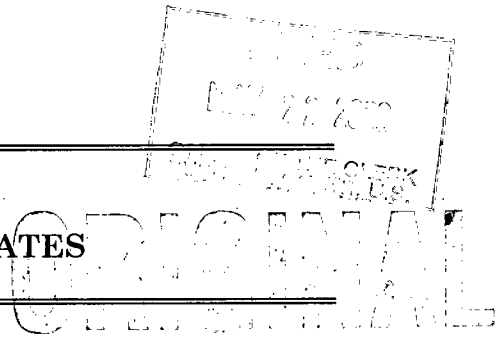
Case No. 26-6061



IN THE
SUPREME COURT OF THE UNITED STATES

DONALD K. BIRNER,

Petitioner,

v.

HYUNDAI MOTOR COMPANY; KIA CORPORATION,

PLAINTIFF'S CONSUMER CLASS,

Respondents

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

PETITION FOR WRIT OF CERTIORARI

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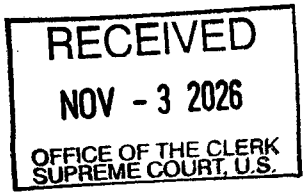
Petitioner and Objector/Class Member



QUESTIONS PRESENTED

1. Whether Rule 23(e) permits approval of a settlement that requires absent class members—without their consent—to use their own insurance or other collateral benefits to satisfy settlement obligations, thereby reducing defendants' liability in conflict with the collateral source rule, the anti subrogation doctrine, and longstanding principles barring use of an insured's personal coverage to pay for another's wrongdoing.

2. Whether Rule 23(e) permits approval of a settlement that provides no relief for the loss of bargain damages suffered by more than 25 million class members at the moment of purchase and requires no recall of the defective vehicles or conformance with safety standards.

3. Whether Rule 23(e) permits approval of a settlement whose valuation rests on an expert report that relies on 'plug in figures' of unknown origin, and assumes all stolen vehicles were uninsured despite acknowledging that most were expected to be insured and entitled only to a capped deductible/increase insurance cost reimbursement in exchange for releasing all future theft related claims.

4. Whether a court of appeals may affirm approval of a class settlement while avoiding the merits and foreclosing meaningful appellate review of preserved issues, thereby depriving more than 25 million class members of the due process protections Rule 23 guarantees.

PARTIES TO THE PROCEEDING

Petitioner Donald K. Birner was an Objector and a class member in the District Court below and the Appellant before the Ninth Circuit Federal Court of Appeals in Case No. 24-7080

Respondents Hyundai Motor Company and Kia Corporation were Defendants in the District Court below and Appellees before the Ninth Circuit Federal Court of Appeals in Case No. 24-7080.

Respondent Class Counsel was the Plaintiff in in the District Court below and an Appellee before the Ninth Circuit Federal Court of Appeals in Case No. 24-7080

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure Statement by this Petitioner is not required by Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the MEMORANDUM dated January 8, 2026, of the United States Court of Appeals for the Ninth Circuit affirming the District Court's order granting final approval of the amended class action settlement.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix Exhibit A to this petition and is unpublished. The rehearing en banc denial by the Appellate Court appears in Appendix Exhibit B. Relevant opinions of the United States District Court appear at Appendix Exhibits C and D.

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

(1) United States District Court-Central District of California

Case No. 8:22-ml-03052-JVS-KES

Case Caption:

In Re: KIA HYUNDAI VEHICLE THEFT, MARKETING, SALES PRACTICES, AND PRODUCT LIABILITY LITIGATION.

(2) United States Court of Appeals for the Ninth Circuit

Case No. 24-7080

Case Caption:

PLAINTIFFS CONSUMER CLASS

Plaintiff-Appellee,

DONALD K. BIRNER,

Objector - Appellant,

v.

HYUNDAI MOTOR COMPANY; KIA CORPORATION,

Defendants - Appellees.

JURISDICTION

The Petitioner duly filed his notice of appeal within 30 days after the District Court issued its Order denying his Motion for Reconsideration.

The date on which the United States Court of Appeals Ninth Circuit decided and denied Petitioner/Appellant's Objection by issuing a Not for Publication Memorandum dated and filed on January 8, 2026.

This Petitioner timely filed his *Petition For Rehearing En Banc By Appellant* on January 22, 2026- within 30 days. [Dkt. Entry No. 74.1]

The panel voted to deny Appellant's Petition for Rehearing En Banc on February 26, 2026. [Dkt Entry No. 75]

This Petition for Certiorari was mailed postage prepaid on May 22, 2026, within 90 days after the denial of the Petition for Rehearing occurring on February 26, 2026.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [emphasis supplied]*

FEDERAL RULE OF CIVIL PROCEDURE 23(e)

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court

may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Class Members Objections

(A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

STATEMENT OF THE CASE

The lower courts approved an amended settlement agreement ("ASA") [Appendix Exhibit E] that cannot be squared with Rule 23 or this Court's requirement that judges address all non frivolous objections. By incorrectly concluding that Petitioner failed to raise the dispositive issues, both courts shut down meaningful appellate review and

stripped more than 25 million class members of the due process protections Rule 23 guarantees.

The ASA is structurally unsound. It omits loss of bargain damages, grants defendants an unwarranted forty percent reduction in liability for distributing 25 million vehicles lacking required theft prevention devices, and allows defendants to satisfy their obligations by diverting class members' private insurance coverage. That mechanism forces hundreds or thousands of insurers—strangers to the litigation—to file subrogation suits solely to recover amounts wrongfully shifted onto them. A settlement that creates litigation rather than resolves it violates *Amchem*, *Ortiz*, and Rule 23(e). [*Amchem Prods. Inc v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.* 527 U.S. 815 (1999). FRCP 23]

Significantly, the ASA also lacks basic oversight protections such as monthly reporting *to the court* of claims submitted, paid, and denied.

The parties' shifting class size representations further expose the settlement's inadequacy. After repeatedly claiming the class numbered several million or so, defendants later admitted via their appellate brief that it exceeds 25 million—drastically shrinking per capita recovery and magnifying every structural defect. By ignoring these issues, the lower courts approved a settlement that is neither fair, nor adequate, nor reasonable.

This Court's intervention is warranted.

REASONS FOR GRANTING THE PETITION

I. The Approved Settlement Agreement is Structurally Unfair and Unjustly Rewards Undeserving Defendants Who Produced Millions of Theft Friendly Vehicles.

A. The magnitude of defendants' deceit shocks the imagination, yet the approved agreement grants them a 40% discount and allows them to use class members' insurance to offset their own liability.

The first extraordinary windfall bestowed upon defendants is the settlement's complete failure to compensate class members for loss of bargain damages arising from defendants' decade long concealment of the absence of basic theft prevention technology—technology that would have prevented steering, forward mobility, or both when the ignition was bypassed. The scale of this concealment is staggering. For more than ten years, defendants knowingly sold 25 million theft prone vehicles to unsuspecting consumers, yet the settlement rewards this misconduct with a gratuitous 40% damages discount and even permits defendants to offset their liability using class members' own insurance coverage. These remarkable benefits were approved by a magistrate judge acting as a fiduciary for absent class members.

The consequences of this deception were not limited to property loss. By saturating the nation's roads with vehicles that could be stolen in seconds, defendants exposed every class member—and the public at large—to dramatically heightened risks of violent theft, catastrophic crashes, severe bodily injury, and death. The record contains no accounting whatsoever of the number of class members who suffered grave injuries or lost their lives during these "easy picking" thefts. Nor does the district court address this grave issue and lack of record in its approval order.

The 38 page order approving the settlement does not mention a single injury or fatality, despite the well documented reality that stolen vehicle crashes, fleeing incidents, and violent confrontations now produce thousands of severe injuries each year and an estimated 400–500 deaths annually, according to federal crime and traffic safety trend data. Any reasonable evaluation of the strengths and weaknesses of the class claims would necessarily consider the loss of limb and life inflicted on innocent persons on our highways and byways as a direct result of defendants' concealment.

B. Government sources confirm that auto thefts expose innocent persons to violent consequences

Government data makes clear that auto theft is a violent public safety threat, not a mere property offense. The FBI's Uniform Crime Reporting Program classifies carjacking separately because it involves "force, violence, or intimidation," and is routinely associated with serious bodily injury and death (FBI, UCR: Carjacking, 2023). Recent FBI Crime Data Explorer reports show carjackings rising sharply from 2019–2022, occurring predominantly in residential and public areas where victims face direct physical confrontation.

The National Highway Traffic Safety Administration ("NHTSA") likewise warns that stolen vehicles are disproportionately involved in high speed crashes, dangerous police pursuits, and fatal collisions, underscoring the life threatening risks created when vehicles lack basic anti theft technology (NHTSA, Traffic Safety Facts: Motor Vehicle Theft, 2023). Defendants—sophisticated manufacturers intimately familiar with vehicle operation and public safety risks—knew these dangers, yet continued to

mass produce theft prone vehicles for more than a decade.

These government findings confirm that Hyundai and Kia's omission of immobilizers exposed 25 million consumers to violent encounters, severe injury, and fatal outcomes—risks the settlement never acknowledges, never quantifies, and never considers.

II. The Settlement Ignores the Loss of Bargain Injury Suffered by All Class Members.

This case presents a structural failure at the core of Rule 23. More than 25 million consumers suffered the same loss of bargain injury at the moment they purchased their vehicles, yet the settlement approved below provides them no compensation for such injury. Neither court addressed the complete absence of any assessment of loss of bargain damages—a deficiency affecting every class member and allowing defendants to retain substantial ill gotten gains. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) A settlement is unfair when it fails to account for the interests of all class members, especially where injuries differ or where a common injury is ignored. [The lower court confuses diminution in value upon resale with loss of bargain resulting at the moment of purchase.]

Rule 23(e) requires courts to ensure that the settlement "adequately represents the interests of absent class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) [Courts must reject settlements that "involve conflicts of interest between class members" or fail to protect "the interests of the entire class."]

Here primary injury overpayment at purchase affecting all class members is

ignored. The Seventh Circuit has likewise rejected settlements that "provide no relief to an entire subclass" despite valid claims. (*Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004))

Courts across the country have held that a settlement is unfair when it provides no relief for the primary injury suffered by the majority of class members. The settlement here violates that rule in its purest form: every class member was deceived at the point of purchase, every class member suffered loss of bargain damages, defendants were unjustly enriched, and yet the settlement provides nothing for those injuries and the district court never even discussed them in its 38 page plan approval order . [Appendix Exhibit E]. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646 (7th Cir. 2006) [settlement is unfair when it fails to compensate the class for its primary damages theory and instead substitutes a different, defendant preferred measure.] *Subway Footlong*, 869 F.3d 551 (7th Cir. 2017) [settlement is unfair when it offers no meaningful relief for the injury alleged by the class] *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) [settlement is invalid when the vast majority of class members receive nothing of value and the court fails to address their actual injury] *In re Bluetooth Headset Litig.*, 654 F.3d 935 (9th Cir. 2011) [Courts must reject settlements that leave defendants unjustly enriched while providing no real benefit to the class.]

This oversight undermines the fairness and integrity of the settlement as a whole and indirectly rewards defendants, who concealed the fact that class members

were purchasing theft friendly vehicles thereby exposing class members to a much greater risk of property loss and severe personal injury or death that often accompanies such thefts. See also: *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) [Courts must reject settlements where "the class receives little or no benefit for the claims that justified the litigation."]

This settlement favors uninsured theft victims whose cars are usually lower value over those class members who obtained insurance creating a conflict of interest between class members, while abandoning the core economic injury suffered by the entire class. *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013) [Relief must be "meaningful" and address the "primary injury alleged."] Likewise, this settlement diverts the value of insurance benefits to the undeserving defendants offsetting their liability for producing theft friendly vehicles, as well as ignoring the universal claim of members that justified the lawsuit. In accord: *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) [The Seventh Circuit held that a settlement is unfair when it "provides little or no benefit to most class members" and emphasized that courts must reject settlements where the class receives "meager or worthless relief."] In this matter, the theft insured class members might receive partial return of their deductible paid and increased insurance payments resulting from theft prone characteristics of the cars subject to a cap of $375.00, however, this modest reimbursement is more than offset because it requires class members to release any *future* claims for increased premiums or inability to insure these theft prone vehicles. See Amended settlement agreement, Appendix Exhibit E, pg. 15

III. The Appellate Panel's Decision that this Objector Failed to Raise Issues Below Misreads the Record and Misapprehends the Law Regarding Standing of Objectors.

A. Objectors have standing to object to any settlement term that diminishes the value of the class recovery.

Objectors play a "valuable and important role" in policing class action settlements and ensuring that the Rule 23(e) fairness inquiry remains genuinely adversarial. *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002)); *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22801724, at *1 (S.D.N.Y. Nov. 24, 2003); *In re AOL Time Warner*, 2007 WL 4225486, at *2.

Their function is to assist the court in evaluating whether a proposed compromise is "fair, reasonable, and adequate" to the class as a whole, not to replicate every subclass injury.

Under *Devlin v. Scardelletti*, 536 U.S. 1, 10–11 (2002), and *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998), a class member has Article III standing to object to any settlement term that diminishes the value of the class recovery, regardless of whether he suffered the same harm as every other class member.

As a certified class member, petitioner satisfies injury, causation, and redressability because the settlement extinguishes his economic claims along with those of millions of others. *Petitioner did raise and urge these claims in Dkts.# 407, #560 and #573 respectfully.*

The fact that petitioner's vehicle was not stolen does not strip him of the ability

to challenge structural defects in the settlement. Rule 23(e) requires scrutiny of fairness to the class as a whole, and objectors may raise class wide defects even when the challenged provision does not produce the same individualized harm for every member.

B. The Appellate Court sidestepped preserved objections and deprived class members meaningful appellate review.

Case law and commentary illustrate that an appellate court may not affirm a class settlement while avoiding the merits of preserved objections.

To hold otherwise—as the panel did—would eliminate meaningful oversight of systemic flaws affecting millions of absent class members. [1]

IV. The Agreement Exhibits Indicia of Collusion.

The settlement bears multiple hallmarks of collusion. First, the parties materially misrepresented the size of the class—initially describing it as "several million" members, only to concede on appeal that the class actually **exceeds 25 million purchasers**. Misstatements of class size are a recognized warning sign because they distort the fairness analysis and artificially inflate the perceived value of the settlement.

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[1] Supreme Court and circuit cases—holding that an appellate court cannot affirm a class settlement while sidestepping preserved objections, because doing so deprives absent class members of the meaningful appellate review that due process and Rule 23 require. *Evitts v. Lucey*, 469 U.S. 387 (1985) [due process requires "meaningful review"] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) [courts may not exercise procedural maneuvers that prevent adjudication.] *Devlin v. Scardelletti, 536 U.S. 1 (2002)* To the same effect; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) Post 2018 Rule 23(e) appellate decisions (ABA survey) [modern trend: appellate courts must engage with objections and cannot affirm while avoiding the merits.] *Kurtz v. Kimberly Clark Corp.*, 79 F.4th 235 (2d Cir. 2025) *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021)

Second, the structural features of this agreement—including its clear sailing fee provision and its reversionary $80 million cap—mirror the "red flags of collusion" identified in *In re Bluetooth Headset Litig.*, 654 F.3d 935, 947 (9th Cir. 2011), and condemned again in *Briseño v. Henderson*, 998 F.3d 1014, 1024–25 (9th Cir. 2021). As those cases explain, such provisions strongly suggest that class counsel negotiated benefits for themselves while sacrificing meaningful relief for the class. [2]

The ASA commits only $80 million to class relief—roughly three dollars per class member—and even that amount is distributed unevenly, with uninsured theft victims receiving the bulk of the common fund. Yet the parties publicly value the settlement at $145 million, a figure inflated by non cash components and speculative offsets. This structure creates a perverse incentive: administrators are encouraged to deny claims on technical grounds to ensure that approved claims never exceed the $80 million cap. The result is a constructive reversion, where defendants retain the benefit of unclaimed funds while the class receives far less than the settlement's advertised value.

That is precisely what occurred here. The settlement ignores the universal loss of bargain injury suffered by all 25 million purchasers and instead channels nearly all monetary relief to a narrow minority of uninsured theft victims. A settlement that

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[2]The ASA commits only $80 million to class relief—roughly three dollars per class member—and even that amount is distributed unevenly, with uninsured theft victims receiving the bulk of the fund. Yet the parties publicly value the settlement at $145 million, a figure inflated by non cash components and speculative offsets. This structure creates a perverse incentive: administrators are encouraged to deny claims on technical grounds to ensure that approved claims never exceed the $80 million cap. The result is a constructive reversion, where defendants retain the benefit of unclaimed funds while the class receives far less than the settlement's advertised value. ASA App.--- pg 14 D. Common fund

abandons the class's primary injury and allocates relief to a small subset is neither fair nor adequate under Rule 23(e) and strongly indicates collusion between class counsel and defendants.

Finally, class counsel's recommendation that defendants use class members' insurance coverage to fund the settlement protects only the defendants' interests. It shifts the cost of the settlement away from the wrongdoer and onto the victims themselves—another indicator that counsel negotiated a deal favorable to the defendant rather than the class they purported to represent.

V. The Decision Below Conflicts with Fundamental Tort Principles and Nationally Uniform Rules Prohibiting the Use of an Insured's Personal Insurance Benefits to Defray Another's Liability.

A. The settlement conscripts class members' theft insurance to subsidize defendants' liability.

The decision below authorizes a settlement structure that forces class members' personal insurance benefits to subsidize defendants' liability—without the class members' consent. That result is irreconcilable with bedrock tort doctrine, the anti subrogation rule, and Rule 23(e)'s structural fairness requirements. It also conflicts with the decisions of multiple state supreme courts and federal courts of appeals, all of which hold that insurance benefits belong exclusively to the insured and may not be appropriated, directly or indirectly, to relieve a wrongdoer of its own financial responsibility.

See state court decisions: New York Court of Appeals — *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281 (1993) [The anti subrogation rule prohibits

a tortfeasor from benefitting from the injured party's insurance.] California Supreme Court — *Pulte Home Corp. v. CBR Electric, Inc.*, 50 Cal. 4th 807 (2010) [A defendant cannot "externalize" its liability by invoking the plaintiff's insurance.] Illinois Supreme Court — *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill. 2d 391 (2010) [Insurance proceeds are the insured's property; a tortfeasor cannot benefit from them and may not diminish its liability by relying on a plaintiff's insurance coverage.] Texas Supreme Court — *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007) [Insurance benefits are the insured's property; subrogation exists only to prevent double recovery, not to relieve a tortfeasor.] Florida Supreme Court — *Blue Cross & Blue Shield v. Matthews*, 498 So. 2d 421 (Fla. 1986) [Insurance benefits cannot be used to reduce a defendant's liability.]

Federal courts of appeal below have ruled by virtue of the collateral source rule and Restitution doctrines that insurance benefits cannot be shifted to a third party. See: 7th Circuit — *Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986) 9th Circuit — *McLean v. Runyon*, 222 F.3d 1150 (9th Cir. 2000) [Insurance benefits if paid from a collateral source are the plaintiff's property; a defendant cannot offset its liability with them.] In accord; 5th Circuit — *Davis v. Odeco, Inc.*, 18 F.3d 1237 (5th Cir. 1994) 11th Circuit — *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (11th Cir. 1976) In accord, the Restatement (Second) of Torts § 920A (collateral source rule) and Restatement (Third) of Restitution § 24.["[a] person is not permitted to profit by his own wrong."]

The district authorized a settlement that shifts defendants' liability onto class members' personal insurance benefits—without their consent and in direct conflict

with the collateral source rule, the anti subrogation doctrine, and Rule 23(e)'s prohibition on diverting class members' assets for the benefit of defendants. Instead of resolving a single controversy in one proceeding, it splintered liability into a nationwide cascade of insurer-initiated lawsuits, overwhelming judicial resources that a lawful settlement would have resolved in one action.

If allowed to stand, the decision below will become a blueprint for defendants nationwide to externalize their liability onto the private insurance of millions of unsuspecting consumers. It threatens the integrity of Rule 23, destabilizes insurance markets, and undermines uniform tort principles that have governed for more than a century. This Court's intervention is urgently needed to restore the structural protections Rule 23(e) was designed to guarantee. Currently it resulted in almost a thousand insurance companies forced to file subrogation actions in a separate track of this case.

B. The collateral source rule forbids a tortfeasor from benefitting from the plaintiff's insurance.

For more than a century, courts have recognized that a tortfeasor "may not reap the benefit of the plaintiff's foresight in obtaining insurance." *Helfend v. Southern Cal. Rapid Transit Dist.*, 2 Cal. 3d 1, 9 (1970). The rule is universal: insurance payments "do not reduce the defendant's liability." Restatement (Second) of Torts § 920A(2). This Court has acknowledged the same principle. *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253, 254 (1963) (per curiam).

The settlement approved below does exactly what these authorities forbid. By

diverting class members' insurance benefits to offset defendants' obligations, the settlement shifts the economic burden of defendants' misconduct onto the victims' insurers—and ultimately onto the victims themselves through increased premiums, deductibles, and coverage limitations. To the best of Petitioner's knowledge, no court has ever permitted such a structure; many have condemned analogous attempts to capture insurance benefits for a defendant's advantage.

When the district court addressed the collateral source rule in its final approval order (Dkt. 629 at 14), it reasoned that class members "were made whole by their insurance" and that "the majority of insured Class Vehicles are covered by the subrogation track of this MDL." That reasoning directly contradicts the collateral source rule and the anti subrogation doctrine, both of which prohibit a tortfeasor from reaping the benefit of the plaintiff's foresight in obtaining insurance or reducing its own liability by pointing to the plaintiff's coverage.

By treating insurance payments as a basis for diminishing defendants' responsibility, the district court adopted the very position that state supreme courts and federal courts of appeals have repeatedly rejected.

And the court's referral of the objection to the "subrogation track" was not a reasoned response at all; it simply nullified the objection by shunting it in to a separate proceeding in which this objector is not a party and where the issue will never be adjudicated on the merits and this objector will not received a reasoned response. The result is that the settlement's use of class members' insurance to subsidize defendants' liability received no meaningful judicial review.

C. The anti subrogation rule independently prohibits compelling an insurer to pay for the liability of a party it does not insure.

The anti subrogation rule is equally clear: an insurer "may not be required to indemnify a party it does not insure." *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294 (1993). Public policy forbids shifting a wrongdoer's liability to an insurer who never agreed to cover that risk. *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 471 (1986).

Yet the settlement below forces class members' insurers to absorb defendants' liability—precisely the scenario the anti subrogation rule prohibits. The rule exists to prevent the very injustice the settlement imposes: compelling an insurer to pay for the wrongdoing of a stranger to the insurance contract. The decision below thus conflicts with the settled law of every jurisdiction that has addressed the issue.

D. Rule 23(e) forbids class settlements that divert class members' assets or impose new burdens to benefit defendants.

Rule 23(e) requires "heightened scrutiny" of settlements that risk disadvantaging absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Courts of appeals have repeatedly held that a settlement is invalid if it "imposes disproportionate burdens on the class" or "diverts value from the class to the defendant." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781–82 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718–19 (6th Cir. 2013); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946–47 (9th Cir. 2011).

Insurance benefits are the property of the class members. A settlement that

commandeers those benefits to reduce defendants' liability is the very definition of structural unfairness. It imposes a new burden on absent class members—use of their insurance—while conferring a direct financial benefit on defendants. No court of appeals has approved such a structure; several have condemned analogous ones. The decision below deepens an entrenched conflict over the limits of Rule 23(e) and the protection owed to absent class members.

E. Public policy and unjust enrichment principles reinforce the prohibition on using an insured's benefits without consent.

Insurance benefits cannot be appropriated, redirected, or leveraged for the benefit of a wrongdoer without the insured's express consent. *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281 (1993) ["An insurer may not be subrogated against its own insured... nor may insurance be used to relieve a wrongdoer of its own liability."] *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465 (1986) [Insurance benefits cannot be diverted to cover the liability of a non insured wrongdoer.] *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing*, 65 Cal. App. 3d 66 (1976) [Insurer cannot be compelled to pay for another party's negligence.]

The settlement below violates this principle in its most extreme form: it uses class members' insurance not merely without consent, but to subsidize the defendants' own liability. That result is incompatible with the foundational rule that a wrongdoer must bear the full cost of its misconduct.

VI. The District Court's Reliance on the Stockton Report Conflicts with *Bluetooth, Pampers*, and Rule 23(e)'s Structural Fairness Requirements.

A. The Bogus Stockton Report.

The settlement's shaking foundation is an internally contradictory expert report that the district court accepted without much scrutiny, even though the expert refused to disclose his compensation, admitted that 80 percent of the stolen vehicles would be insured, and then assumed the opposite to minimize defendants' liability. The court chastised objectors for not producing their own six figure expert analysis, while declining to appoint a neutral expert under Federal Rule of Evidence 706, and required no ongoing oversight after approving the settlement.

The district court's acceptance of the Stockton expert report flatly contradicts this Court's structural fairness jurisprudence. *Bluetooth* requires heightened scrutiny when defendants present expert analyses that minimize their own liability, and *Pampers* condemns settlements built on unsupported or internally inconsistent expert opinions that mask structural unfairness. Dkt # 228-3

Stockton refused to disclose how much he was paid, admitted that more than 80% of stolen vehicles would be insured, and yet constructed his damages model using "plug in" figures with no discernible origin while assuming—contrary to his own admission—that all stolen vehicles were uninsured and that all claims would be approved despite rigorous documentation requirements. These assumptions inverted the facts to produce a lower damages estimate and to justify reimbursing only the small minority of uninsured claimants, who are cheaper to compensate and less likely

to possess the required paperwork.

B. Report was *not* scrutinized by the District Court.

A district court acting as the fiduciary for 25 million absent class members cannot accept an expert report that contradicts itself, obscures its financial incentives, and uses fabricated inputs to minimize defendants' liability. Rule 23(e) demands searching scrutiny, not blind acceptance of a paid expert's internally inconsistent model.

VII. The Defenses Accepted Below Are Legally Incorrect and Conflict with Settled Law.

A. The "criminal act breaks causation" defense is legally incorrect.

The district court accepted or at least found persuasive defendants' argument that the criminal act of vehicle theft severed the causal chain. That is not the law. An intervening criminal act breaks causation only when it is unforeseeable. This Court has long held that a defendant remains liable where the intervening act is *"a normal or foreseeable consequence"* of the defendant's conduct. *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980); accord *Lillie v. Thompson*, 332 U.S. 459, 461 (1947) (railroad liable where its negligence made criminal assault foreseeable). Courts nationwide follow the same rule: "Foreseeable criminal acts do not constitute superseding causes." *Hines v. Garrett*, 108 S.E. 690, 693–94 (Va. 1921); *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975).

The theft of a theft prone vehicle is not merely foreseeable — it is the precise risk created by the defect. The "Kia Boys" demonstrated that these vehicles could be

breached in seconds and driven away with full steering and forward motion. That is not an unforeseeable superseding act; it is the natural and probable consequence of selling millions of vehicles without the theft prevention safeguards that Federal Motor Vehicle Safety Standard ("FMVSS") 114 requires. The district court's contrary conclusion conflicts with settled tort law in every jurisdiction, including California where the court sits.

B. The "FMVSS 114 does not require an immobilizer" defense misconceives the standard which is a performance standard.

Defendants also argued — and the district court accepted — that they could not have violated FMVSS 114 because the standard does not explicitly require an electronic immobilizer. That argument misapprehends the regulation.

FMVSS 114 imposes a performance requirement, not a device requirement: a vehicle must not be capable of "forward self mobility" or steering without the key. See NHTSA interpretations of the standard; See Interpretation ID's GF009787; GF005229-2 and GF003447.[3]

Courts interpreting FMVSS 114 uniformly hold that compliance turns on whether the vehicle can be moved without the key, not on the presence or absence of a particular technology. See *City of Buffalo, et al. V. Hyundai Motor America, Inc., et al.* Docket Number: 24-2350 filed June 20, 2025. See also: *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953 (N.D. Cal. 2004) (holding: FMVSS 114 is a performance

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[3]https://www.nhtsa.gov/interpretations/gf009787;
https://www.nhtsa.gov/interpretations/gf005229-2;
https://www.nhtsa.gov/interpretations/gf003447

standard, and compliance turns on whether the vehicle can be moved without the key, not on any particular device.) *Falco v. Nissan North America, Inc.*, 2014 WL 1325612 (C.D. Cal. Apr. 1, 2014) (the only question is whether the vehicle can be moved without the key.) *Housepian v. Toyota Motor Corp.*, 2009 WL 5069144 (C.D. Cal. Dec. 17, 2009) (the regulation "requires only that the vehicle not be operable or capable of forward self mobility without the key.") *In re General Motors LLC Ignition Switch Litigation*, 2015 WL 2414741 (S.D.N.Y. May 20, 2015) (holding: FMVSS 114 compliance is determined by whether the vehicle can be operated without the key, not by the presence or absence of an immobilizer.)

Here, the defect allowed thieves to break the ignition housing and drive the vehicle away with full steering and propulsion — a textbook failure of FMVSS 114's core requirement. And defendants' own conduct confirms this: their post remedial software update, which adds "theft prevention logic" that disables forward motion unless the key is present, is a classic admission that the vehicles previously lacked the required theft prevention functionality. See *United States v. City of New York*, 717 F.3d 72, 83 (2d Cir. 2013) (post remedial measures may be considered when offered to show feasibility or existence of a defect). Calling the device something other than an "immobilizer" does not change the fact that the vehicles utterly failed the performance requirement FMVSS 114 imposes.

C. False certification of FMVSS compliance on 25 million vehicles over a decade.

Defendants affixed a federally required certification label to every class vehicle,

representing that the vehicle "conforms to all applicable U.S.A. motor vehicle safety, bumper, and theft prevention standards in effect on the date of manufacture." That representation was made more than 25 million times over ten years. Yet the record shows that these vehicles could be started and driven away without the key in seconds — an obvious failure of FMVSS 114's theft prevention requirements.

The certification label reproduced below illustrates the core problem: defendants expressly certified compliance with a federal safety standard their vehicles plainly did not meet, while simultaneously blaming "criminals" for the very thefts the false certification enabled.[4]

BLAME THE CRIMINAL WHEN THEY ARE A CRIMINAL.



False certification 25 million times over 10 years that vehicles conformed to all safety and theft prevention standards in effect on the date of manufacture.

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[4]Federal law imposes significant civil penalties for each false certification of FMVSS compliance. See 49 U.S.C. §§ 30115, 30165(a). NHTSA's inflation adjusted penalty is now up to roughly $26,000 per violation, with a cap exceeding $131 million for a related series of violations. 49 C.F.R. § 578.6(a)(1). Applied to 25 million vehicles, the potential exposure is enormous.

VIII. A Stark Break From How Courts Have Handled Volkswagen, Toyota, and Every Other Major Automotive Defect Coverup.

In other major automotive misconduct cases, courts have demanded accountability—not leniency. When confronted with evidence of wrongdoing in the Volkswagen Dieselgate scandal and the Toyota unintended acceleration litigation—one of which was overseen by the same district judge—both companies ultimately acknowledged the defect, cooperated with regulators, and paid billions in penalties and consumer compensation, even though the primary harms in those cases were economic. Here, by contrast, the theft prone defect has produced not only billions in property losses but widespread injuries and fatalities, yet defendants deny any wrongdoing and secured a settlement that grants them an effective forty percent damages discount while conscripting class members' personal insurance to pay for defendants' own liability.

No automotive misconduct case in American history has involved harm to as many people as this one. The 25 million class members here make Volkswagen and Toyota pale by comparison, yet those companies faced accountability while these defendants receive a discount and use of class members' insurance benefits.

IX. Toyota and Volkswagen Subject to Serious Penalties for Concealing Defects.

The experience of other major manufacturers underscores the seriousness with which federal regulators treat efforts to deflect blame or conceal safety related defects. Toyota, after initially attempting to attribute unintended acceleration incidents to consumer misuse of floor mats, ultimately admitted it had misled regulators and the

public; the company paid $1.2 billion in criminal penalties in 2014, then the largest automotive safety related fine in U.S. history.

Volkswagen likewise sought to shift responsibility for its diesel emissions deception, but ultimately paid more than $20 billion in U.S. civil and criminal penalties, and multiple Volkswagon executives were criminally charged in both the United States and Germany for their roles in the scheme. These episodes illustrate a consistent pattern: when manufacturers mislead regulators or the public about safety or compliance, the consequences are severe.

The markedly different treatment in this case only sharpens the contrast.

X. The Questions Presented Are Nationally Important and Recur Frequently in Modern Class Action Practice.

As class actions increasingly involve claims where insurance coverage exists—healthcare, consumer finance, automotive, data breaches—the question whether defendants may shift liability onto class members' insurers arises with growing frequency. The decision below invites defendants to structure settlements that externalize their liability onto absent class members' insurance. That approach threatens the integrity of Rule 23, undermines the collateral source rule, and destabilizes insurance markets.

This Court's review is urgently needed to restore uniformity and reaffirm the longstanding principle that insurance benefits belong to the insured, not to the wrongdoer.

XI. The Software Fix was Motivated by the Massive Thefts by the Kia Boyz and Bootstrapped into the Settlement.

A. Software fix launched independently to prevent thefts.

Class counsel stated that the software program was the highlight of the settlement, but this is not the case. The software upgrade program predated and operated independently of the settlement plan.

The parties executed a Memorandum of Understanding [MOU] on May 18, 2023, laying the groundwork for the initial settlement agreement.

Yet previously on February 14, 2023, the National Highway Traffic Safety Administration announced that Hyundai and Kia had already deployed a major anti-theft software upgrade in response to a spike in thefts driven by viral social-media Challenges. [Hyundai and Kia Launch Service Campaign to Prevent Theft of Millions of Vehicles Targeted by Social Media Challenge dated Feb. 14, 2023 Washington D.C. stating: *Hyundai and Kia have developed theft deterrent software for millions of their vehicles that lack an immobilizer and will provide it FREE of charge to vehicle owners.*]

Evidence shows that research, development, and rollout of the software began well before the February NHTSA announcement—which occurred over 90 days prior to the MOU. In other words, Defendants launched this safety measure on their own initiative, not as part of any negotiated plan.

Ninth Circuit precedent confirms that preexisting obligations cannot be bootstrapped to a subsequent settlement agreement. *Koby v. ARS National Services Inc.,* 846 F. 3d 1071, 1079 (9th circuit) (2017) *In re Dry Max Pampers Litigation,* 724 F

3d, 713, 719 (6th Cir.) (2013) (refund program here is merely a rerun of the very same program that P & G had already offered to it's customers from July 2010 to December 2010.)

B. Abrupt dealer deadline terminating the software update forecloses class participation in software update.

The "software upgrade" was introduced only after a wave of thefts hit these notoriously easy-to-steal models in 2021, driven by the "Kia Boys" trend. Dealer sites and Hyundai/Kia service bulletins confirm the program ended in December 2024. See: Hyundai/Kia Service Campaign Bulletin SC275 / Technical Service Bulletin 23-01-004H, dealer portals (accessed April 2025). Dealer bulletins show the "Anti-Theft Software Update" (Service Campaign SC275 / TSB 23-01-004H) ran from February 2023 and was sunset in December 2024).

The software patch was not a result of this settlement. Defendants' theft-mitigation "software upgrade" arrived only after TikTok fueled "Kia Boys" videos triggered a 356 percent spike in Hyundai/Kia theft claims in 2021, yet the campaign was allowed to lapse in December 2024. See; Highway Loss Data Institute, "Hyundai and Kia Theft Losses" (December 2022).

XII. The Proposal Totally Abandons Over 6 Million Class Vehicles Ineligible for Software Patch.

Proponents concede that roughly 25 percent of class vehicles—over six million units—are ineligible for the software patch and will remain vulnerable to theft. Vehicles that do receive the so-called "upgrade" are marked with a distinctive sticker—effectively alerting would-be thieves that 'sticker-less vehicles' lack any such

theft deterrence.

Even now, the program covers just 75 percent of the fleet, leaving about 6.25 million cars—more than the total number of registered vehicles in seven smallest fleet states combined—without any factory remedy. Statista, "Automobile registrations in the United States in 2023, by state" (FHWA Statistics Table MV-1) Every one of those unprotected cars can still be hot-wired in under two minutes, exposing owners to soaring insurance premiums, out-of-pocket repair costs, and an elevated risk of violent confrontations during theft attempts.

Meanwhile, competitors like Toyota and GM pushed over-the-air immobilizer patches within weeks of discovering comparable flaws, underscoring how sluggish and partial Hyundai/Kia's response has been. The defendants' insistence that the problem is "largely resolved" rings hollow when millions of their own ineligible customers must still brace for shattered glass every time they park.

CONCLUSION

The courts approved a settlement that violates Rule 23 and this Court's requirement that judges address all non frivolous objections. By wrongly concluding Petitioner failed to raise the dispositive issues, the courts blocked meaningful review and left more than 25 million class members without the due process protections Rule 23 guarantees.

The ASA is structurally defective. It omits loss of bargain damages, grants defendants an unwarranted 40 percent reduction in liability for distributing 25 million federally non compliant vehicles, and shifts settlement costs onto class members'

private insurance—forcing hundreds or thousands of insurers to file subrogation suits that would not exist but for this settlement.

A settlement that creates litigation rather than resolves it cannot survive *Amchem*, *Ortiz*, or Rule 23(e). The ASA also lacks basic oversight mechanisms such as monthly reporting of claims to the court.

Claiming only a several million drastically shrinks per capita recovery and magnifies every structural flaw. The lower courts' refusal to confront these defects leaves a settlement that is neither fair, nor adequate, nor reasonable. Review is warranted.

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court:

1. Grant the petition for a writ of certiorari;

2. Reverse the judgment of the court of appeals; and

3. Remand with instructions that the district court apply the heightened scrutiny required by Rule 23(e), the collateral source and anti subrogation doctrines, and this Court's structural fairness precedents, or in the alternative, vacate the settlement approval and require proceedings consistent with this Court's opinion.

Respectfully submitted,

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