14-910

No.

IN THE
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

JACK JIMENEZ, individually and on behalf of other members of the general public similarly situated,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding, in conflict with decisions of the Second, Fifth, Eighth, and Eleventh Circuits, that the requirements of Federal Rule of Civil Procedure 23 are satisfied by purportedly "common" questions that do not resolve the defendant's liability as to any individual class member and would require hundreds of separate follow-up trials.

2. Whether the court of appeals erred in holding that Rule 23 and the Due Process Clause permit class-wide resolution of a defendant's liability through a class process that prevents the defendant from raising individualized defenses in the liability phase.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Respondent, who was plaintiff-appellee below, is Jack Jimenez. Jimenez is the class representative and, as such, purports to represent a class consisting of "All current and former California-based 'Claims Adjusters,' excluding Auto Field Adjusters, who work(ed) for Allstate Insurance Company within the State of California at any time during the period from September 29, 2006, to final judgment, and who, as a result of Allstate's compensation polices, were not paid overtime compensation for all hours worked in excess of eight hours per day or 40 hours per week." App. 67a (internal quotation marks omitted).

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 United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 765 F.3d 1161. The order of the court of appeals denying rehearing and rehearing en banc (App. 69a-70a) is unreported. The order of the district court (App. 17a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2014. The court of appeals denied a timely petition for rehearing and rehearing en banc on October 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, the Rules Enabling Act, 28 U.S.C. § 2072, and Federal Rule of Civil Procedure 23 are reproduced at App. 71a-79a.

STATEMENT

In this case, respondent sought to certify a class of Allstate employees to challenge Allstate's alleged failure to pay overtime under California law. Despite Allstate's facially lawful overtime policies and the necessarily individualized nature of the question whether any given employee actually worked unpaid

overtime, respondent asserted that class certification was appropriate because of the alleged existence of unofficial, unwritten policies by which local managers would "pressure" employees to work uncompensated overtime. The Ninth Circuit held that these alleged common policies presented a sufficiently "common" question to satisfy Federal Rule of Civil Procedure 23, even though proving the mere *existence* of such alleged policies would not resolve the ultimate liability issue of whether any or all individual class members *succumbed* to the pressure and in fact performed any uncompensated work. Indeed, establishing that the alleged policies existed and were applied exactly as respondent asserts could not answer, for instance, the extent (if any) to which individual class members worked unreported overtime, their motivations for doing so, or the extent to which they concealed any off-the-clock time from their supervisors. In other words, respondent's proffered "common" questions cannot resolve the key disputed elements of the underlying cause of action as to any individual class member—much less the entire class.

In *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court held that Rule 23 requires the existence of at least one common question with the capacity to "resolve an issue that is *central to the validity of each one of the claims* in one stroke." *Id.* at 2551 (emphasis added). And in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), this Court held that Rule 23(b)(3) bars class certification where, as here, individualized damages issues predominate over allegedly common issues. *Id.* at 1433. In the decision below, however, the Ninth Circuit held that under *Wal-Mart* and *Comcast*, Rule 23 is satisfied by (and authorizes class-wide resolution on the basis of) purportedly "common" questions that do not actually an-

swer the question whether the defendant is liable to any individual class member. In so holding, the Ninth Circuit restated its view that—notwithstanding that predominance was defeated by individualized damages issues alone in *Comcast*—"in this circuit . . . damage calculations alone cannot defeat class certification." App. 13a (quoting *Leyva* v. *Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir. 2013)).

Those conclusions are directly contrary to the rulings of several other circuits. The Second, Fifth, Eighth, and Eleventh Circuits have taken this Court's decisions in *Wal-Mart* and *Comcast* to heart, holding that certification requires the existence of common questions that are actually capable of resolving liability, and that "the predominance requirement requires a district court to consider *'all* factual or legal issues.'" *Myers* v. *Hertz Corp.*, 624 F.3d 537, 550 (2d Cir. 2010) (quoting *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006)). Review is necessary to resolve this circuit conflict over the meaning and scope of Rule 23's commonality and predominance requirements for class actions nationwide.

Furthermore, the court below compounded its error by adopting an approach to class certification that conflicts with precedents of this Court and other appellate courts holding that defendants have a due process right to raise individualized defenses at all stages of class proceedings—when liability is assessed no less than at the damages phase. The Ninth Circuit approved a not-yet-developed statistical sampling method of proving class-wide liability, even though such a method would indisputably preclude Allstate from raising its individualized defens-

es to liability and thus runs headlong into this Court's prohibition against "trial by formula" for class-wide liability proceedings. *Wal-Mart*, 131 S. Ct. at 2561. What is more, the court below offered the deeply flawed justification that Allstate retained the ability to raise claimant-specific defenses at the *damages* phase. But these rights are not interchangeable: The theoretical opportunity to mitigate damages on a claimant-specific basis against the highly prejudicial backdrop of a prior class-wide liability determination is not functionally equivalent to the opportunity to raise individualized defenses that could defeat liability entirely as to specific class members.

The Rules Enabling Act precludes using class action rules to alter substantive rights. *See* 28 U.S.C. § 2072(b). Yet that is precisely what the Ninth Circuit's ruling does here: It creates a Rule 23 paradigm in which class members may prevail on "liability" without any class-wide proof that class members actually succumbed to the supposed "unofficial policy" to pressure them to work uncompensated overtime. It denies Allstate the right to prove that particular class members worked no overtime or otherwise were unaffected by the supposed policy. Instead, it transfers all defenses by fiat to the "damages phase," which it then declares categorically irrelevant to certification. This paradigm defies this Court's rulings in *Wal-Mart* and *Comcast*, and it conflicts with the rulings of multiple circuits. It warrants this Court's review.

1. Respondent worked as a casualty adjuster for Allstate from 2006 until September 2010. App. 24a. In 2010, respondent filed a class action against Allstate on behalf of current and former California

claims adjusters, alleging, as relevant here, that Allstate violated various provisions of the California Labor and Business and Professions Codes by failing to pay overtime to its California-based adjusters. App. 28a.

California employers are required to pay non-exempt employees "for all time the employer 'engage[s], suffer[s] or permit[s]' such employee[s] to work." App. 30a (quoting *Morillion* v. *Royal Packing Co.*, 995 P.2d 139, 145 (Cal. 2000)). Drawing heavily on federal precedent applying the Fair Labor Standards Act ("FLSA") in similar cases, *Morillion*, 995 P.2d at 145, California courts recognize three elements to establish a violation of this obligation: "'(1) [that the plaintiff] performed work for which he did not receive compensation; (2) that defendants knew or should have known that plaintiff did so; but that (3) the defendants stood idly by.'" App. 9a (citation omitted).

Allstate's California offices employ roughly 1,300 claims adjusters who are supervised by individual managers at each location, subject to corporate-wide policies. App. 3a, 20a-21a. There are approximately 86 different local managers supervising claims adjusters across California. App. 21a. Adjusters can specialize in one of five categories of claims—Auto, Liability Determination, Casualty, Property, or Special Investigations. App. 20a-21a. The substance of individual adjusters' work varies not only by the category of claims they handle, but also by whether they work primarily in a specific office ("inside" adjusters) or in the field ("outside" adjusters). App. 21a-22a.

Inside adjusters are assigned to an office and "are subject to more immediate supervision and more interaction" with their managers. App. 22a. Local

managers generally set work schedules for the inside adjusters they supervise. *Ibid.* Outside adjusters, by contrast, generally "do not report to a specific office" and "work with less immediate supervision than inside adjusters." App. 21a. Also unlike inside adjusters, outside adjusters receive work assignments from a software system, which is "designed to facilitate an eight-hour workday by scheduling a set number of inspections to be completed each day," taking into account various factors that could affect the time needed per inspection, and that automatically "inserts a one-hour block of unscheduled time in the middle of the work day in anticipation of the meal and rest breaks that are to be provided to claims adjusters." App. 22a.

Claims adjusters' day-to-day responsibilities, as well as "the level and quality of claims adjusters' interaction with managers," can accordingly vary significantly across each of these categories. App. 3a. And even within the same categories, the workload of individual adjusters can vary still more based on whether a "claimant is represented by an attorney," as well as the occurrence of "[e]xternal factors, such as the season, weather, natural disasters, and geographic region." App. 23a.

In 2005, Allstate reclassified all of its California adjusters to hourly status, as opposed to its prior treatment of their positions as salaried. App. 3a-4a, 24a-25a. In 2008, Allstate "implemented formal workload balancing measures," by which a computer "distributes new claims files to adjusters depending on their respective skills sets, geographic locations and workloads," as opposed to Allstate's previous system in which new claims were distributed manually at each location. Respondent alleges that claims

adjusters frequently worked more than an ordinary 8-hours-per-day, 40-hours-per-week schedule before the reclassification, and that (despite Allstate's workload balancing measures) workload expectations for California adjusters have remained generally the same since. App. 24a-25a.

Claims adjusters are paid using a timekeeping system that reflects a regular weekly work schedule of 8 hours per day, 40 hours per week. App. 25a. When adjusters work more or less than this norm, they report these "exception[s]" or "deviation[s]" to their local manager. *Ibid.* Respondent does not allege that Allstate has ever failed to pay a claims adjuster for time worked in excess of 40 hours where that time was entered pursuant to this procedure, and in fact conceded that each local office has a compensation budget designed to include overtime pay, with "no specific limit as to how much of that total compensation budget can be used" for that purpose. App. 27a; *see also* App. 34a ("Plaintiff and other declarants who support Plaintiff's motion admit that they have been paid overtime; they do not claim that overtime is never paid."). Additionally, Allstate maintains uniform, written policies regarding overtime and work schedules that indisputably comply with all relevant laws by requiring payment for all time worked by claims adjusters, including overtime. App. 26a-27a, 33a-34a.

Under respondent's theory of the case, however, Allstate maintains an unofficial policy contrary to these written policies that "pressures" claims adjusters to work "off-the-clock," that is, beyond 40 hours a week, in order to meet workload expectations for their positions—but not to report or otherwise seek compensation for this overtime. App. 31a-32a, 43a-

44a. Respondent alleges that local office managers have "incentives to avoid paying overtime" because they are responsible to maintain "nonnegotiable compensation budget[s], which create[] a functional limit on the amount of overtime a manager may approve." App. 4a, 31a. These factors allegedly "creat[e] a culture that discourages the reporting of overtime" and encourage managers to "turn[] a 'blind eye' to the unpaid overtime actually worked." App. 31a.

2. The United States District Court for the Central District of California certified a class of current and former California-based claims adjusters with respect to the alleged off-the-clock claims. App. 66a-68a. When considering Rule 23(a)(2)'s requirement that a class action must involve "questions of law or fact common to the class," the district court certified three purportedly "common" questions: (1) "whether class members generally worked overtime without receiving compensation as a result of [Allstate's alleged] unofficial policy of discouraging reporting of such overtime"; (2) whether Allstate "knew or should have known that class members did so"; and (3) whether Allstate "stood idly by without compensating class members for such overtime." App. 5a.

The district court acknowledged the lawfulness of Allstate's uniform written policy regarding overtime pay, but stated that "this showing does not end the inquiry" because "[p]laintiff's theory is that Defendant has a common practice of not following its official policy." App. 34a. The court noted that Allstate presented evidence demonstrating "that adjusters were always paid for reported, worked overtime, and that some adjusters claim they never worked without compensation . . . , which contradicts

any claim of a common policy." *Ibid.*; *see also* App. 38a ("[Allstate] also present[ed] a number of competing declarations . . . to support the claim that other putative class members were capable of performing their work within an eight-hour work day and 40-hour week, and that they did not work off-the-clock or feel pressure to work without compensation.").

The district court also found "some merit" to Allstate's insistence "that the class is overbroad and lacks commonality because it includes all different types of claims adjusters, including inside and outside adjusters, adjusters in different offices, and adjusters working under different supervisors." App. 43a. Nevertheless, the district court looked to declarations from seven claims adjusters selected by respondent who stated that Allstate's "'management methods' have a profound effect on [their] work behavior," App. 36a, to conclude that "common questions" existed regarding "whether" Allstate had a "widespread practice of not following its policies regarding overtime" and whether Allstate should have known that adjusters "were working off-the-clock" and taken corrective steps with respect to such adjusters. App. 40a-41a.

With respect to Rule 23(b)(3)'s predominance requirement, the district court acknowledged that "overtime claims may present a number of individualized questions, including whether individual employees worked off-the-clock." App. 60a. But the court concluded that in light of the small size of the alleged class—which it estimated at 1,129 adjusters—the purportedly common question of whether there was a "'policy to violate the policy'" answered the predominance inquiry as well, providing the necessary "glue" to hold the class together. App. 60a-

62a; *see also* App. 57a ("The core of the predominance analysis is addressed in the foregoing discussion concerning commonality."). In finding that certification was appropriate on "issues of liability," the district court declined to "determine[] how the damages phase of a trial might proceed." App. 64a. The risk that damages calculations would render the class unmanageable, the court noted, "is better addressed down the road." *Ibid.* (quoting 2 *Newberg on Class Actions* § 4:26 (4th ed.)).

The district court also rejected Allstate's objections to a hypothetical statistical sampling method that respondent intends to use to establish liability. App. 45a-52a. Respondent provided expert testimony about "the propriety of survey research methods" that could ostensibly be used to shed light on the existence and effects of Allstate's alleged unofficial "pressure" policy, as well as the "feasibility of making class-wide determinations of liability and damages by using statistical sampling." App. 46a. Although this witness had neither developed nor implemented such a survey, he opined about the type of "questions that *could* be posed to a representative sample of class members." *Ibid.* (emphasis added). Allstate argued that this proposal to establish class-wide liability by statistical sampling would eliminate its right to bring individualized defenses and thus would violate the prohibition against "'Trial by Formula.'" App. 47a-48a (quoting *Wal-Mart*, 131 S. Ct. at 2561). The district court ruled, however, that this "shortcoming" in respondent's proposed evidence was "not sufficient to preclude class certification with respect to liability" and did not preclude a finding that common issues predominate. App. 51a-52a.

3. The court of appeals affirmed. App. 1a-16a. The court first rejected Allstate's argument that the class certification order violates Rule 23(a)(2)'s commonality requirement. The court asserted that "[e]ach of the three common questions recognized by the district court will drive the answer to the plaintiffs' claims on one of [the three] elements of their claim." App. 9a. With respect to the first element—whether individual class members actually performed uncompensated overtime—the court stated that "[p]roving at trial whether [the alleged] informal or unofficial policies existed will drive the resolution" of that liability question, *ibid.*—even though proving whether an unofficial policy existed would not answer whether or to what extent individual class members *responded* to that policy.

The court of appeals rejected Allstate's argument that a myriad of individualized circumstances would still affect the ultimate liability determination for each class member even if the purportedly "common" questions about Allstate's alleged "pressure" policy were resolved in respondent's favor. Allstate Opening CA9 Br. 24-32. Moreover, the court refused to entertain Allstate's individualized challenges to plaintiffs' purported evidence of the unofficial "pressure" policy—such as evidence that various individual employees did not work more than *de minimis* amounts of overtime, were compensated for overtime that they did work, or concealed any overtime they worked from Allstate. App. 11a n.7.

The Ninth Circuit also concluded that the class satisfies Rule 23's predominance requirement. The court suggested in a footnote that Allstate had "waived" the predominance issue, App. 7 n.4, notwithstanding Allstate's extensive discussion of pre-

dominance in its opening brief, Allstate Opening CA9 Br. 18-19, and its repeated and express arguments that the purportedly "common" questions "do not meet the requirements of Rule 23(b)(3) because individual questions predominate, including why each individual worked off-the-clock and whether the company had knowledge of each incident," *id.* at 24; *see also id.* at 41 ("[t]he district court erred . . . in failing to recognize that these same concerns [of whether individualized issues predominate with respect to damages] apply equally, if not more so, to proving liability").

Ultimately, however, the court of appeals addressed the predominance issue on the merits, agreeing with the district court that, in light of plaintiffs' theory, resolution of the commonality inquiry suffices to dispose of predominance objections as well. App. 7a n.4 (noting it "would affirm the district court's predominance holding for many of the same reasons that we affirm the result of its commonality analysis").

Indeed, the Ninth Circuit went on for several additional pages in an effort to demonstrate that the class in this case is consistent with *Comcast*, which, as the court acknowledged, had "[r]evers[ed] the Third Circuit's affirmance of class certification under Rule 23(b)(3)." App. 12a. In this connection, the court of appeals relied extensively on *Leyva* v. *Medline Industries, Inc.*, 716 F.3d 510 (9th Cir. 2013) (Pregerson, J.), a post-*Comcast* decision also involving wage-and-hour claims. The district court in *Leyva* had concluded that the requirements of Rule 23(b)(3) were not met because individual issues, particularly as to damages, would predominate over any common questions. The Ninth Circuit reversed the

denial of certification, reasoning that since damages are almost always individualized, it is legal error to rely on damage issues to deny certification. *Id.* at 514. The Ninth Circuit reiterated that holding here, explaining that "'[i]n this circuit'" individualized damage issues "'cannot defeat class certification.'" App. 13a (citation omitted). The court also discussed several post-*Comcast* decisions addressing predominance under Rule 23(b)(3), which it viewed as "[s]imilar" to its approach. App. 13a-14a (citing, *inter alia*, *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert denied*, 134 S. Ct. 1277 (2014)).[1]

The Ninth Circuit also rejected Allstate's arguments that the certification order violated its due-process rights by eviscerating its ability to raise individualized defenses to liability at trial, both by certifying a liability class based on "common" questions that do not resolve liability as to individual class

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[1] Because Allstate expressly and repeatedly challenged the district court's predominance ruling before the Ninth Circuit, the panel below was clearly wrong to suggest that the issue was "waived." In any event, however, the panel's views on that question present no impediment to this Court's ability to review the certification question *in toto*, because the Ninth Circuit ultimately resolved the predominance question on the merits and endeavored at length, albeit unsuccessfully, to square its conclusion with this Court's analysis of Rule 23(b)(3) in *Comcast*. *See, e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (certiorari proper where question was either "'pressed or passed upon below,'" and "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed on below so long as it has been passed upon" (citation omitted)).

members and by permitting an as-yet undeveloped sampling plan to prove class-wide liability. App. 11a-16a. The court of appeals recognized that this Court has repeatedly affirmed class-action defendants' right to individualized determinations of questions central to liability. App. 11a-12a (citing *Wal-Mart*, 131 S. Ct. at 2560; *Comcast*, 133 S. Ct. 1426). Nevertheless, it held that "none of the problems identified by [*Wal-Mart*] or *Comcast* exist in the district court's certification order," because "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." App. 12a. The court also rejected Allstate's challenge to the substance of the hypothetical sampling plan because it deemed any such argument to be "appropriately made at trial or at the summary judgment stage, as it goes to the merits of the plaintiffs' claim." App. 9a n.5; *see also* App. 11a n.7.

The court of appeals was untroubled by the fact that the sampling approach would eliminate Allstate's right to present individualized defenses to liability, such as the defense that individual employees worked at most *de minimis* uncompensated time, or that managers did not have actual or constructive knowledge that particular employees worked off-the-clock. App. 11a n.7, 12a. The court dismissed the danger that Allstate could be subject to a *class-wide liability* judgment based on the work habits and personal motivations of a mere sample of the class, reasoning that "the district court was careful to preserve Allstate's opportunity to raise any individualized defense it might have *at the damages phase* of the proceedings." App. 15a (emphasis added). The court held that this "opportunity" to address *damages* issues defeated Allstate's argument that it was enti-

tled to raise individualized defenses to *liability*. *See ibid.* (holding that the district court's refusal to allow "representative testimony and sampling at the damages phase" "preserved both Allstate's due process right to present individualized defenses to damages claims and the plaintiffs' ability to pursue class certification on liability issues").

Allstate sought rehearing and rehearing en banc. The court of appeals denied Allstate's petition on October 29, 2014. App. 69a-70a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision creates a circuit conflict on the question whether a district court may, consistent with Rule 23, certify a class on the basis of purported "common" questions that cannot actually resolve the defendant's liability to any class member, and which instead leave the bulk of all questions that actually affect liability to ascertainable class members (including all defenses and any consideration of damages) for later resolution under as-yet-unidentified procedures and criteria. In addition, the decision is irreconcilable with precedents of this Court and other appellate courts holding that the class-action mechanism may not be utilized to deprive defendants of their right to present individualized defenses to liability. Both questions are significant and recurring ones for courts nationwide as they analyze the propriety of class certification in a wide array of cases. Review is necessary to establish a uniform understanding of the meaning and scope of Rule 23's commonality and predominance requirements and of this Court's decisions in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013),

and to clarify the intersection between Rule 23 and the right of defendants to present individualized defenses at all stages of class proceedings.

I. THE DECISION BELOW CREATES A CIRCUIT CONFLICT OVER WHETHER RULE 23 IS SATISFIED BY PURPORTEDLY "COMMON" QUESTIONS THAT DO NOT RESOLVE THE DEFENDANT'S LIABILITY TO INDIVIDUAL CLASS MEMBERS

Rule 23(a)(2) precludes class certification unless plaintiffs can "affirmatively demonstrate" the existence of at least one common question that is "capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.[2] Similarly, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). In *Comcast*, this Court made clear that "[t]he same analytical principles" behind the commonality analysis undergird the Rule 23(b)(3) inquiry"—and "[i]f anything," the "predomi-

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[2] As this Court emphasized in *Wal-Mart*, Rule 23(a)'s commonality and typicality requirements "tend to merge," because "'[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" 131 S. Ct. at 2551 n.5 (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157 n.13 (1982)). Here, because the class is limited to employees who were "not paid overtime compensation" due them, App. 67a, these requirements also overlap with Rule 23's ascertainability requirement.

nance criterion is even more demanding" than establishing commonality. 133 S. Ct. at 1432. When a class does not satisfy the commonality requirement under a correct interpretation of Rule 23(a), it by definition also cannot satisfy the "more demanding" requirement that such "common" issues predominate over individualized issues and defenses. As *Comcast* makes clear, a court may certify a class under Rule 23 only by making affirmative findings that *each* requirement of the rule is satisfied *at the time of certification*. A court may not, as the courts below did here, kick all issues that potentially complicate certification down the proverbial road, in the hope that providence or statistics will somehow provide an answer to intractable manageability problems.

The decision below held that these requirements can be satisfied merely by identifying purportedly "common" questions that do not answer whether the defendant is actually liable to any individual class member—much less all of them. According to the Ninth Circuit, Rule 23(a) requires only that a putative class identify a common issue *related to* liability, even if it is merely a *preliminary step* toward resolution of the defendant's liability to individual members of the class. Indeed, the Ninth Circuit affirmed class certification based on the "common" question of "whether [Allstate] had a common and widespread practice of not following its policies regarding overtime," App. 40a; *see* App. 9a, not whether and to what extent *individual class members responded* to Allstate's alleged conduct by actually working overtime for which they were not paid.

At most, resolution of this question that the decision below affirmed as "common" could establish some facts relevant to potential liability as to some

individual putative class members, but that is not the same as *actually resolving* liability on a class-wide basis. *See Hohider* v. *United Parcel Serv., Inc.*, 574 F.3d 169, 197-98 (3d Cir. 2009) (class-wide question regarding existence of defendant's policy could not support class certification where resolution of that question would not enable "a finding of liability and relief" without "excis[ing]" a key individualized liability element). Commonality (or, for that matter, typicality) does not turn merely on "the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 & n.5.

The Ninth Circuit's holding creates a circuit conflict over the meaning of the commonality and predominance requirements. In decisions that are irreconcilable with the rule of law announced below, the Second, Fifth, Eighth, and Eleventh Circuits have each interpreted this Court's pronouncements on Rule 23's requirements to hold that the mere existence of "common" but non-dispositive questions cannot justify class certification where resolution of the purportedly "common" questions would leave class membership unascertainable and individualized liability issues unresolved for many or all class members.

Second Circuit. In *Myers* v. *Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010), the Second Circuit rejected class plaintiffs' attempt to certify a class of employees who alleged that they were unlawfully deprived of overtime pay because they were misclassified as "exempt" from the FLSA's requirements. Plaintiffs claimed that Rule 23's requirements were satisfied because they were challenging the employer's com-

mon policy of classifying "all [purported class members] as exempt without an examination of each individual manager's duties." *Id.* at 549. The Second Circuit agreed that this common policy was "in a general way relevant" to the key liability issue in the case. *Ibid.* But in the Second Circuit's view, this merely "relevant" common question could not satisfy Rule 23 because it did "not establish whether all plaintiffs were *actually* entitled to overtime pay or whether they were covered by the applicable administrative regulations defining FLSA's exemptions." *Ibid.* Accordingly, the Second Circuit held that the alleged common policy "demonstrated little regarding whether the constituent issues that bear on [the defendant's] *ultimate liability* are provable in common." *Id.* at 550 (emphasis added).

Moreover, the Second Circuit rejected plaintiffs' argument that the district court had erred "in ignoring 'uncontested' questions in its predominance inquiry and by focusing only on . . . [whether] plaintiffs were exempt from FLSA's guarantees." *Myers*, 624 F.3d at 550. It explained that the "conceded" issues—including whether specific employees were classified pursuant to a common policy—were "less substantial in the overall mix of issues this case presents when compared to the ultimate (contested) question the district court would have to decide in any potential class action." *Id.* at 551. Thus, whereas the Ninth Circuit in the decision below held that Rule 23 is satisfied by a "common" question that might have some relevance to the ultimate liability issues in the case, the Second Circuit held exactly the opposite.

Fifth Circuit. The Fifth Circuit recently followed a similar rationale in a decision vacating certification

of a class challenging aspects of the State of Texas's foster care system. *M.D. ex rel. Stukenberg* v. *Perry*, 675 F.3d 832 (5th Cir. 2012). The district court had acknowledged that each of the class members "experienced the alleged shortcomings" in the State's system "in a different way," but nonetheless certified the class based on "common" questions regarding the nature of the system itself. *Id.* at 838-39. The Fifth Circuit held, however, that although such an approach to Rule 23(a)(2)'s commonality requirement may have been reasonable prior to *Wal-Mart*, it could not satisfy the "heightened . . . standards for establishing commonality" that this Court set forth in that decision. *Id.* at 839. Specifically, the court concluded that "common" questions that merely "*affect* all or a significant number of the putative class members" cannot meet *Wal-Mart*'s requirement that common issues must be capable of "'demonstrat[ing] that the class members have *suffered the same injury*.'" *Id.* at 840 (quoting *Wal-Mart*, 131 S. Ct. at 2551) (emphases altered).

Just as the Ninth Circuit did here, the district court in *Stukenberg* had rejected the defendants' arguments that dissimilarities in the way individual class members *experienced* the allegedly deficient system could defeat commonality. *Stukenberg*, 675 F.3d at 838. The Fifth Circuit adopted precisely the opposite position, concluding instead that to the extent "resolution of each of the class member's . . . claims requires individual analysis"—including, for instance, assessment of the harm or risk of harm each class member actually experienced while in the allegedly deficient foster care system—then "it is not clear how a 'classwide proceeding' on those claims has the 'capacity . . . to generate common answers apt to drive the resolution of the litigation.'" *Id.* at

843 (quoting *Wal-Mart*, 131 S. Ct. at 2551). The Fifth Circuit's interpretation of the commonality inquiry is thus completely at odds with the decision below, which, like the district court in *Stukenberg*, held that certification is appropriate based on a "common" question that would establish only the existence of a policy "affect[ing]" class members, not the defendant's actual liability to each individual class member.

Eighth Circuit. Similarly, the Eighth Circuit reversed a district court order certifying a class of pizza delivery drivers who alleged that their employer wrongfully withheld a fixed "delivery charge" from their pay. *Luiken* v. *Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Cir. 2013). The Eighth Circuit held that "varying circumstances guide the statutory standard, [and thus] the certified class does not meet the requirement of commonality"—or, for that matter, the "'far more demanding'" predominance requirement. *Id.* at 376-77 (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 624 (1997)).

The class's claim turned on whether the delivery charges "'might reasonably be construed . . . as payment for personal services.'" *Luiken*, 705 F.3d at 373 (quoting Minn. R. 5200.0080). Although the plaintiff attempted to erase all context-specific issues from this inquiry by focusing on the employer's undisputed failure to provide written notification to customers that it did not consider the delivery charge to be a gratuity, *id.* at 373, the Eighth Circuit held that this purported "common proof" of lack of notice did not satisfy Rule 23 because it was "not *dispositive*" of liability. *Id.* at 377 (emphasis added).

Notably, the Eighth Circuit recognized that the alleged lack of written notice might be *relevant* to liability in particular situations, but deemed that fact

insufficient to establish a truly "common" question because assessment of additional context-specific factors would still be necessary to answer the key liability question in each particular case: whether, under all the circumstances, the delivery charge "might reasonably be construed as a payment for personal services." *Luiken*, 705 F.3d at 376-77.

Eleventh Circuit. Finally, in *Babineau* v. *Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009), the Eleventh Circuit rejected class plaintiffs' attempt to certify a class based on allegations that an employer "engaged in a pervasive and long-standing policy of failing to pay hourly employees for all time worked." *Id.* at 1185.

The Eleventh Circuit explained that common issues of law or fact predominate over individual issues only "'if they ha[ve] a direct impact on every class member's effort to establish liability,'" *Babineau*, 576 F.3d at 1191 (quoting *Klay* v. *Humana Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004))—and not "if, 'as a practical matter, the resolution of [an] overarching common issue breaks down into an unmanageable variety of individual legal and factual issues,'" *ibid.* (quoting *Andrews* v. *Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1023 (11th Cir. 1996)).

In response to the defendant's argument that liability turned on individualized assessment, plaintiffs alleged—much like respondent's allegations here—that the employer enforced an unofficial classwide policy that made it "usually impossible for its hourly employees to perform all necessary . . . tasks during their scheduled shifts," thus forcing employees to complete required tasks outside official work hours. *Babineau*, 576 F.3d at 1187. The Eleventh Circuit held that even if the class could establish the

alleged class-wide policy, individual issues would still predominate: Such a policy could not, for instance, answer whether specific employees reported to work before scheduled shifts "for purely personal reasons," or whether any of the class members requested permission for off-shift time and were compensated accordingly. *Id.* at 1193. In other words, even assuming the existence of a "common" unofficial policy materially identical to the one respondent alleges here, certification would still be inappropriate under the Eleventh Circuit's interpretation of *Wal-Mart* because "proving that [the employer] had a policy of holding its employees to efficiency standards that were difficult to meet would not prove that [it] required any individual class member to work without pay," *id.* at 1193-94.

* * *

Each of these decisions is irreconcilable with the Ninth Circuit's interpretation of *Wal-Mart* and *Comcast* in the decision below. These issues arise in a wide array of contexts involving the many types of claims that plaintiffs seek to certify as class actions. Review is therefore warranted to clarify what it means for class plaintiffs to demonstrate "that there are *in fact*" common questions "apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551. This Court should make clear that Rule 23 requires more than merely the identification of purportedly "common" issues; such issues must actually be capable of *resolving* liability, and must predominate over individualized inquiries and defenses that could undermine such a class-wide assessment.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S AND LOWER COURT PRECEDENTS HOLDING THAT DUE PROCESS PRECLUDES CLASS TREATMENT THAT INFRINGES THE RIGHT OF DEFENDANTS TO RAISE INDIVIDUAL DEFENSES

Review is also warranted because the decision below is an egregious departure from the Due Process Clause's guarantee that class adjudication must not undermine a defendant's right to mount a full and fair defense. It is a basic tenet of due process that a class may not be "certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. Indeed, "'[d]ue process requires that there be an opportunity to present *every* available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (emphasis added); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (same). The decision below contravenes these precedents by authorizing a class-wide liability trial that eviscerates Allstate's right to offer individualized defenses to liability for the alleged statutory violations.

Allstate challenged below its inability to raise several potential affirmative defenses at the contemplated class-wide liability trial, including: "that class members performed only *de minimis* amounts of off-the-clock overtime, that knowledge of any substantial off-the-clock work could not reasonably be imputed to managers, and that class members may have unreasonably failed to pursue compensation for their off-the-clock work." App. 11a n.7; *see also, e.g.*, *Forrester* v. *Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981) (granting summary judgment to employer in off-the-clock action based on de-

fense that employer "ha[d] no knowledge that an employee is engaging in overtime work and that employee fail[ed] to notify the employer or deliberately prevent[ed] the employer from acquiring knowledge of the overtime work").

Indeed, respondent himself testified that he often hid his off-the-clock work from his supervisors because he wanted to appear more efficient, precisely the sort of individualized factor that could preclude Allstate's liability as to respondent—or any other class members in a similar position. App. 54a; *see Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (discussing the "complications" for the use of representative testimony to assess class-wide damages "presented by a worker who underreported his time, but did so . . . not under pressure by [his employer] but because he wanted to impress the company with his efficiency in the hope of obtaining a promotion or maybe a better job elsewhere—or just to avoid being laid off").

The decision below indisputably foreclosed Allstate's ability to raise these individualized defenses to liability. Not only did the Ninth Circuit certify a class based on "common" questions that did not resolve liability as to individual class members, as discussed above, but it also approved respondent's *not-yet-developed* statistical sampling method to assess class-wide liability. App. 12a-16a. Plaintiff's expert testified about "the propriety" of potential survey research methods and the "feasibility" of assessing liability on a class-wide basis based on "questions that could be posed to a representative sample of the class members." App. 46a. By definition, however, a court cannot have tested an undeveloped method of proof to determine whether it is representative of the

class, and thus whether employing such evidence will safeguard a defendant's right to litigate "defenses to individual claims"—precisely what *Wal-Mart*'s prohibition against "trial by formula" requires. 131 S. Ct. at 2561.

Indeed, the court of appeals *explicitly refused* to test the hypothetical sampling plan against the requirements of Rule 23, holding instead that Allstate's substantive challenges on that score went "to the merits of the plaintiffs' claim." App. 9a n.5. But that holding is in direct contravention of this Court's teaching that the careful analysis required at the class certification stage "will frequently entail 'overlap with the merits of the plaintiff's underlying claim'" because "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Comcast*, 131 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551-52); *accord Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416-17 (2014). Endorsing the Ninth Circuit's refusal to consider whether the hypothesized statistical sampling method is "'a just and reasonable inference or speculative'" until the merits stage "'would reduce Rule 23(b)(3)'s predominance requirement to a nullity.'" *Comcast*, 133 S. Ct. at 1433 (citation omitted).

If anything, the interpretation of Rule 23 adopted by the court below is even more problematic than that adopted in the Third Circuit decision reversed in *Comcast*. There, plaintiffs' expert had developed a model to calculate class-wide damages, but the parties strenuously disagreed about whether various aspects of the model's methodology sufficiently tracked the class's claims. *See Behrend* v. *Comcast Corp.*, 655 F.3d 182, 206-07 (3d Cir. 2011), *reversed*, 133 S.

Ct. 1426; *see also id.* at 216-17 (Jordan, J., concurring and dissenting in part) (explaining that after the district court rejected all but one of the class's theories of liability, the proposed damages model "no longer fit[]" that theory). The Third Circuit rejected Comcast's challenges to the damages model because it deemed them to be "attacks on the merits of the methodology that have no place in the class certification inquiry," *id.* at 207, but this Court soundly reversed, 133 S. Ct. at 1433. Here, however, no actual model of respondent's hypothesized statistical approach to liability has even been designed, much less tested for "fit" with the class's claims. Rule 23 is not satisfied by a mere plan to someday, possibly craft a statistical model that *might* show something (an unofficial policy or statistical pattern) of conceivable relevance to the case, but which may never in fact be crafted, much less display the requisite "fit" with the class-wide allegations in the case.

The Ninth Circuit papered over the due-process concerns implicated by its holdings based on an erroneous rule of law: It held that class certification predicated on a theory that forecloses a defendant's ability to raise individualized liability defenses is permissible, as long as the defendant has the right to "raise any individualized defense it might have at the damages phase of the proceedings" instead. App. 15a. The Ninth Circuit's rule parts ways with the holdings of this Court and other appellate courts about defendants' due-process right to raise individualized defenses to liability, and also exacerbates a circuit conflict regarding the predominance of individualized issues at the damages phase of class proceedings.

First, the Ninth Circuit's approval of a class-wide liability trial plan that precludes the right to bring individual liability defenses creates a circuit conflict about the scope of a defendant's right to raise all available defenses at each stage of class proceedings. The decision below stands in stark contrast to the Third Circuit's recent holding, interpreting *Wal-Mart*, 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) (citing *Wal-Mart*, 131 S. Ct. at 2561).

Unlike in the decision below, the Third Circuit would have recognized that Allstate's chance to use individualized defenses to mitigate damages—*after* liability has been established on a class-wide basis—is not a permissible substitute for its right to offer claimant-specific defenses that could defeat liability as to some (or many) class members' claims. Similarly, the decision below conflicts with decisions of the Second Circuit recognizing that the class action vehicle may not—as the Rules Enabling Act makes clear, *see* 28 U.S.C. § 2072(b)—alter parties' underlying rights, *see Garber* v. *Randell*, 477 F.2d 711, 715 (2d Cir. 1973) (consolidation devices may not "'change the rights of the parties'" or "have the effect of merging the rights of some parties with those of others" (quoting *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479, 497 (1933))), and that certification can be improper before defenses are resolved where individual defenses "will necessarily inform . . . many class certification issues," *Authors Guild, Inc.* v. *Google Inc.*, 721 F.3d 132, 134 (2d Cir. 2013) (per curiam).

Moreover, the decision below is not an outlier. The Ninth Circuit's troubling and unorthodox justification for affirming a method of trying class-wide liability without regard to individualized defenses is the latest in a widening pattern of similar decisions, making more apparent the need for this Court to resolve this growing conflict in authorities. *See Williams* v. *Superior Court*, 221 Cal. App. 4th 1353, 1365 (2013) (characterizing defendant's liability defenses as issues properly resolved at the damages phase of class proceedings); *Jacobsen* v. *Allstate Ins. Co.*, 215 P.3d 649 (Mont. 2009) (certifying class based on contention that employer's practices constituted *per se* violation of state law, even though certified class conflated two decades of differing practice, which eliminated employer's ability to raise defenses to liability based on divergent practices during varying portions of that timeframe), *cert. denied*, 134 S. Ct. 2135 (2014).

Second, the decision below deepens a circuit conflict regarding whether *Comcast*'s requirement that individualized issues may not predominate over common issues, 133 S. Ct. at 1433, applies at the damages phase. By recognizing that Allstate could properly bring numerous individualized defenses when assessing damages—indeed, this was the Ninth Circuit's express justification for permitting statistical evidence and thereby depriving Allstate of its right to raise similar defenses during the liability stage, App. 15a—the court below implicitly conceded that respondent has not shown a common methodology for measuring class-wide damages tied to his liability theory. *See Comcast*, 133 S. Ct. at 1433 (predominance not demonstrated where individualized issues at the damages stage would "overwhelm" any purportedly common issues). The Ninth Circuit's de-

cision to reclassify liability defenses as damages issues in this manner, then shuttle *all* claimant-specific defenses to the damages phase of class proceedings, thereby encourages class certification even where plaintiffs cannot show a reliable, common methodology for measuring class-wide damages that is tied to the plaintiffs' theory of liability.

Affirming certification despite this predominance deficiency makes the decision below the latest in a deepening circuit conflict regarding whether *Comcast*'s requirement that individualized issues may not predominate over common issues applies at the damages phase. The D.C. Circuit has held that individualized damages issues *can* preclude a finding of predominance under *Comcast*. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013). The Fourth and Tenth Circuits have reached similar conclusions as well. *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) ("predominance may be destroyed if individualized issues will overwhelm those questions common to the class"); *Ward* v. *Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("To be sure, individualized damages determinations cut against class certification under Rule 23(b)(3).").

By contrast, the decision below relied on analysis from the Fifth, Sixth, and Seventh Circuits holding that even highly individualized damages issues are no bar to class certification. *See* App. 13a-14a (citing *In re Deepwater Horizon*, 739 F.3d 790, 815 (5th Cir. 2014) (rejecting argument that *Comcast* precludes certification despite lack of class-wide method of assessing damages), *cert denied*, 135 S. Ct. 754 (2014); *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 801

(7th Cir. 2013) ("[i]t would drive a stake through the heart of the class action device . . . to require that every member of the class have identical damages" because "the fact that damages are not identical across all class members should not preclude class certification"), *cert. denied*, 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013) ("no matter how individualized the issue of damages may be, determination of damages may be reserved for individual treatment with the question of liability tried as a class action" (alteration and internal quotation marks omitted))).

The Ninth Circuit's reliance on other courts' misguided interpretations on the issues surrounding individualized damages issues, especially in the face of the deepening conflict on these issues, underscores the need for this Court's review. Certiorari is warranted not only to ensure that class certification proceedings respect the due process right of defendants to raise individualized defenses to liability, but also to restore uniformity in the lower courts regarding Rule 23(b)(3)'s predominance requirement as applied to all stages of class-action proceedings.

III. THE QUESTIONS PRESENTED ARE RECURRING AND IMPORTANT

The questions presented in this petition are exceptionally important to civil litigants and the judicial system generally. The question whether class plaintiffs have identified truly common questions arises in every putative class action, and the interests of justice require that the lower federal courts enforce a uniform understanding of the legal test governing that question under Rule 23 in order to give meaning to this Court's insistence in *Wal-Mart*

that Rule 23's requirements are more than mere pleading requirements. 131 S. Ct. at 2551. Indeed, this Court granted certiorari in *Wal-Mart* in order to create nationwide uniformity, but the courts of appeals are now divided over the meaning of the definition announced in that case.

Moreover, this Court has repeatedly recognized that preserving litigants' opportunities to raise legitimate defenses is an essential attribute of a justice system worthy of the name, and a basic requirement of due process. The decision below, and others like it, have dramatically undercut this fundamental principle in the name of expediency. This recurring problem will only grow worse unless and until this Court intervenes.

National concern over abuse of the class-action mechanism continues to swell, as members of this Court have acknowledged. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting) (describing state-law measures designed to cabin "overkill" penalties in class actions); *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 636 (2006) (describing federal legislation intended to target "'perceived abuses of the class-action vehicle in litigation involving nationally traded securities'" (quoting *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) ("The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question.").

These concerns are especially important in the context of reviewing a certification order because "[a] district court's ruling on the certification issue is of-

ten the most significant decision rendered in . . . class-action proceedings." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). By rewriting plaintiffs' burdens for establishing commonality and predominance while simultaneously eviscerating defendants' abilities to raise individualized defenses at the liability stage of a contemplated class action trial, the decision below further compounds the already often "insurmountable pressure on defendants to settle" that class certification brings—regardless of the merits of the underlying claims. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* S. Rep. No. 109-14, at 20 (2005) (Senate Report regarding Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, expressing concern about the "unbounded leverage" class actions can provide to a certified class, which "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits").

The court of appeals minimized the often unfairly coercive effect that an improper certification decision can have with the glib assertion that a defendant "'should welcome class certification' as that allows it the opportunity to resolve claims of all class members at once." App. 9a n.5 (citation omitted). Yet empirical evidence bears out the contrary reality: Class certification—not a theoretical class-wide liability trial—is "often the defining moment in class actions" because "it may . . . create unwarranted pressure to settle nonmeritorious claims on the part of defendants." *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 780 (3d Cir. 2009); *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney's Fees and Expenses in Class Action Settlements: 1993-2008*, at 15 tbl.5 (N.Y. Univ. Law & Econ. Research Paper Series, Paper No. 09-50, 2009), *available at* http://ssrn.

com/abstract=1497224 (reporting average settlement for certified class actions from comprehensive study at over $100 million). Indeed, in the booming industry of wage-and-hour class actions, class settlements totaled $467 million in 2012 alone. *See* U.S. Chamber Institute for Legal Reform, *The New Lawsuit Ecosystem* 77 (2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-ReportOct2013_2.pdf.

The Ninth Circuit's decision exacerbates this grave potential for abuse by unmooring class certification standards from the safeguards of Rule 23 and due process. This case presents an excellent opportunity for this Court to clarify that commonality and predominance require the existence of common questions that are not simply related to the disputed issues of liability, but can actually resolve such critical issues on a class-wide basis. And by making clear that defendants retain the right to raise individualized defenses at *all* stages of class proceedings, this Court can protect defendants from the highly prejudicial and unfair specter of being relegated to attempting to prove individualized defenses only *after* class-wide liability has been assessed.

These questions are recurring and arise across the spectrum of federal- and state-law causes of action potentially eligible for class treatment in federal court. Rule 23 and the Due Process Clause are uniform federal standards that should apply equally regardless of where a lawsuit is filed. Yet given the conflicts in the lower courts over the proper scope and meaning of this Court's *Wal-Mart* and *Comcast* decisions on the Rule 23 and due-process issues implicated here, the courts of appeals will continue to apply ever-divergent standards to class certification

unless this Court intervenes. The Court should seize this opportunity to restore uniformity for class-action litigants nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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