NO. 14-910

In the
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

PETITIONER,

v.

JACK JIMENEZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

RESPONDENT.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), *amici* respectfully request leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari filed by Allstate Insurance Company. As required under Rule 37.2(a), *amici* provided noticed to all parties' counsel of their intent to file this brief more than 10 days before its due date. Petitioner has consented to the filing of this brief in a blanket letter of consent on file with the Clerk. Respondent did not respond to *amici*'s request for consent and, therefore, *amici* are filing this motion.

Amici seek leave to file this brief because they are deeply concerned that the Ninth Circuit's decision upholding the district court's certification order has drastically departed from controlling precedent and improperly relaxed the standards for class certification. The Ninth Circuit upheld certification of this purported class action even though the named plaintiff failed to identify any "common" questions that, if answered, could resolve the claims on a class-wide basis. Pet. App. 9a. Compounding that problem, the court was able to conclude that the allegedly "common" questions predominated over individual ones only by labeling all the individual issues and defenses raised by Allstate as "damages" issues and then declaring those issues irrelevant at the certification stage. Pet. App. 15a. The lower courts' certify-now, worry-later approach is flatly inconsistent with this Court's class action jurisprudence, including most notably *Comcast*

Corp. v. Behrend, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). If the court of appeals' decision is allowed to stand, almost any competently crafted class-action complaint filed in the Ninth Circuit will satisfy Rule 23's certification standard—a result that could dramatically increase the class-action exposure faced by the diverse business community *amici* represent.

For these reasons, and because *amici* are well-equipped to help the Court evaluate the parties' arguments, the Court should grant this motion for leave to file a brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amici and their members represent a diverse array of businesses and business interests across the United States, including manufacturers, retail merchants, and professional organizations. They support the petition because they have a strong interest in ensuring that the lower courts undertake the rigorous analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

The Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of this Court's recent class action cases, including *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013),

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amici* timely notified the parties in writing of their intent to file this brief. Because respondents did not consent, *amici* are submitting a motion for leave to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $3 billion a year in combined charitable contributions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are crucial safeguards, essential to protecting the due process rights of both defendants and absent class members. Before a case can proceed as a class action, the named plaintiff must prove, among other things, both that class members share "the same injury" and that they possess claims presenting at least one "common question" that if adjudicated on a class-wide basis "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal quotation marks omitted). The plaintiff must also prove that the common questions "predominate" over individual ones. Fed. R. Civ. P. 23(b)(3); *see also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). These essential prerequisites ensure that resolving a case on an aggregate basis does not strip absent class members of their individual rights or undermine the right of class-action defendants "'to present every available defense.'" *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

The Ninth Circuit's decision below is the latest in a troubling and expanding line of lower-court decisions that flout these fundamental principles and effectively undo this Court's work in *Comcast* and *Wal-Mart* clarifying the standards for class certification. In this case, the court of appeals

affirmed the certification of a class of Allstate claims adjusters based on the named plaintiff's allegation that—despite Allstate's facially lawful overtime policies—Allstate has an unofficial, unwritten policy for local managers to "pressure" claim adjusters into working unpaid, off-the-clock overtime in violation of California law. Pet. App. 3a, 31a–32a, 43a–44a. In so holding, the court failed to enforce the requirements for class certification in at least two respects:

First, the court found that Rule 23's commonality requirement was satisfied even though resolving the "common" questions it identified will do nothing to resolve the issue of liability as to any individual class member (much less the entire class). *See* Pet. App. 9a. The Ninth Circuit concluded that whether Allstate had an "unofficial policy" or "practice" of pressuring its employees to work off-the-clock overtime involved common questions that could be resolved on a class-wide basis. Pet. App. 3a, 9a. But that misapplies the commonality requirement. To prove liability in this case, each class member must establish "that (1) he performed work for which he did not receive compensation; (2) that [Allstate] knew or should have known that plaintiff did so; but that (3) [Allstate] stood idly by." *Adoma v. Univ. of Phoenix, Inc.*, 270 F.R.D. 543, 548 (E.D. Cal. 2010) (internal quotation marks omitted). Accordingly, even assuming that Allstate had an "unofficial policy" to pressure employees into working off-the-clock overtime, Pet. App. 3a, Allstate still would not be liable to any employee absent proof that the employee "performed work for which he did not receive compensation." *Adoma*, 270 F.R.D. at 548.

That separate prerequisite to liability is an inherently individualized inquiry not susceptible to class-wide resolution.

Second, the court held that common questions predominated over individual ones because liability issues could be resolved at the "damages phase" of trial. *See* Pet. App. 15a. In this regard, the court approved respondent's not-yet-developed statistical sampling method to assess class-wide liability, under which a "representative sample" of class members would answer questions regarding Allstate's purported unofficial policy and its effect on their work. Pet. App. 14a, 46a. That approach could subject Allstate to class-wide liability based on the work habits and personal motivations of a fraction of class members; but the Ninth Circuit was untroubled by that result, reasoning that Allstate could "raise any individualized defense[s] it might have at the *damages phase* of the proceedings." Pet. App. 15a (emphasis added). The court thus re-framed threshold liability issues regarding whether any individual class member has a viable claim (*e.g.*, whether the class member worked off-the-clock overtime) as mere "damages" issues and then declared them immaterial to class certification.

If left uncorrected, the lower court's errors will cause uncertainty and open the door to significant mischief. Virtually any competently pled class action could be certified so long as the plaintiff (1) identifies questions common to the class (regardless of whether the answer to those questions would resolve any class member's claim), and (2) convinces the court that any individual issues and defenses are best addressed at

trial or at a post-trial damages phase. As the petition explains, this type of certify-now, worry-later approach is flatly inconsistent with this Court's class-action decisions. In fact, the error is so clear and egregious that summary reversal would be warranted were it not for the fact that this case also presents an ideal opportunity to resolve entrenched divisions in lower-court authority. As more and more lower courts fail to enforce Rule 23's essential prerequisites, this Court's intervention is urgently needed to bring discipline to this important area of federal law.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for at least three reasons: First, the decision below directly conflicts with this Court's instructions in earlier class action cases. Second, there is a deep and irreconcilable split in authority over Rule 23's predominance requirement and the proper interpretation of this Court's decisions explaining what that requirement entails. Third, the questions presented are important and recurring.

I. The Ninth Circuit's Decision Directly Conflicts With This Court's Precedent.

Class actions are supposed to be a carefully policed "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). Aggregating individual claims for joint resolution can endanger the rights of absent class members to press their distinct interests and can undermine the rights of class-action defendants

"'to present every available defense'" to every individual claim. *Phillip Morris*, 549 U.S. at 353 (quoting *Lindsey*, 405 U.S. at 66); *see also* 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Rule 23 thus protects both defendants and absent class members by ensuring that the innovation of aggregating claims and dispensing with individual litigation is deployed only when it is consistent with the rights of all concerned. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23's "procedural protections" are "grounded in due process"); *Amchem*, 521 U.S. at 621 (Rule 23 ensures "sufficient unity" of claims "so that absent [class] members can fairly be bound by decisions of class representatives"). As this Court has long instructed, before certifying a class a trial court must engage in a "rigorous analysis" of both the law and the facts to ensure that the named plaintiffs have carried their burden to satisfy Rule 23's requirements. *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted); *see also Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160–61 (1982) ("actual, not presumed, conformance with" Rule 23 is "indispensable").

No aspect of Rule 23 has tested the due process dimensions of class actions more than section 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614 (internal quotation marks omitted). The drafters of that provision were well aware that in permitting judgments for money that would bind all class members, "they were breaking new ground" and that the "effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in*

Historical Context: A Preliminary View, 156 U. Pa. L. Rev. 1439, 1487 (2008). Rule 23(b)(3) thus contains special "procedural safeguards," *Comcast*, 133 S. Ct. at 1432, designed to ensure that this "new experiment" would not "open the floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 401–02 (2000).

When a plaintiff seeks to litigate a Rule 23(b)(3) class action, the court must ensure that all class members' claims present at least one "common question." *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted). Pleading "a violation of the same provision of law" and labeling it a common question is not enough; after all, "any competently crafted class complaint literally raises common questions." *Id.* (internal quotation marks omitted) Instead, the plaintiffs must "affirmatively demonstrate" their compliance with Rule 23 by identifying "common questions" that will generate "common *answers* apt to drive the resolution of the litigation." *Id.* In addition, the plaintiffs must satisfy the "even more demanding" requirement of proving that the identified common questions "predominate" over any individual ones. *Comcast*, 133 S. Ct. at 1432. That is, the plaintiffs must demonstrate that the case can be resolved with common proof without depriving either defendants or absent class members of their rights to press individual issues. *Id.*; *see also* 28 U.S.C. § 2072(b); *Lindsey*, 405 U.S. at 66 ("Due process requires that there be an opportunity to present every available defense.") (internal quotation marks omitted).

The Ninth Circuit's decision departs strikingly from these fundamental principles. The court below upheld the district court's class-certification decision because it concluded that whether Allstate had an "unofficial policy" or "practice" of pressuring its employees to work off-the-clock overtime involved common questions that could be resolved on a class-wide basis. Pet. App. 3a, 9a. But answering those questions and determining whether that policy exists will not resolve any class member's claim. It is, for instance, indisputable that Allstate cannot be liable to any class member who worked only a *de minimis* amount of off-the-clock overtime, *see Adoma*, 270 F.R.D. at 548, or who concealed any off-the-clock overtime from his supervisor, *see Jong v. Kaiser Found. Health Plan, Inc.*, 171 Cal. Rptr. 3d 874, 881 (Ct. App. 2014). So even assuming that the alleged policy existed, the court must still determine whether each individual claimant "performed work for which he did not receive compensation" *see Adoma*, 270 F.R.D. at 548, and whether Allstate "was aware of [the employee's] unreported overtime hours," *Jong*, 171 Cal. Rptr. 3d at 881.

The lower courts here did not deny that those individualized inquiries would be necessary; instead, they simply brushed them aside on the basis of a not-yet-developed statistical sampling method that plaintiff asserted could prove class-wide liability. *See* Pet. App. 12a, 51a–52a. In doing so, the courts were untroubled by the fact that sampling would eliminate Allstate's right to present its individualized arguments and defenses, *see* 28 U.S.C. § 2072(b), reasoning that Allstate would have an "opportunity to raise any individualized defense[s] it might have

at the damages phase of the proceedings." Pet. App. 15a; *see also* Pet. App. 51a–52a. In other words, the court first stripped the commonality requirement of any teeth by holding that a plaintiff can satisfy that requirement merely by identifying any questions relevant to his claim (regardless of whether the answer to those questions will resolve any individual class member's claim). It then effectively eliminated the predominance requirement by couching threshold questions of liability as mere "damages" issues, which it declared irrelevant to class certification.

Together these errors relieve a class plaintiff of any obligation to "affirmatively demonstrate" the predominance of common questions that can resolve the case "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The plaintiff here, for example, did little more than allege common questions that have some general relevance to his claims and then convince the lower courts that any individual issues and defenses could be ignored until a later stage of proceedings. The result is stark: Even though Allstate's written policy is lawful, Allstate must now defend against a class action of approximately 800 employees, including a variety of different types of claims adjusters, across thirteen individually managed offices, based on unproven allegations of an unofficial, unwritten policy and without any assurances that it will be allowed to raise its key arguments and defenses on liability. Pet. App. 3a–4a. Instead, by relegating critical liability issues to the damages phase of trial, the courts below swept under a rug the serious problems with class certification.

The result is a flagrant break from this Court's precedents. Rather than engage in the requisite "rigorous analysis" to ensure that the named plaintiff carried his burden to prove that the requirements of Rule 23 were met, *Wal-Mart*, 131 S. Ct. at 2551, the Ninth Circuit upheld certification on little more than a promise that the plaintiff would someday craft a statistical model that, whatever it might show, cannot possibly resolve liability as to each class member. This clear and egregious error warrants this Court's intervention.

II. The Decisions Below Reflect Widespread Confusion Among The Lower Courts Over The Meaning Of *Comcast*.

This case also provides an excellent opportunity for this Court to resolve existing circuit splits and provide much-needed guidance to the lower courts. As the petition explains, the decision below violates *Comcast* and deepens a yawning divide in lower-court authority over the meaning of that decision. Pet. 29–31.

In *Comcast*, this Court clarified that the plaintiffs' damages case must be consistent with their liability case, and that lower courts must ensure that the plaintiffs' damages evidence does not operate to sweep away individualized defenses that a defendant may have to each individual class member's claim. For that reason, aggregate damages models that determine the average impact to the average class member are impermissible. Indeed, those types of models are constitutionally suspect because they sweep away individualized damages issues and

transform Rule 23's "procedural . . . device into its own source of substantive right." Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 Cal. L. Rev. 1573, 1597 (2007).

But lower courts have shown widespread reluctance to comply with this Court's clear instructions. Many lower courts—including the lower courts here—have all but rejected *Comcast*'s holding that individualized damages issues can overwhelm common questions and defeat predominance. In this case, for example, the Ninth Circuit recognized that Allstate had raised several individualized issues and defenses that would have to be resolved at the "damages phase" of trial. Pet. App. 15a. The court thus implicitly conceded that the plaintiff had not shown a common methodology for measuring class-wide damages tied to his liability theory. *See id.* The court nonetheless upheld class certification, holding that—even though predominance was defeated by individualized damages issues alone in *Comcast*—damages issues could not defeat certification "'[i]n this circuit.'" Pet. App. 13a (quoting *Leyva v. Medline Indus.*, 716 F.3d 510, 513 (9th Cir. 2013)).

In taking this approach, the Ninth Circuit joined several other courts that have incorrectly characterized highly individualized liability issues as damages issues and concluded that they thus pose no bar to class certification. Pet. 30–31 (collecting examples). Some of those cases arise in the product-defect context where certain courts have applied the dubious theory that if a defendant sells a defective

product to one customer, it has effectively sold a defective product to *all* of its customers because even properly functioning products might carry the latent risk of manifesting a defect in the future. Pet. 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)).

While the logic of those cases is questionable at best—particularly in light of this Court's mandate that all class members "possess the same interest *and suffer the same injury*," *East Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added; internal quotation marks omitted)—extending that logic to non-defect cases, like this one, makes no sense at all. In this case, the only way to determine whether an individual class member has a viable claim is to separately determine whether the class member actually worked unpaid overtime and whether Allstate knew about it. *See Adoma*, 270 F.R.D. at 548; *Jong*, 171 Cal. Rptr. 3d at 881. Yet the Ninth Circuit upheld certification and refused to consider any evidence to the contrary on the basis that critical liability issues should be considered at "a later day." Pet. App. 6a; *see also* Pet. App. 15a.

There can be no dispute that the lower courts are in considerable disarray over the meaning of *Comcast*. A search of the Westlaw legal database reveals that as of February 2015—less than two years after *Comcast*—Westlaw has designated sixty-six cases as negative citing authority that either flat

out disagree with, decline to extend, or distinguish *Comcast*. A recent law review comment dubs this lower-court confusion and intransigence the "post-*Comcast* chaos" where "[c]ircuit splits are building on circuit splits." Alex Parkinson, Comcast Corp. v. Behrend *and Chaos on the Ground*, 81 U. Chi. L. Rev. 1213, 1214 (2014) ("The question that hundreds of judges, practitioners, and clerks face—What does *Comcast* stand for?—remains decidedly unanswered."). Nothing suggests this "chaos" will vanish if the issue continues to percolate. This Court's review is thus necessary now—not only to bring clarity to the important Rule 23 certification requirements, 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 Court Should Grant Review Because The Questions Presented Are Important and Recurring.

The questions presented are important and recurring. As more and more courts fail to comply with *Comcast*, the need for this Court's intervention continues to grow.

First, the current divisions in lower court authority mean that whether a putative class action is certified often turns not on its merits but on where the case is filed. Given that class actions often involve purported class members from a number of different jurisdictions, this creates a significant risk of forum shopping. *See* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev.

481, 483, 491–93 (2011). Indeed, those opposed to this Court's decisions have urged plaintiffs to "avoid some of the worst federal case law by filing in circuits that are [the] most receptive to class actions." Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 823 (2013). That fact alone highlights the need for this Court to restore uniformity to this important area of federal law.

Second, certifying loosely connected classes (like this one) is not only unfair to class-action defendants, it risks binding absent class members to class-wide dispositions that have no real bearing on the validity of their individual claims. *Cf.* 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). This is especially troubling because empirical evidence shows that a significant majority of class actions yield little or no benefit to class members. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions* 2 (Dec. 11, 2013) ("The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents . . . ."). Instead, the majority of settlement costs go directly into the pockets of the lawyers bringing the case. *Id.* at 15. Individual claimants risk being stripped of their individual claims and interests only to receive virtually nothing in return.

Third, by easing the path to certification, the lower courts' certify-now, worry-later approach encourages class-action abuse. Although nominally a threshold question, "[w]ith vanishingly rare

exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In light of the costs of discovery and trial, certification unleashes "hydraulic" pressure to settle. *Newton v. Merrill Lynch*, 259 F.3d 154, 165 (3d Cir. 2001); *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2010) (citing Emery G. Lee III, et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)).

In this context, plaintiffs are encouraged to make broad allegations of an allegedly illegal policy or practice, hoping that sympathetic courts will defer any meaningful substantive inquiries to "a later day," and recognizing that the irresistible pressure to settle makes it unlikely that "later day" will ever come. That appears to be precisely the plaintiff's strategy in this case. It is much too easy to conjure up sweeping allegations about supposed informal, unwritten corporate policies and, regardless of the merits of such claims, force defendants into costly and burdensome class-action litigation.

CONCLUSION

The petition should be granted.

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