No. 08-349

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL CHAMBER LITIGATION CENTER, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an *amicus* to inform courts about the implications of legal developments for its members.

Amicus curiae Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property/casualty insurance companies. PCI members are domiciled in and transact business in all 50 states and the District of Columbia and Puerto Rico. PCI member companies include all types of insurers, including national insurance companies, midsize regional writers, insurers doing business in a single state and specialty companies.

Amicus curiae Chamber of Commerce of the United States of America is the world's largest federation of business companies and associations, representing an underlying membership of more than three million business and professional

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of the intention to file this *amicus* brief.

organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

This case presents a question of great importance to *amici* regarding the scope of a court's constitutional obligation to inquire into variations in the state laws governing the claims of out-of-state class members before undertaking jurisdiction over such class members' claims by certifying a nationwide or multi-state class. Here, the trial court, in a decision affirmed by the Arkansas Supreme Court, declined to make any inquiry into variations in state law before certifying a nationwide class on state law claims regarding an alleged defect in the parking brakes in certain General Motors (GM) vehicles.

The Arkansas Supreme Court's decision on the important constitutional issues presented by this case conflicts with decisions by other courts around the country, including the United States Court of Appeals for the Eighth Circuit, which has held that the United States Constitution requires consideration of choice of law before certification of a nationwide class. *See In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005).

Amici's members have a substantial interest in this issue. Insurance companies and other businesses are subject to the varying laws of the states where they do business. Because they often transact business with millions of consumers throughout the country, they are frequently targets of multi-state class action litigation, in which variations in the state laws and regulations governing their conduct are (or should be) a determinative factor in whether a class action can be conducted without serious detriment to the defendant's constitutional rights to defend itself and

to have the claims against it litigated under the appropriate state law.

Nationwide or multi-state class action litigation imposes enormous expense and burden upon a defendant. Where a court (such as the Arkansas trial court in this case) proceeds to nationwide or multi-state class certification without making a determination as to the law or laws applicable to the class members' claims, the defendant is subjected to that expense and burden without appropriate assurance that class certification meets constitutional requirements under the Due Process Clause and the Full Faith and Credit Clause of the United States Constitution. The expense and burden are not removed or lessened if class certification is reversed on a later appeal. Moreover, certification of a nationwide or multi-state class may subject the defendant to overwhelming pressure to settle even claims of dubious merit. Thus, the Arkansas practice of postponing the determination as to the content of and differences in state law may, as a practical matter, escape review altogether if not reviewed now.

SUMMARY OF ARGUMENT

The Court should review and reverse the Arkansas Supreme Court's ruling that, in deciding to certify a nationwide class, a trial court need not take into account the effect of variations in state law. The Arkansas Supreme Court's decision raises important constitutional concerns under both the Due Process Clause and the Full Faith and Credit Clause. *See* U.S. Const. art. IV, § 1; U.S. Const. amend XIV, § 1.

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) (citation omitted). In certifying a nationwide class, a trial court assumes jurisdiction

over the claims of millions of persons whose transactions with the defendant have no connection to the forum state. Such an assumption of jurisdiction raises constitutional concerns as to the policy interests of the class members' home states in developing and deciding their own law and having that law applied to the claims of their own residents. It also raises constitutional concerns as to how to protect the fundamental fairness of the contemplated proceedings, from the standpoint of both absent class members and the defendant.

A judicial determination before class certification of what law applies to the claims of putative class members from different states and the effect of variations in state law on whether the requirements for class certification are met is a necessary means of ensuring fundamental fairness in the certification of nationwide or multi-state classes. Such an initial determination assures that defendants and out-of-state class members are not deprived of their due process right to have applied the law of a state with some significant contact or aggregation of contacts to the claims of the particular class members. Without such a determination, a proper analysis of the prerequisites for class certification is impossible. These prerequisites have a significant due process component because they function to safeguard the fairness of class action proceedings.

Thus, substantial due process concerns are raised by the procedure, now enshrined in Arkansas law, of certifying a nationwide or multi-state class, and thereby assuming jurisdiction over the claims of out-of-state class members, without any consideration of the laws of the class members' home jurisdictions. Due process requires, as part of the class certification analysis, at least a preliminary determination as to what state's laws will apply to given issues and some consideration of the potential difficulties of applying the various states' laws.

The Arkansas Supreme Court's decision also raises

substantial issues of full faith and credit. By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," the United States Constitution establishes "'barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.'" *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 572 n.16 (1996) (citation omitted). Certification of a multi-state or nationwide class necessarily implicates the Full Faith and Credit Clause, as that Clause requires that the class members' claims be governed by the law of a state having "a 'significant contact or significant aggregation of contacts'" to the transactions in question. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citation omitted).

The claims in this case regarding consumer practices and product warranties involve a traditional area of heightened state-by-state regulation and enforcement and implicate important state policy concerns. Likewise, the business of insurance has traditionally been regulated by each state within its own boundaries. In both contexts, the Constitution mandates that each state respect the laws, regulatory interests and policy concerns of other states. The Arkansas Supreme Court's ruling that Arkansas courts need not make any inquiry into variations in state law before certifying a nationwide class disregards that constitutional mandate and infringes the interests of co-equal sovereigns.

The Arkansas Supreme Court's ruling is a final determination of this issue and is ripe for review by this Court. This Court should grant certiorari to resolve the important federal constitutional questions raised by the Arkansas Supreme Court's decision.

I. DUE PROCESS REQUIRES A CHOICE OF LAW DETERMINATION BEFORE CERTIFICATION OF A NATIONWIDE OR MULTI-STATE CLASS ACTION

Litigants, including defendants and absent class members, "have a due process right to have their claims governed by the state law applicable to their dispute." *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998). Accordingly, "in nationwide class actions, choice of law constraints are constitutionally mandated." *Id.* In *Phillips Petroleum,* this Court made clear that due process forbids an arbitrary or unfair application of forum law, thus protecting a person's or entity's justifiable expectation that a particular state's law will apply to a transaction where the person has conformed his conduct to comply with the state's regulations. Due process also protects contractual rights and does not allow a state to affect the terms of contracts made and performed outside the state, absent a significant contact or aggregation of contacts with the transaction. *See Phillips Petroleum*, 472 U.S. at 821-22; *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 409-10 (1930) (Due Process Clause prohibited Texas from creating "rights and obligations" with respect to insurance contracts that were not made or performed in Texas). The requirements of due process are "not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations [on choice of law] because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum." *Phillips Petroleum*, 472 U.S. at 821.

Under this Court's precedents, due process and full faith and credit require a choice of law determination in a nationwide class action in which state law claims are asserted. The particular issue presented in this case is when that determination should or must occur. *Amici* submit that constitutional considerations require that the

determination be made early on in the process of deciding whether or not class certification should be granted.

Choice of law issues should be decided as part of the class certification analysis because if state laws vary (as they often do), the need to apply varying state laws will greatly impact the propriety of class certification. As the court stated in *In re Prempro Products Liability Litigation*, choice of law "must be tackled" at the outset of the class certification determination because "it pervades every element of [Rule] 23." 230 F.R.D. 555, 561 (E.D. Ark. 2005).[2] Indeed, variations in state law affect not only the requirement of that common issues predominate, but also typicality, adequacy of representation and superiority.

The requirements for class certification are more than mere procedural rules concerned with efficiency and manageability. Rather, these requirements are designed to ensure that a class litigation will be fair both to absent class members and to the defendant. Accordingly, the class action requirements implicate the fundamental fairness requirements of due process. A procedure (such as that adopted by the Arkansas courts in this case) that short-circuits the proper analysis of those requirements raises issues of constitutional concern to this Court.

Thus, because of the importance of the choice-of-law analysis in determining whether class action requirements are met, the due process concerns at stake in this case are twofold. They include not only the due process concerns directly related to choice of law, but also the need to ensure that the class action determination itself and class proceedings, if a class trial is conducted, meet the due process requirements of fundamental fairness.

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[2] Arkansas Rule of Civil Procedure 23 is similar to Federal Rule of Civil Procedure 23. *See* App. 4a-5a.

In particular, the "vital prescription" that common issues predominate assures that a proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "Class cohesion" legitimizes representative litigation by ensuring that the class members' claims can be resolved fairly on a mass basis. It ensures that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13; *see also Amchem*, 521 U.S. at 621 (the "dominant concern" under Federal Rule of Civil Procedure 23 is "whether a proposed class has sufficient unity so that absent members can *fairly* be bound by decisions of class representatives") (emphasis added).

The requirements of class cohesion and predominance also ensure fundamental fairness for class action defendants, as well as absent class members. As one court observed:

> [S]ections 23(a)(2) and (a)(3) are calculated to ensure that regardless of whether the class representatives and all class members win and the opposing party loses, or alternatively if the class representatives and class members lose and the opposing party wins, all who are affected on both sides will have had a fair opportunity to have their claims or defenses heard and determined on the merits.
>
> While it is relatively simple to evaluate the merits of a dispute involving one plaintiff and one defendant, fairness to both sides in a class action is a far greater challenge and places considerable responsibility on the Court. If a class representative with a weak case loses and individual class members with strong cases are bound by the negative outcome, an injustice will have occurred.

> Similarly, if a winning class representative's claim and the class member claims are dissimilar, it may be unjust for the opposing party (usually the Defendant) to be responsible for the claims of class members. The Court's responsibility is to make sure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives.

Cooper v. Southern Co., 205 F.R.D. 596, 608-09 (N.D. Ga. 2001), *aff'd*, 390 F.3d 695 (11th Cir. 2004), *overruled in part on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006).

When the predominance inquiry fails to identify at the outset the legal issues presented by the claims of the putative class representatives and putative class members, it is not possible to make a proper and accurate finding of predominance. *See, e.g., Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) ("'[A] court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (citation omitted)). As the Texas Supreme Court has explained,

> [i]n the context of a nationwide class action, the determination of the applicable substantive law is of paramount importance. If the court does not know which states' laws must be applied, it cannot determine whether variations in the applicable laws would defeat predominance . . . .

Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 672 (Tex. 2004); *see also Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000) ("[t]he district court is required to know which law will apply before it makes its predominance determination"). As these courts have recognized, the determination as to

whether common issues predominate over individual issues involves a weighing, and unless the issues are identified and considered, the weighing is *ipso facto* faulty.

Moreover, a trial court may not escape the necessity of a choice of law determination by purporting to identify "predominating" common factual issues, as the Arkansas trial court did here. What facts are relevant is defined by the applicable law, and where the applicable law is different, the relevant facts may also be different. Thus, the identification of common factual issues for purposes of determining whether common issues predominate and whether class action proceedings will allow a fair resolution of the class members' claims depends upon choice of law.

The choice of law inquiry in a nationwide or multi-state class action also is necessary to ensure that the due process concerns embodied in the requirements of adequate representation, typicality, and superiority are met. *See Lapray*, 135 S.W.3d at 672 ("an extensive choice of law analysis" is required for "predominance, superiority, cohesiveness, and even manageability"). In a class action, "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J. concurring in part and dissenting in part); *see also Phillips Petroleum*, 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.").

The inquiry into whether the named plaintiff's claims are typical of the class and whether the named plaintiff can adequately represent the proposed class is also significantly affected by, and requires prior resolution of, the choice of law issues and the issue of what states' laws are to be applied. Without consideration of the laws that apply and the

extent of variation among them, it cannot be determined whether the claims of absent class members from other states "are fairly encompassed within the named plaintiff's claim." *Falcon*, 457 U.S. at 160. If the legal rights at issue vary from state to state, plainly the interests of the absent class members are *not* fairly encompassed by the named plaintiff's claim, and the absent class members are not adequately represented.[3]

The importance of the inquiry into divergent state laws as relevant to class certification and the elements of Rule 23 has been repeatedly recognized by and emphasized by the courts. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 & nn. 96-97 (D.C. Cir. 1986) (requiring a "considered predomination determination" by the trial court, including "'extensive analysis' of state law variances") (quoting *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986)); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) ("Scrutinizing [the defendant's alleged practices] under the provisions of fifty jurisdictions complicates matters exponentially."); *id.* at 1025 ("[T]he problems with trying the individualized elements of the plaintiff's claims . . . are compounded by the necessity of referencing fifty sets of credit card and consumer protection laws."); *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (even where state laws differ only in nuance, nuance can be significant, leaving district court with "an impossible task of instructing a jury on the relevant law"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297, 1300 (7th Cir. 1995) (decertifying nationwide class; rejecting district court's proposal "to have a jury determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world"); *Central Wesleyan College v.*

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[3] A defendant is of course "obviously and immediately injured if [a] class-action judgment against it bec[omes] final without binding the plaintiff class." *Phillips Petroleum*, 472 U.S. at 805.

W.R. Grace & Co., 6 F.3d 177, 189 (4th Cir. 1993) (use of subclasses to allow juries to consider different state laws will still "pose management difficulties and reduce the judicial efficiency sought to be achieved through certification"). Although these cases were decided under Federal Rule of Civil Procedure 23, the close relationship of Rule 23's requirements to constitutional due process concerns makes the holdings of these cases relevant to the issue here, namely, the necessity of a choice of law analysis to ensure that due process is met in the class certification process.

The instant case illustrates how far the class certification inquiry can stray from the underlying guarantees of fairness provided by the requirements of the class action rule when issues of varying state law are excluded from the predominance determination. The Arkansas Supreme Court identified two purportedly common factual issues raised by plaintiffs' claims, defect and concealment, that the court deemed predominant. *See* Pet. at 21. As shown in the Petition, these concepts are legally defined. *See id.* at 22-31. Thus, for example, antecedent to any factual determination of whether a defect existed in GM parking brakes for purposes of warranty law, the legal definition of "defect" would have to be determined. Where, as here, a nationwide class is sought, the legal definition of defect would be a matter of potentially varying state law, and indeed, as shown in the Petition, state laws vary significantly on the issue of what constitutes a defect as well as on the issue of concealment. *See* Pet. at 21-22; *see also, e.g., Chin*, 182 F.R.D. 448, 455 (rejecting argument that whether product was defective presented a class-wide factual issue: "[f]irst, whether or not there is a defect would have to be decided according to the laws of each of the 52 applicable jurisdictions").[4]

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[4] In analyzing similar due process concerns in the context of collateral estoppel, the Ohio Supreme Court refused to give

The Arkansas Supreme Court, like the Arkansas trial court, simply ignored the legal issues inherent in what it deemed the purely factual questions of defect and concealment. The court adhered to its view that a trial court need not consider variations in state law before certifying a nationwide class because even if "'reference'" to the laws of other states turns out to be necessary, it "'does not seem a particularly daunting or unmanageable task.'" App. 10a (citation omitted). The Arkansas Supreme Court also reiterated its rejection of any requirement that Arkansas trial courts conduct a "rigorous" analysis of the requirements for class certification, explaining that a class can always be decertified. App. 13a.

By postponing indefinitely any obligation by the trial court to assess variations in state law and their effect on the propriety of class certification, the Arkansas Supreme Court has established a process that is unfair and unconstitutional. That process will result in substantial injury to defendants that are subjected to the burden and expense of defending massive class litigations that as a matter of due process exceed the proper scope of the certifying court's jurisdiction and authority. This Court should grant review to correct that constitutional error.

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collateral estoppel effect to a Florida jury's finding that the defendant's lawn mower was defectively designed. *See Goodson v. McDonough Power Equip.*, 443 N.E.2d 978, 981-88 (Ohio 1983). The Ohio court not only noted that Florida law governing the issue was different from Ohio law, *id.* at 988, but stressed the policy concerns raised by allowing a single jury to "establish safety standards for a given product for the entire country." *Id.* at 987. The court also described the complexity of decision-making by courts and juries on such issues, *see id.* at 986, and the danger that "'the first litigated determination of an issue may be wrong.'" *Id.* at 986 n.14 (citation omitted).

II. THE FULL FAITH AND CREDIT CLAUSE REQUIRES A TRIAL COURT TO CONDUCT AN ANALYSIS OF THE APPLICABLE STATE LAWS BEFORE CERTIFYING A NATIONWIDE CLASS

In certifying a nationwide class, a court assumes jurisdiction over the claims of millions of persons whose transactions have no connection to the forum state. If such a class is certified without considering choice of law, the consequent displacement of the diverse laws of the class members' home states and infringement on the interests of those states in regulating transactions within their borders and in developing and deciding their own law raises constitutional concerns of full faith and credit.

By requiring that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," U.S. Const. art. IV, § 1, the United States Constitution establishes "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *accord BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 & n.16 (1996). Pursuant to the Full Faith and Credit Clause, a State cannot "'legislate except with reference to its own jurisdiction,'" and each State's power "is also constrained by the need to respect the interests of other States." *BMW*, 517 U.S. at 571 (citations omitted).

This means that certifying a nationwide class has an inevitable constitutional dimension under the Full Faith and Credit Clause, which requires that each class member's claims be governed by the law of a state having "a 'significant contact or significant aggregation of contacts'" to the class member's transaction, with an individualized choice-of-law analysis of each class member's claim. *Phillips Petroleum*, 472 U.S. at 821-22.

Relying on these constitutional principles, the Eighth Circuit reversed class certification in a decision that is directly in conflict with the decision of the Arkansas Supreme Court in this case. *See In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1118-21 (8th Cir. 2005). In *St. Jude*, a putative nationwide products liability class action brought against a manufacturer of prosthetic heart valves, the Eighth Circuit held that the "district court's class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law." *Id.* at 1120. The Eighth Circuit opined that "'[s]tate consumer protection laws vary considerably, and courts must respect these differences.'" *Id.* (alteration in original; citation omitted).

The assumption by a single state court of jurisdiction over claims of absent class members across the country without due consideration of varying state laws threatens policy concerns that go to the heart of our federal system. The varying state laws on consumer rights and product liability reflect each state's judgment as to the social and economic needs of its citizens. *Cf. BMW*, 517 U.S. at 568-70 ("[T]he States need not, and in fact do not, provide [consumer] protection in a uniform manner. . . . The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 states."). The right of each state to make its own policy judgments and to develop its own laws regarding such matters is a crucial and beneficial component of the federal system established under the Constitution. "Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and may not be overridden in a quest to clear the queue in court." *In re Bridgestone/Firestone, Inc. Tire Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *see id.* at 1021 (reversing certification of nationwide classes).

Nationwide class actions tend to steamroller such differences in state policies and laws and to replace "experimentation" by the states with a decision by a single jury, to the detriment of the federal system and the ability of the states to develop their law and make their own policy decisions. As Justice Brandeis stated:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In assuming jurisdiction over the claims of absent class members nationwide, a state court should take care, in the words of Justice Ginsburg, not to "'imped[e] the States' ability to serve as laboratories for testing solutions to novel legal problems.'" *Smith v. Robbins*, 528 U.S. 259, 275-76 (2000) (alteration in original) (quoting *Arizona v. Evans*, 514 U.S. 1, 9 (1995) (Ginsburg, J., dissenting)).

Full faith and credit requires that a court "fully and fairly consider" whether it has jurisdiction over the parties and matters before it. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 (1982). Principles of comity among the states and respect for co-equal sovereigns counsel some measure of restraint in undertaking to apply and decide the laws of other states. In the context of a nationwide or multi-state class certification, that obligation not only affects the interests of other states in deciding and developing their own laws, but also is essential to assuring that the resulting

judgment will be accorded full faith and credit – a matter in which, as this Court has recognized, a defendant has a substantial and cognizable interest. *See Phillips Petroleum*, 472 U.S. at 805.

A full and fair consideration of whether to certify a multi-state or nationwide class cannot be made without consideration of choice of law, varying state laws and policies and, *amici* submit, the interest of other states in deciding and applying their own laws to the claims at issue. Such state interests should be taken into consideration in determining whether a proposed nationwide or multi-state class action is superior to other available methods for resolving the controversy.

As this Court has recognized, consumer protection issues (as presented in this case) are a fundamental area of state concern. *See BMW*, 517 U.S. at 572, 585. Such issues and the relevant state regulatory variations are also of paramount importance to manufacturers and other businesses. Likewise, issues of insurance, which are of primary importance to the members of NAMIC and PCI, are issues of particular concern to the states. Indeed, the constitutional concerns embodied in the Full Faith and Credit Clause are of heightened importance in the area of insurance. Congress has committed insurance regulation to the states. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. As this Court explained in *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), "[o]ne of the major arguments" for leaving regulation of insurance "to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. That purpose, said the Court, "would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union." *Id.*

By certifying a nationwide class action without regard for varying state laws, a state court arrogates to itself an undue authority over issues affecting residents of other states. This Court should grant review to ensure that the regulatory interests of other states and the interests of the federal system are part of the class certification calculus.

III. THE ARKANSAS SUPREME COURT'S RULING IS FINAL AND MERITS IMMEDIATE REVIEW

The Arkansas Supreme Court held that Arkansas courts need not consider variations in state law before assuming jurisdiction over the claims of millions of absent parties residing and contracting in other states by certifying a class including them as class members. It ruled that the Full Faith and Credit and Due Process Clauses of the United States Constitution do not require a choice of law determination before class certification.

The judgment here is not subject to further review in the state courts and is final within the meaning of 28 U.S.C. § 1257(a). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-81 (1975); *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984). Like the petitioner in *Cox Broadcasting*, GM "may prevail at trial on nonfederal grounds," but the massive trial of the claims of GM vehicle owners nationwide should not take place as now contemplated. *See Cox Broadcasting*, 420 U.S. at 485; *see also id.* at 477-78 ("[I]mmediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'") (citation omitted).

The important federal constitutional issues raised by this case will almost certainly escape review unless this Court reviews them now. A case such as this is very unlikely to reach this Court after a nationwide class trial, because settlement pressure is likely to be irresistible. *See Bridgestone/Firestone*,

288 F.3d at 1015-16 ("Aggregating millions of claims . . . makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable . . . .").[5] Moreover, even if *this* case were tried and appealed and if GM does not prevail on nonfederal grounds, a later correction of the class certification decision in this case will not undo the substantial harm to GM that would be caused by the expense and burden of the enormous class litigation now contemplated by the class certification order.

Also relevant in this Court's pragmatic approach to finality is that the issue presented is not one of "peculiarly local concern" to Arkansas. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948). Rather, the issue here, whether Arkansas may constitutionally provide a forum for the claims of residents of *other states* without first considering what law will apply to their claims, is an issue as to which concerns of comity and federalism support granting, not deferring, review. *See Cox*, 420 U.S. at 505-06 (Rehnquist J., dissenting) ("comity and federalism are significant elements of § 1257 finality"). Ordinarily, postponement of this Court's review of state decisions supports "smooth working of our federal system" by minimizing conflicts between state and federal government. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Here, in contrast, postponement will interfere such smooth working by allowing Arkansas to ignore variations in state law and, thereby, to displace the laws of interested States.

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[5] Indeed, the coercive nature of class certification decisions is demonstrated by the fact that the Arkansas Supreme Court appears *never* to have rendered a decision addressing the propriety of class certification in an appeal of a judgment after a class action trial, despite the fact that Arkansas has become a magnet for class actions and that there are several nationwide or multi-state class actions now pending in Arkansas courts.

The decision to ignore state law variation infringes not only the interests of the defendant and the unnamed class members, but also the quasi-sovereign regulatory interests of the states which actually have contacts with the transactions involved in the suit. So, for example, the diverse definitions of "defect" adopted by those states will be displaced by some uniform definition to be adopted by the Arkansas courts for use in the class trial. Displacement of the law of all states interested in a particular transaction infringes those states' regulatory interests, and denies Full Faith and Credit to the laws of the interested states. *See, e.g., BMW,* 517 U.S. at 571-72. Leaving a decision which inevitably must have this effect unreviewed "might seriously erode federal policy," to wit, the Full Faith and Credit Clause policy of preventing one state, lacking any significant interests in a transaction, from displacing the laws of other states that do have such interests. *See Cox Broadcasting,* 420 U.S. at 483. Even if GM ultimately prevailed under whatever definition Arkansas adopts, that would not cure the affront to the interested States whose laws were displaced by that definition. And the risk that GM would settle the case means that the interests of those States might be sacrificed absent immediate review.

This is an issue that "sound judicial administration requires . . . be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation." *Id.* at 506; *cf. Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977) (Delaware Supreme Court's rejection of jurisdictional challenge was final "consistent with the [Court's] pragmatic approach" to finality).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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