No. 14-910

IN THE
# Supreme Court of the United States

ALLSTATE INSURANCE COMPANY ,

*Petitioner*,

v.

JACK JIMENEZ, individually and on behalf of others similarly situated,

*Respondents.*

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

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The district court certified under Federal Rule of Civil Procedure 23 a class of employees alleging that their employer unlawfully denied them overtime pay under state law. After reviewing the factual record, the court identified common questions regarding a uniform practice of requiring overtime work but discouraging overtime reporting.

The question presented is whether the district court abused its discretion in certifying the class.

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## STATEMENT OF THE CASE

Respondents, Jack Jimenez and about 1,300 other California claims adjusters, allege that petitioner Allstate Insurance Company unlawfully denied them overtime pay under state law. Pet. App. 18a. Allstate's stated overtime policy is to pay employees for all time worked, but respondents allege that Allstate actually required them to work overtime while discouraging their requests for overtime pay. *Id.* 31a-37a. The district court found that respondents "presented sufficient evidence to support the inference that Allstate has a common practice of not following its [stated] overtime policy." *Id.* 35a. Accordingly, the court certified the class to determine whether Allstate indeed had a common practice that violated state law. *Id.* 67a.

1. The California Labor Code requires employers to "pay each employee for all time the employer 'engage[s], suffer[s] or permit[s]' such employee to work." Pet. App. 30a (alterations in original) (quoting *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 586 (2000)); *see* Cal. Labor Code §§ 510, 1198. The district court identified three elements of an unpaid overtime claim under California law: "(1) [that the employee] performed [overtime] 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.'" Pet. App. 31a (quoting *Adoma v. Univ. of Phx., Inc.*, 270 F.R.D. 543, 548 (E.D. Cal. 2010)) (internal quotation marks omitted).

2. Years ago, Allstate's claims adjusters' job responsibilities "often required work of more than eight hours per day and 40 hours per week." Pet. App. 24a.

Adjusters sued the company, claiming they were entitled to overtime pay. Allstate agreed to settle and reclassified respondents in 2005 from "exempt" to "not exempt," thus acknowledging that respondents must be paid for overtime work. *Id.*

Though adjusters' classification changed, their workload did not. CA9 Excerpts of Record (ER) 2167:18-25 (Cohn Dep.); *id.* at 2198:15-21 (Collins Dep.). Today, adjusters still "cannot complete their work within an eight-hour day," so they must "routinely work overtime in order to get their jobs done." Pet. App. 41a-42a. In fact, Allstate now has fewer claims adjusters than it did before the reclassification. CA9 ER 2175-76:24-2 (Lewkoski Dep.).

Allstate empowers only managers to record respondents' hours. Pet. App. 25a. Respondents do not "submit time cards or punch time clocks," and managers do not rely on phone and computer records or their own observations to track employees' actual time. *Id.* 25a-26a, 37a. And Allstate records hours at "a default of eight hours per day and 40 hours per week." *Id.* 25a. Allstate still refers to respondents' compensation as a "salary" and publishes no hourly compensation rate. *Id.* 24a-25a. Respondents must report and justify any deviations from the eight-hour-day and forty-hour-week defaults. *Id.* 25a.

Managers broadcast a "general message that only underperforming, 'inefficient' adjusters would require overtime to keep up with their workloads." Pet. App. 36a. Those managers, who have all "been trained to use the same policies and procedures for the payment of overtime," *id.* 26a, each have a "nonnegotiable" compensation budget that likely puts "a functional limit on overtime," *id.* 27a. Evidence also indicates that

managers' performance evaluations and bonuses depend on how much of that budget they spend. *Id.*

Employees were "reluctant to report overtime" and "feared" the consequences of doing so because of pressure from managers. Pet. App. 36a-37a (summarizing employee testimony). For example, one email from a line manager admonished employees with the heading "Overtime is cancelled! Effective Immediately," and concluded with the command: "No overtime and no exceptions!" *Id.* 37a.

3. Respondents sued, alleging that Allstate unlawfully denied them overtime pay and required them to work during meal and rest breaks. Pet. App. 19a. They sought class certification under Federal Rule of Civil Procedure 23, which requires that a class meet the four prerequisites of Rule 23(a) and the requirements of one of the three subdivisions of Rule 23(b).

The district court's 28-page opinion certified the class as to the unpaid-overtime claim but denied certification for the meal- and rest-break claims. CA9 ER 1-28. For the unpaid-overtime claim, the district court bifurcated the proceedings, certifying the class with respect to common liability questions about Allstate's allegedly unlawful policy and reserving to a second phase whether other issues merited individual or class treatment. Pet. App. 66a-67a. The court found that respondents had "presented sufficient evidence to demonstrate," *id.* 40a, that the class satisfied Rule 23(a)(2)'s commonality requirement of identifying "a common question" whose determination "will resolve an issue that is central to the validity of each one of the claims in one stroke," *id.* 30a (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

The court recognized several common questions: "(i) whether Defendant had a common and widespread practice of not following its policies regarding overtime; (ii) whether Defendant knew or should have known that claims adjusters were working off-the-clock without compensation; and (iii) whether Allstate managers who were so informed elected to take no corrective steps with respect to adjusters who were working overtime without compensation." Pet. App. 40a-41a. The court considered Allstate's arguments that it had a lawful official policy and that overtime practices differed across the class. *Id.* 33a-44a. But, considering all the evidence, the court concluded that "competing evidence" indicated that the alleged unlawful practice "has been applied with equal force to all claims adjusters in California." *Id.* 43a-44a.

The district court also found that respondents' unpaid-overtime claim satisfied the other Rule 23 requirements, including that common questions predominate over individual ones. *See* Fed. R. Civ. P. 23(b)(3). Weighing the individualized issues that Allstate identified, Pet. App. 57a-63a, against the common issues raised by Allstate's "company-wide policy of discouraging and limiting overtime," *id.* 61a, the court concluded that there were not "sufficiently individualized questions that either preclude certification or make a class process unfair," *id.* 63a. In particular, the court considered Allstate's defenses that managers lacked constructive knowledge of overtime work and that any overtime without pay was *de minimis*. *Id.* 62a-63a. Reasoning that Allstate could raise each defense during the first, classwide phase of the litigation, as well as during the second phase, the

court found that these defenses did not defeat predominance. *Id.*; *see also id.* 15a.

The district court also considered respondents' proposed methods of classwide proof. It permitted the use of representative testimony during classwide proceedings, noting that such evidence is widely used in similar cases. *See* Pet. App. 49a-50a, 67a. But it struck respondents' social science evidence and declined to accept statistical sampling for calculating classwide damages. *Id.* 47a n.15, 51a.

Finally, the district court recognized that class certification "will continue to be considered by the Court as this matter proceeds." Pet. App. 65a n.17.

4. The court of appeals unanimously affirmed, concluding that "[t]he district court did not abuse its discretion by entering its class-certification order, and did not violate Allstate's due process rights." Pet. App. 16a. The court of appeals found that the district court had properly applied Rule 23(a)(2)'s commonality requirement under *Wal-Mart*, which, the court explained, requires that determination of a common question's "truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." Pet. App. 7a (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart*, 131 S. Ct. at 2551)) (internal quotation marks omitted).

The court noted that "[w]hether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims" and explained 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 California's *Adoma* standard for unpaid-

overtime claims. Pet. App. 8a-9a. The court also rejected Allstate's due process objections to the district court's certification order, reasoning that "the district court was careful to preserve Allstate's opportunity to raise any individualized defenses it might have" and "carefully analyzed the specific statistical methods proposed by plaintiffs." *Id.* 15a.

Finally, the court of appeals declined to reach the issue of predominance under Rule 23(b)(3), holding that Allstate failed to preserve the issue for appeal. Pet. App. 7a n.4. It briefly observed in a footnote that "if we were to reach that claim, we would affirm the district court's predominance holding." *Id.*

5. The Ninth Circuit denied Allstate's petition for panel rehearing and rehearing en banc, with no judge calling for an en banc vote. Pet. App. 69a-70a.

## REASONS FOR DENYING THE WRIT

The court of appeals faithfully applied Federal Rule of Civil Procedure 23 in holding that the district court's decision to certify a small class of employees was not an abuse of discretion, Pet. App. 16a. In seeking this Court's review, petitioner relies principally on an array of alleged circuit conflicts and then turns to supposed legal errors. These claims fail not just because no circuit conflict exists, but because no court has ever announced the rules of law that petitioner champions.

First, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), requires that common questions "resolve an issue that is central to the validity of each one of the claims," *id.* at 2551, but not that they "*resolv[e]* liability," Pet. 23. Second, defendants have a due process right to raise "every available defense," *see*

*Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation and internal quotation mark omitted), but not to dictate *when* they can raise them, *see* Pet. 28. Third, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), mandates that a classwide damages model be tied to the plaintiffs' theory of liability, *id.* at 1433, but not that the presence of individualized damages necessarily defeats class certification, *see* Pet. 29-30. The lower courts properly applied these settled principles to the facts of this case.

The fact-bound decision below also presents a flawed vehicle and raises issues of limited legal scope. Because petitioner forfeited any argument on whether common questions predominate under Rule 23(b)(3), that question is not properly before this Court. Moreover, the district court's stated intention to monitor its case-management decisions going forward makes this interlocutory appeal particularly ill suited for review.

## I. This Case Does Not Implicate Any Circuit Conflict.

Petitioner is wrong that the circuits are split on the class-certification issues it identifies. Before turning to each claimed split, two related overarching considerations bear mention.

First, none of petitioner's cases expresses disagreement with other circuits, underscoring that the cases simply applied settled legal standards to a wide array of factual circumstances.

Second, these cases reviewed class-certification orders under an abuse-of-discretion standard, which defers to the district court's role as fact-finder and its "inherent power to manage and control pending

litigation," *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (internal quotation mark omitted) (quoting *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007)).

Thus, divergent facts and a deferential standard of review – not disagreement over legal rules – explain the outcomes that petitioner tries to repackage as circuit splits.

### A. No Court Of Appeals Requires That Common Questions Resolve Liability.

The cases cited by petitioner do not hold, as Allstate claims, that common questions must "*resolv[e]* liability" to satisfy Rule 23, Pet. 23. Instead, like the decisions below, each of those cases requires just what this Court required in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011): that common questions "resolve *an issue* that is central to the validity of each one of the claims in one stroke," *id.* at 2551 (emphasis added). These cases simply applied this consistent understanding of Rule 23 to fact-specific commonality and predominance inquiries.

Fifth Circuit. *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012), vacated a certification order, in part on commonality grounds, for a class of children challenging foster care conditions. *Id.* at 844-45. It did not, as petitioner asserts, require that common questions "establish" "the defendant's actual liability," Pet. 21. To the contrary, the Fifth Circuit recognized that a common question need only "decide *an issue* that is *central* to [the class's] claims." 675 F.3d at 841 (emphasis added).

*Stukenberg* is inapposite for additional reasons. First, it concerned thousands of foster children who

alleged child abuse, neglect, and other types of injuries at the hands of various actors. 675 F.3d at 835-37. Here, by contrast, respondents allege a single type of injury caused by a single employer's statewide practice. Second, the Fifth Circuit reached no conclusion at all about whether the plaintiff class would fail the commonality requirement. It vacated the certification order but recognized that "the district court's conclusion may ultimately be a sound application of *Wal-Mart*." *Id.* at 844. It faulted the district court only for failing to "explain its reasoning," since it "conducted no analysis of the elements and defenses for establishing any of the proposed class claims" as required under Rule 23(a)(2). *Id.* at 842-43. As explained below (at 19-20), that flaw is absent from the district court's order here.

Eighth Circuit. *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370 (8th Cir. 2013), reversed on commonality grounds a certification order for Domino's Pizza employees suing to recover delivery charges. *Id.* at 372, 376. That case also never held that answers to common questions must resolve liability. *See id.* at 376 (quoting *Wal-Mart*, 131 S. Ct. at 2551). In fact, the Eighth Circuit expressly recognized that an unpaid-overtime claim would satisfy Rule 23 based on the common question "whether the defendant had an unofficial company policy forcing plaintiffs" to work overtime without pay. *Id.* at 377 (citing *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (2013) (remanded in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013))).

The Eighth Circuit distinguished that scenario from the facts before it, where the employees claimed that delivery charges were recoverable "gratuities"

under a Minnesota statute. 705 F.3d at 373. The court held that this statutory determination hinged on the "context of specific transactions" with customers and was therefore an individualized issue. *Id.* And, under the statute, plaintiffs' common contention – whether Domino's notified customers that the charge was not a gratuity – was "relevant only if" the court first resolved the individualized issues in their favor. *Id.* at 375. By contrast, proof of Allstate's common practice here drives the resolution of all three legal elements of plaintiffs' state-law claims. *See infra* at 19; Pet. App. 9a-10a, 31a-33a.

Second Circuit. *Myers v. Hertz Corp.*, 624 F.3d 537 (2d Cir. 2010), affirmed a denial of certification on predominance grounds for Hertz employees alleging misclassification under the Fair Labor Standards Act. *Id.* at 548. It also did not hold that common questions must resolve liability. Instead, *Myers* acknowledged that an issue "potentially implicating different class members differently does not *necessarily* defeat class certification." *Id.* at 551. And lest there be any doubt, the Second Circuit recently reaffirmed this understanding, explaining that "the resolution" of a common question that "address[es] each element" of a plaintiffs' claim is "not required for there to be a common question under Rule 23." *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 86 (2d Cir. 2015) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013)); *see id.* at 81 (same).

Moreover, *Myers*'s outcome rested on whether common issues predominated "in the overall mix of issues this case present[ed]." 624 F.3d at 551. The court found that only individualized evidence could determine whether employees met the statutory

standard of having duties "characteristic of 'management,'" in part because Hertz lacked "a uniform corporate policy detailing employees' job duties." *Id.* at 542, 549 (citation omitted). In addition, the court recognized that the plaintiffs' common contention – that Hertz classified all plaintiffs as exempt – "demonstrated little" about each employee's job duties, and, in any case, the fact of the classification was "conceded." *Id.* at 550-51.

Eleventh Circuit. Finally, *Babineau v. Fed. Express Corp.*, 576 F.3d 1183 (11th Cir. 2009) – which affirmed, on predominance grounds, a denial of certification for employees allegedly forced to work without pay, *id.* at 1185, 1191 – also did not announce petitioner's purported rule. The Eleventh Circuit required not that common questions resolve liability, but only that they "*ha[ve] a direct impact on* every class member's effort to establish liability." *Id.* at 1191 (alteration in original) (emphasis added) (citation and internal quotation mark omitted).

*Babineau* affirmed the district court's no-predominance holding because of the case's particular mix of common and individual issues. The court noted that plaintiffs' common proof might have shown that employees had not been paid for time on the clock, but the employer raised individualized questions about whether each employee was actually working during those unpaid periods. 576 F.3d at 1192. Weighing those issues, the court concluded that "[u]nder the facts of this case, it was not an abuse of discretion to conclude that proof of" a policy to encourage unpaid work "would not predominate over individualized issues" of whether employees were actually working. *Id.* at 1194. That conclusion does not conflict with the

outcome here, where *Babineau*'s substantial individualized question about employees' on-the-clock activities is not at issue.

### B. Petitioner's Cited Cases Do Not Address A Purported Due Process Right To Raise Defenses At Particular Stages Of Litigation, Let Alone Evidence A Split On That Issue.

Hoping to raise individualized defenses at the common stage of the proceedings, petitioner alleges a second split regarding "a defendant's right to raise all available defenses at *each* stage of class proceedings." Pet. 28 (emphasis added). But neither this Court nor any decision petitioner cites has recognized any such right. To the contrary, it is well established that district courts have inherent authority "to achieve the orderly and expeditious disposition of cases," *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 172-173 (1989) (citation and internal quotation mark omitted). Accordingly, "there is no constitutional impediment to trying different issues to the jury at separate times." 7B Charles Alan Wright, et al., *Federal Practice and Procedure Civil* § 1801 (3d ed. 2014).

Petitioner relies on cases that stand only for the general proposition that defendants must be permitted to raise all available defenses at *some* stage of the proceedings. *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), for example, observed that a class-action defendant has a due process right to raise individual defenses *generally*, but did not guarantee defendants any right to dictate *when* those defenses may be litigated. *See id.* at 307. Likewise, *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973), said nothing about *when* particular defenses may be raised, but rather held that

consolidating cases was inappropriate where only one plaintiff (among fifteen) asserted unique and "unrelated" claims against a defendant. *Id.* at 716-17.

The only case petitioner cites that did consider *when* defenses should be litigated, *Authors Guild, Inc. v. Google Inc.*, 721 F.3d 132 (2d Cir. 2013) (per curiam), did so not on the basis of due process, or even Rule 23, but rather considerations of judicial efficiency. There, the Second Circuit reasoned that a fair-use defense was best litigated prior to class certification because that crucial question might make further proceedings unnecessary, not because the defendant's due process rights demanded that procedure. *Id.* at 134. Further, *Authors Guild* imposed no affirmative obligations on district courts, acknowledging only that individualized defenses "*can be* considered as part of the court's analysis to determine whether individual issues predominate under Rule 23(b)(3)." *Id.* (emphasis added) (quoting *Vulcan Golf, LLC v. Google Inc.*, 254 F.R.D. 521, 531 (N.D. Ill. 2008)) (internal quotation marks omitted).

Trying to fill out the other side of its purported split, petitioner mistakes two state-court cases – each involving claims against Allstate – for "a widening pattern" of cases that ratify "a method of trying class-wide liability without regard to individualized defenses," Pet. 29. First, *Williams v. Superior Court*, 165 Cal. Rptr. 3d 340 (Ct. App. 2013), certified a class of Allstate adjusters raising claims related to those here. *Id.* at 350. Relying on the decision below, *Williams* held simply that resolution of a common question would not deny Allstate the right to raise individualized defenses. *See id.* at 346-50.

Second, petitioner miscites a decision of the Montana Supreme Court unrelated to class certification, Pet. 29 (citing *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649 (Mont. 2009)), perhaps intending to cite a decision issued four years later, *Jacobsen v. Allstate Ins. Co.*, 310 P.3d 452 (Mont. 2013), *cert. denied*, 134 S. Ct. 2135 (2014). That decision, however, actually *refused* to certify a class with respect to punitive damages precisely because certification on that issue would have completely denied Allstate the opportunity to raise individualized defenses. *Id.* at 476.

### C. The Courts Of Appeals Agree That *Comcast* Allows Certification Of Liability Issues Where Damages Are Individualized.

1. As petitioner recognizes (Pet. 30-31), the Fifth, Sixth, and Seventh Circuits agree with the decision below that *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), does not generally preclude class certification where damages will be individualized. The Fifth Circuit upheld certification of a settlement class alleging injury from the Gulf oil spill even though damages calculations were "not capable of classwide resolution." *In re Deepwater Horizon*, 739 F.3d 790, 815, 821 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 754 (2014). That court stressed its agreement with the Sixth, Seventh, and Ninth Circuits in rejecting the "misreading" that *Comcast* precludes certification wherever damages are individualized. *Id.* (citing *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* 722 F.3d 838, 860 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013), *cert. denied*, 134 S.

Ct. 1277 (2014); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)).

Under similar reasoning, the Sixth and Seventh Circuits upheld class certification despite individualized damages. *See Whirlpool*, 722 F.3d at 860-61; *Butler*, 727 F.3d at 801. The First and Second Circuits recently joined this circuit consensus as well, upholding certification orders where damages could not be calculated classwide. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) (holding that "individualized determinations at the liability and damages stage do[] not defeat class certification"); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast*, then, did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis.").[1]

2. None of the cases petitioner cites that supposedly conflict with the cases above addressed whether *Comcast* precludes certification whenever damages will be individualized, much less departed from the consensus position.

Petitioner misconstrues *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013), which established no rule on when individualized damages defeat predominance, much less a rule that certification is never proper when such damages are present. *See* Pet. 30. To the contrary, the D.C. Circuit expressly cautioned that the plaintiffs did not need to "demonstrate through common evidence the precise amount of damages incurred by each class

[1] The First Circuit decided *In re Nexium* six days before the petition here was filed, while the Second Circuit decided *Roach* two weeks afterward.

member." *Rail*, 725 F.3d at 252. The court reversed certification because the plaintiffs could not demonstrate a reliable link between the alleged price-fixing scheme and harm to their balance sheets, reasoning only that "common questions of fact cannot predominate where there exists no reliable means of" common proof. *Id.* at 252-53. Shoddy evidence, not individualized damages, doomed the plaintiffs in *Rail*.

*Ward v. Dixie*, 595 F.3d 164 (4th Cir. 2010), also does not evince a split regarding the meaning of *Comcast*, and not only because *Ward* came three years before *Comcast*. Though the Fourth Circuit said that individualized damages "cut against" predominance, *see* Pet. 30 (quoting *Ward*, 595 F.3d at 180), it nonetheless *upheld* certification even though damages awards would vary among the individual class members, *Ward*, 595 F.3d at 180, 183.

Finally, petitioner cites *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013), for the proposition that individualized damages necessarily preclude class certification. Pet. 30. To begin with, the Tenth Circuit recently expressly reaffirmed the principle that the "presence of individualized damages issues" need not preclude class certification. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014), *petition for cert. filed sub nom. Dow Chem. Co. v. Indus. Polymers, Inc.*, No. 14-1091 (2015).[2]

In any case, petitioner misreads *Roderick*. That case reversed certification in part because the district

[2] The pending petition for a writ of certiorari in *Urethane* concerns issues other than those raised here. *See* Petition for Writ of Certiorari, No. 14-1091, at 28 n.6.

court "may have altered the burden of proof by requiring [the defendant] to disprove commonality." *Roderick*, 725 F.3d at 1218. Though it recognized the settled principle that predominance fails where "'individualized issues will overwhelm those questions common to the class,'" Pet. 30 (quoting *Roderick*, 725 F.3d at 1220), the court also stressed that "there are ways to preserve the class action model in the face of individualized damages" after *Comcast* by bifurcating the proceedings, *Roderick*, 725 F.3d at 1220. The district court heeded that suggestion here. Pet. App. 64a-65a, 65a n.17.

## II. The District Court Did Not Abuse Its Discretion In Certifying The Class.

### A. The District Court Properly Applied Rule 23's Commonality And Predominance Standards Under *Wal-Mart* And *Comcast*.

Contrary to petitioner's understanding, Rule 23 does not demand that common questions "answer whether the defendant is *actually liable* to any individual class member," Pet. 17 (emphasis added). This Court has already held that Rule 23 "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (alterations and internal quotation marks omitted).

1. With respect to commonality, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), requires what it says: "a common contention" whose "truth or falsity will resolve *an issue* that is central to the validity of each one of the claims in one stroke." *Id.* at 2551 (emphasis

added). Put another way, "[c]ommon issues are those legal or factual issues that are the same in functional content . . . regardless of whether their disposition would resolve all contested issues in the litigation." Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 2.01 (2009). Answering a common question need only "drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131-32 (2009)). It need not end the litigation.

Petitioner's contrary argument also cannot be squared with Rule 23(a)(2)'s text, which requires only that "there are questions of law *or* fact common to the class," Fed. R. Civ. P. 23(a)(2) (emphasis added). Thus, by definition, the Rule does not require that *all* questions of law *and* fact be common. Rule 23(b)(3), moreover, by asking whether common questions predominate over individual ones, expressly contemplates the existence of individual questions in a certifiable class. If common questions alone must resolve liability, then individual questions would not only fail to predominate, they would not exist.

Both the district court and the court of appeals identified the correct legal standard for commonality. As the district court noted, "[t]he commonality requirement is satisfied only by a common question 'of such a nature that it is capable of classwide 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.'" Pet. App. 30a (quoting *Wal-Mart*, 131 S. Ct. at 2551); *see also* Pet. App. 7a (same).

Determining whether Allstate had "a company-wide policy of discouraging and limiting overtime," Pet. App. 61a, would drive the resolution of all three prongs of an overtime claim under California law. *See Adoma v. Univ. of Phx., Inc.*, 270 F.R.D. 543, 548 (E.D. Cal. 2010) (requiring that a plaintiff show "(1) he 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.'") (quoting *Lindow v. United States*, 738 F.2d 1057, 1060-62 (9th Cir. 1984)).

First, the common practice, if proved, would show that Allstate took no affirmative steps to reduce respondents' workloads following the 2005 reclassification. By "just and reasonable inference" therefore, *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 687 (1946), respondents generally worked more than forty hours per week without being paid overtime, just as they had before their reclassification.

Second, even if petitioner could show that a few individual managers had their heads in the sand, proving a common practice would demonstrate that they still "should have known that [Allstate's] employees" were working overtime without pay. Pet. App. 62a.

Third, proving a common practice would demonstrate that Allstate at least stood idly by; in fact, it actively pressured its employees to work overtime without pay across its California operations.

The reverse is also true. If plaintiffs fail to prove the common practice during classwide proceedings, their classwide claims fall apart. *See* Pet. App. 31a.

Determining whether Allstate had a common practice, therefore, is not "merely a preliminary step toward resolution of the defendant's liability." Pet. 17 (emphasis omitted). To the contrary, it will drive the resolution of this litigation, as *Wal-Mart* itself suggested. This case presents the "uniform employment practice that would provide the commonality needed for a class action" lacking in *Wal-Mart*. 131 S. Ct. at 2554; *see* Pet. App. 44a (distinguishing the facts here from those in *Wal-Mart*). The *Wal-Mart* plaintiffs alleged a policy of "*allowing discretion* by local supervisors over employment matters" which was effectively "a policy *against having* uniform employment practices." 131 S. Ct. at 2554. Here, by contrast, the district court credited plaintiffs' evidence of a "company-wide policy of discouraging and limiting overtime" that constrained managers' discretion. Pet. App. 61a; *see also id.* 32a, 35a-37a (pointing to, for example, a statewide "directive to 'manage' overtime," maintenance of employees' workload after reclassification from salaried to hourly employees, and requirements that managers be "the only personnel authorized to record overtime 'exceptions'").

2. Petitioner forfeited its predominance argument in the court of appeals, and therefore it is not properly before this Court. *See infra* at 24-25. In any case, the district court did not abuse its discretion by finding plaintiffs had "demonstrated that there are significant common questions at issue and that they will predominate over any individualized inquiries," Pet. App. 62a. Weighing the mix of issues before it, the court found that establishing a common practice would leave only comparatively circumscribed questions for

later proceedings. *See* Pet. App. 60a-62a. This reasoning aligns with "accumulated experience" suggesting that classwide proceedings properly advance litigation efficiency when the issues certified "concern[] 'upstream' matters focused on" the defendant's conduct rather than "'downstream' matters focused on th[e] claimants themselves." Am. Law Inst., *supra*, § 2.02 cmt. a.

### B. The District Court's Order Took Care To Preserve Petitioner's Due Process Rights.

Petitioner objects to when it can raise its defenses that any overtime was *de minimis* and that it lacked constructive knowledge. *See* Pet. 3-4. Petitioner also seizes on the Ninth Circuit's mention of "statistical analysis," Pet. App. 15a, and argues that the district court's order thereby contravenes "this Court's prohibition against 'trial by formula' for class-wide liability proceedings" in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Pet. 4 (citing 131 S. Ct. at 2561). Both arguments are misplaced.

1. This Court has recognized that a district court's "sensible efforts to impose order upon the issues in play and the progress of [class actions] deserve our respect." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487-88 n.6 (2008). Petitioners mistake their right to raise every available defense for a right to decide when those defenses will be litigated. That prerogative belongs to the district courts, which are "necessarily vested" with control "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

Neither case from this Court cited by petitioner supports a due process right to raise defenses at any

particular time. *Lindsey v. Normet*, 405 U.S. 56 (1972), found *no* due process violation where tenants had to raise certain defenses related to an eviction action in a separate lawsuit, because there were "available procedures to litigate any claims against the landlord." *Id.* at 66. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), held only that due process forbids awarding punitive damages for injuries to nonparties when "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge." *Id.* at 353.

There is no due process violation here because Allstate will have the opportunity to defend against respondents' claims during both phases of the proceedings. First, the district court expressly afforded Allstate "an opportunity to raise [its] defenses with the representative witnesses" during the initial, classwide phase of litigation. Pet. App. 63a. Second, as Allstate acknowledges, it will be able to raise its defenses with respect to any individual class member during the second phase of the proceedings. *See* Pet. 4; Pet. App. 15a-16a.

And regardless of how courts label different phases of bifurcated class litigation – liability and damages, common and individualized, first and second – "due process challenges to bifurcation have not been terribly successful as courts have found that bifurcation tends to serve rather than impede due process concerns," William B. Rubenstein, *Newberg on Class Actions* § 11:10 (5th ed. 2014). Because it answers common questions classwide and reserves individualized issues for later proceedings, "bifurcation is a *response* to the due process challenge, not the cause of it." *Id.*; *see also*

*id.* § 11:7 ("[B]ifurcation is the *answer* to the problems found by" *Wal-Mart* and *Comcast*).

2. Regarding statistical sampling, petitioner casts a sheep in wolf's clothing. In *Wal-Mart*, a statistical sample would have found a percentage of valid claims to "then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery – without further individualized proceedings." 131 S. Ct. at 2561. The Court "disapprove[d] that novel project" as a means of proving that thousands of managers scattered across the country and imbued by their corporate parent with broad discretion acted with discriminatory intent. *Id.*

Here, the district court heeded *Wal-Mart* and declined to permit "statistical sampling" as "a proper method of calculating damages" at the second phase of litigation. Pet. App. 51a. All the district court permitted for the litigation's first phase was "representational testimony" to help demonstrate Allstate's common practice. *Id.* 67a. That form of proof, where a fair cross-section of employees testify regarding common practices, has long been used in employment cases. *See id.* 49a-50a (collecting cases).

Whether labeled as statistical analysis or – more accurately – representative testimony, this evidence serves as only one piece of common proof against Allstate. Together with depositions of Allstate managers, company emails, building entry data, phone records, and computer logins, it will demonstrate Allstate's common practice. *See* Pet. App. 35a-37a. Any statistical analysis would only help ensure that the representative testimony is truly representative.

Unlike in *Wal-Mart*, it would not take the place of all other common proof.

## III. This Case Is Ill Suited For Review.

1. This Court's practice is to deny review from an interlocutory appellate decision "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Robert L. Stern et al., *Supreme Court Practice* § 4.18 at 282 (10th ed. 2013) (internal quotation mark omitted).

Beyond that general principle, this case is particularly ill suited for interlocutory review. The district court developed a flexible, bifurcated trial structure and announced its intention to monitor the propriety of its phased approach "as this matter proceeds and more information is developed." Pet. App. 65a n.17. Further, petitioner's due process objection concerning the availability of particular defenses at particular times hinges on those ongoing case-management decisions. At present, petitioner asks this Court to review hypothetical problems with a trial that has yet to occur.

2. Predominance is not properly before this Court because, as the court of appeals held, petitioner forfeited the argument below. Pet. App. 7a n.4 (holding that the "two cursory statements" regarding predominance in petitioner's opening brief were "not enough to preserve the issue for appeal"). The court of appeals accordingly declined to rule on the issue. *Id.* "[O]nly in exceptional cases" will this Court consider a ground that "has not been raised below." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989) (citation and internal quotation marks omitted). And that admonition is doubly salient here, where the

impediment to review is not simply that petitioner failed to press an issue below, but also that the court of appeals expressly found forfeiture.[3]

Thus, because the court of appeals' decision does not properly present a Rule 23(b)(3) question, this case is a poor vehicle for considering "the meaning and scope of Rule 23's . . . predominance requirement[] for class actions nationwide." Pet. 3. And because the court of appeals did not issue any binding precedent on that issue, let alone "rewrit[e] plaintiffs' burden[] for establishing" predominance, *id.* 33, this is far from an "especially important" case warranting this Court's review, *id.* 32.

3. Despite the efforts of petitioner and their amici to suggest otherwise, this case presents none of the systemic concerns that motivated review in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). There, a district court certified a Rule 23(b)(2) non-opt-out class of one-and-a-half million plaintiffs who aimed to prove through statistical sampling that Wal-Mart's policy of allowing discretion by local supervisors created a uniform practice of unlawful discrimination against female employees. *Id.* at 2547-49, 2555. Here, by contrast, about 1,300 claims adjusters intend to show as a Rule 23(b)(3) class that a uniform state-wide policy *limited* the discretion of individual managers to lawfully compensate workers for overtime, Pet. App. 44a, and the district court declined to permit statistical

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[3] Contrary to petitioner's assertion that the court of appeals ruled on predominance in its discussion of *Comcast*, Pet. 13 n.1, the court discussed *Comcast* only with regard to petitioner's due process claim. *See* Pet. App. 15a-16a ("Unlike the putative class in *Comcast*," the district court "preserved the rights of Allstate to present its damages defenses on an individual basis.").

sampling as a method for calculating individual damages. *Id.* 51a.

Thus, far from creating a "grave potential for abuse," Pet. 34, this case involves an approach this Court expressly endorsed in *Wal-Mart*: a class action where plaintiffs first prove in common a uniform "pattern or practice," and then "conduct additional proceedings" to "determine the scope of individual relief." 131 S. Ct. at 2561 (quoting *Teamsters v. United States*, 431 U.S. 324, 361 (1977)) (internal quotation marks omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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