No. 14-910

IN THE
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

JACK JIMENEZ, individually and on behalf of all others similarly situated,
Respondent.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

JOHN PARKER SWEENEY
President of DRI—The Voice of the Defense Bar
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street, N.W., Suite 1350
Washington, DC 20036

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JOSHUA M. DANIELS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Counsel for Amicus Curiae

February 27, 2015

MOTION FOR LEAVE TO FILE BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

DRI—The Voice of the Defense Bar (DRI) respectfully moves for leave to file the following *amicus curiae* brief in support of petitioner. DRI provided the parties with the required ten days' notice and sought the parties' consent to file this brief pursuant to Rule 37.3. Petitioner gave its consent, and its letter to that effect is on file with the Clerk. Despite DRI's repeated efforts to ascertain respondent's position, counsel for respondent did not respond to DRI's requests before the deadline to print this brief. DRI accordingly moves the Court for leave.

DRI is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

DRI's perspective would be of assistance to this Court in evaluating the important questions related to class-action practice that are presented by the petition for certiorari. The brief is timely submitted on proper notice to all parties. DRI therefore asks this Court for leave to participate as *amicus curiae* by filing the following brief.

Respectfully submitted.

JOHN PARKER SWEENEY
President of DRI—The
Voice of the Defense Bar
BRADLEY ARANT BOULT
CUMMINGS LLP
1615 L Street, N.W.,
Suite 1350
Washington, DC 20036

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JOSHUA M. DANIELS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

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BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). Indeed, few issues are as important to DRI's members and their clients—not to mention the civil justice system—as the legal standards that federal courts must follow in deciding whether to certify a

[1] No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

class action under Fed. R. Civ. P. 23. DRI's members regularly defend their clients against proposed class actions in a wide variety of contexts, from products liability to securities to consumer credit. And too often, those proposed classes fail to satisfy the prerequisites that Rule 23 imposes for class certification, such as commonality and, for Rule 23(b)(3) classes like the one at issue here, predominance.

Unfortunately, classes are still sometimes certified despite such flaws, many times based on assurances or assumptions—rather than concrete proposals and supporting evidence—that a workable plan for fairly and efficiently adjudicating class members' claims and defendant's defenses can come later. Indeed, that is the case here. Often, however, "later" never comes, for once the class is certified, enormous settlement pressure mounts, and it is the rare defendant who chooses to keep fighting—and risk losing—either at a class-action trial or on appeal from any adverse final judgment. Worse still, while there is a possibility of interlocutory review of class-certification orders under Fed. R. Civ. P. 23(f), that review is discretionary, and in practice, most courts of appeals only infrequently undertake it. The practical unavailability of appellate review highlights the need for this Court's guidance, and the importance of not allowing the erroneous application of Rule 23 in this case to stand.

SUMMARY OF ARGUMENT

In *Wal-Mart*, 131 S. Ct. at 2551, this Court held that "commonality" under Rule 23 means that the class claims rest on a "common contention" that can be equally resolved for all class members at once,

thus "driv[ing] the resolution of the litigation." *Id.* The decision below holds that a common contention can still "driv[e] the resolution" even if it fails to resolve the defendant's liability to anyone. Not only does that decision implicate a circuit conflict in its own right, it further exacerbates a longstanding split in the courts of appeals about the permissible boundaries of class certification. This Court's guidance on that question is sorely needed.

The court of appeals' decision also exemplifies a worrying trend in federal class-certification decisions toward dealing with significant dissimilarities between class members by writing off those differences as immaterial or deferrable, and instead litigating the case on the basis of statistical generalities. In doing so, decisions like the one below effectively deprive defendants of their right to present every defense they have to each class member's individual claims, and relieve plaintiffs of their burden of proof at the class-certification stage. Both consequences violate *Wal-Mart*'s teachings and warrant review. 131 S. Ct. at 2551, 2561.

The time to correct these ill-conceived trends in federal class-certification practice is now. Waiting for these issues to percolate further in the courts of appeals is inadvisable, for courts of appeals only infrequently elect to review class-certification decisions on an interlocutory basis, and the immense settlement pressures that those decisions exert typically prevents review of those decisions on appeal after final judgment. Those impediments mean that even recurring and important issues like those presented here may not come up on certiorari very often. This

Court should seize this opportunity to review them now.

ARGUMENT

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). The Rule 23(b)(3) class action respondent requests here is particularly exceptional, designed to be "an 'adventuresome innovation,' … for situations 'in which "class-action treatment is not as clearly called for."'" *Comcast*, 133 S. Ct. at 1432 (citations omitted). Rule 23(b)(3) for that reason adds additional requirements not demanded for other class actions—predominance and superiority—to ensure that certification will "achieve economies of time, effort, and expense," "without sacrificing procedural fairness." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997) (citation omitted). These twin aims, efficiency *and* fairness, requires courts to "take a 'close look' at" the proposed class before certifying it. *Comcast*, 134 S. Ct. at 1432 (citation omitted).

This is a case in which the Ninth Circuit lost sight of those key principles. In at least two different respects (corresponding to the two questions presented), the Ninth Circuit disregarded legal constraints on class certification: when an action is replete with individualized issues, the court may not just disregard them at certification or try them in the aggregate through statistics. The result is a construct that will be neither efficient nor fair—a case certified as a class action, but decidedly *not* "a truly representative suit." *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538,

550 (1974). Those errors depart from the law in other circuits and call for this Court's review.

I. This Court Should Grant Review To Make Clear That "Common" Questions Must "Drive The Resolution Of The Litigation"

Rule 23(a)(2) requires as an indispensable prerequisite to class certification that there exist "questions of law or fact common to the class." This Court explained in *Wal-Mart* that Rule 23(a)(2) uses the word "common" as a term of art: not every question that is *literally* "common to the class" in some colloquial sense will suffice for class-certification purposes. 131 S. Ct. at 2551, After all, the Court noted, any minimally competent lawyer can articulate those kinds of literally-common questions: "Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get?" *Id.* But "[r]eciting these questions"—"even in droves," the Court emphasized—"is not sufficient to obtain class certification." *Id.* (citation omitted).

Instead, what is needed for class certification is "a common contention" upon which all class members' claims depend, one "that 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*." *Id.* (emphasis added). To satisfy Rule 23, the resolution of the class members' "common questions" must "generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted).

The lower courts have come into conflict over what *is* sufficient for class certification. One disturbing trend is the increasing number of attempts to circumvent the requirements of Rule 23 by changing the denominator: by persuading the court to subdivide cases and look *only* at the subset of purportedly "common" issues when deciding whether common issues both exist and predominate. It is time for this Court to decide definitively whether this gambit is consistent with Rule 23, when resolving the supposedly common issue does not drive the resolution of the case.

A. The Validity Of Certification Based On A Subset Of The Plaintiff's Case Is An Important And Recurring Issue

This case follows a now-familiar pattern. Plaintiffs seek class certification, but cannot show that common issues predominate in the litigation *as a whole*. Here, for instance, an indispensable element of the plaintiffs' claim for overtime pay—*actually working overtime*—is a wholly individualized issue, not a common one. So the plaintiffs seek certification on the theory that all the individualized elements can be shorn away, leaving what remains "common" enough to certify. Federal courts have responded to this tactic in various and inconsistent ways. This Court should grant review to settle that conflict.

Some courts have yielded to plaintiffs' "desire to certify *something*," even less than the whole case. Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 725 (2014) (Hines). Thus, for example, the Ninth Circuit has said that "[e]ven if the common questions do not predominate over the indi-

vidual questions," as Rule 23(b)(3) expressly requires, the court can just "isolate the common issues …. and proceed with class treatment of these particular issues." *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996) (relying on Fed. R. Civ. P. 23(c)(4)). "[I]ssues common to the class …. would automatically predominate over issues that must be proved on an individual basis because"—presto!—"no individual issues would remain in the class action." Hines, *supra*, at 725.

Other circuits have been far stricter about permitting certification of some convenient subset of the plaintiff's case. The firmest line is the one drawn by the Fifth Circuit even before *Wal-Mart*: "a cause of action, *as a whole*, must satisfy the predominance requirement of [Rule 23(b)(3)]"; *part* of the cause of action is not enough. *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (emphasis added); *accord, e.g.*, *Steering Comm.* v. *Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 421-22 (5th Cir. 1998). In the Fifth Circuit's view, "[a] district court cannot manufacture predominance through the nimble use of [Rule 23(c)(4)]" to certify particular issues. *Castano*, 84 F.3d at 745 n.21; *accord Allison*, 151 F.3d at 422. The Fifth Circuit reasoned that "allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21.

Given the Fifth Circuit's repeated holdings that particular issues cannot be made appropriate for class treatment through severance of the non-common issues, courts and commentators have regularly recognized a "conflict in authority" between the Fifth Circuit's approach and the Ninth Circuit's. *E.g.*, *In re St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.*, 522 F.3d 836, 841 (8th Cir. 2008); *see* Hines, *supra*, at 722 (discussing "circuit split"). That conflict is exacerbated by other circuits that may approve the use of "issue certification" in *some* circumstances but nonetheless—as petitioner explains—are not willing to go so far as to slice up elements of a cause of action. *See In re St. Jude*, 522 F.3d at 841 (citing cases); Pet. 18-23 (citing cases from the Second, Fifth, Eighth, and Eleventh Circuits refusing to certify issues that do not bear directly on ultimate liability).

The Ninth Circuit's decision below widens the split in an important way, because it further emboldens litigants to assume away inconvenient, non-common aspects of the case. District courts in the Ninth Circuit are already reading the decision in this case as requiring certification even when some class members are injured and some are not—quite a basic failure of commonality. Thus, for example, in a recent antitrust class action, a district court within the Ninth Circuit acknowledged that the plaintiffs could not show antitrust standing—that each class member was overcharged—"by common proof." *Kamakahi* v. *Am. Soc'y for Reprod. Med.*, 2015 WL 510109, at *18 (N.D. Cal. Feb. 3, 2015). But because the Ninth Circuit affirmed class certification in this case, even though "classwide proof appear[ed] to have been

lacking," *id.* at *20, the *Kamakahi* court felt compelled to certify the class nonetheless. Indeed, the court thought that under Ninth Circuit law, *failing* to certify the class would be "reversible error," *id.* at *17: that many members of the class might have suffered no injury whatsoever from the challenged conduct is just a "damages" issue, and damages issues cannot defeat class certification in the Ninth Circuit. *See id.* at *17, *20. Similarly, in another recent case within the Ninth Circuit, a defendant's argument that some class members received a valuable service instead of a worthless one was deemed no impediment to class certification; based on the decision in this case, the question of injury was simply shunted to the damages phase. *Cohen* v. *Trump*, 303 F.R.D. 376, 388-89 (S.D. Cal. 2014).

As these decisions applying the Ninth Circuit's precedent show, the concept of an "issue class" effectively circumvents Rule 23's requirements of. Indeed, the class-action plaintiffs' bar has sought with increasing frequency—and increasing "innovation"—to rely on the notion of certifying an "issue class." Andrew J. Trask, *Reactions to* Wal-Mart v. Dukes*: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 801-02 (2013); *see also* Jenna C. Smith, *"Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187, 1188 (2013) ("In light of the heightened standard for achieving certification post-*Dukes*, the use of issue classes under Rule 23(c)(4) is an increasingly attractive option for litigants."). For many putative class-action plaintiffs, issue certification "represents perhaps the last class action game in town." Hines, *supra*, at 721.

That innovation is paying off in certain circuits. A number of recent decisions have approved bifurcation of class claims into classwide "issues" trials, followed by individual trials on both liability and damages. *See, e.g.*, *McReynolds* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490-91 (7th Cir. 2012) (ordering certification of employment-discrimination class limited to issue of disparate impact, despite recognizing that each class member would still "have to prove that his compensation had been adversely affected by the corporate policies, and by how much," for which "hundreds of separate trials may be necessary"), *cert. denied*, 133 S. Ct. 338 (2012); *Pella Corp.* v. *Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (upholding certification of class limited to issue of whether defendant's windows were defectively designed, leaving causation and damages to be proved in possibly hundreds of later individual trials).

The decision below injects further confusion into a longstanding divide among the courts of appeals about when it is permissible, if it ever is, to certify a class to decide "issues" rather than "claims." Without a clear line drawn by this Court, the "nimble use" of issue classes will also continue to undermine the commonality and predominance requirements in a growing number of cases. The Court should therefore grant review here to put that debate to rest.

B. The Ninth Circuit Misapplied Rule 23 In Allowing Certification Based On A Slice Of The Cause of Action

What "commonality" under Rule 23(a)(2) contemplates is identity among the class members' claims

not just with respect to the *legal theory* involved, *see Wal-Mart*, 131 S. Ct. at 2551, but also with respect to the *factual theory* alleged for each class member and the *evidence* that will be used to substantiate it. Only where that identity exists can a class action be what it was intended to be: "a truly representative suit," *Am. Pipe*, 414 U.S. at 550, in which "all [class members'] claims can productively be litigated at once," *Wal-Mart*, 131 S. Ct. at 2551, because trial of one is functionally trial of all.

That is not true here. The court of appeals upheld a class-certification order which proposes classwide trial of three issues that will not determine petitioner's liability to even a single class member, even if all three are decided in the class's favor. *See* Pet. App. 9a-10a. An individual trial would still be necessary to determine whether any individual class member *in fact* worked uncompensated overtime—irrespective of whether his coworkers "generally" did so—and whether petitioner's alleged "unofficial policy" caused him to do so. Hundreds of individual trials—on both liability *and* damages (if any)—would therefore still be necessary, even if the class trial resulted in a victory for the plaintiffs on all the supposedly "common" questions submitted to the jury.

That plan fails to honor Rule 23's objectives. Far from ensuring "the efficiency and economy of litigation which is a principal purpose of the procedure," *Am. Pipe*, 414 U.S. at 553, the decision below merely adds an additional class trial to the hundreds of individual proceedings that must take place in any event. And because the class trial will not even resolve the issue of liability for any class member, it also will not meaningfully simplify the individualized

trials that must follow, nor save either the parties or the courts much in the way of resources. *See, e.g.*, *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) ("[I]n this case, given the number of questions that would remain for individual adjudication, issue certification would not reduce the range of issues in dispute and promote judicial economy.") (citation omitted), *abrogated in part on other grounds by Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *In re St. Jude*, 522 F.3d at 841.[2]

That misapplication warrants review even based purely on its departure from the law followed in the other circuits, *see* Pet. 18-23. But here the case for review is even stronger because the potential malleability of the relevant *Wal-Mart* standard itself—what does it mean to "drive the resolution of the litigation"?—means that in some courts Rule 23's requirements can be evaded merely by cleverly slicing up a class claim. The Court should make clear that a certified class action must "resolve … in one stroke" at least the question of the defendant's *liability* to each class member. *Wal-Mart*, 131 S. Ct. at 2551. The defects of the alternative approach are manifest

[2] Carving up the issues presented by each class member's claim between class and individual proceedings would also raise Seventh Amendment concerns in some cases. *E.g.*, *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995). Any issue decided by a jury in the class trial could not be revisited by a later fact-finder (including a later jury) in the individual trial. *See Gasoline Prods. Co., Inc.* v. *Champlin Ref. Co.*, 283 U.S. 494, 500 (1931). By answering a supposedly "common" question, the class jury could well preclude a defendant from seeking a different answer by litigating its affirmative defenses to individual claims. *See In re Plywood Antitrust Litig.*, 655 F.2d 627, 635-36 (5th Cir. 1981).

in the cases discussed above—in which a class containing the injured and the uninjured alike is allowed to litigate the question of the defendant's fault, a question that for a good chunk of the class is completely academic. Resolving on a classwide basis anything less than *liability* fails to "drive the resolution of the litigation" in any meaningful way, and fails as well to provide any assurance that "all [class members'] claims can productively be litigated at once," at the expense of both judicial and party resources. *Id.*

II. The Court Should Grant Review To Make Clear Courts May Not Salvage Overly Broad Proposed Classes By Resorting To Statistical Extrapolation Or Theoretical Future Procedures That Fail To Preserve Unique Defenses To Individual Claims.

The court of appeals in this case also rejected petitioner's objections that the district court's class-certification order dispenses with the right to present particular defenses to individual class members' claims, in favor of "proof" based on statistical extrapolation from a sampling of class members. Pet. App. 11a-16a. In doing so, the court endorsed the increasingly common tactic of using statistical generalities to elide significant "[d]issimilarities within the proposed class"—such as differences among class members as to the existence or extent of their respective injuries—that "have the potential to impede the generation of common answers" that lies at the heart of the commonality requirement. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted); *see, e.g.*, William C. Martucci & Ashley N. Harrison, *Using Statistics Effectively in Wage and Hour Litigation: An Employer's Offensive and Defensive Tactics*, THE METROPOLITAN

CORPORATE COUNSEL, January 2015,[3] at 14 ("[C]lass litigation and the use of statistics within class litigation have grown increasingly over the last decades…."); Saby Ghosrhay, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 468 (2012) (Ghosray) (noting that "the contemporary class action's certification process … relies heavily on statistical sampling").

But statistical extrapolation is at best a poor substitute for what this Court has demanded: truly "common" evidence that, when presented, "will resolve [the common] issue that is central to the validity of each one of the [class members'] claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. In *Wal-Mart*, this Court was explicit in disapproving a plan (by the same court that decided the case below) which would have determined a defendant's monetary liability to the class as a whole by reference to the claims of a sample set of class members. *Id.* at 2561. That approach could not be squared with the Rules Enabling Act, which provides that mere rules of procedure like the Rule 23 class-action device cannot "abridge, enlarge or modify any substantive right," including the right "to litigate … defenses to individual claims." *Id.* (quoting 28 U.S.C. § 2072(b)). The mere desire to litigate the claims of many on a classwide basis provides no warrant for "replac[ing] [individualized] proceedings with Trial by Formula." *Id.*

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[3] *Available at*: http://metrocorpcounsel.com/articles/31068/using-statistics-effectively-wage-and-hour-litigation-employer%E2%80%99s-offensive-and-defens.

Yet "Trial by Formula" is a predictable result of allowing statistical extrapolation from a sample of class members to be the measure of a defendant's liability in cases, like this one, where the requisite "commonality" of claims is absent. Where significant dissimilarities divide the class—for example, where some class members are grievously injured while others have suffered no harm, or where some class members' claims are subject to good affirmative defenses while others' are not—there is no easy, practicable way of trying every single class member's claim in a single proceeding. In those circumstances, for there to be any hope of efficiently conducting a classwide proceeding, the issues presented to the jury must be simplified for trial purposes, in essence by ignoring certain nuances and being content with "close enough." In this case, for example, the Ninth Circuit was comfortable with upholding certification based on "statistical sampling and representative testimony" as a means of determining petitioner's liability, even though each worker's experience working overtime—whether he worked any, how much he worked, and *why*—is obviously highly individualized. Pet. App. 12a.

Several other circuits have approved similar certification even when the class concededly contains a number of members who have suffered no legally cognizable injury at all. *See, e.g.*, *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (granting class certification despite potential that "most members of the plaintiff class had not experienced" the complained-of product defect); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d

838, 857 (6th Cir. 2013), *cert. denied sub nom. Whirlpool Corp.* v. *Glazer*, 134 S. Ct. 1277 (2014) (same). Just last month, for instance, a divided panel of the First Circuit upheld certification of a class of brand-name drug purchasers suing over the absence of a cheaper generic drug from the market—even though everyone agreed that the class included some purchasers who would never have bought the generic anyway (*e.g.*, out of brand loyalty). *In re Nexium Antitrust Litig.*, ___ F.3d ____, 2015 WL 265548, at *6 (1st Cir. Jan. 21, 2015). The panel majority recognized that there must be some means of separating, prior to judgment, these uninjured goats from the putative class of sheep, but that none had been proposed. *Id.* at *6. Even so, it dismissed that problem because, in its view, "a certified class may include a de minimis number of potentially uninjured parties,"[4] *id.* at *11, implicitly deciding that the district court could defer the critical task of actually sorting which class members will recover and which will not to a still-yet-to-be-determined procedure. *Id.* at *7-8.[5]

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[4] The panel concluded that the number of uninjured members, about two percent of the class, likely was de minimis. 2015 WL 265548, at *16. But as the dissent noted, focusing on the percentage overlooks the sheer number of uninjured members, as many as 24,000 in that case. *Id.* at *20 (Kayatta, J., dissenting).

[5] Even more recently, the Second Circuit upheld class certification where even the district judge recognized there were "individual issues … as to causation and damages as well as" timeliness, but discounted them on the hope that "management tools"—such as " decertifying the class after the liability trial," "creating subclasses," or "altering or amending the class"—could overcome them. *Sykes* v. *Mel S. Harris & Assocs. LLC*, 285 F.R.D. 279, 293-94 (S.D.N.Y. 2012), *aff'd*, ___ F.3d ____, 2015 WL 525904, at *14-19 (2d Cir. Feb. 10, 2015).

The shortcuts these decisions endorse invariably come at the defendant's expense. What some call "nuances," to be glossed over for the sake of simplicity and efficiency, a defendant generally calls defenses—individualized defenses showing that particular class members are not entitled to any relief. *See* Ghosray, *supra*, at 498-99 ("[W]ithin the context of sampling, extrapolation allows a non-plaintiff [class member] to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," but "does not … allow the defendant a reciprocal opportunity to defend against each absent class member"). The resulting proceeding may well be more efficient or manageable than the alternative, but it is also manifestly less fair, a value to which Rule 23, and the Federal Rules of Civil Procedure as a whole, equally gives weight. *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").[6]

The apparent willingness of many courts to avoid addressing the challenges posed by patent dissimilarities among various class members by putting them off until later is unfair to defendants in a different respect. It effectively relieves plaintiffs moving for class certification of their burden to "affirmatively demonstrate [their] compliance with" Rule 23, by

[6] The unfairness of certifying a class with dissimilarly situated members of course may also harm class members, if they fail to exclude themselves, because the class proceeding will "not allow absent class members to stake claims for injury dissimilar to the representative plaintiff's claimed injuries." Ghosray, *supra*, at 499.

"prov[ing] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. That allocation of the burden of proof to the party seeking class certification goes ignored in recent class-certification decisions from courts of appeals, which appear to take it on faith that an undeveloped method of trying the case on a classwide basis and preserving the defendant's right to litigate defenses will someday be found, *Sykes*, 285 F.R.D. at 293-94, or worse, to demand *the defendant* prove that no such method exists before the court will vacate the certification order. *See Nexium*, 2015 WL 265548, at *17 ("We also conclude that *defendants have not established* that more than a de minimis number of uninjured consumers are included in the certified class." (emphasis added)). Neither approach reflects the "rigorous analysis" which this Court has required to decide the fundamental question that Rule 23 poses: whether "all [class members'] claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551.

The Court should grant review now in this case to put a halt to the worrying trend of federal courts trying to overcome significant dissimilarities within proposed classes, either by glossing over the differences—and with them, defendants' right to litigate all their available defenses—or by deferring the resolution of these problems to the indefinite future. *See Madison* v. *Chalmette Ref., L.L.C.*, 637 F.3d 551, 557 (5th Cir. 2011) (disapproving "a figure-it-out-as-we-go-along approach" to class certification which fails "seriously [to] consider[ ] the administration of the trial" (citation omitted)).

III. This Case Presents A Rare Opportunity To Address Important, Recurring Issues Of Class-Action Certification Practice

Besides the critical importance of the questions presented here for federal-court class-certification practice, there is yet another feature of this case that militates in favor of this Court's review: the comparative rarity of class-certification decisions by federal courts of appeals. The paucity of such decisions sharply reduces the number of cases that can serve as a vehicle for addressing a particular class-certification issue, while also increasing the amount of mischief created when erroneous class-certification decisions by the courts of appeals are allowed to stand.

This Court's general practice has been to allow issues to "percolate" to some degree in the courts of appeals before taking them up. But percolation has its limits. Even for issues that can theoretically recur in every circuit, or in every state and federal appellate court, this Court has never insisted that percolation run through every crevice of the judiciary before granting certiorari. *See, e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661 (2012) (resolving 1-1 circuit conflict).

Extended, unnecessary percolation is particularly inadvisable in the class-certification context. Courts of appeals decide Rule 23 cases far less frequently than they decide other types of cases. So when a reasoned appellate decision presents a *legal* issue for this Court's review, one that could clarify class-certification practice, this Court should be less inclined to wait for the next case than in some other

areas on the docket. *Cf. Harper* v. *Maverick Recording Co.*, 131 S. Ct. 590, 591 (2010) (Alito, J., dissenting from denial of certiorari) (noting that "I would grant review in this case because not many cases presenting this issue are likely to reach the Courts of Appeals"). Appellate percolation of Rule 23 issues is slow and difficult, for multiple reasons.

Appeals from a final class judgment are rare. Class certification is often the critical stage in the life cycle of a class action: "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); *accord AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"). And when defendants succumb to that "pressure," as they often do,[7] it may well "prevent judicial resolution of [disputed] issues," *Amgen* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1200 (2013), including "class certification—the ruling that [may] have forced them to settle" in the first

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[7] Indeed, more than one recent study has found that the majority of class actions that are certified for litigation settle thereafter. *See, e.g.*, THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 50 (Federal Judicial Center 2005) ("Certified cases concluded with a court-approved, class-wide settlement 89% of the time; a few were tried and a few were dismissed involuntarily."); Thomas Willging & Emery Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. CIN. L. REV. 315, 341-42 & tbl. 2 (2012) (reporting that certification of litigation class resulted in settlement in 58% of all federal-question cases and 75% of all diversity cases).

place. *Rhone-Poulenc Rorer*, 51 F.3d at 1298 ("If they settle, the class certification—the ruling that will have forced them to settle—will never be reviewed.").

It was for these very reasons that Rule 23 was amended to allow discretionary interlocutory review of class-certification orders. *See* Advisory Committee's 1998 Note on subd. (f) of Fed. R. Civ. P. 23, 28 U.S.C. App., p. 162 (2012). Rule 23(f) appeals, however, have certainly not filled appellate dockets. Most federal courts of appeals in practice are loath to grant review under that Rule. A recent study of all Rule 23(f) petitions filed between October 31, 2006 and December 31, 2013, confirms this. *See* John H. Beisner, Jessica D. Miller, Geoffrey M. Wyatt & Milton P. Wilkins, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* (Apr. 29, 2014) (Beisner *et al.*).[8] It found that "[l]ess than one-quarter of petitions for interlocutory review filed in the last seven years have been granted," a marked decrease from what a 2008 study previously found. *Id.* at 1; *see also* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-84 (2008) (finding that courts of appeals granted only 36% of all Rule 23(f) petitions filed before October 30, 2006).[9]

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[8] *Available at*: http://skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings.

[9] The bulk of the decline is driven by a decrease in the number of *defendants'* petitions being accepted: "defendants' petitions were granted far less frequently than during the prior period," but "the grant rate for plaintiffs' petitions dipped only slightly in recent years." *Beisner et al.*, *supra*, at 1.

Moreover, the various courts of appeals differ considerably, both in the number of Rule 23(f) petitions that they receive, and in the rates at which they accept them. Just three circuits—the Second, the Seventh, and Ninth—accounted for nearly 60% of all Rule 23(f) petitions filed during that period. *See Beisner et al.*, *supra*, App. A. Indeed, about a third of all petitions over the seven-year study period were in the Ninth Circuit alone. But each of those circuits accepted less than 30% of the petitions they received; the Ninth Circuit's acceptance rate was among the lowest of any of the circuits. *See id.* In the circuits where the grant rate is higher, the raw numbers are lower. Circuits such as the Third, Fourth, and Fifth received far fewer petitions: combined, the petitions filed in those three circuits made up only about 12% of the total. *See id.* Even the Fourth Circuit's relative receptivity, for example, translated into only four petitions granted over seven years. Then there are the circuits that receive fewer *and* deny more: the First Circuit, for example, granted only two Rule 23(f) petitions over the entire study period, and the D.C. Circuit only *one*. *Id.*

These metrics demonstrate that the Court cannot afford to wait for the class-certification issues this case presents to percolate further before deciding to resolve them. Quite simply, the Court may have to wait far longer than usual before a different court of appeals decides to tackle these same issues again in a decision suitable for plenary review. And while the Court waits, class-action defendants will be left to deal with the consequences of the Ninth Circuit's decision in this case—and to litigate under that precedent in some of the most popular federal venues for

class actions. The worse the circuit precedent, the heavier the settlement pressure on defendants in that circuit, and the fewer the opportunities to correct the circuit's misapplications of Rule 23. This Court should not pass up the opportunity this case affords.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN PARKER SWEENEY
President of DRI—The
Voice of the Defense Bar
BRADLEY ARANT BOULT
CUMMINGS LLP
1615 L Street, N.W.,
Suite 1350
Washington, DC 20036

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JOSHUA M. DANIELS
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

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