gasperini*, 518 U.S. at 429 (applying state statute governing judicial

review of awards of money damages); *Walker*, 446 U.S. at 749-51 (applying state statute governing when a lawsuit is commenced for statute of limitations purposes); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) (same); *Guaranty Trust*, 326 U.S. at 109-10 (applying state statute of limitations); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (applying state statute governing the burden of proving a defense in court).

At the end of the day, Shady Grove's insistence that "[t]he state rule here does not … define substantive rights," Shady Grove Br. 46, simply ignores the fact that § 901(b) effectively limits the penalty to which a defendant may be subjected in a particular lawsuit. Just as the Federal Government and many States have capped a defendant's liability for particular claims in class actions, *see infra* App. A, many States (like New York) have achieved that same goal by specifying that particular claims are categorically ineligible for class certification in the first place, *see infra* App. B. For *Erie* purposes, there is simply no basis for distinguishing between these two methods of achieving the same goal.

Indeed, if anything, the statutes listed in Appendix B only underscore that the New York statute at issue here is not some fluky anomaly, but simply one manifestation of a much broader recognition that class actions can present a particular risk of excessive liability and abuse. In deciding whether to create a particular cause of action (or a particular remedy, like a penalty or minimum measure of recovery), a State need not face a Hobson's choice between doing nothing or allowing recovery on a classwide basis. Rather, the State may

decide to create a particular cause of action (or a particular remedy) but specify that it may not be pursued on a classwide basis.

As Appendix B underscores, many States have made just such a decision that certain claims are categorically ineligible for class certification. For example, just this year, Texas created two innovative causes of action, but specified that they are categorically ineligible for class certification. *See* Tex. Bus. & Com. Code Ann. § 321.109 (effective Apr. 1, 2009) (for claims involving abuse of e-mail, "[a] court may not certify an action brought under this section as a class action"); Tex. Bus. & Com. Code Ann. § 502.002(f) (effective Apr. 1, 2009) (for claims involving misuse of credit card information, "[a] court may not certify an action brought under this section as a class action"). The Rules of Decision Act, as interpreted and applied in *Erie*, requires federal courts to enforce, not thwart, those substantive decisions.

Thus, as the Second Circuit recognized below, § 901(b) is "a substantive rule the eliminates statutory penalties under New York law as a remedy for class action plaintiffs." Pet. App. 11-12a. That straightforward point answers all three of the Questions Presented in Shady Grove's petition for certiorari. The answer to the first Question Presented—*i.e.*, "Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?," Pet. i—is yes, at least where (as here) the prohibition reflects a substantive state policy applicable in both state and federal court. The answer to the second Question Presented—*i.e.*, "Can state legislatures dictate

procedure in the federal courts?," Pet. i—is that statutes rendering certain state-law causes of action categorically ineligible for class certification, like § 901(b), represent a substantive state policy choice, not an attempt to "dictate procedure in the federal courts," *id.* And the answer to the third Question Presented—*i.e.*, "Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?," Pet. i—is that this is no proper concern of the federal courts. If States decide to limit liability under substantive state law by declaring certain causes of action categorically ineligible for class certification, that is their own business. Just as States are not constrained to create particular causes of action or remedies in the first place, they are not constrained to create causes of action or remedies eligible for pursuit on a classwide basis.

2. Applying § 901(b) In Federal Court Would Serve The Policies Underlying *Erie*.

Shady Grove next argues that applying § 901(b) in federal court would not address "*Erie*'s concerns about fairness and 'forum-shopping.'" Shady Grove Br. 48 (capitalization modified). While Shady Grove is correct to recognize that promoting fairness (or, put differently, "avoidance of inequitable administration of the laws") and preventing forum shopping are the touchstones for proper application of *Erie*, *see*, *e.g.*, *Gasperini*, 518 U.S. at 428; *Hanna*, 380 U.S. at 467-68 & n.9, Shady Grove is incorrect to suggest that these considerations warrant a refusal to apply § 901(b) in federal court.

(a) Fairness

With regard to fairness, Shady Grove does not have much to say. *See* Shady Grove Br. 48. Rather, Shady Grove simply asserts that "the fundamental unfairness that drove the Court's decision in *Erie*" was that the substantive law governing a particular claim should not be different in federal and state court. *Id.* That assertion, needless to say, begs the question whether § 901(b) is substantive or procedural in the first place, which is the question that considerations of fairness are supposed to inform. *See, e.g.*, *Gasperini*, 518 U.S. at 428; *Hanna*, 380 U.S. at 467-68 & n.9.

As this Court explained in *Hanna*, "[t]he *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court." 380 U.S. at 467. Were this Court to hold that § 901(b) does not apply in federal court, there is no question that "the character of result of a litigation materially [would] differ because the suit had been brought in a federal court," *id.*: this litigation could give rise to massive class-action penalty damages under state law in federal court, but not in state court. Thus, while plaintiffs have conceded that they could recover no more than $500 in state court, *see* Pet. App. 4a, they are seeking to recover more than $5 million in federal court, *see* JA7 (invoking federal jurisdiction under 28 U.S.C. § 1332(d)(2)(A)).

Allowing such "'substantial variations between state and federal money judgments,'" *Gasperini*, 518 U.S. at 430 (quoting *Hanna*, 380 U.S. at 467-68; brackets omitted), obviously would be unfair to the

defendant. Indeed, as described in Part A.2 above, the whole point of § 901(b) in the first place was to prevent the aggregation of individual penalty claims of relatively modest value into a mammoth class action that would threaten a defendant with vast liability. If *Erie* means anything, it means that a plaintiff should not be able to turn a $500 case into a $5 million case by simply walking across the street from state to federal court. *See*, *e.g.*, *Gasperini*, 518 U.S. at 431 ("*Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court."). There can be no serious question, then, that an interest in "avoidance of inequitable administration of the laws," *id.* at 428 (quoting *Hanna*, 380 U.S. at 468), strongly favors the application of § 901(b) in this case.

(b) Forum shopping

With respect to forum shopping, Shady Grove cannot and does not deny that its position would create obvious and powerful incentives for plaintiffs to file claims in federal court that are categorically ineligible for class certification in state court. As the Second Circuit put it, "[a] failure to apply CPLR 901(b) would clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the substantial advantages of class actions." Pet. App. 16a (internal quotation omitted). Shady Grove insists, however, that Congress blessed such forum shopping in CAFA. *See* Shady Grove Br. 49-53 & n.27. According to Shady Grove, "any judicial antipathy to litigants' forum preferences in these circumstances must yield to the

contrary policy expressed by Congress in enacting [CAFA]." *Id.* at 49.

That argument is baseless. CAFA amended the diversity statute to extend federal-court jurisdiction over state-law class actions. *See* 28 U.S.C. § 1332(d); S. Rep. No. 109-14 at p. 5 (Feb. 28, 2005) ("[CAFA] corrects a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevents most interstate class actions from being adjudicated in federal courts."). But CAFA did not alter the application of the *Erie* doctrine in cases within its reach: "the Act does not change the application of the *Erie* Doctrine, which requires federal courts to apply the substantive law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction." S. Rep. No. 109-14, at 49 (2005); *see also* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1528-30 (2008).

Thus, although Shady Grove accuses Allstate of seeking to "turn CAFA on its head," Shady Grove Br. 56, just the opposite is true. CAFA both assumes and presupposes that a plaintiff could bring a particular class action in state court, and does not remotely purport to authorize the federal courts to override state statutes rendering particular state-law claims categorically ineligible for class certification. To the contrary, and this is of course the irony in Shady Grove's position, CAFA was motivated by the same general concerns over abusive class actions that motivated such statutes. *See, e.g.*, *Bell v. Hershey Co.*, 557 F.3d 953, 957 (8th Cir. 2009); *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-08 (6th Cir. 2009).

Shady Grove thus misses the point by arguing that "CAFA … 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*." Shady Grove Br. 52 (emphasis added); *see also id.* at 53 (noting "[t]he congressional policy, reflected in CAFA, of encouraging federal jurisdiction over class actions because of the perceived superiority of *federal certification standards*") (emphasis added). The key point here, once again, is that a state statute rendering particular claims categorically ineligible for class certification in no way affects federal "certification standards." *Id.* With respect to claims that are eligible for class certification, federal courts can and must continue to apply those standards as always. But federal courts cannot apply those standards to causes of action that are categorically ineligible for class certification in the first place.

Thus, Shady Grove once again begs the question by asserting that *Erie* concerns "have never been aimed at forum choices that are driven by a preference for superior rules of federal practice and procedure." Shady Grove Br. 11; *see also id.* at 48-53. The question here is whether § 901(b) is properly classified as procedural or substantive for *Erie* purposes in the first place. Given that a refusal to apply § 901(b) in federal court would undeniably promote and reward forum shopping, and would transform a $500 case into a $5 million case, the provision is properly characterized as substantive for *Erie* purposes.

3. Applying § 901(b) In Federal Court Would Not Create Problems.

Shady Grove finally argues that applying § 901(b) in federal court would "generate a host of negative consequences." Shady Grove Br. 54. Again, that argument is incorrect.

First, Shady Grove asserts that applying § 901(b) in federal court would deprive the federal courts of their "inherent authority to govern their own procedures." Shady Grove Br. 54; *see also id.* at 11 (same). The short answer to that assertion is that the federal courts have no "inherent authority" to certify a class outside the framework of Rule 23. Because Rule 23 does not authorize the federal courts to certify a class to pursue a cause of action that is categorically ineligible for class certification, *see supra* Part A.1, the federal courts have no "inherent authority" to do the same thing. A federal court's inherent powers are not a license to override or ignore otherwise applicable law. *See, e.g.*, *Carlisle v. United States*, 517 U.S. 416, 426-28 (1996).

Shady Grove's *amicus* Public Justice goes even one step further by describing class actions as an "'*essential* characteristic' of the federal judicial system," akin to the right to trial by jury, that cannot be displaced by the operation of state law. Public Justice *Amicus* Br. 21 (emphasis added; quoting *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958)). That argument is far-fetched at best. As this Court has emphasized time and again, class actions represent "'an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (emphasis

added; quoting *Califano,* 442 U.S. at 700-01); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (noting the "deep-rooted historic tradition that everyone should have his own day in court"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (same); *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (same); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (same); *Phillips*, 472 U.S. at 808 (same); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (same). Representative litigation raises due process concerns of the first order, which is why federal courts must engage in a "rigorous analysis" of Rule 23's class certification criteria before certifying a class. *Falcon*, 457 U.S. at 161; *see also East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (emphasizing that "careful attention" to the criteria of Rule 23 is "indispensable"). Indeed, modern class action practice did not arrive in the federal courts until the substantial overhaul of Rule 23 in 1966. *See Amchem*, 521 U.S. at 614-18. Any suggestion that this practice is an "essential characteristic" of federal-court litigation akin to the right to trial by jury is thus fanciful.

Shady Grove insists, however, that the application of state statutes rendering certain causes of action categorically ineligible for class certification would impermissibly "deprive" federal courts of their ability to "allocate resources and manage matters before them." Shady Grove Br. 54. To the extent that Shady Grove thereby means to suggest that States could flood the federal courts with small claims that could not efficiently be managed on an individual basis, that suggestion is incorrect. Small claims arising under state law, after all, generally do not fall within federal jurisdiction. Indeed, Shady

Grove's suggestion is ironic, because (as this case shows) one way that small claims arising under state law can reach federal court is via a class action covered by CAFA. If a multiplicity of such small claims cannot be pursued as a class action in federal court, the upshot is that they will be *dismissed* from federal court, not pursued as individual claims in federal court. *See*, *e.g.*, Pet. App. 34a. Allowing a class action to proceed under these circumstances, in short, would *increase*, not *decrease*, the federal courts' workload.[9]

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[9] Shady Grove errs by asserting that States that have not affirmatively authorized class actions in their own courts (like Mississippi and Virginia) have thereby "eliminat[ed] class actions … across the board." Shady Grove Br. 54. By that assertion, Shady Grove apparently means to suggest that the upshot of Allstate's position is that all claims arising under Mississippi or Virginia law are categorically ineligible for class certification in federal as well as state court. That suggestion is incorrect: the *absence* of any authorization for class actions under state law is not the same thing as an affirmative *prohibition* on class actions under state law. *See, e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 241 F.R.D. 77, 83-84 (D. Me. 2007), *vacated on other grounds*, 522 F.3d 6 (1st Cir. 2008). Under the Rules of Decision Act, the absence of state law on a particular issue is not a state law that can be applied in federal court, so that *Erie* presents no barrier to the certification of claims arising under Mississippi and Virginia law in federal court. *See*, *e.g.*, *Ayers v. Thompson*, 358 F.3d 356, 375-76 (5th Cir. 2004); *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 777 (5th Cir. 2001); *see generally* 7A *Federal Practice & Procedure* § 1758 at 118 ("The *Hanna* decision resolves any doubt as to the availability of a class action in a federal court under Rule 23 in a diversity action, even in a state that does not recognize the procedure."). Indeed, although Mississippi does not authorize class actions in its own courts, it has enacted targeted statutes rendering certain state-

(cont'd ...)

Second, Shady Grove argues that the application of § 901(b) in federal court would require the application of "state class action *standards*" in federal court, and thereby "plunge [federal courts] heavily into the business of certifying classes under state procedural standards." Shady Grove Br. 12, 57 (emphasis added). As explained in Part A.2 above, that argument is a red herring. Rule 23 sets forth the federal class certification criteria, which apply to all claims eligible for class certification in federal court. *See*, *e.g.*, *Katrina*, 2009 WL 1707923, at *5, *recon. denied*, 2009 WL 2447846, at *3-5; *cf. Hanna*, 380 U.S. at 473-74. No one here is arguing that state class certification criteria apply in federal court.[10]

At the end of the day, Shady Grove has neither a legal argument nor a policy argument against applying § 901(b) in federal court. That provision has nothing to do with the procedural criteria for class certification (which, in federal court, are set

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law causes of action categorically ineligible for class certification, *see*, *e.g.*, Miss. Code § 41-67-28(3)(b); Miss. Code § 75-24-15(4), presumably recognizing that these causes of action otherwise might be subject to class certification in federal court.

[10] Shady Grove also errs by arguing that "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." Shady Grove Br. 55-56. As explained in the text, this case involves no "displace[ment]" of any Federal Rule; just as the criteria for class certification in federal court would continue to be governed by Rule 23, the criteria for joinder and intervention in federal court would continue to be governed by Federal Rules 18 through 22 and 24.

forth in Rule 23); rather, it represents a substantive policy choice to limit the liability that can be imposed in a particular lawsuit. The Rules of Decision Act requires federal courts to respect that substantive policy choice. Were the law otherwise, litigants could evade § 901(b) by filing in federal rather than state court. Nothing in federal law either requires or permits such evasion.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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APPENDIX A

Representative Federal and State Statutes Limiting the Remedy Available in a Class Action

Federal:

12 U.S.C. § 2605(f) (Real Estate Settlement Procedures Act) ("Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts: … In the case of a class action, an amount equal to the sum of—(A) any actual damages to each of the borrowers in the class as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of—(i) $500,000; or (ii) 1 percent of the net worth of the servicer.");

12 U.S.C. § 4010(a) (Expedited Fund Availability Act) ("[A]ny depository institution which fails to comply with any requirement imposed under this chapter … with respect to any person … is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure; (2) … (B) in the case of a class action, such amount as the court may allow, except that—(i) as to each

member of the class, no minimum recovery shall be applicable; and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved.");

12 U.S.C. § 4907(a) (Homeowners Protection Act) ("Any servicer, mortgagee, or mortgage insurer that violates a provision of this chapter shall be liable to each mortgagor to whom the violation relates for—… (2) … (B) in the case of a class action—(i) in which the liable party is subject to section 4909 of this title, such amount as the court may allow, except that the total recovery under this subparagraph in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of $500,000 or 1 percent of the net worth of the liable party, as determined by the court; and (ii) in which the liable party is not subject to section 4909 of this title, such amount as the court may allow, not to exceed $1,000 as to each member of the class, except that the total recovery under this subparagraph in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of $500,000 or 1 percent of the gross revenues of the liable party, as determined by the court.");

15 U.S.C. § 1640(a) (Truth in Lending Act) ("[A]ny creditor who fails to comply with any requirement imposed under this part … with respect to any person is liable to such person in an amount equal to sum of—(1) any actual damage sustained by such person as a result of the failure; … (2)(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor.");

15 U.S.C. § 1691e(b) (Equal Credit Opportunity Act) ("Any creditor, … who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of $500,000 or 1 per centum of the net worth of the creditor.");

15 U.S.C. § 1692k(a) (Fair Debt Collection Practices Act) ("[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained

by such person as a result of such failure; (2) … (B) in the case of a class action, … (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector.");

15 U.S.C. § 1693m(a)(2)(B) (Electronic Fund Transfer Act) ("[A]ny person who fails to comply with any provision of this subchapter with respect to any consumer, … is liable to such consumer in an amount equal to the sum of—(1) any actual damage sustained by such consumer as a result of such failure; (2) …(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.");

29 U.S.C. § 1854(c)(1) (Migrant and Seasonal Worker Protection Act) ("If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that … if such complaint is certified as a

class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.").

California:

Cal. Civ. Code § 1787.3(b) ("Any creditor … who fails to comply with any requirement imposed under this title [of the California Credit Denial Disclosure Act] shall be liable to the aggrieved applicant for punitive damages in an amount not greater than ten thousand dollars ($10,000), in addition to any actual damages provided in subdivision (a), except that in the case of a class action the total recovery under this subdivision shall not exceed the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the creditor.");

Cal. Civ. Code § 2988.5(a) ("[A]ny lessor who fails to comply with any requirement imposed under [the California Vehicle Leasing Act] for which no specific relief is provided with respect to any person shall be liable to such person in an amount equal to the sum of … in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the lessor.");

Cal. Civ. Code § 1812.31(c) ("[W]hoever [discriminates on the basis of sex in

providing credit] may be liable for punitive damages in the case of a class action in such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not exceed the lesser of one hundred thousand dollars ($100,000) or one percent (1%) of the net worth of the creditor.");

Cal. Health & Safety Code § 18036.5(c) ("With respect to a violation [of the California Manufactured Housing Act of 1980] which is not corrected …, the seller shall be liable to the buyer in an amount equal to the sum of … In the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same seller shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 per cent of the net worth of the seller.");

Cal. Fin. Code § 866.4 ("[A]ny depository institution which fails to comply with any requirement imposed pursuant to this article [of the California Banking Law] shall be liable to the aggrieved party in an amount equal to the sum of any actual damage sustained by the person as a result of the failure; and, … in the case of a class action, such amount as the court may allow, except that as to each member of the class no

minimum recovery shall be applicable, and the total recovery in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of five hundred thousand dollars ($500,000) or 1 percentum of the net worth of the depository institution.").

Colorado:

Colo. Rev. Stat. § 6-1-113(2) ("Except in a class action … any person who, in a private civil action, is found to have engaged in or caused another to engage in any deceptive trade practice listed in this article [of the Colorado Consumer Protection Act] shall be liable in an amount equal to the sum of: (a) The greater of: (I) The amount of actual damages sustained; or (II) Five hundred dollars; or (III) Three times the amount of actual damages sustained, if it is established by clear and convincing evidence that such person engaged in bad faith conduct; plus (b) In the case of any successful action to enforce said liability, the costs of the action together with reasonable attorney fees as determined by the court.");

Colo. Rev. Stat. § 12-14-113(1) ("[A]ny debt collector or collection agency who fails to comply with any provision of this article [of the Colorado Fair Debt Collection Practices Act] … with respect to a consumer is liable to such consumer in an amount equal to the sum of … (a) Any actual damage sustained by such consumer as a result of such failure;

(b)(I) In the case of any action by an individual, such additional damages as the court may allow, but not to exceed one thousand dollars; (II) In the case of a class action, such amount for each named plaintiff as could be recovered under subparagraph (I) of this paragraph (b) and such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed five hundred thousand dollars or one percent of the net worth of the debt collector or collection agency, whichever is the lesser.");

Colo. Rev. Stat. § 12-14.5-235(d) ("In a class action, … the minimum damages provided in … this section [of the Colorado Uniform Debt-Management Services Act] do not apply.").

Connecticut:

Conn. Gen. Stat. § 36a-683(a) ("[A]ny creditor who fails to comply with any requirement of [the Connecticut Truth-In-Lending Act] … with respect to any person is liable to that person in an amount equal to the sum of (1) any actual damage sustained by such person as a result of the failure; … (2)(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of five hundred

thousand dollars or one per cent of the net worth of the creditor.").

Hawaii:

Haw. Rev. Stat. § 480-13(c)(1) ("The minimum $1,000 recovery provided [for violation of Hawaii antitrust law] shall not apply in a class action or a de facto class action lawsuit.");

Haw. Rev. Stat. § 487A-1(b) ("The total class action penalty against any creditor, seller, or lessor shall not exceed $10,000 in any class action or series of class actions arising out of the use by a creditor, seller, or lessor of an agreement which fails to comply with [Hawaii law requiring plain language in consumer transactions].");

Haw. Rev. Stat. § 489-7.5(b)(1) ("The minimum $1,000 recovery provided [for violation of the Hawaii law against discrimination in public accommodations] shall not apply in a class action or a de facto class action lawsuit.").

Idaho:

Idaho Code § 48-608(1) ("[I]n the case of a class action [under the Idaho Consumer Protection Act], the class may bring an action for actual damages or a total for the class that may not exceed one thousand dollars ($1,000), whichever is the greater.");

Idaho Code § 63-4011(1)(b)(ii) ("In the case of a class action" under an Idaho tax statute, the defendant's liability is "not to exceed five hundred thousand dollars ($500,000).").

Indiana:

> Ind. Code § 9-23-2.5-10(c) ("The total recovery of damages, penalties, and fees in a class action civil suit brought [against a retail lessor failing to comply with Indiana disclosure requirements for motor vehicle leases] may not exceed one hundred thousand dollars ($100,000).");
>
> Ind. Code § 24-4.5-5-203 ("[A] creditor who … fails to disclose information to a person entitled to the information under [the loan and credit sales provisions of the Indiana Uniform Consumer Credit Code] is liable to that person in an amount equal to the sum of … (a) the following: … (2) in the case of a class action, an amount the court allows, except that as to each member of the class no minimum recovery is applicable, and the total recovery under this subdivision in any class action or series of class actions arising out of the same failure to comply by the same creditor may not be more than the lesser of: (i) five hundred thousand dollars ($500,000); or (ii) one percent (1%) of the net worth of the creditor.").

Kentucky:

> Ky. Rev. Stat. § 367.983(1)(c) ("A lessor who fails to comply with a requirement imposed [under Kentucky law regulating rental-purchase agreements] with respect to a consumer shall be liable to the consumer in an amount equal to the greater of: … (a) The actual damages sustained by the consumer as a result of the violation, plus the costs of

the action and reasonable attorneys' fees; … (c) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member, plus the costs of the action and reasonable attorneys' fees. The total recovery in any class action or series of class actions arising out of the same violation shall not be more than the lesser of five hundred thousand dollars ($500,000), plus the costs of the action and reasonable attorneys' fees or one percent (1%) of the net worth of the lessor.").

Maine:

Me. Rev. Stat. § 11054(1) ("[A]ny debt collector who fails to comply with any provisions of [the Maine Fair Debt Collection Practices Act] with respect to any person is liable to that person in an amount equal to the sum of: … A. Any actual damage sustained by that person as a result of such failure; … C. In the case of a class action: (1) Such amount for each named plaintiff as may be recovered under paragraph A; and (2) Such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1% of the net worth of the debt collector.").

Maryland:

Md. Com. Law § 12-707(c) ("[A]ny creditor who fails to comply with any requirement imposed under [the Maryland Equal Credit Opportunity Act] may be liable for punitive damages in the case of a class action in such

amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not exceed the lesser of $100,000 or 1 percent of the net worth of the creditor.").

Massachusetts:

Mass. Gen. Laws ch. 140D § 32(a) ("[A]ny creditor who fails to comply with any requirement imposed under [the Massachusetts Consumer Credit Cost Disclosure Act] … with respect to any person is liable to such person in an amount equal to the sum of: (1) Any actual damage sustained by such person as a result of the failure; (2) … (b) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable and the total recovery under this subclause in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of five hundred thousand dollars or one per centum of the net worth of the creditor.");

Mass. Gen. Laws ch. 167B § 20(a) ("[A]ny person who fails to comply with any provision of this chapter [of Massachusetts law governing electronic funds transfers] with respect to any consumer, … is liable to such consumer in an amount equal to the sum of: (1) any actual damage sustained by such consumer as a result of such failure; … (2) … (B) in the case of a class action, such amount

as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of five hundred thousand dollars or one per centum of the net worth of the defendant.").

Michigan:

Mich. Comp. Laws § 493.112(c) ("Recovery in class actions [under the Michigan statute governing credit card transactions and agreements] shall be limited to actual damages without attorneys' fees and the cost of bringing the action.").

Montana:

Mont. Code § 30-14-1112(4) ("In a class action brought under [the Montana Plain Language in Contracts Act], the seller, lessor, or lender is liable … for not more than $10,000 plus actual damages.").

New Jersey:

N.J. Stat § 34:11B-11 ("[I]n the case of a class action [under the New Jersey Family Leave Act] … the total amount of punitive damages shall not exceed $500,000.00 or 1% of the net worth of the defendant, whichever is less.");

N.J. Stat § 56:12-4 ("Class actions may be brought under the provisions of [the New Jersey Truth in Consumer Contract, Warranty, and Notice Act], but the amount of

punitive damages shall be limited to $10,000.00 against any one seller, lessor, insurer or creditor and the amount of attorney's fees may not exceed $10,000.00.").

New Mexico:

N.M. Stat. § 58-16-15(B) ("In the case of a class action [under the New Mexico Remote Financial Service Unit Act], no minimum recovery for each member of the class shall be applicable and the total recovery in any such action is limited to the actual damages sustained by the members of the class but shall not exceed the lesser of one hundred thousand dollars ($100,000) or one percent of the net worth of the defendant.").

Ohio:

Ohio Rev. Code § 1351.08(A) ("A lessor who fails to comply with the requirements of [Ohio law] with respect to a lease-purchase agreement is liable to the lessee in an amount equal to … [t]he greater of the following: (a) The actual damages sustained by the lessee as a result of the failure of the lessor; (b) … (ii) In the case of a class action, an amount the court determines to be appropriate except that as to each member of the class no minimum recovery is applicable. The total recovery under division (A)(2)(b)(ii) of this section in any class action or series of class actions arising out of the same failure to comply cannot be more than the lesser of five hundred thousand dollars or an amount equal to one per cent of the net worth of the lessor.").

Oklahoma:

> Okla. Stat. tit. 14A, § 5-203(1) ("[A]ny creditor who fails to comply with any requirement imposed by the [disclosure provisions of the Oklahoma Consumer Credit Code] with respect to any person is liable to that person in an amount equal to the sum of: (a) any actual damage sustained by that person as a result of the failure; (b) … (ii) in the case of a class action, an amount the court may allow, except that as to each member of the class no minimum recovery shall be applicable and the total recovery other than for actual damages in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of Five Hundred Thousand Dollars ($500,000.00) or one percent (1%) of the net worth of the creditor.");
>
> Okla. Stat. tit. 59, § 1955(A) ("A consumer damaged by a violation of [the Oklahoma Rental-Purchase Act] by a lessor is entitled to recover from the lessor: 1. Actual damages; 2. Twenty-five percent (25%) of an amount equal to the total amount of payments required to obtain ownership of the merchandise involved, except that the amount recovered under this section shall not be less than One Hundred Dollars ($100.00) nor more than One Thousand Dollars ($1,000.00), or in the case of a class action, an amount the court may allow, except that as to each member of the class no

minimum recovery may be applicable and the total recovery other than for actual damages in any class action or series of class actions arising out of the same failure to comply by the same lessor shall not be more than the lesser of Five Hundred Thousand Dollars ($500,000.00) or one percent (1%) of the net worth of the lessor.").

Pennsylvania:

42 Pa. Cons. Stat. § 6909(b) ("[I]n any class action brought for violation of [the Pennsylvania Rental-Purchase Agreement Act], the total recovery arising out of the same failure to comply shall not be more than the lesser of $500,000 or an amount equal to 1% of the net worth of the lessor.");

69 Pa. Stat. § 1902(d) ("The total class action penalty against any … financing agency or retail seller shall not exceed ten thousand dollars ($10,000) in any class action or series of class actions arising out of the use by a financing agency or retail seller of a form of confirmation which fails to comply with [certain of the buyer-confirmation provisions of the Pennsylvania Goods and Services Installment Sales Act].").

Rhode Island:

R.I. Gen. Laws § 19-14.9-13(2) ("Any debt collector who fails to comply with [the Rhode Island Fair Debt Collection Practices Act] with respect to a consumer … shall be civilly liable to such consumer in an amount equal to the sum of: (a) Any actual damages

sustained by such consumer as a result of such failure; … (c) In the case of a class action: (1) Such amount for each named plaintiff as could be recovered under paragraph (b) of this subsection; (2) Such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed five hundred thousand dollars ($500,000) or one percent of the net worth of the debt collector, whichever is the lesser.").

Tennessee:

Tenn. Code § 47-18-611(a)(1) ("A lessor who fails to comply with a requirement imposed in [the Tennessee Rental-Purchase Agreement Act] with respect to a consumer is liable to the consumer in an amount equal to the greater of: (A) The actual damages sustained by the customer as a result of the violation; or (B) … (ii) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member. The total recovery in any class action or series of class actions arising out of the same violation may not be more than the lesser of five hundred thousand dollars ($500,000) or one percent (1%) of the net worth of the lessor.");

Tenn. Code § 47-18-803 ("Any creditor or credit card issuer who discriminates against any individual in a manner prohibited by [the Tennessee Equal Consumer Credit Act] is liable to such individual in damages in an amount equal to the sum of: … [i]n the case

of a class action, not more than ten thousand dollars ($10,000).").

Texas:

Tex. Fin. Code § 349.403(d) ("A minimum recovery is not applicable to a class member [suing under Texas law governing loans and financed transactions]. The total recovery … in a class action or series of class actions arising out of the same violation of this subtitle by the same person may not exceed the lesser of $100,000 or five percent of the net worth of the person.").

Utah:

Utah Code § 13-11-19(2) ("A consumer who suffers loss as a result of a violation of this chapter [of the Utah Consumer Sales Practices Act] may recover, but not in a class action, actual damages or $2,000, whichever is greater …. A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter.").

Wyoming:

Wyo. Stat. § 40-19-119(a) ("A merchant who fails to comply with a requirement imposed in [the Wyoming Consumer Rental Purchase Agreement Act] shall be liable to the consumer damaged thereby in an amount equal to the greater of: (i) The actual damages sustained by the consumer as a result of the violation, plus the costs of the action and reasonable attorney's fees; … or

(iii) In the case of a class action, the amount the court determines to be appropriate with no minimum recovery as to each member, plus the costs of the action and reasonable attorney's fees. The total recovery in any class action or series of class actions arising out of the same violation shall not be more than the lesser of five hundred thousand dollars ($500,000.00) plus the costs of the action and reasonable attorney's fees or one percent (1%) of the net worth of the merchant plus the costs of the action and reasonable attorney's fees.").

APPENDIX B

Representative State Statutes Prohibiting Class Actions For Particular Claims

Arizona:

> Ariz. Rev. Stat. § 33-712(C) ("Any action to enforce the provisions of this section [requiring the acknowledgment of a mortgage's satisfaction or the recording of a deed of release], including any action to recover amounts due under this section, shall be brought and maintained in the individual names of, and shall be prosecuted by, persons entitled to recover under the terms thereof, and not in a representative capacity or otherwise.").

Arkansas:

> Ark. Code § 4-87-103 ("No class action may be filed under the provisions of [the Arkansas Equal Consumer Credit Act]").

Connecticut:

> Conn. Gen. Stat. § 36a-740 ("No class action shall be permitted pursuant to the provisions of this section [of the Connecticut Home Mortgage Disclosure Act].");
>
> Conn. Gen. Stat. § 42-155(c) ("No class action may be brought under this chapter [requiring the use of plain language in consumer contracts].").

Florida:

> Fla. Stat. § 282.5004(7) ("A class action may not be maintained in this state: (a) Against a

governmental agency for damages caused by the failure of its information technology products to be year 2000 compliant. (b) Against a business for damages caused by the failure of its information technology products to be year 2000 compliant, unless each member of the class has suffered direct economic damages in excess of $50,000.");

Fla. Stat. § 624.155(6) ("This section [of the Florida Insurance Code] shall not be construed to authorize a class action suit against an authorized insurer ….");

Fla. Stat. § 634.433(4) ("This section [of the Florida Service Warranty Association Act] shall not be construed to authorize a class action suit against a service warranty association or a civil action against the department, the office, their employees, or the Chief Financial Officer.");

Fla. Stat. § 634.3284(4) ("This section [of the Florida Home Warranty Association Act] shall not be construed to authorize a class action suit against a home warranty association or a civil action against the department or office or their employees or the Chief Financial Officer.");

Fla. Stat. § 642.0475(4) ("This section [of the Florida Legal Expense Insurance Act] shall not be construed to authorize a class action suit against a legal expense insurance corporation or a civil action against the department, commission, or office or their employees.");

Georgia:

Ga. Code § 7-3-29(e) ("A claim of violation of this chapter [of the Georgia Industrial Loan Act] against a duly licensed lender may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-4-5(b) ("Such liability [for failure to comply with certain federal loan provisions referenced in Georgia interest and usury law] may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-4-21 ("A claim of violation [of certain Georgia interest and usury provisions] on any loan secured by an interest in real estate may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 7-6-2 ("Any person denied a loan or credit solely on the basis of discrimination because of sex, race, religion, national origin, or marital status shall have a right to bring an action for damages in any court of competent jurisdiction in an individual, but not in a representative, capacity against the person, firm, or corporation violating this chapter.");

Ga. Code § 10-1-36.1(a) ("A claim of violation [of the Georgia Motor Vehicle Sales Finance Act] on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 10-1-255(c) ("A claim for damages for violation of this article [of the Georgia Below Cost Sales Act] may be asserted in an individual action only and may not be the subject of a class action.");

Ga. Code § 10-1-399(a) ("Any person who suffers injury or damages as a result of a violation of [the Georgia Fair Business Practices Act], … may bring an action individually, but not in a representative capacity.").

Hawaii:

Haw. Rev. Stat. § 477E-4(b) ("[A credit] applicant may proceed only in an individual capacity and not as a representative of a class [under the Hawaii Fair Credit Extension Act of 1975].").

Idaho:

Idaho Code § 28-45-201(1) ("If a creditor has violated any provision of [the Idaho Credit Code or related laws] the debtor has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this act a penalty in an amount determined by the court not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).").

Iowa:

Iowa Code § 537.5108(2) ("With respect to a consumer credit transaction, or a transaction which would have been a consumer credit

transaction if a finance charge was made or the obligation was payable in installments, if the court as a matter of law finds in an action other than a class action, that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction and award the consumer any actual damages the consumer sustained.");

Iowa Code § 537.5201(1) ("The consumer … has a cause of action to recover actual damages and in addition a right in an action other than a class action to recover from the person violating [certain provisions of the Iowa Consumer Credit Code] a penalty in an amount determined by the court, but not less than one hundred dollars nor more than one thousand dollars.");

Iowa Code § 537.5201(3) ("[T]he consumer may recover from the creditor or the person liable, in an action other than a class action, the excess charge or refund and a penalty in an amount determined by the court not less than one hundred dollars or more than one thousand dollars.");

Iowa Code § 537.5203(1) ("[A] creditor who, in violation of the provisions of the Truth in Lending Act …, fails to disclose information to a person entitled to the information under this chapter is liable to that person, in other than a class action, in an amount equal to the sum of the following: a. Twice the amount of the finance charge in connection with the

transaction, but the liability pursuant to this paragraph shall be not less than one hundred dollars or more than one thousand dollars.").

Kansas:

Kan. Stat. § 16a-5-201(1) ("[T]he consumer has a cause of action [under the Kansas Uniform Consumer Credit Code] to recover actual damages and in addition a right in an action other than a class action to recover from the person violating such provisions of this act a penalty in an amount determined by the court not less than $100 nor more than $1,000.");

Kan. Stat. § 50-634(b) ("A consumer who is aggrieved by a violation of [the Kansas Consumer Protection Act] may recover, but not in a class action, damages or a civil penalty …, whichever is greater.").

Louisiana:

La. Rev. Stat. § 51:1409(A) ("Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by [the Louisiana Unfair Trade Practices and Consumer Protection Law], may bring an action individually but not in a representative capacity to recover actual damages.");

La. Rev. Stat. § 10:9-625(c)(1) (for claims involving secured transactions, a plaintiff "may recover actual damages individually

but not in a representative capacity in a class action");

La. Rev. Stat. § 51:1562(A) ("Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of fraud, dishonesty or the violation of the provisions of [a Louisiana statute involving dance studio lessons] may bring an action individually but not in a representative capacity to recover actual damages.").

Michigan:

Mich. Comp. L. § 445.1611(1) ("Class actions shall not be permitted under [the Michigan Mortgage Lending Act].").

Minnesota:

Minn. Stat. § 47.59(14)(a) ("[T]he borrower or purchaser under a credit sale contract may recover from the financial institution actual damages and, in an action other than a class action, a penalty in an amount determined by the court but not less than $100 nor more than $1,000.");

Minn. Stat. § 325F.694(7)(e) ("No class action shall be brought under this section" regarding false or misleading e-mail messages);

Minn. Stat. § 325G.44 ("A person injured by a violation of section 325G.42 may recover actual damages in an action other than a class action.");

Minn. Stat. § 325M.07 ("No class action shall be brought under this chapter [of a state statute governing internet privacy].");

Minn. Stat. § 334.17 ("[N]o class action shall be maintained" for "recovery of interest or finance charges paid.").

Mississippi:

Miss. Code § 41-67-28(3)(b) ("Nothing in [the Mississippi Individual On-Site Wastewater Disposal System Law] shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.");

Miss. Code § 75-24-15(4) ("Nothing in this chapter [governing unfair methods of competition and unfair trade practices] shall be construed to permit any class action or suit, but every private action must be maintained in the name of and for the sole use and benefit of the individual person.").

Montana:

Mont. Code § 30-14-133(1) ("A consumer who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by [the Montana Unfair Trade Practices and Consumer Protection Act] may bring an individual but not a class action … to recover actual damages or $500, whichever is greater.").

New Hampshire:

N.H. Rev. Stat. § 3590-H:4 ("No person may being a class action under this chapter [of the state statute governing computer spyware].").

New Jersey:

N.J. Stat § 46:10B-29(2) ("[A]ny borrower who asserts any defense, claim or counterclaim pursuant to [a provision of the New Jersey Home Ownership Security Act] may do so only in an individual capacity and may not assert that defense, claim or counterclaim in a class action.").

North Carolina:

N.C. Gen. Stat. § 75C-5 ("Class actions are not available under [the North Carolina Motion Picture Fair Competition Act].").

Oklahoma:

Okla. Stat. tit. 15, § 1023(A) ("[A]ny action which is brought against a defendant [under the Oklahoma Y2K Protection Act] shall … [b]e brought only as an individual action and not as a class action.");

Okla. Stat. tit. 36, § 6595 ("No cause of action brought pursuant to [the Oklahoma Managed Health Care Reform and Accountability Act] shall be certified as a class action.").

Pennsylvania:

21 Penn. Stat. § 721-6(d)(3) ("Any action to enforce the provisions of [the Pennsylvania Mortgage Satisfaction Act], including any action to recover amounts due under this

section, shall be brought and maintained in the individual names and shall be prosecuted by persons entitled to recover under the terms hereof and not in a representative capacity.");

73 Penn. Stat. § 2208(d) ("Only an individual action may be brought under this act and no class action shall be permitted under [the Pennsylvania Plain Language Consumer Contract Act].").

South Carolina:

S.C. Code § 37-5-108(2) ("With respect to a consumer credit transaction, … the consumer has a cause of action to recover actual damages and, in an action other than a class action, a right to recover from the person violating this section a penalty in the amount determined by the court of not less than one hundred dollars nor more than one thousand dollars.");

S.C. Code § 37-5-202(1) ("If a creditor has violated any provisions of [the South Carolina Consumer Protection Code], the consumer has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this title a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.");

S.C. Code § 37-10-105(A) ("If a creditor violates [the loan provisions of the South Carolina Consumer Protection Code], the

debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter.");

S.C. Code § 37-23-50(A) ("If a lender, or party charged with a violation, when making a high-cost home loan violates the [high-cost home loan provisions of the South Carolina Consumer Protection Code], the borrower has a right in action, other than a class action, to recover from the lender or party charged with the violation actual damages and also a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars for each loan transaction. No borrower may bring a class action for a violation of this article.");

S.C. Code § 37-23-70(F) ("The making of a consumer home loan that violates this section is a violation of the provisions of [the South Carolina Consumer Protection Code] and the borrower has a right in action, other than a class action, to recover from the lender or party charged with the violation actual damages and also a penalty in an amount determined by the court of not less than one thousand five hundred dollars and

not more than seven thousand five hundred dollars for each transaction. No borrower may bring a class action for a violation of this article.");

S.C. Code § 39-5-140(a) ("Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by [the South Carolina Unfair Trade Practices Act] may bring an action individually, but not in a representative capacity, to recover actual damages.");

S.C. Code § 40-39-160(1) ("If a pawnbroker violates [the South Carolina Pawnbroker Act], the pledgor has a cause of action to recover from the pawnbroker actual damages and the right in an action other than a class action to recover from the person violating these provisions a penalty in an amount to be determined by the court of not less than one hundred nor more than one thousand dollars.").

Tennessee:

Tenn. Code § 47-18-109(a)(1) ("Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages."); *see*

also Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 308-10 (Tenn. 2008) (interpreting this provision to preclude class actions);

Tenn. Code § 56-47-108 ("An action maintained under this subsection [of the Tennessee Workers' Compensation Fraud Act] … may neither be certified as a class action nor be made part of a class action.");

Tenn. Code § 56-53-107(a)(2) ("An action maintained under [the Tennessee Insurance Act] may neither be certified as a class action nor be made part of a class action.").

Texas:

Tex. Bus. & Com. Code § 35.43(m) ("A court may not certify an action brought under this section [of Texas consumer law governing rebates] as a class action.");

Tex. Bus. & Com. Code § 321.109 ("A court may not certify an action brought under this section [of Texas law regulating e-mail] as a class action.");

Tex. Bus. & Com. Code § 502.002(f) ("A court may not certify an action brought under this section [of Texas law governing credit card receipts] as a class action.").

Utah:

Utah Code § 13-37-203(3) ("A person may not bring a class action under this chapter [of the Utah Notice of Intent to Sell Nonpublic Personal Information Act].");

Utah Code § 13-40-302(2) ("A person may not bring a class action under this chapter [of the Utah Spyware Control Act].");

Utah Code § 70C-7-106(6) ("No class action may be brought under this section [of the Utah Credit Code] except for injunctive or declaratory relief.").