JAN 3 · 2011

No. 10-735

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., *et al.*,

Petitioners,

v.

DEANIA M. JACKSON, On Behalf of Herself and All Other Persons Similarly Situated,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeal

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Due Process Clause prevents state courts from employing the class-action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

Amicus curiae focuses on one aspect of that question:

Whether the Due Process Clause prevents state courts from employing the class-action device in the manner described above, where the interests of the class representatives are not aligned with the interests of the absent class members.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, *cert. granted*, 2010 U.S. LEXIS 9588 (U.S., Dec. 8, 2010); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); and *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending).

WLF is particularly concerned by the willingness of the Louisiana courts to permit the two named plaintiffs in this case to serve as representatives of a huge class of current and former smokers, despite uncontested evidence that their interests and alleged injuries diverged substantially from those of many class members. Given those divergent interests, absent class

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

members almost surely cannot be bound – consistently with due process – by judgments entered in these proceedings. Yet, the decision below requires Petitioners to pay hundreds of millions of dollars for the benefit of absent class members. WLF believes that Louisiana's heads-I-win-tails-you-lose approach to class-based litigation is patently unfair to defendants and is inconsistent with traditional notions of due process of law.

STATEMENT OF THE CASE

In 1996, Gloria Scott (now deceased) and Respondent Deania Jackson filed this tort action in the Civil District Court for the Parish of Orleans against Petitioners. They purported to represent a class of all current or former Louisiana smokers. They advanced three legal claims – product defect, fraud, and breach of an assumed duty; they sought recovery of monetary damages as well as an order requiring Petitioners to pay the costs of establishing a medical monitoring program and smoking cessation services for all class members.

In April 1997, the court certified a class of all Louisiana residents who, on or before May 24, 1996, were smokers of cigarettes manufactured by Petitioners and who desired to participate in a medical monitoring program (to ascertain whether they were suffering from any smoking-related diseases) or in a program designed to assist them to quit smoking. Petitioners appealed from the class certification order. In November 1998, the Louisiana Court of Appeal affirmed. Pet. App. 281a-303a. It stated that the case raised one fundamental question: "Is a cigarette that contains nicotine a defective product?" *Id.* at 286a. The court determined

that certification of a state-wide class was "proper" because, "There should be one answer to this question, and the only practical vehicle that can effectively arrive at one consistent answer is the class action procedure." *Id.*[2] The appeals court also stated, without further elaboration, that "the claims of the persons specified as class representatives [*i.e.*, Scott and Jackson] adequately represent a cross-section of the claims made." *Id.* at 302a.

On remand, the trial court determined that it would conduct the trial in two phases, with Phase I devoted largely to issues of fault and causation. The Phase I jury ruled in the plaintiffs' favor on some issues. However, it rejected the plaintiffs' claim that cigarettes manufactured by Petitioners were defective. *Id.* at 249a-252a.[3] Nonetheless, even though the "defective product" question had been the sole issue cited by the appeals court as a justification for trying the case on a class basis, the trial court did not decertify the class. Instead, the case continued through a Phase II trial on the scope and cost of a class-wide smoking cessation remedy. The jury determined that a 10-year smoking cessation program should be established (the plaintiffs had requested a 25-year program), and the trial judge issued a judgment ordering Petitioners to pay nearly $600 million into the court registry to fund the program.

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[2] In summarizing its holding, the appeals court added, "Plaintiffs assert that the defendants' liability is caused by the singular act of the tobacco industry in selling a defective product after concealing the addictive nature of nicotine." *Id.* at 302a.

[3] The jury also rejected the plaintiffs' claim that a medical monitoring program was warranted. *Id.* at 255a-257a.

The case continued as a class action despite the frank admissions of Scott and Jackson that they had quit smoking well in advance of trial. (Scott quit smoking in 2000, Jackson in 2001.) Thus, Scott and Jackson were purporting to represent the interests of 500,000 Louisiana smokers at trials that were designed to determine whether and to what extent Petitioners would be required to fund smoking cessation programs for those smokers, even though Scott and Jackson were not themselves smokers at the time of trial. The trial court saw no problem with such representation, even though Scott and Jackson's need for smoking cessation programs was highly dubious and was unquestionably different in kind from the needs of Louisiana residents who continued to smoke.[4]

On appeal, the court of appeals in 2007 affirmed the judgment in part. Pet. App. 31a-79a. In particular, it upheld the trial court's decision not to decertify the class. *Id.* at 62a-65a. The appeals court held that class treatment was appropriate because the case did not involve "distinct claims of individuals for individualized damage awards," but rather involved "a common unitary claim by a class as a whole for the establishment of a single unitary fund or program." *Id.* at 63a. The court did not address whether the interests of Scott and Jackson were sufficiently aligned with the interests of other class members to allow them to represent absent class members.

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[4] Of course, Scott and Jackson arguably shared with all former and current smokers a desire to establish a medical monitoring program designed to detect smoking-related diseases. But once the Phase I jury rejected a medical monitoring program, that common bond among class members evaporated.

The appeals court rejected the claims of a significant number of class members, however. It stated that the Louisiana Products Liability Act (LPLA), La.R.S. 9:2800.51 *et seq.*, provided the exclusive theory of liability to persons claiming a product defect after September 1, 1988, and that the Phase I jury's rejection of the plaintiffs' defective product claim precluded any liability under the LPLA. *Id.* at 39a. Accordingly, the appeals court ruled that the Phase I jury verdict precluded any recovery by class members who began smoking after September 1, 1988 (or who became addicted to cigarettes after that date). *Id.* at 38a-40a. The court remanded the case to the trial court "to reduce the amount of the damages to cover the Pre-1988 Smokers only" and to reduce the size of the smoking cessation program (by limiting the program to four of the 12 elements sought by the plaintiffs). *Id.* at 74a; *id.* at 78a (Cannizzaro, J., concurring).

Scott and Jackson were personally unaffected by the LPLA ruling because they both had begun smoking before 1988. But the result of the litigation they initiated was a Louisiana judgment that purported to preclude any product liability recovery against Petitioners by a sizeable number of Louisiana smokers who were not similarly situated to the two named plaintiffs.

On remand, the trial court declined to conduct further evidentiary proceedings or to reduce the judgment to reflect the exclusion of LPLA-barred smokers. Instead, it merely reduced the judgment to $264 million to reflect the mandated reduction (from 12 to four elements) in scope of the smoking cessation program.

On appeal, the court of appeals in 2010 amended the judgment in part and affirmed. Pet. App. 1a-30a. It reduced the judgment to $242 million based on its best estimate regarding the effect of eliminating LPLA-barred smokers from the smoking cessation program. *Id.* at 26a-28a. The court explicitly declined Petitioners' request that it reconsider the 2007 appeals court decision (which had rejected numerous due process challenges, including a challenge to class certification), ruling that reconsideration was barred by the law of the case doctrine. *Id.* at 9a.

The Louisiana Supreme Court denied Petitioners' request that it review the judgment. Pet. App. 80a-81. On September 24, 2010, Justice Scalia stayed execution of the judgment pending the Court's action on Petitioners' intended petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. The Court has stressed that "mandatory class actions aggregating damages claims implicate the due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he had not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). While the Court has recognized an exception to that principle for "properly conducted class actions," it has stressed that an absent class member may not be bound by a class judgment unless he was "adequately represented by someone with the same interests who was a party to the suit." *Taylor*

v. Sturgell, 553 U.S. 880, 894 (2008).

In upholding the class-wide judgment in this case, the Louisiana courts have entirely jettisoned the "same interests" requirement. *Amicus* agrees with Petitioners that the Louisiana courts have adopted class action rules that violate a wide array of Petitioners' due process rights by eliminating numerous substantive and procedural protections that would otherwise have applied had the claims of class members been adjudicated on an individual basis. But of all those violations, *amicus* is most troubled by Louisiana's departure from the requirement that the interests of the class representatives must mirror those of the interests they purport to represent. In the absence of such a requirement, absent class members can legitimately complain that they have been denied their own day in court. Review is warranted to determine whether such a dramatic departure from historical class action practices comports with due process.

Some of the absent class members may be happy with the judgment entered by the Louisiana courts. Others – particularly those whose claims are barred because they started smoking after 1988 – are likely to be disappointed. If (as Petitioners contend) Scott and Jackson did not adequately represent absent class members, then those absent class will not be bound by the judgment below and will be free to challenge it collaterally. Such a result cannot possibly be deemed fair to Petitioners; they are being ordered to pay hundreds of millions of dollars for the benefit of absent class members whose claims were upheld by the Louisiana courts, yet they will have great difficulty defending the judgments entered in their favor against

thousands of other Louisiana smokers. Review is warranted to determine whether such a heads-I-win-tails-you-lose class action system comports with the Due Process Clause of the Fourteenth Amendment.

Review is also warranted because this case provides the Court with an unusual opportunity to give constitutional guidance to state courts regarding the use of class actions. When a plaintiff class is certified in a lawsuit, economic pressures generally compel the defendant to settle the case – regardless whether he judges the plaintiffs' claims have any merit. Even if a defendant wants to challenge class certification, in many States he is precluded from appealing until after the trial court enters a final judgment. Moreover, this Court lacks jurisdiction to exercise appellate review of a state court ruling unless the state court has entered a final judgment. The Petition presents the rare class action in which the defendant did not enter into a settlement following class certification but rather saw the case through to final judgment. Despite the increasing number of plaintiff classes being certified by state courts, the Court has not had an opportunity for several decades to provide guidance to state courts regarding due process limitations on class-wide adjudication. *Amicus* respectfully submits that the Court may not have another similar opportunity in the foreseeable future.

I. REVIEW IS WARRANTED BECAUSE LOUISIANA VIOLATES FUNDAMENTAL DUE PROCESS RIGHTS BY PERMITTING NAMED PLAINTIFFS TO REPRESENT THOSE WITH DISSIMILAR INTERESTS

The trial court certified a plaintiff class consisting of hundreds of thousands of Louisiana citizens with widely divergent interests. The certified class encompassed virtually all Louisiana citizens who had smoked Petitioners' cigarettes on or before May 24, 1996 and who desired to participate in either a medical monitoring program or a smoking cessation program. The plaintiffs contended (and the trial court so held) that Petitioners could be held liable under Louisiana tort law based on their alleged fraudulent marketing of cigarettes, without regard to whether individual class members actually relied on the fraudulent marketing. Pet. App. 45a-48a, 63a.

But the Louisiana courts nonetheless made clear that they ultimately were adjudicating the rights of individual citizens, rather than the right of a governmental body to seek sanctions against a corporation deemed to have harmed the general public. Based on the evidence presented by Scott and Jackson, the Phase I and Phase II juries provided individual class members some of the relief they requested and denied them other relief. Indeed, thousands of the absent class members were awarded no relief whatsoever. The Louisiana courts have adjudged that Petitioners must pay $242 million (plus interest) to the court registry to cover the costs of absent class members' smoking cessation programs, but that the absent class members are barred from seeking to recover the costs of medical

monitoring and that class members who started smoking after 1988 should receive nothing. Review is warranted to determine whether that judgment complies with the due process rights of either Petitioners or the absent class members, given the implausibility of any assertion that two individuals could adequately represent the divergent interests of hundreds of thousands of smokers.

Amici note initially that Petitioners have standing to raise claims based on the inadequacy of representation afforded to absent class members. It is well settled that a defendant in a class action has standing to complain that a court has inadequately protected the due process rights of absent parties. In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), the Court made clear that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which absent class members (due to inattention to due process rights) can choose not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

It is "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz*, 527 U.S. at 846 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). "Although 'we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' . . . the burden of justification rests on the exception." *Id.* (quoting *Martin*, 490 U.S. at 762 n.2). The Court held unequivocally in *Hansberry* that due process mandates that absent parties may not be bound by a judgment unless the procedures adopted by the court "fairly insures the protections of the interests of absent parties" as where their interests "are adequately represented by parties who are present." 311 U.S. at 42-43.[5] Reiterating that requirement in the context of a state-court class action seeking a money judgment, *Shutts* held that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 ((1997) (Fed.R.Civ.P. 23(a)(4) requires, before a class may be certified, that "a class representative must be part of the class and possess the same interest and suffer the same injury as class members," and that "the named plaintiff's claim

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[5] *Hansberry* held that property owners could not, consistently with due process, be bound by a judgment in prior litigation in which a similarly situated property owner had been deemed bound by a racially restrictive covenant contained in property deeds, because it was not clear that the interests of the prior defendant coincided with those of the *Hansberry* defendants. *Id.* at 44-45.

and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.").

At no point in these proceedings did Scott or Jackson demonstrate that their claims and the claims of absent class members were sufficiently interrelated that they would adequately protect the interests of absent class members. In particular, the interests of former smokers (such as Scott and Jackson) in the creation of smoking cessation programs are decidedly different than the interests of current smokers. First, it is highly dubious that former smokers have any need whatsoever for a smoking cessation program. That is particularly true of former smokers such as Scott and Jackson, who had not been smoking for a number of years by the time jury trials were conducted in this case. But even if former smokers have a bona fide interest in participating in smoking "cessation" programs, one can be reasonably certain that the interest would be directed toward a program tailored to the needs of former smokers who seek to ensure that they do not relapse. Current smokers, on the other hand, would seek programs specifically designed to assist those who are seeking to end an ongoing smoking habit. Moreover, former smokers such as Scott and Jackson would be far more likely than current smokers to emphasize other forms of relief (such as a medical monitoring program).

The record also indicates that the interests of Scott and Jackson (who began smoking before 1988) diverged dramatically from the interests of absent class members who began smoking (or first became addicted to cigarettes) after September 1, 1988. Class members in the latter category had to overcome limitations on

liability imposed by the Louisiana Products Liability Act, which provided the exclusive theory of liability to persons claiming a product defect after September 1, 1988.[6] Scott, Jackson, and their attorneys failed in their efforts to overcome those limitations on liability, and thus post-1988 smokers were denied all recovery in this case. Of course, Scott and Jackson were personally unaffected by that defeat. It is impossible to conclude that they adequately represented the interests of the plaintiff class when they had no personal stake in how the Louisiana courts resolved the LPLA issue.

Nor is the conclusion that Scott and Jackson inadequately represented the interests of absent class members affected by the fact that the courts ultimately established a smoking cessation program open to both current and former smokers. Fundamental fairness does not permit courts to await the results of litigation before deciding whether the named plaintiffs are adequate representatives of the class. Permitting such after-the-fact analysis would stack the deck against defendants. Absent class members would be able to sit back and reap the benefits of judgments entered in their favor while invoking due process concerns to bring collateral challenges to judgments decided against the plaintiff class (*e.g.*, the LPLA determination and the rejection of claims for a medical monitoring program).

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[6] The interests of Scott and Jackson also differed from those of many absent class members in that both Scott and Jackson began smoking for reasons unrelated to Petitioners' allegedly fraudulent claims regarding smoking and nicotine addiction. Scott and Jackson alleged that those statements were related only to their temporary inability to quit smoking, not to their decisions to start smoking.

As the Court made clear in *Shutts*, a class action defendant "has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata" to the same extent that the class action defendant is bound. 472 U.S. at 805. Petitioners are entitled to have their claim – that the interests of current smokers were inadequacy represented – decided without regard to the merits-based judgment ultimately entered by the Louisiana courts. Review is warranted to determine whether the Due Process Clause permits state courts to certify a plaintiff class when, as here, the interests of the named plaintiffs diverged so dramatically from those of large segments of the plaintiff class.

The due process concerns in this case are heightened because the trial court (over Petitioners' objections) determined that Scott and Jackson would not be required to provide personal notice of the suit to absent class members. The appeals court upheld that determination, stating:

> Defendants also aver that individual notice to potential plaintiffs should have been issued, instead of publication notice only. . . . In light of the large number of potential plaintiffs, individual notice would be unduly burdensome. Publication notice is adequate and sufficient in this matter.

Pet. App. 64a-65a.

That failure to provide personal notice is "troubling" because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest.'" *Richards v. Jefferson County*, 517 U.S. 793, 799 ((1996) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Due Process Clause prohibits a State from binding an absent class member to a court judgment unless he has received at least the level of notice required by *Mullane*, that is, the "best practical" notice that is "'reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Shutts*, 472 U.S. at 812 (quoting *Mullane*, 339 U.S. at 314). Because *Mullane* and later decisions of this Court made clear that notice as so defined meant, at a minimum, sending notice by mail to all interested parties whose names and addresses could reasonably be ascertained, the Louisiana court's resort to notice by publication is constitutionally problematic.[7] The inadequacy of notice provides an additional reason why due process review of Louisiana class action procedures

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[7] The appeals court apparently interpreted *Mullane*'s "reasonably calculated" language as a license for courts to engage in a cost-benefit analysis, and to reject notice by mail where its high costs outweigh the increased likelihood that class members will receive notice. *Mullane* did not sanction any such balancing process; rather, it required that notice be provided "in a manner reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315. As the Court later explained, *Mullane* "held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). *See also Amchem Products*, 521 U.S. at 617 (notice requirements "may not be relaxed based on high costs"). While obtaining the name and address of every smoker in Louisiana may not have been feasible, such difficulty does not excuse failure to provide notice to the many smokers whose identity could have been ascertained without great difficulty.

is warranted.

II. THIS CASE PROVIDES THE COURT WITH AN UNUSUAL OPPORTUNITY TO GIVE GUIDANCE TO STATE COURTS REGARDING THE USE OF CLASS ACTIONS

Review is also warranted because this case provides the Court with an unusual opportunity to give constitutional guidance to state courts regarding the use of class actions. Only rarely do litigants seek review in this court from state-court decisions addressing federal constitutional limits on use of class action devices. Rarer still are the instances where, as here, a litigant seeks review of a final judgment in a case in which the case was tried on a class-wide basis. But the paucity of such requests for review should not be taken as an indication that class certification disputes arise only infrequently in state courts. Rather, the infrequency of petitions seeking review of these issues is a function of the high likelihood of settlement once a plaintiff class is certified. Indeed, Congress has determined that procedural irregularities in state-court class actions is a serious problem; it adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, largely in response to concerns that the procedural rights of defendants were not being adequately protected in many state-court class actions. CAFA broadens the right of such defendants to remove their cases to federal court.

Not since *Shutts* was decided in 1985 has the Court directly addressed constitutional limitations on class action procedures adopted by state courts. *Amicus* respectfully submits that the Court should take

advantage of this unusual opportunity to provide guidance in an unsettled are of constitutional law by granting review in this case.[8]

The overwhelming tendency of class action defendants to settle once a plaintiff class is certified is well-documented. Defendants feel "intense pressure to settle" cases in which a large plaintiff class has been certified because large classes bring with them the potential for enormous monetary judgments. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied,* 516 U.S. 1984 (1995). If not wanting to "roll the dice," they settle, often without regard to the merits of the plaintiffs' claims. *Id.* Such settlements can in many instances legitimately be deemed "blackmail settlements." H. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also Castano v. American Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low"). Certification of a large plaintiff class often also

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[8] In 1996, the Court granted review in a case to consider the due process rights of absent class members to exclude themselves from the settlement of a state-court class action. However, the Court later dismissed the writ as improvidently granted because, it determined, the petitioner had failed to preserve his federal constitutional claim in the Alabama court proceedings. *Adams v. Robertson*, 520 U.S. 83 (1997) (*per curiam*). No similar procedural barriers exist in this case. Petitioners repeatedly argued in the Louisiana courts that the class action procedures adopted by the courts violated Petitioners' rights under the Due Process Clause.

exposes the defendant to enormous discovery costs, costs that are rarely, if ever, shared to an equal degree by the plaintiff class. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1299-1300 (2002).

Rule 23 of the Federal Rules of Civil Procedure was amended in 1998 to provide for interlocutory review (at the discretion of the federal appeals courts) of a district court order granting or denying class certification. Fed.R.Civ.P. 23(f). That amendment has to some extent lessened pressure on defendants to settle immediately following a district court order erroneously (in their view) granting class certification, and provides them with an avenue for correcting erroneous certifications. But defendants in state courts often are denied a similar option. Many state courts continue to prohibit interlocutory appeals from class certification orders. *See* Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 KAN. L. REV. 1027 (2010).

Moreover, even in those States (such as Louisiana) that permit interlocutory appeals from class certification orders, statutes governing this Court's jurisdiction virtually require defendants to endure a class-wide trial of all claims (a huge financial risk that most defendants cannot afford to undertake) before they can obtain federal court review of their federal constitutional claims. The relevant jurisdictional statute limits the Court's certiorari jurisdiction to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The Court lacks certiorari jurisdiction over state appellate decisions rejecting – on

interlocutory appeal – a due process challenge to a class certification order, because such decisions almost surely are not "final" judgments within the meaning of § 1257(a).

In sum, this case presents a particularly good vehicle for addressing the important issues of federal constitutional laws raised therein. Louisiana has adopted a novel interpretation of due process limitations on class action litigation. Petitioners raised its federal due process objections throughout the 14-year history of this class action litigation, and their claims have been squarely rejected by the Louisiana courts. The case has been fully tried, and a $242 million final judgment has been rendered. Accordingly, the Court will be able to consider the due process claims on the basis of a fully developed record. Moreover, because (for the reasons explained above) so few cases involving a certified plaintiff class actually reach the final judgment stage, this case offers a rare opportunity for review of the due process issues raised by the petition. In the absence of other cases in the judicial pipeline raising similar constitutional issues, *amicus* urges the Court not to pass on this opportunity.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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