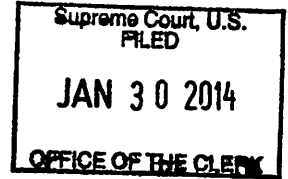


13-916



No.

IN THE
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ROBERT JACOBSEN, and all others similarly situated,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Montana**

PETITION FOR A WRIT OF CERTIORARI

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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.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner, who was defendant-appellant below, is Allstate Insurance Company.

Respondent, who was plaintiff-appellee below, is Robert Jacobsen. Jacobsen is the class representative and, as such, purports to represent a class consisting of “(1) all unrepresented claimants who made first-party or third-party claims to Allstate; (2) for an amount in excess of the applicable policy deductible; (3) for bodily injury or property damage related to an underlying motor vehicle incident or occurrence; and (4) whose claims were adjusted by Allstate in Montana to an unrepresented settlement since deployment in Montana of the various versions of the Casualty CCPR (*CCPR Implementation Manual (Tort States)*).” App. 8a-9a.

In addition, Charles Conners, an adjuster with Allstate Insurance Company, was a defendant in the trial court. The claims against Mr. Conners were dismissed by the trial court by stipulation of the parties. App. 122a n.11.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Allstate Insurance Company states that it is a wholly owned subsidiary of a publicly held corporation, The Allstate Corporation, and that no other publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Allstate Insurance Company (“Allstate”) respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Montana Supreme Court (App. 1a-105a) is reported at 310 P.3d 452. The order of the Montana Supreme Court denying rehearing (App. 293a-294a) is unreported. The order of the trial court (App. 106a-257a) is unreported.

JURISDICTION

The judgment of the Montana Supreme Court was entered on August 29, 2013. The Montana Supreme Court denied Allstate’s petition for rehearing on October 8, 2013. On December 31, 2013, Justice Kennedy extended the time within which to file a petition for certiorari to and including January 30, 2014. No. 13A640. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Allstate fully preserved its due process arguments in the courts below. See pages 7-11, *infra*. This Court has jurisdiction though “there are further proceedings in the lower state courts to come.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). The decision below is a final adjudication of the parties’ federal due process rights and the judgment is not supported by adequate and independent state grounds. Jurisdiction lies because “the federal issue has been finally decided in the state courts” and “reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.” *Id.* at 482-83. The relevant cause of action here, Jacobsen’s class claim seeking declarato-

ry and injunctive relief for an alleged violation of Montana's Unfair Trade Practices Act ("UTPA"), is "distinct from" an individual action for damages under the UTPA. App. 217a. Reversal of the decision below would preclude further litigation on the class cause of action. See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-55 (1989) (fourth *Cox* exception was satisfied where reversal of state-court order "would bar further prosecution on the RICO counts" although prosecution on other counts would proceed). Allowing this class action to proceed would seriously erode federal policy protecting the due process rights of litigants in Montana on whom the decision below is binding. See *Cox*, 420 U.S. at 483; see also *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (Rule 23(a) inquiries "constitute a multipart attempt to safeguard the due process rights of absentees").

Additionally, jurisdiction lies because the constitutional issue "will survive and require decision regardless of the outcome" below. *Cox*, 420 U.S. at 480. The decision below dictates the terms of the class certification and the trial court is not free to amend those terms on remand. Cf. *Mont. R. Civ. P. 23(c)(1)(C)*; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978). Thus, the state-court litigation will proceed under an unconstitutional class mechanism, and either Allstate (if the class prevails below) or individual class members (if Allstate prevails) will be in a position to raise these due process objections in attacking the ultimate outcome below. Moreover, the federal due process issues presented here are separate and distinct from the merits of the underlying action, and are not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); accord *Hudson Distributions, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, the Montana Code Annotated, M.C.A. §§ 27-1-221, 33-18-201, and 33-18-242, and Rule 23 of the Montana Rules of Civil Procedure, are reproduced at App. 295a-309a.

STATEMENT

The certified class approved by the Montana Supreme Court represents a radical abridgment of the parties' due process rights. Under the Due Process Clause of the Fourteenth Amendment, a named plaintiff must present claims that are typical of the class and adequately represent the interests of absentee class members; absentees must be afforded notice and the ability to opt out of any class action predominantly for money damages; and defendants must have an opportunity to raise individualized defenses, particularly with respect to awards of punitive damages. The Montana Supreme Court's decision calls into question whether these principles will apply in all class actions, state and federal, or whether, as the majority below apparently believed, state courts are free to adopt any novel alternative form of classwide adjudication that might "drive the resolution of the litigation," App. 27a, without regard to longstanding norms of procedural fairness.

The Montana Supreme Court has approved a class action under Rule 23(b)(2) of the Montana Rules of Civil Procedure that cannot be reconciled with federal standards of due process. As certified, the class is represented by a plaintiff who is ineligible to receive, and cannot benefit from, the equitable relief he seeks on behalf of the class, because he has already received what he claims class members are

entitled to—namely, a reopening and readjustment of his claim. The class members whose interests are being represented by this atypical plaintiff will be bound by the results of a class trial, even though they have no right to opt out. Moreover, the Montana Supreme Court has announced that the class action is merely the first step in a protracted litigation, the next phase of which will be numerous individual trials to determine the amounts of specific awards of compensatory and punitive damages to individual members of the class if the class representative prevails in the class trial. And, to facilitate the award of punitive damages in these later trials, the Montana Supreme Court has certified for classwide resolution the question whether Allstate is guilty of actual fraud or actual malice—the standard for awarding punitive damages under Montana law—toward the class as a whole. Classwide resolution of this question would thus preclude Allstate from asserting individualized defenses to the statutory predicate for punitive damages.

The courts of appeals and state supreme courts are hopelessly divided over whether a mandatory class action under Rule 23(b)(2) may be certified for the purpose of determining core elements of class members' claims for monetary damages, and in a manner that deprives defendants of the ability to assert individualized defenses. The division has deepened in recent years as courts on both sides of the issues have purported to honor the due process framework set forth in *Wal-Mart*. Certiorari is warranted to resolve these conflicts and to clarify that in all class actions—state and federal—the named plaintiff must represent the interests of absentees, absent class members have a constitutional right to opt out where substantial money damages are

sought, and defendants must be afforded the opportunity to present individualized defenses.

I. Jacobsen's Automobile Accident And Insurance Claim

In 2001, Respondent Robert Jacobsen was involved in a traffic accident in Montana with an Allstate insured. App. 2a, 259a. At the time, both Jacobsen and the medical professionals who initially examined and treated him reported no serious injuries. App. 318a. Allstate's claims adjuster promptly contacted Jacobsen, who stated that he did not wish to retain a lawyer but needed immediate cash for a mortgage payment, and requested that Allstate pay his lost wages. *Ibid.*; App. 152a. After some negotiation, Allstate settled Jacobsen's claim for \$3,500 with medical expenses open and payable for 45 days following settlement, in exchange for Jacobsen executing a full release. App. 153a, 259a.

Three weeks later, while mowing his lawn, Jacobsen experienced pain in his shoulder and arm. App. 154a. Jacobsen and his newly-retained lawyer contacted Allstate and demanded that Jacobsen's claim be reopened and his release rescinded. *Ibid.* Allstate agreed and later settled the reopened claim in 2002 for \$200,000 in exchange for Jacobsen executing a second release. App. 155a, 260a, 319a. Jacobsen does not claim that this settlement was inadequate or unfair. App. 319a.

II. Jacobsen's Individual Lawsuit And The Montana Supreme Court's 2009 Decision

Following his second settlement, Jacobsen retained new counsel and sued Allstate in his individual capacity in the Montana Eighth Judicial District Court, Cascade County, alleging violations of Mon-

tana's UTPA, common-law bad faith, intentional and negligent infliction of emotional distress, and actual malice. App. 260a. The trial court granted Allstate summary judgment on Jacobsen's claim for compensatory damages arising from alleged emotional distress, and the remaining claims were tried to a jury. App. 260a-261a. The jury returned a verdict for Jacobsen, awarding attorney fees and costs as "compensatory damages" and \$350,000 in punitive damages. App. 261a.

Allstate appealed to the Montana Supreme Court, and Jacobsen cross-appealed the trial court's summary judgment ruling on emotional distress and a pretrial order refusing to enforce Jacobsen's request to obtain discovery of documents concerning Allstate's company-wide claims-adjustment practices. App. 259a; see also 125a. In 2009, the Montana Supreme Court affirmed in part, reversed in part, and remanded. *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 653 (Mont. 2009). As relevant here, the Montana Supreme Court held that: attorney fees could not be awarded as compensatory damages, App. 266a-267a; the trial court abused its discretion in refusing to enforce Jacobsen's discovery request for documents purportedly concerning Allstate's company-wide claims-adjustment practices, App. 281a; and the trial court erred in granting summary judgment for Allstate on Jacobsen's claim for damages resulting from alleged emotional distress, App. 284a-286a. Having reversed the jury's award of compensatory damages, the Montana Supreme Court also vacated the punitive damages award and remanded the case for a new trial on Jacobsen's emotional distress claim. App. 285a-286a.

III. Jacobsen's Class Action Claim And The Montana Supreme Court's 2013 Decision

On remand, Jacobsen did not seek a retrial limited to his emotional distress claim. Instead, he radically transformed the case into a class action challenging Allstate's claims-adjustment practices during the past two decades. App. 132a-133a. With the trial court's leave, Jacobsen filed a Fourth Amended Complaint adding a putative class claim under Rule 23(b)(2) and (3) of the Montana Rules of Civil Procedure,¹ and seeking classwide declaratory and injunctive relief, punitive damages, and attorney fees. App. 133a-135a. He then moved to certify a class of all unrepresented individuals whose claims were adjusted by Allstate in Montana since 1995. App. 157a, 193a-194a.

Allstate opposed Jacobsen's motion for class certification on federal due process grounds. App 369a-371a (arguing, *inter alia*, that the proposed class would violate Allstate's "Due Process right to offer proof as to any or all class members to dispute [the asserted] injury"). The trial court rejected Allstate's due process arguments. App. 230a, 235a-239a, 243a-244a. Specifically, the court held that the requested injunctive relief "implicates no due process concerns" and keeps "all ordinarily attendant due process intact regarding each individual claim," App. 230a, and the requested monetary relief "comports with due process as a Rule 23(b)(2) remedy merely incidental

¹ Montana Rule of Civil Procedure 23(b) is substantively identical to Federal Rule of Civil Procedure 23(b).

to the underlying declaratory and ... injunctive relief,” App. 238a-239a, 244a.²

Thus, the trial court certified Jacobsen’s class claim alleging that Allstate’s claims-adjustment practices violated the UTPA, caused “indivisible harm to the class as a whole,” and were carried out with “actual malice.” App. 255a. The trial court also certified a broad array of class remedies under Rule 23(b)(2), including a declaration that Allstate’s claims-adjustment practices are unlawful under the UTPA; a mandatory injunction requiring Allstate to reopen and readjust the claims of all class members; “class-wide punitive damages”; and classwide attorney fees upon an award of punitive damages. App. 256a-257a.

Allstate appealed as of right to the Montana Supreme Court, see Mont. R. Civ. P. 23(f), arguing, *inter alia*, that the trial court’s class certification order violated fundamental principles of federal due process. Specifically, Allstate challenged the trial court’s holding that “the requirements of Due Process under the Montana and United States Constitutions were satisfied” even though “Jacobsen is not a member of the class certified,” “proof of Jacobsen’s claim would not prove the claims of other class members,” and “Jacobsen’s claim is subject to unique defenses not applicable to other class members.” App. 311a-312a; accord App. 324a (arguing that “Due Process protects Allstate against litigation brought by a non-representative plaintiff on behalf of a nonexistent ‘aggregate’ plaintiff class”), 328a (commonality,

² The trial court rejected Jacobsen’s “cursory,” “fall-back” request for class certification under Rule 23(b)(3), App. 213a-214a n.45, a ruling from which Jacobsen did not appeal, App. 44a.

typicality, and adequacy “are mandated by Due Process”). Allstate also argued that the certified class “could deprive any future judgment of finality and clearly prejudice Allstate’s Due Process rights” because “absent Rule 23(b)(2) class members could argue that *they* are not bound by any judgment and are free to pursue identical class claims on their own because they got neither notice nor an opportunity to opt-out.” App. 343a. In addition, Allstate argued that the certified class “violates Allstate’s Due Process right to have an opportunity to present every defense to challenge individual class member[s] entitlement to the class declaratory and injunctive relief.” App. 352a.

In a fractured 4-3 decision, the Montana Supreme Court affirmed the class certification but modified the class claim and certified class relief. App. 2a. While acknowledging that the prerequisites of typicality, commonality, and adequacy “are intended to protect the due process rights of absent class members,” App. 15a (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)), the majority held that Jacobsen satisfied the requirements of commonality and typicality—withstanding that his own “requested relief and alleged bases for damages are not entirely clear,” App. 27a—because he allegedly had been subjected to a “general business practice” that, “as applied to the class members,” was “a per se violation of the UTPA” and “caused harm to the class as a whole.” App. 27a (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)), 38a. Moreover, although individual plaintiffs must show actual damages to assert an independent cause of action under the UTPA, the majority held that individual damages claims do not preclude Rule 23(b)(2) certification because they “may be determined in later in-

dividual trials after a class trial has determined the availability of the requested injunctive and declaratory relief,” App. 33a, and the Rule 23(b)(2) class action “would set the stage for later individual trials,” App. 36a.

The majority agreed with Allstate that certifying classwide punitive damages was inconsistent with due process. App. 56a-57a. In an attempt to resolve this concern, the majority *sua sponte* modified the class claim to allege “damages to the members of the class” and ordered that the amounts of compensatory damage awards would be determined in subsequent individual trials if the class prevails on its claim for declaratory and injunctive relief. App. 34a-36a. The majority also certified for classwide resolution the question whether Allstate was guilty of “actual fraud” or “actual malice”—the prerequisite for an award of punitive damages under Montana law—towards the entire class during the entire class period from 1995 to the present by virtue of implementing its challenged claims-adjustment practices developed in the 1990s. App. 46-47a, 64a. An affirmative answer to that question will serve as the basis for awards of punitive damages in later, individual trials. App. 47a.

Three justices dissented. Justice Baker, joined by Justice Rice, expressed the view that the class was improperly certified for the purpose of laying a foundation for later individualized monetary awards, and expressed doubt over whether Jacobsen meets the requirements of typicality and adequacy. See App. 66a n.2, 70a-71a (Baker, J., dissenting). Justice McKinnon separately expressed the view that the class certification deprived class members of their federal due process rights to receive notice and opt

out of a class action predominantly for money damages. App. 72a-73a, 94a-95a (McKinnon, J., dissenting).

Allstate filed a timely petition for rehearing challenging, on federal due process grounds, the Montana Supreme Court's reformation of the class claims and certified relief. App. 358a-368a. Allstate argued that Jacobsen's inability to obtain the certified equitable relief created an unconstitutional "headless' class," App. 366a, and that "leaving the class with no true representative ... violates Due Process," App. 367a-368a. Allstate also argued that absent class members "are unable to opt out" of the certified class, in violation of due process. *Ibid.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). In addition, Allstate argued that its "Due Process right to present all defenses applies not just to punitive damages claims, but to every claim for relief." App. 365a.

The Montana Supreme Court denied rehearing over a dissent. App. 293a-294a.

REASONS FOR GRANTING THE PETITION

This case raises the fundamental question whether longstanding principles of due process that govern federal class actions have any effect in limiting the certification of class actions in state courts. In the decision below, the Montana Supreme Court repeatedly broke from settled due process precedents in a misguided effort to preserve Jacobsen's class-wide punitive damages claim. The result is a novel litigation scheme that begins with a blatantly atypical class representative, proceeds to the resolution of core elements of class members' damages claims without a right to opt out and with no consideration given to individualized defenses, and ends (if Jacob-

sen prevails in the class trial) with numerous individual trials to award compensatory and punitive damages to members of the class.

The constitutional questions raised here are vitally important both to defendants and to individuals who may find that they are members of a sprawling class like the one certified below. Do class members have a right to have their claims litigated by a plaintiff who is typical of the class and adequately represents their interests? Do class members have a right to notice and opt-out in an action predominantly for money damages? Do defendants have a right to assert the same defenses in a class action that they would be entitled to assert in an individual action? The Montana Supreme Court answered “no” to each of these questions, a view that firmly aligns Montana with an entrenched minority on these issues.

Review is warranted because the class action that the courts below have conclusively authorized conflicts with basic principles of due process long recognized in federal class actions. These due process limitations have become increasingly vital means for ensuring procedural fairness to class members and defendants in response to well-documented and growing abuses of the class action mechanism. This Court has not had a suitable opportunity to apply these principles in the context of a state class action. Despite their ubiquity, state class actions often evade this Court’s review because the specter of procedural unfairness and crippling liability typically causes defendants to settle before trial—an unfortunate reality that becomes more likely where, as here, the due process violations are especially egregious. This Court should take this opportunity to clarify that the due process principles that

safeguard the rights of defendants and class members in federal class actions apply with no less force in state class actions.

I. The Montana Supreme Court's Decision Is An Extreme Departure From This Court's Precedents On Class Action Due Process

The Montana Supreme Court has not only approved, but exacerbated, an extreme abuse of the class action mechanism. What was presented to that court as a deeply flawed but relatively limited class action certified under Rule 23(b)(2) of the Montana Rules of Civil Procedure has now become a sprawling, multi-phase experiment consisting of a mandatory, no-opt-out class action certified to lay the foundation for potentially thousands of individual trials to award compensatory and punitive damages. The class action dispenses entirely with the procedural safeguard of representativeness, adjudicates core elements of absent class members' damages claims, and expressly "removes the consideration" of Allstate's individualized defenses. App. 48a. This wholesale abrogation of the traditional norms of procedural fairness by the Montana Supreme Court "raises a presumption that its procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

A. Due Process Requires That The Class Representative Be Typical Of The Class

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Binding, classwide adjudication of legal rights and obligations is per-

missible only if the “procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit.” *Hansberry v. Lee*, 311 U.S. 32 (1940). To ascertain the requirements of due process, “traditional practice provides a touchstone for constitutional analysis.” *Honda Motor*, 512 U.S. at 430; accord *Walker v. Sauvinet*, 92 U.S. 90, 93 (1876) (due process is satisfied “if the trial is had according to the settled course of judicial proceedings”); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856) (due process is determined according to “settled usages and modes of proceeding”).

Rule 23(a) of the Montana Rules of Civil Procedure, like the identically worded Rule 23(a) of the Federal Rules of Civil Procedure, sets forth several requirements “intended to protect the due process rights of absent class members.” App. 15a. The requirements of typicality and commonality, in particular, are rooted in the ancient concept of representativeness—the common law understanding that “[i]n all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.” *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854). Courts have long honored that principle even “where the question is of general interest, and a few may sue for the benefit of the whole,” *West v. Randall*, 29 F. Cas. 718, 722 (C.C.R.I. 1820) (Story, J.); in such “cases of general right,” the question may be litigated only by those “fairly representing that right, and honestly

contesting in behalf of the whole, and therefore binding, in a sense, that right," *id.* at 723.

The Montana Supreme Court parted with these longstanding precedents by certifying a class action in which the named plaintiff, Jacobsen, fails to satisfy the threshold requirement of representativeness. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members"); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) ("a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)). That requirement is a "prerequisite" to class treatment because where it is not satisfied, as here, the resultant error infects all subsequent stages of the proceedings—skewing burdens of proof for plaintiffs, distorting procedural protections for defendants, and causing prejudice to class members whose interests are not adequately represented.

1. Montana's UTPA provides individuals with a private right of action against an insurer for "actual damages" caused by an insurer's violation of the statute. M.C.A. § 33-18-242(1). But, as the trial court found (without disagreement from the state supreme court), Jacobsen is advancing his class claim under a *different* cause of action that allows a class representative to bring a "UTPA-based Rule 23(b)(2) class action claim for declaratory and derivative non-compensatory injunctive relief" for alleged violations of the UTPA. App. 217a-218a. Under his *class* cause of action, Jacobsen seeks a declaration

that Allstate's claims-adjustment practices violate Montana law "as applied to the class as a whole," App. 41a-42a, 45a & n.8, and an injunction requiring Allstate to reopen and readjust the claims of all class members, App. 45a-46a.

There is no question that Jacobsen cannot maintain an individual action for the equitable relief he is seeking on behalf of the class. The release that he signed in 2001 has already been rescinded and his insurance claim has already been reopened and readjusted. Jacobsen has not maintained that he was underpaid after his claim was reopened. Because he is ineligible for the equitable relief that he purports to seek on behalf of the Rule 23(b)(2) class, he is not part of the certified class and lacks the "same interest" and "same injury" as the class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *Schlesinger*, 418 U.S. at 216).

2. Jacobsen also does not present a common question of law or fact. See Mont. R. Civ. P. 23(a)(2). Quite the contrary, his claim depends on individualized contentions that are incapable of classwide resolution. Whether Allstate's claims-adjustment practices can be deemed to violate Montana law rests on case-specific contentions, such as whether Allstate "misrepresent[ed] pertinent facts or insurance policy provisions relating to coverages at issue," M.C.A. § 33-18-201(1), or whether Allstate neglected to settle a particular claim "in which liability has become reasonably clear," *id.* § 33-18-201(6). The truth or falsity of these contentions cannot be determined "in one stroke," as is required for common issues of law or fact in class actions certified under Rule 23(b)(2). See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

In addition, as a predicate for punitive damages, Jacobsen seeks a declaration that Allstate acted with “actual fraud” or “actual malice” in its claims-adjustment practices between 1995 and the present. See M.C.A. § 27-1-221(1). Under Montana law, actual fraud presents “specific questions of proof best resolved in individual trials.” *Gonzales v. Mont. Power Co.*, 233 P.3d 328, 330 (Mont. 2010); see also M.C.A. § 27-1-221(4) (actual fraud limited to plaintiffs who have a “right to rely” on the representation). Similarly, actual malice is shown by proving intentional disregard of facts that create “a high probability of injury to the plaintiff.” M.C.A. § 27-1-221(2) (emphasis added). Because Montana law requires a plaintiff-specific inquiry for allegations of actual fraud and actual malice, Jacobsen again has failed to present a common question that can be determined “in one stroke.” *Wal-Mart*, 131 S. Ct. at 2551.³

3. The Montana Supreme Court held that Jacobsen is an adequate class representative because his own claim “stems from” and is “based on” his class theory that Allstate’s claims-adjustment practices constitute a “per se violation of the UTPA” that harmed “the class as a whole.” App. 39a. By approving class certification on this basis, however, the Montana Supreme Court used the class action device to vest Jacobsen with qualities that he does not individually possess. A class representative must litigate on behalf of himself, not on behalf of a “perfect plaintiff” pieced together for litigation.” *Broussard v.*

³ Although Jacobsen did not seek certification of a class claim for compensatory damages, the Montana Supreme Court *sua sponte* modified the second certified claim to require a classwide determination of whether Allstate’s claims-adjustment practices “resulted in damages to the members of the class.” App. 34a.

Meineke Disc Muffler Shops, Inc., 155 F.3d 331, 344 (4th Cir. 1998). The Montana Supreme Court has allowed Jacobsen to deploy the class action device to mask the deficiencies of his own claim in the guise of seeking relief on behalf of the class. That decision violates the due process rights of Allstate, which is entitled to litigate against actual parties and not a hypothetical “perfect plaintiff.” See *Wal-Mart*, 131 S. Ct. at 2561 (Rule 23 may not be used to enlarge or abridge substantive rights); *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam) (due process requires that class actions not be used to diminish the substantive rights of any party to the litigation). It also violates the due process rights of absent class members, who are entitled to have their legal rights and obligations litigated by a plaintiff who truly represents their claims. See, e.g., *Rattray v. Woodbury Cnty.*, 614 F.3d 831, 835 (8th Cir. 2010); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 480 (5th Cir. 2001); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

Even if Allstate’s claims-adjustment practices as applied to Jacobsen were determined to violate Montana law, that determination could not benefit other class members whose claims were adjusted using different procedures. Only some of the challenged practices apply to Jacobsen’s individual claim, yet the Montana courts have allowed him to seek relief on behalf of all claimants who allegedly “suffered a violation of the same provision of law” that “can be violated in many ways.” *Wal-Mart*, 131 S. Ct. at 2551; see App. 40a. Here again, the Montana courts have used the class vehicle to vest Jacobsen with qualities he is otherwise lacking.

In *Cullen v. State Farm Mutual Automobile Insurance Co.*, 999 N.E.2d 614 (Ohio 2013), the Ohio Supreme Court reversed a virtually identical class certification order. Cullen, the putative class representative, sought to certify a Rule 23(b)(2) class seeking a declaration that State Farm's claims practices violated state law; the declaration would have supplied the basis for individual damages awards. *Id.* at 623-24. The Ohio Supreme Court held that certification was improper where money damages were the "primary relief sought" and the predicate declaration would not have benefitted certain class members, including Cullen. As the court noted, "claimants have not demonstrated that *all class members* would benefit from the declaratory relief sought." *Id.* at 624.

The Montana Supreme Court's decision cannot be squared with *Cullen* and other decisions. As the Seventh Circuit has held, "[b]asic principles of due process prevent individual named plaintiffs from binding—through litigation or court-approved settlement—absent class members the plaintiffs do not legally represent." *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 502 (7th Cir. 2012).⁴ Permitting Ja-

⁴ Accord *Phillips v. Klassen*, 502 F.2d 362, 365 (D.C. Cir. 1974) ("[I]n order for a class action to be maintainable the representative party must adequately protect the interests of those he purports to represent. The concept is as old as the historic remedy of a class suit"); *Life of the Land v. Land Use Comm'n*, 623 P.2d 431, 444-45 (Haw. 1981) (typicality and adequacy requirements are "primarily structured to assure due process for absentees"); *Newberry Library v. Bd. of Educ.*, 55 N.E.2d 147, 153 (Ill. 1944) (in a class action, "where the substantial interests of parties present in such a suit are not necessarily or even probably the same as the interests of those they seek to represent, such parties present cannot be said to afford that protection to absent parties required by due process"); *Sw.*

cobsen to represent absentee class members in a class action to award equitable relief that Jacobsen cannot obtain himself would fundamentally alter Jacobsen's claim and violate core tenets of federal due process. Review is therefore warranted to ensure that the due process principles of typicality and commonality are respected in state as well as federal litigation.

B. Due Process Requires That Class Members Have Notice And Opportunity To Opt Out In An Action Predominantly For Monetary Damages

Under both the Federal and Montana Rules of Civil Procedure, Rule 23(b)(2) allows certification of a class action for "final injunctive relief or corresponding declaratory relief ... respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2). Because such limited relief "must perforce affect the entire class at once," due process does not require that absentee class members be afforded notice or an opportunity to opt out of the class. *Wal-Mart*, 131 S. Ct. at 2558. But this Court has recognized an important constitutional limitation on Rule 23(b)(2) class actions: "In the context of a class action *predominantly for money damages* we have held that absence of notice and opt-out violates due process." *Wal-Mart*, 131 S. Ct. at 2559 (emphasis add-

[Footnote continued from previous page]

Bell Tel. Co. v. Mktg. on Hold, Inc., 308 S.W.3d 909, 919 (Tex. 2010) (Rule 23(a) "protections are not only procedural safeguards but are based in the Due Process clauses of the United States and Texas Constitutions to ensure ... that the class representative adequately represents the[] [class members'] interests.").

ed); see also *AT&T Mobility*, 131 S. Ct. at 1751; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). That is what the court below has authorized here.

1. The Montana Supreme Court left no room for doubt that money damages are the predominant object of this litigation. Indeed, the court acknowledged that the purpose of the Rule 23(b)(2) class action is to “*set the stage* for later individual trials” to award compensatory and punitive damages. App. 36a (emphasis added); see also App. 70a-71a (Baker, J., dissenting). Moreover, to facilitate the award of punitive damages at a later stage of the litigation, the Montana Supreme Court modified Jacobsen’s class claim to allege “damages to the members of the class.” App. 34a (majority); App. 86a (McKinnon, J., dissenting). “Simply stated, this is not a Rule 23(b)(2) class.” App. 71a (Baker, J., dissenting).⁵

⁵ Jacobsen has effectively admitted that the class approved by the Montana Supreme Court violates due process. In an attempt to narrow the due process violations mandated by the judgment below, Jacobsen has proposed a trial plan that would provide absent class members with notice and an opportunity to opt out. But that relief is foreclosed by the Montana Supreme Court’s decision directing that if the class factfinder determines that Allstate violated state law, then the trial court will “determine whether [it] should enter an order requiring Allstate to provide notice to the class members of their right to re-open and re-adjust their claims.” App. 63a-64a. The trial court, on remand, “must proceed in conformity with the views expressed by the appellate court.” *Haines Pipeline Constr., Inc. v. Mont. Power Co.*, 876 P.2d 632, 637 (Mont. 1994). Even if the trial court were to disregard this aspect of the judgment below, it could not immunize the Montana Supreme Court’s decision from review by this Court because that decision continues to

In *Wal-Mart* this Court questioned whether “any forms of ‘incidental’ monetary relief” are permissible in a Rule 23(b)(2) class action. 131 S. Ct. at 2560. Even assuming, *arguendo*, that incidental monetary relief is possible in a no-opt-out class action such as this, the compensatory and punitive damages that will be litigated if Jacobsen prevails in the class trial cannot possibly be deemed “incidental” to the (b)(2) injunction.⁶ Rather, as the Montana Supreme Court candidly admitted, the individualized monetary awards are simply the remedy to be awarded after the “specifics” of each class members’ injuries are aired following a finding of harm to the class “generally.” App. 26a; see also App. 41a (“[O]ur reformation of the requested class relief will cause the specifics of Jacobsen’s injuries to be aired in a later, individual suit for damages if the court awards the requested class injunctive and declaratory relief.”).

Members of the mandatory class will necessarily have essential elements of their damages claims litigated to a binding adjudication in a no-opt-out trial, contrary to the dictates of due process as recognized by this Court. For example, an individual plaintiff’s claim for emotional distress damages would require proof of “the nature and circumstances of the wrong,”

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authorize the very constitutional violation that even Jacobsen now admits.

⁶ See, e.g., *Nationwide Life Ins. Co. v. Haddock*, 460 F. App’x 26, 29 (2d Cir. 2012) (holding that due process precludes certification of Rule 23(b)(2) class seeking non-incidental monetary relief); *In re Rodriguez*, 695 F.3d 360 (5th Cir. 2012) (noting that “individualized issues begin to predominate” when “damages enter the fray”) (internal quotation marks omitted).

Carey v. Piphus, 435 U.S. 247, 263-64 (1978)—facts that will be determined on a classwide basis under the Montana class certification order. See App. 49a (noting that the class trial “will determine whether [Allstate’s claims-adjustment practices] will be ‘enjoined or declared unlawful only as to all of the class members or as to none of them’”) (quoting *Wal-Mart*, 131 S. Ct. at 2557). That determination would bind absent class members who have no right to opt out of the Rule 23(b)(2) class. See *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 820 (7th Cir. 2011) (noting that under Rule 23(b)(2), if “the decision on the merits, adverse to the class, is affirmed, the claims of the unnamed members, as of the named members, will be barred”).⁷

This due process violation cannot be cured by allowing subsequent damages juries to revisit the class jury’s factual findings. Principles of due process require that issues of fact be decided by the first empaneled jury. See *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (“Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.”). To allow a second jury to revisit the first jury’s factual findings “would amount to a denial of a

⁷ The Montana Supreme Court drew support from *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012). *McReynolds*, however, did not consider or decide the due process question presented here; nor did it involve an atypical class representative, a compensatory damages claim created from whole cloth by the court to save a fatally flawed class, or any question of punitive damages.

fair trial.” *Ibid.*; see also, e.g., *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 245 & n.36 (Md. 2000) (splitting between class and individual juries such interrelated issues as the determinations of liability for punitive damages and liability for actual damages would give “cause for constitutional concerns”).

2. The decision below implicates an established and deepening split among federal courts of appeals and state supreme courts. The Seventh and District of Columbia Circuits and the Supreme Court of Ohio all have held that a Rule 23(b)(2) class cannot be certified in an action predominantly for monetary damages. See *Jamie S.*, 668 F.3d at 499 (“[S]uperficially structur[ing] a case around a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only, and it would certainly not be final.”); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006) (“[W]hen the relief sought would simply serve as a foundation for a damages award, or when the requested injunctive or declaratory relief merely attempts to reframe a damages claim, the class may not be certified pursuant to Rule 23(b)(2).”) (citations omitted); *Cullen*, 999 N.E.2d at 624 (“[C]laims for declaratory relief that merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages do not meet the requirement for certification as set forth in Civ.R. 23(B)(2).”). These decisions are consistent with the requirement that the injunctive relief awarded be “final.” Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2).

In contrast, the Supreme Court of New Mexico has held that even the “dominance” of claims for money damages will pose no obstacle to certifying a Rule 23(b)(2) class for injunctive relief. *Ideal v. Burlington Res. Oil & Gas Co.*, 233 P.3d 362, 364 (N.M. 2010) (“[A]s long as declaratory or injunctive relief is sought as an integral part of the relief for the class, then Rule 23(b)(2) is applicable regardless of the presence or dominance of additional prayers for damages relief for class members.”) (internal quotation marks omitted). The Montana Supreme Court has aligned itself firmly in the latter camp, approving the certification of a Rule 23(b)(2) class action that “would set the stage for later individual trials” on damages, App. 36a, even though the members of the class would receive no prior notice and have no right to opt out of the class.

The Ohio Supreme Court’s decision in *Cullen* provides an instructive contrast to the decision below. In *Cullen*, the plaintiff purported to represent a class of insureds who allegedly had been injured by State Farm’s systematic practice of dissuading claimants from replacing damaged windshields. The trial court had certified a Rule 23(b)(2) class seeking a declaration that State Farm’s practice violated state law and a declaration that “damages and remedies ... are due” to members of the class. 999 N.E.2d at 619, 623; cf. App. 34a (modifying class claim for a declaration that Allstate’s claims practice “resulted in damages to the members of the class”). The Ohio Supreme Court held that the class could not be certified, even where “[t]he effect of a declaration on members of the proposed class could establish liability, thereby allowing an individualized award of monetary damages to each class member.” 999 N.E.2d at 624. That result is compelled by federal

due process, and the Montana Supreme Court's decision is in direct conflict with *Cullen* and the other authorities cited above.

This Court's review is warranted to provided much-needed guidance on the contours of class members' due process rights in a Rule 23(b)(2) class action seeking money damages. The Court should make clear that in state class actions as well, due process forbids certifying a mandatory class for the purpose of laying a foundation for individualized damages awards.

C. Due Process Requires That Class Actions Permit Adjudication Of Individualized Defenses

"Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). This basic principle is particularly true for claims seeking punitive damages, a subject that implicates heightened due process protections. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). "[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. The decision below contravenes this principle.

1. The decision below deprives Allstate of its due process right to present every available defense to disputed questions of liability for punitive damages. Under the scheme mandated by the court below, the class trier of fact will determine whether claims-adjustment procedures allegedly implemented in 1995 constituted "actual fraud" or "actual malice" with respect to a class of claimants spanning nearly 20 years. See M.C.A. § 27-1-221(1). But those prac-

tices changed over time and necessarily varied in individual applications. In an individual lawsuit, a plaintiff would have to show that Allstate acted with actual fraud or actual malice in processing *that individual plaintiff's* claim, which may have been submitted many years after 1995 and adjusted using different procedures than those contemplated in documentation from 1994 and 1995. Allstate is entitled to challenge each plaintiff's ability to show actual fraud or actual malice at the time each claim was submitted. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (punitive damages can be awarded only for "conduct that harmed the plaintiff"). Montana's one-size-fits-all approach to proving actual fraud or malice violates Allstate's due process rights by precluding its ability to offer individualized defenses.

Under Montana law, actual fraud requires that the plaintiff "has a right to rely upon the representation of the defendant," M.C.A. § 27-1-221(4), and "whether a party has a right to rely upon another's representation could create specific questions of proof best resolved in individual trials," *Gonzales*, 233 P.3d at 330. In the certified Rule 23(b)(2) class, however, Allstate will be denied its right to raise such individualized questions of proof.

Similarly, actual malice requires proof that the defendant intentionally disregarded "a high probability of injury *to the plaintiff*." M.C.A. § 27-1-221(2) (emphasis added). As certified, however, the question has become whether there is a "high probability that the net effect of" Allstate's business practices would cause harm "*to the class as a whole*." App. 8a (emphasis added). This Court has held that an "unforeseeable and retroactive judicial expansion of nar-

row and precise statutory language” can violate due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Here, the Montana Supreme Court has unconstitutionally used the class certification device to deprive Allstate of defenses otherwise available under the statutory standard for malice and simultaneously dispensed with the requirement that *each* member of the class must have suffered a common injury. *Wal-Mart*, 131 S. Ct. at 2551.

Allstate has a due process right to challenge the factual basis for *each* class member’s punitive-damages claim. By divorcing the classwide determination of actual fraud or actual malice from individual awards of punitive damages, however, the Montana courts have severed the required “nexus to the specific harm suffered by the *plaintiff*.” *State Farm*, 538 U.S. at 409-10 (emphasis added). This result violates due process.

2. Allstate has also been deprived of its right to present every available defense to a finding of liability for the alleged statutory violation. The Montana courts certified a class based on Jacobsen’s contention that Allstate’s claims-adjustment practices, as contemplated in documents from 1994 and 1995, constitute a per se violation of M.C.A. § 33-18-201(1) or (6). See App. 27a. But the certified class conflates two decades of claims handling, unconstitutionally depriving Allstate of individual defenses to liability that would apply to claims adjusted after 1995 using different procedures. In an individual action for damages stemming from a violation of this statute, a plaintiff would be required to prove case-specific facts—for example, that Allstate’s liability to the insured had become “reasonably clear,” M.C.A. § 33-18-201(6)—and Allstate would be permitted to raise in-

dividual defenses. Allstate must be permitted to defeat individual claims by pointing to specific examples involving specific plaintiffs for whom its claims-adjustment practices produced results that comport with Montana law. The decision below denies Allstate this right by decreeing that the lawfulness of Allstate's claims handling over two decades will be determined on a classwide basis in light of practices allegedly employed in 1995.

Montana's unorthodox procedure stands in stark contrast to the Third Circuit's recent holding that "[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). Consolidation devices, such as the class action mechanism, cannot "change the rights of the parties" or "have the effect of merging the rights of some parties with those of others." *Garber v. Randell*, 477 F.2d 711, 715 (2d Cir. 1973) (quoting *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933)). The Montana Supreme Court's class certification decision breaks from this longstanding principle as well, necessitating this Court's review.

II. The Questions Presented Are Recurring And Important, And This Case Is An Ideal Vehicle To Ensure That Due Process Principles Are Respected In State Class Actions

Issues surrounding class certification are exceptionally important to courts and civil litigants. The due process principles implicated here—representativeness, notice and opt-out, and the right to present defenses—are central to these issues and of recurring national importance, as this Court's recent deci-

sions have shown. In *Wal-Mart* this Court unanimously reaffirmed that due process is an important constraint on class certification under Federal Rule of Civil Procedure 23, and some states, including Montana, have taken steps “to bring more uniformity” between state rules on class certification and their federal counterpart. See App. 66a (Baker, J., dissenting) (noting that Montana’s Rule 23 is “identical in all substantive respects with Rule 23 of the Federal Rules”). But, as the Montana Supreme Court’s decision demonstrates, some state courts continue to resist the implications of this Court’s due process precedents in certifying class actions, particularly those seeking monetary damages.

State class actions are particularly susceptible to abuse because they are not directly governed by the Rules Enabling Act, which guarantees that Rule 23 of the Federal Rules “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). Many state courts evade constitutional review by cloaking their decisions in state-law garb, resulting in widely disparate standards of procedural fairness for parties in state class actions. Congress acknowledged this problem in enacting the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), which expands federal diversity jurisdiction for certain types of multistate class actions. See Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4 (finding “abuses of the class action device”); see also S. Rep. No. 109-14, at 4 (2005) (finding that “most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements”). That statutory remedy,

however, affords scant protection in cases such as this, where the certified class is carefully tailored to fall primarily within state boundaries. See 28 U.S.C. § 1332(d)(4).

In recent Terms, in a variety of contexts, this Court and individual Justices have acknowledged national concern over abuse of the class action mechanism. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). Granting this petition would afford the Court an excellent opportunity to clarify that the due process principles enunciated in its precedents are not merely “best practices” for class adjudication in the federal courts, but essential guarantees of procedural fairness in all class action litigation, state and federal.

Although several decades have passed since this Court applied federal due process principles in reviewing a state-court class action,⁸ the issue is undoubtedly important and recurring. Indeed, on several prior occasions this Court has granted certiorari to review due process questions similar to those presented here, only to encounter case-specific vehicle problems that prevented the Court from reaching the issue and warranted dismissal. In *Ticor Title Insurance Co. v. Brown*, for example, the Court granted

⁸ *Phillips Petroleum*, 472 U.S. at 799; cf. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (due process precludes binding state class members by res judicata effect of prior action in which they were not parties).

certiorari to consider “[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.” 511 U.S. 117, 120-21 (1994) (per curiam) (internal quotation marks omitted). The Court ultimately was compelled to dismiss the writ after it became clear that, under the unique circumstances of that case, even the parties themselves may not have benefitted from resolution of the constitutional question. *Id.* at 122.

The Court again attempted to reach the due process issue in *Adams v. Robertson*, where certiorari was granted to review whether a state court’s approval of a mandatory settlement class for damages, “without affording all class members the right to exclude themselves from the class or the [settlement] agreement, violated the Due Process Clause of the Fourteenth Amendment.” 520 U.S. 83, 85 (1997) (per curiam). There again, however, the Court found it necessary to dismiss the writ when it became clear, after argument, that the petitioners had not met their burden of showing that the issue had been decided by or properly presented to the state’s highest court. *Id.* at 86.

In contrast to *Ticor* and *Adams*, this case presents no vehicle problems that would bar this Court’s review of the constitutional questions conclusively decided by the Montana Supreme Court. Indeed, the Montana Supreme Court’s *sua sponte* reformation of the certified class claims and class relief, and its creation of multi-phase litigation scheme consisting of a Rule 23(b)(2) class action followed by numerous individual damages trials, is the source of many of the

due process issues that Allstate promptly raised in its petition for rehearing and now presents here. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2600 n.4 (2010) (plurality) (where state supreme court decision itself constitutes a violation of federal law, issues presented in rehearing petition are properly preserved); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge . . . in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."). A state supreme court cannot insulate its rulings from this Court's review by denying key procedural protections for the first time in its own pronouncements.

Montana's constitutional offense cannot be resolved or mooted in subsequent proceedings before the state's lower courts. The Montana Supreme Court has spoken on the due process issues presented here, and all that remains is for the trial court to carry out the litigation scheme that Montana's highest court has directed. See App. 63a-64a. The trial court is not free to alter or amend that scheme, cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.11 (1978), and there is no possibility that the trial court will be subjected to conflicting appellate guidance under Montana's two-tier judiciary.

This case is therefore the ideal vehicle for this Court to provide much-needed guidance on the boundaries of federal due process in state class actions. Now in its second decade, this litigation perfectly illustrates the many types of procedural unfairness that defendants and class members often face in state class actions but that infrequently rise to this Court's attention. The Court should seize this

valuable opportunity to clarify the due process principles that govern state class actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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