No. 08-1008

IN THE

Supreme Court of the United States

SHADY GROVE ORTHOPEDIC ASSOCIATES, P.A.,

Petitioner,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5087

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

TABLE OF AUTHORITIES

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INTRODUCTION

This case is governed by a well-known precedent not even cited in the petition: *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Under *Erie*, as every law student learns, "federal courts sitting in diversity apply state substantive law and federal procedural law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996). To be sure, "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Id.* at 416. But it is an endeavor that the federal courts have been undertaking for more than seven decades, and as to which the governing principles of law are very well settled.

The petition here challenges the Second Circuit's application of the *Erie* doctrine to a New York statutory provision, N.Y. C.P.L.R. § 901(b), that prohibits the recovery of certain state statutory penalties through class actions. In particular, petitioner insists that any state law relating to class actions is invariably "procedural" in nature, and thus inapplicable in federal court under *Erie*. But that argument sweeps far too broadly. In analyzing whether a particular state law is "substantive" or "procedural" for *Erie* purposes, a court must carefully analyze the law's effects and its relationship with federal procedural rules. Here, as the Second Circuit recognized, there is no conflict between § 901(b) and any federal rule of civil procedure, and a refusal to apply § 901(b) in federal court not only would frustrate New York's efforts to limit certain state statutory causes of action but also would promote forum-shopping. The petition makes no effort to

address any of these points, but simply repeats the mistaken mantra that any state law relating to class actions is invariably procedural in nature.

For present purposes, of course, the key point is not simply that the decision below is correct, but that petitioner has presented no reason for this Court to review the Second Circuit's application of the well-settled *Erie* doctrine to the particular New York statutory provision at issue here. The Second Circuit's decision was unanimous, and comports with the decisions of all other courts (both inside and outside that Circuit) that have addressed this issue. *See, e.g.*, *In re Onstar Contract Litig.*, No. 2:07-MDL-01867, __ F. Supp. 2d __, 2009 WL 415990, at *14 (E.D. Mich. Feb. 19, 2009); *Gordon v. Kaleida Health*, No. 08-CV-378S, 2008 WL 5114217, at *10 (W.D.N.Y. Nov. 25, 2008); *Gratt v. ETourAndTravel, Inc.*, No. 06-CV-1965, 2007 WL 2693903, at *1-2 (E.D.N.Y. Sept. 10, 2007); *In re Automotive Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 549-50 (E.D. Pa. 2007); *Holster v. Gatco, Inc.*, 485 F. Supp. 2d 179, 185-86 (E.D.N.Y. 2007); *Bonime v. Avaya, Inc.*, No. 06-CV-1630, 2006 WL 3751219, at *3 (E.D.N.Y. 2006); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 290-91 (S.D.N.Y. 2005); *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 285 (D. Mass. 2004); *United States v. Dentsply Int'l, Inc.*, No. 99-005, 2001 WL 624807, at *16 (D. Del. 2001); *Dornberger v. Metropolitan Life Ins. Co.*, 182 F.R.D. 72, 84 (S.D.N.Y. 1999). In short, petitioner has identified none of the "compelling reasons" for this Court to exercise its discretion to grant review, S. Ct. R. 10, and accordingly this Court should deny the petition.

RELEVANT STATUTORY PROVISION

Section 901 of New York's Civil Practice Law and Rules provides in its entirety as follows:

§ 901. Prerequisites to a class action

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.

N.Y. C.P.L.R. § 901.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of a May 2005 automobile accident in which one Sonia Galvez was injured. *See* Pet. App. 21a. After the accident, Ms. Galvez sought medical treatment for her injuries from petitioner Shady Grove Orthopedic Associates, P.A., a Maryland orthopedic clinic. *See id.* As part of her payment for those services, Ms. Galvez assigned Shady Grove certain rights to payment from her automobile insurer, respondent Allstate Insurance Company, under her "New York Private Passenger Auto Insurance Policy." *See id.*

Shady Grove sought and received payment for those services from Allstate. Nonetheless, Shady Grove took the position that Allstate should have made those payments more quickly, and that its failure to do so violated a New York insurance statute, N.Y. Ins. Law § 5106(a). Shady Grove thus claimed that Allstate was liable for a statutory 2% monthly interest penalty, which in this case amounted to about $500. Pet. App. 4a.

B. Procedural History

Shady Grove filed this putative class action against Allstate in federal court in April 2006, invoking federal jurisdiction under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d). In particular, Shady Grove alleged that federal jurisdiction under CAFA was warranted because the putative class sought statutory interest penalties of more than $5 million under New York law, and there was at least minimal diversity of citizenship between the parties. *See* Pet. App. 20a. Shady Grove

conceded that there was no basis for federal jurisdiction other than CAFA, given the modest size of Shady Grove's individual claim against Allstate. *See id.* at 4a, 34a, 36a.

Allstate moved to dismiss the action, and the district court (Gershon, J.) granted the motion. *See* Pet. App. 19-36a. Because § 901(b) by its plain terms precludes Shady Grove from bringing a class action to recover statutory penalties under New York law, the court explained, the only question was whether that statute applies in federal as well as state court under *Erie*. *See* Pet. App. 26-29a, 33-34a. Concluding, as have other courts, that it does, the court granted the motion to dismiss. *See id.* at 36a.

A unanimous panel of the Second Circuit affirmed. *See* Pet. App. 1-18a. The Second Circuit agreed with the district court that § 901(b) was "substantive," rather than "procedural," for *Erie* purposes because it would lead to very different results in federal than in state court, and thus encourage forum-shopping. *See* Pet. App. 15-16a. The court also emphasized that nothing in § 901(b) conflicts with Rule 23 of the Federal Rules of Civil Procedure, which establishes the criteria for class certification in federal court. *See* Pet. App. 10-14a. And the court rejected the notion that applying § 901(b) in federal court would offend basic tenets of federalism, noting that § 901(b) is a *state*-law limitation on a *state*-law cause of action. *See* Pet. App. 16-17a.

REASON FOR DENYING THE WRIT

The Decision Below Is Correct And Does Not Warrant This Court's Review.

Shady Grove contends that this Court's review is warranted to reaffirm the principle that "state legislatures cannot properly dictate procedure in the federal courts." Pet. 8. But there is no dispute here about that principle. Rather, the dispute here is about whether § 901(b) is properly characterized as "substantive" or "procedural" for *Erie* purposes in the first place. Shady Grove does no more than assume the answer to that fundamental question. That assumption is unwarranted.

As a threshold matter, there is no question that Shady Grove could not pursue this case as a class action in the courts of New York. The petition does not deny that § 901(b) means what it says—namely, that "an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action" in the absence of specific statutory authorization, which concededly is lacking here. Thus, the only question presented in this case is whether Shady Grove can evade that prohibition by filing this putative class action in federal court.

The answer to that question, as the Second Circuit explained, is no, because § 901(b) "is a substantive law" for *Erie* purposes and thus "must be applied in the federal forum, just as it is in state court." Pet. App. 15a. The decision whether a state law is substantive or procedural for *Erie* purposes, as this Court has taught, turns on whether a refusal to apply that law would "[1] have so important an effect upon the fortunes of one or both of the litigants that

failure to apply it would unfairly discriminate against citizens of the forum State, or [2] be likely to cause a plaintiff to choose the federal court." *Gasperini*, 518 U.S. at 428 (internal quotation and brackets omitted); *see also* Pet. App. 9a (setting forth this analysis). The Second Circuit applied precisely this analysis below, concluding that § 901(b) was substantive for *Erie* purposes because a failure to apply that statute in federal court would "[1] allow[] plaintiffs to recover on a class-wide basis in federal court when they are unable to do the same in state court," and "[2] clearly encourage forum-shopping, with plaintiffs and their attorneys migrating toward federal court to obtain the substantial advantages of class actions." Pet. App. 16a (internal quotation omitted); *see also Onstar*, 2009 WL 415990, at *14 (concluding that § 901(b) is "substantive" for *Erie* purposes); *Gordon*, 2008 WL 5114217, at *10 (same); *Gratt*, 2007 WL 2693903, at *1-2 (same); *Automotive Refinishing*, 515 F. Supp. 2d at 550 (same); *Holster*, 485 F. Supp. 2d at 185-86 (same); *Bonime*, 2006 WL 3751219, at *3 (same); *Leider*, 387 F. Supp. 2d at 291 (same); *Relafen*, 221 F.R.D. at 285 (same); *Dentsply*, 2001 WL 624807, at *16 (same); *Dornberger*, 182 F.R.D. at 84 (same).

Nor is there any merit to the suggestion that § 901(b) must be characterized as "procedural" because the criteria for class certification in federal court are set forth in Rule 23 of the Federal Rules of Civil Procedure. As the Second Circuit explained, the criteria for class certification in New York state court are set forth in N.Y. C.P.L.R. § 901**(a)**, not § 901**(b)**. *See* Pet. App. 11a. Rather than setting forth the criteria for class certification, § 901(b) simply provides that certain state-law causes of

action are not amenable to classwide adjudication in the first place. There is no analogue to § 901(b) in the Federal Rules of Civil Procedure. In particular, nothing in Rule 23 either requires or forbids a federal court to certify a class action for any specific claim. "Rule 23 does not control the issue of which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs." Pet. App. 11a. Accordingly, there is no conflict between § 901(b) and Rule 23. *See* Pet. App. 11a; *see also Automotive Refinishing*, 515 F. Supp. 2d at 549 ("[T]here is no real conflict between Rule 23 and CPLR 901(b)."); *Leider*, 387 F. Supp. 2d at 290-91 (same); *Relafen*, 221 F.R.D. at 285 (same); *Dentsply*, 2001 WL 624807, at *16 (same); *Dornberger*, 182 F.R.D. at 84 (same).*

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* As the Second Circuit noted, "[t]he contrary cases brought to our attention by Shady Grove are neither controlling nor relevant." Pet. App. 15a n.6. Both *In re Oot*, 112 B.R. 497, 502 (Bankr. N.D.N.Y. 1989), and *In re Peters*, 90 B.R. 588, 594-95 (Bankr. N.D.N.Y. 1988), involved the class certification criteria set forth in N.Y. C.P.L.R. § 901(a), and merely held that those criteria (as opposed to the class certification criteria set forth in Fed. R. Civ. P. 23) do not apply in federal court. Neither case involved § 901(b), with its distinct prohibition on classwide recovery of certain state statutory penalties. And in *Wesley v. John Mullins & Sons, Inc.*, 444 F. Supp. 117 (E.D.N.Y. 1978), the court responded to the enactment of § 901(b) by (1) decertifying a class that sought to recover statutory penalties under New York law, and (2) dismissing "the class action aspect of plaintiff's claim under [New York law] for lack of jurisdiction over the subject matter." *Id.* at 120. In a footnote, the court mused that it "might" have had jurisdiction over the class claims under state law if the plaintiffs had limited their claims, but then noted that this result "would ...

Finally, Shady Grove errs by arguing that "application of [§ 901(b)] in federal courts would raise fundamental concerns of federalism, allowing state legislatures to dictate to the federal courts the use or nonuse of procedural mechanisms that are otherwise available under the Federal Rules." Pet. App. 16a (internal quotation and brackets omitted). As the Second Circuit explained, "Shady Grove has made no argument that the availability of the class action device in *all* circumstances is an essential characteristic of the federal court system, particularly where the very cause of action that Shady Grove seeks to assert is a creature of New York state statute." *Id.* at 16-17a (emphasis added; internal quotation omitted). Indeed, Shady Grove's approach would turn federalism on its head by flouting New York's prohibition on classwide recovery of certain state statutory penalties. Because New York created the cause of action, federalism commands respect for New York's corresponding decision to limit that cause of action to individual claims.

Shady Grove seems to think that the upshot of the decision below is that "state-law class actions [could] eventually disappear altogether, as more

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circumvent the prohibition against class actions under C.P.L.R. § 901(b)," and thus render "doubtful whether it would be a proper exercise of our discretion to assert pendent jurisdiction under these hypothetical circumstances." *Id.* at 120 n.12. Not surprisingly, thus, the petition does not cite *Oot*, *Peters*, or *Wesley*, and does not identify a single case holding that § 901(b) is procedural, rather than substantive, for *Erie* purposes. *See also* Pet. App. 28-29a (distinguishing *Oot*, *Peters*, and *Wesley*).

state legislatures declare them off limits to the federal courts." Pet. i. But it is unclear why Shady Grove thinks that this possibility should raise any concern for this Court. In our federal system, States are generally free to create—and to limit—causes of action as they see fit. Where, as here, a State decides as a policy matter that particular state-law causes of action may be pursued only on an individual basis, the federal courts have no basis to second-guess that decision.

Rather than addressing the Second Circuit's analysis, Shady Grove simply insists that "the Second Circuit has effectively ceded federal authority to the states" by "permitting New York's legislature to dictate procedure in the federal courts." Pet. 6. But that hyperbole simply assumes the answer to the question whether § 901(b) is "substantive" or "procedural" in the first place. Just because the criteria for certifying a class action are procedural in nature does not mean that *any* state law relating to class actions is invariably procedural in nature for *Erie* purposes. To the contrary, as this Court has recognized time and again, *Erie* requires careful analysis of a challenged state law rather than mechanical application of "substantive" and "procedural" labels. *See, e.g.*, *Gasperini*, 518 U.S. at 427-28 & n.7; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980); *Hanna v. Plumer*, 380 U.S. 460, 469-74 (1965).

Thus, to conclude that New York's law prohibiting recovery of certain statutory interest penalties on a classwide basis is substantive for *Erie* purposes is not, as Shady Grove would have it, to say

that States are free to establish rules of procedure for the federal courts. It all depends, as this Court emphasized most recently in *Gasperini*, on whether application of the state law in federal court would undermine the twin aims of *Erie*: to prevent unfair discrimination and forum-shopping. *See* 518 U.S. at 428 & n.8. Shady Grove's far-fetched hypotheticals about state laws that regulate deposition or discovery practice in the federal courts, *see* Pet. 7, or require federal judges to wear powdered wigs, *see id.* at 8, thus miss the point: the Second Circuit never held that States may dictate rules of procedure in the federal courts. To the contrary, the whole point of the Second Circuit's analysis, which Shady Grove never addresses, is that § 901(b) is substantive, rather than procedural, for *Erie* purposes.

Apart from challenging the Second Circuit's decision on the merits, Shady Grove has identified no reason whatsoever for this Court to review this case. In particular, Shady Grove has not alleged—because it cannot allege—a circuit conflict on this point. It bears emphasis, in this regard, that this is not an issue that arises only in the Second Circuit; to the contrary, it also has arisen in the lower courts in the First, Third, and Sixth Circuits. *See, e.g.*, *Onstar*, 2009 WL 415990, at *14; *Automotive Refinishing*, 515 F. Supp. 2d at 549-50; *Relafen*, 221 F.R.D. at 285; *Dentsply*, 2001 WL 624807, at *16. Because Shady Grove is challenging no more than the application of settled law to the facts of this case, this Court's review is not warranted.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

ANDREW T. HAHN, SR.
SEYFARTH SHAW LLP
620 Eighth Ave., 32d fl.
New York, NY 10018
(212) 218-5554

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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