No. 13-916

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

BRIEF OF THE CATO INSTITUTE AND CENTER FOR CLASS ACTION FAIRNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

THEODORE H. FRANK
ADAM E. SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. N.W., No. 236
Washington, D.C. 20036
(703) 203-3848
tfrank@gmail.com

JOHN B. LEWIS
Counsel of Record
THOMAS D. WARREN
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
PNC Center, Suite 3200
1900 E. 9th St.
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

DEBORAH H. RENNER
PAUL G. KARLSGODT
CASIE D. COLLIGNON
BAKER & HOSTETLER, LLP

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES AND RULES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because it concerns the due process rights of absent class members and the abuse of the class action mechanism that is a vital part of our civil justice system.

The Center for Class Action Fairness (the "Center") is a non-profit law firm; its attorneys represent consumers *pro bono* in class action litigation across the United States by, among other things, objecting to unfair class action settlements on their behalf. The Center's attorneys' litigation on behalf of consumers has been covered by the *Wall Street Journal*, *Forbes*,

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution intended to fund the brief 's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; letters from the parties consenting generally to the filing of briefs of *amici curiae* are on file with the Court.

the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval?*, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the Center represents consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys, in the process winning millions of dollars for class members. *E.g.*, *In re Classmates.com Consol. Litig.*, No. 09-45, 2012 WL 3854501, at *9 (W.D. Wash. Jun. 15, 2012) (noting Center "was relentless in [its] identification of the numerous ways in which the proposed settlements would have rewarded class counsel . . . at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second").

The Center's work also makes it especially familiar with cases where putative class attorneys looking out for their own interests attempt to herd class members into unsuitable mandatory classes, thereby laying the groundwork for abusive settlements. *See, e.g., In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *Richardson v. L'Oreal USA, Inc.,* No. 13-508,

___ F. Supp. 2d___, 2013 WL 5941486 (D.D.C. Nov. 6, 2013). The unfair settlements the Center has fought are not isolated cases. Indeed, economic theory, experience, and Congressional findings all indicate that a significant number of class actions leave consumers without meaningful relief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case raises an issue of exceptional importance to class action defendants and absent class members alike. That issue is whether established principles of federal due process permit state courts to employ an artificially segmented process that begins with the certification of a class for injunctive and declaratory relief without opt-out rights and culminates (if Jacobsen wins in the class trial) in a multitude of individual trials to award both compensatory and punitive damages to class members. This Court clarified in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that such manipulative tactics to avoid the due process requirements of Federal Rule 23 cannot be tolerated. In *Jacobsen v. Allstate Ins. Co.,* 310 P.3d 452 (Mont. 2013), the Montana Supreme Court condoned those same abusive approaches to class certification despite the resulting compromise of constitutional rights. The Montana Supreme Court's mechanism deprives defendants of their ability to raise individual defenses to the plaintiffs' claims. The due process rights of absent class members are also

undermined because the class could lose the class-wide issue, depriving individuals with otherwise meritorious damage claims of the right to pursue them.

The embedded constitutional questions are worthy of review but this Court has not yet had a proper opportunity to do so. Can a state-court plaintiff suppress the due process rights of a defendant and of absent class members – with no right to opt-out – by pursuing injunctive relief that is no more than a preliminary step for individual class member claims for damages? This Court should reaffirm that due process, which protects the rights of all class action participants, applies in state class actions as it does in federal courts. The constitutional rights of class action participants and absent class members should not depend on the venue in which the case is filed.

ARGUMENT

I. THE CERTIFICATION OF DISGUISED MONETARY DAMAGES CLASS ACTIONS VIOLATES DUE PROCESS.

"[M]inimum [procedural] requirements [are] a matter of federal law." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (second and third alterations in original) (internal quotation marks omitted). The U.S. Constitution provides due process protection for those involved in class litigation, whether under

federal or state jurisdiction. *Id.* Because they necessarily implicate property rights, class actions pursuing monetary relief involve even greater due process concerns than class actions seeking limited fund or injunctive or declaratory relief. This Court has long held that, to satisfy due process, absent class members must be provided notice, an opportunity to exclude themselves from the class, and adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

For decades, class action plaintiffs have sought to avoid these more stringent requirements by characterizing their cases as seeking injunctive relief, even though money damages stand out in the background as the primary remedy. As courts began to allow monetary damages to creep into Rule 23(b)(2) certification, this Court held in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that "individualized monetary claims belong in Rule 23(b)(3)," because the procedural devices afforded under that Rule ensure due process. *Id.* at 2558. The due process protections of Rule 23(b)(3) are absent from Rule 23(b)(2) "not because the Rule considers them unnecessary," but because they are either self-evident (predominance and superiority) or they serve no purpose when the class is mandatory (notice and opt-out rights). *Id.* at 2558-59. Thus, this Court held that the Due Process Clause demands that individual damages class actions cannot be certified under Rule 23(b)(2), at least where the monetary relief is not incidental to

requested injunctive or declaratory relief. *Id*. at 2557, 2560.

II. LOWER COURTS HAVE NOT REFLECTED THIS COURT'S CONCERN FOR DUE PROCESS ABUSE IN THE CLASS ACTION ARENA.

Despite these constitutional protections, many state courts have attempted to sidestep *Dukes* through bifurcation or a segmented approach.[2] *Jacobsen* simply reflects the latest trend in due process abuse, under which the procedural requirements of Rule 23 are undermined by segmented class action litigation that uses injunctive relief only as an opening gambit. The *Jacobsen* plaintiff sought to certify a 23(b)(2) injunctive class, leaving class members bound by a class trial without either notice or the right to opt-out to preserve their ability to individually pursue their claims.[3] This intermediate procedural

[2] For instance, in *Ideal v. Burlington Res. Oil & Gas Co. LP*, 233 P.3d 362, 364 (N.M. 2010), the Supreme Court of New Mexico affirmed certification of an injunctive class pursuant to Rule 23(b)(2) noting that "the existence of individualized issues is irrelevant for certifying a [New Mexico Civil Procedure] Rule 1-023(B)(2) class" if plaintiffs could show the defendant had a pattern of illegally deducting funds from royalty payments.

[3] Jacobsen is ineligible for the equitable relief he purports to seek on behalf of the Rule 23(b)(2) class, is not part of the certified class, and does not have the "same interest" and "same injury" as the class members. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted). Thus, the class as certified has a number of crucial infirmities.

maneuver expressly contemplated numerous subsequent individual trials to determine compensatory and punitive damages – but only if the class representative was successful in the class trial. The majority of the Montana Supreme Court was untroubled by the lack of final (b)(2) relief in *Jacobsen*, commenting that under Montana's version of Rule 23, "substantive 'finality'" is not required. *Jacobsen*, 310 P.3d at 473. That may be so as a matter of state law. But constitutional due process in the class action context requires far more protection for all participants and affected parties than the Montana Supreme Court's amalgam of procedures provided in *Jacobsen*.

Federal Rule 23 operates to protect the due process rights of the participants and those whose interests might be impacted by class actions.[4] As the Third Circuit recognized:

> The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can

[4] As with most rules of civil procedure, state courts typically interpret their respective versions of Rule 23 uniformly with the Federal counterpart. *See Cullen v. State Farm Mut. Auto. Ins. Co*., 999 N.E.2d 614, 621 (Ohio 2013) ("Because [Ohio] Civ. R. 23 is virtually identical to Fed. R. Civ. P. 23, we have recognized that federal authority is an appropriate aid to interpretation of the Ohio rule.") (internal quotation marks omitted). Indeed, Montana's Rule 23 is "identical in all substantive respects" to the federal rule, and so the history of Federal Rule 23, along with federal authority, is instructive on the issue of class certification. *Jacobsen,* 310 P.3d at 479 (Baker, J., dissenting).

> assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests. The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation.

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995). *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182 n.27 (3d Cir. 2001).

Congress and the federal courts have policed the potential due process abuses created by lax Rule 23 application in state courts. For instance, when the Kansas Supreme Court violated the due process rights of out-of-state class members by applying Kansas substantive law to all class members' claims in *Phillips Petroleum*, 472 U.S. at 822,[5] this Court stepped in to clarify that due process demanded that the Kansas Supreme Court employ a fairer adjudication process that respected "the rights of parties

[5] This Court previously granted certiorari to review due process issues in cases where absent class members were not permitted to opt-out of Rule 23(b)(2) classes that implicated individualized determinations. In both instances, the Court dismissed the cases as improvidently granted because of procedural defects not present here. *See Adams v. Robertson*, 520 U.S. 85 (1997); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

beyond its borders." (Internal quotation marks omitted.) And when state courts persisted in disregarding the due process rights that the federal courts had recognized as limiting the scope of class certification, Congress intervened to provide federal removal jurisdiction over a much wider range of class actions initially filed in state court. *See generally* Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005).

In 1966, the Federal Rules Advisory Committee had little occasion to consider the due process effects of Rule 23(b)(2) because the Committee envisioned that the provision primarily would be applied in the civil rights arena to pursue equal and undivided injunctive relief to stem civil rights abuses. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371 (2000) (observing the original role of class actions plaintiffs' attorneys as "public-regarding private attorney[s] general").

Nevertheless, Rule 23 reflects due process concerns by requiring that claims for damages guarantee that absent class members receive notice and opt-out rights under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2)(B). Correspondingly, when class claims seek only final injunctive relief, Rule 23(b)(2) appears to permit notice-free classes because "it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause." *Dukes*, 131 S. Ct. at 2559. But due process is

violated under Rule 23(b)(2) when "an action seeking a declaration concerning defendant's conduct . . . appears designed simply to lay the basis for a damage award rather than injunctive relief. . . ." 7AA Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1775 (3d ed.).

Unlike the Montana Supreme Court, some federal courts understand the due process implications of (b)(2) classes that are no more than a prelude to individual damage recoveries. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006) (holding that "when 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)") (citing, inter alia, *Bolin v. Sears, Roebuck & Co.,* 231 F.3d 970, 978 (5th Cir. 2000); *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); *Lukenas v. Bryce's Mountain Resort, Inc.,* 538 F.2d 594, 595-96 (4th Cir. 1976)). This Court's review is essential to ensure that the due process concerns evident in the federal courts also guide state court judges when they examine certification of mandatory classes.

III. CONGRESS PASSED CAFA TO REMEDY STATE COURT CLASS ACTION PROCEDURES THAT CONTRAVENE DUE PROCESS.

Eventually, Congress noticed distortions in the application of the class action vehicle. Forces outside

the federal judiciary were stretching the Advisory Committee's view of the limited scope for Rule 23. Divorced from the federal system with its rigorous focus on procedural safeguards, the lucrative class litigation industry thrived in more remote state courts where due process was pushed aside by the development of an opportunistic interpretation of Rule 23. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 168-69 (2009) ("[T]he game for class counsel became one of finding . . . a state court inclined to certify the class when the vast majority of federal courts, other states' courts, and perhaps even other courts within the same state would not.").

Congressional efforts targeted those state court procedures where litigants' rights stood unprotected – where so-called "drive-by certification" benefited no one but trial attorneys clever enough to find the right judge. *See generally* S. Rep. No. 109-14, at 4 (2005) ("[M]ost 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.").

This concern centered on due process rights, as Congress sought to provide defendants access to federal courts that "would be more inclined than state courts to protect individual participatory rights of absent class members and defendants." John C. Massaro, *The Emerging Federal Class Action Brand*,

59 Clev. St. L. Rev. 645, 670 (2011). As Congress debated the passage of CAFA, its members focused on the unfortunate reality that "many state court judges are lax about following the strict requirements of Rule 23 (or the state's parallel governing rule), which are intended to protect the due process rights of both unnamed class members and defendants." S. Rep. No. 109-14, at 14 (2005).[6] Congress understood that if federal court class certification denials occurred in the interest of "the parties' due process rights, there should be no room constitutionally for a State court to reach a different result on class certification issues." H.R. Rep. No. 108-144, at 39 (2003).

Despite its concern with state court procedural abuses, CAFA has only a limited reach. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). Congress intended for state courts to remain the domain for class actions where minimal diversity does not exist, where more than two-thirds of the class members and the primary defendant are from the same state, or where the amount in controversy

[6] The evidence before the legislators revealed that "some class actions currently being certified in some state courts will not be heard as class actions [after CAFA] but only those that should not be class actions, because they do not satisfy the basic requirements of fairness and due process too often ignored in those courts." *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 99 (2002) (statement of Walter E. Dellinger); *see also* 151 Cong. Rec. 1,664 (2005) (statement of Sen. Grassley) ("Our problem is many of these lawsuits are not fair and violate the due process rights of both plaintiffs as well as defendants.").

does not exceed $5 million. 28 U.S.C. § 1332(d)(2), (4). But the fact that those actions may not meet CAFA's removal requirements does not surrender the participants' due process safeguards. This Court has long held that class litigants are entitled to due process rights even in state court. *See Phillips Petroleum*, 472 U.S. at 823 (holding that the "constitutional limitations" of due process must be observed in state courts "even in a nationwide class action"). CAFA aids that effort by establishing federal jurisdiction over a wide category of class litigation. Special attention, however, should be directed to those state court class actions which remain outside CAFA jurisdiction to ensure compliance with necessary due process safeguards.

IV. THE MONTANA SUPREME COURT'S APPLICATION OF RULE 23 VIOLATES DUE PROCESS AND USHERS IN A NEW ERA OF CLASS ACTION ABUSE.

Some state courts recognize the constitutional implications when named plaintiffs try to do an end-run around due process by seeking to certify an injunctive class that merely sets the stage for subsequent individual damages litigation. In *Cullen v. State Farm Mut. Auto. Ins. Co.*, 999 N.E.2d 614 (Ohio 2013), for example, the Ohio Supreme Court rejected certification of claims for declaratory relief regarding an insurance claims process that "merely lay a foundation for subsequent determinations regarding liability or that facilitate an award of damages." *Id.*

at 624. The *Cullen* court noted a (b)(2) class was unsuitable for certification because "'[a]n injunction would not provide "final" relief as required by Rule 23(b)(2)'" and the attempt to shoehorn the class into (B)(2) was an artificial tactic to avoid the due process strictures of Rule 23 (notice and opt-out rights).[7] *Id.* at 624 (quoting *Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 893 (7th Cir. 2011)). In rejecting certification, the *Cullen* court properly observed *Dukes*' admonitions that "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only *as to all of the class members* or as to none of them," and that Rule 23(B)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."[8] *Id.* at. 623-24 (internal quotation marks omitted) (emphasis added by *Cullen*).

---

[7] In Ohio, the Rule 23 subparts are designated as 23(B)(2) and (B)(3).

[8] The Ohio Supreme Court applied a principle already familiar to federal courts that due process is not satisfied where a (b)(2) class seeks relief that "would merely initiate a process through which highly individualized determinations of liability and remedy are made" because "this kind of relief would be class-wide in name only, and it would certainly not be final." *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 499 (7th Cir. 2012) (vacating class certification order pursuant to Rule 23(b)(2) because the "order merely establishe[d] a system for eventually providing individualized relief").

The lower federal courts are reaching similar conclusions after *Dukes*. In *Swan ex rel. I.O. v. Bd. of Educ. of City of Chicago*, No. 13-3623, 2013 WL 4047734 (N.D. Ill. Aug. 9, 2013), parents of disabled students argued for an injunctive relief class under Rule 23(b)(2) to obtain a class-wide injunction keeping certain schools with special education programs open for one year. Reinforcing the principle that a (b)(2) class cannot be certified where "as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made," the court rejected certification because the question of whether the requested injunction "would benefit or harm each putative class member would require an individualized determination" for each class member. *Id.* at *13.

Similarly, in *Cholakyan v. Mercedes-Benz USA, LLC*, 281 F.R.D. 534 (C.D. Cal. 2012), the buyer of an allegedly defective used Mercedes vehicle sought to certify a (b)(2) class of similarly situated current and former owners. The plaintiff, who originally sought certification under Rule 23(b)(3) for a monetary relief class, reframed his class certification motion to request declaratory and injunctive relief relating to the defect and certain warranty and information services to be provided. *Id.* at 541, 558. Citing *Dukes*, the court correctly noted that "Rule 23(b)(2) demands that plaintiff seek an indivisible injunction benefitting all its members at once," and concluded that "no single declaration or injunction sought would benefit the class as a whole" because "the class includes

former owners of class vehicles who will not benefit from declaratory or injunctive relief." *Id.* at 558-59 (internal quotation marks omitted). The court further stated that Rule 23(b)(2) does not authorize certification where "each class member would be entitled to an individualized award of monetary damages." *Id*. at 558 (internal quotation marks omitted). Although the case before it was framed as an action for declaratory and injunctive relief, the court correctly concluded that Rule 23(b)(2) did not permit certification because "the end result would be individualized monetary payments to qualifying class members." *Id.* at 560.

The reason *Dukes* dictates the result reached in these cases is that the "procedural protections attending the (b)(3) class – predominance, superiority, mandatory notice, and the right to opt out – are missing from (b)(2). . . ." *Dukes*, 131 S. Ct. at 2258. When a class action purports to be one for class-wide injunctive relief under (b)(2), but is actually one for individual damages, it effectively allows a monetary relief class to proceed without the due process protections afforded by Rule 23(b)(3). *See id.* at 2259 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.") (citing *Phillips Petroleum*, 472 U.S. at 812). Accordingly, the only outcome consistent with due process is that (b)(2) classes cannot proceed where individual monetary claims predominate and class-wide injunctive relief would not benefit all class members in the same way. Implicitly, if not explicitly, *Cullen*, *Swan*, and

Cholakyan recognized this important due process concern and reached the right result.

The Montana Supreme Court's ruling is directly contrary to the procedural dictates of *Dukes* and the above opinions because it sanctioned a mandatory class to "set the stage for later individual trials" to award compensatory and punitive damages. *Jacobsen*, 310 P.3d at 468. By finding that the class-wide relief could include a "mandatory injunction requiring Allstate to give all class members notice of the right to re-open and re-adjust their individual claims," *id.* at 472, the court approved the precise result that other courts have rejected post-*Dukes*.

The ruling's due process violations are profound. Most apparent, the ruling eliminated Allstate's due process right to defend against individual claims. Absent class members, of course, suffered because without notice, they had no knowledge of the action. And, without the right to opt-out, class members with potentially meritorious monetary claims were forced to have those claims presented by a class representative who could lose on the merits of class-wide issues. *See Dukes*, 131 S. Ct. at 2559 (evincing concern that for "the possibility . . . that individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from"). In other words, an absent class member could have his or her damages claim wiped out without ever receiving the opportunity to object to class representation or present the facts of his individual

case. The process approved by the Montana Supreme Court is, in reality, the antithesis of due process.

The Montana Supreme Court further disregarded the finality requirement of Rule 23(b)(2), which is a fundamental due process principle that is violated when individual damage determinations are implicated by injunctive relief. *See, e.g., Kartman,* 634 F.3d at 893 (holding (b)(2) class unsuitable for certification because injunctive relief setting up individual damage determinations would not be final). That result improperly permitted "a process through which highly individualized determinations of liability and remedy are made" while "avoid[ing] the need to comply with Rule 23(b)(3)." *Cholakyan*, 281 F.R.D. at 560 (internal quotation marks omitted).

Unfortunately, the Montana Supreme Court is not alone in its disregard for basic due process rights. Other state courts have also permitted the segmented certification of (b)(2) classes that effectively deny the due process rights of those impacted. *See, e.g.*, *Ideal v. Burlington Res. Oil & Gas Co. LP*, 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 contrast is stark between what passes constitutional muster for a (B)(2) class in Ohio and a (b)(2) class in Montana based on nearly identical rule

language. In Ohio – and in federal court – a (b)(2) class cannot be a non-final means to litigate individual damages, either directly or indirectly. *See Cullen*, 999 N.E.2d at 623-24; *Kartman,* 634 F.3d at 893. The due process requirements of notice and opt-out rights for damage claims simply will not allow manipulative, intermediate (b)(2) classes.

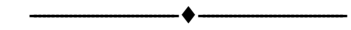
In *Jacobsen*, the Montana Supreme Court rubberstamped that exact form of due process denial – and it did so using this Court's reasoning in *Dukes* as justification. *See Jacobsen,* 310 P.3d at 465-66 (stating that (b)(2) certification of an injunctive class that sets the stage for later damages determinations "aligns with the *Wal-Mart* majority's interest in certifying classes that will drive the resolution of litigation and . . . supports affirming the certification of Jacobsen's class to determine the certified declaratory and injunctive relief."). If *Jacobsen* is permitted to stand without review, class action litigation will revert to the pre-CAFA days of rampant forum shopping where plaintiffs' attorneys seek out friendly state court jurisdictions with lax due process protection. The path to abusive certification paved by the Montana Supreme Court is broad. It permits class actions in pursuit of individual damages to proceed under (b)(2) without regard for individual defenses, finality, notice, or opt-out rights, elevating the putative efficiency of certification above all other considerations, especially due process. But can the violation of constitutional rights ever be truly efficient?

State courts are certainly free to apply their own gloss to the requirements of class certification under their version of Rule 23. But state courts may not rewrite the U.S. Constitution. Either due process demands finality under Rule 23(b)(2) or it does not; either it demands that notice and opt-out rights accompany class actions seeking future damage claims or it does not. The action of Congress in enacting CAFA and this Court's consistent focus on due process monitoring suggest very strongly that (b)(2) classes cannot on the one hand "set the stage for" subsequent damages actions by individual, absent class members and on the other hand deny notice and opt-out rights to those same class members.

Dukes reinforces this procedural bar. Indeed, *Dukes* stands on basic due process principles that apply far beyond even Rule 23. *See* 131 S. Ct. at 2558-59 (holding that class actions seeking money damages comply with due process only when they provide notice and opt-out rights); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 799 (1996) (noting that the guarantee of due process "'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'") (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, state courts cannot, consistent with due process, allow plaintiffs to avoid compliance with Rule 23(b)(3) in cases involving damages – regardless of the "stage" or "phase" of the case where damages are adjudicated. *See Dukes*, 131 S. Ct. at

2558. "Permitting the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure" of the rule and with fundamental due process. *Id*. A class action to determine class-wide issues before later individualized damages trials belongs not under Rule 23(b)(2) but instead under Rule 23(b)(3), which "allows class certification in a much wider set of circumstances but with greater procedural protections" to protect litigants' rights to due process. *Id*.

The due process guarantee is illusory when a state court certifies a (b)(2) class that is nothing but a stepping-stone to individual determinations of liability and damages. Whether a litigant is entitled to such due process should not depend on the state in which the class representative's attorney chooses to file the lawsuit.



CONCLUSION

The questions presented are of vital importance to defendants and to individuals who may be bound by the artificially segmented class certified below. Rule 23(b)(2) should not be just the opening gambit in a quest for ultimate monetary relief. That construction of the rule by the Montana Supreme Court effectively nullifies Rule 23's requirements and intended due process protections for those who may be affected by the class proceeding. For the foregoing

reasons and those stated in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

THEODORE H. FRANK
ADAM E. SCHULMAN
CENTER FOR CLASS
ACTION FAIRNESS
1718 M St. N.W., No. 236
Washington, D.C. 20036
(703) 203-3848
tfrank@gmail.com

JOHN B. LEWIS
Counsel of Record
THOMAS D. WARREN
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
PNC Center, Suite 3200
1900 E. 9th St.
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

DEBORAH H. RENNER
PAUL G. KARLSGODT
CASIE D. COLLIGNON
BAKER & HOSTETLER, LLP

Counsel for Amici Curiae