No. 11-1257

In the Supreme Court of the United States

KIA MOTORS AMERICA, INC., PETITIONER

v.

SHAMELL SAMUEL-BASSETT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

DRI—the Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in civil-litigation defense. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. As part of this commitment, DRI seeks to address issues germane to the defense bar to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more efficient, and—when national issues are involved—more consistent. To promote these objectives, DRI participates as *amicus curiae* in cases, such as this one, that raise issues important to its members, their clients, and the judicial system.

DRI members have wide experience in litigating class actions and understand the issues raised by such cases in a variety of contexts. They are only too familiar with the dangers that the class-action mechanism poses for fundamental principles of due process. This case presents two situations that DRI members often encounter: courts' dilution of bedrock due-process guarantees to facilitate the resolution of class-action claims, and some state courts' selective invocation of waiver or forfeiture principles to insulate questionable rulings from review. DRI and its members seek to promote a level playing field and the fundamental fairness necessary to resolve

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties were timely notified and they consented to this filing.

disputes efficiently, equitably, and predictably. That is not possible under the decision below. This Court should grant certiorari; at a minimum, it should summarily reverse the judgment of the Supreme Court of Pennsylvania, which was plainly wrong under this Court's precedents.

SUMMARY OF ARGUMENT

As petitioner Kia Motors America, Inc. ("Kia") persuasively demonstrates, Pennsylvania's courts denied it due process of law by awarding aggregate damages to the respondent class based on a simple formula that multiplied the damages of the single class representative by the total number of persons in the class. The trial court did not allow Kia to contest the other 9,401 individual class members' rights to damages, and the court made no attempt to determine the damages any of those individuals suffered or, indeed, whether any of them actually suffered damages at all. On appeal, the Supreme Court of Pennsylvania compounded that due-process violation by failing even to consider the issue based on the plainly incorrect conclusion that Kia waived its right to challenge the aggregate-damages award by failing to object to the trial court's method during jury instructions—despite the fact that Kia had already repeatedly stated that damages would have to be determined in individual proceedings. See Pet. App. 115a (Saylor, J., dissenting) ("[T]he record is replete with objections * * *.").

Allowing an entire class to recover damages based only on a rudimentary "Trial by Formula," *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), without any inquiry into class members' individual entitlement to damages would transform class

actions from a mere procedural device into a means for obtaining enhanced damages unmoored from the actual harm suffered by class members. Properly understood, a class action *is* a mere procedural device: "[N]o less than traditional joinder (of which it is a species)," a class action simply allows the prosecution of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). By relieving class members of their individual obligation to prove actual injuries, the Pennsylvania trial court expanded the class's right to recover at the expense of Kia's fundamental due-process rights. This Court should reject such a "novel project." *Wal-Mart*, 131 S. Ct. at 2561.

Most federal courts of appeals and state courts of last resort that have addressed the issue have held that aggregate-damages awards of the sort at issue here violate defendants' due-process rights because they exceed the damages individual class members actually suffered. But other courts have allowed aggregate-damages awards. Even among those courts, however, the Pennsylvania trial court embraced a particularly broad form of aggregate damages, an "unconventionally liberal approach to class certification and collectivized treatment of individualized issues in aggregate litigation," Pet. App. 115a (Saylor, J., dissenting). This Court's review is necessary to provide guidance on a frequently recurring issue that Justice Scalia recently recognized is an "important question"—the "extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip*

Morris USA, Inc. v. *Scott*, 131 S. Ct. 1,*4 (2010) (Scalia, J., in chambers).

ARGUMENT

Class actions have become the favored way of commencing tort suits in the United States. Compared to traditional individual lawsuits, class actions result in higher damages awards,[2] net higher payoffs for plaintiffs' attorneys,[3] and—because of the risk of crippling judgments—tend to induce defendants to agree to larger sums even to "settl[e] questionable claims."[4] *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). In 2005, prompted by "[n]ational concern over abuse of the class-action device," *Philip Morris USA, Inc.* v. *Scott*,

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[2] See, *e.g.*, Hui Ling Lin et al., *An International Look at the Lawsuit Avoidance Hypothesis of IPO Underpricing*, *14 presented at Financial Management Association 2008 in Dallas, *available at* http://fma2.org/Texas/CompPapers/AnInternationalLookAtTheLawsuitAvoidanceHypothesisOfIPOUnderpricing.pdf ("By representing all investors at the same time (some of whom may not otherwise have filed a lawsuit) class actions tend to result in substantially larger damage claims * * *.").

[3] Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for* Res Judicata, 86 Tulane L. Rev. 1, 73 (2011).

[4] Accord *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842, 848-849 (7th Cir. 2010) (Posner, C.J.) ("The risk of error becomes asymmetric when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy; in such a case the defendant will be under great pressure to settle even if the merits of the case are slight."). See generally Monestier, 86 Tulane L. Rev. at 73.

131 S. Ct. 1, *4 (2010) (Scalia, J., in chambers), Congress passed the Class Action Fairness Act, with the explicit goal of bringing more state class actions into federal court and thus under the protection of federal procedure. But seven years later, the number of state-court class actions continues to rise.[5] In those many cases, like the one here, "the constraints of the Due Process Clause will be the only federal protection" for defendants. *Ibid.*

In this case, Kia had the misfortune of being sued in Philadelphia, a city where, as one academic study found, data support the "conclusion that [the] courts demonstrate a marked and meaningful preference for plaintiffs."[6] In the class-action suit and appeals that

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[5] See, *e.g.*, Patricia A. Seith, *Civil Rights, Labor, and the Politics of Class Action Jurisdiction*, 7 Stan. J. C.R. & C.L. 83, 115 (2011) ("At least in California, limited state court data—combined with statistics regarding class action filings in federal court—'strongly suggest that CAFA has shifted class action activity from state courts to federal courts even as the total number of class actions in California has grown.'") (quoting Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1609 (2008)).

[6] Joshua D. Wright, *Are Plaintiffs Drawn to Philadelphia's Civil Courts? An Empirical Examination*, Exec. Summ. 2 (Int'l Ctr. for L. & Econ., Oct. 20, 2011), *available at* http://laweconcenter.org/images/articles/philadelphia_courts.pdf. As Professor Wright noted in his study, that conclusion is unsurprising given efforts to make the venue "even more attractive to attorneys" in mass tort cases "'so we're taking business away from other courts.'" Amaris Elliott-Engel, *Philadelphia courts may see substantial layoffs*, Legal Intelligencer (Jan. 29, 2009) (*available at* http://www.law.com/jsp/nlj/legaltimes/PubArticleFriendlyLT.jsp?id=1202427822149) (quoting Court of Common Pleas President Judge Pamela Pryor Dembe). Of course, it was probably not happenstance that the class filed suit in a jurisdiction that is widely regarded as being plaintiff-friendly. Cf. *Deposit Guar. Nat'l Bank* v. *Roper*,

followed, Pennsylvania's courts violated Kia's due-process rights. They did so first by denying Kia the ability to have its liability assessed on the basis of actual damages suffered by individual class members, instead awarding aggregate damages to class members although it was "an unarguably individualized form of damages they sought—and * * * were awarded—namely, 'out of pocket paid repair costs.'" Pet. App. 102a (Saylor, J., dissenting). And, on appeal, the Pennsylvania courts exacerbated that due-process violation by concluding that Kia had forfeited its argument, despite a "record * * * replete with objections," *id.* at 115a (Saylor, J., dissenting), through an aggressive application of the state's contemporaneous-objection rule.

Although both issues raise troubling due-process concerns, this brief will principally focus on the due-process implications of aggregate damages, for two reasons. First, "[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question," *Philip Morris*, 131 S. Ct. at *4 (Scalia, J., in chambers), and one on which both state and federal courts are deeply and intractably divided. Second, this is a frequently recurring issue that nonetheless tends to be insulated from review by the pressures on defendants to settle. See, *e.g.*, *AT&T Mobility*, 131 S. Ct. at 1752 (noting defendants' tendency to settle even specious claims when damages are potentially great). This case thus represents an unusual opportunity to review a class-

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445 U.S. 326, 339-340 (1980) (discussing "'forum shopping' by putative class representatives attempting to locate a judge perceived as sympathetic to class actions.").

action case that not only did not compel settlement, but comes to this Court with the benefit of a full trial record. The Pennsylvania courts' aggressive and incorrect finding of waiver would not prevent this Court from considering the underlying issue of the due-process implications of aggregate-damages awards. See generally *Osborne* v. *Ohio*, 495 U.S. 103 (1990). And, even if it did, summary reversal would clear the way for future review. It is well past time for the Court to review this issue; as Justice Scalia has noted, "this constitutional issue ought not to be permanently beyond our review." *Philip Morris*, 131 S. Ct. at *4 (Scalia, J., in chambers).

I. THE TRIAL COURT VIOLATED KIA'S DUE-PROCESS RIGHTS BY DETERMINING DAMAGES ON AN AGGREGATE BASIS

The Pennsylvania trial court's award of aggregate damages violated Kia's due-process rights. It is indisputable that, in the "usual" circumstance of separate trials (*Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011)), each plaintiff would only be able to recover damages equal to the individual harm he suffered. To receive more than that would run afoul of the bedrock rule that "a plaintiff may not be made more than whole or receive more than one full recovery for the same harm." *Kforce, Inc.* v. *Surrex Solutions Corp.*, 436 F.3d 981, 984 (8th Cir. 2006) (internal quotations omitted); see also 22 Am. Jur. 2d *Damages* § 28 (2003) ("The sole object of compensatory damages is to make the injured party whole for losses actually suffered * * *."). Yet that is precisely what happened here. Although the trial court recognized that "individual class members paid varying out-of-pocket costs," Pet. App. 37a, and

although it "was well established that [Kia] already had paid for many of the repairs as warranty items," *id.* at 106a (Saylor, J., dissenting), the court nonetheless awarded damages for the *entire class* based only on proof of *a single class member's* out-of-pocket expenses, Pet App. 6a-7a, 129a-130a; see also Pet. 8-10. The effect of relying on this "grossly generalized, hypothetical proof," Pet. App. 106a (Saylor, J., dissenting), was to create an "astronomical damages figure" that "bears little or no relationship to the amount of economic harm actually caused by [the] defendant[]," *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).[7]

That this occurred in the context of a class action does not affect its propriety. If anything, there should be greater scrutiny for constitutional infirmities in a class-action proceeding, because class actions are "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979)). A defendant's due-process rights do not expand or contract based on the particular procedural mechanism a plaintiff chooses when filing suit. See Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 490 (2003) ("[W]e should hold the substantive law constant regardless of

[7] Aside from the due-process concerns in any individual case, allowing loose aggregate proof has a distorting effect on the litigation process by ratcheting up damages and increasing the pressure on defendants to settle. As this Court has observed, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility*, 131 S. Ct. at 1752.

whether the plaintiffs proceed by individual action, permissive joinder, or class action. * * * The substantive outcome should not be distorted by the choice of procedural vehicle."). After all, a class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980). As this Court has said, class actions exist to promote "efficiency and economy of litigation." *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974). "'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace* v. *Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

That is, the class-action mechanism exists to provide a streamlined way for those injured to go after their pieces of the pie; it does not exist to *expand* the pie. And it does not exist to provide plaintiffs with an end-run around a defendant's due-process rights. See *Wal-Mart*, *supra*. At the federal level, the Rules Enabling Act codifies this basic principle that the form of an action should not affect the substance of an action. The Act explicitly "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

It is undoubtedly easier for a court to award aggregate damages, as was done here, by multiplying

the class representative's out-of-pocket expenses by the number of class members than it is to determine the amount of damages each is entitled to receive. But it is long established that due process requires defendants have "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted) (quoting *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). And just last Term, this Court held that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. Unless class actions somehow diminish that right, a defendant should, at a minimum, be able to contest individual class members' injuries and entitlement to damages. Here, however, "the court eliminated any need for plaintiffs to prove, and denied any opportunity for [the defendant] to contest, that any particular plaintiff who benefits from the judgment (much less all of them)," *Philip Morris*, 131 S. Ct. at *3, is not entitled to the full amount of his damages award.

Indeed, without *some* effort to determine the amount of damages to which individual claimants are entitled, it is a virtual certainty that "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of a class action." *Philip Morris*, 131 S. Ct. at *4. The class-action mechanism facilitated such a perversion of due process here. The Pennsylvania trial court sidestepped entirely the issue of whether individual class members are entitled to damages, preferring instead the simpler "Trial by Formula" approach this Court held invalid for backpay claims

in *Wal-Mart*, 131 S. Ct. at 2561. Determining damages on an aggregate rather than an individual basis offends defendants' due-process rights, particularly when, as here, "there simply was no evidence of class-wide commonality relative to numerous factors affecting out-of-pocket costs." Pet App. 102a (Saylor, J., dissenting).

II. FURTHER REVIEW IS NECESSARY TO RESOLVE PERSISTENT DISAGREEMENT ABOUT THE VALIDITY OF AGGREGATE-DAMAGES AWARDS

Although this Court has considered the due-process implications of other aspects of class actions, see, *e.g.*, *Wal-Mart*, 131 S. Ct. 2541 (certification); *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003) (punitive damages); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996) (same), it has not yet addressed the constitutional propriety of awarding aggregate damages without allowing the defendant to contest individual class members' right to damages. The issue has arisen twice in merits cases, but both times the Court resolved the case on narrower grounds. See *Boeing Co.* v. *Van Gemert*, 444 U.S. 472, 481 n.6 (1980) ("[W]e express no opinion on the validity of judgments permitting [fluid-class] recoveries."); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 n.10 (1974) ("We * * * have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery * * *.") As a result, state courts and federal courts of appeals have come to conflicting conclusions. This Court's review is necessary to provide a "nationally uniform interpretation of

federal law." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1192 (2010).

A. Most Courts Reject Aggregate Damages As Contrary To Due Process

State courts of last resort and federal courts of appeals are deeply and intractably divided about the constitutional permissibility of aggregate-damages awards. Some state courts of last resort have held that class-action defendants are only liable for the damages actually suffered by individual class members. Texas, for instance, has categorically held that "due process requires that class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam); accord *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (rejecting, under Texas law, a trial-management plan that extrapolated liability and damages suffered by 2,990 class members based on proof offered by 41 sample representatives).

California has also recognized that it is "inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen."). *Granberry* v. *Islay Invs.*, 889 P.2d 970, 976 (Cal. 1995). That State's court of appeals recently reversed a class action award, agreeing with the defendant that the "trial management plan deprived it of its constitutional due process rights [by] prevent[ing] it from defending against the individual claims for over 90 percent of the class." See *Duran* v. *U.S. Bank Nat'l Assoc.*, 137 Cal. Rptr. 3d 391, 395 (Cal. Ct. App. 2012). Although the court of appeals took account of the California

Supreme Court's directive to "think outside the box" when it comes to class-certification and -management decisions, *id.* at 420 (citing *Sav-on Drug Stores, Inc.* v. *Superior Ct.*, 96 P.3d 194, 208 (Cal. 2004)), it ultimately determined that, "[w]hile innovation is to be encouraged, the rights of the parties may not be sacrificed for the sake of expediency," *ibid.* And statistical sampling of the damages suffered by a set of randomly chosen class representatives did not accord with due process where there was significant variation in the extent of class members' injuries. See *id.* at 422-428.

Most federal courts of appeals have likewise concluded that aggregate damages are constitutionally impermissible. The Second Circuit took the lead in holding that aggregate damages based on classwide rather than individual proof violates defendants' due-process rights. In *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (1973), vacated on other grounds, 417 U.S. 156 (1974), that court invalidated an aggregate-damages procedure, reasoning that, "if the 'class as a whole' is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous." *Id.* at 1018. To do so, the court held, would violate the "procedural safeguards established by the Constitution." *Id.* at 1013. That court recently reaffirmed its position in *McLaughlin*, where it rejected determining the "defendant's aggregate liability * * * in a single, class-wide adjudication" that would allow "individual class members * * * to collect their individual shares * * * through a simplified proof of claim procedure." 522 F.3d at 231. Such an approach, the court concluded, would hinder "the

right of defendants to challenge the allegations of individual plaintiffs." *Ibid.* More troublingly, determining individual damages on an aggregate basis would likely "result in an astronomical damages figure that [would] not accurately reflect the number of plaintiffs actually injured by defendants" and would "bear[] little or no relationship to the amount of economic harm actually caused by defendants," which in turn would violate the defendant's "substantive right to pay damages reflective of [its] actual liability." *Ibid.*; accord *Seijas* v. *Republic of Argentina*, 606 F.3d 53, 58-59 (2d Cir. 2010) ("Estimating gross damages for each of the classes as a whole * * * enlarges plaintiffs' rights by allowing them to encumber property to which they have no colorable claim.").

The Fourth Circuit has taken a similar approach in disapproving aggregate-damages awards in class actions. In *Broussard* v. *Meinecke Discount Muffler Shops, Inc.*, 155 F.3d 331 (1998), that court reversed in part because the district court allowed the class to rely on "class-wide proof of damages" rather than putting forward "actual proof of damages" that the individual class members suffered. *Id.* at 343; accord *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 327-329 (4th Cir. 2006). Earlier, in *Windham* v. *American Brands, Inc.*, 565 F.2d 59 (1977), that court, sitting en banc, rejected resorting to aggregate calculation of damages to avoid "the difficulties inherent in proving individual damages," reasoning that "[s]uch a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.'" *Id.* at 72 (quoting *Eisen*, 479 F.2d at 1018). As the

court in *Thorn* later put it, even though "[a] class-action claim for monetary relief may present common questions of liability [it is] the goal of the damage phase * * * to compensate the *plaintiffs* for their *individual injuries*." 445 F.3d at 330. "[T]o determine the particular amount of damages to which each plaintiff is entitled," the court added, "will generally require the court to conduct individual hearings * * *." *Ibid.*

The Fifth Circuit, too, has explicitly rejected a class's attempt "to calculate damages for [its] members * * * according to a formula that utilized a nationwide average," concluding that there is no reason to believe the "proposed damages calculus represents an adequate approximation of any single class member's damages, let alone a just and reasonable estimate of the damages of every class member * * *." *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304 (2003); accord *In re Fiberboard*, 893 F.2d at 711 (criticizing certification of a class action where "the claim of a unit of 2,990 persons" would be adjudicated instead of the "individual claims of 2,990 persons" because it would "inevitably restate[] the dimensions of tort liability").

The Ninth, Eleventh and—most significant here—Third Circuits have likewise rejected aggregate-damages awards. See, *e.g.*, *Six (6) Mexican Workers* v. *Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) ("'Allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights * * *.'") (quoting *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir.

1974));[8] *Allapattah Servs., Inc.* v. *Exxon Corp.*, 333 F.3d 1248, 1257 (11th Cir. 2003) ("[I]ndividualized proof of claims would be necessary regardless of whether an aggregate judgment was entered[;] the considerations that must be taken into account to calculate the correct amount of damages during the claims process reveal the obstacles to entering an aggregate judgment for the class."); *Nelson* v. *Greater Gadsden Housing Auth.*, 802 F.2d 405, 409 (11th Cir. 1986) ("Class plaintiffs cannot [be] relieve[d]" * * * of the burden of proving individual damages."); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191, 192 (3d Cir. 2001) (affirming class decertification in light of "insurmountable manageability problems" arising from the need for individual determinations of injury and damages because "actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member").

This case thus presents the situation where class actions in state and federal courts in Pennsylvania are governed by different standards. When the

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[8] But see *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 785, 786 (9th Cir. 1996) (affirming class award that depended on only a subset of class members' injuries, despite finding that the "due-process claim * * * raise[s] serious questions," because of the "extraordinarily unusual nature" of the class's claims for human rights abuses against Ferdinand Marcos). Judge Rymer dissented, writing, "I cannot believe that a summary review of transcripts of a selected sample of victims who were able to be deposed for the purpose of inferring the type of abuse, by whom it was inflicted, and the amount of damages proximately caused thereby, comports with fundamental notions of due process." *Id.* at 788 (Rymer, J., dissenting). "[E]ven in the context of a class action," she reasoned, "individual causation and individual damages must still be proved individually." *Ibid.*

requirements of due process of law turn on the happenstance of the court in which a suit is filed, an untenable conflict arises that requires this Court's intervention. See, *e.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari was granted to resolve conflict between the Eleventh Circuit and the Florida Supreme Court).

B. A Minority Of Courts Permit Aggregation-Based Damage Awards

Other courts, however, have been more accepting of awarding aggregate damages without allowing defendants to challenge individual class members' awards. Some, such as the Iowa Supreme Court, limit their approval of aggregate-damages awards to particular types of cases. See, *e.g.*, *Anderson Contracting, Inc.* v. *DSM Copolymers, Inc.*, 776 N.W.2d 846, 850 (Iowa 2009) ("[A]n aggregate approach to injury and damages [i]s appropriate in an antitrust case."). But see *ibid.* ("[S]uch potential problems [as individual damages can] be confronted, if necessary, after the trial of the liability and class-wide injury issues is completed."). The Sixth Circuit has likewise approved of aggregate-damages awards in certain types of cases. See, *e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534 (2008) (antitrust case). Other courts tellingly permit aggregation-based awards *only* when a showing has been made that it accurately approximates the results of individual proceedings. See, *e.g.*, *Scottsdale Mem'l Health Sys., Inc.* v. *Maricopa Cnty.*, 228 P.3d 117, 133 (Ariz. Ct. App. 2010) (approving statistical sampling to calculate damages if "the methodology to be employed appropriately takes into account the variables in the claims, addresses the relationships

among those variables and uses a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole.") (internal quotations omitted). But see *id.* at 132 (finding that the use of statistical sampling in that case did not "unduly threaten the County's interest that it be compelled to reimburse the Hospitals no more than the sum of all valid claims"). The Seventh Circuit, similarly, "favor[s] an ad hoc test to determine whether fluid recovery," *McLaughlin on Class Actions* § 8:16 (6th ed. Supp. 2009)—meaning a system where "a court assesses damages on a class-wide basis, without requiring any class member to prove individual damages" and "[i]ndividual damages are * * * apportioned out of the total award," 5 James Wm. Moore et al., *Moore's Federal Practice* § 23.46[2][e][iii], at 23-284 (3d ed. 2009) (footnote omitted)[9]—"comports with the policies underlying the relevant statute." *McLaughlin on Class Actions*, *supra*. After noting the split with regard to "fluid recovery mechanism[s]," that court decided "not [to] adopt either of the two extreme positions," instead favoring a "case-by-case analysis" of whether awarding aggregate damages is appropriate. *Simer* v. *Rios*, 661 F.2d 655, 675-676 (7th Cir. 1981).[10]

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[9] See also *In re Indus. Gas Antitrust Litig.*, 100 F.R.D. 280, 301 (N.D. Ill. 1983) ("When a fluid recovery is sought, no attempt is made to correlate class members with actual injuries. Damages are distributed in an imprecise manner that eliminates the need for individualized determinations.").

[10] Although the Seventh Circuit is open to aggregate damages, unlike the Court below, it is nonetheless keenly aware of the need to protect due-process rights in class actions. See,

But other courts, such as the New Mexico courts, take a more aggressive position akin to that adopted by the lower courts in this case, rejecting the proposition that class damages must reflect a class member's actual loss. See, *e.g.*, *Romero* v. *Philip Morris, Inc.*, 109 P.3d 768, 791 (N.M. Ct. App. 2005) (rejecting defendant's argument that "by * * * allow[ing] an award of aggregate and not individualized damages the court lessens and alters the substantive proof of actual damages," and concluding that aggregate awards need not "correspond to each class member's actual loss"). In the context of a mass-tort class action, the First Circuit went so far as to say that the "use of aggregate damages calculations is well established in federal court and "implied by the very existence of the class action mechanism itself." *In re Pharmaceutical Indus. Average Wholesale Price Litigation*, 582 F.3d 156, 197 (1st Cir. 2009). That court later held that there is a "*preference* for individually proven damages," but that aggregate approximations can be acceptable, particularly when the defendant offers "no practical solution to the problem" of how to fashion a remedy. *Brown* v. *Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 53-54 (1st Cir. 2010) (emphasis added).

Thus, even among the minority of jurisdictions that have determined that aggregate damages comport with due process, Pennsylvania has established itself as an outlier. The decision below represents the far end of the spectrum of views on the

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e.g., *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.")

subject, "an unconventionally liberal approach to * * * collectivized treatment of individualized issues in aggregate litigation." Pet. App. 115 (Saylor, J., dissenting).

C. Leading Treatises Confirm The Need For This Court's Guidance

Further indication of the need for this Court's guidance is evident in the fact that the two leading treatises on class actions express conflicting opinions about the propriety of determining damages for class plaintiffs on an aggregate basis. *McLaughlin on Class Actions*, adopting the majority view, disapproves of aggregate-damages awards because "substituti[ng] the 'class as a whole' for its individual members on damages issues would almost inevitably violate * * * due process * * *." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:16 (6th ed. Supp. 2009). Although, *McLaughlin* notes, "difficulties in proving individualized actual damages * * * often denote unsuitability for class proceedings," where certification is nonetheless proper, "[a] district court may not attempt to resolve manageability problems inherent in having to make individual damage determinations by [awarding] damages to the class as a whole [with] damages that go unclaimed by absent class members * * * re-distributed by the Court." *Ibid.*

The other leading class-action treatise, however, approves of determining class members' damages award on an aggregate basis. For instance, it concludes that "[c]hallenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each class member's claim individually[] will

not withstand analysis." 3 William Rubenstein et al., *Newberg on Class Actions* § 10:5 (4th ed. Supp. 2009). Thus, according to *Newberg*, which relies for that proposition on a since-overruled district court opinion, "If each member in a class suit joined as a named plaintiff, the defendant could not complain of an aggregate liability determination for all of them on the basis of altered substantive law." *Id.*; see also *id.* at § 9.59 ("In appropriate circumstances, various individual issues can be eliminated by the use of classwide proof of aggregate damages and by the employment of methods for distribution of aggregate recoveries by means other than individual proofs of damages suffered.").

III. THE WAIVER FINDING ITSELF VIOLATES KIA'S DUE-PROCESS RIGHTS, AND DOES NOT INSULATE THE CONSTITUTIONALLY SUSPECT AGGREGATE-DAMAGES AWARD FROM REVIEW

The Pennsylvania courts exacerbated their due-process violation by refusing to reach the aggregate-damages issue. The basis for this refusal was Kia's failure to object at the time of jury instructions, which purportedly ran afoul of the state's contemporaneous-objection rule. See Pet. App. 65a, 74a-76a., 159a-162a, 194a-198a.

But, under Pennsylvania law, "[t]he purpose of contemporaneous objection requirements respecting trial-related issues is to allow the court to take corrective measures and, thereby, to conserve limited judicial resources." *Commonwealth* v. *Sanchez*, 36 A.3d 24, 42 (Pa. 2011). There is no question that Kia squarely raised this issue for the trial court's consideration. "[T]he record is replete with objections

on [Kia's] part to: the class certification decision; the expert testimony upon which the hypothesized class-wide out-of-pocket expenses was based; and the trial court's failure to require proof for individualized claims." Pet. App. 115a (Saylor, J., dissenting). Given that litany of objections, it is difficult to imagine the trial court was unsure where Kia stood on the question of individual versus aggregate proof. Any further objection from Kia would have been "patently futile." *Osborne*, 495 U.S. at 125 (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)). "[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid.* (quoting *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923)). As the dissenting justice below concluded, "this case should not turn on waiver." Pet. App. 115a.

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This case embodies two troubling trends that DRI members increasingly encounter: courts' dilution of bedrock due-process guarantees to facilitate the resolution of class-action claims, and state courts' selective invocation of waiver or forfeiture principles to insulate questionable rulings from review. This Court should review the Supreme Court of Pennsylvania's invocation of the contemporaneous-objection rule in this case; indeed, it is so plainly flawed under existing precedent that this Court should consider summary reversal. Such action would clear the way for resolving the unquestionably "important" question of the "extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris*, 131 S. Ct. at *4 (Scalia, J., in chambers).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should consider summarily reversing the patently wrong decision of the Supreme Court of Pennsylvania.

Respectfully submitted.

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