NO. 05-39

IN THE
Supreme Court of the United States

GENERAL MOTORS CORPORATION,
Petitioner,

v.

DELMAS FORD, SHIRLEY CARTWRIGHT, BERT CROSSLAND, MARGARET CROSSLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Civil Appeals of Oklahoma, Division III

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to review the judgment of the Oklahoma Court of Civil Appeals, Division III, affirming the trial court's interlocutory class certification order?

2. Does the Due Process Clause or the Commerce Clause forbid a court from applying the law of one state to the claims of a nationwide class of plaintiffs, where that state has a significant relationship to those claims?

3. Does a class action notice violate due process solely because it does not identify which state's law will apply?

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INTRODUCTION

Petitioner General Motors Corporation ("GM") asks this Court to review an unreported decision of the Oklahoma Court of Civil Appeals, Division III, affirming the trial court's decision to certify a nationwide products liability class action. The decision below closely follows the Oklahoma Supreme Court's decision in *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), from which review was sought and denied just last year, 124 S. Ct. 2907 (2004).

GM's petition, which resurrects the petition in *Ysbrand* nearly verbatim, should be denied for the same reasons certiorari was denied in that case. Most fundamentally, review should be denied because this Court lacks jurisdiction over non-final orders from the state courts. The Court has previously concluded that orders granting class certification are interlocutory, and the petition fails to present any compelling policy reason to depart from that conclusion. But even if this Court did have jurisdiction, certiorari would be inappropriate because no court has ever adopted the Due Process or Commerce Clause analysis that GM urges here. On the contrary, when confronted with the issue presented—whether the Constitution prevents a court from applying the law of one state to the claims of a nationwide class of plaintiffs, when that state has a significant relationship to those claims—courts across the nation have uniformly come to the same conclusion as the Oklahoma courts. Moreover, the petition's view that due process requires a class notice to identify the state whose law will be applied has never been addressed, much less adopted, by any appellate court.

Additionally, three features of this case make it even less certworthy than *Ysbrand*. First, GM failed to present to the

Oklahoma Supreme Court the principal federal questions that it now asks this Court to review. Second, as GM conceded below, appellate review of the issues presented here would be premature in light of the trial court's decision to defer the ultimate determination of what state's law will apply to plaintiffs' claims. Third, as the petition acknowledges, the recent enactment of the Class Action Fairness Act of 2005 significantly diminishes the importance of the issues presented in the petition.

STATEMENT

Automobile manufacturers have long known of the dangers caused by inadvertent deployment of airbags. "Because air bags are designed to inflate almost instantly upon impact," in some circumstances, "the force of the inflation can injure, even kill." *Public Citizen v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1254 (D.C. Cir. 2004). Between 1997 and 1999, GM manufactured over 420,000 Chevrolet Malibu and Oldsmobile Cutlass automobiles at its facility in Oklahoma City. In 1999, as evidence began to accumulate that these two models, known collectively as GM P-90 automobiles, contained defective airbag systems that tended to deploy inadvertently, the National Highway Traffic Safety Administration (NHTSA) opened a safety investigation into the defects. NHTSA, however, ultimately closed its investigation without issuing a recall or requiring GM to correct the problem. Pet. App. 8a.

Respondents are owners and lessees of GM P-90 automobiles who sued GM in Oklahoma, alleging that the airbag system in their automobiles was defective and asserting claims under the Uniform Commercial Code for breach of express warranty, breach of the implied warranty of merchantability, and breach of the implied warranty of fitness

for a particular purpose, as well as claims under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, and for unjust enrichment. Pet. App. 2a.

The Oklahoma trial court certified a class of all current owners and lessees of GM P-90 platform automobiles manufactured in Oklahoma between 1997 and 1999. Pet. App. 30a. The trial court considered the parties' arguments concerning choice of law and rejected GM's argument that the need to apply different states' laws precluded a finding that common issues predominate. Pet. App. 28a. Instead, the court relied on the Oklahoma Supreme Court's decision in *Ysbrand*, which held that Oklahoma's choice-of-law rules permit the application of the law of a single state to the U.C.C. warranty claims of a nationwide class, where that state has a significant relationship with the claims. The court, however, deferred the ultimate choice-of-law determination to the merits stage of the proceedings. *Id.*

GM immediately appealed the certification order, which a three-judge panel of the Oklahoma Court of Civil Appeals, Division III, unanimously affirmed in an unpublished opinion.[1] With respect to GM's choice-of-law arguments, the appellate court concluded that the Oklahoma Supreme Court had already "considered these issues in *Ysbrand*." Pet. App. 4a. Because *Ysbrand* held that Oklahoma's choice-of-law doctrine allows application of the law of the manufacturer's state to UCC warranty claims without violating due process, the appellate court concluded, the trial court did not abuse its discretion in

[1]There are four divisions of the Oklahoma Court of Civil Appeals. Unless it is published, an opinion of any one of the divisions has "no precedential effect." *Skinner v. John Deere Ins. Co.*, 998 P.2d 1219, 1224 (Okla. 2000).

deciding to certify the class. Pet. App. 7a. GM then filed a petition for certiorari with the Oklahoma Supreme Court, which was denied. This petition followed.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction Because the Judgment Below Is Not Final.

Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision [on a federal question] could be had." 28 U.S.C. § 1257(a). Recognizing the inherently interlocutory nature of the decision below, petitioner attempts to invoke the fourth exception to section 1257's finality requirement. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). That narrow exception has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, with further proceedings pending in which the party seeking review might prevail on the merits on non-federal grounds, and where reversal of the state court on the federal issue would preclude any further litigation on the relevant claims. *Id.* Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Id.* Neither requirement is met here.

First, the federal issues on which review is sought have not been finally decided by the courts of Oklahoma. As explained below (at 7-9), the Oklahoma Supreme Court never had an opportunity to decide the principal questions presented in the petition. Moreover, GM conceded in its petition to the Oklahoma Supreme Court that review of the federal constitutional questions that it now asks this Court to decide

would be premature. *See* GM Pet. in Okla. S. Ct. 3 n.1 (arguing that, without a final determination of what state's law will apply, "review of whether a trial court's certification of a nationwide class comports with the due process, full faith and credit, and commerce clauses is virtually impossible."). In short, even as to the federal questions presented in the petition, the decision below is "avowedly interlocutory." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997).

Second, in light of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), petitioner cannot show that a refusal to review the decision below immediately risks a serious erosion of federal policy. *Coopers & Lybrand* held that "[a]n order passing on a request for class certification" is not a final order, and hence is not appealable as a collateral order under 28 U.S.C. § 1291. *Id*. at 469. The Court found no reason to allow immediate review for three reasons, each of which is equally applicable here: (1) that the "order is subject to revision" by the trial court, (2) that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action,'" and (3) that the order "is subject to effective review after final judgment." *Id.* (citations omitted).

Of particular relevance to the "erosion of federal policy" factor, *Coopers & Lybrand* dismissed the parties' competing policy arguments about the consequences of class action litigation as immaterial to the question of finality. *Id.* at 470. ("Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide."). The Court also rejected the notion that, absent appellate rules to the contrary, appeals in class actions should be governed by rules different from ordinary litigation. *Id.* ("The appealability of any order entered in a class action is determined by the same

standards that govern appealability in other types of litigation."). Because petitioner can make no convincing claim of erosion of federal policy that is not common to virtually all orders granting class certification in large class actions, the fourth *Cox* exception does not apply. *Johnson v. California*, 541 U.S. 428, 430 (2004); *Florida v. Thomas*, 532 U.S. 774, 780 (2001). "A contrary conclusion would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (per curiam).

Petitioner attempts to limit the reach of *Coopers & Lybrand* on the ground that the particular order at issue there was an order denying rather than granting certification. Pet. 27 n.5. But *Coopers & Lybrand* specifically rejected any attempt to draw a distinction, for finality purposes, between orders granting and denying certification. On the contrary, the Court made clear that "orders *granting* class certification are interlocutory." 437 U.S. at 476 (emphasis added). The Court recognized that class certification may often be of "critical importance" to defendants, and took note of the risk that "[c]ertification of a large class" may pressure defendants to settle—the same policy concerns on which GM relies here. *Id*. Nevertheless, the Court explained that "[w]hatever similarities or differences there are between plaintiffs and defendants in this context involve questions of policy for Congress." *Id.* at 476 & n.28 (citing *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181-82 (1955)). Notably, in 1998, Congress exercised its policy judgment and allowed limited discretionary appeals within the *federal* courts from "order[s] granting or denying class certification," Fed. R. Civ. P. 23(f), but has not seen fit to modify section 1257 to permit review of interlocutory *state* court certification orders by this Court. And even under Rule 23(f), the federal courts of appeals have "unfettered discretion whether to permit the appeal," and are instructed, on the basis

of a Federal Judicial Center study, that "many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23(f), Advisory Committee Notes.

That this case comes from a state rather than a federal court only reinforces the conclusion that the Court lacks jurisdiction. Section 1257's finality requirement serves not only the same interest in efficient judicial administration that underlies section 1291, but also "serves an important interest of comity." *Adams v. Robertson*, 520 U.S. 83, 90 (1997). For this reason, section 1257 establishes a particularly "firm" rule and "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson*, 522 U.S. at 486 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *see also Cox Broad. Corp.*, 420 U.S. at 503 (1975) (Rehnquist, J., dissenting) ("[T]he underlying concerns [in §§ 1257 and 1291] are different, and that difference counsels a *more restrictive* approach when § 1257 finality is at issue.") (emphasis added).

II. Petitioner Did Not Present to the Oklahoma Supreme Court the Principal Federal Issues On Which It Seeks Review.

The petition's central argument is that the Due Process Clause requires an "individualized" choice-of-law analysis, and that the decision below runs afoul of such a requirement. Pet. 5-17. In its brief to the Oklahoma Court of Civil Appeals, GM argued that the trial court's choice-of-law analysis violated due process, *see* GM Apl. Br. 19-23, and the court, relying on *Ysbrand*, rejected that argument. *See* Pet. 6a (citing *Ysbrand*, 81 P.3d at 625-626; *Phillips Petroleum Co. v. Shutts*, 472 U.S.

797, 818 (1985)). GM, however, completely omitted this issue from its petition to the Oklahoma Supreme Court. Indeed, GM fell short of making even the sort of "passing invocations of 'due process'" that this Court has found insufficient to meet the "minimal requirement that it must be clear that a federal claim was presented." *Adams*, 520 U.S. at 89 n.3. Similarly, the petition argues that the decision below runs afoul of constitutional limits on extraterritorial regulation, Pet. 17-20, but GM did not raise that issue in its petition to the Oklahoma Supreme Court either.[2]

"[W]hen the highest state court fails or refuses to pass expressly upon a federal question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Stern, Gressman, et al., *Supreme Court Practice* 175 (8th ed. 2002); *see Street v. New York*, 394 U.S. 576, 582 (1969). Because "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," this "rule affords state courts an opportunity to consider" the questions presented in the first instance. *Adams*, 520 U.S. at 90 (internal citation omitted); *id.* (state's highest court "has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action[s] satisfy the requirements of due process"). The Oklahoma Supreme Court did not have that opportunity and, accordingly, this Court should deny review.

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[2]The *only* federal constitutional issue that GM presented to the state's highest court was its argument that the certification order violated due process because the class notice would be constitutionally inadequate. *See* GM Pet. to Okla. S. Ct. 8-10; *see also* Pet. 20-22 (making same argument).

That conclusion follows regardless of whether the Court treats the requirement as prudential or jurisdictional. *Id.*; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992).[3]

III. No Court Has Adopted the Due Process Analysis Urged by Petitioner.

Petitioner asserts that the decision below conflicts with decisions that "require, in the context of a putative nationwide class action, that choice-of-law principles be applied to each potential plaintiff, not to the litigation as a whole with the goal of certifying a class." Pet. 6. Even if the Court were to assume that it has jurisdiction and were to overlook petitioner's waiver of this issue, review would still be unwarranted because there is no such conflict.

In assessing the constitutionality of choice-of-law decisions in class actions, the Oklahoma courts faithfully apply this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985): "[F]or a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 818 (quoting *Allstate Ins. Co. v.*

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[3]The petition should also be denied because it violates this Court's Rule 14.1(g)(i), which requires the petitioner to specify when and where the federal questions sought to be reviewed were raised in the state courts, including "pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears." The petition states only that GM raised "federal-law issues" in its petition to the Oklahoma Supreme Court, without elaboration. Pet. 4. "This general citation fails to comply with our requirement that petitioners provide us with '*specific* reference to the places in the record where the matter appears.'" *Adams*, 520 U.S. at 89 n.3 (emphasis in original).

Hague, 449 U.S. 302, 312-313 (1981) (plurality opinion)); *see* Pet. App. 6a.

None of the cases that GM cites holds that due process forbids a court from considering whether a single state's law may apply to claims of a class of plaintiffs who, as here, have identical significant contacts with that state. Nor do any of the cited cases hold that *Shutts* prohibits a choice-of-law analysis that accounts for the class-action nature of claims as long as significant contacts otherwise exist. Instead, the cases cited in the petition uniformly identify a general constitutional requirement—which no one disputes—that the claims of all individual members of the plaintiff class have significant contact with the state.[4] To the extent they speak of "an individualized choice-of-law analysis" at all, Pet. 10, courts require nothing more than the standard significant contacts analysis employed by the Oklahoma appellate courts, both here and in *Ysbrand*. *See* Pet. App. 5a-6a (choice-of-law analysis must be consistent with the "constitutional imperative" that the state whose law will be applied to the plaintiffs' claims has "['a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair'") (quoting *Ysbrand*, 81 P.3d at 625-26 (quoting *Shutts*, 472 U.S. at 818)).

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[4] *See, e.g.*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.6 (11th Cir. 1987) (citing *Shutts* for proposition that "the law of Georgia could be applied consistent with due process only if the particular transaction had some significant relation to Georgia"); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 n.90 (D.C. Cir. 1986) (interpreting *Shutts* to require that the state whose law was applied "had a significant relationship to each class member's claim"); *Clarke v. TAP Pharm. Prods., Inc.*, 798 N.E.2d 123, 129 (Ill. App. Ct. 2003) (finding a state's law can be applied to a class action consistent with *Shutts* when the state "has significant contact or aggregation of contacts to the claims asserted by each member of the plaintiff class").

Several of the cases that GM cites examine only a lower court's failure to conduct *any* choice-of-law analysis.[5] Not surprisingly, therefore, these cases find only that the lower courts should have conducted *some* analysis that—consistent with *Shutts*—did not *assume* that the forum state's law would apply to a nationwide class.[6] Consistent with these holdings, the Oklahoma appellate court *did* conduct a preliminary analysis of the choice-of-law issue in accordance with *Ysbrand*. Moreover, in none of cases cited in the petition did the courts reject certification in the face of a developed argument that a single state had significant contact with all the claims. *See, e.g.*, *Walsh*, 807 F.2d at 1016 (noting that the party seeking certification of nationwide class action treated choice-of-law decision as "academic").

The other cases GM cites do not rest on due process principles at all, but are instead determinations based on various

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[5] *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996) (holding that mere existence of settlement does not show that Rule 23(a) commonality requirement is met), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Walsh*, 807 F.2d at 1016 (noting that the district court explicitly declined to consider application of multiple states' law); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 159 (Pa. Super. Ct. 2002) ("The record fails to reflect an analysis of the choice-of-law issue.").

[6] *See Walsh*, 807 F.2d at 1016 ("Appellees see the 'which law' matter as academic. . . . A court cannot accept such an assertion 'on faith.'"); *Debbs*, 810 A.2d at 159 ("[A] trial court can not sidestep choice-of-law issues by declaring that the class action would be governed by [the forum state's] law.").

states' choice-of-law doctrine.[7] These cases differ from the decision below only in that those states' choice-of-law doctrines differ—either in theory or in application—from Oklahoma's. None of these courts found that *Shutts* mandated deviating from the dictates of state choice-of-law doctrine.

When applying *Shutts* to the actual issue presented in this case—whether due process permits a state's choice-of-law doctrine to apply to a nationwide class of plaintiffs the law of a single state with a significant relationship to the claims—courts across the nation, *without exception*, come to the same conclusion as the Oklahoma courts. In short, when the court does not merely assume that the forum state's substantive law applies to the claims of all the plaintiffs in a nationwide class action but instead determines that one state has significant contact with the claims of all plaintiffs, courts have always

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[7] *See Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1187 (9th Cir. 2001) (examining whether Colorado law would apply to a plaintiff class under California's government-interest doctrine after noting plaintiffs' concession that the application of California law would violate *Shutts*); *Kirkpatrick*, 827 F.2d at 725 & n.6 (determining that Georgia's *lex loci delicti* doctrine would require application of multiple states' law for class action with nationwide class); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 696-98 (Tex. 2002) (refusing to apply manufacturer's state's law to nationwide plaintiff class under Texas choice-of-law doctrine with no reference to due process); *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 355-59 (Tex. App. 2003) (refusing to apply manufacturer's state's law to claims by plaintiff nationwide class under *Schein* and other state-law precedents without further reference to opening observation that due process limits choice-of-law). The subsequent decision in *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), which is not cited in the petition, likewise straightforwardly applies Texas choice-of-law doctrine without further reference to the opening observation that choice-of-law must comply with due process. *See id.* at 680-81.

found the state's choice-of-law decision constitutionally valid.[8]

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[8]*See, e.g.*, *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456, 461 n.1 (D. Minn. 2001) (finding no due process violation in applying the law of the state where defendant had its headquarters to a nationwide class action); *Simon v. Phillip Morris, Inc.*, 124 F. Supp. 2d 46, 69-70 (E.D.N.Y. 2000) ("[Defendants] assert that, even assuming that defendants did substantial business in the forum state and conducted a national fraud from the forum state, its courts may not apply forum law to individual claims of non-forum residents whose injuries were suffered in their home states. *Shutts*, however, has not been read so narrowly."); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 686-87 (N.D. Cal. 1986) ("Evidently, defendants believe that the *Shutts* test can only be satisfied by a court's making specific findings regarding the [state's] contacts to each class member's claims, name-by-name. The Court finds no basis for interpreting *Shutts* in such a way. The *Shutts* opinion merely requires a showing that there are sufficient contacts between the forum state and each individual class member's claims to create forum interests in the litigation such that application of forum law will not be arbitrary or unfair. When a court finds that this requirement can be satisfied by simply considering contacts that apply generally to every class member's claims, the court need not articulate how the contacts apply in each class member's case."); *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 670 (E.D.N.Y. 1986) ("Without doubt, *Shutts* does not require us to apply the law of each state in which the plaintiffs reside nor does it prohibit the application of one state's law to all plaintiffs, regardless of residence."); *In re Activision Sec. Litig.*, 1985 WL 5827 at *1 (N.D. Cal. Dec. 2, 1985) ("[D]efendants contend that under *Shutts* 'blanket' application of [a state's] law to the common law claims of all plaintiffs would be unconstitutional . . . . Defendants read *Shutts* too broadly and confuse constitutional limitations upon application of a state's law with the application of state choice-of-law rules."); *Washington Mut. Bank, FA v. Superior Court*, 15 P.3d 1071, 1081 (Cal. 2002) (holding state choice-of-law doctrine could constitutionally assign burden to defendant to demonstrate appropriateness of another state's law as long as significant contacts exist); *Macomber v. Travelers Prop. & Cas.*, 2004 WL 1559183 at *9 (Conn. Super. Ct. May 26, 2004) (holding that claims of entire plaintiff class had constitutionally sufficient contact with state when defendant's headquarters were located in the state).

At bottom, petitioners' complaint is with the Oklahoma courts' holding that their own choice-of-law jurisprudence allows application of the law of a single state to U.C.C. warranty claims. But this is a decision on a matter of state law that our federal system leaves to the courts of Oklahoma. This Court has long recognized the right of states to adopt distinctive choice-of-law doctrines that must be respected by the federal courts, *see Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), and it has specifically refused to reconsider this deference even when pressed to do so by the circuit courts. *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam).

Finally, the Court should deny review because the importance of the question presented is significantly diminished by the enactment of the Class Action Fairness Act of 2005 ("CAFA"), which grants the federal courts jurisdiction over most class actions in which class members reside outside the forum state. *See* Pub. L. No. 109-2, § 4(a), 119 Stat 4, 9-12 (to be codified at 28 U.S.C. § 1332(d)) (providing federal courts with original jurisdiction in class actions seeking more than $5 million in damages when at least one class member has diverse citizenship from at least one defendant). GM itself acknowledges that CAFA's passage greatly reduces the significance of this case. *See* Pet. 5 n.3 (suggesting that review by this Court would affect only those cases pending in state court before CAFA's enactment).

IV. No Court Has Rejected a State Choice-of-Law Ruling Supported by Significant Contacts on the Ground That It Violates Constitutional Limits on Extraterritorial Regulation.

GM's second basis for seeking certiorari is even further

afield than the first. To make its argument, GM must liken the application of Oklahoma's significant contacts analysis to instances in which this Court has found that a state violates the Commerce Clause or Due Process Clause by engaging in wholly extraterritorial regulation, *i.e.*, regulation having *no* contact with the regulating state. *See* Pet. 17-20. But GM is unable to identify a single decision that has rejected a choice-of-law determination supported by a state's significant contact with the claim on the basis of extraterritorial regulation. On the contrary, every court to address this interplay of choice-of-law doctrine and the constitutional limits on extraterritorial jurisdiction has held that no constitutional violation is possible once a state's law is judged to have a connection to the claims at hand.[9]

GM argues that the application of a single state's law in this nationwide class action fails to honor the choice of substantive legal protections made by the class members' states of residency. Pet. 17. But such an outcome is inevitable in any choice-of-law decision where multiple states arguably have a

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[9] *See, e.g., Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003) (finding California statute "does not regulate commerce entirely outside of California" because "[i]t applies only to contracts that have sufficient connections with California to support a California choice of law"); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) ("In traditional contract litigation, courts must apply some state's law to interpret the contract. While a contract which covers multiple states may raise a difficult choice-of-law question, once that question is resolved there is nothing untoward about applying one state's law to the entire contract, even if it requires applying that state's law to activities outside the state."); *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 147 (N.J. 1992) (equating constitutional restrictions placed on choice-of-law determinations by the prohibition of extraterritorial regulation and due process limitations of *Allstate*).

connection to the claims. Thus, GM's position would seemingly render unconstitutional *any* choice between these states' law. This Court has made clear, however, that multiple choice-of-law outcomes in a given situation may satisfy the Constitution. *See Shutts*, 472 U.S. at 823 ("[I]n many situations a state court may be free to apply one of several choices of law."); *Allstate*, 449 U.S. at 307 (plurality opinion) (noting "the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction").

Even assuming that GM's position were correct in theory, the application of the prohibition on extraterritorial regulation to this case—like the due process claim under *Shutts*—founders on the Oklahoma courts' requirement that only the law of a state with significant contacts to the claims of all class members may be applied. As the very standard cited by GM indicates, the Commerce Clause's ban on extraterritorial regulation is implicated only when a state's law has the "undeniable effect of controlling commercial activity occurring *wholly outside* the boundary of the state." Pet. 17-18 (emphasis added) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 337 (1989)) (internal quotation marks omitted). But here, the relevant commercial activity occurred within both GM's home state and the forum state, where the cars were manufactured. When a state regulates activity occurring within that state, this Court has sustained such regulation even if it affects economic activity in other states, unless it "impose[s] burdens on interstate trade that are 'clearly excessive in relation to the putative local benefits.'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2424 (2005) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). GM makes no claim, nor could it, that the state in which a manufacturer

conducts business or manufactures its products has a constitutionally insufficient interest in ensuring the safety of consumers affected by business activities in the state.

Similarly, this Court's punitive damages cases have held that the Due Process Clause invalidates state law as unconstitutional extraterritorial regulation only when a state imposes penalties "for conduct that was lawful where it occurred and that had *no impact* on [the regulating state] or its residents." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996) (emphasis added); *see also State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (noting that a State cannot impose penalties "to punish a defendant for unlawful acts committed *outside* of the State's jurisdiction") (emphasis added). Again, because the Oklahoma courts require, consistent with due process, that the state whose law will be applied have significant contact with the plaintiffs claims', there is no danger that they will run afoul of that principle. Indeed, this Court has indicated that a choice-of-law determination that complies with *Shutts* does not, by definition, involve an unconstitutional extraterritorial application of law. *See State Farm*, 538 U.S. at 421-22; *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494-95 (2003).

V. No Court Has Held That a Class Notice Must Identify Which State's Law Will Apply.

Finally, GM raises a novel argument that was not raised in the *Ysbrand* petition—that due process requires a class notice to identify which state's law will be applied. GM, however, is unable to cite even one decision that has adopted its argument. In fact, the only case GM cites in which a court found notice to be constitutionally lacking involved the failure to provide details of a proposed partial *settlement* of a class action. *See In*

re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1105 (5th Cir. 1977). Nor does it appear that any appellate court in this country has addressed the issue of whether the state whose law will be applied must be identified in a certification notice.

The absence of any conflict on this point—indeed, the absence of any decision on point—is reason enough to deny review. But even if the issue were otherwise worthy of this Court's attention, certiorari is also unwarranted because GM's position is untenable on the merits. To be sure, due process requires class members to be informed of the pending suit and to be afforded the right to exclude themselves from the class. *See Shutts*, 472 U.S. at 812. To make these requirements effective, class members must receive notices that give certain information about the suit and their rights. *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B) (detailing information to be contained in notices sent out for class actions in federal courts). This Court, however, has stressed that when notice is constitutionally required, the Due Process Clause does not mandate rigid, inflexible standards. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Due process does not require that class members be provided a treatise on the law and claims at issue. As the standard quoted in the petition states, the touchstone of constitutionally adequate notice is providing information that "a reasonable person would consider to be material" in deciding whether to participate in the suit. Pet. 21 (quoting *Nissan*, 552 F.2d at 1105). "[A]n overly detailed notice would not only be unduly expensive, but would also confuse class members and impermissibly encumber their rights to benefit from the action." *Id.* at 1104.

GM's argument, if taken seriously, would cast doubt on this Court's recently approved changes to Rule 23, as illustrated by the model notices prepared by the Federal Judicial Center at the request of the Advisory Commitee of the Federal Rules of Civil Procedure. The newly-approved rule demands that class certification notices contain "concise[] and clear[]" statements "in plain, easily understood language." Fed. R. Civ. P. 23(c)(2)(B). Not one of the notices prepared by the Federal Judicial Center as exemplars of this type of notice contains information about the jurisdiction whose law will be applied—or, in fact, any detailed information about the legal particulars of the claim. *See e.g.*, Federal Judicial Center, *"Illustrative" Forms of Class Action Notices: Employment Discrimination Class Action Certification: Full Notice* 3-4, at http://www.fjc.gov/public/pdf.nsf/lookup/ClaAct11.pdf/$file/ClaAct11.pdf (last visited August 9, 2005) (noting only that claim involves whether employer "discriminated against female account executives based on their gender, by making it harder for them to advance in their careers" without providing any specifics on the exact legal provisions that the employer is accused of violating). In other words, petitioner contends that the Constitution requires in *every* instance what these model notices do not provide in *any* instance. To state this position is to refute it.

CONCLUSION

The petition for writ of certiorari should be denied.

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