No. 13-916

In The Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

ROBERT JACOBSEN,
and all others similarly situated,

Respondent.

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

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF ALLSTATE INSURANCE COMPANY

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FELIX SHAFIR
CURT CUTTING
15760 Ventura Boulevard,
18th Floor
Encino, California
91436-3000
(818) 995-0800
FAX: (818) 995-3157
daxelrad@horvitzlevy.com
fshafir@horvitzlevy.com
ccutting@horvitzlevy.com

LEDERER WESTON CRAIG, PLC
J. MICHAEL WESTON
Counsel of Record
118 Third Avenue SE,
Suite 700
Cedar Rapids, Iowa
52401-1408
(319) 365-1184
FAX: (319) 365-1186
mweston@lwclawyers.com

Counsel for Amicus Curiae
DRI – The Voice of the Defense Bar

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar (DRI), is an international organization that includes more than 23,000 members involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

DRI has taken an interest in this case because DRI's members routinely defend clients in class action lawsuits across the Nation, whether under Federal Rule of Civil Procedure 23 or other comparable provisions of state law. Accordingly, DRI's members are familiar with the risk that courts will employ the class action mechanism in ways that favor expediency at the expense of fundamental principles of due process.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. More than ten days prior to the due date, *amicus curiae* notified the parties of its intention to file this brief. Pursuant to Supreme Court Rule 37.3(a), *amicus curiae* certifies that counsel of record for both petitioners and respondents have consented to this filing in letters on file with the Clerk's office.

This case presents a situation that DRI members often encounter, in which a court is willing to endorse class action procedures that deprive defendants of defenses that would be available to them in individual actions. Of particular concern to DRI is the Montana Supreme Court's adoption of a procedure that would determine entitlement to punitive damages on a classwide basis, without any individualized determination of whether Allstate engaged in punishable conduct towards any particular class member.

DRI and its members seek to promote a level playing field and the fundamental fairness necessary to resolve disputes efficiently, equitably, and predictably. That is not possible under the decision below. This Court should grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition in this case raises three important questions regarding the intersection between due process principles and class action procedures. All three issues warrant this Court's review, but we write to emphasize the importance of the third issue: whether the Due Process Clause precludes state courts from certifying class claims on the premise that individual defenses will be removed from consideration.

That question must be answered in the affirmative. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Properly understood, a class action is a mere procedural device: a class action simply allows the prosecution of claims of "multiple parties at once, instead of in separate suits," but "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

By permitting classwide adjudication of entitlement to punitive damages – without any consideration of whether Allstate acted with malice towards any particular plaintiff – the Montana Supreme Court improperly employed the procedural class action device to expand the class's right to recover punitive damages at the expense of Allstate's fundamental due process rights. Unfortunately, the Montana Supreme Court is not the only court to adopt such a procedure. Other courts have approved class action procedures that call for determination of punitive damages on a classwide basis, depriving the defendant of its right to an individualized determination of its conduct toward each class member.

Many other courts, however, have recognized the problems with this procedure, and have declined to certify a class, or reversed class certification, to

protect the defendant's right to an individualized determination of its conduct toward each class member. The lower courts are deeply divided, and this Court's review is necessary to provide guidance on what Justice Scalia recently recognized as an "important question" – the "extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers).

REASONS FOR GRANTING THE PETITION

I. CLASS ACTION PROCEDURES THAT DEPRIVE A DEFENDANT OF ITS OTHERWISE AVAILABLE DEFENSES VIOLATE DUE PROCESS.

Class actions have become a favored way of commencing tort suits in the United States. Compared to traditional individual lawsuits, class actions result in higher damages awards,[2] net higher payoffs for plaintiffs' attorneys,[3] and – because of the risk of crippling judgments – tend to induce defendants to agree

[2] *See*, *e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (stating that class actions lead to significantly higher damage awards than individual cases, citing Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 Judicature 22 (1989)).

[3] Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 Tul. L. Rev. 1, 73 (2011).

to larger sums even to "settl[e] questionable claims."[4] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

In 2005, Congress passed the Class Action Fairness Act, prompted by "[n]ational concern over abuse of the class-action device," *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers), with the explicit goal of bringing more state class actions into federal court and thus under the protection of federal procedure. But early data suggests that CAFA has caused at most only a small decline in the number of state-court class action filings.[5] In many of those cases, like the

---

[4] *Accord Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 848-49 (7th Cir. 2010), *vacated*, 131 S. Ct. 3060 (2011) ("The risk of error becomes asymmetric when the number of claims aggregated in the class action is so great that an adverse verdict would push the defendant into bankruptcy; in such a case the defendant will be under great pressure to settle even if the merits of the case are slight."). *See generally* Monestier, *supra*, at 73.

[5] *See* Office of Court Research, Administrative Office of the Courts, Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report 3 (2009) (finding that California class action filings decreased by 9.8% in the year after CAFA's enactment). *See also* Neil J. Marchand, *Class Action Activity in Michigan's State and Federal Courts* 28 (Jan. 2009) http://goo.gl/7HMgfy (finding that "CAFA has not relocated class action activity to Michigan's federal courts").

one here, "the constraints of the Due Process Clause will be the only federal protection" for defendants. *Id*.

A civil defendant's right to be heard and to present every available defense is among the Due Process Clause's essential guarantees. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (due process requires that defendants have "an opportunity to present every available defense" (internal quotation marks omitted) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932))); *accord Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Nickey v. Mississippi*, 292 U.S. 393, 396 (1934). That right should not expand or contract based on the particular procedural mechanism a plaintiff chooses when filing suit. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 490 (2003) ("[W]e should hold the substantive law constant regardless of whether the plaintiffs proceed by individual action, permissive joinder, or class action. . . . The substantive outcomes should not be distorted by the choice of procedural vehicle.").

As recently as 2011, this Court reiterated that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. That is because a class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). A class action device does no more than provide "the procedural means by which [a] remedy may be pursued." *Shady Grove Orthopedic*

Assocs., P.A., 559 U.S. at 402 (majority opinion). Thus, there is "no entitlement to the ancillary class action procedural mechanism," *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013), and class treatment must conform to due process, not vice versa.

This Court has identified several specific "minimal procedural due process protection[s]" that apply in state court class actions, including notice, an opportunity to be heard, the right to opt out, and adequate representation. *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *see also Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940) (explaining representation requirement). But this Court has not yet expressly addressed the due process questions that arise when a class action procedure is used to deprive a defendant of otherwise available defenses.

This Court's recent decision in *Wal-Mart*, however, indicates that a class action device cannot eviscerate a defendant's substantive right to litigate its defenses. In that case, the Ninth Circuit affirmed a district court's order granting class certification on the assumption that statistical sampling could be used to decide the defenses to individual claims. Thus, the claims of a sample set of class members were to be tried, and the results of those trials were to be applied to the remaining class members without further individualized proceedings. *Wal-Mart*, 131 S. Ct. at 2561. This Court "disapprove[d] that novel project" because "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its

. . . defenses to individual claims." *Id*. The Court arrived at this conclusion because, under the Rules Enabling Act, federal class actions cannot "'abridge, enlarge or modify any substantive right.'" *Id*.

Wal-Mart's determination that, under the Rules Enabling Act, class procedures cannot deprive defendants of their substantive right to litigate individualized defenses must apply with equal force under the Due Process Clause because, like the Rules Enabling Act, constitutional due process "prevents the use of class actions from abridging the substantive rights of any party." *Sacred Heart Health Sys. Inc. v. Humana Military Healthcare Servs. Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010). This is unsurprising given that class action procedural "protections [are] grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

Thus, both before and after *Wal-Mart*, lower appellate courts have repeatedly recognized that a class action procedural device cannot be employed to impinge on the fundamental due process right to present all defenses. *See*, *e.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) ("'[D]efendants have the right to raise individual defenses against each class member.'"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) (same); *In re Brooklyn*

Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation."); *Western Elec. Co., Inc. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (trial court abused its discretion by denying defendants the right to obtain discovery on the claims of the individual class members; "to deny [defendants] the right to present a full defense on the issues would violate due process"); *Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (due process requires that class actions not be used to diminish the substantive rights of any party to the litigation); *Sw. Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) ("[B]asic to the right to a fair trial – indeed, basic to the very essence of the adversarial process – is that each party have the opportunity to adequately and vigorously present any material claims and defenses.").

State class action procedures like those of Montana cannot abridge this fundamental due process right any more than the federal class action device could abridge the same substantive right at issue in *Wal-Mart*, because state law must comply with the due process protections afforded by the United States Constitution. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987) (under the United States Constitution's Supremacy Clause, state law must "give way"); *see also City of Boerne v. Flores*, 521 U.S. 507, 529 (1997)

(United States Constitution is the "'superior paramount law'").

II. THE MONTANA SUPREME COURT DEPRIVED ALLSTATE OF ITS DEFENSES, AND THEREBY VIOLATED DUE PROCESS, BY AUTHORIZING CLASSWIDE DETERMINATION OF ENTITLEMENT TO PUNITIVE DAMAGES.

This Court has previously explained that the Due Process Clause requires adjudication of punitive damages on an individualized basis, i.e., courts can impose punitive damages only to punish a defendant's specific conduct towards a particular plaintiff. The Court first made this point in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003), when it stated that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." The Court further explained that due process permits courts to consider the defendant's conduct towards nonparties when assessing the reprehensibility of the defendant's conduct towards the plaintiff, but "such conduct must have a nexus to *the specific harm suffered by the plaintiff*." *Id.* (emphasis added).

The Court revisited this point again in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), a products liability action against a cigarette manufacturer. There, the Court held that the Due Process Clause prohibits a state from imposing punitive damages based on injuries that the defendant "inflicts upon

nonparties or those whom they directly represent." *Id*. at 353. The Court explained that the Due Process Clause guarantees defendants the "opportunity to present every available defense," and that imposing punitive damages based on harm to others would eliminate the defendant's ability to raise defenses that would otherwise be available in an action directly brought by those nonparties. *Id*. (quoting *Lindsey*, 405 U.S. at 66). The Court noted, for example, that other allegedly injured smokers might have known smoking was dangerous, or might not have relied upon the defendant's allegedly misleading statements. *Id*.

In short, the Due Process Clause requires an individualized adjudication of whether a plaintiff is entitled to punitive damages. *See*, *e.g.*, *Holdgrafer v. Unocal Corp.*, 160 Cal. App. 4th 907, 929-30, 73 Cal. Rptr. 3d 216, 235 (2008) ("*State Farm*'s proscription of dissimilar conduct . . . applies to evidence offered to prove that the defendant is guilty of malice, fraud or oppression and is therefore subject to [punitive damages]" because the "due process concerns identified in *State Farm*" apply to proof of whether plaintiff is entitled to punitive damages). It is therefore unsurprising that commentators interpreting this Court's precedent concerning the individualized limitations imposed by the Due Process Clause on a plaintiff's entitlement to punitive damages have recognized that classwide determination of punitive damages would not be consistent with due process. *See*, *e.g.*, Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell L. Rev. 1105, 1138

(2010) ("By casting punitive damages ultimately as punishment vis-à-vis the plaintiff – not anyone else – the [*Williams*] Court arguably constitutionalizes a kind of divisible characterization for that remedy. On this view, punitive damages would be no more amenable to class treatment than demands for the prototypical divisible remedy of compensatory damages."); Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 Baylor L. Rev. 880, 884 (2008) ("[W]here harm to the class is individualized, punitive damages cannot be pursued as a classwide remedy."); *see also* Linda S. Mullenix, *Nine Lives: The Punitive Damage Class*, 58 U. Kan. L. Rev. 845, 850 (2010) ("[P]revailing class action jurisprudence, integrated with the Court's punitive damage jurisprudence, is unlikely to support certification of a Rule 23(b)(3) punitive damage class."); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 664-65 (2003) (identifying due process problems with classwide adjudication of punitive damages prior to *State Farm* and *Williams*).

In the instant case, however, the Montana Supreme Court violated the due process principles discussed in *State Farm* and *Williams* by approving a class action procedure that calls for a classwide determination of entitlement to punitive damages. The court recognized that a classwide determination of the *amount* of punitive damages would violate due

process, and for that reason reversed the trial court's class certification order to the extent it permitted a calculation of the *amount* of punitive damages to the class as a whole. Pet. App. 55a-56a. But that ruling left intact the portion of the trial court's order that permits a determination of whether the class as a whole is entitled to punitive damages, leaving the amount of punitive damages to be determined later in individual mini-trials. Pet. App. 64a ("The trier of fact in the class trial will also make a determination as to whether Allstate's implementation of the CCPR program involved actual fraud or actual malice, such as could justify the entry of punitive damages. . . ."). Thus, the Montana Supreme Court approved a procedure under which any finding that Allstate is liable for punitive damages will necessarily rest on a retrospective view of Allstate's conduct over the entire 20-year time period in question, not on Allstate's conduct in handling any particular claim. In so doing, the Montana Supreme Court missed the more fundamental due process problem discussed above – that classwide adjudication of entitlement to punitive damages deprives Allstate of a defense it would have in a non-class-action proceeding.

A plaintiff in an individual action would not be entitled to punitive damages based merely upon a showing that Allstate adopted improper claims-handling policies. Under *State Farm* and *Williams*, and under Montana's punitive damages statute, each plaintiff would have to show that Allstate acted with malice or fraud in handling that plaintiff's particular

claim. *See* Mont. Code Ann. § 27-1-221(2), (4) (2013) (to obtain punitive damages based on malice, a plaintiff must prove that the defendant intentionally disregarded "a high probability of injury *to the plaintiff*," and to obtain punitive damages based on actual fraud the plaintiff must prove that he or she had a right to rely on the defendant's alleged misrepresentations) (emphasis added). Allstate could defend against those claims by showing that, whatever its policies may have been, it did not act with fraud or malice in adjusting the particular claim at issue.

This is not a case in which defendant engaged in precisely the same conduct towards every member of the class, especially not when the claims at issue were adjusted over a period of 20 years. Pet. 26. Some of the challenged practices were not even applied to petitioner Jacobsen himself. Pet. 18. And yet, under the class procedure approved below, if a jury determines that Allstate acted with malice towards the class *as a whole* in adopting a particular policy, then each class member's entitlement to punitive damages will be established, with no further opportunity for Allstate to prove that it did not act with malice towards any individual class member. Such a procedure deprives Allstate of an important substantive defense and thereby violates due process.

III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS REGARDING THE PROPRIETY OF CLASSWIDE ADJUDICATION OF ENTITLEMENT TO PUNITIVE DAMAGES.

The Fifth and Seventh Circuits and many district courts have already reached the conclusion that classwide adjudication of entitlement to punitive damages is improper because punitive damages cannot be imposed without an individualized evaluation of the defendant's conduct toward each class member. *See Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 581 (7th Cir. 2000) (reversing class certification order that called for classwide determination of entitlement to punitive damages: "to win punitive damages, an individual plaintiff must establish that the defendant possessed a reckless indifference to the plaintiff's federal rights – a fact-specific inquiry into that plaintiff's circumstances"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-20 (5th Cir. 1998) (holding that punitive damages claims cannot be determined on a classwide basis "because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct," which must be determined as to each class member, not based on general practices directed to the class as a whole).[6]

---

[6] *See also Morrow v. Washington*, 277 F.R.D. 172, 203 (E.D. Tex. 2011) (declining to certify class because plaintiff's claim for punitive damages "would require an individualized, factual

(Continued on following page)

determination"); *Altier v. Worley Catastrophe Response, LLC*, Nos. 11-241, 11-242, 2011 WL 3205229, at *13 (E.D. La. July 26, 2011) (declining to certify class in part because "a claim for punitive damages requires a focus on individualized issues to comply with constitutional protections"); *E.E.O.C. v. Sterling Jewelers, Inc.*, 788 F. Supp. 2d 83, 91-92 (W.D.N.Y. 2011) (denying E.E.O.C.'s request for adjudication of punitive damages on classwide basis, concluding that such a procedure would be inconsistent with *State Farm* and *Williams*; "[t]o determine punitive damages . . . without regard to the individual experiences of each [class member], is simply inappropriate given the highly individualized and subjective manner in which the discrimination is alleged to have occurred"); *Xavier v. Belfor Group USA, Inc.*, 254 F.R.D. 281, 291 (E.D. La. 2008) (dismissing state class action claims in part because "punitive damages claims must depend on an individualized analysis to comport with the Constitutional protections"); *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 376 (E.D. Ark. 2007) (observing that entitlement to punitive damages requires "a fact-specific inquiry into [each] plaintiff's circumstances" and declining to certify class treatment of punitive damages claims); *E.E.O.C. v. Int'l Profit Assocs., Inc.*, 102 Fair Empl. Prac. Cas. (BNA) 139, at *11 (N.D. Ill. 2007) (rejecting E.E.O.C.'s proposal to determine punitive damages on a classwide basis, and ordering that punitive damages be determined individually for each plaintiff; "[t]his will allow the jury to make the fact-specific determinations necessary for each claimant, and will also allow the court to ensure that the Supreme Court's concerns regarding punitive damages . . . are met"); *Carlson v. CH Robinson Worldwide, Inc.*, No. Civ. 02-3780 (JNE/JGL), 2005 WL 758602 at *16 (D. Minn. Mar. 31, 2005) (citing *State Farm* and holding it would be inappropriate to certify classwide determination of punitive damages because there would be no individualized consideration of malice as to each class member); *In re Baycol Products Litig.*, 218 F.R.D. 197, 215-16 (D. Minn. 2003) (denying class certification of punitive damages; "Plaintiffs' proposed class trial on punitive damages poses . . . due process concerns because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiffs' [sic] claims"); *Arch v. Am. Tobacco Co., Inc.*, 175 F.R.D.

(Continued on following page)

A significant minority of courts, however, like the Montana Supreme Court in this case, have approved the adjudication of entitlement to punitive damages on a classwide basis, often brushing aside due process concerns. *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 540-44 (N.D. Cal. 2012) (adopting trial procedure calling for classwide determination of entitlement punitive damages, notwithstanding defendant's due process objections under *State Farm* and *Williams*); *In re Tobacco Litig. (Personal Injury Cases)*, 624 S.E.2d 738, 743-44 (W. Va. 2005) (holding that the Due Process Clause, as interpreted by *State Farm*, does not preclude classwide adjudication of entitlement to punitive damages).[7]

469, 489 n.21 (E.D. Pa. 1997); *id*. at 493 (noting that it "would abrogate the constitutional rights of defendants" for plaintiffs seeking to recover for harm to a group of persons to attempt to prove damages on a "class-wide basis"); *In re Copley Pharm., Inc.*, 161 F.R.D. 456, 467-68 (D. Wyo. 1995) (denying class certification of punitive damages, because "punitive damages are measured, in part, by how outrageous [the defendant's] conduct is relative to a particular plaintiff").

[7] *See also E.E.O.C. v. Outback Steak House of Fla., Inc.*, 576 F. Supp. 2d 1202, 1205-07 (D. Colo. 2008) (rejecting defendant's argument that *State Farm* precludes determination of punitive damages on a classwide basis during first phase of trial; "the focus of a punitive damages claim is 'not on the facts unique to each class member, but on defendant's conduct toward the class as a whole'"); *State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161, 164-65, 166-67 (W. Va. 2007) (affirming a trial order calling for determination of entitlement to punitive damages for a putative class, rejecting the defendants' arguments that the procedure violated the due process principles enunciated in *Williams*); *Satchell v. FedEx Corp.*, No. C 03-02659 SI, C 03-02878 SI, 2005

(Continued on following page)

These divergent approaches demonstrate a need for guidance from this Court. Moreover, the sheer number of these cases demonstrates that it is a recurring issue. The issue tends to be insulated from review, however, because an order exposing a defendant to punitive liability to an entire class creates enormous pressure to settle. *See*, *e.g.*, *AT&T Mobility*, 131 S. Ct. at 1752 (noting defendants' tendency to settle even specious claims when damages are potentially great); *Blair v. Equifax Check Servs., Inc.*, 18 F.3d 832, 834 (7th Cir. 1999) ("[G]rant 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. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. . . . This interaction of procedure with the merits justifies an earlier appellate look. By the end

---

WL 2397522, at *12 (N.D. Cal. Sept. 28, 2005) (granting motion for class certification: "The first phase will address liability and relief applicable to the class as a whole . . . and whether defendant is liable for punitive damages"); *E.E.O.C. v. Dial Corp*., 259 F. Supp. 2d 710, 712 (N.D. Ill. 2003) (refusing to reconsider trial plan calling for adjudication of entitlement to punitive damages on a classwide basis, and rejecting defendant's argument that the procedure was contrary to *State Farm*); *Palmer v. Combined Ins.*, 217 F.R.D. 430, 438 (N.D. Ill. 2003) (granting class certification of entitlement to punitive damages in case involving allegations of discrimination and sexual harassment); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming judgment in which entitlement to punitive damages was decided on a classwide basis).

of the case it will be too late – if indeed the case has an ending that is subject to appellate review.").

This Court should grant review now to settle this important question of due process, providing a "nationally uniform interpretation of federal law." *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010).

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

LEDERER WESTON CRAIG, PLC
J. MICHAEL WESTON
Counsel of Record
118 Third Avenue, SE, Suite 700
Cedar Rapids, Iowa 52401-1408
(319) 365-1184 • FAX: (319) 365-1186
mweston@lwclawyers.com

HORVITZ & LEVY LLP
DAVID M. AXELRAD
FELIX SHAFIR
CURT CUTTING
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
daxelrad@horvitzlevy.com
fshafir@horvitzlevy.com
ccutting@horvitzlevy.com

Counsel for Amicus Curiae
DRI – The Voice of the Defense Bar