No. 13-916

IN THE
Supreme Court of the United States

ALLSTATE INSURANCE CO.,

Petitioner,

v.

ROBERT JACOBSEN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

On Petition for a Writ of Certiorari to the Montana Supreme Court

BRIEF OF WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Date: March 3, 2014

QUESTION PRESENTED

Amici curiae address the second and third Questions Presented:

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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

REASONS FOR GRANTING THE PETITION . . . 11

I. THE LOWER COURT'S HOLDING THAT DUE PROCESS PERMITS CERTIFICATION OF MANDATORY CLASSES IN CASES RAISING MONETARY CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT 12

II. CERTIFYING CLASS ACTIONS IN A MANNER THAT PREVENTS DEFENDANTS FROM RAISING DEFENSES TO THE CLAIMS OF INDIVIDUAL CLASS MEMBERS RAISES SERIOUS DUE PROCESS CONCERNS 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases:

Carrera v. Bayer Corp.,
727 F.3d 300 (3d Cir. 2013) 24

Cullen v. State Farm Mut. Automobile Ins. Co.,
137 Ohio St. 3d 373 (2013) 1, 17

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 17

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 8

Philip Morris USA v. Williams,
549 U.S. 346 (2007) 11, 21

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) . . . . *passim*

Richards v. Delta Air Lines, Inc.,
453 F.3d 525 (D.C. Cir. 2006) 17

Scott v. American Tobacco Co.,
36 So.3d 1046 (La. App. 2010), *cert. denied sub nom., Philip Morris USA, Inc. v. Jackson*,
131 U.S. 3057 (2011) 24

Strawn v. Farmers Ins. Co. of Oregon,
350 Ore. 336 (2011),
cert. denied, 131 S. Ct. 1142 (2012) 24

Page(s)

Thomas v. Alcoser,
2011 WL 537855 (Cal. App. 2011),
cert. denied, 132 S. Ct. 518 (2012) 1

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) . . . . *passim*

Statutes and Constitutional Provisions:

U.S. Const., Amend. xiv
(Due Process Clause) . . . . *passim*

Montana Unfair Trade Practices Act (UTPA),
Ch. 320, L. 1977 . . . . *passim*
M.C.A. § 33-18-201 . . . . 3, 4
M.C.A. § 33-18-201(1) 4, 5, 21
M.C.A. § 33-18-201(6) 4, 5, 21
M.C.A. § 33-18-242(1) 4
M.C.A. § 33-18-242(5) 4, 22

M.C.A. § 27-1-221 22

Miscellaneous:

Megan E. Barringer, *Due Process Limitations on on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitations in Wal-Mart Stores Inc. v. Dukes*, 15 U. PA. J. CONST. L. 619 (2012) . . 18

Martin H. Redish & Nathan D. Larsen,
Class Action, Litigant Autonomy, and the Foundations of Procedural Due Process,
95 CAL. L. REV. 1573 (2007) 18

Page(s)

Fed.R.Civ.P. 23 . . . . 5, 10, 11, 19, 22, 23

Fed.R.Civ.P. 23(b)(2) 2, 9, 11, 15, 16, 17, 18

Fed.R.Civ.P. 23(b)(3) 2, 18

Mont.R.Civ.P. 23 5

Mont.R.Civ.P. 23(a) 12

Mont.R.Civ.P. 23(b)(2) 5, 7, 9, 12, 15, 17, 18

BRIEF OF WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. In particular, WLF advocates and litigates against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Thomas v. Alcoser*, 2011 WL 537855 (Cal. App. 2011), *cert. denied*, 132 S. Ct. 518 (2012); and *Cullen v. State Farm Mut. Automobile Ins. Co.*, 137 Ohio St. 3d 373 (2013).

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; blanket letters of consent have been lodged with the Court. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of *amici*'s intent to file.

administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs.

Amici are concerned that the decision below, by endorsing the certification of mandatory, no-opt-out classes in cases that seek substantial monetary relief, unfairly prejudices the due process rights of both absent class members and defendants. Absent class members risk being precluded from pursuing their own damages claims by a judgment against a class of which they were involuntarily made a part. Defendants risk being denied an opportunity to present individual defenses to the damages claims of each class member.

Cases of this sort—in which numerous consumers conducted unrelated transactions with a single company—rarely lend themselves to certification under Fed.R.Civ.P. 23(b)(3) (or its state court equivalents) because of difficulty in meeting the Rule 23(b)(3) predominance requirement—the requirement that common issues of fact and law "predominate" over individual issues. In response to that difficulty, plaintiffs in state court proceedings have been turning with increasing frequency to the state court equivalents to Fed.R.Civ.P. 23(b)(2) and seeking certification of mandatory classes, even when (as here) the requested relief consists predominantly of money damages. The courts in many states have followed this Court's lead in *Wal-Mart* and declined to certify 23(b)(2) classes in such cases. But others, including the Montana Supreme Court in this instance, have upheld class certification despite defense claims that certification is inconsistent

with federal due process rights.

WLF supports Petitioner's request that the Court review the decision below because it is concerned that class actions not become vehicles by which the due process rights of litigants—defendants and absent class members alike—are sacrificed based on the supposed efficiency of treating all potential claims as if they were identical.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

In 1977, Montana adopted the Unfair Trade Practice Act (UTPA), Ch. 320, L. 1977, to regulate claims settlement practices of insurance companies. The UTPA prohibits insurers from engaging in 14 specified settlement practices. M.C.A. § 33-18-201. Of relevance here are the first and sixth provisions: prohibitions against misrepresentations of "pertinent facts or insurance policy provisions relating to coverages at issue" and against failing to attempt "in good faith" to reach a fair settlement of valid claims.[2]

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[2] Section 201 provides in relevant part:

A person may not, with such frequency as to indicate a general business practice, do any of the following:
(1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue; . . .

As currently codified, the UTPA provides both insureds and "third-party claimant[s]" with a right of action for actual damages caused by violations of either § 201(1) or § 201(6). M.C.A. § 33-18-242(1). It provides an absolute defense to any such action if the insurer can show that it had "a reasonable basis in law or in fact for contesting the claim or the amount of the claim." M.C.A. § 33-18-242(5).

Respondent Robert Jacobsen was involved in a traffic accident in Montana in 2001 with an individual insured by Petitioner Allstate Insurance Co. In 2002, Allstate settled Jacobsen's claims for medical expenses and physical injuries by paying him $200,000. Jacobsen does not claim that the settlement was unfair or inadequate. He contends, however, that Allstate violated the UTPA by initially engaging in unfair settlement practices; in particular, he contends that Allstate improperly sought to convince him to settle his claims without retaining a lawyer. Indeed, he initially entered into an unrepresented settlement; Allstate later re-opened the claim after Jacobsen began experiencing more serious medical symptoms and after he retained an attorney.

Jacobsen filed suit against Allstate in 2003. Seven years later, Jacobsen for the first time sought class-action status for his lawsuit, seeking to represent a class of all unrepresented individuals whose claims were

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> (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear; . . .

M.C.A. § 33-18-201.

adjusted by Allstate in Montana since 1995. Jacobsen contended, based on internal Allstate documents from 1994-95, that Allstate had established and maintained a system of claims adjustment guidelines that uniformly misrepresented facts to claimants, encouraged claimants to settle their claims without the benefit of counsel, and constituted a violation of Allstate's duty to negotiate fair and equitable settlements.[3] Allstate appealed to the Montana Supreme Court from the trial court's order certifying a class under Mont. R. Civ. P. 23(b)(2).[4] The Montana Supreme Court's decision modifying the certification order significantly expanded its scope and magnified the due process concerns that are the focus of the Petition. Pet. App. 1a-105a.

As modified, the certified 23(b)(2) class now consists of all unrepresented claimants whose claims were adjusted by Allstate in Montana since 1995. *Id.* at 254-55. The three certified class claims are: (A) Allstate's adjusting practices "are a common pattern and practice in violation of §§ 33-18-201(1) and (6), MCA, as generally applied to the class of unrepresented claimants as a whole"; (B) this pattern and practice "resulted in damages to the members of the class" due to "decreases in the total amount of compensation paid to the class of unrepresented claimants as a whole"; and (C) "Allstate

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[3] Jacobsen refers to this alleged policy as the CCPR program (an acronym for Claim Core Process Redesign). Allstate denies that a uniform claims settlement policy existed throughout the class period, and denies that all claims were handled in a uniform manner.

[4] Rule 23 of the Montana Rules of Civil Procedure, governing class actions, contains language virtually identical to Rule 23 of the Federal Rules of Civil Procedure.

acted maliciously by applying the CCPR with the intent of lowering payouts to increase profits." *Id.* at 25a-26a, 27a, 34a, 36a.

The court held that if the plaintiff class could prove its class claims, it would be entitled to an award of injunctive and declaratory relief. Pet. App. 46a. In addition, the court stated that a finding by the trial court that Allstate violated the UTPA "would set the stage for later individual trials" regarding monetary claims. *Id.* at 36a; *see also id.* at 33a ("Damages claims may be determined in later individual trials after a class trial has determined the availability of the requested injunctive and declaratory relief.").

However, the court rejected Jacobsen's effort to have punitive damages determined on a class-wide basis. *Id.* at 54a-57a. It explained that class members who "were not actually damaged by the adjustment of their claims under the CCPR" were not entitled to recover punitive damages, and that determining punitive damages on a class-wide basis would deprive Allstate of its right to demonstrate that individual class members were not injured and thus were not entitled to seek punitive damages. *Id.* at 56a-57a. Instead, the court directed that punitive damages claims be handled as follows:

> 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, such as would justify the entry of punitive damages following a finding of actual damages in the ensuing individual cases. If the trier of fact determines

> that Allstate did not engage in either actual fraud or actual malice, the class members will be entitled to only the compensatory damages they can prove in the individual cases.

Pet. App. 64a.

The court rejected Allstate's assertion that certifying a mandatory 23(b)(2) class in a case involving substantial monetary claims would violate its due process rights. *See, e.g., id.* at 46a-47a. Indeed, as a result of the Montana Supreme Court's revisions to the certification order, monetary damages came to play an even more prominent role in the proceedings. The only damages-based class remedy certified by the trial court was an award of "class-wide punitive damages" if the trier of fact ruled in favor of the plaintiffs on the three certified claims. *Id.* at 46a. In contrast, the Montana Supreme Court held that all class members would be entitled to seek both compensatory and punitive damages on an individualized basis. *Id.* at 64a.

Three justices dissented from the majority opinion. Justice Baker, joined by Justice Rice, concluded that class certification was improper under Mont. R. Civ. P. 23(b)(2). Pet. App. 65a-71a. Justice McKinnon agreed with that conclusion. *Id.* at 72a-105a. Her dissent also concluded that the certification order violated the due process rights of absent class members "by approving a mandatory class absent notice and opt-out rights." *Id.* at 95a.

Allstate's timely petition for rehearing reiterated its due process contentions. Among other things, it argued that the Montana Supreme Court's revised

certification order violated the Due Process Clause by denying opt-out rights to absent class members, *id.* at 367a-368a, and by preventing Allstate from presenting individualized defenses to the claims of class members. *Id.* at 365a. The court denied rehearing. *Id.* at 293a-294a.

SUMMARY OF ARGUMENT

This case raises constitutional issues of exceptional importance. The Montana Supreme Court has certified a mandatory class action that will bind absent class members to a class-wide judgment regarding monetary claims, even though they have not been afforded an opportunity to opt out of the action and might not even be given notice of its existence. As the Court recognized in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), this nation has a "deep-rooted historic tradition" of granting everyone his day in court and of refusing to bind him to any court judgment unless he either voluntarily appeared as a party in that court or has been made a party by service of process. While the Court has created limited exceptions to that general rule in connection with class actions, the Court has made clear that the Due Process Clause imposes strict limits on the power of state and federal courts to bind nonparties to a class action judgment. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Review is warranted to resolve the conflict between the judgment below and this Court's "deep-rooted historic tradition" of protecting the litigation rights of those who do not directly participate in a court proceeding.

It is wholly appropriate that this due process issue is being raised by the defendant rather than by the

absent class members. If Allstate is to be put to the burden of defending a class-wide claim, it has a constitutionally protected interest in ensuring that class members will be as bound by the judgment as Allstate will be. *Shutts*, 472 U.S. at 805. The only means by which it can assure itself that any victory will not be pyrrhic is to "ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate." *Id.*

Shutts held explicitly that, in a class action involving claims "predomina[nt]ly for money damages," the Due Process Clause "requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* at 811-12 & n.3. Given the Montana Supreme Court's holding that the verdict on the class-wide claims would determine whether Jacobsen and the numerous other members of the plaintiff class would be entitled to seek compensatory and punitive damages on an individual basis, there is little question that the claims at issue here are predominantly for money damages. Yet, Montana does not permit absent class members to opt out of Rule 23(b)(2) classes. Indeed, the Court held unanimously in *Wal-Mart* that in analogous federal court actions, class certification under Fed. R. Civ. P. 23(b)(2) is improper in cases raising monetary claims, at least where such claims are not merely "incidental" to the injunctive and declaratory relief also being sought. *Wal-Mart*, 131 S. Ct. at 2560. *Wal-Mart*'s interpretation of Fed. R. Civ. P. 23(b)(2) was based to a large extent on the Court's understanding of due process limitations imposed on non-opt-out classes. Review is warranted to resolve the considerable tension between

the understanding of the court below and the *Wal-Mart* court regarding due process limitations on non-opt-out classes.

Review is also warranted to determine whether the Due Process Clause limits the authority of state courts to certify class actions in a manner, as here, that prevents defendants from raising defenses to the claims of individual class members. *Wal-Mart* held that under Rule 23 of the Federal Rules of Civil Procedure, a class "cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. But that is precisely the premise upon which the Montana Supreme Court certified the plaintiff class in this case. The claims that the court directed be tried on a class-wide basis included: (1) whether Allstate's adjusting practices violated the UTPA with respect to "the class of unrepresented claimants as a whole"; and (2) whether Allstate acted with "actual fraud" or "actual malice" with respect to the entire class—thereby rendering itself liable for punitive damages to any injured class member.

If the trier of fact decides the certified claims in favor of the plaintiff class, Allstate will be precluded from asserting (in any later individual damages proceeding involving an individual class member) that: (1) its claims adjustment practices with respect to that class member did not violate the UTPA; and (2) it did not commit "actual fraud" or act with "actual malice" against that class member. The Montana Supreme Court clearly intended class findings to have such preclusive effect; otherwise, there would have been no point in certifying a class action with respect to damages

claims. Yet, preventing a defendant from asserting defenses raises troubling due process concerns. As this Court has explained, "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Review is warranted because the Montana courts have departed radically from that tradition by permitting findings that a defendant acted wrongfully with respect to some individuals to bar the defendant from introducing evidence that its conduct toward other individuals was blameless. Review is particularly warranted because Montana is not alone: a number of state supreme courts—apparently in the name of efficiency—have endorsed short-cut class action rules that result in defendants being barred from raising individual defenses that would have been available to them outside the context of class actions.

REASONS FOR GRANTING THE PETITION

In light of *Wal-Mart*, there is no question that this case could not have been certified as a Rule 23(b)(2) class action in federal court. *Wal-Mart* held that certification of a no-opt-out class in a case raising monetary claims is unfair to absent class members, and that the defendant is unfairly prejudiced if the certification of a plaintiff class under Fed.R.Civ.P. 23 prevents the defendant from raising otherwise available defenses to individual claims. The Petition asks whether the Due Process Clause protects against the infliction of similar unfairness in state court proceedings. Review of those due process questions is warranted to resolve the conflict between

the decision below and decisions of this Court and other federal and state courts.

I. THE LOWER COURT'S HOLDING THAT DUE PROCESS PERMITS CERTIFICATION OF MANDATORY CLASSES IN CASES RAISING MONETARY CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT

The Montana Supreme Court certified a mandatory plaintiff class in this case—*i.e.*, one in which absent class members are denied an opt-out right—under Mont. R. Civ. P. 23(b)(2). Pet. App. 44a-57a. Rule 23(b)(2) provides in pertinent part:

> (b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
>
> . . . .
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

The court recognized that mandatory classes of this sort raise potential due process concerns because "a [mandatory] class that lacks homogeneity could unjustly bind absent class members to a negative decision." Pet. App. 47a. The court dismissed those concerns, however, because it determined that "[t]he individual context of any one settlement is not relevant to the adjudication of the certified declaratory relief," and none of the

individual monetary claims would be finally resolved in connection with the trial of class claims. *Id.* at 48a. Instead, those monetary claims would be resolved at "later individual trials," and the court said that Allstate would have an opportunity at the later trials "to present evidence that individual class members suffered no injury." *Id.*

That explanation, however, does not adequately address the due process rights of absent class members. While the court contemplated that the extent of damages suffered by individual plaintiffs would be determined at "later individual trials," the existence of such trials presupposes that the trier of fact will decide the certified class claims in favor of the plaintiff class. If Allstate prevails on the class claims, there will be no later individual trials, and absent class members will be bound by the trial court's determination that their rights under the UTPA were not violated by Allstate's claims adjustments policies. As the Montana Supreme Court explained, the trial of the class claims is "aimed at adjudicating the initial legality of the CCPR as applied to the class. . . . [T]he initial legality of the CCPR would not need to be relitigated in each subsequent individual trial." *Id.* In other words, the monetary claims of absent class members could be extinguished by a legal proceeding in which they have never agreed to participate and from which they are prohibited from opting out. That would be true regardless whether Allstate adjusted an absent class member's insurance claims in blatant violation of that individual's rights under the UTPA.

In her dissenting opinion, Justice McKinnon

expressly noted this due process problem, asserting that "[t]he absence of such procedural protections [*i.e.*, notice of the action and an opportunity to opt out] in a class action predominantly for monetary damages violates due process." Pet. App. 93a. The majority did not respond to her assertion.

Justice McKinnon's assertion is fully supported by this Court's case law. The Court made clear in *Shutts* that due process imposes strict limits on the power of state and federal courts to bind nonparties to a class action judgment. *Shutts*, 472 U.S. at 811-12 & n.3. In particular, it held explicitly that, in a class action involving claims "predominately for money damages," the Due Process Clause "requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.* The Court repeated that holding in *Wal-Mart*. 131 S. Ct. at 2558 (stating, "In the context of a class predominantly for money damages we have held that absence of notice and opt-out violates due process.") (citing *Shutts*).

There is little question that the claims at issue here are predominantly for money damages. Jacobsen's suit seeks an injunction that would prohibit Allstate from continuing claims settlement practices that (he contends) violate the UTPA. But he seeks to recover hundreds of thousands of dollars in compensatory and punitive damages for himself alone, and similar damages on behalf of other class members. As the Montana Supreme Court recognized, if the jury hearing the class claims finds that "the CCPR violates the UTPA," the

ensuing declaratory judgment "would set the stage for later individual trials" at which damages would be determined. Pet. App. at 36a. Thus, the fate of many millions of dollars of damages claims rests on the jury's determination of the class claims.

The Montana Supreme Court apparently concluded that this class action should not be deemed a lawsuit "predominantly for money damages" so long as the trial plan did not contemplate awarding damages on a class-wide basis. Thus, the court criticized the trial court for authorizing the jury, if it found in favor of the plaintiff class and determined that Allstate acted with actual malice or actual fraud, to award punitive damages to the class as a whole. Pet. App. 54a-55a. The court concluded that such class-wide damages awards were inappropriate in a Rule 23(b)(2) class action. *Id.* In the course of its discussion, the court noted that *Wal-Mart* had not totally "foreclose[d] the availability of monetary relief in Rule 23(b)(2) classes" but rather had "left open the possibility that incidental monetary claims could be certified under Rule 23(b)(2)." *Id.* at 55a. The court concluded that it need not decide whether it should similarly leave open the possibility that "incidental" monetary claims could be certified under Rule 23(b)(2) because it was reversing "the District Court's certification of a class-wide punitive damages award based on our concerns over the award's potential effect on the due process rights of Allstate." *Id.*

The implication of the Montana Supreme Court's statements is clear: it concluded that it could successfully avoid *Shutts*'s and *Wal-Mart*'s due process limitations on mandatory classes by certifying class claims in which the

jury does not award punitive damages on a class-wide basis. That conclusion is based on a misunderstanding of *Shutts* and *Wal-Mart*. In neither of those cases had the trial courts contemplated the award of damages on a class-wide basis. Rather, as in most class actions, the trial courts contemplated that the common issues of fact and law to be determined on a class-wide basis would not include damages. Damages awards to class members were to be determined in individual proceedings that would occur following completion of the class-wide trial of common issues. *See, e.g., Wal-Mart*, 131 S. Ct. at 2561.

This Court nonetheless deemed the class claims in both cases to be "predominantly for money damages" because the plaintiffs' principal goal in the cases was the recovery of damages—and thus the claims were not amenable to resolution in a no-opt-out proceeding. *Id.* at 2560-61.[5] Those decisions require a finding that Jacobsen's lawsuit is also one "predominantly for money damages"—and certainly not one in which damages claims are only "incidental"—regardless that no damages are to be awarded on a class-wide basis. *Shutts*'s concern was not that the rights of absent class members to a specific level of damages might be determined in a no-opt-out class proceeding, but rather was a much broader concern: the Court held that due process bars class

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[5] *Shutts* recognized that the proceedings in Kansas state courts were predominantly for money damages. In upholding Kansas's right to exercise jurisdiction over a nationwide class asserting claims against an oil company, the Court made clear that exercise of jurisdiction over absent class members would have been constitutionally impermissible had the Kansas courts not granted them an opt-out right. *Shutts*, 472 U.S. at 810-12.

adjudication of *any portion* of an absent class member's monetary claims, unless he is provided an opportunity to opt out of the class. 472 U.S. at 810-12. Because the Rule 23(b)(2) mandatory proceedings certified by the Montana Supreme Court are intended to resolve issues that serve as a predicate for any damages awards to absent class members (*e.g.*, did Allstate violate the UTPA and did it act with actual malice?), the court's due process determination directly conflicts with *Shutts* and *Wal-Mart*.

The Montana Supreme Court's apparent understanding of when a class action is "predominantly for money damages" conflicts with the understanding of numerous federal appeals courts and other state supreme courts. Each of those courts cited *Shutts*'s and/or *Wal-Mart*'s "predominantly for money damages" language as a basis for rejecting Rule 23(b)(2) class certification, even though in each of those cases the trial court contemplated that damages would be awarded on a plaintiff-by-plaintiff basis following an initial trial of class-wide liability issues. *See, e.g.*, *Cullen v. State Farm Mut. Automobile Ins. Co.*, 137 Ohio St. 3d 373, 382 (2013) ("[T]he damages in this case are not merely incidental to the declaratory relief but, rather, are the primary relief sought. The effect of a declaration on members of the proposed class could [be to] establish liability, thereby allowing an individualized award of monetary damages to each class member."); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986-87 (9th Cir. 2011); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530-31 (D.C. Cir. 2006).

Numerous legal commentators agree that certifying a Rule 23(b)(2) no-opt-out class raises serious

due process concerns whenever class findings could have a negative impact on the damages claims of absent class members. *See, e.g.,* Megan E. Barringer, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitations in Wal-Mart Stores, Inc. v. Dukes*, 15 U. PA. J. CONST. L. 619, 647-48 (2012); Martin H. Redish & Nathan D. Larsen, *Class Action, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007). These authorities further underscore the importance of this Court granting review to resolve the conflict between the decision below and the decisions of this Court and numerous other courts.

The absence of an opt-out right is, perhaps, of greater due process importance to the absent class members than to Allstate. Nonetheless, Allstate unquestionably has standing to raise the issue. *Shutts* made clear that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which plaintiffs (due to the absence of an opt-out right) would have grounds for claiming not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court had jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a

> later suit for damages by class members.

Shutts, 472 U.S. at 805. Similarly, Allstate must be permitted to complain that the Rule 23(b)(2) certification prevents absent class members, as a matter of Montana law, from being offered the right to opt out. Otherwise, Allstate would face a heads-I-win-tails-you-lose situation: a trial victory by Allstate on the class claims would accomplish little because absent class members interested in pursuing their own damages claims would likely assert that they are not bound by a judgment issued in a proceeding which they never agreed to join and from which they were not permitted to opt out.

Finally, review is warranted even if Jacobsen could plausibly argue that the compensatory and punitive damages he seeks truly are "incidental" to the requested injunctive and declaratory relief. Because class actions certified under Rule 23(b)(3) almost always involve claims for damages, that rule includes numerous procedural safeguards— including notice and the right to opt out—designed to protect due process rights. As *Wal-Mart* explained, the fact that injunctive relief may be the predominant claim in a class action does not explain why it is fair to eliminate notice and opt-out protections with respect to the damages portion of the class action:

> The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problem. We fail to see why the Rule should be read to nullify these

> protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Wal-Mart, 131 S. Ct. at 2559.

Indeed, the Court explicitly left open the question whether the Due Process Clause *ever* permits certification of mandatory classes in cases involving monetary claims, even when claims for monetary relief are only an "incidental" part of the overall complaint. *Id.* at 2560. *Amici* respectfully suggest that this case—in which the Petitioner has repeatedly asserted its federal due process rights at all levels of the proceedings—is an appropriate vehicle for the Court to address the issue left open by *Wal-Mart*.

II. CERTIFYING CLASS ACTIONS IN A MANNER THAT PREVENTS DEFENDANTS FROM RAISING DEFENSES TO THE CLAIMS OF INDIVIDUAL CLASS MEMBERS RAISES SERIOUS DUE PROCESS CONCERNS

Review is also warranted to determine whether the Due Process Clause limits the authority of state courts to certify class actions in a manner, as here, that prevents defendants from raising defenses to the claims of individual class members. *Wal-Mart* held that under federal Rule 23, a class "cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. But that is precisely the premise upon

which the Montana Supreme Court certified the plaintiff class in this case. The issues that the court directed be tried on a class-wide basis included: (1) whether Allstate's adjusting practices violated the UTPA with respect to "the class of unrepresented claimants as a whole"; and (2) whether Allstate acted with "actual fraud" or "actual malice" with respect to the entire class.

If the trier of fact decides the certified issues in favor of the plaintiff class, Allstate will be precluded from asserting (in any later individual damages proceeding involving an individual class member) that: (1) its claims-adjustment practices with respect to that class member did not violate the UTPA; and (2) it did not commit "actual fraud" or act with "actual malice" against that class member.

Yet, preventing a defendant from asserting defenses raises troubling due process concerns. "[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). The Montana Supreme Court suggested that it satisfied Allstate's due process concerns when it authorized Allstate to contest individual damages claims. Pet. App. 33a, 56a-57a. Yet, even a cursory review of the UTPA and Montana's punitive damages statute demonstrates that Allstate possesses numerous individual defenses to claims asserted under those statutes but that it will not be permitted to raise under the certification order:

- The UTPA (M.C.A. § 33-18-201(1) & (6)) prohibits an insurer, when attempting to settle a claim,

from "misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue," and requires an insurer to attempt "in good faith" to negotiate a fair settlement of claims "in which liability has become reasonably clear." Even if the jury determines that Allstate had a policy or practice of violating these provisions, Allstate would not be liable to an individual claimant if it could demonstrate that it made no misrepresentations to him; or that it made a good-faith attempt to reach a fair settlement; or that it agreed to settle even though liability was not "reasonably clear."

- The UTPA (M.C.A. § 33-18-242(5)) establishes as an absolute defense to a damages claim that the insurer "had a reasonable basis in law or in fact for contesting the claim or the amount of the claim." Even if the jury determines that Allstate had a policy or practice of violating the UTPA, it would not be liable to an individual claimant if it could demonstrate that it had a reasonable basis in law or in fact for contesting his claim.

- Montana law (M.C.A. § 27-1-221) prohibits an award of punitive damages unless "the defendant has been found guilty of actual fraud or actual malice." "Actual malice" requires a showing that the defendant has, at a minimum, deliberately acted "with indifference to the high probability of injury to *the plaintiff*." "Actual fraud" requires a showing that "the plaintiff" reasonably relied on the defendant's misrepresentation. Even if the jury determines that Allstate committed actual

> fraud or acted with actual malice against the plaintiff class, Allstate would not be liable for punitive damages to an individual claimant unless he could show that Allstate acted with indifference to the high probability of injury or that he relied on a misrepresentation made by Allstate.

As pointed out by Judge McKinnon, Allstate could raise numerous statutory defenses to any UTPA claims asserted on an *individual basis* by class members, but it is being denied the right to do so in this class action. Pet. App. 103a.

Wal-Mart held that federal Rule 23 prohibits certification of a class if the result is to deprive a defendant of its right "to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. The Third Circuit has held that the rule is constitutionally based: "A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Review is warranted to resolve the conflict between *Carrera* and the decision below.

Unfortunately, the decision below is not unique in this respect. Numerous state courts have upheld certification of classes under circumstances that prevent defendants from raising statutory defenses to individual claims, and have rejected defense claims that the procedure violates the Due Process Clause. *See, e.g., Strawn v. Farmers Ins. Co. of Oregon*, 350 Ore. 336

(2011), *cert. denied*, 132 S. Ct. 1142 (2012); *Thomas v. Alcoser*, 2011 WL 537855 (Cal. App. 2011), *cert. denied*, 132 S. Ct. 518 (2012); *Scott v. American Tobacco Co.*, 36 So. 3d 1046 (La. App. 2010), *cert. denied sub nom., Philip Morris USA, Inc. v. Jackson*, 131 S. Ct. 3057 (2011). Review is particularly warranted in light of the frequency with which state courts—even post-*Wal-Mart*—have turned a blind eye to the due process rights of defendants to raise individual defenses in certified class actions.

CONCLUSION

Amici curiae respectfully request that the Court grant the Petition.

Respectfully submitted,

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March 3, 2014