Nos. 15-56014, 15-56025, 15-56059, 15-56061, 15-56064, 15-56067

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN RE: HYUNDAI AND KIA FUEL ECONOMY LITIGATION

AMICI CURIAE BRIEF OF ASSOCIATION OF GLOBAL AUTOMAKERS AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR EN BANC REHEARING

Cary Silverman
Philip S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, D.C. 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
csilverman@shb.com
pgoldberg@shb.com
cappel@shb.com

Attorneys for Amici Curiae

DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that the associations represented on this brief have no parent corporations and have issued no stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that (1) no party's counsel authored the brief in whole or in part;[1] (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the *amici curiae* associations, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Circuit Rule 29-3, counsel for *amici* sought consent of all parties to the submission of this proposed brief. Defendants and several plaintiffs consented. Objector/Appellant Antonio Sberna and counsel for several plaintiffs did not consent.

[1] Holly Pauling Smith of Shook, Hardy & Bacon L.L.P. serves in a limited capacity as local counsel to Kia Motors Corporation in this matter. Ms. Smith had no involvement in the preparation of this *amicus* brief or in any aspect of the appeals.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Association of Global Automakers, Inc. (Global Automakers) is a nonprofit trade association representing international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations. Global Automakers is dedicated to ensuring a responsible, open, and competitive automotive marketplace in the United States. Global Automakers supports public policy initiatives that improve vehicle safety, encourage technological innovation, and promote responsible environmental stewardship. Its members include American Honda Motor Co., Inc.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America, Inc.; Isuzu North America Corp.; Kia Motors America, Inc.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Nissan North America, Inc.; Subaru of America, Inc.; Suzuki Motor of America, Inc.; and Toyota Motor North America, Inc. Global Automakers has a substantial interest in ensuring that when concerns arise with respect to the marketing, design, or manufacturing of vehicles, manufacturers and consumers are able to promptly, efficiently, and fairly resolve such issues.

The American Tort Reform Association (ATRA), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil

litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues, including advocating for rigorous analysis of Rule 23's prerequisites for class certification. ATRA has a substantial interest to ensure that these prerequisites are not misapplied to impede the ability of its members to settle class action lawsuits without prolonged and needless litigation.

INTRODUCTION AND RULE 35(b) STATEMENT

This case warrants *en banc* review. The panel's ruling places a significant, unnecessary obstacle on the ability of businesses to fairly settle disputes with their customers on a nationwide basis. When settling a national class action, the primary question for the court should be whether the settlement is fair. Requiring the type of extensive analysis of each state's law that would be required for a litigation class serves little purpose and produces no benefit when the parties have agreed on a fair remedy for all those involved.

State consumer protection laws are indeed diverse. They vary significantly in the proof that they require on certain elements and the recovery they authorize for class members. Proposed nationwide class actions that rely on individual state consumer laws generally cannot and should not be certified for trial. Settlement classes present an entirely different matter. In the settlement context, most state-law differences are not relevant to the predominance inquiry, though they can

remain relevant when evaluating the fairness of the agreement. Therefore, formalistically applying a predominance standard developed for ensuring the manageability of a class action for trial purposes to a voluntary agreement between the parties will hurt the ability of businesses and consumers to promptly, fairly, and fully resolve disputes. As a result, courts in this Circuit will be burdened with unnecessary litigation, businesses will waste resources on extensive briefing, and consumers will wait years longer to receive compensation.

The case before this Court provides a model of a prompt and fair settlement, which is in stark contrast to many other modern settlements in the consumer class action arena. This type of settlement should be incentivized, not discouraged.

ARGUMENT

I. THE PANEL MAJORITY DECISION WILL MAKE IT DIFFICULT FOR BUSINESSES TO PROMPTLY AND FAIRLY RESOLVE CONSUMER DISPUTES

Variations in state law should not unduly impede the ability of businesses and consumers to fully and promptly resolve their disputes when they have agreed on a resolution that is fair to everyone involved, including absent class members.

Certifying a class for settlement purposes implicates different concerns and priorities than certifying a class for trial. This Court and others have recognized that a class may be certified for settlement purposes despite weighty trial manageability concerns. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir.

2003) ("Although we have some concerns, largely relating to litigation management, as to whether the case could be maintained as a class action if the litigation continues, the district court did not abuse its discretion in certifying the case for settlement purposes pursuant to Rule 23."); *Hanlon v. Chrysler*, 150 F.3d 1011, 1022 (9th Cir. 1998) ("[A]lthough some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification."); *see also In re Mexico Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) (observing "no one need draw fine lines among state-law theories of relief" given a fair settlement).

To be sure, where there are significant differences in state law, nationwide class actions that rely on state consumer protection statutes generally should not be certified *for trial* because litigating such disputes would be unmanageable. State consumer protection statutes vary significantly in such fundamental aspects as the elements of proof required to state a claim, how losses are measured, the availability of statutory or treble damages, the length of the statute of limitations, and available defenses. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 17-32 (2006) (surveying state law). Certification of such cases results in a significant risk that the substantive requirements of state law will be relaxed, available defenses will be

overlooked, and individuals who do not have a viable claim will receive compensation. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (recognizing that the Rules Enabling Act prohibits use of the class action device to "abridge, enlarge or modify any substantive right") (quoting 28 U.S.C. § 2072(b)).

For example, an action in which some class members may have viewed allegedly misleading advertising materials, while many others certainly did not, is inappropriate for certification to proceed to trial due to material variations in whether reliance is required under state law. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591-93 (9th Cir. 2012) (properly vacating certification of a class for trial that included consumers in 44 jurisdictions where many owners purchased vehicles incorporating the safety feature at issue without reading a brochure or viewing television commercials describing the system's operation). These individuals should not be shoe-horned into one massive trial where important distinctions cannot be properly addressed.

However, Rule 23 should not be applied in a manner that stops parties from resolving "in one stroke" issues that would not otherwise be "capable of classwide resolution." *Dukes*, 564 U.S. at 350. The predominance inquiry required by Rule 23(b)(3), for example, does not apply in the same manner when directed at the manageability of the litigation as it proceeds to trial as it does when evaluating a settlement class. As the American Law Institute has observed, "So long as there

is sufficient commonality to establish that the class is generally cohesive, the propriety of a *settlement* need not depend on satisfaction of a 'predominance' requirement. . . . The elimination of any mechanical requirement that common issues predominate should help to facilitate settlements, provided that the central indicia of fair and adequate representation are met." Principles of the Law of Aggregate Litigation § 3.06 cmt. a (Am. Law Inst. 2010) (emphasis added).

Here, the panel majority rejected the settlement class because the district court was unlikely to certify the nationwide class if the class were to proceed to trial given variations in state consumer protection laws. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 703-04 (9th Cir. 2018). Such a narrow analysis unduly interferes with the right of the parties to fairly and adequately resolve the plaintiffs' alleged economic injuries.

II. COURTS PROTECT THE RIGHTS OF ABSENT CLASS MEMBERS BY SCRUTINIZING THE OVERALL FAIRNESS OF PROPOSED SETTLEMENTS

Rule 23 protects the rights of absent class members, in addition to protecting the ability of a defendant to receive a fair trial. In the context of an agreed-upon settlement, courts guard against collusion and protect the rights of absent class members by closely scrutinizing the overall fairness of the agreement and the relief it provides. *See, e.g., Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576-77 (9th Cir. 2004) (holding district court did not abuse discretion in certifying a

nationwide settlement between manufacturer and consumers of dishwashers with potentially faulty "energy saver" switch).

After the district court assesses whether a coherent class exists, Rule 23(e) directs the court's attention on the overall fairness of the proposed settlement. *See Staton*, 327 F.3d at 952. That rule requires courts considering whether to approve a class settlement to assess whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). It is designed to promote the fair and efficient resolution of claims; a policy favored by this Court. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (recognizing a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned").

As the Court explained in *Churchill Village*, assessing the fairness of a settlement requires the district court to balance several factors including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

361 F.3d 566, 575 (9th Cir. 2004) (citing *Hanlon*, 150 F.3d at 1026). The *Churchill* factors are distinct from the trial class certification prerequisites established by Rule 23(a) and from the evaluation of whether "questions of law or

fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently *adjudicating the controversy*." Fed. R. Civ. P. 23(b)(3) (emphasis added).

Applying these principles, this Court has rejected settlements that do not provide a significant benefit to the class. For example, in *In re Bluetooth Headset Prod. Liab. Litig.*, this Court reversed a district court's approval of a multistate settlement of a consumer class action claiming that manufacturers of Bluetooth devices failed to warn users of the potential for hearing loss. 654 F.3d 935, 938 (9th Cir. 2011). There, the Court found that settlements entered prior to class certification "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest that is ordinarily required by Rule 23(e) before securing the court's approval as fair." *Id*. at 946.

Applying this stringent standard, the Court found multiple "warning signs" of collusion, where the settlement agreement provided for class counsel to receive $800,000 in attorneys' fees, nonprofit groups to receive $100,000 in *cy pres* awards, but zero dollars to compensate class members for their alleged economic injuries. *See id.* at 939-40, 947. The Court rejected the settlement based on its assessment of its fairness, not potential differences between state laws covered by the 26 class actions that had been coordinated in multi-district litigation.

In addition, class settlements that present conflicts between members, or favor or disfavor certain members, are not suitable for certification and approval. *See Stanton*, 327 F.3d at 956-57. That concern drove the Supreme Court's rejection of a global settlement in *Amchem Prods., Inc. v. Winsor*, 521 U.S. 591 (1997). *Amchem* was heavily relied upon by the panel majority. *See In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d at 693-94, 702-03, 705. But as Judge Nguyen recognized in her dissent, "this case is nothing like *Amchem*." *Id.* at 713.

Amchem affirmed the denial of certification of a proposed global class settlement of current and future asbestos-related personal injury claims involving dozens of manufacturers of asbestos products. There, the Court expressed a need for "heightened attention in the settlement context" where the interests of the potentially millions of individuals affected by the settlement, and those representing various groups of claimants, differed substantially. *Id.* at 620. The "key to *Amchem*" was "the careful inquiry into the adequacy of representation," *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 308 (3d Cir. 1998), not variations in the applicable law.

Here, the proposed settlement involves consumers who alleged economic harm in a relatively uniform way. The settlement includes all individuals who owned or leased certain vehicle models during a discrete period of only a few years, and includes several options to remediate any economic harm. By contrast,

Amchem involved highly individualized personal injuries where some class members contracted a deadly disease while others alleged no more than exposure to a toxic substance. *See Amchem*, 521 U.S. at 609. The concerns expressed in *Amchem* about class counsel colluding with defense counsel to pick winners and losers among different groups of injured claimants, or potential future claimants, simply do not exist in this context.

In this and other consumer class actions alleging uniform economic harm, this Court should clarify that when a district court evaluates a proposed settlement, it should focus on the objective reasonableness and adequacy of the settlement. It should not demand an assessment of variations in state law unless it is tied to the fundamental inquiry of whether the proposed settlement fairly remedies class members for the actual economic harm they have alleged.

III. THE PROPOSED SETTLEMENT SHOULD SERVE AS A MODEL TO ENCOURAGE OTHER FAIR CONSUMER CLASS SETTLEMENTS

This Court has recognized the value of global class settlements in providing a fair and efficient remedy to consumers, particularly those who have sustained only economic injury. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (affirming class settlement with millions of consumers of online DVD rental services). In *Hanlon*, this Court appreciated that there may be "no guarantee that the class would receive a better deal" than a proposed

settlement, and that the Court's role is not to determine "whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion" given that reality. 150 F.3d at 1027.

The Supreme Court, in *AT&T Mobility LLC v. Concepcion*, similarly expressed approval of dispute resolution methods proposing to leave consumers "*better off* under their arbitration agreement with AT&T than they would have been as participants in a class action." 563 U.S. 333, 352 (2011) (emphasis in original). In doing so, the Court indicated that a paramount consideration, regardless of whether claims are resolved through arbitration, class action adjudication, or settlement, is whether the ultimate means of dispute resolution is a fair one. Alternatives which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars" are disfavored. *Id.* at 352 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05-cv-1167, 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008)).

The Supreme Court's "message" to businesses in *Concepcion* was to provide consumers with attractive compensation options that provide a worthwhile alternative to expensive and often protracted litigation. This race to the top includes the design of proposed class settlements with consumers.

By almost any metric, Hyundai and Kia's proposed class settlement fairly compensates consumers for their alleged economic harm. The settlement provides

vehicle owners and lessees with four options: (1) a lump sum payment in the form of a cash or debit card; (2) a dealer service debit card worth 150% of the lump sum award to redeem for any products or services at dealerships; (3) a new car purchase certificate worth 200% of the lump sum award for use in buying a Hyundai or Kia vehicle; or (4) participation in a Lifetime Reimbursement Program (LRP) which provides compensation for the additional fuel costs incurred, plus 15%, for the life of the vehicle. Hence, the settlement is sensitive to those class members who simply want an immediate payment of money (and may choose not to purchase another Hyundai or Kia vehicle in the future) as well as class members who are satisfied to receive something extra by remaining a loyal customer. No class member is left without a fair and adequate remedy.

If the panel majority's rejection of this settlement stands, it will make it difficult for businesses that seek to promptly, fully, and fairly address the concerns of their customers to do so in the Ninth Circuit. If courts within this Circuit cannot certify fair agreements between businesses and their customers to resolve their disputes at a nationwide level, the result will be either the need to create highly complex arrangements with multiple subclasses or to settle consumer litigation on a state-by-state basis. Each option would needlessly multiply and prolong litigation, with the additional legal fees undoubtedly outweighing any additional benefit to the class. Such a result is not good for consumers or businesses.

CONCLUSION

For these reasons, the Court should rehear this case *en banc*.

Respectfully submitted,

/s/ Cary Silverman

Cary Silverman
Philip S. Goldberg
Christopher E. Appel
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, D.C. 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
csilverman@shb.com
pgoldberg@shb.com
cappel@shb.com

Attorneys for Amici Curiae

Dated: March 19, 2018

CERTIFICATE OF COMPLIANCE

I certify that this *amici curiae* brief complies with the length limits permitted by Ninth Circuit Rule 29-2(c)(2). The brief contains 2,835 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Cary Silverman
Cary Silverman

Dated: March 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amici Curiae* Brief of Association of Global Automakers and American Tort Reform Association in Support of Defendants-Appellees Petition for En Banc Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 19, 2018. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Lee A. Cirsch J.
The Lanier Law Firm
10866 Wilshire Boulevard, Suite 400
Los Angeles, CA 90024

Thomas Henretta
Henretta Law Offices
159 S. Main Street, Suite 400
Akron, OH 44308

/s/ Cary Silverman
Cary Silverman

Dated: March 19, 2018