**IN THE**
**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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

***IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION***

Panel Opinion Filed: January 23, 2018

APPEAL FROM ORDERS OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. GEORGE H. WU, PRESIDING
CASE NO. 2:13-ML-02424-GW-FFM

# BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES-PLAINTIFFS' PETITION FOR REHEARING EN BANC

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## INTRODUCTION

A divided panel, over Judge Nguyen's strong dissent, invented a new predominance requirement not found anywhere in Rule 23. Specifically, before a district court may certify a nationwide class alleging violations of California law, it must now "apply the California governmental interest test" in the first instance. *In re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679, 702 (9th Cir. 2018) ("*Hyundai*"). This holding decisively breaks from both this Court's precedents and binding California case law, both of which place the burden on the foreign law proponent, as explained in the dissent and the settling parties' *en banc* petitions.

This brief avoids repeating the settling parties' points. Instead, amici, informed by their distinct perspectives, discuss other troubling aspects of the *Hyundai* decision that have generated intra-circuit (and inter-circuit) conflicts and endanger important public policy. Amicus Curiae Judge Stephen G. Larson (Ret.), formerly of the United States District Court for the Central District of California, is particularly concerned with *Hyundai's* unnecessary

exacerbation of the burdens on the district courts. Amicus Curiae David Rosenberg, the Lee S. Kreindler Professor of Law at Harvard Law School, is particularly concerned with the decision's impact on the efficacy of the class action device.[1]

## ARGUMENT

### I. The Panel Majority's Newly-Imposed Requirement for Class Certification Would Unduly Hamper District Courts' Wide Discretion to Certify Settlement Classes

The correct application of the standard of review will often dictate the outcome of a case. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). For certification orders, review is performed under an abuse of discretion standard. *See*, *e.g.*, *In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 942 (9th Cir. 2015); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, for orders *granting* class certification, the reviewing court "accord[s] the district court noticeably more deference than when [it] review[s] a denial." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Reviewing courts recognize that, because "class actions

[1] The undersigned certifies that no party's counsel authored this brief in whole or in part, and no person contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

vary so widely in their circumstances" the trial judge should be "vested with broad discretionary control over the conduct of such actions enabling the presiding judge to respond fluidly to the varying needs of particular cases." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982).

The reviewing court's role is simply to ask "whether the district court's decision 'exceeded the bound of permissible choice,' a standard… that acknowledges the possibility that polar opposite decisions may both fall within the 'range of possible outcomes the fact and law at issue can fairly support.'" *Shook v. Board of County Commissioners of El Paso*, 543 F.3d 597, 610 (10th Cir. 2008) (citation omitted). *Shook* observed that while the district court could have *sua sponte* suggested subclasses to mitigate the problems identified, and that the reviewing panel "may have reached a different conclusion had the issue been presented to us as an initial matter…[it] cannot say that the district court's assessment was beyond the pale." *Id.* at 602-604.

Under this deferential standard, the panel majority, had it sat

in the district court's seat, might have been entitled to ask for more information on variations in state law prior to rendering the certification decision. But the standard of review constrains the reviewing court from vacating a decision simply because it disagrees with the lower court's otherwise legal approach.

Here, neither controlling California law nor Rule 23 compelled the district court to conduct a governmental interest test, *sua sponte*, before finding predominance.[2] In fact, *Hanlon*, the controlling precedent on this issue, is directly to the contrary. No previous published case of this Court, as far as amici are aware, has ever found an abuse of discretion under such circumstances. The panel majority, by "faulting the district court at every turn," has simply failed to adhere to the abuse of discretion standard, as the dissent aptly observed. *Hyundai*, 688 F.3d at 715.

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[2] Likewise, the panel majority's exclusion of used car owners from a potential California-only class (*Hyundai*, 881 F.3d at 703-05) is premised on both an incorrect application of California law (which does not require individualized proof of reliance) and an improper disregard of the deference due to the district court's review and evaluation of submitted materials. *See id.* at 715-16 (criticizing panel majority's misapplication of California law on reliance and observing that the settling parties presented substantial evidence of a widespread advertising campaign).

By styling its *de novo* review as "abuse of discretion," the panel majority dramatically lowers the bar for reversing discretionary orders—a bar that previously required a clear showing that the order is "illogical, implausible or without support in inference that may be drawn from the record." *United States v. Hinkson*, 558 F.3d 1247, 1263 (9th Cir. 2009) (en banc). This will create disarray and confusion.

Without assurance that their discretionary decisions will be accorded proper deference, district courts may resort to rigid, overly formalistic approaches to class certification, such as in a mechanical application of the governmental interest test. District courts may also order extra briefing in an abundance of caution, adding delay to the process. These consequences would defeat the purpose of a deferential standard, which recognizes that "the factors which may properly influence [the district judge's] decision are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair his ability to deal fairly with a particular problem than to lead to a just result." *United States v. McCoy*, 517 F.2d 41, 44 (7th Cir. 1975).

## II. The Imposition of an Onerous Requirement Would Unnecessarily Exacerbate the Burdens Placed on District Courts

Under the panel majority's new edict, already-strapped district courts must undertake an onerous analysis of state law variations, even where no party seeks application of foreign law, before they certify nationwide settlement classes. This is unnecessarily burdensome, as explained by the Third Circuit's *en banc* decision in *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 308 (3d Cir. 2011), with which *Hyundai* directly conflicts.

*Sullivan* persuasively demonstrated why an "intensive fifty-state cataloguing of differences in state law" is wholly unnecessary in the settlement context. First, *Sullivan* held that the settlement context renders state law variations meaningless because there would be no trial. *Sullivan*, 667 F.3d at 303. State law variations implicate manageability—not predominance—and manageability is irrelevant for purposes of settlement certification. *Id.* at 303-04. Thus, settlement "eliminate[s] the principal burden of establishing the elements of liability under disparate laws." *Id.* at 303.

Second, attaching a conflict-of-law test to the predominance

analysis effectively creates a full-blown merits determination at the certification stage. *Id.* at 305-06. But the Supreme Court has restricted inquiries at the class certification stage to defenses that assert that "'failure of proof on th[is] common question' likely would have ended 'the litigation and thus [would not have] cause[d] individual questions . . . to overwhelm questions common to the class.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (quoting *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184, 1196 (2013)).

A conflict-of-law test falls into the category excluded by the Supreme Court for consideration and the class certification stage because it would entail determining whether class members in each state have a valid claim based on standing, limitations period, etc. *Sullivan*, 667 F.3d at 306. But there is "no proof on the merits [that] need to be adduced" for certification. *Id.* at 307. Moreover, *Sullivan* explained that conflating merits determinations with certification would "unduly complicate" matters, since the court is bound to encounter difficult questions or unsettled legal issues under each state's consumer laws, creating immense and perhaps insuperable

administrative, logical, and practical obstacles. *Id.* at 309-310 and n.39 (noting that an exhaustive analysis of all states' laws "would produce absurd results and cause undue delay"). Indeed, the point of settlement is to avoid the risk associated with such unsettled and difficult issues.

*Sullivan* rigorously exposes the fatal flaws of requiring an extensive conflict-of-law test for settlement certification. That the panel majority ushered in this sea change in Ninth Circuit jurisprudence—incorporating these very flaws—without even grappling with the on-point and well-reasoned *Sullivan* decision makes *en banc* review even more appropriate.

## III. The Panel Majority's Decision Would Impede Nationwide Class Actions, Undermining Efficient Resolution and Deterrence of Unlawful Conduct

Judge Nguyen does not exaggerate in warning that the panel majority's decision "deals a major blow to multistate class actions." *Hyundai*, 881 F.3d at 708. The *Hyundai* decision threatens to place unsupportable roadblocks to the pursuit and settlement of nationwide class actions and would further erode the key features of class actions: efficiency in handling numerous claims and deterrence

of harmful business conduct.

All parties would suffer from this result. The cardinal virtue of class actions is efficiency. Consumer class actions are particularly likely to "yield substantial economies in litigation" by maintaining millions of individual small dollar claims in one suit. *Carnegie v. Household Intern.*, 376 F.3d 646, 661 (7th Cir. 2004) (Posner, J.). In automotive defect cases, this Court has explained that individual suits face the problems of challenging state laws (state lemon laws can require vehicles to be defective beyond repair), often short limitations periods, and litigation costs that typically dwarf the individual recovery. *See Hanlon*, 150 F.3d at 1023. Splintering a class action into thousands of individual claims would also "unnecessarily burden the judiciary." *Id.* For these and other reasons, many types of automotive defect claims are most efficiently and properly adjudicated on a classwide basis.

Further, nationwide class action settlements allow defendants to obtain "global peace" and avoid protracted, ceaseless litigation over similar claims arising in different jurisdictions. *Sullivan*, 667 F.3d at 310-312. And, unlike *Amchem Products, Inc. v. Windsor*,

521 U.S. 591 (1997), this case does not involve any financially meaningful differences in the interests of different plaintiff groups that could provide an incentive to, as in *Amchem*, undercompensate exposure-only claimants to provide immediate payment to current injury claimants. *Cf. id.* at 626. In contrast, the panel majority's approach results in state claims being siphoned off into "countless suits in state court[s]." *Sullivan*, 667 F.3d at 312 (citation omitted). The panel majority thus disables the legal and practical efficiencies class actions were designed to promote.

This Court has also long recognized the importance of class actions in deterring unlawful conduct.[3] *See, e.g.*, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) (finding that for statutes that promote enforcement, deterrence, or disgorgement, the class action may be the 'superior' and only viable method to achieve those objectives…"); *Blackie v. Barrack*, 524 F.2d 891, 903 (9th Cir. 1975) (highlighting the

[3] *See* Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing*, Legal Studies Research Paper Series, Working Paper No. 17-40 (2017) (summarizing of empirical research demonstrating the deterrence effect of class actions), available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282>.

"substantial role that the deterrent effect of class actions plays in accomplishing the objectives of the securities laws").

The objectives of deterring unlawful conduct and protecting consumers would suffer from the panel majority's evisceration of nationwide class actions. By dramatically increasing the burden on plaintiffs —and exacerbating the transaction costs—to certify nationwide classes even for settlement, the panel majority's opinion creates strong disincentives for consumers to pursue meritorious nationwide class suits.[4] *See generally*, David Rosenberg and Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. Leg. Analysis 305, 350 (2014) (demonstrating that the class action's aggregation of expected recovery "increases the defendant's total costs from liability and litigation to promote the social objective of optimal deterrence").

The panel majority also ignores alternative approaches. Several sister circuits have concluded that, where "differences in

[4] *Sullivan* underscores this point by observing that immediate relief under the nationwide settlement is "the most efficient enforcement of the antitrust laws[] when compared to the highly uncertain result the plaintiffs would encounter…." in attempting to litigate against a powerful defendant with "long track record of avoiding… [United States] jurisdiction." *Sullivan*, 667 F.3d at 314.

state law [fall] into a limited number of predictable patterns," courts may "group similar state laws together and appl[y] them as a unit." *Sullivan*, 667 F.3d at 301; *see also Klay v. Humane, Inc.*, 382 F.3d 1241, 1262 (11th Cir. 2004) (authorizing grouping of state law in class actions); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986) (R.B. Ginsburg, J.) (same).

Courts could also consider conflict analysis at a later phase in the proceeding. But as *Sullivan* explained, a conflict analysis at the certification stage is premature and impermissibly results in a merits determination. (*See* Sec. II, *supra*.) The better approach is to consider conflicts in law during the liability or damages phase, grouping states as necessary. This is efficient as well as logical. There is no reason to undertake this costly and complex inquiry at the certification stage, particularly in small-dollar-value cases, since the differential in payouts between various state's laws are trivial, if not negative, given transaction costs, and those questions will already arise in the course of the court's review of the settlement's reasonableness. At that stage, the court will have the opportunity to have a real adversarial proceeding in which objectors (class

members, public interest organizations, professional objectors, and public officials) will have notice and the opportunity to demonstrate at their expense—not the class's—that the differentials are substantial and worth the price of adjusting the settlement.

Another approach is to tap into the broad pre-trial authority transferee courts are given under the multidistrict litigation (MDL) procedure.[5] *See In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 699-701 (9th Cir. 2011) (outlining the numerous actions an "MDL court can do in its sound discretion in order to manage multidistrict litigation effectively"). Under MDL consolidation, the transferee court can, and usually will, manage discovery and adjudicate core common questions of fact and law (here, *e.g.*, whether California law applies generally to all cases, whether federal law required uniform representations as to mileage, etc.), and once that work is completed,

[5] The panel majority also wrongly found that plaintiffs had little bargaining leverage due to a tentative order finding conflicts between the various states' laws. In fact, that variation did not result in little bargaining leverage, because the MDL proceeding itself generated collective bargaining leverage among plaintiffs who would otherwise be scattered around the country. *See Hyundai*, 881 F.3d at 703.

remand cases to the transferor court for trial as required.[6] Each transferee court then can apply their own state law—or their grouping of similar state laws—at trial.

Another route, advocated by amicus curiae Professor David Rosenberg, is the "average law" solution. *See* David Rosenberg, *A Solution to the Choice-of-Law Problem of Differing State Laws in Class Actions: Average Law*, 79 G.W.L. REV. 374, 384-88 (2011). As the article explains, businesses, in assessing risk in interstate commerce, need to know, as a matter of conducting their ordinary business, their expected nationwide liability from alternative courses of conduct, so that they can pursue the optimal approach. This practical "average law" analysis drives the business's cost-minimizing safety strategy. The optimal conduct decision is the population-weighted mid-point between liability standards of all fifty states—the "average law." *See* David Rosenberg, *A Sampling-Based System of Civil Liability*, 15 THEORETICAL INQUIRIES L. 635 (2014).

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[6] Notably, some courts have applied the law of transferor courts in MDL proceedings involving class actions. *See In re Wal-Mart Wage and Hour Employ. Prac. Litig.*, No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315 (D. Nev. June 20, 2008).

The average law is the optimal point that balances deterrence with business cost-efficiency, and can be used to relieve the problems presented by the governmental interest test. The average law approach is, as a matter of practice, adopted by parties settling nationwide class actions, as the settlement is based on the parties' expectations concerning the nationwide average expected trial outcome, which is impossible to know in advance, on a state-by-state basis or otherwise.

## IV. The Panel Majority's Decision Breaks with This Court's Precedents on False Conflict

The panel majority's insistence on the application of a governmental interest test—and its assumption that California law could not apply nationwide—also breaks with several decades of Circuit precedent recognizing the critical dichotomy between "true" and "false" conflicts. These cases hold that where the defendant is a domestic corporation and the plaintiffs are foreigners, the defendant's attempt to invoke foreign (non-forum) law presents a "classic false conflict" because the foreign jurisdiction has no unique interest in applying its own pro-defendant laws instead of the forum state's pro-plaintiff laws. *See, e.g.*, *CRS Recovery, Inc. v. Laxton*, 600

F.3d 1138, 1143 (9th Cir. 2010) (recognizing that the case "presents a classic 'false conflict'" where plaintiff was a Virginian and defendant was a Californian); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1007 (9th Cir. 2001) (finding no "true conflict" between Hawaii law and California law where plaintiff was a Hawaiian seeking to invoke the greater protections of California law); *In re Aircrash in Bali*, 684 F.2d 1301 (9th Cir. 1982) (applying California law where plaintiffs resided in Virginia and Australia and defendant was based in California).

Here, Defendant is a California corporation, and much of the alleged misconduct occurred in California. Had the panel majority hewed to this Circuit's long-standing precedents, it would have concluded that this case presents a classic "false conflict," defaulted to application of forum (California) law, and affirmed the district court's order certifying a nationwide class under California law.

As this is a class "false conflict" case, the panel majority's heavy reliance on *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) is therefore entirely misplaced. Moreover, in *Mazza*, the defendant-foreign law proponent argued that it would be prejudiced

by extending pro-consumer California law to its transactions with consumers in states with laws friendlier to business. *Mazza,* 666 F.3d at 592-93. According to *Mazza*, those states have a stronger governmental interest in applying their own, carefully-calibrated laws meant to attract out-of-state businesses than California does in policing its own corporate citizens. *Id*. at 593.

*Mazza*'s rationale has no application here. Defendant assented to California's strong consumer protection laws, and *class members* in this case have no interest in weaker consumer protection laws. To the extent that the objectors are invoking the interests of a foreign jurisdiction, they cannot establish Virginia's governmental interest in applying its presumably less consumer-friendly laws to the class under the reasoning of *Mazza*.

Requiring a conflict test under these circumstances is therefore erroneous and conflicts with California and Ninth Circuit precedent.

## CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the Court to grant appellees' petition for rehearing en banc.

Dated: March 19, 2018 Respectfully submitted,

By: ***/S/ Ryan H. Wu***

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## ATTESTATION REGARDING SIGNATURES

Pursuant to Circuit Rule 25-5(f), I attest that all other signatories, and on whose behalf the filing is submitted, concur in the filing's content.

Dated: March 19, 2018

***/S/ Ryan H. Wu***
Ryan H. Wu

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9th Circuit Case Number(s) 15-56014, 15-56025, 15-56059, 15-56061, 15-56064, 15-56067

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