No. 20-2317

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BREANN HUDOCK, et al.,
Plaintiffs-Appellees,
v.
LG ELECTRONICS U.S.A., INC., BEST BUY CO., INC., BEST BUY STORES, L.P., BESTBUY.COM, LLC,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Minnesota, 0:16-cv-1220-JRT-KMM
Chief Judge John R. Tunheim

AMICUS BRIEF OF RETAIL LITIGATION CENTER, INC., CONSUMER TECHNOLOGY ASSOCIATION, ASSOCIATION OF HOME APPLIANCE MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANTS-APPELLANTS

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, SE Suite 700
Washington, DC 20003

Kevin M. McGinty
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
Counsel for Association of Home Appliance Manufacturers

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Charles A. Samuels
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania NW #900
Washington D.C. 20004
Counsel for Association of Home Appliance Manufacturers

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

CORPORATE DISCLOSURE STATEMENT

Amici curiae certify that they have no outstanding shares or debt securities in the hands of the public, and they do not have a parent company. No publicly held corporation has a 10% or greater ownership in *amici curiae*.

/s/ Adam G. Unikowsky

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All parties consent to the filing of this amicus brief.[1]

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. (the "RLC") is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The Consumer Technology Association (CTA)® is the trade association representing the $398 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. More than 2,200 companies—80% of which are small businesses and startups; others are among the world's best-known brands—enjoy the benefits of CTA membership including policy advocacy, market research,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

technical education, industry promotion, standards development and the fostering of business and strategic relationships. CTA also owns and produces CES®—the world's gathering place for all who thrive on the business of consumer technologies. Profits from CES are reinvested into CTA's industry services.

The Association of Home Appliance Manufacturers ("AHAM") represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's more than 150 members employ tens of thousands of people in the U.S. and produce more than 95% of the household appliances shipped for sale within the U.S. The factory shipment value of these products is more than $30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the

Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Notably, *amici* are submitting this brief during the COVID-19 pandemic. Retailers, factories and global supply chains, including *amici's* members, are all experiencing major disruptions as a result of the pandemic and the public health measures that are necessary to curb its spread.

Although *amici* are primarily focused on helping their members deal with the business exigencies presented by this unprecedented crisis, they are also participating in pending litigation that raises issues of greatest importance. Such litigation includes certain class action cases that present the highest concern, given that businesses, including *amici*'s members, are almost always defendants in class action litigation. Moreover, the uncertain nature of the current economy makes many businesses financially vulnerable and therefore even more susceptible to the unfair settlement pressure caused by the improper certification of massive classes. *Amici*'s members—and indirectly the customers, employees, and communities that depend on them—thus have a strong interest in ensuring that the rules governing class certification are applied properly.

SUMMARY OF ARGUMENT

The District Court erred in certifying a national class. As Defendants correctly argue, the District Court's choice-of-law analysis violated the Due Process

Clause. In addition, the District Court erred in conducting a single choice-of-law analysis for all members of the putative class, and in concluding that Minnesota and New Jersey law should apply for all class members nationwide. The District Court overlooked that under this Court's precedents, choice-of-law analysis must be conducted on an individualized basis—and the outcome of that choice-of-law analysis may differ from class member to class member, even for consumers within a particular state. The need to conduct a consumer-by-consumer choice-of-law analysis should have precluded class certification.

Not only does the District Court's class certification decision violate the Due Process Clause, but it also violates the Commerce Clause. The Commerce Clause bars states from regulating transactions that take place in other states, which is exactly what Minnesota and New Jersey would be doing if the District Court's choice-of-law analysis stands. At a minimum, considerations of constitutional avoidance require applying choice-of-law principles in a manner that would avoid the risk of a constitutional violation.

Certifying national classes to adjudicate state law claims is not only bad law, but also bad policy. It harms businesses by subjecting them to multiple state laws with respect to activities within a single state and by creating massive and unwieldy classes that threaten exorbitant liability. It harms consumers by forcing them into

putative classes under state laws that may be contrary to each consumer's interests. And it undermines federalism by permitting states to regulate across state lines.

The District Court's decision should be reversed on the independent ground that Plaintiffs did not establish predominance, as required to certify a damages class under Federal Rule of Civil Procedure 23(b)(3). Different consumers with different preferences and different budgets were exposed to different product tags from different retailers, with different sales associates conveying different marketing and messages. No two plaintiff's cases are alike, so the class should not have been certified. The Advisory Committee Notes accompanying Rule 23 illuminate this case as the paradigm for inappropriate class certification.

Class certification was additionally unwarranted for the independent reason that Plaintiffs' damages model was completely untethered from their own theory of liability. This Court should reaffirm the Supreme Court's holding in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), that a class cannot be certified unless the plaintiffs proffer a damages model consistent with their theory of liability.

ARGUMENT

I. The District Court Erred in Certifying a Class to Assert Claims on Behalf of a Nationwide Class Under the Laws of Two States.

The District Court certified national classes consisting of millions of consumers who bought certain LG LED televisions *anywhere* in the United States over the last decade. The District Court reasoned that all class members could assert

claims under Minnesota or New Jersey law because the defendants are Minnesota and New Jersey businesses—regardless of whether the class members had ever been to those states, or were aware that the defendants had any connection to those states.

Amici agree with Defendants that the District Court's choice-of-law analysis violated both the federal Constitution and Minnesota state law. *Amici* write separately to make three points. First, in its choice-of-law analysis, the District Court made a critical error: it resolved the choice-of-law question on a classwide basis without determining whether the choice-of-law analysis might differ from class member to class member. Second, the District Court's choice-of-law analysis violated not only the Due Process Clause, but also the Commerce Clause. Third, the District Court's decision will cause grave practical consequences for *amici* and their members.

A. The District Court Improperly Conducted Its Choice-of-Law Analysis on a Classwide Basis.

The District Court ruled that certifying the nationwide class complied with the Due Process Clause. That ruling contained a critical error: the District Court conducted a single choice-of-law analysis for all class members, overlooking the individualized nature of choice-of-law analyses that will differ among class members. Because individualized choice-of-law questions predominate over any common issues, the Court should reverse the grant of class certification.

Extraterritorial application of state law is constrained by the Due Process Clause. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quotation marks omitted). "When considering fairness in this context, an important element is the expectation of the parties." *Id.* at 822.

The District Court concluded that Minnesota and New Jersey law could constitutionally be applied to Best Buy and LG, respectively, because Best Buy and LG were headquartered there. As Defendants explain, that fact is insufficient to establish that Minnesota and New Jersey law may be applied under the Due Process Clause. Def. Br. 20-32.

In addition, the District Court committed a distinct error. The District Court incorrectly assumed that the constitutional choice-of-law inquiry could be conducted for all class members in one fell swoop. It stated: "to the extent that a consumer contemplated potential choice-of-law issues when purchasing a television—a generous assumption—they likely thought that either the law of the state of purchase, the law of Minnesota, where Best Buy is headquartered, or perhaps the law of New Jersey, where LG is headquartered would apply." Add. 21 (emphasis omitted). The District Court therefore concluded (based on its surmise that a *generic*

consumer "likely" would have thought that either Minnesota or New Jersey law applies) that *all* class members may invoke Minnesota or New Jersey law.

That speculative analysis was incorrect. Choice-of-law analysis must be *individualized*, not aggregated. As this Court recently explained, a "district court must conduct an individualized choice-of-law analysis that is susceptible to meaningful appellate review to ensure that the application of a given state's 'law is neither arbitrary nor fundamentally unfair.'" *Hale v. Emerson Elec. Co.*, 942 F.3d 401, 404 (8th Cir. 2019) (per curiam) (quoting *Grovett v. St. Jude Medical, Inc. (In re St. Jude Medical, Inc.)*, 425 F.3d 1116, 1120 (8th Cir. 2005)). And a nationwide class cannot be certified unless *each individual* in the class may assert the protections of Minnesota and New Jersey law. *See Shutts*, 472 U.S. at 821-22 ("Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by *each member of the plaintiff class*, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair.").

Further, that individualized analysis will differ from class member to class member. The due process analysis turns on the "expectation of the parties." *Shutts*, 472 U.S. at 822. This requires analyzing the expectation of the *actual parties*, not speculating about the expectation of a hypothetical generic consumer. Some particularly conscientious class members might carefully review background information about Best Buy and LG's corporate structure before they buy a

television, and expect that Minnesota and New Jersey law will apply. Other—probably most—class members simply buy televisions they like without researching this background information, and would assume the transaction is governed by the law of the state in which they live.

It is impossible to try all class members' claims together unless the same law applies to all of them. Yet it is impossible to determine what law applies to any class member without an individualized analysis. Because there is no way to determine Defendants' liability to *any*—let alone all—class members without conducting an individualized choice-of-law analysis with respect to each class member, the District Court should have denied class certification.

The District Court may have concluded that it was more convenient to analyze the expectations of a hypothetical generic class member than it would have been to consider the expectations of each class member individually. But convenience is not a permissible basis to alter the substantive choice-of-law standard. The Rules Enabling Act bars courts from using the class-action device in a way that would "abridge … any substantive right" of any party. 28 U.S.C. § 2072(b). This means that defendants must be permitted to assert the same substantive defenses as they would assert in individualized litigation. Here, if class members had brought individual lawsuits, then the defendants could have made individualized arguments that the applicable law for a particular plaintiff was a different state's law—and

asserted a defense to liability based on that state's law. For instance, if a particular plaintiff admitted in discovery that he had no idea Best Buy and LG were from Minnesota and New Jersey, the defendants could have argued that Minnesota and New Jersey law should not apply. The fact that Plaintiffs filed a putative class action should not strip Defendants of the right to make those individualized arguments. The District Court therefore erred in conducting a choice-of-law analysis on a classwide basis.

B. The District Court's Application of New Jersey and Minnesota Law to Out-of-State Transactions Violated the Commerce Clause—Or, at Least, Created Constitutional Doubt.

Extraterritorial application of state law implicates not only the Due Process Clause, but also the Commerce Clause. Under the Commerce Clause, "a state regulation is per se invalid when it has an 'extraterritorial reach,' that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995). "The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders." *Id.*

The application of Minnesota and New Jersey law to out-of-state transactions would have "the practical effect of controlling conduct beyond the boundaries of the state," *id.*, in violation of the Commerce Clause. If Best Buy sells an LG television in Alaska or Florida, and the transaction is legal under both federal law and Alaska

or Florida law, then the transaction is legal, period. Under our federal system, out-of-state transactions are none of Minnesota or New Jersey's business, and they may not impede out-of-state commerce by attempting to regulate those transactions.

At a minimum, the Court should apply state choice-of-law principles in a manner that would avoid constitutional doubt. "[A] court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Granite Re, Inc. v. Nat'l Credit Union Admin. Bd.*, 956 F.3d 1041, 1048 (8th Cir. 2020) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) (quotation marks omitted)); *accord State v. Irby*, 848 N.W.2d 515, 521 (Minn. 2014) ("[I]f we can construe a statute to avoid a constitutional confrontation, we are to do so." (quotation marks omitted)). As Defendants explain, standard choice-of-law principles should have precluded application of Minnesota and New Jersey law on a nationwide basis. But even if this were a close question, the Court should construe those choice-of-law principles in a manner that would avoid any potential Commerce Clause violation.

This Court's decision in *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016), demonstrates both of those approaches. In *Heydinger*, Minnesota required out-of-state businesses to comply with certain regulations "any time they enter into a transaction or agreement that may 'import' electricity into Minnesota." 825 F.3d at 921 (opinion of Loken, J.). In separate opinions, Judge Loken and Judge Colloton

both concluded that the statute was invalid, but for different reasons. Judge Loken concluded that Minnesota's statute violated the Commerce Clause. He acknowledged that "Minnesota and other States have long regulated the siting, construction, and operation of electric generating facilities located within their borders." *Id.* at 922 (opinion of Loken, J.) But he nonetheless concluded that Minnesota's statute was unconstitutional because its "practical effect is to control activities taking place *wholly* outside Minnesota." *Id.* Judge Colloton declined to resolve the Commerce Clause question, pointing to the "practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Id.* at 927 (opinion of Colloton, J.) (quotation marks omitted). He concluded that federal law, as a matter of statutory interpretation, preempted the state statute, making it unnecessary to resolve the Commerce Clause question. *Id.* Under either of those two approaches, the Court should reject the District Court's choice-of-law-analysis. Under Judge Loken's view, the District Court's application of Minnesota and New Jersey law nationwide violated the Commerce Clause. Under Judge Colloton's view, the Court should adopt Defendants' choice-of-law argument as a basis to avoid the constitutional question.

C. Certification of Nationwide Classes to Adjudicate Claims Arising under State Law Harms Businesses, Consumers, and States.

The District Court's choice-of-law decision is wrong not only as a matter of law, but also as a matter of policy.

Extraterritorial application of state law harms businesses, consumers, and states. Businesses are harmed because extraterritorial application of state law creates the risk that activities of businesses within a single state will be subject to multiple states' laws. If the District Court's ruling stands, then a national retailer incorporated in State A, with its principal place of business in State B, operating a store in State C, will be unable to determine whether the consumer protection laws of State A, State B, or State C apply to a particular transaction. To protect itself from liability, the retailer may be forced to comply simultaneously with multiple states' consumer protection laws in every state in which it does business. At best, such compliance is cumbersome. At worst, it may be impossible when states' laws are inconsistent, such as if one state's consumer-protection statute mandates a disclosure while another state's consumer-protection statute deems that disclosure false and misleading. *Compare, e.g.*, *CTIA-The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 836-37 (9th Cir. 2019) (upholding law requiring cell phone retailers to make certain disclosures to purchasers), *with id.* at 853 (Friedland, J., dissenting) (finding that law "require[s] businesses to make false or misleading statements about their own products").

Moreover, certification of nationwide classes harms businesses for an additional reason. Class-action lawyers frequently seek extraterritorial application of state law in order to certify national classes. The stakes of certifying nationwide

classes are so dramatic that companies are often forced to settle, regardless of whether they may have meritorious defenses. As the Supreme Court has emphasized, if class litigation is not properly managed, class certification "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." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017) (noting that "an order granting class certification may force a defendant to settle rather than run the risk of potentially ruinous liability" (quotation marks, ellipses and brackets omitted)). This concern is magnified in the context of a nationwide class, in which class certification can instantly transform a run-of-the-mill lawsuit for nominal individual damages into bet-the-company litigation. And the problem is yet worse when a defendant faces financial struggles. A financially stable company may be willing to defend against an abusive class action despite the small risk of an adverse judgment, so as to avoid the risk of copycat class actions. But a financially struggling company may not be willing to face the risk of a judgment that could force it into bankruptcy. Faithful application of choice-of-law principles is necessary to ensure that businesses have a fair chance to defend themselves in litigation.

Extraterritorial application of state law harms consumers as well. It is far from clear that consumers benefit when businesses are forced to comply (or attempt to

comply) with multiple states' laws simultaneously. This may lead to consumers receiving a confusing array of warnings and disclaimers, and ultimately bearing higher prices to compensate businesses for their compliance efforts. Moreover, extraterritorial application of state law introduces a wedge between consumers and the class action lawyers who purport to represent their interests. Class counsel prefer certification of nationwide classes: nationwide classes both increase businesses' incentive to settle, and increase the size of fee awards associated with those settlements. As a result, class counsel always have an incentive to argue for a single state's law applying nationwide. Individual consumers, however, may be better off with the law of their own state than the law of some other state that class counsel selected purely for the purpose of certifying a nationwide class.

Finally, extraterritorial application of state law hurts states. In our system of federalism, different states have different views on the appropriate extent of regulation. Some states may conclude that lighter regulation is necessary for businesses to flourish. Others may conclude that heavier regulation is necessary to protect consumers. Some states may believe that detailed disclaimers at the point of sale are helpful to consumers. Others may believe that mandating such disclaimers increases the risk of liability without protecting consumers who will not listen to or understand those disclaimers. States that favor more stringent consumer-protection laws are generally free to implement their preferred policies with respect to in-state

transactions, to the extent those policies comply with federal constitutional and statutory law. At the same time, states that favor lighter regulation should have the opportunity to implement their preferred policies with respect to in-state transactions, too. Yet under the District Court's approach, they cannot. Rather, states can regulate transactions in other states—even if those other states oppose that regulation. Reversing the District Court's class certification order would not only protect businesses and consumers, but would also promote federalism.

II. The District Court's Predominance Analysis is Incorrect.

As Defendants explain, the District Court gravely erred in concluding that Plaintiffs satisfied Rule 23(b)(3)'s predominance requirement. As to both liability and damages, individual issues overwhelm common issues. *Amici* write separately to explain that the District Court's predominance decision is fundamentally contrary to Rule 23's purpose and history.

A. Class Certification Should Be Reversed Because Individual Issues Predominate Over Common Issues.

To obtain class certification, a plaintiff bears the burden of proving that all requirements of Rule 23 are satisfied, including—among others—that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To certify a damages class, the plaintiff bears the additional burden of showing, among other things, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

Making this showing is difficult both procedurally and substantively—which is as it should be, given the high stakes of class certification. It is difficult procedurally because plaintiffs must *prove*—not only plead—that Rule 23's requirements are satisfied: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs bear that burden even if proving class certification entails proving all or most of their underlying merits case: "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351

It is difficult substantively because plaintiffs must prove not only that common questions *exist*, but that they *predominate*. That requirement has particular bite in the context of consumer class actions like the one at issue here. In such cases, class counsel is almost always able to come up with *some* question common to the class under Rule 23(a)(2), such as whether a particular consumer product has a particular property. But under the Federal Rules, showing that common questions *predominate* is—by design—a steeper climb. Consumer fraud lawsuits will frequently present highly individualized issues, such as what statements, precisely were made at the point of sale or whether particular consumers relied on allegedly

fraudulent statements. The presence of those issues may preclude a showing of predominance, even if class counsel can satisfy the threshold requirement of showing a question common to the class.

Here, class certification should be reversed because individual issues predominate over common issues. Different consumers with different preferences and different budgets were exposed to different product tags from different retailers, with different sales associates conveying different messages. There is no way to try any class member's case without hearing evidence specific to that class member's purchase—which means classwide adjudication is impossible. As Defendants ably demonstrate, this Court's decision in *Grovett v. St. Jude Medical, Inc. (In re St. Jude Medical, Inc.)*, 522 F.3d 836 (8th Cir. 2008), confirms that this case is fundamentally ill-suited for classwide adjudication. *See* Def. Br. 50-54.

The Advisory Committee Notes accompanying Rule 23(b)(3)'s enactment in 1966 explain why this class should never have been certified. Those notes recite: "although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representation made or in the kinds or degrees of reliance by the persons to whom they were addressed." Those words could have been written for this case. There was indeed "material variation in the representation made": As Defendants explain, no two consumers heard the same message regarding the televisions' refresh rates. Def. Br. 42. There were also

"material variations … in the kinds or degrees of reliance." Different consumers understood "refresh rates" to varying degrees; different consumers cared about "refresh rates" to varying degrees. Some consumers had no idea what a "refresh rate" meant. Others never saw the "refresh rate" of the televisions they were buying. Others researched their purchase in varying ways. Some looked up product information on the Internet; others looked at the tag; others talked to the sales associate. Different consumers also valued different features in televisions. Some consumers wanted the cheapest television; others wanted the biggest one; others valued televisions that were compatible with their laptops. Def. Br. 42-43. On the crucial question of reliance, no two consumers were alike. As the Advisory Committee presciently anticipated in 1966: "In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." There is simply no way to try any *two* cases together without individualized evidence, let alone *thousands* of cases nationwide.

Amici and their members do not seek to escape state consumer-protection laws. Rather, *amici* merely seek to ensure that their members can have fair trials. If Rule 23's predominance requirements are not enforced, a business will not have a fair trial. If the Court allows the business to present individualized defenses with respect to every class member, the proceeding will become lengthy, complex, and expensive, with either a single jury sitting for months or years, or alternatively,

dozens or hundreds of juries hearing evidence in the same case. Alternatively, if the Court concludes that efficiency requires cutting corners, then defendants will be stripped of their right to present individualized defenses and will be held liable to class members who suffered no harm. More realistically, the threat of ruinous liability may force the defendant to settle no matter what the strength of its defenses. The Court should therefore apply Rule 23 according to its terms and reverse the grant of class certification.

B. Class Certification Should Be Reversed Because Plaintiffs Have Not Put Forth an Adequate Damages Model.

Class certification should be reversed on the independent ground that Plaintiffs' damages model is inadequate. In *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), the Supreme Court held that a class should not be certified unless the plaintiff can prove that "damages are capable of measurement on a classwide basis." *Id.* at 34. To make that showing, the plaintiff must proffer a "model supporting a plaintiff's damages case" that "must be consistent with its liability case." *Id.* at 35 (internal quotation marks omitted). Plaintiffs here did not come close to satisfying that burden.

As Defendants correctly argue (Def. Br. 45-50), Plaintiffs' counsel proffered a model purporting to show the average consumer's willingness to pay for a particular "refresh rate." But that model does nothing to establish damages under Plaintiffs' own theory of liability. Plaintiffs contend they bought televisions because

of Defendants' alleged misrepresentations. Thus, for purposes of damages, the question is: what would they have paid for the televisions if the purported misrepresentations never occurred? Plaintiffs did not proffer a damages model that would answer that question. And Defendants *do* proffer a model demonstrating that Plaintiffs' damages are *zero*. Defendants compare the historical price of the televisions with and without the allegedly fraudulent refresh rate labels—and find that the price is identical. Def. Br. 47.

Amici write separately to state that rigorous adherence to *Comcast* is especially essential in the context of class actions alleging consumer fraud. This case follows the typical pattern of such class actions. First, class counsel identifies some feature of a product's label or tag that is allegedly misleading. Of course, merely identifying a purportedly misleading statement does not show whether any consumer was harmed by the statement, let alone the amount of the harm. To overcome this problem, class counsel develop a model purportedly establishing *the value of the advertised feature*. For instance, if a plaintiff alleges that a car manufacturer made a misleading statement about an airbag, class counsel will proffer a damages model purporting to show the value of the airbag. Class counsel then argues that *the plaintiffs' own damages theory* can be calculated on a classwide basis: because the same airbag was sold to all class members, the airbag has the same value for all class members. Through this mechanism, class counsel can paper over

individualized differences in damages and urge that a single damages model can be used to calculate damages for all class members.

Comcast is designed to prevent this tactic. *Comcast* requires the plaintiff to show not only that a damages model *exists*, but that a damages model is *consistent with the plaintiffs' theory of liability*. This issue cannot be deferred until after class certification. If the damages model contains a flaw that renders it unusable as a measure of damages—as Plaintiffs' damages model here does—the class should not be certified. The Court should hold that class certification requires not just *any* damages model, but a damages model that permits damages to be calculated for all class members *consistent with the plaintiff's theory of liability*—and that no such damages model exists here.

CONCLUSION

This Court should reverse the grant of class certification.

Dated: September 3, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street, SE Suite 700
Washington, DC 20003

Kevin M. McGinty
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
Counsel for Association of Home Appliance Manufacturers

Charles A. Samuels
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania NW #900
Washington D.C. 20004
Counsel for Association of Home Appliance Manufacturers

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H St., NW
Washington, DC 20062

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g), and Local Rule 31.1(c) and 28.3(d), the undersigned counsel for *amici curiae* certifies as follows:

1. I am a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 5,058 words, excluding the parts of the brief exempted by Rule 32(f).

3. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

4. A virus detection program, Microsoft Security Essentials, has been run on the file and no virus was detected.

I understand that a material misrepresentation may result in the Court's striking the brief and imposing sanctions. If the Court so desires, I will provide an electronic version of the brief and/or copy of the work or line print-out.

Dated: September 3, 2020

Respectfully Submitted,

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that that on September 3, 2020 I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: September 3, 2020

/s/ Adam G. Unikowsky