Nos. 14-1123 & 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 *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191

CHARLES H. MOELLENBERG, JR.
Counsel of Record
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219.2514
Telephone: +1.412.391.3939
chmoellenberg@jonesday.com

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state court from certifying a class action, and entering a monetary judgment in favor of the class, where the court permits the use of extrapolation to relieve individual class members of their burden of proof and forecloses the defendants from presenting individualized defenses to class members' claims.

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 105 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of its corporate members, which span a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 1,000 briefs as *amicus curiae* in both state and federal courts, including this Court, seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix 1.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus* or its counsel. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* further states that all parties received timely notice of the intent to file this brief, Petitioners have filed with the Court a blanket consent to all *amicus curiae* briefs, and Respondents have consented to the filing of this brief.

[2] Except for this citation, all remaining appendix citations in this brief are to the Appendix filed with Wal-Mart Stores, Inc. and Sam's East, Inc.'s Petition for a Writ of Certiorari directed to the Pennsylvania Supreme Court (No. 14-1124).

This case is of particular importance to PLAC's members, because product manufacturers are frequent targets of class action litigation in state courts. The errors committed by the Pennsylvania courts in this case would likely have negative implications and create confusion in future class action cases outside of the employment context. The Pennsylvania courts have allowed a jury to hold defendants liable to a statewide class of over 187,000 employees at 139 different stores for every missed rest break and all work off-the-clock over an eight-year time period—when the only relevant company policies common to the class were to provide paid rest breaks and to prohibit work off-the-clock. To find that every instance of a missed rest break or work off-the-clock was unlawful and warranted damages, the Pennsylvania courts' judgment extrapolates from records covering only a fraction of the class period and from records that never say why a rest break was missed or why an employee worked off-the-clock. The decision rests on the anecdotal testimony of the two class plaintiffs and four other former or current employees.

The Pennsylvania ruling adopts class action principles and methods of proof that threaten product manufacturers' ability to defend against common class action claims, such as breach of express or implied warranties, violation of consumer protection statutes, restitution, false advertising, consumer fraud, and unjust enrichment. All of those types of claims can assert, as in this case, that the defendant had unofficial "policies" that harmed consumers financially. However, the existence of those policies—whether proven or disproven—will not resolve any element of any claim brought by any

individual class member. Product manufacturers are often subjected to lawsuits in which common policies—such as policies to deny warranty coverage—are alleged. Having the ability to contest consumers' class claims fairly, both to disprove liability and damages, is of utmost importance to product manufacturers.

Also of concern to PLAC's members is the improper characterization of individual liability-related issues and defenses as "damages" issues, which then receive a relaxed standard and method of proof for the class. By misinterpreting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Pennsylvania courts in effect stripped defendants of any ability to contest any class member's right to damages and the amount of damages.

In short, the Pennsylvania courts' decision has the potential to affect adversely much of the class action litigation filed against product manufacturers and to deny them the protection of federal due process of law. Their decision is unfortunately indicative of the scant attention that many state courts pay to the federal due process rights of defendants when trying a class action.

STATEMENT OF THE CASE

PLAC adopts Petitioners' Statement of the Case.

In addition, several facts are worthy of emphasis. In this case, the only relevant common company policies covering the entire statewide class of over 187,000 employees for the entire class period were to provide paid rest breaks for their employees and to prohibit any work off-the-clock. The companies agreed to pay for missed rest breaks, as they did for missed meal breaks. Plaintiffs' claims aimed to show

violations of these common policies. However, violations of company policies, if any, occurred at 139 separate stores supervised by different managers, assistant managers, and department supervisors across the Commonwealth. Breaches of company policy were not common across the state, but the result of individual actions affecting individual employees in different ways.

Through hourly employees, supervisors, and executives, defendants Wal-Mart and Sam's East presented plausible explanations for why individual employees might miss rest breaks or occasionally might appear to work off-the-clock. Those reasons would require investigation into the particular employees' circumstances not revealed in company time-keeping records, which depended on employees to punch in and out of a time clock.

Only six fact witnesses testified for plaintiffs out of over 187,000 class members. Two were the named plaintiffs. One plaintiff worked for less than a year at one store as a cashier before she was terminated for poor performance. The other plaintiff worked at a different store in the bakery for four of the total eight years of the class period. The other four witnesses were employed as a fabrics department manager; a cashier, then junior customer service manager; a cashier and overnight stocker; and a cashier and customer service manager; only one worked for defendants for the entire duration of the class period. In short, to prove liability for a class of over 187,000 members working at 139 stores across the Commonwealth of Pennsylvania in numerous job categories, plaintiffs' fact testimony covered merely 6 employees, 6 stores, 4 job categories, and a few years.

Plaintiffs' statisticians relied on company records. Wal-Mart has time clock records for rest breaks for only three of the eight years in the class period and only 15% of the missed or short rest breaks. Plaintiffs' statistician reviewed records to show off-the-clock work for only 16 of the 139 stores and only for five of the eight years.

Although conceding that defendants' time-keeping records did not capture the reasons for missed rest breaks or apparent working off-the-clock, that there could be errors in the data because of employee mistakes in punching or not punching the time clocks, and that the available data covered only a fraction of the entire class period, plaintiffs' experts used the incomplete data to extrapolate the number of classwide violations by assuming that every missed rest break and every apparent instance of work off-the-clock was a violation—an assumption disproven by defendants' witnesses. The trial court's jury instructions allowed the jury to award damages for every actual and extrapolated missed rest break and work off-the-clock without requiring plaintiffs to prove the cause of any in particular, and without allowing defendants to dispute any in particular. The trial court awarded statutory penalties of liquidated damages in the same way. Therefore, the trial court's judgment assumes that every recorded and extrapolated missed rest break or work off-the-clock occurred for an impermissible reason and warranted an award of damages and penalties.

SUMMARY OF ARGUMENT

This petition presents an important question of federal constitutional law that this Court has not decided. Federal due process principles protect the

right of defendants to receive a fair trial on issues of liability and damages in state class action proceedings. But, this Court has not defined with specificity those due process principles applicable to defendants' rights. Thus, in practice, state courts often disregard the principles, with the result that defendants' right to a fair trial is not effectively safeguarded in state class actions.

Through pleading designed to avoid the subject matter jurisdiction of federal courts, most class actions still take place in state courts. The Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), recognized that fact of litigation life for defendants, but was able to provide only a partial fix. Most certified classes are tailored to fall primarily within state boundaries, 28 U.S.C. § 1332(d)(4), and often plaintiffs disclaim damages above $75,000 to avoid federal court diversity of citizenship jurisdiction.

Almost all state court class actions escape the Court's review because defendants bow to the overwhelming financial and other pressures to settle before the risk, publicity, and expense of trial. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). As a result, the state court class action landscape has changed little since the Senate reported ten years ago that "most class actions are currently adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 4 (2005).

This case provides an exceptional opportunity for the Court to address the principles of federal due process of law that should govern defendants' rights in state class action proceedings. The federal due process issues were raised in the Pennsylvania courts, but given short shrift—in fact, the Pennsylvania Supreme Court, in a *per curiam* decision, felt no need to consider federal due process. After finding that the trial court did not abuse its discretion in certifying the class, the Superior Court rejected the federal due process challenge to the class action trial for one circular reason: defendants' argument was "in derogation of class certification, since common questions of law and fact predominate." App. 195a-196a.

It is of national importance for this Court to instruct the state courts on the federal due process principles protecting defendants' rights to present defenses against claims of liability and damages in state class action proceedings. Only this Court can provide clarity and certainty. State courts need not follow opinions from the lower federal courts; they are bound only by this Court's rulings.

ARGUMENT

I. IT IS TIME FOR THIS COURT TO ADDRESS THE FEDERAL DUE PROCESS PRINCIPLES THAT PROTECT DEFENDANTS IN STATE CLASS ACTIONS.

This Court has primarily addressed the rights of absent class members in state court class actions. *See*, *e.g.*, *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996) (due process precludes binding state class members by res judicata effect of prior action in which they were not parties); *Hansberry v. Lee*, 311

U.S. 32 (1940) (plaintiffs not adequately represented in prior class action suit could relitigate issues).

To PLAC's knowledge, the Court has only addressed the rights of defendants in state court class actions three times. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Court struck down an award of punitive damages against the defendant insurance company. It held that the punitive damages award was grossly disproportionate to the actual harm caused to the class of insureds.

In *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), the Kansas trial court applied its state's longer statute of limitations to keep alive the claims of a class of oil field lessors located in other states who sued a lessee for interest on increased royalties. This Court affirmed the decision of the Kansas Supreme Court, ruling that federal due process did not require the Kansas courts to apply other states' statutes of limitations along with their substantive law.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court ruled that a defendant has a "distinct and personal interest in seeing [an] entire plaintiff class bound by res judicata." The Court thus held that the defendant-petitioner had standing to question the Kansas trial court's personal jurisdiction over non-resident, absent plaintiff class members. The Court also clarified the constitutional limits on choice of law to govern the class action claims arising from gas leases in other states.

Accordingly, this Court's three prior decisions addressing defendants' federal due process rights in state court class action proceedings did not deal with

the fairness of trial procedures and methodology, as are raised in this case.

In recent Terms, this Court has shown interest in reviewing state court class action proceedings, but case-specific vehicle obstacles precluded its review. *See*, *e.g.*, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (per curiam) (constitutional question was hypothetical). Members of the Court have also recognized the national concern over the abuse of the class action mechanism. *See*, *e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 444 (2010) (Ginsburg, J., dissenting); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636 (2006); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006).

In granting a stay against enforcement of a judgment in a Louisiana state court class action, Justice Scalia wrote: "The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010). However, this Court ultimately denied certiorari. 131 S. Ct. 3057 (2011). So, too, in *DTD Enters. v. Wells*, 558 U.S. 964 (2009), the Court denied certiorari, because it "would be required to construe New Jersey law without the aid of a reasoned state appellate court decision and to confront a procedural obstacle unrelated to the question presented." Yet, Justice Kennedy, joined by Chief Justice Roberts and Justice Sotomayor, noted "a serious due process question" raised by the defendant, which was forced to bear the cost of class notification because the plaintiff could not afford that expense.

Consequently, this Court has never addressed many of the important due process issues arising from the way in which state court class actions are being tried. Its recurring interest is manifest in prior decisions; finally, a ripe case without vehicle problems has reached the Court for review. The Court should seize this rare opportunity without hesitation.

II. THIS COURT HAS NOT DEFINED THE FEDERAL DUE PROCESS PRINCIPLES APPLICABLE TO THE TRIAL OF STATE COURT CLASS ACTIONS.

PLAC has looked in vain for a clear, robust articulation from this Court of the federal due process principles applicable to the trial of state court class actions. Not surprisingly, virtually every decision of this Court addressing class action principles occurred in a case filed in federal court and governed by Rule 23, Fed. R. Civ. P. Accordingly, the Court decided those cases by interpreting and applying Rule 23 to claims involving federal substantive laws. *See*, *e.g.*, *Comcast*, 133 S. Ct. at 1432-33; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (and cases cited therein). While those decisions alluded in passing to federal due process of law, *see*, *e.g.*, *Dukes*, 131 S. Ct. at 2559-61, this Court's holdings were premised on Rule 23, not federal due process. Consequently, this Court has never set forth with specificity and applied the federal due process principles protecting defendants' right to a fair trial in state court class actions.

Undoubtedly, federal due process principles apply to safeguard all parties' right to a fair trial in a state court class action. But, in practice, those rights are

often illusory. Decisions enforcing federal due process of law in state court class actions are scant, and the principles are unhelpfully general.[3]

The starting point is this Court's pronouncement, not in a class action context, that "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Because *Lindsey* concerned Oregon's procedure for eviction of tenants after nonpayment of rent, it offers no guidance on how to apply that venerable statement of due process to a trial of a state court class action. Nor does it directly address the more particular issue of whether it is permissible to extrapolate statistically from the evidence offered by one or few plaintiff class representatives and witnesses to all class members, or the evidence that a defendant is entitled to discover and offer to refute not only the claims of the class representatives but of the hundreds or hundreds of thousands of absent class members. And, *Lindsey* addressed the rights of the evicted plaintiffs, not class action defendants.

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[3] Similarly, the American Law Institute's Aggregate Litigation (2010) recognizes that principles of due process apply to class action trials, but says quite generally that "the court shall ensure that aggregate treatment of related claims does not compromise the ability of any person opposing the aggregate group in the litigation to dispute the allegations made by claimants or to raise pertinent substantive defenses." *Id.* at § 2.07(d); *see also id.* at § 2.07, cmt. j ("Aggregation should not proceed if the court is unable to formulate an adjudication plan that ensures due process for a defendant in these regards.") The trial court in this case contravened this principle by not allowing the defendants to raise defenses or present evidence contesting the liability and damages claims of individual class members.

Another seminal, oft-cited decision of this Court discussing rights of procedural due process is *Goldberg v. Kelly*, 397 U.S. 254 (1970). In that case, the Court determined that a recipient of public assistance benefits has the federal due process right to an evidentiary hearing before termination of benefits. This decision allowed the Court to reaffirm the salutary principles that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *id.* at 267 (*quoting Grannis v. Ordean*, 234 U.S. 385, 394 (1914)), and that hearing "must be 'at a meaningful time and in a meaningful manner.'" *Id.* (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Again, like *Lindsey*, *Goldberg* involved the rights of plaintiffs generally and did not address the rights of defendants in responding to evidence introduced during a class action trial.

In *Richards v. Jefferson County*, 517 U.S. 793 (1996), the Court confirmed that plaintiffs cannot be bound by a judgment in a prior action in which they received neither notice nor sufficient representation to defend themselves.

Finally, the Court has said that "traditional practice provides a touchstone for constitutional analysis," and a deviation from that traditional state law practice "raises a presumption that [the new] procedures violate the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

Just as these general litmus tests for federal due process did not provide sufficient protection for defendants against arbitrary and grossly disproportionate awards of punitive damages in some states until this Court intervened with precise criteria and unequivocal instructions, *see*, *e.g.*, *Philip*

Morris USA v. Williams, 49 U.S. 346 (2007), the aphorisms of federal due process do not provide adequate clarity and direction to the state courts in order to safeguard defendants' federal due process rights in state class action trials.

Moreover, though this Court stated in *Comcast* that Rule 23(b)(3), Fed. R. Civ. P., demands class certification that "damages are susceptible of measurement across the entire class," 133 S. Ct. at 1433, petitioners explain the disarray in the federal and state courts. As in this case, the state courts are frequently brushing aside the insurmountable problems of proving damages on a classwide basis when certifying a class. Then, the defendant is precluded from presenting evidence and defenses to refute the damages claims of individual class members. Plaintiffs are permitted to rely on extrapolations and averages—in effect, merely assumptions and speculation since there has been no discovery on the damages actually sustained by the individual class members—to prove damages for every class member.

This common practice denies defendants due process of law in two ways. First, it prevents defendants the opportunity to be heard on their defenses to the individual claims for damages presented by each class member. Second, it does not allow defendants a fair opportunity to defend against class certification in the first place. By recasting individual liability issues on the merits and affirmative defenses as related to damages, and then holding that calculations of damages do not need to be exact and cannot defeat class certification, state courts depart from the rules for class certification.

As a result, the fair balance sought by the class action rules among the parties is lost.

Accordingly, this case presents issues of national importance to the fair administration of justice that would benefit from this Court's guidance.

III. THE PENNSYLVANIA COURTS GAVE SHORT SHRIFT TO THE IMPORTANT FEDERAL DUE PROCESS QUESTIONS PRESENTED.

Not only is the federal due process question ripe for review, but it demands this Court's immediate attention. The Pennsylvania courts ignored federal due process principles that should be honored in this, and every future, state class action trial.

With allegations spread across eight years and 139 stores, the Pennsylvania courts relied on the anecdotal testimony of six witnesses and incomplete records to hold defendants liable for over $150 million, including over $62 million in penalties, to a class of 187,000 plaintiffs. *See supra* Statement of the Case. They erroneously assumed an unlawful cause for each of the millions of missed and mistimed swipes of tens of thousands of employees. In those courts' eyes, generalizations and extrapolations—numerically, geographically, and temporally—were permissible because the trial court decided to certify the case as a class action.

The Pennsylvania Superior Court affirmed class certification, citing a litany of general principles favoring liberal class certification: (1) "since the hearing is akin to a preliminary hearing, [class certification] is not a heavy burden," App. 58a; (2) "the existence of individual questions of fact is not necessarily fatal," *id.* at 59a; (3) "Pennsylvania's rule does not require that the class action method be

'superior' to alternative modes of suit," *id.* at 60a; (4) "class members can assert a single common complaint even if they have not suffered actual injury," *id.* at 62a; and (5) distinguishing defendants' authority denying class certification for similar claims in several other states because "those courts do not liberally construe class action rules." *Id.* at 166a. The Superior Court focused myopically on "whether [Wal-Mart] encouraged, at times, a culture of denying those promised breaks," App. 196a, rather than the discrete circumstances that would accompany and explain the individual missed breaks. The Superior Court failed to recognize that liability can only arise from a breach of an agreement, and the breach raises individual issues and defenses for the class members.

The Pennsylvania appellate courts used class certification, which is only reviewable for abuse of discretion, to justify depriving defendants of their right to contest the claims of individual class members on liability or damages. In a *per curiam* opinion, the Superior Court barely addressed defendants' federal due process rights. It ruled that the "contention that Wal-Mart was denied due process in not being able to question each individual employee is in derogation of class certification." *Id.* Consequently, its opinion was circular and begged the question, for due process does not end with class certification.

The plea to the Pennsylvania Supreme Court fell on similarly deaf ears. Its *per curiam* opinion allotted a few conclusory paragraphs to due process. It held that Wal-Mart's due process rights were not violated because "the extrapolation evidence Wal-

Mart challenges in this appeal involves the amount of *damages* to the class as a whole [as opposed to class certification or liability]," and that, as a result, "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here." *Id.* at 18a-19a (emphasis in original). Therefore, the Pennsylvania Supreme Court confused the analysis by disregarding defendants' right to contest their liability to individual class members.

Although this Court has offered little guidance on federal due process principles in state class actions, the trial of those claims must "leave[ ] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 408 (plurality op.). Had each plaintiff filed an individual claim, each would have been required to present specific evidence that Wal-Mart prevented him or her from taking rest breaks and forced to work "off the clock" after the end of his or her shift.

Proceeding as a class permitted plaintiffs to circumvent their evidentiary burdens on liability, not just damages. Moreover, if each class member had brought separate claims, each plaintiff would have been subject to cross-examination by Wal-Mart, as well as facing Wal-Mart's individualized defenses. Instead, though guaranteed an opportunity to present "every available defense" *Lindsey*, 405 U.S. at 66, defendants were backed into generic, one-size-fits-all defenses against potentially 187,000 unique fact patterns. The trial became largely a battle of statisticians with few fact witnesses (plaintiffs' fact witnesses accounted for 0.003% of the class) and little evidence relating to any individual breach of policy.

Of course, the class-action mechanism permits courts to "adjudicate claims of multiple parties at once, instead of in separate suits," and some classwide proof will be used in lieu of plaintiff-specific injuries. *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 408 (plurality op.). However, as the Pennsylvania Supreme Court's dissent recognized, "the latitude extended in this case is of an untenable magnitude." App. at 27a. A defendant's due process rights cannot yield to administrative convenience. *See id.*; *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (a class action is "a procedural right only, ancillary to the litigation of substantive claims").

In the absence of explicit guidance from this Court, the Pennsylvania courts proceeded on the belief that, once a class is certified, defendants surrender the opportunity to question individual claims. However, this reasoning is circular. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 104 (2009) ("[T]he real concern about aggregate proof in class certification lies in the threat 'to conform the law to the proof.'"). And, this reasoning impermissibly sets aside any serious consideration of fundamental due process protections.

The Pennsylvania courts permitted a procedural device to alter the substantive law on burdens of proof: for example, even though plaintiffs' statistician could not tell from the data why any individual rest break had been missed, he assumed every missed break was involuntary. App. at 10a. The courts similarly permitted extrapolation of rest-break data taken from 1998 to 2001 into the 2002 through 2006 time frame. *Id.* at 27a. "These sorts of

gross generalizations and assumptions which permitted the simple averaging and extrapolations … would never hold up to peer review as a matter of science." *Id.* (Saylor, J. dissenting). They deprived defendants of presenting their affirmative defenses to the class members' claims.

Denying defendants their constitutional right to present defenses also led to the imposition of massive statutory penalties in the form of liquidated damages (as well as the imposition of statutory interest and attorney fees). The imposition of statutory penalties magnifies the need for constitutional scrutiny and this Court's review. App. at 47a, 312-13a; *see also* Wal-Mart Pet. at 30.

IV. THE FEDERAL DUE PROCESS PROBLEM IS ONE OF NATIONAL SCOPE AND IMPORTANCE.

This case presents a rare opportunity for the Court to ensure the protection of federal due process rights in state class actions. It comes not a moment too soon. Class actions in federal court must adhere to Rule 23 and this Court's evolving body of law interpreting that rule. In contrast, the states may interpret their own class action rules as they wish, in the absence of this Court's instruction on federal due process constraints. Some state courts, like Pennsylvania, are increasingly out-of-sync with this Court's assurance of defendants' rights to present individualized defenses against claims of liability and damages.

That state courts default to certifying a class without meaningfully considering the effect of

certification on defendants' right to contest individualized claims is at odds with decades of this Court's jurisprudence. *See, e.g.*, *General Tele. Co. v. Falcon*, 457 U.S. 147 (1982) (a "class action … may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."). In *Amchem Products, Inc. v. Windsor*, for example, this Court foreshadowed the dangers of administrative ease trumping substantive rights and instructed judicial restraint: "[O]f overriding importance, courts must be mindful that … Rule [23] as now composed sets the requirements they are bound to enforce … [R]ules of procedure shall not abridge any substantive right." 521 U.S. 591, 620 (1997). Most recently, this Court in *Dukes* rejected a "Trial by Formula" extrapolation approach that the Ninth Circuit believed would have allowed that case to "be manageably tried as a class action." 131 S. Ct. at 2550.

The problem, apparent in this case and state class actions across the country, is that the courts' guiding principles are mired in decades-old law, announced at a time when class actions were innovative and viewed as a salutary means of improving judicial efficiency. However, experience is a good teacher. Whereas this Court now urges caution for certification and administration of class actions in federal courts, liberal certification and few procedural protections pervade class actions in too many state courts.

In this case, for example, the Pennsylvania courts relied on a cascade of anachronisms to deny defendants a fair opportunity to present their defenses. The Pennsylvania courts began with

saying the class proponent's "burden is not heavy and is thus consistent with the policy that 'decisions in favor of maintaining a class action should be liberally made.'" App. at 328a (citing *Cambanis v. Nationwide Insurance Co.*, 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (1985) (quoting *Bell v. Beneficial Consumer Discount Co.*, 241 Pa. Super. 192, 205, 360 A.2d 681, 688 (1976))). "[I]n doubtful cases, *any error should be committed in favor of allowing class certification*." App. at 331a (citing *Foust v. SEPTA*, 756 A.2d 112, 118 (Pa. Commw. 2000), *allocatur denied*, 565 Pa. 652, 771 A.2d 1289 (2001) (emphasis added)). It mischaracterized liability defenses as related only to damages, and said that uncertainty over the calculation of damages will not stand in the way of certification. Once the class was certified, then defenses against the liability and damages claims of individual class members were swept aside. App. at 18a-19a, 22a-23a.

Pennsylvania is not unique. A number of state supreme courts urge a liberal approach to class certification subject only to abuse of discretion review—an approach that ignores the last thirty years of this Court's shift to a more rigorous analysis. *See*, *e.g.*, *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278 (Wash. 2011) ("[T]he trial court should err in favor of certifying the class."); *Money Place v. Barnes*, 349 Ark. 518, 523 (2002) ("[We will not reverse] the question of whether the class-action elements in [Arkansas] R. Civ. P. 23(a) and (b) have been satisfied is a matter within the broad discretion of the trial court, and we will not reverse the trial court's decision absent an abuse of that discretion.").

That other state courts have adopted a cautious approach only demonstrates that a divide exists and this Court's guidance is necessary. *Smith v. Illinois Central R.R. Co.*, 860 N.E.2d 332, 338-39 (Ill. 2006) (recognizing that "[a]ggregating claims can dramatically alter substantive tort jurisprudence"); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (rejecting an approach of "certify[ing] now and worry later").

State supreme courts are not bound by the decisions of lower federal courts. Only this Court's review and its articulation of the due process principles that must be observed in state class actions can ensure that those federal constitutional rights will be protected nationwide.

CONCLUSION

This Court should grant the petition for writ of certiorari in order to provide, for the first time, clarity and direction to the state courts concerning the federal due process principles to which they must adhere in class action trials and proceedings.

Respectfully submitted,

CHARLES H. MOELLENBERG, JR.
Counsel of Record
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219.2514
Telephone: +1.412.391.3939
chmoellenberg@jonnesday.com

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY
COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191

Counsel for Amicus Curiae

April 16, 2015

APPENDIX

Corporate Members of the Product Liability Advisory Council

as of 4/14/2015

Total: 105

3M	Crane Co.
Altec, Inc.	Crown Cork & Seal Company, Inc.
Altria Client Services Inc.	Crown Equipment Corporation
Ansell Healthcare Products LLC	Daimler Trucks North America LLC
Astec Industries	Deere & Company
Bayer Corporation	Delphi Automotive Systems
BIC Corporation	Discount Tire
Biro Manufacturing Company, Inc.	The Dow Chemical Company
BMW of North America, LLC	E.I. duPont de Nemours and Company
The Boeing Company	Eisai Inc.
Bombardier Recreational Products, Inc.	Emerson Electric Co.
Boston Scientific Corporation	Endo Pharmaceuticals, Inc.
Bridgestone Americas, Inc.	Exxon Mobil Corporation
C. R. Bard, Inc.	Ford Motor Company
Caterpillar Inc.	Fresenius Kabi USA, LLC
CC Industries, Inc.	General Electric Company
Celgene Corporation	General Motors LLC
Chevron Corporation	Georgia-Pacific Corporation
Chrysler Group LLC	GlaxoSmithKline
Cirrus Design Corporation	The Goodyear Tire & Rubber Company
Continental Tire the Americas LLC	
Cooper Tire & Rubber Company	

Great Dane Limited Partnership
Harley-Davidson Motor Company
The Home Depot
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
NuVasive, Inc.
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
RJ Reynolds Tobacco Company
Robert Bosch LLC
SABMiller Plc
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Takeda Pharmaceuticals U.S.A., Inc.
TAMKO Building Products, Inc.
TASER International, Inc.

Techtronic Industries
North America, Inc.
Teva Pharmaceuticals
USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA,
Inc.
TRW Automotive
Vermeer Manufacturing
Company
The Viking Corporation
Volkswagen Group of
America, Inc.
Volvo Cars of North
America, Inc.
Wal-Mart Stores, Inc.
Western Digitial
Corporation
Whirlpool Corporation
Yamaha Motor
Corporation, U.S.A.
Yokohama Tire
Corporation
Zimmer, Inc.