No. 13-916

In The Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ROBERT JACOBSEN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In addition to the questions presented by Allstate, the following question is presented:

Whether this Court has jurisdiction to review a non-final decision of a state court certifying a class consisting solely of state residents regarding a state law claim on which there have been rulings on the merits.

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INTRODUCTION

Allstate seeks review of a non-injunctive, non-final order of a state court order granting certification of a class consisting only of citizens of the state. This Court never has reviewed such an order and does not have jurisdiction to engage in that review.

Even if this Court could hear this case, it should not. Allstate asserts that three constitutional questions are presented. It cites not a single opinion – not even the opinion of the lower court here – that has ruled on any of these questions. Thus, in this interlocutory context, in which only a question of state law was resolved, Allstate seeks review of three constitutional questions of first impression.

Allstate avers that "[t]he courts of appeals and state supreme courts are hopelessly divided over whether a mandatory class action under Rule 23(b)(2)" is appropriate under certain circumstances. Pet., 4. But the manner in which the federal courts and the courts of the several states apply their respective procedural rules has nothing to do with the questions Allstate presents, which deal only with constitutional matters.

Allstate's argument is premised on three mistaken premises: first, that class certification standards are uniform, an idea this Court has rejected. *Smith v. Bayer Corp*., 131 S. Ct. 2368, 2377 (2011) ("Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways."); *see also* Pet. App. 15a ("Montana courts are

not required to march lockstep with federal interpretations of Fed. R. Civ. P. 23."); and second, that each rule governing class certification reflects the outermost bounds of what is constitutionally permissible. But class certification rules are not analogs of long-arm statutes that say: exercise jurisdiction anywhere due process permits it. They are crafted to implement, not to exhaust, principles of due process. *See* Pet. App. 15a (Montana Rule 23 is "intended to protect the due process rights of absent class members.") Allstate's second premise would take away the roles of legislatures, rulemaking bodies, and lower courts in illuminating the interstices of the Constitution. The abstract constitutional questions Allstate presents are not appropriate for review, as "this Court does not sit to satisfy a scholarly interest in such issues," especially "where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues. . . ." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Allstate acknowledges that the rules the Montana Supreme Court applied are informed by the constitutional standards Allstate deems appropriate in this inquiry, Pet., 9 (citing Pet. App. 15a), but argues that the lower court misapplied them. Thus, in addition to the other infirmities of the Petition, it seeks review not to resolve doctrinal inconsistency but only to correct claimed error in application of doctrine.

Allstate also posits this third faulty premise: that "the trial court is not free" to amend the terms of

class certification on remand. Pet., 2. Not only is the order below, as a matter of state law, mutable, M. R. Civ. P. 23(1)(C), it is in flux. For example, Allstate asserts here that one problem with the interlocutory class certification below is that class members asserting a claim for injunctive relief would not receive notice of the pending claim and an opportunity to opt out of the class. After the Montana Supreme Court issued its decision and the matter was returned to the trial court, Jacobsen moved in the trial court that such notice and opportunity be given. Curiously, Allstate has opposed that proposal.[1]

In addition, Allstate asserts here that the named plaintiff in this class action is not entitled to injunctive relief – a question of state, not federal law – and therefore is not an appropriate class representative. Pending below is a motion to join an additional class member who meets even Allstate's overbroad criteria as an appropriate class representative. Allstate has not yet taken a position below on that proposal.[2] Thus, the constitutional harms of which Allstate complains have not been realized and may never be realized. Any opinion on these issues from this Court would be merely advisory, another reason the Petition

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[1] By Order of January 22, 2014, the trial court set a briefing schedule on the motion with a hearing on Tuesday, May 20. Cause No.: ADV-03-201(d), Montana Eighth Judicial District Court, Cascade County.

[2] The motion is pending in the trial court, *supra*, n. 1, Dkt. 371, 372.

should be denied. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

STATEMENT

In 2001 a person insured by Allstate injured respondent Robert Jacobsen in an automobile collision. Allstate accepted liability and its adjuster negotiated a settlement with the unrepresented Mr. Jacobsen. The adjuster used Allstate's Claims Core Process Redesign ("CCPR") program, which is at the heart of this case. The CCPR directs adjusters, using an "attorney economics script," to tell unrepresented clients that attorneys commonly take "between 25-40% of the total settlement received." It does not require adjusters to tell claimants that Allstate knew that despite that fee claimants would be better off with counsel. Pet. App. 12a-13a.

Mr. Jacobsen accepted $3500 and executed a release six days after the collision. Pet. App. 259a; Pet. App. 11a. Mr. Jacobsen quickly began having physical problems and, still unrepresented, asked Allstate to rescind the release. It refused. Mr. Jacobsen secured counsel, the release was rescinded, and he received $200,000. Pet. App. 259a-60a.

The genesis of the CCPR, which Allstate chose to omit from its petition, explains why the Montana courts agreed that the claim in this case was properly brought under Montana's Rule 23. Allstate hired McKinsey, a management-consulting firm, in the

early 1990s to assist it in lowering its claim costs. McKinsey proposed to lower payouts by reducing representation of claimants by attorneys. Pet. App. 10a-11a. McKinsey's research showed that represented claimants negotiated settlements two to three times larger – and perhaps as much as five times larger – than those negotiated by persons who did not have the benefit of counsel. Pet. App. 10a-12a. McKinsey called claims adjusting a "zero sum" economic game. Pet. App. 11a. If Allstate were to make more money, it was necessary that the money be taken from what otherwise would be paid to medical providers, attorneys, and claimants. For Allstate to win, others, in McKinsey's words, "must lose." Pet. App. 10a-11a.

The CCPR immediately generated colossal monetary gains for Allstate. In just its first year it yielded "an estimated $200 million-300 million in bodily injury savings . . . and approximately $1 billion in additional opportunity identified in all areas." Dkt. No. 221, and documents attached, Bates No. 12886. Over a decade later, in 2006, Allstate's CEO stated that Allstate's claims payments were reduced by 15 to 20 percent *more* than McKinsey had suggested might be possible, yielding a "competitive advantage" over the industry. (Dkt. No. 324).

Rigid invariability is a key to the CCPR's results. McKinsey had counseled that success would require a change in corporate culture, a change in view of senior management, and investment of "significant time" in measuring performance: "Measurement as a

way of life – We win by winning one claim at a time." Dkt. No. 221 and attached document, Bates No. 4594. "The essential motive of centralization was to gain total control over claims valuations. This necessitated wresting control away from Allstate's highly trained and experienced field claims adjuster professionals." Roberts Report, p. 8, attached to Dkt. Nos. 237 and 239.

Allstate implemented McKinsey's recommendations by requiring measurement of all aspects of the CCPR. Dkt. Nos. 221 and 294, and documents attached thereto, Bates Nos. 10293 and 10295. It established a highly centralized and regulated claims system, with incentive payments to Allstate personnel linked to adherence to the system. Dkt. No. 324, and attachment thereto. New initiatives were designed to "[l]ock in new processes developed in CCPR. . . ." (Bates No. 10326) and establish new processes with a consistent measurement system. Dkt. No. 294, and attachments thereto, Bates No. 10326. Performance standards required managers to manage costs through "consistent implementation and expert execution of CCPR" and to "ensure continuous application of CCPR processes through a system of Quality Assurance and Process Compliance Reviews." *Id*., Bates No. 10335. Claims managers were required to "inspire and motivate others to implement and apply well-defined" systems and to "develop and install a rigorous performance management system of measurements and checkpoints for all employees." *Id*., Bates No. 10336.

Because of the impact that the CCPR had on Mr. Jacobsen and others who filed claims with Allstate, Mr. Jacobsen sued Allstate, alleging, among other things, that use of the CCPR produced breaches of duties of good faith, including violations of MCA 33-18-201(1) and (6), Pet. App. 27a, which provide:

> A person may not, with such frequency as to indicate a general business practice, do any of the following:
>
> (1) misrepresent pertinent facts or insurance policy provisions relating to coverages at issue; . . .
>
> (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

Mr. Jacobson sought declaratory and injunctive relief and damages.

A trial was held. There was an appeal, a partial reversal, and a remand (*Jacobsen I*). Pet. App. 310a. Further proceedings in the trial court led to a class certification ruling that itself was subject to an interlocutory appeal, giving rise to the non-final order at issue here (*Jacobsen II*). Pet. App. 1a.

That order certified a class of Montana citizens and authorized Mr. Jacobson to pursue his claims for declaratory and injunctive relief on behalf of the class. The Montana Supreme Court remanded the case to the trial court "to determine whether the application of the CCPR to the class violated the

[statute] and, if so, to determine whether the District Court should enter an order requiring Allstate to provide notice to the class members of their right to re-open and re-adjust their claims." Pet. App. 64a.

In the first proceeding the trial court found, Pet. App. 128a-130a, and the Montana Supreme Court affirmed, Pet. App. 274a-275a, that Mr. Jacobsen had adduced evidence from which a jury could find that Allstate, acting pursuant to the CCPR, had intentionally misrepresented the benefits of securing counsel and deliberately and indifferently disregarded its duties in settling claims. The Montana Supreme Court found, in *Jacobsen I*, that this was what Allstate's CCPR was intended to do. Pet. App. 274a.

In *Jacobsen II* the Montana Supreme court found, also germane to the allegations of violation of MCA 33-18-201(1) and (6), "the presence of a 'general business practice,' the CCPR, is undisputed," and that, if other statutory elements were proven, they would show a violation. Pet. App. 27a. As a matter of Montana substantive law, whether there were individual variations in application of the CCPR was not at issue; at issue was whether the undisputed "general business practice" was applied with sufficient frequency to violate the statute. The Montana Supreme Court found good reason to believe this could be proven, as strict adherence to rigid protocols was a hallmark of the CCPR, which it found to be a "centralized, regimented claims adjusting process." Pet. App. 11a.

The case is now before the trial court on remand. Pending before the trial court are motions: 1) to have Mr. Jacobsen provide to all class members notice and an opportunity to opt out of the class; and 2) to amend the complaint to add a named plaintiff and class representative whose claim never has been re-adjusted.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction because the judgment below is not final.

A. The decision is not final.

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review only "[f]inal judgments or decrees" of state courts. As the Court has explained, this limitation on its certiorari jurisdiction is no mere formality to be observed in the breach:

> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily

> scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

Jefferson v. City of Tarrant, 522 U.S. 75, 81 (1997).

The decision on class certification here is subject to modification by the trial court and is not final until a final judgment is rendered. *Rolan v. New W. Health Servs*., 307 P.3d 291, 297-98 (Mont. 2013) ("'[C]ertification orders are not frozen once made.' Instead, under Rule 23(c)(1)(C), the District Court maintains discretion to alter or amend the class definition at any time until final judgment.") (internal citation omitted); *see* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment.") The Montana Supreme Court's review of the certification here is merely interlocutory, as permitted under Montana procedure. Pet. App. 2a; *Diaz v. State*, 308 P.3d 38, 43 (2013). Allstate invokes *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), in support of immutability, but that case held, as a matter of federal law, "a district court's order denying or granting class status is inherently tentative," *Coopers & Lybrand,* 437 U.S. at 469 and n. 11 and, "a refusal to certify a class is inherently interlocutory." *Id.* at 470. The "final word of a final court" has not been uttered here.

When Congress authorized expanded interlocutory review of class certification rulings in federal courts, it did not change the requirement of finality in

28 U.S.C. § 1257(a). Congress amended the Rules Enabling Act to authorize this Court to "prescribe rules . . . to provide for an appeal of an interlocutory decision to the Courts of Appeals." After the subsequent enactment of Fed. R. Civ. P. 26(f), interlocutory review of District Court class certification decisions came within the jurisdiction of the Courts of Appeals and therefore within the jurisdiction of this Court under 28 U.S.C. § 1254(1). Congress took no action to expand the jurisdiction of this Court to review interlocutory class certification decisions of *state* courts. That jurisdiction continues to be predicated on finality. Absence of Congressional authorization of jurisdiction "must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described," *United States v. More*, 7 U.S. 159, 173, (1805) (Marshall, C.J.), and is powerful evidence, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992) (Congress acts with "full cognizance" of existing law), that Congress had no desire to dilute the respect for federalism and finality embodied in extant jurisdictional rules. *N. Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (finality doctrine "limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.").[3]

[3] *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (the Framers authorized, and Congress implemented, "a dual system of federal and state courts. . . . Prevention of

(Continued on following page)

B. No exception to the finality requirement applies.

This Court has exercised its certiorari jurisdiction over state-court judgments that do not terminate a case in only a "limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified "four categories" of such cases. *Florida v. Thomas*, 532 U.S. 774, 777 (2001). Allstate invokes the second and fourth.

Cox's second category is confined to cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. None of the questions presented by Allstate has been finally decided by the Supreme Court of Montana. Allstate presented due process arguments but the Montana court, exercising prudent jurisprudence, found no need to reach them. Neither should this court. "If there is one doctrine more

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frequent federal court intervention is important to make the dual system work effectively."); *Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 176 (1959) (Court should avoid "unnecessary interference by the federal courts with proper and validly administered state concerns," giving "'scrupulous regard for the rightful independence of state governments'" as its contribution to "'furthering the harmonious relation between state and federal authority.'") (internal citations omitted).

deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) Allstate remains free, on remand, to press any constitutional questions raised by any class certification and embodied in any final judgment of the trial court. *Rolan v. New W. Health Servs*., 307 P.3d at 297-98; *Murphy Homes, Inc. v. Muller*, 162 P.3d 106 (Mont. 2007).

It is not certain that any of the questions Allstate presents will survive and require decision. Allstate asserts, inaccurately, *supra*, 11-12, that the class certification at issue cannot and will not be modified. There is no requirement in Montana law that this action proceed as a class action at all and no requirement that it proceed on behalf of the class as presently certified. Indeed, there is substantial possibility that factors relating to certification will change. The certainty required by *Cox*'s second factor that the order in question will survive and require decision is not present.

The fourth category of *Cox* "covers those cases in which 'the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review' might prevail on nonfederal grounds, 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' *and* 'refusal *immediately* to review the state-court decision might seriously erode federal policy.'" *Nike, Inc. v. Kasky*,

539 U.S. 654, 658-59 (2003) (opinion concurring in dismissal of writ) (quoting *Cox*, 420 U.S. at 482-83) (emphases added). Not only has the federal issue not been finally decided in this case, reversal would not preclude litigation on any "cause of action" and the case would not be "terminated" by this Court's decision, an important factor in finding finality in *Cox*. *Cox*, 420 U.S. at 486. This Court's decision would deal only with class certification, a procedural issue, "'the manner and the means' by which the litigants' rights are 'enforced,'" and not, as in *Cox*, a substantive one, "'the rules of decision'" governing the substance of the case. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010). It would do nothing to alter the "relevant cause of action," which is vested in individual "insureds and third-party claimants," Pet. App. 217a, not distinctly in a class of such claimants.

Allstate has cited no case in which, under *Cox*, this Court found a procedural ruling to be final for purposes of 28 U.S.C. § 1257(2). In *Cox* the Court was concerned that "failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt." *Cox,* 420 U.S. at 486. This is not a case about a prior restraint chilling a free press. Allstate "can make no claim of serious erosion of federal policy that is not common to all run-of-the-mine decisions" of state courts on class certification, just as the state could not do so regarding motions to

suppress in *Florida v. Thomas, supra*, at 779-80 (2001). As in *Florida v. Thomas*, the ruling below is subject to review, in state court (and ultimately by this Court) upon final judgment being rendered by the trial court. *See Rolan, supra,* 307 P.3d at 297-98. Allstate's naked assertion, "Allowing this class action to proceed would seriously erode federal policy" protecting due process rights, Pet., 2, does not explain how federal policy is not similarly eroded by this Court's lack of jurisdiction, absent an exercise of discretion by a Court of Appeals, to hear the exact same case arising in a federal trial court.

Evidently to bolster its assertion that interlocutory review of the class certification issue prior to a final judgment in the case would be appropriate, Allstate avers that the issues here "are not 'enmeshed in the factual and legal issues comprising the plaintiff 's cause of action.' " Pet., 2, (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). Then it argues that reasons for denying class certification are enmeshed in factual and legal issues relating to the plaintiff 's cause of action. Pet., 8. This Court has noted that, generally, they will be, at least under federal rules. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (evidentiary proof of Rule 23 elements required at class certification stage and analysis of those elements "will frequently entail 'overlap with the merits of the plaintiff 's underlying claim.' ") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011)). *Mercantile Nat'l Bank* is not analogous to this case.

Respect for federalism would be further eroded by the scope of jurisdiction Allstate proposes. Allstate's formulation of finality would vest this Court with jurisdiction to be the *initial* arbiter, on an *interlocutory* basis, of claims of due process violations in decisions of state *trial* courts in the many states that do not provide for interlocutory appeals of class certification decisions. *See* Laura J. Hines, *Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking,* 58 U. Kan. L. Rev. 1027, 1045 and fig. 3 (2010); 16B Fed. Prac. & Proc. Juris. § 4007, n. 39 (2d ed.)

II. The Montana Supreme Court's decision does not conflict with this Court's precedents or with decisions of other state supreme courts or federal courts of appeals.

There is no conflict here. The Montana Supreme Court did not pass on any of the questions presented by Allstate. It stated and resolved three issues, all arising under and based on Montana law:

> ¶3 1. Whether the District Court abused its discretion by finding that the proposed class met the requirements of M. R. Civ. P. 23(a)?
>
> ¶4 2. Whether the District Court abused its discretion by certifying a M. R. Civ. P. 23(b)(2) class action lawsuit?

> ¶5 3. Whether the District Court erred by holding that the Montana Rules of Evidence do not apply to class action proceedings?

Pet. App. 2a. Only the first two are at issue here. The Montana Supreme Court did not consider whether actions found to be permissible within Rule 23 could themselves be unconstitutional. It "affirmed the District Court's decision under *Wal-Mart*," Pet. App. 19a, extensively discussing this Court's decision in that case, which itself resolved no constitutional issue.

Allstate proposes that a certiorari-worthy conflict arises from general statements about due process. Pet. 13-14. It invokes one representative action brought in equity, *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854), for the proposition that requirements of typicality and commonality are rooted in the idea, "'care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.'" The concerns of *Smith* were addressed in the text of Rule 23, Scott Douglas Miller, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 Colum. L. Rev. 1371, 1382 and n. 89 (1984), text construed by the Montana Supreme Court.

Allstate also relies on cases that did not involve class certification. It cites *Hansberry v. Lee*, 311 U.S. 32 (1940) for the proposition that absent parties must be protected by procedures "'which would satisfy the requirements of due process and full faith and credit.'" *Hansberry* is a decision about issue preclusion

when a judgment had not been rendered on behalf of a class and, importantly, it came to this court after a final decision of the Illinois Supreme Court. Allstate notes, "'traditional practice provides a touchstone for constitutional analysis,'" citing *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994), a punitive damages case. Allstate offers no explication of these principles more detailed than M. R. Civ. P. 23, which the Montana Supreme Court analyzed and found was satisfied. Resolution of the questions Allstate presents "can await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (dismissing as improvidently granted).

This Court never has ruled squarely on any of the three questions of constitutional law presented here. Allstate cites six decisions of this Court that resolved issues of class certification.[4] Only one of these directly resolved a question of constitutional law, and it resolved it in favor of class certification. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (rejecting assertion that due process required "opt-in" classes). The cases discuss constitutional principles. But their holdings, like the decision of the

[4] *Califano v. Yamasaki*, 442 U.S. 682 (1979); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

court below, are based in rules, not in the Constitution, and this Court avoids making constitutional decisions unnecessarily. *Spector Motor Serv., supra,* 323 U.S. at 105.

The conservative posture regarding review of constitutional questions expressed in *Spector Motor Serv.* is especially important here because this Court respects threshold constitutional interpretations made by state lawmakers and courts. *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 369 (1914) ("We ought not to indulge the presumption either that the Legislature intended to exceed the limits imposed upon state action by the Federal Constitution, or that the courts of the state will so interpret the legislation as to lead to that result."). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Here, the lower court found particular actions to be within the bounds of rules of procedure promulgated by state lawmakers. Those rules were designed to be, Pet. App. 15a, and this Court presumes them to be, *Spector Motor Serv., supra*, within the bounds of the due process clause.

This Court ought not finally explicate grand questions of constitutional law absent more concrete, and more final, conflict with its own decisions. *Rice v. Sioux City Mem'l Park Cemetery*, *supra*, 349 U.S. at 74. Nor should it do so without conflict among inferior courts.

Not a single lower court case cited by Allstate as creating conflict has ruled on any of the questions presented by Allstate's Petition. Not even the decision of the Ohio Supreme Court in *Cullen v. State Farm Mut. Auto. Ins. Co*., 999 N.E.2d 614, 623 (2013) could be considered to conflict squarely with the decision of the Montana Supreme Court at issue here. *Cullen* decided, as a matter of state procedural law, that a class could not be certified under Ohio's analog of Fed. R. Civ. P. 23(b)(2) when only retrospective injunctive relief was sought. The court distinguished the situation before it from a prior case in which, "without injunctive or declaratory relief, the class would not be able to recover for ongoing injuries caused to each class member by continuing practices." This case, where prospective injunctive relief also clearly is sought, Fourth Amended Complaint, Prayer for Relief, para. 7, *see* Pet. App. 256a, is more like the prior case than it is like *Cullen*. More importantly, just as Montana need not follow Fed. R. Civ. P. 23, in our federal system, Ohio and Montana are entitled to have different class action rules and to interpret the same language differently.

III. This case is an inappropriate vehicle for review of the questions Allstate presents.

A matter that "sufficiently clouds" a record can render a case an inappropriate vehicle for review. *Jones v. State Bd. of Ed. of State of Tenn*., 397 U.S. 31, 32, (1970). Here, the trial court has pending before it proposals to adjudicate this case in a manner

decidedly different from the manner proposed in the decision of which review is sought. Joinder of a named plaintiff whose claim has not already been adjusted would remove any ambiguity about whether class representatives were unconstitutionally atypical. Provision of notice and an opportunity to opt out would nullify any concern about the existing order not requiring that they be given.

Allstate's third question presented asserts that the interlocutory order would deprive it of raising individual defenses to its CCPR program. Allstate misconstrues the applicable substantive law.

Primarily at issue is whether the CCPR was a "general business practice" for purposes of MCA 33-18-201. Allstate asserts, factually, that the CCPR "changed over time and necessarily varied in individual applications." Pet., 26-27. But the Montana Supreme Court found "the presence of a 'general business practice,' the CCPR, *is undisputed*." Pet. App. 27a. (emphasis added). That lack of dispute established that Allstate "misrepresent[ed] pertinent facts or insurance policy provisions relating to coverages at issue." MCA 33-18-201(1).

Secondarily at issue is whether "Allstate's implementation of the CCPR program involved actual fraud or actual malice," Pet. App. 64a, predicates for an award of punitive damages defined in MCA 27-1-221. Allstate relies on *Gonzales v. Montana Power Co*., 233 P.3d 328, 330 (Mont. 2010), for the proposition "whether a party has a right to rely upon another's

representation *could* create specific questions of proof best resolved in individual trials." Pet., 27 (emphasis added). That proposition was announced solely with regard to actual fraud. *Gonzales* held that there never will be questions of individual proof regarding actual malice, as "[a] plaintiff need not show any proof of reliance to prevail on a claim for" it. *Gonzales*, 233 P.3d at 330. *Gonzales* emphasized that the "could" in the quoted statement was highly conditional even when applied to actual fraud. It held, on the facts of the case before it, that actual fraud could be established on the basis of the defendant's systematic behavior toward the class:

> The Class premises its actual malice claims, however, on MPC's conduct. The Class alleges that MPC consciously and intentionally disregarded the high probability of worker injury "by withholding information, failing to investigate, failing to inquire about maximum medical improvement and/or impairment ratings, and other benefits." MPC's behavior, and, in particular, MPC's system and method of handling workers' compensation claims – and not the potentially fact-specific issues of reasonable reliance by members of the class – constitutes the main focus of the Class's actual malice claims.

Id. at 330. Here, as in *Gonzales*, each element of actual malice and actual fraud can be satisfied by reference to "implementation of the CCPR," which itself undisputedly is predicated on misrepresentation.

If the questions presented by Allstate are, indeed, "recurring," as it alleges, Pet., 29, the Court will have no shortage of opportunities to reach them in cases over which it has jurisdiction and in which they are squarely presented after lower courts have analyzed constitutional issues. *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens. J., on denial of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories" for the development of constitutional doctrine.)

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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