

September 27, 2018

Honorable Chief Justice Tani Cantil-Sakauye  
and Honorable Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-4783

Patrick J. Gregory  
Andrew J. Trask

One Montgomery Street  
Suite 2700  
San Francisco, CA 94104  
(415) 544-1900  
atrask@shb.com

**Re: Letter of *Amici Curiae* Supporting the Petition for Review in  
*Case v. Am. Honda Motor Co., Inc., California Supreme Court*  
No. S250639.**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The National Association of Manufacturers, Association of Global Automakers, Inc., and American Tort Reform Association submit this letter brief as *Amici Curiae* pursuant to Rule 8.500(g) of the California Rules of Court. For the reasons stated herein, *amici* respectfully request that the Court grant the Petition for Review filed on August 27, 2018 in the above-referenced matter.

### **Interest of *Amici Curiae***

The National Association of Manufacturers is the largest manufacturing association in the United States and represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, including more than 1,284,100 men and women in California. It also contributes \$2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The Association of Global Automakers, Inc. (Global Automakers) is a nonprofit trade association representing the U.S. operations of international motor vehicle manufacturers, original equipment suppliers, and other automotive-related trade associations.<sup>1</sup> Global Automakers is dedicated to ensuring a responsible, open,

---

<sup>1</sup> The Global Automaker's 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.

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. It has a substantial interest in ensuring that when concerns arise with respect to the marketing, design, or manufacturing of vehicles, manufacturers and consumers can fairly resolve them.

The American Tort Reform Association (ATRA) 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 a decade, ATRA has filed *amicus* briefs in cases involving important liability issues.

The Court of Appeal's decision here raises deep concerns among *amici's* members and other companies that lawfully manufacture, market and distribute beneficial products to the public. They are concerned that if courts certify consumer classes based on unsubstantiated theories of design defect on behalf of people who are not injured, that unfounded, speculative litigation will flourish in California. The result will be unprincipled liability and needless costs.

### **Reasons this Court Should Grant the Petition**

The Court should grant the Petition to clarify that the pursuit of justice in California requires trial courts to ensure that a claim has factual and legal grounding, and is not merely theoretical, before certifying it as a class action. Courts in California must be preserved for legal disputes that can be addressed in concrete, factual contexts. When broadening the scope of a lawsuit into a class action, Plaintiffs cannot pull the lens so far back that facts and elements lack any definition.

Here, the trial court properly denied class certification. It looked at the underlying claims in determining that Plaintiffs did not meet the requirements for commonality. Plaintiffs articulated no concrete theory binding the class together, which included several types of vehicles with different transmissions. Further, the vast majority of the class vehicles never experienced transmission failures, let alone premature transmission failures as Plaintiffs allege. Their transmissions did not fail prematurely. When a trial court finds such fundamental deficiencies, it should not be forced to certify the class, which exponentially increases the stakes of litigation and requires the court and parties to incur the costs of protracted litigation.

***The Court Should Clarify that, Consistent with Federal Law,  
Determining Whether the Requirements for Class Certification Are  
Satisfied Can Involve a Preliminary Evaluation of the Claim's Merits.***

The Court of Appeal erred in overturning the trial court's ruling denying class certification merely because it believed that the trial court improperly evaluated the merits of Plaintiffs' claims at the class certification stage. As Defendant explains in its Petition, in order to have a class action certified in California, this Court has instructed trial judges that plaintiffs must "place substantial evidence in the record that common issues *predominate*" over the individual claims of injury. *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1108 (emphasis in original). The trial court here followed these instructions in deciding against certifying Plaintiffs' purported class.

In *Lockheed*, the Court similarly evaluated the plaintiff's substantive claims in denying certification. It stated that it is "settled" law that "[a]n expert's opinion which rests upon guess, surmise or conjecture, rather than relevant, probative facts, cannot constitute substantial evidence." *Id.* at 1110. Accordingly, courts must ensure that plaintiffs' evidence is not "too qualified, tentative and conclusory." *Id.* at 111. It then concluded that "[e]xamination of the instant record reveal[ed] that plaintiffs ha[d] not provided" such substantial evidence. *Id.* at 1109. Thus, the Court made clear that class certification can include a look behind the veneer of the pleadings to determine if there is sufficient evidence for a case to proceed as a class. The trial court engaged in the same type of analysis in denying certification here.

Allowing this evaluation of the underlying claims is consistent with jurisprudence outside of California. Specifically, the Supreme Court of the United States has instructed that the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 351. The class certification analysis "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* Accordingly, federal district courts have found that "[i]t is now indisputably [their] role . . . to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" *In re Rail Freight Fuel Surcharge Antitrust Litig.* (2013) 725 F.3d 244, 253 (citing *Comcast Corp. v. Behrend* (2013) 133 S. Ct. 1426, 1433).

Further, the U.S. Supreme Court has rebutted the assumption that the invalidity of the claims can be corrected later, explaining that certifying a class "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 476. Justice Ginsburg further

observed that when “a class action poses the risk of massive liability unmoored to actual injury,” the “pressure to settle may be heightened.” *Shady Grove Orthopedic Assocs.* (2010) 559 U.S. at 445 n.3 (Ginsburg, J., dissenting).<sup>2</sup>

Sept. 27, 2018  
Page 4

The Advisory Committee on Civil Rules acknowledged this concern when amending Rule 23 in 1996. It stated that courts should be careful to ensure that class actions are not misused “to coerce a defendant into settling rather than risking defeat and ‘losing the company.’” *See* John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 *Miss. C. L. Rev.* 323, 351 (2005). When it is clear at certification that a class is based on unsubstantiated design defect claims and most of its members have not experienced the alleged defect, a trial court’s denial of class certification should be upheld. Otherwise, justice delayed will be justice denied.

***When a Trial Court Determines at the Certification Stage that a Class Has No Viable Theory for Liability and Its Members Have No Injury, It Should Not Be Forced to Certify the Class.***

The importance of allowing courts to evaluate the merits of class actions during the certification process is underscored by the case at bar, which is part of a growing trend of “no injury” class actions. *See generally* Victor E. Schwartz & Cary Silverman, *The Rise of Empty Suit Litigation*, 80 *Brook. L. Rev.* 599 (2015); Edward Sherman, “No Injury” Plaintiffs and Standing, 82 *Geo. Wash. L. Rev.* 834 (2014). In these actions, the vast majority of the class has not experienced the harm the complaint alleges, which here is a pre-mature transmission failure. They received exactly what they paid for: a properly functioning product. This is especially true in this case, where the vehicles at issue are 14 to 17 years old.

In an effort to overcome this deficiency, lawyers seeking to expand their case from an individual to a class action will re-frame the issues. They may allege, as here, that everyone who bought the product paid a “premium” because of the alleged

---

<sup>2</sup> *See also AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, 1752 (observing that with “even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”); *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 599 (the threat of expensive litigation “will push cost-conscious defendants to settle even anemic cases”); *Gen. Motors Corp. v. City of New York* (2d Cir. 1974) 501 F.2d 639, 657-58 (Mansfield, J., concurring) (“[T]he sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route.”).

product defects. When courts certify such classes, even though no actual design defect theory or harm binds the members, the ability of the parties to achieve justice is undermined. Courts and scholars have identified several core problems with certifying these classes.

First, a person who has not experienced the alleged injury has no individual right to sue. *See* W. Keeton, et al., *Prosser & Keeton on the Law of Torts* § 30, at 164-65 (5th ed. 1984) (“Actual loss or damage resulting to the interests of another” is a necessary element of common law causes of action.); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.* (7th Cir. 2002) 288 F.3d 1012, 1017 (“No injury, no tort, is an ingredient of every state’s law.”). Any lawsuit brought by the individual would be dismissed as either premature because no genuine injury has occurred yet or meritless because it will never occur.

Evaluating the theories and evidence at the certification stage, which the trial court did here, allows it to ensure that aggregating claims does not create a cause of action that does not exist for individual claims. It is settled law that the class action mechanism cannot “alter[] the substantive standard that would be applied were each claim to be tried independently.” *Principles of the Law of Aggregate Litigation* § 2.02 cmt. D, at 89 (2010); *Shady Grove Orthopedics Assocs. v. Allstate Ins. Co.* (2010) 559 U.S. 393, 408 (“A class action . . . leaves the parties’ legal rights and duties intact and the rules of decision unchanged.”). The court should grant the Petition so courts can distinguish at certification between classes bundling valid small claims from those, as here, that pay those who could not recover on their own.

Second, as the trial court found, the lead plaintiffs are impermissibly atypical of the class. *See* 7 AA Charles Alan Wright, et al., *Fed. Prac. & Proc.* 3d § 1785.1 (2005) (“[T]he court must be able to find that both the class and the representatives have suffered the same injury requiring court intervention.”). The lead plaintiffs allege their transmissions failed prematurely, but the class does not seek to recover any costs to repair any transmissions.<sup>3</sup> To broaden the litigation to the class level, these individuals surrendered their rights to potential valid claims. As is typical in these cases, the complaint avoids individual questions of causation and damage that would preclude certification. The result is a class based entirely on abstract theories of liability intended to generate the greatest settlement advantage and fee award.

---

<sup>3</sup> *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act*, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 6 (Feb. 27, 2015) (statement of Chairman Goodlatte) (class members with injuries are “forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert”).

Third, as the trial court observed, such abstractions must not allow Plaintiffs to mask their lack of any valid design defect theory common to the class. As Defendant explains, Plaintiffs merely asserted without any evidence—substantial or otherwise—that had each and every model’s transmission been made with six plates in the third clutch the “defect” would have been fixed. This theory was undoubtedly designed to maximize the size of the class and gloss over issues essential to liability, such as causation and injury.

Fourth, these types of abstract, no-injury class actions provide little benefit, to society or class members. Studies have shown they often fail and, when they do produce a settlement, there is little interest among class members in participating because they do not feel aggrieved. *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act*, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 6 (Feb. 27, 2015) (statement of Andrew Pincus on behalf of the U.S. Chamber of Commerce) (reporting on an empirical analysis conduct by his law firm). As a result, settlements often allocate money to non-class members through *cy pres* awards to try to justify their fees and releasing the claims against the defendant.

Finally, these actions deter beneficial behavior. Perversely, they are often filed *after* a company reports a problem, undertakes a repair program, or, as here, services the vehicles. In one California case, a class representative testified in deposition that after the manufacturer fixed his car’s anti-lock brakes, he was “happy” and the car was “working fine.” *See, e.g., In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.* (C.D. Cal. 2013) 915 F. Supp. 2d 1151, 1154, 1159. Yet, he sought to represent a nationwide class of purchasers, claiming they did not receive the benefit of the bargain. The district court dismissed the case, properly finding that “[m]erely stating a creative damages theory does not establish the actual injury that is required to prevail on his product liability claims.” *Id.* at 1157-58; *see also Briehl v. Gen. Motors Corp.* (8th Cir. 1999) 172 F.3d 623, 628 (similar result).

The Court should grant the Petition to give trial courts the tools for avoiding these injustices. It should clarify that, consistent with *Lockheed Martin Corp.*, if Plaintiffs cannot substantiate a viable design defect theory at the certification stage and a vast majority of class members have not suffered the alleged defect, the class should not be certified.

***The Court Should Not Allow Liability Based on Abstract Design Defect Theories to Regulate the Redesign of Beneficial Products***

Many of *amici*’s members manufacture products. If the Court does not grant

the Petition, they will likely be targeted in large class actions over unsubstantiated allegations of design defects. Reputational and business risks aside, any settlement or award that requires a manufacturer to favor an unproven design could have adverse consequences. The Court of Appeal's ruling could disincentivize basic product testing in litigation. By granting this Petition and allowing courts to evaluate whether there is sufficient support for an allegation of defect common to the class at certification, the Court can help ensure that manufacturers are implementing only appropriate alternative designs for their products, if actually needed.

For automobiles and other products, the stakes are high. Redesigning products based on abstract defects can lead to concrete injuries. Many features in today's automobiles involve highly technical assessments, as manufacturers and regulators balance multiple factors in determining which designs to use. There are often trade-offs, where a design that can prevent injuries in certain situations could lead to more injuries in others. *See Restatement, Third of Torts: Prods. Liab.* § 2 cmt. a (1998) ("Society benefits the most when the right, or optimal amount of product safety is achieved."). For this reason, California product defect law requires juries to assess the benefits and risks of products, including the feasibility of an alternative safer design. *See* CACI No. 1204, *Strict Liability-Design Defect-Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof* (2017). The Court should not allow consumer class action litigation asserting unsubstantiated and speculative defects to weaken these standards.

The importance of this Petition is underscored by the fact that the auto industry is entering a new era of vehicle safety technology. If class certification can be achieved based on merely asserting a theoretical design defect, litigation against such manufacturers would be limited only by plaintiff-lawyer creativity. Some classes suggesting a product should have been designed one way could be certified, while at another courthouse another class could be certified suggesting that a contrary or third design would be needed. In certifying these classes, courts would be hamstrung and not able to consider, for example, whether the alleged defect has been studied and rejected by the manufacturer or appropriate agencies. *See* Robert B. Reich, *Regulation is Out, Litigation is In*, U.S.A. Today, Feb. 11, 1999, at 15A.

Already, California's manufacturing base is under heavy pressure from the state's regulatory and civil liability systems. *See* Chris Kirkham, *Manufacturing Slower to Grow in California than Elsewhere in U.S.*, L.A. Times, Jan. 19, 2015, <http://touch.latimes.com/#section/-1/article/p2p-82576854/> (noting that "regional cost equations" for locating manufacturing facilities do not favor California). And, American businesses spend more than \$2 billion on class litigation per year. *See* Carlton Fields Jordan Burt, *The 2018 Carlton Fields Class Action Survey*, at 4 (2018), at <https://classactionsurvey.com>. Now, nearly 60% of all major companies

are engaged in class actions. *Id.* at 6. California trial courts should be encouraged to, not forbidden from, rejecting class certification when a precursory evaluation shows the claim is meritless.

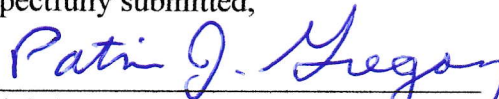
Sept. 27, 2018  
Page 8

**Conclusion**

Creative pleadings are no substitute for showing actual defect, causation and injury. Certifying such classes hinders the ability of California's civil litigation system to generate sound results. The size of the actions increase the pressure on defendants to settle, the plaintiffs' attorney fees outpace class members' recoveries, and little, if any, attention is given to resolve claims of those with actual injuries.

Cases such as this undermine the judicial system. The result is not "access to justice," but removing the hinges from the courthouse doors. The Court should grant the Petition so civil liability here can remain principled and trial courts can properly address fatal flaws in class actions at the certification stage. For these reasons, *amici* respectfully request that this Court grant the Petition.

Respectfully submitted,



Patrick J. Gregory (Cal. Bar # 206121)  
Andrew J. Trask (Cal. Bar # 320222)  
SHOOK, HARDY & BACON L.L.P.  
One Montgomery Street, Suite 2700  
San Francisco, CA 94104  
(415) 544-1900  
atrask@shb.com

Philip S. Goldberg  
Cary Silverman  
SHOOK, HARDY & BACON L.L.P.  
1155 F Street, NW Suite 200  
Washington, DC 20004  
(202) 783-8400

Counsel for *Amici Curiae*



**PROOF OF SERVICE**

Sept. 27, 2018  
Page 9

STATE OF CALIFORNIA )

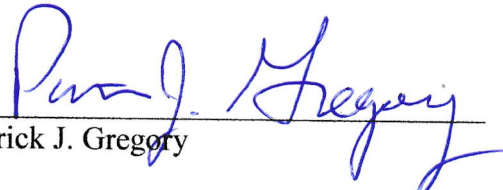
)

COUNTY OF SAN FRANCISCO )

I certify that on September 27, 2018, I sent an original and four copies of the foregoing by courier to:

California Supreme Court, Clerk's Office  
350 McAllister Street  
San Francisco, CA 94102  
Tel: (415) 865-7000

I also served a copy on the interested parties in this action by placing true and correct copy in sealed envelopes by U.S. Mail, first-class postage-prepaid, addressed to:

  
Patrick J. Gregory