

**IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO**

Ct. App. No. 26,058

Supreme Court No. 30,165

JOAN FERRELL, MARIA C. CAPPUZELLO,
ELIZABETH MARTINEZ, and H. JAKE SALAZAR,

Plaintiffs-Petitioners,

vs.

ALLSTATE INSURANCE COMPANY and
ALLSTATE INDEMNITY COMPANY,

Defendants-Respondents.

**MOTION OF THE AMERICAN COUNCIL OF LIFE INSURERS FOR LEAVE
TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS
ALLSTATE INSURANCE COMPANY AND
ALLSTATE INDEMNITY COMPANY**

AMERICAN COUNCIL OF LIFE
INSURERS

Lisa Tate
101 Constitution Ave. N.W.
Washington, D.C. 20001
Tel: (202) 624-2118

MAYER, BROWN, ROWE & MAW LLP

George Ruhlen
141 East Palace Avenue
Santa Fe, NM 87501
Tel: (505) 820-8180
Fax: (505) 820-7334

Evan M. Tager
Miriam R. Nemetz
Elizabeth G. Oyer
1909 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300

Pursuant to New Mexico Rule of Appellate Procedure 12-215, the American Council of Life Insurers (“ACLI”) moves this Court for leave to file the accompanying brief of *amicus curiae* in support of respondents Allstate Insurance Company and Allstate Indemnity Company. ACLI is the largest life insurance trade association in the United States, representing the interests of 377 member life insurers, conducting business in all 50 states. ACLI member companies account for 91% of the total assets, 90% of the life insurance premiums, and 95% of the annuity considerations in the United States among legal reserve life insurance companies. 306 ACLI member companies provide financial and retirement security to families in New Mexico. 96% of all life and annuity payments in New Mexico are from ACLI member companies, and 94% of total life insurance coverage in New Mexico is provided by ACLI members.

An *amicus curiae* brief from ACLI is desirable, *see* N.M. R. App. P. 12-215, because ACLI brings an important perspective to the issues that are before the Court in this case. The appellants argue for a rule that would favor the certification of multi-state class actions by permitting a New Mexico court to decide the claims of out-of-state plaintiffs under New Mexico law. Such a rule would be devastating to ACLI’s member insurance companies, which are heavily regulated by the diverse laws of the states in which they do business.

In order to comply with these widely varying state insurance laws, ACLI insurers carefully tailor their policies and practices to the laws of each state. Consequently, their conduct varies considerably from state to state, and they rely heavily on the pronouncements of each state’s courts and regulatory agencies in structuring their operations and writing policies. Multi-state class actions threaten to subject insurance companies to multiple standards of conduct in a single state, making it impossible for them to structure their business to comply with the law.

They also threaten to deprive ACLI's members of the ability to influence the development of the law in each state through litigation and participation in the rulemaking process.

ACLI therefore has a substantial interest in urging this Court to uphold the decision of the Court of Appeals and is well-situated to explain why the Court should do so. Accordingly, ACLI respectfully requests that the Court grant leave to file the accompanying brief of *amicus curiae*.

Respectfully submitted,

MAYER, BROWN, ROWE & MAW LLP
George Ruhlen
141 East Palace Avenue
Santa Fe, NM 87501
Tel: (505) 820-8180
Fax: (505) 820-7334

Evan M. Tager
Miriam R. Nemetz
Elizabeth G. Oyer
1909 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300

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Tel: (202) 624-2118

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101 Constitution Ave. N.W.
Washington, D.C. 20001
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Santa Fe, NM 87501
Tel: (505) 820-8180
Fax: (505) 820-7334

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Miriam R. Nemetz
Elizabeth G. Oyer
1909 K Street, NW
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Tel: (202) 263-3000
Fax: (202) 263-3300

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The American Council of Life Insurers (“ACLI”) is the largest life insurance trade association in the United States, representing the interests of 377 member life insurers, conducting business in all 50 states. ACLI member companies account for 91% of the total assets, 90% of the life insurance premiums, and 95% of the annuity considerations in the United States among legal reserve life insurance companies. 306 ACLI member companies provide financial and retirement security to families in New Mexico. 96% of all life and annuity payments in New Mexico are from ACLI member companies, and 94% of total life insurance coverage in New Mexico is provided by ACLI members.

ACLI’s member companies have a strong institutional interest in ensuring the development of appropriate standards for the certification of class actions, particularly those that adjudicate the claims of plaintiffs in multiple states. Insurance companies are heavily regulated by the diverse laws of the states in which they do business. In order to comply with these widely varying state insurance laws, ACLI members carefully tailor their policies and practices to the laws of each state. Consequently, their conduct varies considerably from state to state, and they rely heavily on the pronouncements of each state’s courts and regulatory agencies in structuring their operations and writing policies.

Appellants seek certification of class action in which a New Mexico court, applying New Mexico law on the assumption that it is no different from other states’ laws, would resolve claims by plaintiffs in twelve different states regarding the contours of the obligation to disclose “premiums.” The prospect of a court of a single state undertaking to interpret the laws of a dozen others threatens to severely disrupt the settled expectations of ACLI members (and their insureds) in each of those other states. If the forum court interprets another state’s law in a way

that differs even slightly from the state's own interpretation, smoothes over nuances in the law to facilitate class treatment, or makes pronouncements on issues that the other states' courts have not yet had the opportunity to address, then ACLI member could be subjected to multiple standards of conduct in a single state, making it impossible for them to structure their business to comply with the law. Such a multi-state class action also threatens to deprive ACLI's members of the ability to influence the development of the law in each state through litigation and participation in the rulemaking process. Accordingly, ACLI has a substantial interest in defending the decision of the Court of Appeals reversing the district court's certification of a multi-state class action here.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court in this case certified a class of Allstate policyholders from thirteen different states who have within the past six years paid installment fees in conjunction with their insurance policies. Plaintiffs contend that fees they were charged by Allstate for paying their premiums in installments rather than in one lump sum amounted to unlawful collections of "premium" over and above the amount of "total premium" plaintiffs had agreed to pay under the terms of their policies. The district court found that plaintiffs had satisfied all requirements of New Mexico Rule 1-023(A), and concluded that a class action was the superior method of adjudicating their claims as prescribed by New Mexico Rule 1-023(B)(3). In reaching this conclusion, the court made no real effort to reconcile the competing laws of the thirteen interested states. The court simply stated: "The case is manageable in the forum of New Mexico as there is no debilitating conflict of law among the thirteen (13) states on the issues of contract interpretation, right to jury trial, and the definition and specification of insurance policy

premiums, the issues to be adjudicated under the breach of contract claim in Plaintiffs' Second Amended Complaint." Findings of Fact and Conclusions of Law at 5.

The Court of Appeals rejected the district court's apparent assumption that New Mexico law could be applied to all plaintiffs and reversed the order certifying a multi-state class. Comparing the relevant laws of the thirteen interested states, the court concluded that differences among them precluded class certification. Opinion at 23-24. The court observed that New Mexico's statutory definition of "premium" was central to plaintiffs' breach-of-contract claim. *Id.* at 6. However, the court concluded that New Mexico law could not be applied across the board because it differed materially from the law of many of the other states. *Id.* at 8-9. The prospect of conducting an individualized choice-of-law analysis for each plaintiff and applying the disparate laws of thirteen states persuaded the court that class certification was inappropriate.

The court reasoned:

We think it is clear that common questions of law would not predominate and the case would become unmanageable if the district court were to attempt to apply the ambiguous laws of all thirteen jurisdictions. It is very common for a court to decline certification or decertify a class on the ground that the need to apply different states' laws would prevent the case from satisfying the manageability, superiority, and predominance requirements. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1780.1, at 204-13 (3d ed. 2005) (citing numerous cases where certification was denied due to the need to apply different laws). We think the difficulties are exponentially magnified where, as here, the district court would need to make detailed inquiries into analogous precedents to try to guess what the courts of each of the class states would do if faced with the question of whether fees constitute premium.

Id. at 23-24. Accordingly, the Court of Appeals reversed the district court's order certifying a multi-state class, and remanded for the case to proceed as a New Mexico-only class "if the district court still believes it is appropriate to do so." *Id.* at 28.

The decision of the Court of Appeals reflects the high regard in which the courts of New Mexico hold principles of interstate federalism. A fundamental component of our federal system

is the ability of states to pursue their own independent policies. Conversely, states are strictly prohibited from projecting their individual policy judgments beyond their own borders. The preservation of this system of interstate federalism relies largely on the restraint that both federal and state courts exercise in applying the laws of other jurisdictions. In New Mexico, doctrines such as comity and forum non conveniens, which enable courts to refrain from adjudicating matters better resolved by the courts of another state, reflect this strong policy of avoiding unnecessary infringement of the sovereignty of other states.

In a multi-state class action, the protection of interstate federalism depends on the court's careful choice-of-law analysis. By placing the courts of a single state in the position of interpreting and applying the laws of numerous other states, multi-state class actions have significant potential to encroach upon the sovereign prerogatives of the non-adjudicating states. The task of deciding how another state—or a dozen other states—would resolve a question of law is fraught with the risk of error. Moreover, when presented with multitudinous claims and competing state laws, courts face tremendous pressure to find consensus. Accordingly, courts may smooth over variations in state laws or interject the policy judgments of their own state in order to facilitate the class-wide resolution of a dispute. The result is that a single state can project its law far beyond its borders, binding persons in states nationwide.

Such intrusion on interstate federalism is avoided when courts scrupulously analyze choice-of-law issues in deciding whether to certify a class, precisely as the Court of Appeals did here. Rule 1-023 gives courts broad discretion to deny class certification when it is not the “superior” method of adjudication. In evaluating superiority, courts must consider not only questions of efficiency and manageability, but also the implications for sovereignty among the states. When, as here, class-wide adjudication would require the court to interpret and apply the

unsettled laws of multiple states, both efficiency and federalism suffer. Accordingly, ACLI urges the Court to hold plaintiffs to their burden under Rule 1-023(B) of demonstrating that a class action is the superior method of adjudicating this case, and on this basis to affirm the Court of Appeals denial of certification of a multi-state class action here.

ARGUMENT

I. PRINCIPLES OF INTERSTATE FEDERALISM REQUIRE RESPECT FOR EACH STATE’S RIGHT TO APPLY ITS OWN LAWS

A. Principles of Federalism Preclude States From Legislating Outside Their Borders

As the Supreme Court has stated, “our federal system * * * leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.” *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *see also, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (noting “the Constitution’s special concern . . . with the autonomy of the individual States within their respective spheres”). Thus, the Court has emphasized the “vital” importance of “the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

These founding principles of our republic preclude states from applying their own laws to regulate conduct outside their borders. *See, e.g., S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (striking down a state law under the Commerce Clause because the “practical effect of such regulation is to control [conduct] beyond the boundaries of the state”); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 n.5 (1930) (“a state is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there”); *Bonaparte v.*

Tax Court, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.”). Permitting a state to export its laws would “throw[] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.” *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). For a state “to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of the acts within it” also is at odds with the basic constitutional notion of full faith and credit. *Pac. Employers Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 504-05 (1939).

Thus, the Supreme Court has invalidated efforts by state courts to impose the state’s laws on out-of-state conduct. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for example, the Supreme Court held that an Alabama jury could not impose punitive damages to “punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents,” or “to deter conduct that is lawful in other jurisdictions.” *Id.* at 573. The Court reasoned that “it follows from the[] principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ conduct in other States.” *Id.* at 572; *see also id.* at 585 (“While each state has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.”).

Likewise, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court held that a Utah lawsuit seeking punitive damages could not be used “as a platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country.” *Id.* at 420. Relying on *Gore* and *Shutts*, the Court reiterated:

A State cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

Id. at 421-22 (citations omitted).

B. Courts Are Properly Reluctant To Decide The Laws Of Other States

Principles of federalism not only preclude states from exporting their laws, but also counsel in favor of allowing the courts of each state to articulate that state's law. In deference to these principles, federal courts avoid deciding unsettled issues of state law whenever possible. *See, e.g., Chauvin v. State Farm Fire & Cas. Co.*, 450 F. Supp. 2d 660 (E.D. La. 2006) (“Needless decisions of state law should be avoided as a matter of comity.”); *W.R. Grace & Co. v. Cont'l Cas. Co.*, 896 F.2d 865, 871 (5th Cir. 1990) (federal courts “must refrain from unnecessary poaching upon a sovereign state's jurisprudential turf”). Although federal courts are required to decide issues of state law in diversity cases, they do so with recognition that “the potential for significant intrusion, sometimes with disastrous results, counsels that the task be undertaken with great care, thoroughness and a full realization of the impact that the process, even when executed adroitly, has on ‘Our Federalism.’” *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 638 (7th Cir. 2002) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

Accordingly, the Supreme Court has recognized several doctrines permitting the federal courts to abstain from addressing issues more appropriately resolved by state courts. The doctrine of *Pullman* abstention, for example, has emerged from the Court's decision compelling a district court to defer resolution of a case that presented both an unsettled issue of state law and a federal constitutional question until after the state court had an opportunity to address the state-law question. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941). Abstention under such

circumstances not only avoids unnecessary adjudication of federal constitutional questions, but also promotes “the harmonious relation between state and federal authority” and “scrupulous regard for the rightful independence of the state governments.” *Id.* The Court’s subsequent opinion in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), expanded the permissible scope of abstention to cases involving unsettled issues of state law that are “intimately involved with [the state’s] sovereign prerogative.” *Id.* at 28. Federal courts use these abstention doctrines to avoid “gratuitous interference” with matters of state law. *Canadian Universal Ins. Co. v. Thibaut Oil Co.*, 622 F. Supp. 1055, 1058 (E.D. La. 1985) (citation omitted).

The federal courts’ reluctant approach to assuming pendent jurisdiction over state-law claims is another example. In a case presenting a federal question, the federal court is permitted to exercise “pendent jurisdiction” over closely related state-law claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, such jurisdiction is a matter of discretion, and “need not be exercised in every case in which it is found to exist.” *Id.* at 726. In implementing this doctrine, the Supreme Court has stressed: “Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of the applicable law.” *Id.*; *see also Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973) (affirming district court’s refusal to exercise pendent jurisdiction).

One final means by which federal courts avoid needless determinations of state law is the practice of certification to state supreme courts. The federal courts may certify controlling questions of state law to the state’s highest court for resolution when doing so will facilitate proper resolution of a case. The state court is then free to accept or decline the invitation to

decide the issue in accordance with its own certification rules. *See generally* Chief Judge John R. Brown, *Fifth Circuit: Certification—Federalism in Action*, 7 Cumberland L. Rev. 455 (1976-77) (discussing the mechanics and the value of certification). Federal courts use certification to avoid making speculative “*Erie* guesses.” *See, e.g., Boardman v. U.S. Auto. Ass’n*, 742 F.2d 847 (5th Cir. 1984). Through certification, “[t]he interests of the state are advanced by giving the state an opportunity authoritatively to declare its own law in light of important underlying state policies.” Brown, *supra*, at 465.

C. New Mexico’s Own Law Reflects The Policy Of Avoiding Unnecessary Infringement Of Other States’ Laws.

Like federal law, New Mexico’s law reflects a healthy respect for the value of interstate federalism. The courts of this State regularly employ a variety of doctrines—including forum non conveniens, comity, and certification—in order to avoid deciding issues and cases that are better decided by the courts of another state.

The doctrine of forum non conveniens, as this Court has described it, “allows a court that has jurisdiction over the parties and subject matter involved to decline to exercise jurisdiction when trial in another forum ‘will best serve the convenience of the parties and the ends of justice.’” *Marchman v. NCNB Texas Nat’l Bank*, 120 N.M. 74, 85 (1995) (quoting *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 527 (1947)). Courts of this State have invoked forum non conveniens to decline jurisdiction over matters better left to the courts of other states for resolution. In *Marchman*, for example, this Court affirmed the district court’s dismissal of a breach-of-contract suit on grounds of forum non conveniens, reasoning:

This is a dispute between a Texas plaintiff and a Texas defendant over alleged tortious acts that occurred in Texas, and over a contract executed and performed in Texas and interpreted under Texas law. The state of Texas has the overwhelmingly greater interest in this matter and its courts are better prepared to handle the interpretation and application of Texas law. We hold that the balance

of all relevant factors weighs heavily in favor of dismissal, and therefore find no abuse of discretion by the trial court in dismissing for forum non conveniens.

120 N.M. at 88; *see also, e.g., McLam v. McLam*, 85 N.M. 196 (1973) (affirming district court's dismissal of custody case on grounds of forum non conveniens).

This preference for avoiding interference with the laws and policies of other states is also reflected in the Court's application of the doctrine of comity. As this Court has explained, "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching on the laws and interests of other states." *Sam v. Sam*, 139 N.M. 474, 479 (2006). Comity among the states, even more than comity between the federal government and the states, "is not self-administering because there is no doctrine like *Erie* to mandate compliance." Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 *Judicature* 125, 128 n.29. Nevertheless, this Court has articulated a strong preference in favor of extending comity to its sister states: "As a general rule, comity should be extended. Only if doing so would undermine New Mexico's own public policy will comity not be extended." *Sam*, 139 N.M. at 480.

New Mexico's rules on certification of questions of law also reflect a high regard for interstate federalism. While many states accept certification only from federal courts and lack procedures for certifying controlling questions of law to the courts of other states (*see* 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4248 (___ ed. ___)), New Mexico permits certification both to and from other states' courts. *See* N.M. Stats. Ann. § 39-7-1 to -13; N.M. R. App. Proc. 12-607. These procedures formally recognize the importance of permitting a state's own courts to

interpret its laws in the first instance—a value that counsels against the certification of multi-state class actions raising novel claims governed by other states’ laws.

II. IN A MULTI-STATE CLASS ACTION, PRINCIPLES OF FEDERALISM RESTRICT THE ABILITY OF THE FORUM STATE TO APPLY ITS OWN LAW TO THE CLAIMS OF ABSENT CLASS MEMBERS

Principles of federalism and comity come strongly into play when a state court entertains a multi-state class action. In such cases, a single state court may be asked to rule upon the claims of plaintiffs and defendants who have no connection to the forum state and whose conduct is governed by the laws of other states. Before certifying such a class action, the court must scrupulously apply choice-of-law principles to the claims of all class members. In addition, it must ensure that it can feasibly adjudicate all claims under the correct standards—an obligation that is difficult to satisfy in practice and which counsels against certification of a multi-state class action in many cases.

A. *Shutts* Requires Scrupulous Application Of Choice-of-Law Principles To The Claims Of Absent Class Members

In *Shutts v. Phillips Petroleum Co.*, 472 U.S. 797 (1985), the Supreme Court made clear that a state court entertaining a multi-state class action may not apply its own law to claims that are properly governed by the laws of another state. *Shutts* involved a suit by some 28,000 owners of natural gas royalties, residing in all of the fifty states and beyond, to recover interest on royalties suspended pending final administrative approval of a gas price increase. Although the Court approved the exercise of personal jurisdiction over the out-of-state plaintiffs, it held that it would be unconstitutional for the trial court to apply Kansas law to the claims of all class members.

As the Court observed, “over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit.” *Id.* at 815.

“Given Kansas’ lack of ‘interest’ in claims unrelated to that State,” and the substantive differences between the law of Kansas and those of other states, the Court concluded that the “application of Kansas law to every claim in this case” would be “sufficiently arbitrary and unfair as to exceed constitutional limits.” *Id.* at 821; *see also id.* at 822 (“Kansas ‘may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them’”) (quoting *Home Ins. Co. v. Dick*, 281 U.S. at 410). Accordingly, the Court held that the Kansas court was required to conduct individualized choice-of-law inquiries and apply the appropriate state’s law to each claim. *Id.* at 822-23.

B. Applying The Laws Of Multiple States To The Claims of Class Members Is A Difficult And Perilous Exercise

In theory, *Shutts* protects the interests of federalism by ensuring that the appropriate states’ laws are applied to the claims of non-resident class members. *See* E. Kennedy, *The Supreme Court Meets the Bride of Frankenstein: Phillips Petroleum Co. v. Shutts and the State Multistate Class Action*, 34 Kansas L. Rev. 255, 303-04 (1985) (observing that “constitutionally requiring the state courts to apply multiple state laws will act as a sufficient restraint on abusive multistate forum shopping when that restraint is joined with other constraints on class actions”). In practice, the adjudication of class claims under the varying laws of different states has proven to be exceedingly difficult to achieve.

Although “state courts always have been assumed competent to apply the laws of other states when adjudicating transitory causes of action,” the “contemporary national class action . . . obliges them to undertake the task on an unprecedented scale.” Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale. L. J. 1, 63-64 (1986). Given the extraordinary difficulty of analyzing subtle nuances of different states’ laws and applying those different laws in a single action, “[a] state

court faced with deciding an uncertain issue on the basis of its own plus forty-nine other states' laws may tend either to impose its own conception of good policy or to assume that other states would follow the forum's policy." *Id.* Exacerbating the effect of applying the state's decisional law, "a state court hearing a nationwide class action in all likelihood will apply local rules of evidence, statutes of limitations, and other procedural laws that dramatically affect substantive results." *Id.* at 64.

As Professors Miller and Crump have explained, a court tempted to apply its own state's laws to the claims of out-of-state plaintiffs generally will find a way to do so:

A forum bent upon applying its own policy can do so, first, by the simple device of declaring that no conflict exists. It can review the decisions of other states in a way that reconciles them with its own law, find separate grounds (such as waiver or estoppel) for reaching the result, or, as the Kansas court in *Shutts* purported to do, invoke a separate body of law in the name of equity. The worst-case scenario is that of a result-oriented court, camouflaging its true reasoning with a contrived analysis of another state's law.

Id. at 61 (footnote omitted); *see also* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. Rev. 547, 554 (1996) (discussing the various ways in which "judges in complex litigation have managed to suppress the[] differences" in state laws and citing *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981), and *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988) as illustrations of "the lengths to which courts will go to apply a single law in complex cases"); *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (observing that class certifications have tempted judges "to remake some substantive doctrine in order to render the litigation manageable").

Sometimes, courts attempt to overcome the manageability problems inherent in multi-state class actions by sorting apparently similar state laws into categories. But this grouping tactic may obfuscate rather than reconcile the variations in states' laws:

This approach may provide some benefit, but it would be illusory to think that the mere act of classifying can reduce the task to manageable proportions. In order to group the states, the court initially must make decisions about the meanings of the laws of each. This approach, in effect, may amount to shifting those decisions to a time before the states are grouped. If the state classifications merely are tentative, the result may be two sets of decisions, one before and one after. Either approach may mean that the same quantum of decisionmaking ultimately will be necessary.

Of course, the classification of states might reduce effort dramatically if differences among bodies of law were to be compromised. Thus, in instances in which the general statutory language in two different states is similar, or when most states have no law resolving a disputed point, these superficial indications might result in their being grouped together and claims of their residents decided identically. The point is that the compromising of real but hard-to-perceive differences is at odds with *Shutts* but, in some cases, the court may have a tendency to group various states together as a natural result of *Shutts*' encouragement of multistate class actions.

Miller & Crump, *supra*, at 64-65 (footnotes omitted).

A striking example of the perils inhering in the certification of multi-state class action is *Avery v. State Farm Mutual Automobile Insurance Co.*, 746 N.E.2d 1242 (Ill. App. Ct. 2001). The plaintiffs in *Avery* challenged State Farm's practice of using generic automobile parts in repairs covered by its insurance policies rather than more expensive original equipment manufactured ("OEM") parts. Although this practice was fully disclosed to policyholders, plaintiffs claimed that OEM parts were categorically inferior and thus that by using them State Farm could not satisfy its contractual obligation to restore the covered vehicle to its "pre-loss condition." The trial court certified a multi-state class, and the appellate court affirmed, in spite of the fact that the class states had adopted widely varying policies on the use of OEM parts in repairs. Many of the states' insurance laws expressly permitted the use of non-OEM parts, and some even required it. Hawaii, for example, required that non-OEM parts be offered to the insured and that the insured foot the bill for the price difference if he or she chose OEM parts.

See *Scribner, supra* at 1423. And Iowa required the use of non-OEM parts if they were “certified by a nationally recognized entity.” *Id.* at 1431.

Although these state-to-state differences in the treatment of non-OEM parts represent “considered policy judgments” with real effects on the prices of auto parts and insurance, the Illinois court glossed over them by “stating that no state ‘authorizes an insurer to specify inferior replacement parts.’” *Id.* at 1423 (quoting *Avery*, 746 N.E.2d at 1254). The court noted: “Former and current representatives of state insurance commissioners testified that the laws in many of our sister states permit and in some cases encourage the use of non-OEM parts as an effort to encourage competitive price control. But each witness admitted unequivocally that his respective state would not sanction the use of *inferior* aftermarket replacement parts.” *Avery*, 746 N.E.2d at 1254. The effect of such decisionmaking is effectively to override the considered policy judgments of every other state. As one commentator has put it: “Iowa’s insurance commissioner has made a policy decision that the quality of non-OEM parts should be judged according to automotive industry standards. Iowa’s insurance commissioner certainly did not intend for a single Illinois jury to determine the quality of 33,000 different replacement parts, yet the *Avery* decision now binds Iowa residents.” *Scribner, supra*, at 1431.

By glossing over the differences in state laws, the *Avery* court was able to conclude that there were “no true conflicts between the substantive laws of Illinois and those of the other states whose residents were part of the class,” and thereby to comply with the letter of *Shutts and Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). *Avery*, 746 N.E.2d at 1254. Although the decision, at least nominally, satisfied constitutional standards, it “was nonetheless an assault upon horizontal federalism principles,” with particularly sharp repercussions for the insurance industry:

In the federal system, each state is supposed to be able to decide for itself how to regulate business transactions with its citizens. This is especially true with

the business of insurance. Congress, through the McCarran-Ferguson Act, has expressly declared that the business of insurance shall be regulated state-by-state. To that end, the legislatures in many states have statutorily required that insurance policies issued to their residents be construed under their state's law. Moreover, the insurance commissioners in many states have primary jurisdiction to resolve insurance coverage disputes. The insured are forbidden to file a lawsuit against their insurance companies until they have exhausted their administrative remedies.

Scribner, *supra*, at 1430 (footnotes omitted). The *Avery* court simply “ignored these efforts by its sister states to exercise jurisdiction over their own residents’ insurance disputes and then rewrote the insurance laws of the other states by judicial fiat.” *Id.*

Ultimately, the Illinois Supreme Court reversed the class certification in *Avery*. 835 N.E.2d 801 (Ill. 2005). Among other things, it held that the trial court erred before it even got to the choice-of-law analysis by treating the case, which involved policyholders in forty-eight states, as if “there was a single contract at issue with a uniform contractual obligation.” *Id.* at 825. Analyzing variations in the policy language, the court observed that State Farm’s Massachusetts policies promised simply to pay “the actual cash value” of “parts at the time of the collision,” while policies in other states promised to pay to restore the vehicle to its “pre-loss condition,” or to repair the vehicle with parts of “like kind and quality,” among other things. *Id.* at 813. The fact that “there were multiple policy forms which differed materially,” the court reasoned, defeated commonality and predominance and therefore precluded class certification. *Id.* at 825.

Nevertheless, the assault on interstate federalism threatened by a single court’s ability to set national policy through a class action was a driving force in Congress’s enactment of the Class Action Fairness Act. As the Judiciary Committee Report observed, “the trend toward ‘nationwide’ class actions, which invite one state court to dictate to 49 others what their laws should be on particular issues, thereby undermin[es] basic federalism principles.”

Clearly, a system that allows state court judges to dictate national policy on these and numerous other issues from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism. In one case, for example, plaintiffs filed suit in an Alabama county court on behalf of more than 20 million people alleging that the design of federally mandated airbags is faulty. From the standpoint of federalism, this suit defies logic. Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?

S. Rep. No. 109-14, at 24 (footnotes omitted) (citing *Smith v. General Motors Corp.*, Civ. A. No. 97-39 (Cir. Ct. Coosa County, Ala.)).

Insurance cases were of special concern to the Committee, which noted:

The most egregious of such cases are those in which one state court issues nationwide rulings that actually contradict the laws of other states. This problem is particularly prevalent in insurance cases, which are being filed in increasingly great number. As District of Columbia Insurance Commissioner Lawrence Mirel has testified before this Committee [on the Judiciary], class actions “frequently go[] around or simply ignore[] the role of state regulators.”

Id. (footnote omitted) (second and third alterations in original). That precise disregard for the variations in state insurance laws underlies the district court’s decision to certify a class here.

C. The Difficulties In Attempting To Apply Other States’ Laws In A Multi-State Class Action Are More Serious When The Law Is Unsettled

Even a court determined to apply faithfully the laws of its sister states will face tremendous difficulty in cases such as this one, in which the issue before the court has not been squarely addressed by any other court. This problem is one that federal judges have repeatedly acknowledged when called upon to interpret state law in diversity suits. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), requires a federal district court sitting in diversity to apply state law. The proper function of the federal court “is to ascertain what the state law is, not what it ought to be.” *Klaxon*, 313 U.S. at 497. “When there is no controlling state supreme court precedent, this is a perilous business indeed.” *Verticalnet, Inc. v. U.S. Specialty Ins. Co.*, 2007 WL 1490513, at *7 n.13 (E.D. Pa. May 21, 2007); *see also, e.g., Combs v. Int’l Ins. Co.*, 354

F.3d 568, 577 (6th Cir. 2004) (noting the court’s “proper reluctance to speculate on any trends of state law”); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1675-76 (1992) (discussing the difficulty of discerning the applicable state law).

An unsurprising consequence of this difficulty is that federal courts often get it wrong. As the Supreme Court has remarked, “no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.” *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 499 (1941); *see also* Chief Judge John R. Brown, *Fifth Circuit: Certification—Federalism in Action*, 7 Cumberland L. Rev. 455, 455 (1976-77) (“In carrying out our *Erie* role . . . , the federal judge must often trade his judicial robes for the garb of prophet.” (footnote omitted)). Two federal judges have written articles documenting the limitations on their courts’ powers of prediction. *See* Sloviter, *supra*, at 1679-81 & n.52 (discussing a range of tort and contract issues on which the state courts rejected the so-called “*Erie* guesses” of the Third Circuit and its district courts, and noting errors by other courts as well); Brown, *supra*, at 455 & n.2 (citing examples of erroneous *Erie* guesses by the Fifth Circuit); *see also* George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1105 n.40 (1987) (citing as an example *Gold v. Johns-Manville Sales Corp.*, 553 F. Supp. 482 (D.N.J. 1982), which incorrectly predicted that punitive damages were unavailable in a strict liability action under New Jersey law—a view that was rejected as “unpersuasive” and “erroneous” in *Fischer v. Johns-Manville Corp.*, 472 A.2d 577, 583 (N.J. App. Div. 1984)).

The result of these erroneous predictions can be to frustrate litigants and even to shift the course of the state’s law:

Until corrected by the state supreme court, such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them and inequitably

affect the losing federal litigant who cannot appeal the decision to the state supreme court; they may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent.

Sloviter, *supra*, at 1681; *see also* Brown, *supra*, at 455-56 (“It has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding. But more important than the possible embarrassment is the frustration for litigants when the rule of law we prescribe turns out to be a ticket for one ride only.”) (footnote omitted).

Moreover, the guesswork involved in resolving unsettled questions of state law tends to encroach upon the sovereign lawmaking function of the state. *See* Sloviter, *supra*, at 1682. This encroachment can “interrupt[] ... the orderly development and authoritative exposition of state law,” particularly when it “involves areas of law that define one citizen’s rights and obligations vis-a-vis another’s, a function traditionally associated with state sovereignty and therefore with state courts.” *Id.* at 1682 (quoting *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 282 (2d Cir. 1981)).

Class actions are especially problematic in this respect. As one scholar has explained:

If a federal court misinterprets state law in adjudicating a single-plaintiff diversity case, the individual plaintiff or defendant may suffer; but the state’s sovereign interest in developing its law will be vindicated at some future time when a case raising a similar issue arises between citizens of the forum. The nature of class litigation, however, severely limits the state’s chance of ever developing its law. First, a class action adjudicates the claims of hundreds, thousands, even tens of thousands of plaintiffs at once, thus ensuring that those plaintiffs will not bring individual claims in state court and foreclosing a vast number of opportunities for the state to adjudicate the relevant issues. Second, class action suits often raise claims where the anticipated damages are too small to justify an individual suit.

Scribner, *supra*, at 1441-42. Consequently, an inartfully handled multi-state class action may forever deprive a state—or many states—of control over the development of an entire area of law.

III. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS AND DENY CERTIFICATION OF A MULTI-STATE CLASS ACTION HERE

This Court should approach class certification with the same restraint it has shown in other matters implicating the sovereign prerogatives of other states: In evaluating whether a class action is the “superior” method of adjudicating this controversy, the Court should consider not only questions of efficiency and manageability, but also the implications for the interstate system.

In this case, the threat to interstate federalism could not be more clear. Plaintiffs ask this Court to rule that, “when the law of another state is unclear—either because there is no law on the subject or because the law on the subject is in conflict,” a New Mexico court entertaining a multi-state class action may apply its own law to the claims of out-of-state class members. Appellant’s Brief-in-Chief, at 10-11. That argument is flatly contrary to *Shutts*, which forbids a state court from applying the forum state’s own law to decide controversies with which the forum state has no connection. Plaintiffs’ position also is highly offensive to well-established principles of interstate comity, which hold that the courts of a state should be allowed to interpret that state’s law whenever possible.

Given the risks to federalism inherent in attempting to adjudicate the claims of non-resident class members under the unsettled laws of other states, the Court should affirm the ruling of the Court of Appeals that the certification of a multi-state class action was improper here. The strong judicial preference against interpreting the laws of other jurisdictions has been a dominant consideration in many decisions denying class certification. Courts are free to deny certification whenever the difficulty of resolving state-law issues defeats the “superiority” of the class action as a mechanism for adjudicating the claims, and they commonly do so. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) (“In a multi-state class action, variations in

state law may swamp any common issues and defeat predominance. Accordingly, a district court must consider how variations in state law affect predominance and superiority.”).

For example, in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), the Seventh Circuit denied class certification based on the difficulty of accurately discerning the laws of the relevant states:

The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. What *is* the law of Michigan, or Arkansas, or Guam, as applied to this problem? Judges and lawyers will have to guess, because the central planning model keeps the litigation far away from state courts. . . . And if the law were clear, how would the facts (and thus the damages per plaintiff) be ascertained? One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident.

Id. at 1020 (emphasis in original). Not willing to leave matters to chance, the court reversed the trial court’s class certification order. *Id.* at 1021; *see also, e.g., In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (“If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action.”); *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1024 (11th Cir. 1996) (denying certification of multi-state class and explaining: “The appellants cite the need to interpret and apply the gaming laws of all fifty states to assess the legality of each 900-number program as foremost among the difficulties in trying the gambling claims on a class basis, and we agree. 900-number programs could conceivably be legal in one state but not in another. Scrutinizing hundreds of 900-number programs under the provisions of fifty jurisdictions complicates matters exponentially.”); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff’d sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (holding that “the multiplicity of

individualized factual and legal issues, magnified by choice of law considerations” defeated predominance and therefore precluded class certification).

Similarly, in *Castano* the U.S. Court of Appeals for the Fifth Circuit decertified a class because it was not persuaded that a class action was the superior method of adjudication in light of variations in state law. The court explained that resolution of the state-law issues was better left to the states themselves:

The complexity of the choice of law inquiry also makes individual adjudication superior to class treatment. The plaintiffs have asserted eight theories of liability from every state. Prior to certification, the district court must determine whether variations in state law defeat predominance. While the task *may not* be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto*, renders class treatment not superior.

Through individual adjudication, the plaintiffs can winnow their claims to the strongest causes of action. The result will be an easier choice of law inquiry and a less complicated predominance inquiry. State courts can address the more novel of the plaintiffs’ claims, making the federal court’s *Erie* guesses less complicated. It is far more desirable to allow state courts to apply and develop their own law than to have a federal court apply “a kind of Esperanto [jury] instruction.”

Id. at 749-50 (emphasis in original; footnotes and citations omitted).

Many other courts have agreed that class treatment is not the superior method of adjudication when it would usurp the ability of sovereign states to interpret and apply their own laws. For example, in *Spence v. Glock*, 227 F.3d 308 (5th Cir. 2000), the court rejected the plaintiffs’ effort “to finesse the choice of law” so that Georgia law would apply to all claims. *Id.* at 313. It reasoned that all of the “51 relevant jurisdictions are likely to be interested in ensuring that their consumers are adequately compensated in cases of economic loss, but many will have different conceptions of what adequate compensation is. Georgia’s laws may not provide sufficient consumer protection in the view of other states.” *Id.* (footnotes omitted); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 562-65 (E.D. Ark. 2005) (denying certification of a

multi-state class based on variations in state laws and observing that the laws at issue “cannot reasonably be grouped in a comprehensive manner that does not seriously impinge on the integrity of the law of each state”); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J.1997) (observing that “[e]ach plaintiff’s home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws” and denying certification of multi-state class based on failure to establish predominance and superiority).

Even when the differences among the states’ laws are matters of nuance, other courts have recognized that class certification retains significant potential to interfere with sovereign lawmaking function of the affected states. Decertifying a class of plaintiffs with negligence claims, the Seventh Circuit emphasized that “nuance can be important. . . . The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.” *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-01 (7th Cir. 1995) (citations omitted); *see also, e.g., In re Baycol Prods. Litig.*, 218 F.R.D. 197, 208 (D. Minn. 2003) (denying certification of a multi-state class because “[d]ifferences in state law, no matter how slight, are important and must be determined prior to certification because such differences may swamp any common issues and defeat predominance”) (citation and internal quotation marks omitted).

In addition, a court may conclude that it serves no legitimate purpose for it to decide out-of-state claims having no connection to the forum. In *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646 (1988), for example, the California Court of Appeal denied certification of a nationwide class of Subaru owners claiming engine defects. The court reasoned: “In determining whether the nationwide class is appropriate, we think we must ask whether it would be of benefit to the courts and plaintiffs of this state or, if not, whether this state has some special

obligation to adjudicate a nationwide class action.” *Id.* at 662. The court concluded that the answer to both questions was no. As to the former, the court determined that the adjudication of the claims of non-California plaintiffs and the application of non-California law “would not promote judicial economy in California for the simple reason that these issues would not be litigated here if a class were limited to California claimants.” *Id.* at 662-63. As to the latter, the court found that the defendants’ “minimal connection with California, which bears no causal relationship to the defects asserted by plaintiffs, is insufficient to impose on California a special obligation to undertake this nationwide class action.” *Id.* at 664. The court therefore elected to avoid “the gratuitous adjudication of this dispute in the courts of this state,” for fear that it would “bestow upon California the dubious distinction of becoming the class action capital of the country.” *Id.*; *see also Duvall v. TRW, Inc.*, 578 N.E.2d 556 (Ohio App. 1991) (relying on *Osborne* to deny class certification).

A multi-state class action clearly is not the superior method of adjudication here. The difficulty of ascertaining and applying the varying laws of more than a dozen states would undermine any potential efficiency gains and render the class unmanageable. *See Miller & Crump, supra*, at 69 (explaining that “unusual difficulties in choice or ascertainment of law are a management problem that should be taken into account in certification”). Moreover, the imprecision and speculation that an effort to reconcile these laws—and the temptation simply to apply New Mexico law to all claims—would erode interstate federalism.

As one court has observed, “it is hard to adopt the central-planner model without violence not only to Rule 23 but also to principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.” *Bridgestone*, 288 F.3d at 1020.

Accordingly, state courts “should refuse nationwide certification in favor of statewide or regional actions if management difficulties and federalism concerns outweigh the efficiency gains of a nationwide class.” Miller & Crump, *supra*, at 81.

That is precisely the case here. If class treatment is otherwise deemed to be appropriate here, both efficiency and interstate federalism would be better served by adjudicating the case as a New Mexico-only class action. As one commentator has explained:

Litigation in a court of the jurisdiction whose law will be applied promotes fairness by eliminating the possibility that a federal court or a court of another state will misapply or misinterpret the controlling law. A plaintiff should not, for example, be left with the suspicion that he might have recovered but for one court’s error in guessing at how another would have ruled. In addition, efficiency is fostered because the courts that are best able to determine a particular state’s law quickly and efficiently are the courts of that state.... Finally, litigation in the courts of the state providing the controlling law reduces uncertainty about legal standards for future behavior by providing a direct opportunity for definitive appellate review.

George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1105-07 (1987) (footnotes omitted). In contrast, certifying a multi-state class in this case would be inimical to these basic values of efficiency and interstate federalism, and at odds with the statutory requirements of N.M. Rule 1-023(B)(3).

CONCLUSION

The Court should affirm the decision of the Court of Appeals reversing the district court’s certification of a multi-state class action.

Respectfully submitted,

MAYER, BROWN, ROWE & MAW LLP
George Ruhlen
141 East Palace Avenue
Santa Fe, NM 87501
Tel: (505) 820-8180
Fax: (505) 820-7334

Evan M. Tager
Miriam R. Nemetz
Elizabeth G. Oyer
1909 K Street, NW
Washington, DC 20006
Tel: (202) 263-3000
Fax: (202) 263-3300

AMERICAN COUNCIL OF LIFE INSURERS
Lisa Tate
101 Constitution Ave. N.W.
Washington, D.C. 20001
Tel: (202) 624-2118