No. 13-916

In the Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,
PETITIONER
v.
ROBERT JACOBSEN,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND THE PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Montana Supreme Court approved a class action in which the class representative is seeking classwide equitable relief that he cannot seek individually, the mandatory class claims establish the predicate for later individual trials on monetary damages, and the factfinder will determine whether the statutory prerequisites for individual awards of punitive damages have been satisfied on a classwide basis without regard to individual circumstances in the class trial.

The questions presented are:

1. Whether the Due Process Clause precludes state courts from certifying a class action for injunctive and declaratory relief that the class representative cannot seek in an individual capacity.

2. Whether the Due Process Clause precludes state courts from certifying a no-opt-out class action to provide the predicate for later individual awards of compensatory and punitive damages.

3. Whether the Due Process Clause precludes state courts from certifying class claims on the premise that individual defenses will be removed from consideration.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Montana Supreme Court's decision in this case deprives the parties of due process and adds to entrenched state court division over Fourteenth Amendment limits on state class procedures. To satisfy due process, this Court has held that class actions for damages must allow the defendant to raise all available defenses and must provide absent class members with notice of the action and an opportunity to opt out. The decision below holds that state courts may dispense with these longstanding constitutional protections in order to streamline or "drive the resolution of" class litigation seeking injunctive and monetary relief. App. 27a. Specifically, it holds that a state trial court may combine the state equivalent of Federal Rule of Civil Procedure 23(b)(2) with assertions of classwide injury to certify a class that will litigate not only class members' right to common equitable relief (which the named plaintiff here lacks standing to seek), but also key elements of individual claims for compensatory and punitive damages.

This decision joins the minority side of a split among state courts of last resort regarding the constitutionality of using Rule 23(b)(2) or other state procedures to permit class resolution of damages issues without notice and opt-out rights or an opportunity to litigate individual defenses. The economic and legal consequences of this division are substantial. But cases implicating it often escape review because adverse state certification decisions place enormous pressure on defendants to settle, and the broad federal removal provisions in the Class Action Fairness Act ("CAFA") may not provide a path out of state

court where, as here, the plaintiff class is composed primarily of in-state consumers. See 28 U.S.C. § 1332(d)(4). *Amici* urge the Court to grant the petition and clarify the due process requirements that state courts must follow in administering class actions for monetary relief. The scope and enforceability of these procedural protections is of paramount importance to *amici*, whose members face state class actions for damages throughout the country.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber called on Congress to curb unfair and abusive state class-action procedures in CAFA, and regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Rule 37.2, *amici* state that they timely notified counsel of record for the parties of their intent to file this brief.

The American Tort Reform Association ("ATRA") was founded in 1986 and is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases before state and federal courts, including this Court, that have addressed important liability issues.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC's 1,400 member companies serve more than 135 million auto, home, and business policyholders, and write more than $196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market.

The Property Casualty Insurers Association of America ("PCI") promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of more than 1,000 member insurance companies, representing the broadest cross-section of insurers of any national trade association. PCI advocates on behalf of its members at both the state and federal levels and submits *amicus* briefs in cases of interest to the insurance industry. PCI members write more than $195 billion in annual premiums, 39 percent of the nation's property casualty insurance. Member com-

panies write 46 percent of the U.S. automobile insurance market, 32 percent of the homeowners market, 37 percent of the commercial property and liability market, and 41 percent of the private workers compensation market.

SUMMARY OF ARGUMENT

This case presents an exceptional opportunity to clarify the due process limits that govern state class actions for monetary relief. The decision below deepens entrenched state court division over the constitutionality of state procedures that permit class resolution of individual damages issues without notice and opt-out rights or an opportunity to litigate individual defenses. The result is a growing body of state law that sanctions due process violations and prejudices the rights of both defendants and absentee plaintiffs in an important category of cases.

This Court's review is urgently needed because it is the only means of resolving the disagreement among state courts of last resort on the due process issues here, which have significant legal and economic consequences for a broad range of American consumers and businesses, including *amici*'s many members. As the decision below confirms, state courts cannot agree with one another (or with lower federal courts) on the procedural due process requirements for class actions seeking monetary relief. And CAFA's broad removal provisions may not provide a federal forum where, as here, the putative class is composed mainly of in-state plaintiffs. Such actions are common in industries, like insurance, where even national businesses must tailor certain policies and products to individual state markets. Ensuring procedural integrity in these actions is every bit as cru-

cial as it is in federal class actions. In both categories of cases, class certification will prejudice absent parties' rights and typically lead to settlements or judgments that affect the defendant's broader business.

This Court should grant review and resolve the questions presented by clarifying that procedural due process requires all state class actions for monetary relief to provide notice and opt-out rights as well as a full and fair opportunity to be heard on all available defenses.

STATEMENT

The certified class here consists of thousands of individuals whose insurance claims were adjusted by Allstate in Montana over a 20-year period. The plaintiffs allege that "irrespective of individual outcomes," adjustments made pursuant to Allstate's 'Claim Core Process Redesign' ("CCPR") manual "constitute[d] a common pattern and practice in violation of" the Montana Unfair Trade Practices Act ("UTPA"). App. 255a. Although plaintiffs seek compensatory and punitive damages from Allstate, the named plaintiff requested certification pursuant to Montana Rule of Civil Procedure 23(b)(2), which authorizes mandatory (no opt-out) class litigation only of claims for "final injunctive relief or corresponding declaratory relief * * * respecting the class as a whole." Mont. R. Civ. P. 23(b)(2); Fed. R. Civ. P. 23(b)(2). Notwithstanding these limitations, the trial court certified a class claim for "punitive damages * * * predicated on the [alleged] class-wide conduct" in violation of UTPA. App. 256a.

Allstate urged the Montana Supreme Court to reverse the certification on federal due process and oth-

er grounds, and *amicus* the U.S. Chamber of Commerce filed a brief in support. The court's 4-3 opinion affirms the certification order and authorizes the Rule 23(b)(2) class to litigate whether "Allstate's common, systematic use of [certain CCPR practices in Montana] *resulted in damages to the members of the class*." App. 34a (emphasis added). The opinion further states that "the trier of fact in the class trial will also make a determination as to whether [Allstate's] implementation of the CCPR program involved *actual fraud or actual malice*," the predicates for punitive damages under Montana law. *Id.* at 64a (emphasis added). The opinion concedes that these classwide findings will "set the stage for later individual trials" to determine compensatory and punitive damages. *Id.* at 36a. Yet it makes no provision for absentee notice or opt-out, or for resolving all available defenses, including Allstate's UTPA right to defeat a damages claim by showing a "reasonable basis in law or in fact for contesting [a particular class member's] claim or the amount of the claim." M.C.A. § 33-18-242(5).

ARGUMENT

I. The Decision Below Deepens State-Court Division On Important and Recurring Due Process Questions

The Due Process Clause of the Fourteenth Amendment prohibits States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "[I]n determining what due process of law is," this Court considers "settled usages and modes of proceeding" that have traditionally characterized the adversary judicial process. *Tumey* v. *State of Ohio*, 273 U.S. 510, 523 (1927). Departures from these "well-established

common-law protection[s] * * * raise[] a presumption that [the new] procedures violate" due process. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). And "the burden of justification rests on the exception." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999). These principles govern state class actions generally and the Montana Supreme Court's novel use of Rule 23(b)(2) certification here.

Class actions are "'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979)). Accordingly, although "[s]tate courts are generally free to develop their own rules for protecting against * * * the piecemeal resolution of disputes," such rules warrant close scrutiny in the class context and may deviate from traditional practice only "in certain limited circumstances." *Richards* v. *Jefferson Cnty., Ala.*, 517 U.S. 793, 797-798 (1996). The decision below deviates from traditional litigation as well as class action litigants' typical right to notice, opt-out, and a full and fair opportunity to be heard on all claims and defenses in damages actions. A bare majority of the Montana Supreme Court coupled the mandatory class device of Rule 23(b)(2) with a novel theory of classwide injury on inherently individualized claims to authorize class litigation of damages issues without these longstanding procedural protections. In so doing, the majority added to significant and entrenched state court division on whether and how the Fourteenth Amendment constrains the use of state class procedures in actions for monetary relief.

The most pointed division concerns whether and how state courts may use Rule 23(b)(2) classes to litigate issues that prejudice individual damages claims. The decision below sides with two New Mexico Supreme Court decisions holding that, where "declaratory or injunctive relief is sought as an integral part of the relief for the class, Rule 23(b)(2) is applicable *regardless of the presence or dominance of additional prayers for damages relief for class members*." *Davis* v. *Devon Energy Corp.*, 218 P.3d 75, 82 (N.M. 2009) (quoting 2 A. Conte & H. Newberg, Newberg on Class Actions § 4:11, at 94 (4th ed. 2002)) (emphasis added); *Ideal* v. *Burlington Res. Oil & Gas Co.*, 233 P.3d 362, 364 (N.M. 2010) (same). In contrast, and consistent with this Court's pronouncements in federal class actions "predominantly for money damages," *Dukes*, 131 S. Ct. at 2558-2559, the Texas and Ohio Supreme Courts (along with several federal courts, see Pet. 24-25) have refused to certify Rule 23(b)(2) classes for declaratory or injunctive relief that would simply pave the way for damages determinations. See *Compaq Computer Corp.* v. *Lapray*, 135 S.W.3d 657, 670 (Tex. 2004); *Cullen* v. *State Farm Mut. Auto. Ins. Co.*, 999 N.E.2d 614, 623 (Ohio 2013).

In *Lapray*, the Texas Supreme Court highlighted the due process problems with attempting to "'shoehorn' [a] damages action into the (b)(2) framework, [thus] depriving class members of notice and opt-out protections." 135 S.W.3d at 670 (internal quotation marks omitted). There, as here, plaintiffs sought Rule 23(b)(2) certification to pursue declaratory relief that would "become a predicate for money damages." *Id.* at 668. The court rejected that request, explaining that it could not certify the class "without know-

ing whether class members will be provided the[] protections" of "notice and [the right to] opt-out." *Ibid.* In *Cullen*, Rule 23(b)(2) plaintiffs sought a declaration that the defendant insurers' adjustment practices violated state law, as well as a declaration "establishing the damages and remedies that are due to them." 999 N.E.2d at 623. The Ohio Supreme Court held that the class was improperly certified because an "action seeking a declaration that [the] defendant's] practices are illegal * * * merely *lays a foundation for a subsequent individual determination* of liability [and damages,] and does not satisfy the requirements for class certification pursuant to Civ. R. 23(b)(2)." *Id.* at 624 (emphasis added).[2]

Division among state courts of last resort on the due process requirements for damages class actions does not end with the foregoing disagreement over the proper use of Rule 23(b)(2) certification. For example, in one line of cases of significant concern to *amici*, numerous state courts have departed from controlling precedent in other jurisdictions by adopting a presumption of classwide reliance on allegedly fraudulent or misleading statements in actions seeking compensatory and punitive damages. See, *e.g.*, *Scott* v. *Am. Tobacco Co.*, 949 So. 2d 1266, 1277 (La. Ct. App. 2007);[3] *Wilner* v. *Sunset Life Ins. Co.*, 93 Cal.

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[2] The Ohio Supreme Court has long recognized that Rule 23 requirements are "of crucial importance in terms of ensuring due process to members of the proposed class who will not have their individual day in court." *Marks* v. *C.P. Chem. Co.*, 509 N.E.2d 1249, 1253 (Ohio 1987).

[3] This Court denied certiorari in a later phase of the case. See *Scott* v. *Am. Tobacco Co.*, 44 So. 3d 707 (La. 2010), *cert. denied sub nom. Philip Morris, USA* v. *Jackson*, 131 S. Ct. 3057 (2011).

Rptr. 2d 413, 420 (Cal. Ct. App. 2000); *Liberty Lending Servs, Inc.* v. *Canada*, 668 S.E.2d 3, 12 (Ga. Ct. App. 2008); *Varacallo* v. *Mass. Mut. Life Ins. Co.*, 752 A.2d 807, 816 (N.J. Super. Ct. App. Div. 2000); *Cope* v. *Metro. Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998). This presumption is pernicious, because it allows "individual plaintiffs who could not recover had they sued separately [to] recover only because their claims were aggregated with others' through the procedural device of the class action." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). The due process problems with such aggregation are plain.

In *Scott,* the presumption of classwide reliance on alleged misstatements about the health effects of tobacco use deprived the defendants of a full and fair opportunity to "present every available defense" to the plaintiffs' massive compensatory and punitive damages claims. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007). Notably, it prejudiced defendants' ability to show that some class members continued smoking for reasons unrelated to the alleged misrepresentations. 949 So.2d at 1277-1278. The same prejudice attended the presumptions the California, Georgia, and Ohio courts adopted, respectively, in *Wilner*, 93 Cal. Rptr. 2d at 420, *Liberty Lending*, 668 S.E.2d at 12, and *Cope*, 696 N.E.2d at 1008. And the New Jersey decision in *Varacallo* went even further, holding that "if the plaintiffs in this [class action] establish the core issue of liability, they will be entitled to a presumption of *reliance and/or causation*." 752 A.2d at 818 (emphasis added).

All of these decisions create "evidentiary presumptions to avoid having to consider individualized ques-

tions of fact on legal elements such as reliance" despite the absence of any "factual basis for presuming that a particular piece of false or misleading information had any effect on any particular consumer." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1012-1013 & n.24 (2005). In so doing, these decisions join the opinion below in abandoning traditional procedural safeguards for supposed efficiency even where, as here, the substantive law governing the plaintiffs' claims permits recovery only upon proof of "highly individualized, case-specific criteria." App. 90a (McKinnon, J., dissenting) (citing the individualized showings required for damages under M.C.A. §§ 33-18-201(1), 201(6), 242(4), and 242(5)); see also *Gonzales* v. *Mont. Power Co.*, 233 P.3d 328, 330 (Mont. 2010) (allegations of actual fraud present "specific questions of proof best resolved in individual trials"); M.C.A. § 27-1-221(2) (actual malice requires proof of injury "to the plaintiff").

These and other decisions subordinating traditional procedural protections to the expedient of class resolution are open and deliberate, with some courts going so far as to embrace a "'certify now, worry later' approach" over persistent constitutional objections. Comment, F. Ehren Hartz, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707, 708 (2009). For example, the Arkansas Supreme Court has openly "rejected any requirement of a rigorous-analysis" before class certification, reasoning that "a class can always be decertified at a later date if necessary." *Gen. Motors Corp.* v. *Bryant*, 285 S.W.3d 634, 641 (Ark. 2008).

Such decisions disregard not only due process but also the high "risk of '*in terrorem*' settlements" that preclude any opportunity to address constitutional violations later in the litigation. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011).[4] Citing this risk, this Court has "[r]epeatedly" held that "certification is proper only * * * after a rigorous analysis" of the procedural and other requirements for the proposed class claims at issue. *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted). Such analysis is necessary to ensure that state courts do not "sacrific[e] procedural fairness" or compromise substantive rights to "achieve economies of time, effort, and expense." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997). Yet the decisions above show that some state courts continue to use class actions to do exactly that. The decision below adds to the pile, and is not the first Montana Supreme Court decision to depart from this Court's precedents in authorizing unorthodox class claims.[5] The due process questions here are

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[4] See also *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail.").

[5] In *Stevens* v. *Novartis Pharmaceuticals Corp.*, the Montana Supreme Court endorsed an unprecedented expansion of the tolling rule this Court recognized in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 552-553 (1974), to allow a state class claim that would otherwise have been barred by the statute of limitations. 247 P.3d 244, 251, 256 (Mont. 2010), *cert. denied*, 131 S. Ct. 2938 (2011). In so doing, the court conceded that its holding dramatically extended *Pipe* and contradicted other state decisions on the tolling issue. *Id.* at 251, 253. But it allowed the class claims to proceed nonetheless, disregarding these objections and the concern that its ruling would prejudice

thus important and recurring, and if not addressed by this Court will continue to fuel division among state courts of last resort over constitutional limits on Rule 23(b)(2) and other significant class procedures.

II. Review Is Necessary to Protect the Constitutional Rights of a Broad Range of Litigants In an Important Category of Cases

The due process questions at issue here are of major consequence to a broad range of parties, including *amici*'s members. State damages class actions are common in a wide range of industries and are a mainstay of state consumer products litigation. They are also especially prevalent in industries, like insurance, that involve business activities tailored to state markets. Indeed, insurance is the quintessential example of an industry that must engage in such tailoring because federal law "'specif[ies] that '[t]he business of insurance' shall be recognized as a subject of state regulation.'" *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 427-428 (2003) (quoting 15 U.S.C. § 1012(a) and explaining that the "policy behind" this rule is that "continued regulation and taxation by the several States of the business of insurance is in the public interest"). Consequently, many of *amici's* members

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defendants' ability fairly to contest allegations by untold numbers of putative class members whose claims would normally be time-barred. See *id.* at 250-253.

must design products and practices adapted to state rules and practices.

State litigation involving products and practices tailored to individual states typically entails significant legal and economic exposure because it proceeds under state unfair trade or consumer protection statutes that allow massive damages awards and statutory penalties. See, *e.g.*, Cal. Bus. & Prof. Code § 17082 (West 2014) (authorizing trebling of actual damages); Fla. Stat. Ann. §§ 501.211, 501.213, 501.2075 (West 2013) (authorizing actual damages, costs, attorneys' fees, civil penalties of up to $10,000 per violation, and any other remedies permitted by law); N.Y. Gen. Bus. Law § 349 (McKinney 2014); *Midland Funding, LLC* v. *Giraldo*, 961 N.Y.S.2d 743, 752 (N.Y. Dist. Ct. 2013) (permitting plaintiffs to recover "actual damages in any amount, together with treble damages, punitive damages, and attorney's fees") (internal quotation marks omitted); *Kirkpatrick* v. *Strosberg*, 894 N.E.2d 781, 795-796 (Ill. App. Ct. 2008) (authorizing punitive damages even when supported only by nominal damages for violations of Illinois's Consumer Fraud Act); Fla. Stat. Ann. §§ 494.00792, 494.00795 (West 2013) (authorizing per-violation fines and other damages for failing to make required mortgage disclosures).

Due process concerns with state class actions under such laws are well-documented. See Part I, *supra*; S. Rep. No. 109-14, at 5 (2005) (citing evidence that state class action rules are "frequently" applied "inconsistently" or "in a manner that contravenes basic fairness and due process considerations"). And CAFA's broad federal removal provisions, 28 U.S.C. § 1332(d), may not provide access to a federal forum

where more than two-thirds of the proposed class members are residents of the state in which the action was filed. See 28 U.S.C. § 1332(d)(4).[6] In this group of cases especially, this Court's articulation of baseline due process requirements is critical to ensuring that evolving state class procedures comport with the constitutional rights of a broad range of litigants.

III. This Case Is an Ideal Vehicle for Clarifying the Due Process Requirements That Govern State Class Actions for Monetary Relief

The decision below presents an excellent opportunity to clarify the due process requirements that govern state class actions for monetary relief. The majority acknowledged the due process problems with the trial court's certification order. App. 56a-57a. But as dissenting Justice McKinnon observed, the court's attempt to solve these problems merely

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[6] Even where CAFA's removal provisions apply, some courts have allowed plaintiffs to avoid them by filing separate suits. See, *e.g.*, *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 392 (7th Cir. 2010). The circuits are split on the propriety of this "slice-and-dice" method of avoiding CAFA's removal provisions. Compare, *e.g.*, *id.*; *Scimone* v. *Carnival Corp.*, 720 F.3d 876, 879 (11th Cir. 2013) (affirming remand to state court of two complaints "contain[ing] essentially the same allegations" involving 48 and 56 plaintiffs, respectively, because CAFA's removal provision requires 100 plaintiffs); and *Romo* v. *TEVA Pharm. USA, Inc.*, 731 F.3d 918, 923-924 (9th Cir. 2013) (pet. for reh'g *en banc* granted), *with In re Abbott Labs, Inc.*, 698 F.3d 568, 573 (7th Cir. 2012); *Atwell* v. *Boston Sci. Corp.*, 740 F.3d 1160, 1164-1166 (8th Cir. 2013); and *Freeman* v. *Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407–408 (6th Cir. 2008) ("reading CAFA not to permit the splintering of lawsuits solely to avoid federal jurisdiction").

perpetuated them under a different label. The majority recast the trial court's "punitives-only" no-opt-out class as a compensatory-*and*-punitives no-opt-out class that "removes the consideration" of Allstate's individualized defenses, *id.* at 48a, from class resolution of injury, fraud and malice elements that will serve as the "foundation" for "later individual trials" on damages. *Id.* at 98a (McKinnon, J., dissenting). In so doing, the majority opinion presents due process questions this Court has addressed in federal class actions "predominantly for money damages," *Dukes*, 131 S. Ct. at 2558-2559; *Philip Morris*, 549 U.S. at 353, but that continue to divide state courts in state actions for such relief. See Part I, *supra*.

The Court should use this case to resolve that division because it is ripe for intervention, and suitable opportunities to address it are relatively rare because "[a]n order granting class certification * * * can exert substantial pressure on a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199-1200 (2013). It is no secret that a "certification decision appears to mark a turning point, separating cases and pointing them toward divergent outcomes." Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 649-650 (2006). As studies in state and federal courts consistently show, class certification orders trigger settlement in the vast majority of cases. For example, in a federal court study, "certified class actions terminated by a class settlement [at a rate of] 62% to 100%, while settlement rates * * *

for cases not certified ranged from 20% to 30%." Thomas E. Willging, *et al.*, *Federal Judicial Center, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 60 (1996) (available at http://1.usa.gov/1fPhEis) (last visited March 3, 2014). Likewise, in California, "[t]he rate of settlement after certification through a court-granted motion for certification is 69%," whereas cases that were not certified following such motions settled at a rate of 36%. Administrative Office of the Courts, *Class Certification in California* 26 (2010) (available at http://bit.ly/1d3UAeV) (last visited March 3, 2014).

The pressure to settle is especially great where non-discretionary appellate review of the certification order is limited to post-judgment review by state courts that have already approved the class procedures in issue. See generally Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking*, 58 U. Kan. L. Rev. 1027, 1028-1029 (2010). And even where due process appeals have been taken, they have thus far been complicated by case-specific vehicle problems that ultimately prevented this Court from reviewing them on the merits. See Pet. 31-32.

In this case, by contrast, the due process issues are cleanly presented and the record demonstrates their importance to both plaintiffs and defendants. As Justice McKinnon observed in her dissent, the majority's opinion "depriv[es]" absentee plaintiffs of due process by denying them "notice and opt-out rights" in a class action that could "seriously compromise[] if not totally bar[]" their individual claims if their (blatantly atypical) class representative loses some or all

of the certified issues. App. 94a (McKinnon, J., dissenting). The decision also plainly violates the defendant's due process rights because it permits compensatory and punitive damages awards without providing a full and fair opportunity to "present every available defense." *Philip Morris*, 549 U.S. at 353 (quotation omitted); see also App. 90a (McKinnon, J., dissenting) (explaining that the majority's certification decision does not sufficiently allow Allstate to contest the "highly individualized, case-specific criteria" for UTPA damages). Last but certainly not least, the decision ignores the fundamental due process goal of "allow[ing] citizens to order their behavior." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). It expands the number of jurisdictions in which individuals and businesses, including *amici's* members, cannot conduct activities without facing class adjudication of rights and issues that the Due Process Clause and state substantive law normally protect with individualized proceedings.

This Court should address these concerns by clarifying that state class actions for monetary relief, however styled, must provide absent class members with notice and opt-out rights, and must guarantee defendants a full and fair opportunity to be heard on all available defenses.

CONCLUSION

For the foregoing reasons, the Court should grant Allstate's petition.

Respectfully submitted.

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