No. 11-445

IN THE

Supreme Court of the United States

FARMERS INSURANCE COMPANY OF OREGON, et al.,
Petitioners,

v.

MARK STRAWN, on his own behalf and as representative of a class of similarly situated persons,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause prohibits a state court from relieving class members of their burden to prove a longstanding and fundamental element of liability—here, individual reliance in a fraud claim—thereby depriving the defendant of its right to assert an individualized defense to a class action.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents 300,000 di-

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioners and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

rect members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

This case presents the "important" and recurring question of "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). In this case, the Oregon Supreme Court dispensed with the traditional requirement in fraud cases that the plaintiff affirmatively prove reliance in order to ensure that the action could proceed on a class basis. Many of the Chamber's members have first-hand experience with state-court decisions that have reformulated procedural rules and doctrines of substantive liability in order to facilitate class actions, often forcing defendants to settle dubious claims.

The Chamber has regularly called on Congress to curb unfair and abusive state class-action procedures, and was an early and vocal supporter of the Class Action Fairness Act. It has also filed briefs on issues relating to class actions in this Court and other courts, including *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). The Chamber and its members thus have both a unique perspective on the question presented and a substantial interest in ensuring that state courts abide by the constitutional protections that constrain their ability to refashion state law in the context of class actions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with an Oregon statute requiring certain types of insurance coverage, petitioner Farmers Insurance Company of Oregon (Farmers) provided policies that covered all "reasonable and necessary" medical expenses arising from automobile accidents. In the case on review, plaintiff policyholders alleged that Farmers defrauded them by evaluating the reasonableness of submitted medical expenses and paying claims commensurate with the 80th percentile of statewide billing rates for a particular expense. (The State of Oregon had previously used a benchmark of the 75th percentile in evaluating medical charges for workers compensation claims, and, in 2003, the State legislature adopted the 75th percentile limit for medical expenses arising from automobile accidents.)

On appeal from a jury verdict in plaintiffs' favor, Farmers argued that, in light of the well-established Oregon law principle that a plaintiff claiming fraud must prove he detrimentally relied on a defendant's misrepresentation, the trial court erred when it found the element of reliance established through an inference of classwide reliance based on the insurance policies themselves, rather than evidence of class members' actual reliance. Farmers contended that, absent the class-action mechanism, individual class members—some of whom had not even read their policies—would have been unable to recover under Oregon law.

The Oregon Supreme Court rejected that argument, finding sufficient evidence that the class as a whole had relied on Farmers' representations. The court concluded that "[d]irect evidence of reliance by each of the individual class members is not always necessary" (Pet. App. 40a), and it further ruled that, unlike

in most fraud cases, class members who purchased motor vehicle insurance policies did "not need to read the policy to justifiably rely on its provisions" (*id.* at 43a). The court asserted that this case was distinguishable from its prior decision rejecting the argument that classwide reliance could be proven based on common misrepresentations. *Id.* at 36a-37a.

The decision of the Oregon Supreme Court is symptomatic of a troubling trend, in which state courts have deviated from traditional rules of procedure and principles of substantive law in order to facilitate class action treatment. Here, the Oregon Supreme Court departed from settled principles establishing the elements of the claim of fraud in order to homogenize a class of individuals whose reliance on the terms of the agreement would otherwise present issues of individualized proof precluding class certification. This decision reflects only one of the many ways in which state courts have reformulated substantive elements of common-law liability, stretched established state-court standing doctrine, and unexpectedly refashioned tolling rules, all in an effort to accommodate class actions. These decisions that prioritize class relief over the defendant's ability to present every available defense continue a significant and unwarranted expansion of liability for American businesses. The Court should grant certiorari to address the "important" and recurring question of "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

ARGUMENT

I. THE DUE PROCESS CLAUSE CONSTRAINS STATE COURTS IN DEVIATING FROM ESTABLISHED SUBSTANTIVE AND PROCEDURAL RULES TO ACCOMMODATE CLASS ACTIONS

Although "[s]tate courts are generally free to develop their own rules for protecting against … the piecemeal resolution of disputes," deviations from traditional bilateral litigation are proper only "in certain limited circumstances," and may not deprive parties of the opportunity to present a claim or defense in a way that would be "inconsistent with a federal right that is fundamental in character." *Richards* v. *Jefferson County*, 517 U.S. 793, 797 (1996) (internal quotation marks omitted); *see Philip Morris USA* v. *Williams*, 549 U.S. 346, 353-355 (2007). In particular, when a state court unaccountably departs from its traditional procedural rules or substantive principles of law in a manner that impairs one party's ability to present its case on a crucial element of a claim or defense, a serious due process concern arises. Such a deviation from "well-established common-law" principles "raises a presumption that [the innovation] violate[s] the Due Process Clause," because, "[a]s this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994); *see id.* at 430-431 ("When the absent [state-court] procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.").[2]

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[2] *See also Bouie* v. *City of Columbia*, 378 U.S. 347, 352-354 (1964) (state court's "unforeseeable" ruling that departed from

Thus, due process principles constrain state courts' ability to deviate from established substantive and procedural principles of law solely in order to facilitate class treatment. Of course, state courts are not prohibited from innovating in order to improve the efficiency of their judicial systems, but the core requirement of due process—that a litigant have the opportunity to make its case on the crucial elements of a claim or defense—cannot be compromised. "Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *see also* Epstein, *Class Actions, Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 490 ("[W]e should hold the substantive law constant regardless of whether the plaintiffs proceed by individual action, permissive joinder, or class action. Thus, the class format does not alter the terms of the basic cause of action; nor does it introduce some new defenses, or eliminate others, in the prosecution of the case…. The substantive outcomes should not be distorted by the choice of procedural vehicle.").[3]

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prior precedent violated due process); *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1877) (Due Process Clause ensures "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights").

[3] When properly used, class action lawsuits can be a valuable part of the legal system. In recent years, however, the class action system has become severely abused. As this Court has repeatedly observed, the interest in judicial economy and class members' interest in relief cannot trump due process. *See, e.g., Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997) (class actions may "achieve economies of time, effort, and expense," but those goals

Some state courts, recognizing this principle, have appropriately ensured that class actions do not submerge the right of litigants to make out their claims or defenses on an individualized basis. *See Garcia* v. *Medved Chevrolet, Inc.*, No. 09SC1080, 2011 WL 5120761, at *9 (Colo. Oct. 31, 2011) (en banc) (stressing that trial courts must "rigorously analyze" the nature of each case and all the evidence to determine whether individual evidence of reliance is necessary); *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) ("Due process requires that class actions not be used to diminish the substantive rights of any party to the litigation."); *Kia Motors America Corp.* v. *Butler*, 985 So. 2d 1133, 1138 (Fla. Ct. App. 2008) (same). Other courts, however, have not been so scrupulous, and have instead allowed legal doctrine to be bent to facilitate class actions when no such departure from traditional principles would be warranted in an individual case. *See* pp. 10-15, *infra*. The decision of the Oregon Supreme Court in this case reflects yet another state court's departure from traditional legal principles to facilitate a class action that would not have been approved had the case arisen in the context of traditional, bilateral litigation.[4]

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must be achieved "without sacrificing procedural fairness or bringing about other undesirable results" (internal quotation marks omitted)); *see also In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.").

[4] In federal courts, the Rules Enabling Act performs this key function of constraining departures from traditional legal principles solely to facilitate class actions. The Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*

II. STATE COURTS ARE INCREASINGLY VIOLATING DUE PROCESS BY BENDING PROCEDURAL AND SUBSTANTIVE RULES TO FACILITATE CLASS ACTIONS

The phenomenon of state courts departing from traditional legal principles to facilitate class actions is not unknown to either this Court or to Congress. It was this trend in state-court class-action practice that led Congress to enact the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d). *See Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) (Ginsburg, J., dissenting) (noting that, in CAFA, "Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions," described in the Senate Report as "'the "I never met a class action I didn't like" approach to class certification' that 'is prevalent in state courts in some localities'" (quoting S. Rep. No. 109-14, at 4 (2005))).[5]

Yet the passage of CAFA has not obviated the need for this Court's intervention to clarify the due process principles that constrain state-court treatment of class actions. Notwithstanding Congress's efforts to

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Stores, Inc. v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)); *see also Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) ("[N]o less than traditional joinder (of which it is a species)," class adjudication enables the prosecution of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

[5] As is relevant here, by enacting CAFA, Congress intended to remedy two significant problems with state-court adjudication of class actions: inconsistent application of state law, often at the expense of due process protections, S. Rep. No. 109-14, at 7, and forum selection that enabled plaintiffs to remain in state courts where judges were perceived to be particularly willing to certify class actions, *id.* at 3, 7.

eliminate barriers to removal, many class actions remain in state court. *See Philip Morris USA, Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers); *see also, e.g.*, *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010) (allowing plaintiffs to avoid federal jurisdiction under CAFA's "mass action" provision by filing five separate suits); *Tanoh* v. *Dow Chemical Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (same); *cf. Freeman* v. *Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008) (rejecting plaintiffs' attempts to avoid removal by dividing their claims into five separate actions, alleging injuries over distinct six-month time increments, and claiming losses less than CAFA's requisite amount in controversy).

Congress has thus recognized the danger that state courts will distort established procedural rules and substantive principles to facilitate class adjudication. As Justice Scalia has observed, the impermissible consequence of such deviations is that "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others through the procedural device of the class action." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. at 4 (Scalia, J.). State courts are thereby permitting class adjudication at the expense of due process.

The most salient example of this trend is in class actions that, like the case on review here, allege fraud. Under the guise of "common questions," courts certify for class adjudication cases that involve inherently individualized proof. Rather than holding plaintiffs to their burden of proof at trial, state courts simply adopt a classwide "presumption" of reliance, in abrogation of traditional substantive principles of state law.

For example, in *Scott* v. *American Tobacco Co.*, 949 So. 2d 1266 (La. Ct. App. 2007),[6] the plaintiffs claimed that the defendant tobacco companies engaged in fraudulent conduct when they intentionally exposed the plaintiffs to harmful toxins by obfuscating the dangerous and addictive qualities of cigarettes. As a remedy, plaintiffs requested that defendants establish and finance a smoking-cessation fund. To prevail, however, Louisiana law required plaintiffs to prove they relied on the defendants' misrepresentations regarding the effects of cigarette smoking. *Id.* at 1277. Although plaintiffs did not offer any individualized proof of reliance, the trial court permitted a jury verdict on classwide liability. The trial court adopted a classwide presumption of reliance because plaintiffs sought common, rather than individual, relief (in the form of a common fund). *Id.* at 1272. The Louisiana Court of Appeal affirmed, distinguishing its precedent—which held plaintiffs to the traditional standard of individualized proof of reliance—on the basis that the defendants concealed and omitted material information through an advertising campaign "designed to distort the entire body of public knowledge," rather than simply making individual affirmative misrepresentations. *Id.* (distinguishing *Banks* v. *New York Life Ins. Co.*, 737 So. 2d 1275, 1281-1282 (La. 1999)).

The court of appeals discarded its traditional mode of analyzing reliance in fraud claims, which focused on plaintiffs' actions in the face of the defendant's alleged misrepresentations. Instead, the court presumed reli-

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[6] The Court ultimately denied certiorari from a later iteration of this case, *Scott* v. *American Tobacco Co.*, 44 So. 3d 707 (La. 2010), *cert. denied sub nom. Philip Morris, USA* v. *Jackson*, 131 S. Ct. 3057 (2011), which presented some of the class-action issues discussed here.

ance based on the *defendant's conduct alone*. 949 So. 2d at 1277. The court accordingly deprived the defendants of the opportunity to present a full defense, such as evidence that the plaintiffs continued smoking for reasons other than defendants' alleged misrepresentations. *Id.* at 1277-1278. The presumption of reliance adopted by the court thus contravened the core due process principle that a party must be afforded "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (same).

Similarly, in *Alcoser* v. *Thomas*, plaintiff advanced a class claim that a landlord defrauded tenants by failing to comply with a lease provision concerning deductions from security deposits. In certifying the class and entering classwide judgment, the state trial court found it unnecessary to establish that each member of the class had relied on the lease provision in question. The court of appeal affirmed. *See* Nos. A124848, A125994, A126464, 2011 WL 537855, at *7 (Cal. Ct. App. Feb. 16, 2011) (unpublished), *cert. denied*, 80 U.S.L.W. 3134 (U.S. Oct. 31, 2011) (No. 11-308). Deviating from traditional California rules for fraud claims and class actions, the court concluded that such evidence of reliance was unnecessary because "[i]n our view, it is reasonable, if not common knowledge" to believe that tenants would so rely—thus dispensing with the need for any actual testimony about such reliance. *Id.* In effect, the appellate court adopted an irrebuttable presumption of reliance based on the nature of the contract, even if not all (or even any) class members had actually read the relevant lease provision,

much less relied on it to their detriment.[7] Similar state-court cases, dispensing with the requirement of individual evidence of reliance to facilitate class actions, abound. *See, e.g.*, *Fortis Ins. Co.* v. *Kahn*, 683 S.E.2d 4, 8-9 (Ga. Ct. App. 2009) (permitting classwide evidence of reliance so that individual issues did not "defeat class certification"); *Braun* v. *Wal-Mart Stores, Inc.*, 24 A.3d 875, 950-951 (Pa. Super. Ct. 2001) (per curiam) (denying defendant opportunity to fix liability as to each employee class member because individual examination is in "derogation of class certification").

In addition to reformulating the substantive elements of common-law causes of action, state courts have also distorted firmly established procedural rules in the name of class-based adjudication and in derogation of defendants' due process rights. A prime example is *Mitchell* v. *Residential Funding Corp.*, 334 S.W.3d 477 (Mo. Ct. App. 2010). Plaintiffs brought a class action against multiple mortgagees claiming the defendants had violated state law in collecting impermissible closing fees. The trial court permitted the named plaintiffs to represent a class comprised of mortgagors whose loans were held by three different financial institutions, even though the named plaintiffs had prior dealings with only one of the defendants. This ruling violated the cardinal principles of Missouri standing law that a plaintiff only has standing to sue if he was injured "by the conduct complained of in the

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[7] In *Alcoser*, the lease covenant at issue was identical to an obligation imposed on the landlord by state statute. Yet the court never addressed the question whether plaintiffs relied on the statute, the lease provision, or simply their unrelated prior experiences in fashioning their expectations. *See* 2011 WL 537855, at *8. Defendants were likewise unable to present evidence in this regard.

suit," *City of Wellston* v. *SBC Commc'ns, Inc.*, 203 S.W.3d 189, 193 (Mo. 2006) (en banc), and that a plaintiff "must assert his own legal rights and interests and cannot base a claim for relief on the legal rights of third parties," *Bannum, Inc.* v. *City of St. Louis*, 195 S.W.3d 541, 545 (Mo. Ct. App. 2006). The Missouri Court of Appeals affirmed, and the Missouri Supreme Court denied the defendants' applications for transfer.

Because two of the defendants in *Mitchell* had no relationship with the named plaintiffs, there was no party from whom they could take discovery or whom they could cross-examine at trial. Consequently, two of the three defendants could not engage in any fact-finding, and were unable to present any defense against a mortgagor with whom they had any dealings. Nonetheless, multi-million-dollar judgments—including for punitive damages—were entered against each of them.

In *Stevens* v. *Novartis Pharmaceuticals Corp.*, the Montana Supreme Court unprecedentedly expanded a tolling rule to deem as timely a classwide claim that was otherwise barred by the statute of limitations. As originally pleaded, the action was brought against plaintiff Stevens' doctors, who she claimed caused her injury by failing to warn her of the medical risks attendant to a drug produced by Novartis. 247 P.3d 244, 249 (Mont. 2010), *cert. denied*, 131 S. Ct. 2938 (2011). When class certification was denied in a federal lawsuit against Novartis concerning the same drug, Stevens sought to add Novartis as a defendant in her state-court action, even though the statute of limitations had run. Stevens claimed that the claim was timely under the federal rule providing that class actions toll the statute of limitations as to putative class members in subsequent actions. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538

(1974). The state court allowed the amendment, and the state-court action proceeded against Novartis.

On appeal, the Montana Supreme Court held as a matter of first impression that federal class action tolling should apply to render timely Stevens' claim against Novartis. The court acknowledged that its holding was unprecedented, 247 P.3d at 251, in light of the fact that the *American Pipe* rule had never been applied cross-jurisdictionally to save a Montana state-law claim from a time bar. Nonetheless, the court radically expanded the reach of the federal tolling rule, holding that the filing of a never-certified federal class action tolled the state statute of limitations as to any future plaintiffs. The court rejected Novartis' claim that this expansive application of the federal tolling rule constituted precisely the type of "unforeseeable" result prohibited by the Due Process Clause. *See Bouie* v. *City of Columbia*, 378 U.S. 347, 352-354 (1964). Specifically, the court rejected Novartis' claim that the tolling rule had no place in the context of cross-jurisdictional personal injury mass torts, because its application would deprive Novartis of the ability to preserve evidence and collect discovery from an entire class of as-yet unknown class members, for whom the statute would tolled indefinitely. 247 P.3d at 250-253.

The foregoing is merely a sampling of the cases in which state courts have altered their procedural and substantive rules to suit the needs of class certification. These cases have eluded this Court's review for a variety of reasons. The petition in this case should be granted so that this Court can clarify what already ought to be clear: that state courts are not free to reformulate well-established doctrine merely because it stands in the way of a class action.

III. This Court Should Grant Certiorari To Clarify The Federal Principles That Govern State-Court Class Actions

Federal courts have repeatedly recognized that abrogation of traditional rules to facilitate class actions can be unfair to litigants. *See, e.g.*, *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (criticizing substitution of the "class as a whole" for the individual members of a class as a "fantastic procedure" that would violate "due process"); *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-345 (4th Cir. 1998) (permitting class to proceed on "classwide" claim, rather than on individual claims, gives class representatives the "advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation"); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (criticizing certification of class action where "the claim of a unit of 2,990 persons" would be adjudicated instead of the "individual claims of 2,990 persons" because it would "inevitably restate[] the dimensions of tort liability"). Unfortunately, these federal cases do not provide sufficient guidance on the federal implications of state-court class certification decisions because they are most often resolved based on interpretation of Rule 23, without addressing underlying due process principles. *See, e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 n.10 (1974) (declining to reach constitutional issues).

This Court is rarely presented—as it is in this case—with the opportunity to review the important federal issues implicated by state-court class actions. In many states, there is no interlocutory review of class-certification determinations, as there is under

Federal Rule of Civil Procedure 23(f).[8] *See generally* Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027, 1028-1029 (2010). Accordingly, class-certification issues are rarely reviewed by state appellate courts, as a decision certifying a class often leads to settlement. Indeed, as in the federal system, class certification is, very often, the end of the matter, because defendants are unwilling to litigate against certified classes on the merits—regardless of how lacking in merit the claims may be—due to the potential exposure. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of 'in terrorem' settlements that class actions entail[.]"); *see also Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842, 848-849 (7th Cir. 2010) (Posner, J.), *vacated and remanded on other grounds*, 131 S. Ct. 3060 (2011) ("The risk of error becomes asymmetric when

[8] The threat of litigation is compounded in states that permit initial certification of a class even when there are serious concerns that the court will later decertify the class because individualized injury and damages questions likely predominate. *See, e.g.*, *Farmers Union Mut. Ins. Co.* v. *Robertson*, No. 09-619, 2010 WL 2006406, at *17 (Ark. May 20, 2010) (finding no "federal due process concerns" in state procedure "that allows class actions to be certified first when there are predominating threshold issues of liability common to the class, even though there may be individualized issues that come later requiring … decertification altogether").

the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy; in such a case the defendant will be under great pressure to settle even if the merits of the case are slight.").[9]

Cases like this one—state-court class actions that go forward only because of errors of law that would not occur in individual cases—proliferate, yet escape this Court's review. This Court should take this opportunity to rearticulate the fundamental due process principles requiring fair notice and fair play for all parties in state-court class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] Indeed, the coercive effect of a certified class in state-court litigation was one of the primary motivations for CAFA. Congress sought a remedy for "state court judges[' inclination] to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." S. Rep. No. 109-14, at 16; *see id.* ("Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits.").

Respectfully submitted.

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