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

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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Jacobsen concedes that Allstate properly presented its due process objections to the Montana Supreme Court, but misconceives the role of due process by arguing that the court below "found no need to reach" those issues. Opp. 12. Due process is a constitutional floor—a minimum of procedural protections—that must be afforded in *all* actions. Allstate objected to the proposed class as violating that due process floor, but the Montana Supreme Court, in certifying the class, of necessity decided that the class procedures comply with due process. The notion that the Montana court somehow left those issues undecided when it affirmatively ordered this anomalous class trial, over the explicit protests of both Allstate and the dissent, is unsupportable.

Jacobsen's opposition makes no effort to contest the merit or importance of the issues presented in Allstate's petition, electing to rest almost exclusively on a purported absence of jurisdiction. Since the filing of Allstate's petition, Jacobsen has engaged in a concerted effort in the trial court to propose purported 'fixes' to the obviously unconstitutional procedures ordered below. Those proposals have no other role than to provide *something* to say in an opposition brief, since they cannot lawfully be implemented given the unambiguous mandate of the highest court of the State. In remaking the Rule 23(b)(2) class claim and remedies, the Montana Supreme Court took pains to specify *who* will be the class representative (Jacobsen), *when* notice to absent class members will occur (after trial), and *what* issues will be resolved on a classwide basis (liability for "damages to the members of the class" and the predicates for awards

of punitive damages). *That* is the ruling under review, not some hypothetical, never-to-happen future ruling.

The Court should not countenance Jacobsen's improper efforts to hide an unconstitutional class certification decision by Montana's highest court behind spurious jurisdictional arguments and empty assurances of future compliance with law. The Montana Supreme Court's final word on the important due process questions presented in Allstate's petition warrants review now.

I. The Court Has Jurisdiction To Review The Montana Supreme Court's Decision Rejecting Allstate's Due Process Objections

The Court has jurisdiction under 28 U.S.C. § 1257(a) and the second and fourth exceptions of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

A. The Montana Supreme Court has "finally decided" the federal due process issues surrounding class certification under the second *Cox* exception, and those issues will survive and require decision regardless of the outcome of proceedings below. 420 U.S. at 480. Jacobsen argues that his post-remand motions seeking to add a new class representative and provide notice and opt-out to absent members of the Rule 23(b)(2) class show that the due process issues are supposedly "in flux." Opp. 3. Those motions are frivolous—members cannot 'opt out' of a mandatory injunctive class—and futile. They are also a clear confession that the certified class procedures violate federal due process. This Court has never allowed such tactics to thwart its review of important constitutional issues like those presented here. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,

457-58 (1958) (state courts may not "thwart review in this Court" by announcing new procedures).

Allstate's federal due process questions have been finally decided by the Montana Supreme Court and are subject to no further review or correction by any Montana court. The trial court "must proceed in conformity with the views expressed by the appellate court." *Brown & Brown of MT, Inc. v. Raty*, 313 P.3d 179, 180-81 (Mont. 2013). Jacobsen cites only authority establishing that a trial court may modify *its own* certification decisions before final judgment. *Diaz v. State*, 308 P.3d 38, 43 (Mont. 2013); *Rolan v. New W. Health Servs.*, 307 P.3d 291, 297-98 (Mont. 2013); Mont. R. Civ. P. 23(c)(1)(C). No authority establishes that a decision by the Montana Supreme Court is "subject to modification by the trial court." Opp. 10. Quite the contrary, "[o]n remand, the District Court has no power to modify the judgment of the Supreme Court." *R.L.S. v. Barkhoff*, 674 P.2d 1082, 1088 (Mont. 1983).

The Montana Supreme Court affirmatively remade the class claim and remedies to create a multiphase litigation scheme that begins with a Rule 23(b)(2) class action to determine whether Allstate is liable for "damages to the members of the class" (Pet. App. 34a)—including punitive damages for "actual fraud" or "actual malice" (*id.* at 46a)—followed by potentially thousands of trials to determine individual awards of damages, if any (*id.* at 36a). Further, the majority held that notice to absent class members will occur *after* the class trial (*id.* at 64a), despite the dissent's showing that the lack of notice and opt-out violated due process (*id.* at 92a-95a (McKinnon, J., dissenting)). Underscoring this point, the majority noted that "Rule 23(b)(2) classes are considered

'mandatory' because the rule does not provide an opportunity for class members to opt out and does not require a district court to afford them notice." *Id.* at 47a n.11. The majority's hands-on remaking of the class claim and remedies and explicit rejection of pre-trial notice and opt-out cannot be modified by a subordinate court on remand, and Jacobsen cites literally no authority showing otherwise.[1]

If the possibility of a state trial court disregarding an appellate mandate were sufficient to preclude finality, this Court could never review a state decision under *Cox*—a view long ago rejected. Moreover, Jacobsen's argument that this action need not "proceed as a class action at all" (Opp. 13) proves too much: In that scenario, litigation on the class cause of action would be "terminated." 420 U.S. at 486.

B. Under the fourth *Cox* exception, the "relevant cause of action," 420 U.S. at 483, is Jacobsen's class claim seeking declaratory and injunctive relief for an alleged violation of Montana's Unfair Trade Practices Act. Reversal of the Montana Supreme Court's final determination of the federal due process issues surrounding class certification would preclude further litigation on the class cause of action. *See id.* at 482-83. Refusal to review these issues now would unquestionably erode the oft-expressed federal policy of ensuring adequate procedural protections in class

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[1] Jacobsen cites *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978), which noted only that *a district court's* certification order may be amended before final judgment. That observation is inapposite here.

actions. *See id.* at 383. Thus, the exception is fully satisfied here.[2]

Jacobsen does not dispute that the relevant cause of action is his class claim, which, under Montana law, is "distinct from" an individual action for damages. Pet. App. 217a. He argues, instead, that reversal by this Court would not terminate a class cause of action that is "vested" in all class members (Opp. 14)—the assumption evidently being that some other class member could litigate the same class cause of action anew. Even if that were so, however, *this* class claim, with Jacobsen at its head, cannot proceed, a dispositive fact under the fourth *Cox* exception. In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-55 (1989), this Court held that *Cox*'s fourth exception was satisfied where reversal "would bar further prosecution on the RICO counts at issue here," although prosecution could continue on other state-law counts. So, too, here: That others may sue in the future on different claims does not show that *Jacobsen's* class claim can proceed. Nor would certifying a new class representative cure the *other* due process violations that infect the class.

C. Jacobsen broadly asserts that the *Cox* exceptions apply only to "substantive" state rulings (Opp. 14), but there is no authority for that limitation. Certainly *Cox* did not so hold, and neither of the certiorari dismissals that Jacobsen cites plausibly establishes that proposition. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (per curiam); *Florida v. Thomas*, 532

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[2] Jacobsen quotes the general statement for determining finality in state court litigation. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). But *Jefferson* did not address *Cox*'s fourth exception, which focuses on "the relevant cause of action." 420 U.S. at 483.

U.S. 774 (2001). To the contrary, the Court has held that challenges to state venue statutes, which are clearly "procedural," are reviewable on certiorari under 28 U.S.C. § 1257, even though the case will continue regardless of the outcome of the venue dispute. *E.g.*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 650 n.* (1992); *Am. Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963).

Jacobsen suggests that factual and legal issues comprising the class cause of action are necessarily "enmeshed" in the legal issues presented in Allstate's petition. Opp. 15 (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)). But *Wal-Mart* and *Comcast* merely hold that certification decisions may not ignore pertinent evidence solely because that evidence also bears on the merits. That some evidence *may* have to be considered in *some* class certification decisions, even if that evidence is also relevant to the merits, does not mean that the merits are at issue here. To the contrary, the issues presented here—*e.g.*, Can someone who is not a member of the class represent it? Can a state court certify a Rule 23(b)(2) no-opt-out class to provide a predicate for compensatory and punitive damages? Can a state court certify a class to remove individual defenses from consideration?—are pure questions of law that neither resolve nor overlap with the merits at all.

II. The Montana Supreme Court's Decision Conflicts With This Court's Precedents And Decisions Of Federal Courts Of Appeals And State Courts Of Last Resort

Because there is no dispute that the Montana Supreme Court ordered a class trial over Allstate's

properly presented due process objections (Opp. 12), it is irrelevant that the majority only "stated and resolved" three state-law questions (*id.* at 16). Due process "establishes a constitutional floor" below which state procedures may not sink. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). The *manner* by which a state court breaches this floor—whether expressly or *sub silentio*, by purporting to construe its own procedures—is of no consequence to this Court's review. *Vitek v. Jones*, 445 U.S. 480, 491 (1980). State courts cannot immunize their decisions from review through the simple artifice of ignoring federal constitutional violations.

There can be no doubt that the Montana Supreme Court ruled on—and rejected—Allstate's due process objections. When an argument or request presented to the Montana Supreme Court is not addressed in the court's opinion, "[t]hat tacit denial is as effective as if set out explicitly in the opinion, and it is part of the judgment" of the court. *R.L.S.*, 674 P.2d at 1088. An issue "actually presented and silently resolved by the state court against the petitioner" is no less 'ruled on' than an issue formally addressed in the court's opinion. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

As Allstate has shown, the Montana Supreme Court's decision also violated due process *in the first instance* by ordering a Rule 23(b)(2) class trial to "set the stage" for later damages trials, modifying the class claim to assert "damages to the members of the class," and certifying a freestanding question of actual malice or actual fraud to establish a foundation for later punitive damages. The Montana Supreme Court ordered these procedures *sua sponte*—no party requested them—and Allstate promptly objected on

due process grounds. Pet. App. 358a-371a; *see Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 n.3 (1996). Jacobsen does not answer this point.

Jacobsen notes that this Court has only "discuss[ed] constitutional principles" in the class certification context without actually applying them. Opp. 18-19. But that is why the Court should take this opportunity to apply the due process principles it has reaffirmed in recent decisions and make clear that those core principles apply in state courts as well. *See Wal-Mart*, 131 S. Ct. at 2559, 2561; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011). Eighteen *amici*, representing diverse interests, have urged the Court to provide needed clarity in this regard.

Jacobsen makes no attempt to square the Montana Supreme Court's decision with the due process principles this Court has repeatedly announced.

- Jacobsen does not argue that his individual claim is typical of the class he purports to represent, and does not dispute that due process requires a typical plaintiff.
- Jacobsen does not dispute that this action is predominantly for money damages, and that the certified Rule 23(b)(2) class does not provide notice and opt-out rights for absentees, in violation of due process.
- Jacobsen admits that the class factfinder will determine the "predicates for an award of punitive damages" (Opp. 21)—namely, actual fraud or actual malice—without affording Allstate an opportunity to present individualized defenses.

Indeed, Jacobsen's motions seeking to cure the Montana court's due process errors on typicality, notice, and opt-out effectively concede the fundamental unsoundness of its decision.

Jacobsen misleadingly posits that no lower court decision cited by Allstate "has ruled on" the questions presented. Opp. 20. In Jacobsen's erroneous view, however, even the Montana Supreme Court did not "rule on" the due process issues in certifying the class over Allstate's properly presented objections (*id.* at 1). Other courts have correctly refused to approve similar classes over concerns with misusing Rule 23(b)(2) class actions to lay a foundation for later individual monetary awards. *E.g.*, *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012); *Cullen v. State Farm Mut. Auto. Ins. Co.*, 999 N.E.2d 614, 624 (Ohio 2013). The Montana class conflicts with those decisions.

Jacobsen also ignores additional cases cited by the *amici*. In *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657 (Tex. 2004), for example, the Texas Supreme Court rejected, on due process grounds, a mandatory injunctive class in which plaintiffs attempted to "'shoehorn' their damages action into the '(b)(2) framework, depriving class members of notice and opt-out protections.'" *Id.* at 670 (citation omitted). The Montana Supreme Court's decision squarely conflicts with *Lapray* as well.

Jacobsen repeatedly invokes the general principle that the Court "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). But that principle is no more an impediment to certiorari review here than in any case involving disputed constitutional questions.

The Montana class certification decision—authorizing a lead plaintiff who is not a member of the class he purportedly represents; denying notice and opt-out to absentees in an action for money damages; and denying Allstate the defenses it would have in an individual action, including individualized defenses to a freestanding, classwide determination of actual fraud or actual malice that is divorced from an award of punitive damages—makes adjudication of these due process issues unavoidable.

III. This Case Is An Excellent Vehicle To Decide These Questions

This case is an excellent vehicle for resolving these due process issues, notwithstanding Jacobsen's vain attempts to cloud the record.

Even if the trial court were to violate Montana's mandate rule and grant Jacobsen's motions, that action would not cure the due process violations. The Rule 23(b)(2) class would still be unconstitutionally certified "on the premise that [Allstate] will not be entitled to litigate its statutory defenses to individual claims" for violation of the Montana Unfair Trade Practices Act, actual fraud, and actual malice. *Wal-Mart*, 131 S. Ct. at 2561. Similarly, the due process violation caused by divorcing the factual predicates for punitive damages from individual damages awards would undisputedly persist in any event. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409-10 (2003); Pet. 28.

Indeed, Jacobsen's nonsensical request to allow class members to 'opt out' of the mandatory class merely highlights the dangers of allowing litigation on this unconstitutional class claim to proceed. By definition, mandatory class actions under Rule

23(b)(2) can award only indivisible relief for conduct that is unlawful as to all of the class members or none of them. *Wal-Mart*, 131 S. Ct. at 2557. If the class certification violates due process, then no absent class member would be bound by an adverse class verdict. *Concepcion*, 131 S. Ct. at 1751. Conversely, *all* class members would seek to claim the res judicata effect of a favorable class verdict, regardless of any purported opt-out. This heads-I-win, tails-you-lose construct is the epitome of procedural unfairness.

History also refutes Jacobsen's assurance that the Court will have "no shortage of opportunities" to decide these questions if it does not do so now. Opp. 23. As Allstate and the *amici* have amply shown, these issues are vitally important in state class actions but rarely rise to this Court's review. Awaiting a final judgment on the merits is a false palliative: The *in terrorem* effect of certification in a state forum with inadequate procedural protections means that the vast majority of state class actions will settle long before there is a litigated judgment. Jacobsen does not answer, and thus tacitly concedes, this point.

In the years since these due process issues narrowly evaded the Court's review in *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam), and *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994) (per curiam), divisions among state and federal courts in affording minimum procedural protections in class actions have grown more profound. Pet. 17-20, 24-26, 29. This case, and the Court's recent reaffirmations of due process limitations on class certification, show those deepening divisions in stark relief.

State courts and litigants deserve clarity on whether the due process principles that establish the constitutional floor in federal class actions apply fully in state class actions as well. These issues have percolated for many years, yet the state courts remain in disarray. Only this Court's review can provide the guidance needed to define the minimum procedural contours of class certification in state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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