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No. 09-110

In the Supreme Court of the United States

HCA INC., BRIDGESTONE AMERICAS, INC. F/K/A BRIDGESTONE AMERICAS HOLDINGS, INC., HUNTSMAN CORPORATION, NECHES GULF MARINE, INC., AND HORNBECK OFFSHORE SERVICES, INC.,
Petitioners,

v.

AON CORPORATION, AON GROUP, INC., AON SERVICES GROUP, INC., AND ALAN S. DANIEL AND WILLIAMSON COUNTY AGRICULTURAL ASSOCIATION, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to The Appellate Court of Illinois, First District

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In giving final approval to a settlement in this high-profile case, which involves a nationwide class of 1.5 million plaintiffs, the Illinois courts held that Illinois law could constitutionally apply to the entire class without individually analyzing Illinois' connection to the claims of each class member. Plaintiffs-Respondents do not address most of the ways—described in the petition—in which the ruling below directly contravenes *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The defense of the ruling that Respondents do offer, moreover, is inconsistent with *Shutts* and otherwise mistaken. There is no way to reconcile the decision below with *Shutts*, and summary reversal on this significant issue is therefore warranted.

In addition, while Respondents sound the predictable theme that this case merely involves the application of settled law to particular facts, that argument rings hollow. Respondents do not deny that other courts have reached conflicting decisions on strikingly similar facts. Nor do they seriously dispute the importance of the issues raised here, or that this petition offers the Court a rare chance to address these recurring issues. Unless *Shutts* is meant to be an anomaly in this Court's jurisprudence, the Illinois court's judgment should be reversed. Proper respect for the due process rights of litigants, and for core principles of federalism, call for either plenary review or summary reversal.

I. Respondents Do Not Address Most Of The Conflicts Between *Shutts* And The Decision Below.

A court cannot constitutionally apply a single State's law to a nationwide class action unless that State has "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests," such that "the choice of [its] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-822 (internal quotation marks omitted). The petition explained that the courts below violated this rule, employing a choice of law analysis that is constitutionally deficient for many of the same reasons identified in *Shutts*. Pet. 13-17. Respondents do not address most of these deficiencies.

A. The *Shutts* rule guards the important constitutional value of due process by ensuring that the application of a given State's law is consistent with "the expectation of the parties." 472 U.S. at 822.[1] Respondents do not dispute that the Illinois Appellate Court failed even to consider this critical factor.

As the petition notes (at 14-15), there is no evidence that when the non-Illinois class members entered into insurance brokerage transactions with Aon entities incorporated in their own States, they had any idea that Illinois law would govern the transactions. In particular, they could not have expected that Illinois law would determine (a) the fidu-

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[1] *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring in the judgment) ("This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.").

ciary duties arising from these non-Illinois transactions, (b) the claim that the local Aon entities breached those duties by failing to disclose information material to the transactions, and (c) the remedies available for those breaches. Yet the Illinois Appellate Court agreed that Illinois law controlled all of these questions without even considering the parties' expectations.[2] Indeed, the main conduct by Aon that the Illinois courts focused upon—the alleged hatching of a secret kickback scheme in Illinois—could have had no part in class members' expectations because they did not know about it.

Respondents entirely fail to explain how all class members could reasonably have expected that Illinois law would govern. For this reason alone, *Shutts* demands reversal.

B. *Shutts* also rejected the "bootstrap" argument that the procedural requirements of class actions can support the application of forum law. 472 U.S. at 821. It reasoned that these procedures do not alter the constitutional limitations on choice of law, which require a connection between the forum State and the transactions of each class member. *Ibid.* The petition pointed out several bootstrap arguments in the decisions below, which sought to justify the application of Illinois law based upon: (a) the class nature of the suit and Petitioners' right to opt out, (b) the lead plaintiffs' choice of an Illinois remedy, and (c) an Illinois choice-of-law analysis that did not consider the claims of each class member. Pet. 14-16. Respondents do not dispute the bootstrapping nature of

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[2] Moreover, the trial court only considered the expectations of the named plaintiffs, who—unlike most class members—dealt directly with Aon entities in Illinois. Pet. 13; Pet. App. 95a.

these arguments, which are discussed further in Part II below.

C. Finally, *Shutts* held that a court addressing a constitutional choice of law challenge must "first determine whether [Illinois] law conflicts in any material way with any other law which could apply." 472 U.S. at 816. Respondents do not dispute that the lower courts failed to resolve that question here, or that they would have found material conflicts had they done so. *See* Pet. 8, 17 n.1. Instead, the Illinois Appellate Court agreed with "the trial court's decision not to perform a state-by-state law analysis." Pet. App. 23a. This refusal to consider *Shutts*' first question may explain why the Illinois Appellate Court never explicitly addressed its second question (discussed below): whether Illinois has significant contacts with each class member's claims. 472 U.S. at 818-19.

Respondents appear to misunderstand this point, asserting that it does not matter "whether [Illinois'] contacts are looked at *ex ante* or *ex post* a multi-state survey," and that such a survey "has nothing to do with the constitutional sufficiency of a state's contacts." Opp. 18, 26. Petitioners agree that a state-by-state survey or balancing of significant contacts is not required to answer *Shutts*' second question, but a state-by-state analysis of allegedly conflicting laws *is* required to answer *Shutts*' first question. Moreover, to answer *Shutts*' second question, a member-by-member analysis of the sufficiency of a State's contacts is required. *See* Part II.A., *infra*. Because the courts below did not conduct the analysis required to answer either question, *Shutts* compels reversal.

II. Respondents' Efforts To Defend The Decision Below Are Misguided.

Not only do Respondents ignore many of the ways in which the decision below is contrary to *Shutts*, the attempts they make to rehabilitate the decision are themselves contrary to *Shutts* and otherwise incorrect. Respondents' arguments provide no basis for denying the petition.

A. *Shutts*' second question requires an individualized analysis of whether Illinois has significant contacts with the claims of *each class member*. 472 U.S. at 821-822. The petition explained that neither court conducted that individualized analysis below. Pet. 13-14. Respondents barely address this point; they simply assert that the Illinois Appellate Court (but not the trial court) did the analysis. Opp. 15, 17, 22.

Yet there is no credible way to argue that the Illinois Appellate Court conducted the requisite analysis on a member-by-member basis. For example, Petitioner HCA showed that it is a Tennessee-based corporation that dealt with a Tennessee-based Aon subsidiary that breached its fiduciary duty by failing to disclose kickbacks it received from their Tennessee transactions. R3835, 3871-3878. Indeed, Plaintiffs-Respondents' own complaint made clear that the breaches of fiduciary duty at issue were the failures of each local Aon entity to *disclose* its additional commission (*i.e.*, kickback) as part of each transaction with a local plaintiff. R13811. The complaint did not allege that any Aon entities breached fiduciary duties by receiving or scheming to obtain additional commissions in Illinois.

A proper *Shutts* analysis would thus have examined whether Illinois had a "significant contact" with HCA's Tennessee-based claim before applying Illinois law to that claim—or to the claim of any other non-Illinois class member. 472 U.S. at 821-822. The Illinois Appellate Court indisputably failed to conduct that analysis.

Rather, the Appellate Court focused solely on the actions of the Illinois-based Aon defendants and the Illinois remedy sought by the two lead plaintiffs; it never discussed the claims of any other class member. Pet. App. 19a-20a. Indeed, even when the court acknowledged that many class members entered into contracts in other States, it attempted to sidestep that fact by reiterating that the named Illinois *defendants* hatched the kickback scheme in Illinois—even though that scheme was not the basis of the class members' claims as discussed above. Pet. App. 20a. There is, in sum, no basis for arguing that the Illinois Appellate Court conducted the member-by-member analysis required by this Court.[3] Summary reversal is therefore warranted.

B. Respondents' primary defense of the decision below is to highlight the "unique" theory of recovery pleaded by the lead plaintiffs: a constructive trust theory. Opp. 3, 6-7, 25, 28. Yet Respondents' and the Illinois courts' heavy reliance on an Illinois remedy to justify the general application of Illinois law to a nationwide class is misguided and directly offends this Court's analysis in *Shutts*.

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[3] Furthermore, there is no dispute that the trial court failed to engage in an individualized, member-by-member analysis (Pet. 13), and the Illinois Appellate Court simply affirmed and reiterated the trial court's flawed analysis. Pet. App. 19a-20a.

For one thing, this focus skews the *Shutts* analysis. The question here is whether Illinois substantive law can constitutionally be applied to all class members' claims. By relying on the "unique" Illinois damages remedy, the courts used Illinois law to hold that Illinois law can be applied to this nationwide class under *Shutts*. Pet. App. 19a-20a, 91a, 115a. Such bootstrapping wrongly sidesteps *Shutts* and the constitutional values it protects, and it allows creative pleading to render *Shutts* meaningless in virtually any case. The Illinois damages remedy sought by lead plaintiffs simply cannot have any bearing on the antecedent question whether Illinois law can be applied class-wide.

The focus on this remedy is also contrary to *Shutts* in another important respect. *Shutts* demands examination of whether a State has significant contacts with the "claims" of each class member. 472 U.S. at 821-822. Yet Respondents and the Illinois courts improperly elevate the importance of a *remedy* sought by the lead plaintiffs and ignore the underlying *claims* alleged in this case. *See Fujisawa Pharm. Co. v. Kapoor*, 16 F. Supp. 2d 941, 952 (N.D. Ill. 1998) (constructive trust is equitable remedy, not separate cause of action). Whatever remedy is sought by the lead plaintiffs, it cannot be disputed that the claims for breach of fiduciary duty focus on failures to disclose kickbacks by Aon entities throughout the country, as described above. The Illinois courts violated *Shutts* by disregarding these claims and basing their analysis on an element of the damages sought.

C. Respondents and the Illinois courts also contend repeatedly that the fruits of Aon's misconduct were received in Illinois, supporting the application of Illinois law. Opp. 3, 8-9, 22-25, 28; Pet. App. 19a-

21a, 91a, 115a. As the petition explained (at 12, 14), this argument is nothing more than the "common fund" notion rejected in *Shutts*. 472 U.S. at 819-20. Apart from an unexplained reference to "an Illinois based res" (at 28), Respondents make no attempt to distinguish *Shutts*. That is unsurprising, as there is no evidence of a specific, identifiable, non-commingled res in Illinois that could support the application of Illinois law. *Shutts*, 472 U.S. at 820.

Even apart from *Shutts*, Respondents are wrong to focus on the receipt of funds in Illinois. That is merely a ministerial fact that occurred after the claims in this case arose. As Respondents themselves pleaded (R13805) and concede here (Opp. 8-9), Aon entities in 50 different States received kickbacks without disclosing them to their fiduciaries in those States, and those entities later transferred the kickbacks to Illinois as a matter of internal corporate affairs. If the ultimate location of ill-gotten gains were a constitutionally significant contact for choice-of-law purposes, then any defendant would be subject to nationwide class certification—and application of a single State's laws—so long as it was headquartered in that State. That cannot be the law.

D. Finally, throughout their brief, Respondents repeat that this was an "opt-out" settlement class, and that Petitioners could have opted out. Opp. i, 15, 18, 19, 25. Respondents even suggest that this feature cures any constitutional infirmity in the decision below. Opp. 18.

As the petition explained (at 14), however, *Shutts* held that the presence of an opt-out feature is no substitute for the individualized choice of law analysis that the Constitution requires. 472 U.S. at 820. If the law were otherwise, *Shutts* would be a

dead letter because the analysis it mandated could simply be ignored whenever a class action includes an opt-out provision. Respondents' repeated focus on the opt-out provision thus cannot affect the analysis.

* * *

For these reasons, Respondents' attempts to defend the Illinois Appellate Court's decision are mistaken. There is no basis on which to reconcile the ruling below with *Shutts*. If *Shutts* is to have any meaningful effect going forward, this Court should reverse.

III. Respondents Do Not Deny The Lower Court Conflicts And Do Not Seriously Contest The Importance Of The Issues Or The Appropriateness Of This Vehicle.

Even if the decision below were not plainly contrary to *Shutts*, courts addressing similar facts have interpreted *Shutts* to require a much more individualized analysis of a State's contacts with class members' claims than the Illinois courts conducted here. Respondents do not dispute this conflict. Moreover, they do not seriously contest that it is important to enforce the constitutional limitations on choice of law, or that this petition offers a rare vehicle for addressing the recurring issue whether those limitations are being respected. This Court's review is warranted for these reasons as well.

A. Respondents do not deny—or even address—the two splits of authority that the petition explains are implicated by the decision below. Pet. 18-26. In particular, two courts have squarely held on virtually indistinguishable facts that a constitutional analysis like the one conducted by the Illinois courts was insufficient under *Shutts*. Pet. 19-22.

First, in *In re St. Jude Medical, Inc.*, the district court had certified a nationwide consumer class under Minnesota law because (1) the defendant was headquartered in Minnesota, and (2) much of the conduct relevant to the claims occurred in or emanated from Minnesota, where the defective product was produced. 425 F.3d 1116, 1119 (8th Cir. 2005). The Eighth Circuit reversed, holding that "the [district] court did not analyze the contacts between Minnesota and each plaintiff class member's claims"—an inquiry necessary for the "protection of out-of-state parties' constitutional rights." *Id.* at 1120. The court remanded for the "individualized choice-of-law analysis" required by *Shutts*, observing that there was no indication out-of-state parties had any idea that Minnesota law could control potential claims when they received the product. *Id.* at 1120-1121.

Second, in *Macomber v. Travelers Property & Casualty Corp.*, Travelers allegedly received undisclosed rebates in creating structured settlements for the plaintiff class. 894 A.2d 240, 246 (Conn. 2006). The trial court ruled that Connecticut law applied because Travelers' home office was in Connecticut and the challenged company policies were set there. *Id.* at 257-258. The Connecticut Supreme Court reversed. Relying on a Third Circuit case discussing *Shutts*, it held that the trial court failed to "apply an individualized choice of law analysis to each plaintiff's claims." *Id.* at 256. It reasoned that such an analysis was required because—as here—"the nationally dispersed potential class members entered their structured settlements in different jurisdictions," and representations "necessarily were made to them by . . . agents of the defendants in those various jurisdictions." *Id.* at 257.

In this case, the Illinois Appellate Court affirmed the trial court's application of Illinois law to a nationwide class because the kickback scheme was primarily devised and orchestrated from Aon's Illinois headquarters. Pet. App. 19a-20a. Respondents do not dispute that the trial court's decision would be reversed by an appellate court that followed either case discussed above. The Court should at minimum grant certiorari to resolve this conflict, as well as the second conflict discussed in the petition (at 24-26).

B. The issues here are important: the petition shows that if courts in even a few states are allowed to continue applying their law to nationwide class actions without conducting a proper *Shutts* analysis, they will disproportionately harm the constitutional policies of due process and federalism underlying *Shutts* and will create economic inefficiencies. Pet. 26-30. The U.S. Chamber of Commerce made similar points in urging this Court to review an interlocutory Oklahoma Supreme Court decision that conflicted with *Shutts*. *See* Br. of Chamber of Commerce of the U.S. and Alliance of Auto. Mfrs. as Amici Curiae in Support of Pet'r, *DaimlerChrysler Corp. v. Ysbrand*, 542 U.S. 937 (2004) (No. 03-1342), 2004 WL 1174634.

Respondents have no serious answer to these importance arguments. Contrary to their assertion (at 27), Petitioners do not believe that all "nationwide state court class actions are bad," just as this Court did not reverse the application of Kansas law to the *Shutts* class because it thought such actions were "bad." Instead, *Shutts* recognized that applying a single State's law to a nationwide class can violate important constitutional values, and this Court

should grant certiorari here to ensure that those values remain protected.

C. Finally, whether lower courts are respecting *Shutts*' constitutional limitations on choice of law is a recurring and important question, as shown by the conflicting decisions and certiorari petitions that Petitioners have cited. Pet. 18-26, 31 n.4. Unlike past petitions, Respondents do not dispute that there are no obstacles to this Court's review of that question here. Pet. 30-33. Unless *Shutts* is meant to be written off as an anomaly of constitutional jurisprudence, therefore, the Court should grant certiorari and resolve the question.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted and the case set for full briefing and argument. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

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