IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1856

On Review from a Decision of the

Third District Court of Appeal

HOWARD A. ENGLE, M.D., et al., Petitioners

v.

LIGGETT GROUP INCORPORATED, et al., Respondents

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' MOTION FOR REHEARING

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The Chamber of Commerce of the United States of America respectfully submits this brief as *amicus curiae* in support of the Motion for Rehearing filed on behalf of all respondents except Liggett and Brooke.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the Chamber of Commerce of the United States of America ("the Chamber"), is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.[1] The Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as *amicus curiae* in numerous cases addressing class certification.[2]

The Chamber and its members have a strong interest in seeking rehearing of the Court's July 6 opinion in this matter because the Court's decision to uphold certain Phase I findings under the rubric of "issues" classes would threaten the ability of automobile, healthcare, chemical and numerous other companies that do business in Florida to fairly defend themselves against potentially bankrupting

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[1] No counsel for any party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] These cases include *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998).

class action judgments. For this reason, as well as the reasons explained below, the Chamber contends that the Court's July 6 decision was partially in error and should be reconsidered.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court rightly held in its July 6 opinion (consistent with a long line of federal and state caselaw) that class action treatment of plaintiffs' claims in this matter was inappropriate because "individualized issues such as legal causation, comparative fault, and damages predominate." (Op. at 32.) However, the Court veered off-course in its effort to save some of the Phase I findings resulting from the trial court's erroneous class certification ruling, upholding a single jury's determination of purportedly common questions applicable to the claims of approximately 700,000 Floridians who smoked for different periods, had varying knowledge regarding the health effects of smoking, and allege varying injuries.

The Court's approval of a bifurcated or "issues" class trial is contrary to the prevailing and well-reasoned views of courts that have previously addressed the question. As those courts have recognized, permitting the "predominance" requirement to be met by slicing up claims into supposedly distinct issues eviscerates the safeguards of class certification requirements and raises serious constitutional concerns by denying defendants the ability to properly defend themselves and permitting reexamination of factual findings by successive juries.

Moreover, contrary to the Court's belief that "the procedural posture of this case is unique and unlikely to be repeated" (Op. at 37 n.12), the precedent set by this case threatens to have a far-reaching impact on businesses providing goods and services within the state of Florida. The Court's decision serves as a strong suggestion to plaintiffs' counsel everywhere that class certification is readily available in Florida courts, regardless of how individualized the proposed class members' claims may be, so long as just one common issue exists. With the bar to class certification thus arguably relaxed, Florida businesses will not only face an upsurge in class action filings but will also be unable to fairly defend themselves against those suits – regardless of merit. As a result, Florida companies will find themselves at a substantial disadvantage with respect to competitors in other states that are not subject to the same onslaught of "bet-the-company" lawsuits.

For these reasons, the Court should grant rehearing and hold that the findings challenged by respondents were not properly the subject of a classwide determination and thus have no preclusive effect.

ARGUMENT

I. CERTIFICATION OF AN ISSUES CLASS DESPITE LACK OF PREDOMINANCE EVISCERATES THE REQUIREMENTS OF RULE 1.220 AND VIOLATES DEFENDANTS' DUE PROCESS AND JURY TRIAL RIGHTS.

The Court's ruling that a class may be certified as to certain purportedly common issues even in the absence of predominance is wholly premised on an

unprecedented misreading of Florida Rule of Civil Procedure 1.220(d)(4)(A), which provides that "a claim or defense may be brought or maintained on behalf of a class concerning particular issues." As numerous courts have held, "issues classes" such as those contemplated by Rule 1.220(d)(4)(A) and its federal analogue, Federal Rule of Civil Procedure 23(c)(4)(A), may not be certified unless the court first determines that common issues predominate with respect to the causes of action as a whole. In ignoring that fundamental principle, the Court not only wrote the basic requirements for class certification out of Florida law but also compromised defendants' Constitutional rights, approving purported "classwide" findings in violation of basic due process as well as the right to a jury trial.

A. <u>**The Court Cannot Manufacture Predominance By Artificially Dissecting Plaintiffs' Claims.**</u>

As a threshold matter, the Court's decision runs afoul of a core limitation on the class certification mechanism – the predominance requirement. Under both the Florida and federal class action rules, an action for damages may only be certified for class treatment if "the claim or defense of each member of the class predominates over any question of law or fact affecting only individual members of the class." Fla. R. Civ. P. 1.220(b)(3); *see also* Fed. R. Civ. P. 23 advisory committee's notes ("It is only where this predominance exists that economies can be achieved by means of the class-action device."). Notwithstanding this fundamental requirement, the Court held that findings on certain purportedly

common questions could be upheld even though common issues do not predominate as to any cause of action as a whole, and that such findings may be invoked as *res judicata* in subsequent individual trials. (Op. at 36.)

In reaching its ruling, the Court acknowledged that "no Florida cases address whether it is appropriate under rule 1.220(d)(4)(A) to certify class treatment for only limited liability issues" (Op. at 33) and thus relied on a few federal cases addressing Rule 23(c)(4)(A), the analogous federal rule (Op. at 34-35 n.11). What the Court failed to recognize, however, is that the federal decisions allowing limited certification of issues classes are in the distinct minority and, in any event, involve fundamentally different facts from those presented here. The more analogous and better-reasoned state and federal cases have held that a "district court cannot manufacture predominance through the nimble use of subdivision (c)(4) . . . because a cause of action, ***as a whole***, must satisfy the predominance requirement." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (emphasis added).

Strict enforcement of the predominance requirement is necessary to ensure that class actions are conducted consistent with both their purpose and the substantive rights of the parties involved. After all, the class action procedure was devised to allow a single plaintiff to represent a limitless number of other individuals only when the representative plaintiff's claims have so much in

common with all the other claims that the defendant's liability (or lack thereof) can fairly be decided in a single proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958). "The predominance requirement" protects the integrity of class actions by "prevent[ing] class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses." *Sw. Refining Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000). The Court's decision here did away with the predominance requirement by welcoming through the back door the very result that it barred at the front: certification of a sprawling class even though the Court itself recognized that liability ultimately turns on individualized factual issues that predominate over common issues.[3] (Op. at 32.)

Other courts have recognized the dangers of this approach. In *Castano*, for example, the U.S. Court of Appeals for the Fifth Circuit reversed certification of a class of tobacco users alleging claims against tobacco product manufacturers similar to those asserted here. Recognizing, as this Court did, that the claims of individual smokers are necessarily individualized and cannot be resolved on a

[3] If predominance of the claim as a whole is no longer a limiting factor for class certification, as suggested by the Court's opinion, every proposed class would be certifiable because the court could always "simply narrow the pinhole until, in its view, the selected issue predominates over the other issues it chooses to see." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 451 (4th Cir. 2003) (Niemeyer, J., dissenting).

classwide basis, the Fifth Circuit rejected a similar "issues only" certification proposal. In explaining its decision, the court noted:

> Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

84 F.3d at 745, n.21; *see also Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) (rejecting bifurcated class certification because "when considered as a whole," the plaintiffs' claim "implicates predominantly individual-specific issues").[4]

The Fifth Circuit's reasoning in *Castano* has been widely accepted where (as the Court has recognized is the case here) proposed class members' claims turn on issues individual to each class member. For example, in *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 496 (E.D. Pa. 1997), the court refused to certify common questions arising from claims made against a tobacco product

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[4] The Fifth Circuit's decision in *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999) is not to the contrary. In *Mullen*, the court certified the claims of casino boat workers suing under federal law after they were allegedly injured by a defective air ventilation system on a single boat, at a single location in Louisiana, and during the same general time frame. *Id*. at 627. Although the court in that case approved a bifurcated proceeding, the certification decision was plainly premised on a conclusion that common issues predominated over individual issues as to the action ***as a whole***. In addition, the *Mullen* court itself distinguished the facts of that case from standard personal injury class actions like *Castano* and the case at bar. *Id*. at 626 ("this case does not involve the type of individuated issues that have in the past led courts to find predominance lacking").

manufacturer where the cause of action as a whole did not meet the predominance requirement. There, the court recognized that certification of any part of plaintiffs' action was contrary to basic principles of class action law because it would allow plaintiffs to "read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues." *Id.*; *see also Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003) (purportedly common "sub-issues cannot be separated out from those that require individualized treatment unless the common issues in the action as a whole predominate"; Rule 23(b)(3) "cannot be satisfied by seeking to repeatedly split the claims pursuant to Rule 23(c)(4)," when "liability as to Plaintiffs is, overall, a highly individuated issue") (citation and internal quotation omitted); *Robertson v. Sikorsky Aircraft Corp.*, No. 397CV1216(GLG), 2000 WL 33381019, at *19 (D. Conn. July 5, 2001) ("[a]n action must be considered as a whole in order to determine whether or not the predominance requirement has been satisfied"); *Neely v. Ethicon Inc.*, Nos. 1:00-CV-00569, 1:01-CV-37, 1:01-CV-38, 2001 WL 1090204, at *5 (E.D. Tex. Aug. 15, 2001) (refusing to limit predominance inquiry to "common issues" alone; "Rule 23(c)(4)(A) does not operate independently from the rule of predominance found in 23(b)(3)"); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 10 (N.Y. App. Div. 1998) (rejecting certification of general liability issues; "[s]uch a relaxation of the predominance requirement would effectively

nullify it: if any element of fraud were common to all the individual trials, [the rule] would be deemed satisfied no matter how much individualized proof was needed for the other elements"). The reasoning embraced in each of these cases is clearly applicable in cases like the one at bar, where the proposed class members' claims are based on a host of claimant-specific issues, "including individual causation and apportionment of fault among the defendants, [which] are highly individualized and do not lend themselves to class action treatment." (Op. at 2.)

For this reason alone, the Court should grant rehearing and modify its decision to conform to established principles of class action law.

B. The Phase I Findings Violate Defendants' Basic Constitutional Rights.

1. The Purported Classwide Findings Violate Defendants' Due Process Rights.

The Court's willingness to uphold certain findings challenged by defendants despite a lack of predominance has constitutional ramifications as well: by permitting the determination of purported "classwide" questions pertaining to elements of fraud, strict liability, negligence and other claims without consideration of any particular plaintiff's individual circumstances – a defect that cannot be remedied through subsequent individual trials – the Court compromised the defendants' due process right to a fair trial.

The very essence of due process is the right of a party to be heard before a judgment is entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."). Accordingly, the U.S. Supreme Court has not hesitated to invalidate state rules of civil procedure when they afford inadequate protections to parties affected by mass litigation. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940). The Court's decision does just that, impairing defendants' right to present a full and meaningful defense by constraining their ability to contest the Phase I findings and then presenting them with a lopsided playing field through the use of those findings in subsequent individual trials.

The Phase I trial supposedly established purportedly common issues without considering individualized factors affecting each plaintiff. As a result, the causal relationship between defendants' alleged misconduct and plaintiffs' alleged harm, as well as all individualized defenses, are relegated to subsequent individual trials, to be considered by juries that will be unable to apply those generic findings to the individualized facts before them. Conducting a trial with blinders on in this fashion deprives defendants of a meaningful defense. As one court explained:

> Under [plaintiffs'] plan, a jury would be allowed to decide whether a conspiracy existed, whether cigarettes are unreasonably dangerous and whether defendants intentionally disregarded the rights of plaintiffs – all without regard to reliance, contributory negligence, assumption of the risk, addiction and medical causation. These issues, which are normally ***linked inextricably*** with a final determination on liability, would be litigated in a subsequent phase.... [P]artitioning the trial in such an unorthodox manner would prejudice [the defendants'] ability to protect their rights effectively.

Insolia v. Philip Morris Inc., 186 F.R.D. 547, 551 (W.D. Wis. 1999) (emphasis added); *see also Windham v. Am. Brands, Inc.*, 565 F.2d 59, 71 (4th Cir. 1977) (courts may not "deny or limit a litigant's right to offer relevant 'intertwined matter'").

Other courts have resisted even less extreme efforts to permit bifurcated proceedings because of due process ramifications like those implicated here. In *In re Paxil Litigation*, 212 F.R.D. 539 (C.D. Cal. 2003), for example, a federal court rejected a proposal to bifurcate pharmaceutical litigation, finding that a

> class trial on liability without any reference to [defendant's defenses] runs the real risk . . . of a composite case being much stronger than any plaintiff's individual action would be . . . [and] permitting plaintiffs to strike [Defendants] with selective allegations, which may or may not have been available to individual named plaintiffs.

Id. at 548 (alterations in original) (citations and internal quotation marks omitted). A similar problem tainted proceedings here.[5]

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[5] What is more, a Phase I jury may be artificially predisposed to finding adversely to defendants on so-called "common issues" because it is not asked to address the circumstances of any real individual, to determine whether (and to

The Phase I trial in this case papered over differences not only with respect to individual claimants but also the defendants, since it involved evidence of alleged misconduct by multiple companies at different times over nearly half a century. The trial court nonetheless permitted the jury to reach generalized determinations indicting an entire industry – determinations that necessarily subsumed questions incapable of *en masse* resolution. For instance, in reaching the Phase I finding that "all of the defendants were negligent" (Op. at 8 n.4, Finding 8), the jury should have considered the state of each defendant's knowledge over time and the reasonableness of its conduct in relation thereto – matters that inevitably vary depending on the time period and the products used by each claimant. Likewise, before deciding that the defendants misrepresented or concealed information "with the intention that smokers and the public would rely

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what extent) a real individual actually relied on an alleged fraud or was actually injured by any supposed misconduct, or to settle upon any compensation. Instead, it is presented with a series of abstract questions about whether the defendants are bad actors. The jury may thus be more inclined to find there is sufficient evidence to warrant subsequent individual trials, as no tangible consequences follow from its verdict against the defendants. In a very real sense, then, the first jury acts as a *de facto* grand jury rather than a true factfinder. In addition, the same concerns that animate the federal rule against advisory opinions counsel further skepticism about the accuracy of a judgment based on abstract facts. *Cf. Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (observing that "the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests'") (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

on this information to their detriment" (*id*., Finding 5(a)), jurors would have to consider evidence concerning each defendant's conduct, knowledge and state of mind at different points in time. Instead, the Phase I jury was forced to make blanket findings on matters that are not susceptible of blanket proof, and defendants were denied the opportunity to put on a full and meaningful defense.

This problem cannot be cured by simply providing for individualized assessments of proximate cause, affirmative defenses, and other matters in subsequent individual actions, as the Court suggests. Most significantly, the later juries would inherit findings tainted by the problems discussed *supra* and simply compound the due process deprivation by basing a final determination of liability in the subsequent trial on the flawed prior findings. Indeed, a later jury might be inclined to give inordinate weight to the prior findings, despite their limited scope and unreliable foundation. After all, before they are told anything of substance by either party, those jurors apparently will be told by the trial court about the generalized findings of the prior jury – *e.g.*, that defendants agreed to misrepresent and conceal unspecified information about their products and that all defendants were "negligent." (Op. at 8, n.4.) Under these circumstances, defendants' arguments and individualized defenses are likely to fall on deaf – or at least skeptical – ears. In addition, the generality of the Phase I verdicts would make it impossible for the jury to meaningfully evaluate reliance, legal causation, and

affirmative defenses. For instance, the jury would be hamstrung in attempting to assess comparative negligence when it cannot be told anything about a particular defendant's conduct vis-à-vis a particular claimant.

In short, the one-sided procedures approved by the Court do not provide the "meaningful opportunity to be heard" guaranteed by the Due Process Clause. And while the Court found this to be a "pragmatic" *ex post facto* solution (Op. at 36) to ensure that the Phase I proceedings were not in vain, concern for expediency has no place in the analysis.[6] For this reason too, the Court should grant rehearing and modify its opinion to reject the bifurcated trial plan.

2. The Bifurcation Approved By The Court Violates Article I, Section 22 Of The Florida Constitution.

The bifurcation method approved by the Court in this case also violates the jury-trial right secured by the Florida Constitution. As this Court acknowledged, Florida courts "f[i]nd guidance in the Seventh Amendment to the United States Constitution." (Op. at 37 & n.13.) Without so much as acknowledging the U.S. Supreme Court's admonition that bifurcation of fact issues threatens to violate that core Constitutional right, *see Gasoline Prods. Co. v. Champlin Ref. Co.,* 283 U.S.

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[6] *See*, *e.g.*, *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987) ("substantive rights conferred by law can be neither diminished nor enlarged by procedural rules"); *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) (class action rules cannot "alter the required elements which must be found to impose liability and fix damages (or the burden of proof thereon)").

494, 501 (1931), the Court has set a course for mass litigation in this State in which improper reexamination of factual findings by successive juries will become routine. The right to a trial (and only one trial) by jury may not be reconfigured as convenience demands, but must "remain inviolate." Fla. Const. art. I, § 22. In this manner too, the Court's decision ignores fundamental principles of law.

Numerous federal courts have rejected bifurcation in cases like this one where facts decided by the first jury in the first phase of a trial would inevitably be reconsidered by the second jury in the second phase of the trial. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (bifurcation of fact issues is "not the usual course that should be followed") (citing *Gasoline Prods. Co.* 283 U.S. at 500); *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 489 (S.D. Ohio 2001) (rejecting plaintiffs' bifurcation proposal because the two stages "are not 'so distinct and separable' from one another that they may be considered separately by multiple factfinders without violating the Seventh Amendment") (quoting *Gasoline Prods. Co.*, 283 U.S. at 500). In *In re Rhone-Poulenc Rorer, Inc.*, for example, the U.S. Court of Appeals for the Seventh Circuit reversed the district court's bifurcation order because the first jury would merely have determined "whether one or more of the defendants was negligent under one of the two theories, leaving for the second jury "such issues as comparative negligence … and proximate causation." 51 F.3d 1293, 1303 (7th Cir. 1995). *See also Castano*, 84 F.3d at 751

("[s]evering a defendant's conduct from comparative negligence" runs afoul of the Seventh Amendment).

This case raises precisely the same concerns as *Rhone-Poulenc*, because each plaintiff will present facts to a second jury that overlap with those considered by the Phase I jury. For example, although the first jury decided issues of "negligence" in the abstract (Op. at 4), numerous second juries will have to revisit that same issue in deciding whether defendants proximately caused each particular plaintiff's injury and what proportion of fault they bear in relation to that plaintiff's comparative fault. (Op. at 74-75 (Wells, J., concurring in part and dissenting in part) (explaining that resolving issues of misrepresentation, comparative negligence, and reliance will require the second jury to reexamine the first jury's findings).) Thus, "[a]t a bare minimum, a second jury will rehear evidence of the defendant's conduct," and "the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff." *Castano*, 84 F.3d at 751 (noting that "risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication"); *see also* Op. at 72 (Wells, J., concurring in part and dissenting in part).[7]

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[7] This Court's reliance on *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999), to support its contrary conclusion is misplaced. (Op. at 38.) Defendants in that case did not raise a Seventh Amendment challenge, and the

Thus, as in *Castano* and *Rhone-Poulenc*, bifurcated proceedings would inevitably result in reexamination of factual findings by a second jury, in violation of the Florida Constitution.

II. IF ALLOWED TO STAND, THE COURT'S RULING WILL MAKE THE STATE A MAGNET FOR CLASS ACTION LAWSUITS, PLACING A SUBSTANTIAL BURDEN ON FLORIDA BUSINESSES.

The Court's ruling not only deprived the defendants in this matter of a fair trial for the reasons discussed above, but absent modification, it will have widespread negative repercussions on businesses and industries throughout the state. The relaxation of class certification requirements contemplated by the Court's ruling in this case will serve as a clarion call to potential plaintiffs and their counsel that Florida courts are blindly receptive to class actions.

While the Court's opinion reflects a belief that its holding is tailored to the unique facts of this case and is not likely to be replicated elsewhere (Op. at 37 n.12), the decision itself reveals no limiting principle that would constrain its application to this case alone. To the contrary, plaintiffs will view the Court's opinion as an open invitation to file class action lawsuits in Florida courts that heretofore would not have been brought because of their obvious unsuitability for certification. What is more, because single-state and certain multi-state class action suits brought against Florida companies in Florida courts generally cannot

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court was "reluctant to find that the district [court] abused its discretion by failing to consider an issue that was not raised by the parties." 186 F.3d at 628.

be removed to federal court under the federal Class Action Fairness Act, the effects of this ruling will be felt disproportionately by Florida-based companies. The inevitable upsurge in class action filings will tax Florida courts and impose huge costs on companies that do business in this state, exposing them to increased litigation expenses and placing them at a competitive disadvantage vis-à-vis companies situated elsewhere that are not subjected to the same burdens.

Over the last several years, plaintiffs' lawyers have hopped around the country in search of courts that are willing to relax the traditional requirements for class certification. Each time plaintiffs have found such "magnet" courts, the supreme courts of those states have eventually stepped in to rectify the problem. When Alabama courts became a haven for abusive class actions in the 1990s, the Alabama Supreme Court stepped in and established bright-line rules for class certification. *See, e.g.*, *Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199 (Ala. 1997) (rejecting "drive by" class certification practice under which some Alabama state trial courts conditionally certified classes before service on defendants). Plaintiffs soon moved on to Mississippi, where they discovered a number of courts that were willing to allow mass litigation to proceed without regard to fairness or due process – but in due course, the Mississippi Supreme Court stepped in to stop the rampant abuses in such cases. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004) (rejecting mass joinder product liability cases). Most

recently, the action moved to Illinois, where certain county courts made known their willingness to rubber stamp class certification proposals and approve abusive settlements. *See, e.g.*, American Tort Reform Foundation, *Judicial Hellholes 2004*, 14-15 (2004) (identifying Madison County, Illinois as "Number One Judicial Hellhole" because it has "become a magnet court" for class actions). But once again, the Illinois Supreme Court stepped in to reassert fundamental class action principles and end the abusive rulings. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing certification of nationwide insurance class action).

This Court's decision – if left standing – would take precisely the opposite approach of that taken by other state Supreme Courts in recent years. It would send an unmistakable message that this state's top court ***is*** willing to entertain otherwise uncertifiable class actions under the guise of "issues classes." And lest there be any doubt, prior history reveals that the invitation will be accepted. As one commentator has noted: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

Moreover, while most nationwide class actions are now removable to federal court and will not be directly affected by this ruling, plaintiffs will inevitably attempt to expand the import of this decision beyond class action suits in various ways. For example, plaintiffs might try to obtain findings against a Florida company in a Florida-only class action and then attempt to rely on the collateral estoppel effect of those findings in individual or class action lawsuits filed throughout the country. Plaintiffs may also seek to propose issues trials outside the rubric of class certification (*e.g.*, by proposing consolidated issues trials under Rule 1.270). While the precise litigation tactics plaintiffs will attempt remain to be seen, history has shown that every time a state's courts have loosened standards for mass litigation, the result has been the same – an influx of abusive lawsuits against businesses by plaintiffs' lawyers eager to take advantage of the newest mass tort haven. The Court should reconsider its ruling before Florida's courts become the next arena for class action abuse to the detriment of the state's consumers and businesses and the integrity of the state's legal system.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to grant Respondents' Motion For Rehearing.

Respectfully submitted,

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I HEREBY CERTIFY that I have caused to be served true and correct copies of the foregoing motion by U.S. Mail on all counsel on the attached Service List this 14th day of August, 2006.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

By: ________________________________

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