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 OF *AMICI CURIAE* THE PARTNERSHIP FOR NEW YORK CITY, INC., THE BUSINESS COUNCIL OF NEW YORK STATE, INC., NYTORTREFORMNOW.ORG, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules & Statutes **Page(s)**

Other Authorities **Page(s)**

INTEREST OF *AMICI CURIAE*[1]

Amici include New York and national nonprofit and business organizations and trade associations.

Amicus curiae The Partnership for New York City, Inc. ("Partnership"), is a nonprofit organization comprised of business leaders from the city's top corporate, investment, and entrepreneurial firms. The Partnership works closely with the government, labor, and the nonprofit sector to maintain New York City's position as a global center of commerce, culture and innovation. The Partnership focuses on research, policy formulation, and issue advocacy at the city, state and federal levels and submits *amicus curiae* briefs in federal and state courts on issues of concern to the city and its economic environment.

Amicus curiae The Business Council of New York State, Inc., is a leading business organization in New York State, representing the interests of large and small businesses throughout the State. Its primary function is to serve as an advocate for employers in the political and policy-making arena, working for a healthier business climate, economic growth, and jobs. One of its predecessor organizations, the Empire State Chamber of Commerce, was involved in the legislative process that resulted in the enactment of the statutory provision at issue in this case, section 901(b) of the New York Civil Practice Law and Rules ("C.P.L.R.").

Amicus curiae NYTortReformNow.org is a broad based coalition of New York business leaders, professionals, local government leaders and

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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.

consumers who are committed to bringing about meaningful reform to New York State's tort laws and legal system.

Amicus curiae the American Insurance Association ("AIA") is a national trade association representing major property and casualty insurance companies that collectively underwrote more than $124 billion in direct property and casualty premiums in 2007. AIA members, domiciled in most states (including New York) and transacting business nationwide, range in size from small and regional insurers to the largest insurers with global operations.

Amicus curiae the Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled 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 the Chamber of Commerce of the United Sates 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 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, including an *amicus* brief in *Sperry v. Crompton Corp.* 863 N.E.2d 1012 (N.Y. 2007), in which the New York Court of Appeals addressed N.Y. C.P.L.R. § 901(b), the statute at issue in this case.

This case presents a question of great importance

regarding the power of New York and other States to control the extent of statutorily-created civil penalties by barring their recovery through class action proceedings. The issue of the States' power to control and moderate the extent of penalties imposed under their statutes is a matter of great concern to businesses in New York and across the country, as businesses are generally the target of class action lawsuits. Accordingly, *amici* have a profound interest in the legal and policy issues presented by this case.

The New York State Legislature enacted section 901(b) of the C.P.L.R. to preclude class recovery of statutory penalties, recognizing that when each member of a class is allowed to recover a statutory minimum or penalty, the result may be an "annihilating punishment" for businesses that are class action defendants, with deleterious consequences to the State's economic well-being. *See* N.Y. C.P.L.R. § 901(b) cmt. C901:11 (McKinney 2006) (practice commentary by Professor Vincent C. Alexander) (citation omitted). Petitioner, which seeks statutory penalties under a New York insurance statute on behalf of a purported class of New York policyholders, asserts that it should be able to avoid New York's legislative bar on the class recovery of such penalties by bringing its class action claim in federal court, rather than state court.

Numerous states have enacted legislation restricting the availability of class actions for particular types of claims and remedies. *See* Appendix B to Brief for Respondent. Mississippi's consumer protection act, for example, does not permit plaintiffs to pursue class actions under that act – a bar that has been held by the Mississippi federal district court to apply in federal court as well as state court. *See Cole v. Chevron U.S.A., Inc.*, 554 F. Supp. 2d 655, 668-69 (S.D. Miss. 2007); *see also In re Pharm. Indus. Average Wholesale Price Litig.*, 230

F.R.D. 61, 68 (D. Mass. 2005) (excluding consumers from Alabama, Alaska, Georgia, Kentucky, Louisiana, Mississippi, and Montana from class because the consumer protection statutes of those states did not allow class actions). Provisions such as section 901(b) of the New York C.P.L.R. and other state statutes barring class actions in specific categories of statutory claims reflect substantive policy choices as to the appropriate level of enforcement, punishment and deterrence. Such provisions also reflect a State's policy choices as to the appropriate extent to which to permit individual plaintiffs to act as private attorneys general in the enforcement of state statutes.

Amici respectfully submit that this Court should affirm the decision of the Second Circuit Court of Appeals, upholding the application in federal court of New York's statutory prohibition on class action lawsuits seeking penalties and minimum recoveries under New York statutes. Section 901(b) balances the interests of consumers, individuals, businesses and the State of New York in deterrence and avoiding over-deterrence. The striking of such a balance with regard to the statutory penalties it enacts is the proper prerogative of the New York State Legislature. The federal courts should not overturn that balance by making class action procedures available for plaintiffs seeking New York statutory penalties, where a class action would be unavailable under section 901(b) in the New York state courts.

SUMMARY OF ARGUMENT

The determination as to what penalties are appropriate for what conduct is a matter of substantive law that is of significant concern to each State and is unquestionably an appropriate field for State legislation. In making such determinations, numerous States have decided that certain statutory

penalties should not be recoverable in a class action. *Amici* respectfully submit that such legislative enactments barring class action recovery of statutory penalties are substantive provisions of law and embody substantive policy choices that not only affect litigants, but have important broader social and economic purposes and consequences. Such substantive provisions and policy choices should be respected by the federal courts and should not be overridden under the aegis of Federal Rule of Civil Procedure 23.

Section 901(b) of the New York C.P.L.R., at issue in this case, provides that "[u]nless 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." Section 901(b) was designed to prevent the "annihilating punishment" that may result when each member of a class is allowed to recover a statutory penalty or minimum. N.Y. C.P.L.R. 901(b) cmt. C901.11 (McKinney 2006) (citation omitted).

Petitioner here contends that it should be allowed to bring a class action claim for statutory penalties under a New York insurance statute. Petitioner has brought its class action in federal court to avoid the bar of section 901(b), arguing that New York's prohibition on class recovery of statutory penalties should not apply in federal court. If accepted, that argument would lead to a fundamental disparity in outcomes between the state and federal courts and would severely undermine the substantive policies that the New York State Legislature attempted to further in enacting section 901(b).

Legislative enactments governing the statutory penalties that may be imposed on a defendant, even

if the method for limiting penalties is to bar class action recovery of them, do not conflict with Rule 23's procedures for determining whether a particular lawsuit can be fairly and efficiently tried as a class action. Rule 23 does not address in any way whether certain categories of claims may be legislatively barred in class actions. Rule 23 does not mandate that class action procedures be available for all state law claims for statutory penalties.

Petitioner seeks to subject Respondent to penalties far in excess of the penalties that would be recoverable in a New York state court, by utilizing federal class action procedures. Permitting class actions in federal courts to recover statutory penalties where the state law that created the cause of action has limited the right of recovery to individual actions would subject defendants to a level of punishment exceeding that intended or permitted by state law. Such a result impermissibly modifies substantive rights in contravention of the Rules Enabling Act, 28 U.S.C. § 2072(b).

Moreover, contrary to Petitioner's contentions, nothing in the language or purposes of the federal Class Action Fairness Act supports Petitioner's assertion that it is entitled to bring a class action claim to recover New York statutory penalties. Indeed, the legislative history of CAFA makes clear that its primary purpose was to address the problem of the over-readiness of some state courts to certify multi-state and national class actions. CAFA was not intended to override the substantive laws of the States and was not intended to further the use of federal class actions as private attorneys general actions where such actions are not available under state common or statutory law.

For these reasons, as set forth more fully below, *amici* respectfully urge that the Court affirm the determination of the Court of Appeals that class

actions to recover New York statutory penalties are barred in federal court as they are in the New York state courts, in the absence of express authorization by the New York State Legislature.

ARGUMENT

I. STATE LEGISLATIVE BARS ON CLASS RECOVERY OF STATUTORY PENALTIES ARE SUBSTANTIVE PROVISIONS THAT SHOULD APPLY IN FEDERAL COURT

A. N.Y. C.P.L.R. § 901(b) Was Enacted as a Substantive Limit on the Recovery of Statutory Penalties

The legislative history of section 901(b) amply documents the substantive policy goals that prompted its enactment by the New York State Legislature. Section 901(b) was passed into law in 1975 when New York revised its prior, extremely restrictive class action rule. Before the enactment of the new rule, New York law in practice confined class actions to cases involving "the closely associated relationships growing out of trust, partnership, or joint venture and ownership of corporate stock." *Hall v. Coburn Corp. of Am.*, 259 N.E.2d 720, 722 (N.Y. 1970); *see also Soc'y Milion Athena, Inc. v. Nat'l Bank of Greece*, 22 N.E.2d 374, 377 (N.Y. 1939). Under the old rule, there was no possibility of class action suits to recover statutory penalties or to pursue statutory causes of action in New York state courts. *See Hall*, 259 N.E.2d at 721 (rejecting consumer class action).

New York's new class action rules (N.Y. C.P.L.R. §§ 901-909) by and large followed the model furnished by Federal Rule of Civil Procedure 23. *See* Memorandum from the State Consumer Protection Board to Counsel to the Governor, at 2 (May 29,

1975). Section 901(b), however, has no counterpart in the Federal Rule. It was added to section 901 to prevent the "excessively harsh results" that would occur if the many statutory penalties contained in New York law, which had been calibrated to individual lawsuits, suddenly were made recoverable in large class actions. *See* Legislation Report No. 15 of Banking Law Committee, Business Law Committee, and Committee on Civil Practice Law & Rules of the N.Y. State Bar Ass'n, Bill Jacket, L. 1975, ch. 207, at 2 (hereinafter "Report No. 15").

The language of section 901(b) was suggested in Report No. 15, which stated:

> This section [section 901] should contain a separate subdivision (b) reading as follows:
>
> > b. Unless a statute creating or imposing a penalty, forfeiture or minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, forfeiture or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Report No. 15 at 2. This language (with omission of the reference to forfeitures) was ultimately included in the text of section 901 as enacted. *See* N.Y. C.P.L.R. § 901(b).

In explaining the need for limits on the recovery of statutory penalties, Report No. 15 pointed out that New York had many statutory penalties that had been enacted in amounts sufficient to encourage individual suits, not in anticipation that they would be recovered in class actions:

> New York statutory law contains many

> "penalty" and similar provisions establishing arbitrary measures of liability for noncompliance which, although appropriate for individual actions, would lead to excessively harsh results in large class actions. The amounts of those penalties were established at levels sufficient to provide incentives for individual suits and it would be a gross distortion of their purpose to permit their recovery in class suits.

Report No. 15 at 2. [2]

An earlier Report of the Banking Law Committee on the proposed revision of New York's class action rules described the "unfair and harsh results" of allowing recovery of "severe statutory penalties unrelated to actual damages" in class actions. *See* Legislation Report No. 1 of Banking Law Committee of Banking, Corp. and Business Law Section of N.Y. State Bar Ass'n, Bill Jacket, L. 1975, ch. 207, at 3. This Report emphasized that companies and businesses were subject to the same statutory penalties for a trivial or technical error in compliance with a statutory provision as for a more substantial failure to comply. *Id.* at 2. The Report stressed the often complex and technical nature of consumer legislation affecting banks, credit companies and retailers, and the difficulties in compliance given that the consumer "laws and regulations are subject to varying opinions, and

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[2] *See also* Sponsor Memorandum of Assemblyman Stanley Fink, Bill Jacket, L. 1975, ch. 207 ("The bill, however, 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.").

attorneys who specialize in these fields do not always agree on matters of interpretation." *Id.* The Report also emphasized the "special problems relating to multiplicity of error" in similar transactions with large numbers of consumers, such that allowing statutory penalties in class actions could result in "ruinous liability" for defendants, and the potential constitutional concerns of the imposition of unbounded penalties unrelated to actual damages. *Id.* at 1-3.

The New York State Legislature was also urged to adopt section 901(b) by the Empire State Chamber of Commerce, [3] which submitted a Memorandum arguing that the bill as then drafted would "harm taxpayers and our social and political institutions" and that the recovery of penalties in class actions should be prohibited. *See* Memorandum in Opposition of Empire State Chamber of Commerce, at 1, 3, Feb. 14, 1975, Bill Jacket, L. 1975, ch. 207. The Memorandum stressed that "Penalties and class actions simply do not mix," citing the example of a case in which "the combination [of a claim for penalties and a class action] caused a potential liability of $130,000,000 although the actual damages to individual plaintiffs were zero." *Id.* at 3. The Memorandum stated:

> The purpose of penalty provisions *in individual actions* envisioned in State and Federal law is to encourage wronged individuals and their attorneys to pursue their claims by creating a sufficient amount in controversy to ensure economic incentive. Statutory penalties and minimum recoveries which are necessary in *individual* actions are *not necessary in class actions*, where the

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[3] As noted above, the Empire State Chamber of Commerce was a predecessor organization of the Business Council of New York State, Inc., one of the *amici* submitting this brief.

> aggregate damage claims are large and sufficient, in and of themselves, to support litigation.

Id. (emphasis added). The Empire State Chamber of Commerce also pointed out the deleterious economic consequences of class action liability for statutory violations, including the vast amounts of money that would be expended by businesses and other institutions in defending such suits, and the resulting increase in costs of goods and services. *Id.* at 2.

In summarizing the legislative background of section 901(b), the New York Court of Appeals explained that various groups that had commented on the proposed legislation – including the committees of the New York State Bar Association through Reports Nos. 1 and 15 and the Empire State Chamber of Commerce –

> 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. Responding to these concerns, the Legislature amended the legislation to include a new subdivision – C.P.L.R. 901(b) . . . .

Sperry v. Crompton Corp., 863 N.E.2d 1012, 1015 (N.Y. 2007).

Thus, Petitioner is wrong in claiming that the decision by the New York Court of Appeals in *Sperry*

does not contain "any reference to a desire on the part of the state (as opposed to some of those who lobbied for the legislation) to limit the deterrent effect of statutory penalties, to shield defendants from liability, or to place a cap on recoveries." Pet. Br. at 40. The New York Court of Appeals made clear in *Sperry* that the New York State Legislature was "[r]esponding" to the twin concerns of avoiding excessive penalties and ensuring an appropriate level of private enforcement of the substantive goals of the statutes involved. *Sperry*, 863 N.E.2d at 1015. In any case, the Legislature's determination that class actions should not be available "where individual plaintiffs were afforded sufficient economic encouragement to institute actions [for statutory penalties]," *id.* at 1017, is clearly inseparable from the Legislature's determination as to an appropriate level of deterrence and as to the extent that it was in the public interest to enable individuals to act as private attorneys general in vindicating statutory purposes. Contrary to Petitioner's contentions, such concerns are not "procedural objectives." Pet. Br. at 40.

In short, the policy objective of section 901(b) was to ensure the appropriate application of statutory penalties to achieve the purposes intended by the Legislature, including the appropriate level of deterrence and punishment. The importance of such policy choices by the States was acknowledged by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Each State has "legitimate interests in punishing unlawful conduct and deterring its repetition," and "States necessarily have considerable flexibility in determining the level of [punishment] that they will allow in different classes of cases . . . ." *Gore*, 517 U.S. at 568. Accordingly, the "basic principle of federalism" requires that "each State may make its own reasoned judgment about what conduct is

permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Campbell*, 538 U.S. at 422.

Section 901(b) represents a policy judgment by the New York State Legislature as to substantive matters of deterrence and punishment and is clearly substantive law under traditional standards. As shown below, section 901(b) is also substantive law under the substantive-procedural analysis established under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and governs substantive statutory rights, which may not be abridged, enlarged or modified by the application of the Federal Rules of Civil Procedure.

B. N.Y. C.P.L.R. § 901(b) Is Substantive for Purposes of *Erie* and the Rules Enabling Act

A statute or rule is substantive for purposes of the determination whether a federal court sitting in diversity should apply state or federal law when it "significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court," *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945); *see also Hanna v. Plumer*, 380 U.S. 460, 466 (1965); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court." *Guaranty Trust*, 326 U.S. at 109. The application of the outcome-determination test is guided by "the twin aims of the *Erie* rule:

discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

Under the outcome-determination test, where local law that creates the cause of action qualifies it, "the federal court must follow suit," for "a different measure of the cause of action in one court than in the other" would transgress "the principle of *Erie*." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949). Thus, in "adjudicating a state-created right," a federal court "cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." *Guaranty Trust*, 326 U.S. at 108-09.

Here, like the New York C.P.L.R. provision at issue in *Gasperini*, section 901(b) effectively limits the recovery available in a single lawsuit and is substantive. In *Gasperini*, New York imposed a different standard for review of compensatory awards for excessiveness (the "deviates materially" standard) from that used in federal courts (the "shock the conscience" test). Noting that "[i]n design and operation, [the 'deviates materially' standard] influences outcomes by tightening the range of tolerable awards," *Gasperini*, 518 U.S. at 425, this Court held that "the State's objective" in imposing the "deviates materially" standard was "manifestly substantive." *Id.* at 429. As the Court stated, "[i]f federal courts . . . persist in applying the 'shock the conscience' test to damage awards on claims governed by New York law, '"substantial" variations between state and federal [money judgments]' may be expected." *Id.* at 429-30 (second alteration in original) (footnote omitted) (citation omitted).

Here, New York's objective in prohibiting recovery of statutory penalties or minimum awards in class actions absent a specific statutory authorization is to

prevent the imposition of excessive penalties. As in *Gasperini*, section 901(b) in design and operation influences outcomes and limits the range of tolerable awards. Failure by the federal courts to apply section 901(b) will clearly result in substantially different outcomes in state and federal court, with defendants in federal court potentially subjected to penalties that are hundreds or thousands of times the penalty that could be imposed in state court. That disparity would encourage forum shopping and would result in inequities between New York plaintiffs and out-of-state plaintiffs and between New York defendants and out-of-state defendants.

The fact that New York accomplishes the substantive policy goal of limiting the statutory penalties to which a defendant may be subjected through a rule that restricts the availability of the class action procedure does not render section 901(b) procedural. *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 728 (1974). This Court has recognized that the fact that the "enforcement mechanism" chosen by a State to effect substantive state policy achieves its goal by restricting the availability of a court procedure or the court's jurisdiction does not itself render the rule in question procedural. *Id.* at 727-28 (citing *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949)).[4]

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[4] In *Woods*, this Court "held applicable in a diversity action a Mississippi statute providing that corporations that had not qualified to do business in the state would not be permitted to sue in its courts." Ely, 87 Harv. L. Rev. at 728. As Professor Ely explains, that decision was correct whether analyzed under the Rules of Decision Act or under the Rules Enabling Act because, although "the statute's enforcement mechanism, its club, was a denial of jurisdiction, a device that may well typically be employed for procedural ends, . . . a primary reason jurisdiction was denied . . . was to encourage corporate qualification," which is "a substantive goal concerned with something other than the way litigation is to be managed." *Id.*

Section 901(b) was enacted for substantive purposes. New York has chosen to enforce civil statutory requirements and prohibitions (most of which, like New York Insurance Law section 5106 here, are applicable to insurance companies or other consumer businesses) by authorizing plaintiffs, acting as private attorneys general, to recover statutory penalties, even in the absence of actual damages. Such penalties are enforcement mechanisms intended to achieve the substantive state policies embodied in those statutes. In creating such penalties, New York is entitled to determine the appropriate level of deterrence – which does not necessarily mean "maximizing" the quantity of enforcement of its statute by private attorneys general.[5] Such penalties are provided to incentivize and reward particular individual conduct – bringing and prevailing in a lawsuit under the statute in question. Absent members of a class by definition have not engaged in the conduct sought to be encouraged and have not acted to further the State's substantive policies and goals. Application of Rule 23 to permit the award of statutory penalties to absent class members would improperly interfere with the substantive policies embodied in the enforcement mechanisms chosen by New York.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court rejected the argument that the provisions of a New Jersey statute that made a small stockholder who instituted a derivative action liable for the expenses of the corporation if he lost the lawsuit, and required the stockholder to post

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[5] *Cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598, 620 (2001) (in enacting fee-shifting statute that allowed defendants as well as plaintiffs to receive a fee award, "Congress did not intend to *maximize* the quantity of 'the enforcement of federal law by private attorneys general;'" rather, Congress "desired an *appropriate* level of enforcement . . . ." (citation omitted)).

a bond as security for those expenses were "mere rules of procedure rather than rules of substantive law." *Id.* at 555. The goal of the New Jersey statute was to discourage "strike lawsuits" and to help ensure that a plaintiff was "not putting forward a claim to capitalize personally on its harassment value." *Id.* at 552. As the Court held, the statutory imposition of liability on a losing plaintiff for the defendant's litigation expenses was a substantive provision. The fact that the statute also prescribed a procedure (posting a bond) to ensure that the liability for expenses, if incurred, would be met did not warrant treating the statute as a "mere procedural device." *Id.* at 556. In short, a state statute or rule may have procedural aspects, but if, as with section 901(b), its goals and purposes are primarily substantive, the provision or rule is substantive and should be applied in federal court.

Unless section 901(b) is applied in federal court to claims for penalties and minimum damages under New York statutes, the "character" and "result" of litigation seeking such penalties will "differ[] materially simply because a plaintiff sues in federal, as opposed to state, court." *Bonime v. Avaya, Inc.*, 547 F.3d 497, 502 (2d Cir. 2008) (quoting *Hanna v. Plumer*, 380 U.S. at 467).

II. PERMITTING CLASS ACTIONS IN FEDERAL COURT TO RECOVER STATUTORY PENALTIES SUBJECT TO N.Y. C.P.L.R. § 901(b) WOULD ABRIDGE SUBSTANTIVE RIGHTS

Petitioner argues that section 901(b) does not contravene the Rules Enabling Act's mandate that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), because there is no right "not to face a class action." Pet. Br. at 33. Petitioner profoundly

misunderstands the right at issue. The right at issue here is the right not to be subjected in a single lawsuit to New York statutory penalties far in excess of the penalties intended or authorized by the State Legislature.

The imposition in a class action lawsuit of multiple statutory penalties unrelated to any actual damages (as Petitioner seeks here) would raise significant due process concerns, which would clearly be within the province of the federal courts to address. *See Campbell*, 538 U.S. at 416-17. New York, however, is not required to allow private enforcement of its statutes up to the outermost limits of due process. New York may protect defendants from penalties that might pass muster under due process but would be excessive as a matter of New York's substantive policy. Application of Rule 23 to override New York's policy determination would impermissibly enlarge the rights of plaintiffs and abridge the rights of defendants as established by New York law. Petitioner's contention that Rule 23 requires that the federal courts have "discretion" over such matters is directly contrary to the Rules Enabling Act.

Nor should the federal courts treat a State's mandate that recovery for a state statutory cause of action not be had in a class action merely as a factor in a federal court's discretionary determination as to whether a class should be certified. Contrary to Petitioner's contentions, such a result is not supported by this Court's decisions in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), or *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987). Both those decisions (unlike this case) involved issues directly and solely related to judicial process and procedure. In *Burlington Northern*, this Court held that an Alabama statute imposing a mandatory ten percent "affirmance penalty" on unsuccessful appellants was not applicable in federal court. This Court held that application of the

Alabama rule would improperly limit the federal courts' exercise of discretion under Federal Rule of Appellate Procedure 38. Unlike the penalty in *Burlington Northern*, which penalized conduct in litigation (*i.e.*, "frivolous appeals and appeals interposed for delay," 480 U.S. at 4), the penalties at issue in this case penalize conduct outside of litigation, namely the defendant's conduct in its insurance or commercial transactions with the plaintiff – the conduct upon which the substantive cause of action is based.

Stewart is similarly distinguishable from the present case. In *Stewart*, the Court held that 28 U.S.C. § 1404(a) governed a litigant's "request to give effect to the parties' contractual choice of venue." *Stewart*, 487 U.S. at 29. In so holding, the Court stated that "[s]ection 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized case-by-case consideration of convenience and fairness.'" *Id.* (citation omitted). Significantly, a forum-selection clause does not govern the parties' conduct in performing their contractual obligations. It governs only what occurs when a contractual dispute proceeds to litigation. Thus, unlike section 901(b), a forum-selection clause (and the state law governing its validity and enforceability) is purely procedural. It does not influence the outcome of the litigation, but only where the litigation takes place.

Neither *Stewart* nor *Burlington Northern* supports making it discretionary with the federal district courts whether to give or not give effect to the substantive law enacted by the New York Legislature barring recovery of statutory penalties in class actions. The application or non-application of section 901(b) would produce a substantial – indeed an enormous – difference not only in the penalties that can be imposed in a single litigation, but also on the penalties that will be imposed overall for a

course of conduct affecting numbers of consumers. Section 901(b) is based on the common-sense and realistic recognition that if each individual must go to court to collect a statutory penalty, the sum total of penalties will be very much smaller than the penalties that might be assessed in a class action. *Cf., e.g., Castano v. American Tobacco Co.*, 84 F.3d 734, 748 & n.26 (5th Cir. 1996) ("[A] court cannot extrapolate, from the number of potential plaintiffs, the actual number of cases that will be filed."). This Court should not disregard this reality based upon Petitioner's contention that there is no effect on substantive rights because theoretically a defendant would be subject to the same number of potential penalties even if a class were not certified.

In sum, permitting class actions to recover New York statutory penalties would result in the imposition of penalties far beyond those contemplated and intended by the New York State Legislature, with deleterious economic and social consequences to corporate and business defendants doing business in New York, to New York consumers, and to the economic and social environment of the State.

III. THE CLASS ACTION FAIRNESS ACT DOES NOT OVERRIDE SECTION 901(b)

Petitioner's invocation of the federal Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), as somehow supporting its use of a federal forum to sidestep section 901(b) is completely without merit. *See* Pet. Br. at 49-53. Congress's concern in enacting CAFA was to preclude the abuse of state court class actions in cases with interstate or national importance. *See* Pub. L. No. 109-2, § 2(a)(4), (b)(2), 119 Stat. at 5 (codified at 28 U.S.C. § 1711 note); S. Rep. No. 109-14, at 5 (2005), *reprinted in*

2005 U.S.C.C.A.N. 3, 6. CAFA was not intended to provide and does not provide a federal forum for class actions for state law claims (and especially claims for state-created penalties) where state law specifically prohibits a class action on the particular claim presented.

The legislative history of CAFA repeatedly makes clear that the principal problem that Congress sought to address was the over-readiness of some state courts to certify multi-state and national class actions. Congress found that the fact that "'federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly,'" was a "compelling rationale[] for allowing more interstate class actions to be heard by federal courts." S. Rep., No. 109-14, at 53, *reprinted in* 2005 U.S.C.C.A.N. at 50 (citation omitted) (response to Critics' Contention No. 2); *see also id.* at 22, *reprinted in* 2005 U.S.C.C.A.N. at 22 (criticizing the "'I never met a class action I didn't like' approach to class certification" prevalent in state courts in some localities); *id.*, at 11, *reprinted in* 2005 U.S.C.C.A.N. at 12 (noting as justification for expanded diversity jurisdiction over class actions the fact that some state court systems are prone to produce "'gigantic awards against out-of-state corporate defendants'") (citation omitted).

The Senate Report on CAFA also decried "the tendency of some state courts to be less than respectful of the laws of other jurisdictions, applying the law of one state to an entire nationwide controversy and thereby ignoring the distinct, varying state laws that should apply to various claims" in a multi-state or nationwide class action. *Id.* at 37, *reprinted in* 2005 U.S.C.C.A.N. at 35. The Report rejected the contentions of some critics of the proposed legislation that CAFA would "trample on the rights of states to manage their legal systems"

and that there was "no evidence that in the class action context, federal courts will intrude less on the states' rights to interpret their own laws than have state courts." *Id.* at 60-61, *reprinted in* 2005 U.S.C.C.A.N. at 56-57 (Critics' Contentions Nos. 8 and 9). The Report stated that "federal courts have consistently heeded" this Court's "admonitions," including its admonition that "'each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.'" *Id.* at 63, *reprinted in* 2005 U.S.C.C.A.N. at 58 (Response to Critics' Contention No. 9) (citation omitted).

The legislative history of CAFA emphasizes that CAFA was *not* intended to authorize or facilitate the "use [of] class actions as private attorneys general actions to deter corporate wrongdoing." *Id.* at 58, *reprinted in* 2005 U.S.C.C.A.N. at 54 (Response to Critics' Contention No. 6); *see also id.* ("Although a few courts have over the years referred to the deterrent effects of class actions, the promulgation history of the current Rule 23 of the Federal Rules of Civil Procedure reflects no intent to create a private attorney general device.").[6] To the contrary, the Senate Report on CAFA makes clear that, in the view of the Senate Judiciary Committee, the "concept of class actions serving a 'private attorney general' or other enforcement purpose is illegal." *Id.*

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[6] The Senate Report also quotes the statement of Judge Paul Niemeyer, formerly chair of the Advisory Committee on Civil Rules, in which he says "I believe that Rule 23 was never intended to be a rule to enhance enforcement of substantive claims. Such legitimization should, in my judgment, be effected by Congress, and Congress might well conclude . . . that it is too anarchical to authorize private attorneys to self-appoint themselves as enforcers of law without adequate accountability to the lawmakers or the public." Senate Rep. No. 109-14, at 59, *reprinted in* 2005 U.S.C.C.A.N. at 55 (internal quotation marks omitted; alteration in original).

at 59, *reprinted in* 2005 U.S.C.C.A.N. at 55. Thus, "[i]f the intended purpose of Rule 23 was to empower private attorneys to act as 'attorneys general,' the rule plainly bestows substantive rights not otherwise available under common or statutory law." *Id.* "Interpreted in this way," Rule 23 would "run[] afoul of the Rules Enabling Act, which forbids federal courts from adopting 'rules of practice and procedure' that may 'abridge, enlarge or modify an substantive right.'" *Id.* (footnote omitted; citation omitted).

Accordingly, by enacting CAFA, Congress did not intend to alter state law restricting the recovery of state statutory penalties in class actions and viewed such laws as substantive, not procedural. In the instant case, Plaintiff's claim for statutory penalties is based upon a New York statute setting a time-frame for an insurer's deciding to grant or deny a claim for benefits under a New York insurance policy. It is not disputed that those statutory penalties are subject to section 901(b) of the New York C.P.L.R. Contrary to Petitioner's contentions, under this Court's *Erie* and Rules Enabling Act decisions, neither CAFA nor Rule 23 may permissibly override New York's limitation on the recovery of statutory penalties in class actions.

CONCLUSION

The Court should affirm the decision of the Court of Appeals holding that section 901(b) of the New York C.P.L.R. applies in federal court to bar class certification of claims for penalties provided under New York statutes, absent specific statutory authorization of class recovery of such penalties.

Respectfully Submitted,

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