Nos. 15-56014 (L), 15-56025, 15-56059, 15-56061, 15-56064, 15-56067

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE HYUNDAI AND KIA FUEL ECONOMY LITIGATION

Kaylene P. Brady, et al. and Nicole Marie Hunter, et al.
Plaintiffs-Appellees,

Kehlie R. Espinosa; et al.,
Plaintiffs-Appellees,

Hyundai Motor America, Inc.; et al.
Defendants-Appellees.

v.

Caitlin Ahearn; Andrew York; et al.
Objectors-Appellants.

On Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding
Case No. D.C. No. 2:13-ml-02424-GW-FFM

BRIEF OF AMICI CURIAE PUBLIC JUSTICE, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND THE IMPACT FUND IN SUPPORT OF REHEARING EN BANC

Decision by Circuit Judges Andrew J. Kleinfeld, Sandra S. Ikuta,
and Jacqueline H. Nguyen, Opinion by Judge Ikuta; Dissent by Judge Nguyen
January 23, 2018

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RULE 26.1 DISCLOSURE STATEMENTS

No Amici Curiae has a parent company or issues stock. Accordingly, no publicly-held company owns 10% or more of the stock of any Amici Curiae.

Dated: March 19, 2018

Respectfully submitted,

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CIRCUIT RULE 29-2(a) STATEMENT

This brief has been filed with the consent of all parties to this action.

Dated: March 19, 2018

Respectfully submitted,

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STATEMENTS OF INTEREST

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. It specializes in precedent-setting and socially significant cases. Public Justice regularly represents consumers in class actions. In its experience, the national class action device is often the only meaningful way that individuals can vindicate important legal rights. Given this fundamental importance, Public Justice has also worked to prevent and correct class action abuses and preserve the integrity of the class action settlement approval and implementation processes.

The **National Association of Consumer Advocates** ("NACA") is a non-profit corporation formed in 1994 whose members are lawyers, law professors, and students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers by maintaining a forum for information sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

The **National Consumer Law Center ("NCLC")** is recognized nationally as an expert in consumer credit issues. It has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. It also publishes a

twenty-volume Consumer Credit and Sales Legal Practice Series, including *Consumer Class Action,* (9th Ed. 2016). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers and to promote protections against such practices, and for this reason it has an interest in seeking strong and effective enforcement of consumer protection laws and insuring equal access to justice.

The Impact Fund is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It has been counsel in numerous civil-rights class actions, including cases challenging employment discrimination, lack of access for persons with disabilities, and violations of fair housing laws.

I. INTRODUCTION AND SUMMARY OF ARGUMENT.

On January 23, 2018, a divided Panel of this Court issued an opinion with potentially devastating consequences for consumer class actions. En banc review is necessary because the Panel created both an intra- and inter-circuit split on an issue of exceptional importance. *See* Fed. R. App. P. 35(b)(1)(A) & (B).

The panel effectively overruled controlling Circuit precedent holding that "differences between state consumer protection laws" do not preclude certification of a Rule 23(b)(3) settlement class, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), directly contravening the rule that "[n]o three-judge panel has the power" to overrule a prior decision of this Court. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 759 F.3d 990, 992 (9th Cir. 2014) (O'Scannlain, J., dissenting) (citing *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). It also created an irreconcilable—and unnecessary—circuit split with the Third and Seventh Circuits—*see Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc); *In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001)—disregarding this Court's practice to "decline to create a circuit split unless there is a compelling reason to do so." *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017) (citation omitted).

Moreover, this case is of exceptional importance to the consumers Amici have worked for decades to protect. The Panel majority effectively forecloses an

important mechanism for securing redress for harms inflicted on consumers when companies violate well-recognized, garden-variety state consumer protection statutory and common laws.

Accordingly, Amici respectfully ask this Court to grant the Petitions for Rehearing En Banc.[1]

II. BACKGROUND.

This is a case about the defendants' admitted errors in testing its vehicles' miles per gallon performance, resulting in uniformly misleading statements on a metric of importance to reasonable consumers nationwide. After approximately a year of litigation, the parties reached a settlement providing consumers several alternative methods of compensation. The District Court certified a nationwide class for purposes of that settlement. A divided Panel reversed, finding that the District Court erred in "failing to make a final ruling as to whether the material variations in state law defeated predominance under Rule 23(b)(3)." *In re Hyundai & Kia Fuel Econ. Litig*., 881 F.3d 679, 702 (9th Cir. 2018).

Judge Nguyen dissented, noting that the majority's opinion "contravenes precedent, and disregards reasonable factual findings made by the district court

[1]The undersigned certifies that no party's counsel authored this brief in whole or in part, and no person besides amici and their counsel contributed money that was intended to fund preparing or submitting this brief. See Fed. R. App. P. 29(a)(4). All parties have consented to the filing of this brief.

after years of extensive litigation." *Id.* at 708. As she explained, the decision "deprives thousands of consumers of any chance to recover what is, conservatively speaking, a more than $159 million settlement." *Id.* at 707-08.

III. THE PANEL MAJORITY'S DECISION CONFLICTS WITH PRECEDENT OF THIS CIRCUIT AND SISTER CIRCUITS.

A. The decision cannot be reconciled with *Hanlon*.

Under this Circuit's long-established precedent, "differences between state consumer protection laws" do not preclude certification of a Rule 23(b)(3) settlement class. *Hanlon*, 150 F.3d at 1022-23. In *Hanlon*, this Court upheld certification of a nationwide settlement class seeking damages under state consumer protection statutes for defective latches in their vehicles. Common questions predominated because a "common nucleus of facts and potential legal remedies," including the defendant's knowledge of the defect, "dominate[d] [the] litigation." *Id.* at 1022. With these common questions, certification was warranted notwithstanding the possibility of "differing remedies" and "variations in state law." *Id.* at 1022-23.

This rubric has guided settlement of nationwide consumer class actions for twenty years. For example, in *Hartless v. Clorox Co*., the district court certified a nationwide 23(b)(3) settlement class when consumers purchased a potentially harmful cleaning product. 273 F.R.D. 630, 634 (S.D. Cal. 2011). The *Hartless* court did not undertake a 50-state comparison of laws. Rather, it concluded that

common questions focused on the defendant's conduct predominated and that "idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over [these] shared claims." *Id*. (citing *Hanlon*, 150 F.3d at 1022). This Court affirmed. *Hartless v. Clorox Co*., 473 F. App'x 716 (9th Cir. 2012) (unpublished).

Hanlon has been cited positively by Ninth Circuit panels on over seventy-five occasions, and by *thousands* of district courts. Courts routinely cite *Hanlon* in certifying nationwide settlement classes under Rule 23(b)(3). *See, e.g.*, *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152, 1163 (9th Cir. 2001) (finding predominance satisfied, where, "as in *Hanlon*, "[a] common nucleus of facts and potential legal remedies dominates this litigation"). Such cases reflect the reality that common questions of the defendants' knowledge and misrepresentations are often at the core of consumer fraud cases to establish predominance, and accord with the Supreme Court's observation in *Amchem Prods., Inc. v. Windsor* that "predominance is a test readily met in certain cases alleging consumer . . . fraud." 521 U.S. 591, 625 (1997) (citation omitted). Consistent with this precedent, the District Court concluded that common questions about the defendants' conduct predominated over individual considerations for a settlement class.

In spite of the District Court's reasonable exercise of discretion in reaching its conclusions, the Panel majority found that it erred in failing to "rigorously analyze potential differences in state consumer protection laws before certifying a single nationwide settlement class." *Id.* at 702. But the District Court was under no such obligation. First, *Hanlon* expressly holds that "idiosyncratic differences" in state law do *not* preclude nationwide settlement where questions as to the defendant's conduct predominate. Second, the burden is on the foreign law proponent to establish by a preponderance of the evidence that there are material differences in the law. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.), *reh'g denied* 273 F.3d 1266 (9th Cir. 2001); *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 919 (Cal. 2001) (citations omitted). Objectors—the foreign law proponent here—did not meet their burden.[2]

At bottom, the District Court did not abuse its discretion in certifying a nationwide settlement class. The Panel majority's contrary holding conflicts with

[2] As the Dissent correctly noted, Objectors did not undertake the three-prong governmental interest test, including analyzing comparative governmental interests as required by *Zinser*. And while Objectors argued that Virginia law is better—including, incredibly, a 100% chance of class certification—they did not establish outcome determinative differences. The only differences that matter are those that actually matter. *See Phillips Petr. Co. v. Shutts*, 472 U.S. 797, 816 (1987). And while every objector argues they could get a "better deal," that does not satisfy their burden. *See Hanlon*, 150 F.3d at 1027 ("[T]he question we address is not whether the final product could be prettier, smarter or snazzier.").

established Ninth Circuit precedent. Rehearing en banc is necessary to "secure or maintain uniformity" of decision in this Circuit. Fed. R. App. P. 35(b)(1)(A).

B. The decision creates a split with the Third and Seventh Circuits.

The Panel majority opinion should also be reviewed because it creates a needless, avoidable circuit split with both the Third and Seventh Circuits.

In *Sullivan*, plaintiffs alleged that diamond wholesaler De Beers wrongfully inflated the price of diamonds. The district court approved a settlement and certified nationwide classes of direct and indirect purchasers for that purpose. A divided Third Circuit reversed, holding that state law variations precluded a finding of predominance because, for example, many states do not recognize antitrust claims when they are brought by indirect purchasers. *Sullivan v. DB Invs., Inc.*, 613 F.3d 134, 151 (3d Cir. 2010).

In an opinion largely tracking the holding of *Hanlon*, an en banc Third Circuit reversed, holding that "variations in the rights and remedies available to injured class members under the various laws of the fifty states [do] not defeat commonality and predominance" for certifying a settlement class. *Sullivan*, 667 F.3d at 301 (citations omitted). The en banc court explained that the predominance inquiry is meant to evaluate the "constellation of common issues [that] binds class members together" and focus on "whether the defendant's conduct was common as to all of the class members." *Id.* at 298, 302. In concurrence, Judge Scirica agreed

that predominance for settlement classes is satisfied where all claims arise "out of the same course of *defendants' conduct*" and thus "share a common nucleus of operative fact, supplying the necessary cohesion." *Id.* at 338 (Scirica, J., concurring) (emphasis added).

Likewise, in *In re Mexico Money Transfer Litig.*, the Seventh Circuit upheld certification of a settlement class of wire transfer customers, noting that "nationwide classes are certified routinely even though every state has its own" laws, and that "many opinions . . . give consumer fraud as an example of a claim for which [nationwide] class treatment is appropriate." 267 F.3d at 747. Upholding certification, in accord with *Hanlon* and *Sullivan*, Judge Easterbrook reasoned that "no one need draw fine lines among state-law theories of relief" when considering certification of a *settlement* class. *Id*.

In contrast, the Panel majority here improperly placed the burden on the district court to "rigorously analyze" state law variations prior to certifying a settlement class. *In re Hyundai*, 881 F.3d at 702. In support of this proposition it cited an oft-distinguished Fifth Circuit case, *Castano v. Am. Tobacco Co*., 84 F.3d 734, 741 (5th Cir. 1996). Even on its own terms, *Castano* has no bearing here: it decertified a *litigation* class of plaintiffs bringing "novel and wholly untested" addiction-as-injury claims yet to be recognized under *any* state law. *Id.* at 737. And *Castano* does not even preclude nationwide *settlement* classes within the Fifth

Circuit. *See, e.g.*, *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) (affirming certification of nationwide settlement class where defendant's "injurious conduct [gave] rise to numerous common questions"), *cert. denied sub nom*. *BP Exploration & Prod. Inc. v. Lake Eugenie Land & Dev., Inc.,* —— U.S. ——, 135 S.Ct. 754 (2014).

Here, as in *Sullivan* and *Mexico Money*, it is the *defendants*' common course of conduct, including material misrepresentations to consumers, that sits at the heart of the litigation and provides the necessary common questions. As the *Sullivan* court made clear, without litigation-related manageability concerns, such a common nucleus is sufficient to establish predominance for a settlement class without a thorough review of variations in the laws of the fifty states. *Cf. Mazza v. Am. Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012) (decertifying a *litigation* class where state law variations precluded predominance)

Accordingly, en banc rehearing is necessary to address the Panel majority's conflict with the authoritative decisions of the Third and Seventh Circuits. *See* Fed. R. App. P. 35(b)(1)(B).

IV. THE PANEL MAJORITY'S DECISION UNDERMINES THE FAIR AND EFFICIENT RESOLUTION OF CLAIMS AND WILL RESULT IN HARM TO CONSUMERS.

A. Settlements may be fair, reasonable, and adequate without a detailed inquiry into the laws of each state.

Litigation is costly and time-consuming for plaintiffs, defendants, and the court system alike, engendering a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting *In re Syncor ERISA Litig.,* 516 F.3d 1095, 1101 (9th Cir. 2008)). *Hanlon* stands as an important polestar for the proposition that fair, reasonable, nationwide settlements promote uniformity of decision as to similarly situated plaintiffs and can provide efficient redress to consumer harms, even on a massive scale.

This was further demonstrated this past year by the *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* 2.0 Liter TDI settlement. Despite the complexity of that case, a nationwide settlement was proposed, negotiated, and approved by the court within approximately one year of the revelations of the scheme that sparked those lawsuits. The court looked to the core of the defendants' fraudulent scheme, including, as in this case, uniform misrepresentations and concealments of material facts about its vehicles, and concluded the predominance requirement was satisfied for purposes of a global settlement valued at $14.7 billion. *See In re: Volkswagen "Clean Diesel" Mktg.,*

Sales Practices, & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2016 WL 6248426, at *1, 24 (N.D. Cal. Oct. 25, 2016), *appeal dismissed sub nom. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 16-16731, 2017 WL 5649270 (9th Cir. Mar. 23, 2017) (order).

B. If left to stand, the decision will undermine important protections and remedies available to consumers.

Class action lawsuits are a powerful legal device. When companies or institutions cheat or harm large numbers of people, class actions are often the only way to hold them accountable. Precluding certification of nationwide settlement classes because of potential variations in state law would deprive consumers of an essential device for efficient and effective redress for nationwide wrongs. In practice, eviscerating nationwide settlements will not result in 50+ customized settlements tailored to the laws of each state and district, but rather, will operate to prevent settlements at all. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The *realistic* alternative to [this] class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis in original)). In that way, the Panel majority's decision will frustrate efforts to resolve nationwide harms efficiently and effectively, contravening "[t]he policy at the very core of the class action mechanism . . . to overcome the problem that small recoveries do not provide the incentive for any

individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617 (citation omitted).

The Panel majority, moreover, would weaken consumers' ability to negotiate advantageous settlements in exchange for assurances of closure. This is so because nationwide settlements provide true finality. *Cf. Sullivan*, 667 F.3d at 339 ("Plaintiffs receive redress of their claimed injuries without the burden of litigating individually. Defendants receive finality."). This ability to offer a defendant global peace increases plaintiffs' bargaining power and draws defendants to settlement. *Id.* at 310. Absent assurances of global resolution, defendants face the prospect of litigation in Idaho following settlement in Oregon, depriving consumers of the opportunity to maximize recovery. Compounding this issue, even if each of the 51 cases settles, requiring a defendant to cover claims administration and other costs in each necessarily reduces the total funds available to compensate class members.

Finally, the Panel's opinion also contravenes the mandate of Fed. R. Civ. P. 1 that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." That Rule applies with no less force in the context of Rule 23. Indeed, Rule 23 is itself designed to promote the efficient resolution of large numbers of claims. *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (the

"principal purpose" of Rule 23 is "efficiency and economy of litigation"). And the particular provision at issue here—predominance—is itself "a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *vacated* 569 U.S. 1015 (2013) *reinstated* 727 F.3d 796 (7th Cir. 2013) (Posner, J.) (citations omitted). While substance cannot be sacrificed at the altar of efficiency, *see In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (decertifying a litigation class), courts are not empowered to require more than the substance demands. The Panel majority added requirements and shifted burdens where none were mandated.

Accordingly, en banc rehearing is necessary to address this question of exceptional public importance. *See* Fed. R. App. P. 35(b)(1)(B).

V. CONCLUSION

For the above reasons, Amici respectfully urge this Court to grant rehearing en banc and reaffirm the holding of *Hanlon*.

Dated: March 19, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and Fed. Circ. R. 29-2(c)(2), because it contains 2,649 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman type style, 14-point font.

Dated: March 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System on March 19, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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