No. 08-349

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

BOYD BRYANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY

Petitioner, General Motors Corporation ("GM"), submits this reply in response to the brief in opposition ("Opp.") filed herein by Respondent, Boyd Bryant ("Mr. Bryant").

Mr. Bryant's brief is premised on the misguided notion that the Arkansas Supreme Court has unfettered authority to interpret state procedural rules without regard to overriding constitutional principles. While the federal system affords states broad discretion to enact laws, they are not free to enact or apply those laws in ways that subvert federally protected constitutional rights. The requirements of due process and full faith and credit bar states from interpreting their laws in ways that evade those limits.

GM's petition demonstrates that the Arkansas Supreme Court's final decree – that no choice of law determination is required before certifying a massive nationwide class of four million vehicle owners from every state in the nation – violates both GM's and the absent class members' fundamental due process rights by injecting arbitrariness, uncertainty, lack of notice, and unfair surprise into the proceedings. Moreover, certifying a nationwide class without considering the varying state laws fails to give full faith and credit to the laws of the fifty states and the District of Columbia.

Mr. Bryant's argument that the constitutional issue was not raised below is contrary to the record. Similarly, his contention that the ruling below is merely "interlocutory" and not subject to review by this Court

lacks merit and, indeed, Mr. Bryant's brief essentially does not analyze the governing provision on this issue, 28 U.S.C. § 1257(a).

This Court has the power to intercede on behalf of litigants whose federal constitutional rights are at stake. The constitutional issues raised in GM's petition are significant, and thus GM asks this Court to intercede in this matter.

I. THE CONSTITUTIONAL ISSUE WAS SQUARELY RAISED BELOW.

Mr. Bryant's suggestion that GM did not preserve the constitutional issue below is inexplicable. Opp. at 11-12. The central question GM presented to the Arkansas courts was whether a choice of law analysis was required before certifying a nationwide class. GM made virtually every argument in the briefing below in this precise context. GM repeatedly referenced this Court's choice of law decisions, and specifically *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

For example, in GM's original brief before the Arkansas Supreme Court, GM noted as follows:

> This appeal presents an issue of first impression that merits careful scrutiny by this court — in particular, whether a nationwide action involving products liability claims under the laws of all 51 jurisdictions can or should be certified. That issue implicates important public policy and *constitutional* concerns.

GM's Original Brief (Ark.S.C.) at 1 (emphasis added). In the same brief, under a section heading entitled "The Circuit Court Erred by Failing to Consider the Legal Variations," GM made the very argument made in the petition before this Court:

> The circuit court's decision [failing to address choice of law] is also contrary to constitutional principles. The United States Supreme Court requires an individualized choice-of-law analysis in a nationwide class action. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985); *see also In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005); *In re Prempro*, 230 F.R.D. at 562 ("in nationwide class actions, choice-of-law constraints are constitutionally mandated"). The *Shutts* Court said, as a matter of due process, that the state law to be applied to each class member's claim must be "neither arbitrary [n]or fundamentally unfair." 472 U.S. at 821. "[I]f a state has only insignificant contact with the parties and the . . . transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981). *Shutts* emphasized that "constitutional limitations [on choice of law] must be respected even in a nationwide class action. 472 U.S. at 821. If the circuit court's deferral of the choice of law issue were allowed to stand, this fundamental constitutional question would effectively evade this Court's review.

Id. at 6-7.[1] Additionally, in a section of GM's Arkansas Supreme Court reply brief entitled "The Circuit Court Erred by Failing to Consider the Legal Variations," GM reiterated the same point:

> Put simply, a "court must make a choice of law determination, in the first instance, when a controversy" potentially involves multiple state laws. 4 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 13:37, at 438 (4th ed. 2002). "[C]ourts can hardly evaluate the claims, defenses or applicable law [for a nationwide class] without knowing what the law is." *Compaq Computer Corp. v. Lapray,* 135 S.W.3d 657, 672 (Tex. 2004). Indeed, "due process" requires consideration of "the choice of law issues . . . before certification." *Chin v. Chrysler Corp.,* 182 F.R.D. 448, 457 (D.N.J. 1998); GM Br. at Arg. 5-7.

GM's Reply Brief (Ark.S.C.) at 4.

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[1] Later in that brief, GM argued:

> Due process would also require application of each state's laws to the claims of its citizens, as noted above in the discussion of the *Shutts* case. 472 U.S. 797 at 821-23. *See also State Farm Mut. Auto. Inc. Co. v. Campbell,* 538 U.S. 408, 422 (2003) (each state must be allowed to make its own reasoned judgment about what conduct is permitted within its borders).

Id. at 11.

Thus, it is difficult to see what more GM could have said to have preserved the issue. Mr. Bryant does not explain how the language cited above could be insufficient. GM argued directly that the circuit court's failure to address choice of law before certification was "contrary to constitutional principles" and specifically *Shutts*. The constitutional issue was unquestionably presented with "fair precision and in due time" and the Arkansas Supreme Court had "a fair opportunity to address the federal question." *Adams v. Robertson*, 520 U.S. 83, 87 (1997).[2] Indeed, the Arkansas Supreme Court not only acknowledged GM's due process argument but recognized it as a question of first impression.[3] Thus, the federal issue was clearly presented.

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[2] The *Adams* case on which Mr. Bryant relies so heavily bears no resemblance to the present matter. Opp. at 8-12. The petitioner in *Adams* apparently raised the constitutional issue only indirectly in the context of *another* argument, not in the context of the argument before this Court. In the present matter, the *Shutts* constitutional analysis was raised in exactly the same context, both before the Arkansas Supreme Court and in the petition before this Court – *i.e.*, choice of law has to be addressed prior to certification because of its constitutional significance.

[3] Specifically, the Arkansas Supreme court under the heading "Choice of Law" began its analysis as follows:

> General Motors initially argues that the significant variations among the fifty-one motor vehicle product defect laws defeat predominance and prevent certification in the instant case. It contends that a choice-of-law analysis must be conducted prior to

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II. THE CONSTITUTIONAL QUESTION HAS BEEN FINALLY DETERMINED UNDER 28 U.S.C. § 1257(a).

Mr. Bryant's analysis of whether the Arkansas Supreme Court's decision is subject to review consists primarily of repeating the word "interlocutory." Opp. at 1, 5, 8, 14, 16-18, 22, 28. His brief, however, barely mentions the controlling provision on this issue (28 U.S.C. § 1257(a)), and does not discuss a single case interpreting that provision. In particular, his brief ignores entirely *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975). Petition ("Pet.") at 9. In *Cox* this Court informed that it takes a "pragmatic approach" to "determining finality," such that whether a state court calls the decision below "interlocutory" does not determine whether the ruling is "final" under § 1257(a). 420 U.S. at 477, 486. Mr. Bryant takes no notice that this Court "recurringly" has granted review in cases "in which the highest court of a State has finally

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(Cont'd)

> certification of the class and that the circuit court's failure to conduct such an analysis at this junction permits due-process considerations to evade this court's review.

App. at 6a. The Arkansas Court's opinion continued:

> A question of first impression still, remains, however, as to whether an Arkansas circuit court must first conduct a choice of law analysis before certifying a multistate class action.

Id. at 11a.

determined the *federal* issue presented in a particular case, but in which there are further proceedings in the lower state courts to come." *Id.* at 477 (emphasis added). Here, the Arkansas Supreme Court finally determined that no choice of law determination is required before certifying a nationwide class. Mr. Bryant cannot argue that anything more needs to be decided with respect to that *federal* question.

Mr. Bryant also fails to address GM's additional § 1257(a) arguments. First, he offers *no explanation* as to how notice that comports with due process can now be provided to class members without a choice of law determination having first been made. Pet. at 8, 16-18. Class members must make decisions about whether to remain in the class, and have their claims subject to *res judicata*, without the opportunity to make an informed decision about what their legal rights are. Second, Mr. Bryant provides no explanation for how the constitutional issue could ever make its way back to this Court given the lower courts' phase I and phase II trial plan which backloads all issues of significance into thousands or millions of individual trials. *Id.* at 10-11.[4]

[4] Mr. Bryant's assertion that GM's challenge to the trial plan was not argued by GM below is wrong. Opp. at 17. GM argued in the Arkansas Supreme Court that a class action would be unmanageable because of the "substantial number of individualized issues [that] would need to be resolved in phase II of a bifurcated proceeding," and as a part of that argument, GM quoted essentially the same language from the trial plan that is quoted in GM's petition to this Court. *See* GM's Original Brief (Ark.S.C.) at 28; Pet. at 10. Both of the decisions below recognized that GM had frontally challenged the workability of the bifurcated trial plan. App. at 18a-20a, 93a-107a.

Third, Mr. Bryant ignores that this Court has often accepted review when important federal constitutional rights are at issue. *Id.* at 12.

Instead Mr. Bryant misdirects the Court to *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). Opp. at 14-17. That case neither involved a federal constitutional issue nor 28 U.S.C. §1257(a). Rather, it addressed the collateral-order exception and the "death knell" doctrine in connection with jurisdiction under 28 U.S.C. § 1291. Neither § 1291 nor the exceptions thereto are relevant here, and GM's arguments above have nothing to do with the "death knell" doctrine.

III. THE CONSTITUTION REQUIRES THAT CHOICE OF LAW BE ADDRESSED PRIOR TO NATIONWIDE CERTIFICATION.

Mr. Bryant seeks to avoid the constitutional issue by attempting to cleverly re-phrase it. There is no constitutional issue, he asserts, but rather merely an issue with regard to how Arkansas' class action rules should be interpreted. And, thus, he claims there is no split of authority since only the Arkansas Supreme Court has interpreted those rules. That does not withstand scrutiny.

A. Procedural Rules Are Not Exempt From Constitutional Constraints

Mr. Bryant frames the issue as "the interpretation of Arkansas Rule 23 and the application of Arkansas's class-action jurisprudence." Opp. at 28. But the issue presented is not dependant on Rule 23. The issue is

whether the principles of due process and full faith and credit embodied in the United States Constitution and outlined in *Shutts* require choice of law to be determined prior to certification in a class action involving citizens from 50 jurisdictions who have no contact with Arkansas.

Mr. Bryant admits that there are constitutional restrictions on choice of law but wrongly postulates that there are no similar constitutional restraints on a state's interpretation of its procedural rules governing class actions. Opp. at 19, 22-23. To the contrary, although state courts are generally permitted to interpret their own laws, there are "federal constitutional limitations." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 307 (1981). Indeed, *Shutts* itself teaches that there are constitutional restrictions on a state court's interpretation of its laws, that the rights of the individual, absent class members must be considered, and that arbitrary and unfair determinations exceed constitutional limitations. 472 U.S. at 818, 821; Pet. at 14-15.[5] Thus, merely because Arkansas does not require

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[5] In *Shutts*, the Court held that, although a forum state has some freedom to select among the potentially applicable rules of decision, the Due Process and Full Faith and Credit Clauses require that the selection be made from among bodies of law bearing a sufficient relationship to the claims at issue. 472 U.S. at 818. In this way, the Constitution imposes substantive "restrictions" on the manner in which a state may conduct its choice-of-law inquiry in a multistate class action. *Id.* In *Shutts*, this Court held that the Kansas court could not simply "bootstrap" its personal jurisdiction over the plaintiffs into a justification for applying Kansas law to claims in which Kansas otherwise would not have a cognizable interest. *Id.* at 821. (Cont'd)

a "rigorous analysis"[6] of the procedural requirements for class certification (Opp. at 23) does not mean that Arkansas courts can abdicate their duty in a nationwide class action to perform an analysis that comports with due process and respects the interests of sister states. *The United States Constitution is not subject to Ark. R. Civ. P. 23, it is the other way around.*

The decision below, which certified a class of four million vehicle owners in every part of the country without any consideration of the policy interests of the class members' home states, was wholly arbitrary and, therefore, exceeded constitutional limitations. Pet. at 14-16. Without knowing what law applies, it is impossible to evaluate the claims, much less make a determination as to whether either facts or legal issues are common to the class. Simply presuming that

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Rather, the constitutional substantive limitation on choice of law requires that a state court make an *individualized* determination that the law applied "have 'significant contact or significant aggregation of contacts' to the claims asserted by each member . . . in order to ensure that the choice of []law is not arbitrary or unfair." *Id.* at 821 (quoting *Allstate,* 449 U.S. at 312-313 (emphasis added)).

[6] The "rigorous analysis" standard derives from this Court's decision in *Gen. Tel. Co. of the S.W. v. Falcon,* 457 U.S. 147, 161 (1982). "Recognizing the important due process concerns . . . inherent in the certification decision, the Supreme Court requires district courts to conduct a rigorous analysis" of the class criteria. *Unger v. Amedisys,* 401 F.3d 316, 320-21 (5th Cir. 2005). *See also Ex parte Mercury Finance Corp.,* 715 So.2d 196, 198 (Ala. 1997).

generically defined concepts of "defect" and "concealment" are common is not only uninformed and random but precisely the type of bootstrapping this Court condemned in *Shutts*. *Id.* at 21.

Differences in the various state laws "are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/ Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (citing *BMW v. Gore*, 517 U.S. 559, 56873 (1996)), *cert. denied*, 537 U.S. 1105 (2003)). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *Id.* at 1021 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). The failure by the Arkansas courts to even consider what laws might apply resulted in a violation of the litigants' constitutional rights.[7]

B. There Is a Split of Authority on the Constitutional Issue

Mr. Bryant argues there is no split among the courts on the issue because the Arkansas Supreme Court is the only arbiter of Arkansas procedural rules. Opp. at 29. As noted above, the issue presented is not confined

[7] The brief in opposition says that this nationwide class action may not be governed by all 51 laws, perhaps just Michigan law. Opp. at 30. That approach to choice of law in nationwide class actions has been roundly rejected, but it is irrelevant to GM's petition. The focus of GM's petition is not that all 51 laws must be applied, only that the choice of law analysis must be performed prior to certification.

to a narrow interpretation of a procedural rule. The issue is whether there is an overriding constitutional requirement on a procedural rule like Ark. R. Civ. P. 23. On that issue, there is a split among the courts—both federal and state. Pet. at 18-20.

IV. THE CLASS ACTION FAIRNESS ACT DOES NOT IMPACT THE SIGNIFICANCE OF THE CONSTITUTIONAL ISSUE.

Mr. Bryant claims that this Court should not entertain GM's petition because of the passage of the Class Action Fairness Act of 2005 (28 U.S.C. §§ 1332(d), 1443) ("CAFA"). Opp. at 31. However, CAFA is irrelevant for two reasons. First, Mr. Bryant's argument erroneously presupposes that the constitutional issue is inapplicable to federal class actions. It is not. Whether federal constitutional principles require consideration of the choice of law analysis before certification of a nationwide class applies equally to nationwide class actions in federal court. And, as noted in GM's petition, there is a split on the choice of law issue within the federal courts. Pet. at 18-20. Second, Mr. Bryant's CAFA argument ignores the reality that *many* pre-CAFA nationwide class actions are still pending against national companies in state courts, including many in just the one county in Arkansas where the present matter is pending. A decision by this Court on GM's petition will greatly impact those cases as well.

CONCLUSION

GM respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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