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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 others similarly situated,
Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party in this case authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioners, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Respondent has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

Few issues are of more concern to American business than those pertaining to class certification. The Chamber thus regularly files amicus briefs in significant appeals involving class certification issues, including *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), *cert. granted in part*, --- S. Ct. ---, 2010 WL 3358931 (U.S. Dec. 6, 2010), *Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010), *cert. granted*, --- S. Ct. ---, 2010 U.S. LEXIS 5755 (U.S. Sept. 28, 2010), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), among many others.

The Chamber's members have a strong interest in reversal of the ruling below because the decision of the Louisiana Court of Appeal undermines the fundamental due process rights of American businesses by severely restricting their ability to defend themselves in class action trials. If allowed to stand, the ruling has the potential to dramatically increase the class action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Louisiana Court of Appeal, Fourth Circuit, upheld class certification and a classwide verdict of $270 million in a suit involving all Louisiana residents who smoked on or before May 24, 1996 and purportedly sought to participate in a smoking cessation program. This class of over 500,000 smokers included individuals who purchased different cigarette

brands, were told different things by the companies that manufactured and sold those cigarettes about the safety or risks of smoking – and knew different things from other sources about the risks of smoking when they began smoking and throughout the time when they smoked. Inexplicably, the case was cleared for class treatment – and the verdict was ultimately upheld – even though the class members presented highly individualized, disparate claims that were subject to individualized affirmative defenses.

Class treatment of respondents' claims was particularly inappropriate because their suit sounded in fraud, a cause of action that requires proof of reliance as a matter of long-established Louisiana law. Although courts across the country have almost uniformly recognized that it is virtually impossible for plaintiffs in consumer cases to satisfy a reliance requirement in a class trial, the court of appeal determined that reliance was no obstacle here. In so concluding, the court reasoned that because defendants had supposedly distorted the "body of public knowledge" and because plaintiffs sought to recover in the form of a common fund, "the causal connection" required for a showing of reliance could simply be established in one fell swoop for "the class as a whole." *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1277-78 (La. App. 4 Cir. 2007), *reh'g denied sub nom. Jackson v. Am. Tobacco Co.*, No. 04-2095, 2007 La. App. LEXIS 437 (La. App. 4 Cir. Mar. 2, 2007) (determining that "individual reliance is not at issue in the instant case"). Thus, the court of appeal approved the jury verdict even though no class member was required to prove the elements of his or her claim at

trial – and even though petitioners were effectively barred from presenting any real defense to the class members' claims.

This Court should grant review for two important reasons. First, review is necessary to curtail state-court abuse of the class action device. This decision is just one of a number of state-court rulings that have used the class action device to eliminate substantive and procedural protections guaranteed by due process. The decision in this case essentially overrides the requirements for asserting a fraud claim under Louisiana law if that claim is pursued as part of a class action rather than individually. Absent reversal, this case would become a leading precedent for the proposition that courts can properly construe a state law to mean one thing in individual suits and another in class actions. And its effects would not be limited to Louisiana. Rather, the verdict – and its affirmance – would send a strong message to state courts across the country that they too can use the class device to abrogate the protections afforded by state substantive law and fundamental due process principles. *See* Ted Frank, *SCOTUS to rule on due process in class actions?*, PointofLaw Forum, Sept. 28, 2010, *available at* http://www.pointoflaw.com/archives/2010/09/scotus-to-rule.php (noting the "tremendous due process problems" created by the "tail-wagging-the-dog aspect of class actions, where the procedural Procrusteanism of creating a class ends up depriving defendants of their ability to mount a substantive defense that they would have to individual claims").

Second, review is necessary to protect the interests and vitality of American businesses. The court of appeal's loose approach to class actions involving alleged fraud – apparently authorizing class treatment whenever a company is alleged to have "distorted the body of public knowledge" – threatens to solidify select state courts as havens for class actions that would be routinely rejected by the federal system. In particular, the ruling invites plaintiffs' attorneys to craft class actions that evade the jurisdictional requirements of the Class Action Fairness Act ("CAFA") and file them in state courts that will bend state law to accommodate class trials. Such a result would have a deeply destructive effect on businesses nationwide. For this reason too, the Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT CLASS PROCEEDINGS CANNOT ABRIDGE DUE PROCESS PROTECTIONS.

The Court should grant review to clarify that a state court violates due process when – in order to facilitate class adjudication – it excuses class representatives from proving a critical element of a cause of action and/or bars defendants from presenting individualized evidence that bears on that element.

As recognized by Justice Scalia's stay order, "this is a fraud case, and in Louisiana the tort of fraud normally requires proof that the plaintiff detrimentally relied on the defendant's misrepresentations." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010)

(Scalia, J., in chambers) (citation omitted). The court of appeal's finding that plaintiffs in this case could be excused from proving individual reliance – and that defendants could be barred from contesting reliance on an individual basis – applied a fraud standard that is substantively different from the one used in the "normal[]" case. The basis proffered by the court of appeal for this departure was the nature of the suit – a class action in which plaintiffs sought relief in the form of a single, court-supervised common fund. But as a substantial volume of caselaw makes clear, such a modification of the substantive requirements of state law to facilitate classwide resolution of disputes does not comport with the minimum requirements of due process.

It is well established that the fundamental fairness guarantee of the Due Process Clause requires a plaintiff to prove every element of his or her claim. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that the elimination or shifting of the burden to prove every element of an alleged offense violated defendant's due process rights); *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) ("[A] conclusive presumption on [an] issue . . . is the functional equivalent of a directed verdict on that issue."); *In re Winship*, 397 U.S. 358, 364 (1970). Due process thus prevents state courts from eliminating an element of a cause of action and applying that change retroactively to prior conduct – as the court of appeal did in this case. *See Bouie v. City of Columbia*, 378 U.S. 347, 352-54 (1964) (holding that state court's "unforeseeable" and "retroactive" ruling that departed from prior precedent violated due process because, "[i]f a state legislature is barred by the Ex Post Facto

Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result through judicial construction"); *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1044-45 (E.D. Wis. 2010) ("[T]he constitutional principles [of due process] apply with equal force to the . . . application of a common law rule in a civil lawsuit. The federal guaranty of due process extends to state action through its judicial . . . branch of government. . . . The . . . retroactive application of a common law judicial decision cannot circumvent constitutional implications when the rule expressed by that decision is applied.") (internal quotation marks and citations omitted). Such retroactive modifications are proscribed under the Due Process Clause because they offend a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citation omitted); *see also Gibson*, 719 F. Supp. 2d at 1046 ("[R]etroactive application of judicial rulings cannot trump due process concerns.").

Due process also protects the right of every litigant "to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (citation omitted). As this Court has repeatedly recognized, this due process right requires that defendants have "an opportunity to present every available defense" at trial. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405

U.S. 56, 66 (1972)). The same principle applies in the context of a class action. *See, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997) (stating that defendants "cannot receive a fair trial without a process which permits a thorough and discrete presentation of [their] defenses"). For this reason, due process mandates that defendants have an opportunity to assert defenses that apply separately to individual class members, even if they do not apply to the class as whole. *See Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (holding that an overbroad consolidation order may "deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result").

Consistent with these due process principles, courts across the country have repeatedly held that fraud claims are particularly ill-suited for class resolution because under Louisiana law – and the law of other states – each plaintiff must show that he or she relied on the alleged fraud. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 320 (4th Cir. 2006) (stating that the "contents of the plaintiff's mind," which is a focal point of fraud suits, "is not readily susceptible to class-wide determination"); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 453-54 (E.D. Pa. 2000); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (denying class certification where "reliance [was] an individualized issue"); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-57 (D.N.J. 1998); *In re Ford Motor Co. Bronco II*

Prod. Liab. Litig., 177 F.R.D. 360, 374 (E.D. La. 1997) ("[U]nder plaintiffs' common law fraud/misrepresentation theory, each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate."). Notably, court after court has recognized these principles in cases like this one, denying certification of tobacco-related class actions where plaintiffs would need to demonstrate reliance to prevail at trial. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Castano v. Am. Tobacco Co.*, 84 F.3d at 735; *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 94 (W.D. Mo. 1997).

In rebuffing this line of precedent, the Court of Appeal trampled defendants' due process rights. Although the court began with a proper recognition that proof of plaintiffs' fraud-based claims would require a showing of "causation in the form of reliance," *Scott*, 949 So. 2d at 1277, it quickly veered off-course, attempting to excuse this requirement on the grounds that: (1) defendants had supposedly distorted the "entire body of public knowledge," and (2) plaintiffs sought to establish a common fund to pay for smoking cessation programs, *id.* Neither ground can justify the court's wholesale abrogation of petitioners' due process rights.

Smoking cessation programs are merely forms of relief – not causes of action. Thus, they do not extinguish the requirement that each plaintiff allege and satisfy every element of his or her underlying claim. *See Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 361-62 (La. 1998) ("[A] plaintiff who can demon-

strate a need for medical monitoring has suffered damage" that "is compensable *when* the plaintiff establishes liability under traditional tort theories of recovery") (emphasis added). Nor should it make any difference that plaintiffs dress their allegations of fraud in collective terms – such as distortion of "public knowledge." Fraud claims – in Louisiana and elsewhere – require a showing of individual reliance regardless of how broadly the alleged deception was disseminated. *See Edmundson Bros. P'ship v. Montex Drilling Co.*, 731 So. 2d 1049, 1062 (La. App. 3 Cir. 1999) ("To succeed on their fraud claims, plaintiff must prove a misrepresentation or failure to disclose by [defendant]; [defendant's] intent to deceive; reliance by plaintiff on [defendant]; and resulting loss or damage to plaintiff."); *see also Ford Vehicle Paint*, 182 F.R.D. at 216, 221 (denying class certification because, inter alia, "reliance is an individualized issue" where vehicle manufacturer is alleged to have "fraudulently conceal[ed] a paint defect" in certain vehicles "from the consuming public"); *Bronco II*, 177 F.R.D. at 363-64, 374 (denying class certification and observing that "each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate" where plaintiffs alleged that defendant sought to "deceive the public concerning the safety" of its product). Accordingly, the mere fact that plaintiffs allege distortion of the body of public knowledge does not obviate the basic requirement that they establish the reliance element of their fraud claims. Were it otherwise, plaintiffs would

merely allege that all frauds "distort[ed] the body of public knowledge," rendering causation or reliance a nullity in all class actions.[2]

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[2] As other courts have explained, theories that seek to eliminate a showing of reliance by pointing to the public dissemination of an alleged misrepresentation are tantamount to "fraud on the market" theories, which are limited to a narrow category of cases in which the plaintiff can prove the existence of an efficient market – like securities. Courts have generally rejected efforts to extend fraud-on-the-market theories to other markets – including those for consumer products – that do not price efficiently. Thus, in those contexts, the question whether an alleged deception had any effect on a buying decision is an inherently individualized one. *See, e.g., Ford Vehicle Paint*, 182 F.R.D. at 221-22 (acknowledging that the vast majority of states have refused to allow a "fraud on the market" theory of reliance in common law fraud cases) (collecting cases); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 381 (D.N.J. 2004) (acknowledging the impropriety of using "the fraud on the market theory to circumvent the reliance element" in a consumer fraud action); *Brown ex rel. Estate of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002) (rejecting plaintiff's attempt to use a "fraud on the market" theory of reliance in an action for common law fraud against three tobacco companies for an alleged smoking-related death); *Graham v. Am. Cyanamid Co.*, Nos. C-2-94-423, C-2-94-425, 2000 WL 1911431, at *6 (S.D. Ohio Dec. 21, 2000) (holding that "fraud on the market" theory did not apply to common law fraud claims); *Cofield v. Lead Indus. Ass'n*, No. Civ. A. MJG-99-3277, 2000 WL 34292681, at *10 (D. Md. Aug. 17, 2000) (concluding that securities cases do not "provide a useful analogy in the product/fraud context" and noting "that most courts have refused to extend the 'fraud on the market' *(cont'd)*

Even assuming plaintiffs could make out a prima facie case of reliance based on their "public knowledge" theory, the courts below further violated defendants' due process rights by denying defendants the right to dispute that theory through individualized proof about the circumstances of each plaintiff's cigarette purchases. Most importantly, defendants were unable to question the class representatives (or any other class members) at trial about what information they had regarding the risks of tobacco use and how much – if at all – they relied on such information when deciding whether to purchase defendants' products. *See Scott*, 949 So. 2d at 1278 (recognizing that "the trial court prevented [defendants] from contesting plaintiffs' claims with specific proof" and that "defendants were not allowed to question the class representatives as to . . . whether they relied on the alleged misrepresentations"); 131 S. Ct. at 3 (Scalia, J., in chambers) ("[T]he court eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest, that any particular plaintiff who benefits from the judgment (much less all of them) believed applicants' distortions and continued to smoke as a result.").[3]

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concept from securities litigation to common law fraud actions").

[3] Notably, the two class representatives– Scott and Jackson (the only class members called by plaintiffs at trial) could not have met their legal burden of proving reliance. Both of them admitted that they started smoking for reasons unrelated to any alleged misstatements or omissions by defendants, and that they stopped smoking
(cont'd)

Instead, the courts below improperly focused on the purported reliance of the "class as a whole," stitching together a fictional, perfect plaintiff from a quilt of disparate claims. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (reversing class certification where plaintiffs "portrayed the class at trial as a large, uniform group that suffered a uniform, collective injury" and defendant was forced to "defend against a fictional composite without the benefit of . . . cross-examining the disparate individuals behind the composite creation"). Indeed, the trial court threatened to hold defendants' counsel in contempt for raising any questions about individualized issues (2003-03-29 Tr. 17261-62), and prohibited the defendants from cross-examining the class representatives on essential elements and defenses. *See* App. 48-49a (determining that this denial of the right to cross-examine was "harmless error"). Because these limitations deprived defendants of viable defenses, defendants were not afforded an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 33 (citation omitted).[4]

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years before trial. (2003-03-27 Tr. 17360-63; 2003-03-31 Tr. 17510-15; 2003-03-27 Tr. 17274-82, 17366, 17391-92; 2003-03-31 Tr. 17448-54, 17476, 17483-84.)

[4] Defendants were also denied due process when they were barred from presenting individualized evidence on their affirmative defenses of comparative fault and prescription. *See SEC v. Elliott*, 953 F.2d 1560, 1567-68 (11th Cir. 1992) (holding that defendants were denied due process because they were not afforded the chance to pre-
(cont'd)

The decision of the court of appeal sets a dangerous precedent. The effect of the decision, as the stay order recognized, is "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 the class action." 131 S. Ct. at 4 (Scalia, J., in chambers). Unfortunately, Louisiana is not alone in embracing such an approach. In West Virginia, the state Supreme Court has stated that once a class is certified, the defendant is barred from asserting any defenses to individual claims. *See, e.g., Perrine v. E.I. Du Pont de Nemours & Co.*, 694 S.E.2d 815, 854 (W. Va. 2010) ("To the extent that this class action was properly certified by the trial court, all of [defendant's] individualized [defenses] have no merit.").[5] In Missouri,

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sent available affirmative defenses); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370-71 (D.N.J. 1987) (holding, in a class action suit brought by over 1300 company employees, that "[t]o proceed without permitting [defendant] to raise" affirmative defenses particular to each plaintiff would "deprive defendant of the Fifth Amendment right to due process").

[5] Trial court judges in West Virginia are struggling to understand whether this precedent is intended to bar defendants from introducing any plaintiff-related evidence in class action trials. In one pending class action involving alleged dioxin exposure from chemical plants, the judge hesitated for several months as to whether the defendant should even be allowed to obtain blood samples from the named plaintiffs in discovery. In his original order denying the request, the judge held that "independent medical exams are an example of individual evidence that
(cont'd)

courts have held that one common issue suffices to satisfy the predominance requirement, *Plubell v. Merck & Co.*, 289 S.W.3d 707, 713 (Mo. Ct. App. 2009), setting the stage for class trials that cannot be conducted consistently with due process. And in Arkansas, the state Supreme Court has rejected virtually all arguments by defendants in opposition to class certification, holding that "[c]hallenges based on the statutes of limitations, fraudulent concealment, releases, causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." *Arkansas Media, LLC v.*

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would be without merit in a class action." *See* Order Denying Defs.' Mot. At 7, *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. May 20, 2010). The judge also noted that "class actions favor focusing on the issues of the class as a whole rather than the individual class members in order to practically and economically resolve the rights of a large number of claimants." *Id.* Although the court has since allowed the tests to go forward, *see* Tr. 43:1-5, *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. Sept. 8, 2010), the judge has not indicated that he will admit them at trial, and plaintiffs continue to argue that allowing evidence at trial about the named plaintiffs would violate controlling West Virginia Supreme Court law, *see, e.g.*, Pls.' Resp. To Defs.' Mot. To Require Class Reps. To Produce Blood Samples And Alternative Mot. To Certify Questions Of Law To The Supreme Court Of Appeals Of W. Va., *Bibb v. Monsanto Co.*, No. 04-C-465 (Cir. Ct. Putnam County, W. Va. Aug. 18, 2010).

Bobbitt, 2010 Ark. 76, 12 (Ark. 2010) (citations omitted). Notably, Arkansas has never established a process for individualized adjudication in class action trials of "those issues [that] go to the right of a class member to recover," *id.*, and defendants have generally gone straight from the Arkansas Supreme Court to the settlement table, lest they face the due process deprivations that occurred here.

In sum, this Court's intervention is needed to clarify a critical proposition that has long been recognized by federal district courts and courts of appeal: due process rights cannot be sacrificed merely because a plaintiff wishes to aggregate substantial numbers of claims in a class or mass action. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating trial plan in a mass consolidated proceeding on due process grounds); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing district court's consolidation of 48 asbestos cases and holding that "[t]he benefits of efficiency can never be purchased at the cost of fairness"); *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1348 (M.D. Fla. 2008), *vacated on other grounds*, 611 F.3d 1324 (11th Cir. 2010) ("[T]his Court may not manipulate established procedural and substantive law in the interests of expediting the progress of this litigation. To do so would be to perpetrate an independent constitutional violation. . . . This Court will not sacrifice the fundamental right of due process upon the altars of expediency, thrift, and 'pragmatism.'") (citations omitted). For this reason alone, review should be granted.

II. ABSENT REVIEW – AND REVERSAL – THE COURT OF APPEAL'S RULING WILL ENCOURAGE THE FILING OF ABUSIVE CLASS ACTIONS IN STATE COURTS, CREATING GRAVE RISKS FOR BUSINESSES.

Review is also needed because the relaxation of class certification requirements endorsed by the court of appeal's ruling would set a dangerous precedent for state courts across the nation. In particular, it would send a strong message to plaintiffs' counsel that class certification is readily available in state courts, regardless of how individualized the proposed class members' claims might be – and that trials of such cases will not require plaintiffs to prove the elements of their claims. Although Congress attempted to rein in state-court class action abuse by enacting CAFA, there are many pre-CAFA cases that continue to wind their way through state-court systems around the country. Moreover, the lure of class trials like the one at issue here will encourage plaintiffs' counsel to devise class actions that fall within CAFA's jurisdictional exceptions and file them in plaintiff-friendly state courts, wreaking havoc on American businesses and industries. *See* 131 S. Ct. at 4 (Scalia, J., in chambers) (noting that the *Scott* suit "typifies the sort of major class action that often will not be removable, and in which the constraints of the Due Process Clause will be the only federal protection").

Notably, the plaintiffs' bar has already hailed the *Scott* litigation as a "trailblazer" that will pave the way for the certification of lawsuits that heretofore would have been deemed unsuitable for certification.

Press Release, Tobacco Products Liability Project ("TPLP") (Apr. 28, 2010), *available at* http://www.phaionline.org/2010/04/28/louisiana-court-of-appeals-orders-tobacco-companies-to-pay-over-230-million-for-court-approved-smoking-cessation-program/ (quoting Richard A. Daynard, founder of TPLP). And the effects of such suits would stretch far beyond the tobacco industry. After all, the approach adopted by the courts below could be applied in virtually any sector of the U.S. economy – paving the way for unconstitutional class action trials against automotive, pharmaceutical, technology and insurance companies. Across these sectors, class members would be able to prevail on fraud claims regardless of whether they satisfy the fundamental requirements for proving fraud, and defendant businesses would be denied their due process right to a fair trial.

The business implications of class action abuses – like those countenanced by the courts below – cannot be overstated. It has long been recognized that loose certification standards have serious repercussions for American business. In particular, loose certification raises the stakes of litigation and the risk of gargantuan verdicts. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, 30 Reg. 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so.").

Indeed, "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs, of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 GEO. J. LEGAL ETHICS 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases. David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009). Left unreviewed, the rulings below will only exacerbate these problems, sending the message that class certification is only the beginning of a defendant's woes. It is hard to imagine a defendant that would not feel intense pressure to settle a case, knowing that it faces a trial in which plaintiffs will not be forced to prove core elements of their claims, while the defendant will be threatened with contempt for seeking to cross-examine the plaintiffs about the facts underlying their allegations.

As Justice Scalia recognized in his stay order, state courts have become a "national concern" because they are breeding grounds for abuses of the class action device. *See* 131 S. Ct. at 4 (Scalia, J., in chambers); *see also* American Tort Reform Foundation, Judicial Hellholes (2010/2011), *available at* http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf (identifying state courts where judges systematically apply laws and court proce-

dures in an unfair and unbalanced manner against defendants in civil lawsuits). This case presents the perfect opportunity for the Court to clarify that federal due process principles prohibit states from using the class action device to water down elements of substantive law, displace the burden of proof that ordinarily applies in an individual action, and deprive defendants of the ability to defend themselves at trial. Such clarification is critical for American businesses, the American economy – and the integrity of our judicial system.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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