Nos. 14-1123 and 14-1124

IN THE

Supreme Court of the United States

WAL-MART STORES, INC., and SAM'S EAST, INC.,

Petitioners,

v.

MICHELLE BRAUN,
on behalf of herself and all others similarly situated,

and

DOLORES HUMMEL,
on behalf of herself and all others similarly situated,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC, whose members include some of the country's largest retailers, was formed to provide courts with retail industry perspectives on significant legal issues, and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. The member entities whose interests are represented by the RLC operate throughout the United States, employing millions of people and providing goods and services to tens of millions more.

The businesses that make up the RLC's membership are frequently targeted by class action lawsuits. Plaintiffs in those cases frequently propose trial by allegedly "representative" evidence that denies RLC's members an opportunity fully to defend against the claims of each putative class member. *Amicus curiae* has a substantial

1. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of *amicus curiae*'s intention to file this brief, and all parties consented in writing to its filing. Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

interest in the development of the law of class certification and its due-process implications, particularly in the employment context, and in ensuring that this Court's guidance on issues of class certification is followed by lower courts, both state and federal. Therefore, *amicus curiae* submits this brief in support of Wal-Mart Stores, Inc.'s petitions for writs of certiorari.

SUMMARY OF ARGUMENT

This Court broke no new ground when it held, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), that the perceived efficiency of class litigation cannot justify the override of a defendant's right to litigate its defenses to each individual claim. That holding was based on the Rules Enabling Act, 28 U.S.C. § 2072(b), but the Court previously made clear that the Due Process Clause similarly guarantees a defendant the "opportunity to present every available defense" before it can be held accountable for allegedly unlawful conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

Dukes similarly was only the latest in a series of decisions emphasizing that class actions, with their capacity for debilitating judgments and therefore *in terrorem* pressure to settle without an adjudication of liability or assessment of damages, require careful examination. *E.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741-43 (1975); *see also* Fed. R. Civ. P. 23(f), Committee Notes on Rules, 1998 Amendment (certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk

of potentially ruinous liability"). This Court accordingly has demanded a "rigorous analysis" of such requests. *General Telephone Co. of the Southwest v. Falcon*, 457 US 147, 161 (1982). That careful screening protects not only defendants from liability to individuals who have not proven their cases, but also absent class members from an expedient but summary determination of their claims and damages. *Id.* (noting the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad"); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (Rule 23 is "designed to protect absentees by blocking unwarranted or overbroad class definitions").

Despite these clear directives, some lower courts—including both the Pennsylvania Supreme Court and the Pennsylvania Superior Court in this case—continue to bend over backwards to accommodate class-wide adjudication, relieving plaintiffs of their burden to prove affirmatively that aggregate litigation is fair to all involved. The problem is particularly widespread in state courts, many of which continue to certify classes after only the gentlest review.

This case also exemplifies a practice, in both the state and federal courts, of dismissing individualized questions of damages as irrelevant to class certification analysis. This Court rejected that notion in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), but some lower courts have resisted that holding, particularly in the employment context. They acknowledge *Comcast* only so far as to ensure that the plaintiffs' damages theory matches the liability theory. The courts' refusal to apply *Comcast*'s full reasoning results in certification of classes where

defendants' defenses to the damage claims of individual plaintiffs are simply ignored.

And often the incantation that damages variations are irrelevant to certification sweeps so broadly as to excuse proof of liability as well. The faults in Plaintiffs' proof here—for example, that they do not account for the possibility that an employee actually took a break but failed to clock in or out as required—are not just defects in the calculation of damages, as the Pennsylvania courts held here, but of the basic proposition that Wal-Mart is liable to the Plaintiffs in the first place.

This case provides an ideal opportunity for this Court to clarify that class certification standards rest on constitutional mandates of fairness that apply to state court litigants as vigorously as to those in federal courts, and to ensure that certification analysis is as sensitive to individual damages issues as the Court intended in *Comcast*. The Court should grant certiorari in this case because it is imperative for this Court to make clear that its class-action jurisprudence is applicable to *all* class actions, regardless of the forum in which they arise.

ARGUMENT

I. Pennsylvania's Lenient Standards For Class Certification Exemplify The Widely Used But Improper Tests Applied In State Courts.

In *Dukes*, this Court disallowed the extrapolation of liability and damages determinations for a class of plaintiffs from the testimony of just a few, in part because "a class cannot be certified on the premise that [the

defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. Though that holding was based on the requirement of the Rules Enabling Act, 28 U.S.C. § 2072(b), that the Federal Rules of Civil Procedure not be interpreted to "abridge, enlarge or modify any substantive right," the holding echoed the established principle that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (noting that the "protections" of Rule 23 are "grounded in due process").

In the decision below, however, the Pennsylvania Supreme Court used its analysis of state-law certification standards to dispose of Wal-Mart's federal constitutional concerns. Citing Pennsylvania precedent, the court held, for example, that "the existence of distinguishing individual facts among class members is not fatal to certification," and that "[c]lass members may assert a single common complaint even if they have not all suffered actual injury."[2] Pet. App. in No. 14-1124 ("App.") 14a n.8. With that lenient state-law standard in mind, the court then held it sufficient, including for federal due process purposes, for Plaintiffs to show that Wal-Mart managers were "pressured" by profitability targets to understaff stores, and that that pressure "impeded the ability of employees, across the board, to take scheduled, promised,

2. The court also held, again citing Pennsylvania law, that once a case is tried as a class action, the decision to certify is no longer subject to review. *Id.* at 12 n.9 (citing *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 34 (Pa. 2011)).

paid rest breaks," without requiring proof that every class member in fact was denied rest breaks. App. 20a.

That sort of theorizing about ways in which general incentives might have resulted in specific missed rest breaks flies in the face of *Dukes*. Just as the *Dukes* plaintiffs could not justify class certification by assuming and generalizing illicit motives where managers had discretion as to whom they promoted, 131 S. Ct. at 2554, so too the Plaintiffs here cannot succeed merely by arguing that managers had an incentive to prevent employees from taking full breaks. The possibility that a lawful policy may lead to unlawful actions by individual managers does not justify certification of a class action.[3]

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3. *See, e.g.*, *Frye v. Baptist Mem'l Hosp., Inc.*, 495 Fed. Appx. 669, 672 (6th Cir. 2012) (affirming denial of certification of a meal break class where the employer used a lawful automatic-deduction policy); *Brickey v. Dolgencorp, Inc.*, No. 06-CV-6084L, 2011 WL 643256, at *4 (W.D.N.Y. February 23, 2011) (rejecting the argument "that facially-lawful policies . . . can form the equivalent of a 'common policy or plan that violate[s] the law,' merely because they indirectly might encourage the minimization of overtime") (citing *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07CV7350, 2009 WL 7311383 (S.D.N.Y. Nov. 13, 2009)); *see also Beauperthuy v. 24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1124 (N.D. Cal. 2011) ("Plaintiffs maintain that the policy of allocating a certain number of FIT hours to each club created incentives for club-level managers to make trainers work off the clock. Such allegations are insufficient to constitute evidence of a common decision, policy, or plan, especially in light of 24 Hour's formal written policies to the contrary."); *Brechler v. Qwest Commc'ns Int'l*, Inc., 2009 WL 692329 at *3–4 (D. Ariz. 2009) (decertifying a Fair Labor Standards Act collective where plaintiffs "relie[d] on a subtler system of pressure and coercion that, ultimately, appears to have been backed or not by individual managers"); *Proctor v. Allsups Convenience Stores, Inc.*, 250 F.R.D. 278, 282 (N.D. Tex. 2008) (pressure against overtime created by allocating a number of

Pennsylvania's approach is unfortunately common, however, and the prevalence of such soft standards for class certification in many state courts provides a further reason for this Court to seize the opportunity this case presents to clarify the limits that the Due Process Clause imposes on class certification.

A. Some States Expressly Reject Federal Certification Standards.

Several states have expressly rejected federal certification standards, including *Dukes*. For example, in *Williams v. Superior Court*, 165 Cal. Rptr. 3d 340, 347-49 (Cal. App. 2013), the California Court of Appeal rejected *Dukes* and its concerns about "Trial by Formula," holding them irrelevant to class certification analysis: "Trial by Formula is a method of calculating damages. Damage calculations have little, if any, relevance at the certification stage before the trial court and parties have reached the merits of the class claims." (footnote omitted). *See also Soper v. Tire Kingdom, Inc.*, 124 So. 3d 804 (Fla. 2013) (holding that a lower Florida appellate court's reliance on *Dukes* to deny certification was in "express and direct conflict" with the less rigorous standard under Florida law); *Mattson v. Mont. Power Co.*, 291 P.3d 1209, 1219 (Mont. 2012) (noting "a recent divergence between the federal approach and Montana's approach to the commonality requirement");[4] *Stecko v.*

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work hours per week to individual stores did not constitute a "single decision, policy, or plan").

4. *See also Jacobsen v. Allstate Ins. Co.*, 371 Mont. 393, 403-405, 310 P.3d 452, 460-61 (2013) (expressly deferring the question of whether to apply *Dukes* under Montana state law).

RL Ins. Co., 121 A.D.3d 542, 543-44 (N.Y. App. 2014) ("We note that the motion court was not required to apply the 'rigorous analysis' standard utilized by the federal courts in addressing class certification motions under Rule 23(b) of the Federal Rules of Civil Procedure, given this Court's recognition that CPLR 901(a) 'should be broadly construed' . . . .").

B. Some States Favor Certification Despite Weak Evidence That Aggregate Litigation Is Justified Or Fair.

Other courts, less explicitly but no less rigidly, apply presumptions that favor certification without considering the protections afforded by federal law. Several states, for example, prohibit any review of the merits in assessing whether to certify a class, despite express and repeated rejection of that notion in this Court's decisions, most recently in *Dukes*, because some review of the merits may be essential for the court to satisfy itself that aggregate litigation is appropriate. *See* 131 S. Ct. at 2551-52 & n.6 (collecting cases). *See, e.g., Elsea v. U.S. Eng'g Co.*, WD77687, 2015 WL 1246614 at *7 (Mo. Ct. App. Mar. 17, 2015) ("The circuit court erred in refusing to accept the allegations and evidence presented by Plaintiffs as true, and erred in focusing on remaining individual questions related to the litigation.") (internal citation omitted); *Baker v. Autos, Inc.*, No. 201400833, 2015 WL 1299799, at *3 (N.D. Mar. 24, 2015) ("It is well settled that a district court must make a determination of class certification without delving into the merits of the case."); *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459, 461 (W. Va. 2014) ("Nothing in either the language or history of Rule 23 of the West Virginia Rules of Civil Procedure

[1998] gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."); *Jaques v. Midway Auto Plaza*, Inc., 240 P.3d 769, 776 (Utah 2010) ("While the court may consider evidence relevant to the plaintiff's claims, the court may not inquire into the merits of the case."); *Nat'l Cash, Inc. v. Loveless*, 205 S.W.3d 127, 130 (2005) (courts "will not delve into the merits of the underlying claims when deciding whether the Rule 23 requirements have been met"); *Fraley v. Williams Ford Tractor & Equip. Co.*, 5 S.W.3d 423, 431 (1999) ("consideration of affirmative defenses at the class certification stage is an improper intrusion into the merits of the case").[5]

Other state courts describe the plaintiffs' burden to justify class certification as easily satisfied and requiring little evidence, leading to certification of classes despite the plaintiffs' inability actually to prove that the defendant is liable to each class member. *See, e.g.*, *Delgado v. Del Monte Fresh Produce, N.A., Inc.*, 317 P.2d 419 (Or. 2014) (noting "the difference between plaintiffs' burden to show that an issue is susceptible to proof by common evidence to support class certification and plaintiffs' burden of proof to send an issue to the jury for decision on a class-wide basis"); *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (2008) ("at the pretrial class action stage, plaintiffs must only provide 'information sufficient to enable the motion judge to form a reasonable judgment that the class meets the requirements of rule 23; they do

5. Though several of these cases, and others cited in this section, were decided before *Dukes*, they accurately state the most recent holding in these jurisdictions.

not bear the burden of producing evidence sufficient to prove that the requirements [of rule 23] have been met.'"); *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 324 (Ia. 2005) ("Except where the facts underlying the class are merely speculative, the proponent's burden is light."); *see also id.* at 322 ("[Microsoft] contends a showing of predominance is a condition precedent to certification, but we disagree; this is only one of thirteen factors to be considered.").

Similarly, many states express a preference for class certification, endorsing certification despite little showing that the questions driving resolution of the litigation for the entire class can be answered with common evidence. *See, e.g.*, *Elsea*, 2015 WL 1246614, at *4, *9 ("we will err on the side of upholding certification in cases where it is a close question. . . . The predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved."); *Thurman v. CUNA Mut. Ins. Soc'y*, 836 N.W. 2d 611, 618 (S.D. 2013) ("class certification is 'favored by courts in questionable cases'") (quoting *Beck v. City of Rapid City*, 650 N.W.2d 520, 525 (S.D. 2002)); *Stewart Title Guar. Co. v. Finney*, No. 2011-CA-00499-ME, 2012 WL 5378813, at *3, *6 (Ky. App. Nov. 2, 2012) ("there exists a presumption in favor of class certification . . . . Even if there must be 'individual inquiries into class membership,' if there is still a 'larger common question . . . class certification would have been appropriate.'"); *Jackson v. Unocal Corp.*, 262 P.3d 874, 883-84 (Colo. 2011) ("Colorado has a policy of liberally construing C.R.C.P. 23 in favor of class certification. To the extent recent federal circuit court decisions are based on a policy of limiting class actions, they are not persuasive.") (citations and footnote omitted); *Lee v. Carter-Reed Co.*, 4 A.3d 561, 574 (N.J. 2010) ("New Jersey courts . . . have

consistently held that the class action rule should be liberally construed."); *Collins v. Anthem Health Plans, Inc.*, 880 A.2d 106, 112-114 (2005) ("doubts regarding the propriety of class certification should be resolved in favor of certification"); *ESI Ergonomic Solutions, LLC v. UA Theatre Circuit, Inc.*, 50 P.3d 844 (Ariz. App. 2002) ("Generally, the rule should be construed liberally, and doubts concerning whether to certify a class action should be resolved in favor of certification.").

Pennsylvania's relaxed approach to certification and its decision to ignore federal protections does not stand alone; it mirrors the lax standards widely applied in state courts across the nation. Wal-Mart's petition should be granted to resolve the important constitutional questions it presents and to ensure that state courts are as protective of defendants' and absent class members' due process rights as federal courts.

II. This Case Provides The Ideal Opportunity For This Court To Stop Lower Courts From Improperly Limiting *Comcast v. Behrend*.

The Pennsylvania Supreme Court held that "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here, because . . . the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole [rather than liability]." App. 18a-19a (original emphasis). The notion that Trial by Formula is permissible to defeat individual defenses to damages, but not to liability, should not have survived *Comcast*.

In *Comcast*, an antitrust case, this Court held that the plaintiffs had failed to satisfy the predominance requirement of Fed. R. Civ. P. 23(b)(3) because they had failed to show "that damages are capable of measurement on a classwide basis." 133 S. Ct. at 1433. The failure had nothing to do with the susceptibility of the liability case to aggregate proof; the focus was entirely on damages. The Court held that the plaintiffs had failed in that respect because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Id.* The Court thus put to rest the notion that Rule 23(b)(3) requires that common questions predominate solely as to liability, but not damages.

Lower courts, state and federal, have rejected this common-sense statement and many have attempted to limit *Comcast* to its facts. The *Comcast* plaintiffs had failed to show that certification was appropriate because their expert's damages model estimated damages based on multiple theories of liability, even though just one of those theories had survived dismissal. Because the expert "failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action [was] premised," the Court held certification to have been improper. *Id.* at 1433.

Instead of recognizing that the particular flaw in the *Comcast* plaintiffs' evidence was just one example of a way in which individual damage questions could overwhelm common questions, lower courts have held that *Comcast* stands solely for the proposition that damages theories, however abstracted from the actual experience of individual class members, must be related in some way to the liability theory. *Roach v. T.L. Cannon Corp.*, 778

F.3d 401 (2d Cir. 2015); *AstraZeneca AB v. United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund*, 2015 WL 265548, at *8, *10 (1st Cir. Jan. 21, 2015); *Dow Chem. Co. v. Seegott Holdings, Inc.*, 768 F.3d 1245, 1257-58 (10th Cir. 2014) ("Comcast did not rest on the ability to measure damages on a class-wide basis."); *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014) (rejecting the argument that after Comcast "certification under Rule 23(b)(3) requires a reliable, common methodology for measuring classwide damages"); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013); *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 860-61 (6th Cir. 2013); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013).

In the wage-and-hour context, which by one report may account for as much as 90% of the state and federal claims filed as class or collective actions[6], this blinkered view means that *Comcast* has no application, regardless of how individualized the required proof of damages may be, because the damages theory in those cases nearly always nominally matches the liability theory; the claim is for lost wages. This approach fails to credit the reasoning of this Court's decision, which does not distinguish between liability and damages issues for purposes of the predominance analysis, requiring equally careful scrutiny of both.

The Pennsylvania Supreme Court's decision here exemplifies this superficial analysis. That court held that

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6. Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take*, ADP, 2011, at 1.

damages proof need not be "exact," and should be subject only to a "relaxed burden." App. 21a (quoting *Gomez v. Tyson Foods, Inc.*, 295 F.R.D. 397, 400 (D. Neb. 2013)). That is hardly the "rigorous analysis" that this Court's precedents demand. *Falcon*, 457 U.S. at 161.

Feeding some courts' unwillingness to give *Comcast* its due, at least in the wage-and-hour context, is the holding in *Anderson v. Mt. Clemens Pottery Co., Inc.*, 328 U.S. 680, 688 (1946), that courts may award damages based on an employee's evidence of the uncompensated work time, "even though the result be only approximate." The Pennsylvania Supreme Court followed that course here, holding that Plaintiffs' lack of concrete damages proof was Wal-Mart's problem, and that if Wal-Mart could not prove the exact amount of damages itself, then "it cannot . . . avoid the relaxed burden of proving damages through extrapolation." App. 22a.

There are at least two problems with this approach. First, it ignores all of this Court's recent jurisprudence on the rigorous application of class certification standards and related constitutional concerns. Second, and more insidiously, this willingness to accept the risk of overcompensating undeserving class members depends on the questionable premise that liability and damages are neatly distinguishable. It assumes that proof of damages need be considered only after liability to a particular class member has been definitively established. Here, though, as in so many wage-and-hour cases, liability and damages are not so easily separated.

Wal-Mart pointed out below, for example, that Plaintiffs' summary, extrapolated proof admittedly did

not account for "the possibility that a particular employee had failed to clock in or out for a break." Petition at 3. That sort of fault in the Plaintiffs' evidence is a matter not just of damages, but of liability: if the employee actually took the break, but simply failed to record it in the timekeeping system as Wal-Mart's policy required, then Wal-Mart is not liable to that individual for the wages corresponding to the break.

Mt. Clemens addresses situations in which the fact of injury is established or undisputed, and the question is merely about the amount of damages to each class member. But that situation frequently is confused with cases like this one, where the plaintiffs' evidence for nearly all class members, of liability as well as damages, is based on assumptions and extrapolations rather than proof. *See, e.g.*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage, and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount.").

In this way, the courts' tolerance for approximation and downright failures of proof, waved away in reliance on *Mt. Clemens'* presumption, ends up overlooking substantial individual questions of liability that should preclude certification of the class. That is why, perhaps especially in the employment context, it is so important to take *Comcast* at face value. The predominance analysis required by Rule 23(b)(3), and by the Due Process Clause, must consider not only whether individual questions

of liability predominate over common questions, but whether "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S. Ct. at 1433; *see, e.g.*, *Espenscheid v. DirectSat USA*, 705 F.3d 770 (7th Cir. 2013) (plaintiff must present a realistic and workable trial plan explaining how all class issues, including damages, can be resolved on a classwide basis at trial).

The Pennsylvania decisions cannot be squared with this Court's precedents. And the proper application of class certification requirements, particularly as wage-and-hour class actions continue to dominate the landscape for such cases, is vitally important to American businesses, which routinely are forced to settle improperly certified class actions regardless of the merits of the certified claims. *See*, *e.g.*, *Shady Grove*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978))).

Granting review and reversing the Pennsylvania Supreme Court's and Superior Court's flawed decisions will send a clear message to class action plaintiffs and the lower courts that this Court meant what it said in *Comcast.*

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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