In The

Supreme Court of Pennsylvania

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SUPREME COURT
EASTERN DISTRICT

NOS. 32, 33, EAP, 2012

MICHELLE BRAUN, on Behalf of Herself and All Others Similarly Situated,
Plaintiff/Appellee,
v.
WAL-MART STORES, INC., a Delaware Corporation, and **SAM'S CLUB**, an Operating Segment of Wal-Mart Stores, Inc.,
Defendants/Appellants.

DOLORES HUMMEL, on Behalf of Herself and All Others Similarly Situated,
Plaintiff/Appellee,
v.
WAL-MART STORES, INC., a Delaware Corporation, and **SAM'S CLUB**, an Operating Segment of Wal-Mart Stores, Inc.,
Defendants/Appellants.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, THE GREATER PHILADELPHIA CHAMBER OF COMMERCE, THE GREATER PITTSBURGH CHAMBER OF COMMERCE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPEAL OF WAL-MART STORES, INC. AND SAM'S CLUB

Consolidated Appeals from the Order of the Superior Court of Pennsylvania, at Nos. 3373, 3376 EDA. 2007, Decided June 10, 2011, Affirming the Orders of the Court of Common Pleas of Philadelphia County, Bernstein, J., Dated November 14, 2007, at No. 3127, March Term 2002

Marc J. Sonnenfeld (#17210)
Howard L. Meyers (#17184)
Joseph B.G. Fay (#33480)
Michael J. Puma (#94463)
A. Lauren Carpenter (#205410)
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000 / (215) 963-5001 fax

Counsel for Amici the Pennsylvania Chamber of Business and Industry, the Greater Philadelphia Chamber of Commerce, the Greater Pittsburgh Chamber of Commerce, and the Chamber of Commerce of the United States of America

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INTRODUCTION

Amici Curiae, The Pennsylvania Chamber of Business and Industry, The Greater Philadelphia Chamber of Commerce, The Greater Pittsburgh Chamber of Commerce, and the Chamber of Commerce of the United States of America (collectively "the amici"), submit this brief in support of the appeal of Appellants Wal-Mart Stores, Inc. and Sam's Club from the June 10, 2011 order of the Superior Court of Pennsylvania, Eastern District, affirming the November 14, 2007 Judgment of the Court of Common Pleas of Philadelphia County, at August Term, 2004, No. 3127. The Superior Court issued a *per curiam* opinion (Musmanno, Donohue, and Fitzgerald, JJ.) (2012 PA Super. 121) affirming a class-wide judgment against Wal-Mart. This Court granted Appellant's Petition for Allowance of Appeal in its Order of July 2, 2012.

The amici agree with the merits of the legal analysis in the brief of Appellants. The amici, however, will focus on a few central issues that are of particular concern to their members because they make Pennsylvania less attractive to businesses and employers. Those issues include whether voluntary policies set forth in an employee handbook can be deemed a contract when the handbook expressly disclaims the intent to enter into a contract, and whether Pennsylvania's state courts should allow class-wide recovery and even large penalties on the extraordinarily loose and inadequate approach to proof of class-wide harm the Superior Court endorsed here.

STATEMENT OF INTEREST

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ greater than 50% of Pennsylvania's private workforce. The Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

The Greater Philadelphia Chamber of Commerce is a not-for-profit corporation whose purpose is the promotion of trade and commerce in southeastern Pennsylvania. It has approximately 5,000 members and is the largest regional chamber of commerce in the Commonwealth. It acts as an advocate for the business community in the region, and seeks to assist its members in competing regionally, nationally, and globally.

The Greater Pittsburgh Chamber of Commerce has more than 1,000 members, encompassing small and large businesses. It strives to create a competitive business climate, increase job opportunities, and contribute to the overall economic development of the region.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and an underlying membership of more than three million United States businesses and professional organizations. It represents its members' interests by, among other activities, advocacy on issues of vital concern to the nation's business community. The U.S. Chamber represents the interests of thousands of businesses in Pennsylvania.

The amici's members devote extensive resources to developing employment practices and programs designed to ensure compliance with local and federal law. Many of the amici's members are subject to wage and hour statutes similar to the one at issue below. The amici's members have an interest in the Superior Court's ruling because it departs significantly from existing Pennsylvania law, and that of its sister states, on the important issue of contractual enforceability of employee handbooks. It also does so in ways that undermine employers' needs for predictability, certainty, and flexibility in their relationships with employees. The amici's members have a further interest in the Superior Court's ruling because its extremely loose application of Pennsylvania's class action rules may trigger a multitude of meritless class action

lawsuits. If the ruling is allowed to stand, and if Philadelphia, and Pennsylvania more generally, are allowed to become magnets for baseless class actions, the amici's members may be exposed to more, and more expensive, class-action litigation, and the state will be less attractive to businesses and employers.

CONCISE FACTUAL STATEMENT

A putative class of nearly 187,000 employees in Wal-Mart stores in Pennsylvania sued Wal-Mart for alleged breaches of a voluntary policy to provide employees with rest breaks. The class was certified and the case went to trial. Plaintiffs sought to prove their claims through the testimony of only six of the nearly 187,000 employees, as well as the testimony of two experts who had reviewed records that showed (for some of the years at issue) when employees had clocked in and out. The jury found that Wal-Mart's voluntary rest break policy was a contractual obligation, and that Wal-Mart had breached the contract as to all members of the class. A judgment was entered against Wal-Mart for more than $187 million, the largest class-action verdict in Pennsylvania's history; $62 million of that amount was a penalty for alleged violations of Pennsylvania's Wage Payment and Collection Law. The Superior Court affirmed the judgment on appeal.

INCORPORATION OF STATEMENTS

The amici incorporate by reference the Statement of Jurisdiction, Statement of the Scope and Standard of Review, Order or Other Determination in Question, Statement of the Questions Involved, and Statement of the Case, as it bears on the legal arguments herein, set forth in the brief of appellants, Wal-Mart Stores, Inc. and Sam's Club (hereinafter, "Appellants' Brief").

SUMMARY OF ARGUMENT

The Superior Court's loose approach to proof of a contract between an employer and its employees, and its extension of that approach to a class-action context, represent marked departures from existing Pennsylvania law as well as that of sister jurisdictions and the federal courts, and threaten to harm employers and Pennsylvania's business climate. The Superior Court ruled that Wal-Mart's inclusion of a rest break policy in its employee handbook created a contract, despite the handbook's express contractual disclaimer and the lack of proof of reliance. The ruling risks transforming virtually any phrase in an employee handbook into a class-wide contract and allowing it to be enforced in a class action, no matter how obvious it may be that the employer did not intend to make a contractually binding offer, and no matter how little proof there may be that employees acted as though an offer had been made. If the ruling is allowed to stand, Pennsylvania employers may be unable to provide their employees with employment handbooks without risking class litigation about every policy or benefit in the handbook. The erroneous ruling also threatens to deprive employers of the flexibility they need to tailor employment policies to meet the challenges of a competitive and fast-paced economy.

The Superior Court further erred in allowing the imposition of class-wide damages, and a massive class-wide statutory penalty, on proof that was plainly inadequate to establish that Wal-Mart had prevented the class members from taking rest breaks. By endorsing this lax approach to class-wide liability and damages, the Superior Court's ruling makes Pennsylvania an outlier in class-action procedure and threatens to make Pennsylvania a magnet for frivolous class action litigation. If allowed to stand, the ruling may expose businesses to increased numbers of baseless class actions in Pennsylvania generally, and also in Philadelphia, which unfortunately already has gained a reputation as a "judicial hellhole." And those meritless class actions will be

not only more expensive, but more unpredictably expensive. Lenient class action procedures that make Pennsylvania a desirable forum for claimants in abusive class-action lawsuits will increase the costs of doing business and discourage companies from locating their businesses in and creating jobs in Pennsylvania. Pennsylvania can ill afford rulings that make it less attractive to employers, particularly when it is striving to emerge from a recession and reduce its high unemployment rate. To prevent the risk of such harm, and to restore conformity with existing law, the erroneous Superior Court ruling should be reversed.

ARGUMENT

Plaintiffs' claims were based on, and required proof of, two main contentions: that each class member had a **contract** with Wal-Mart to be provided with rest breaks; and that, in breach of each such contract, Wal-Mart **deprived** each class member of the opportunity to take rest breaks. The Superior Court erred in finding that either contention was proven on a class-wide basis.

I. THE SUPERIOR COURT ALLOWED RECOVERY BASED ON AN UNPRECEDENTED THEORY THAT VIRTUALLY ANYTHING IN AN EMPLOYMENT HANDBOOK IS A CONTRACT

Under Pennsylvania (and hornbook) law, a contract is formed only when there is, among other things, (1) a legally sufficient "offer" to enter into a contract, and (2) a legally sufficient "acceptance" of that offer. The Superior Court departed from Pennsylvania law in holding that a contract to provide rest breaks existed merely because Wal-Mart had voluntarily established a rest-break policy and included the policy in its employee handbooks, and because an expert speculated that, despite an express disclaimer, a "reasonable" employee would view that policy as intended to be an offer to enter into a contract. Pennsylvania courts have recognized that under certain circumstances an employee handbook may create a contract that alters the traditional at-will employment relationship. But amici are unaware of any Pennsylvania case

that has concluded, as the Superior Court did here, that virtually anything else in a handbook, on any other subject, may form the basis for contractual obligations, regardless of a disclaimer and without individualized proof of intent or reliance. The Superior Court's ruling causes Pennsylvania's contract law to diverge from that of most other jurisdictions as well, and may affect employers and employees in Pennsylvania in undesirable ways.

A. The Superior Court Erred in Holding That Wal-Mart Made a Contractual Offer By Describing Its Rest Break Policy in an Employee Handbook

1. The Superior Court Departed From Established Pennsylvania Law in Holding That a Description of a Rest Break Policy in an Employee Handbook Was an "Offer" Sufficient to Form a Contract When the Manual Expressly Disclaimed the Intent to Form a Contract

To be an "offer," a proposal must be intended to be an offer, or at least reasonably construable as such. *Temple University Hospital, Inc. v. Healthcare Management Alternatives, Inc.*, 764 A.2d 587 (Pa. Super. 2000). Pennsylvania law has long held that, when an employment handbook disclaims the intent to form a contract, the disclaimer evidences a lack of mutual intent to be bound and precludes the handbook from being an offer that can form a contract.[1] Wal-Mart's employee handbooks stated that they were "for ... information only and **do not constitute terms or conditions of employment**," and, even more bluntly, that "[t]his handbook is **not a contract**." *See* Appellants' Brief at 8, 43. The Superior Court, however, held that the rest-break policies described in Wal-Mart's employment handbooks could be an offer that created a contract because a "reasonable employee" might not have understood the disclaimers. (Super. Ct. slip op. at 10) (emphasis added). In other words, the Superior Court appears to have concluded that a reasonable employee would have understood that virtually everything in the

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[1] *See, e.g., Donahue v. Fed. Express Corp.*, 753 A.2d 238, 243-44 (Pa. Super. 2000); *Rutherford v. Presbyterian-Univ. Hosp.*, 612 A.2d 500, 503-04 (Pa. Super. 1992); *Luteran v. Loral Fairchild Corp.*, 688 A.2d 211, 215-16 (Pa. Super. 1997) (handbooks cannot constitute binding offers when they "contained no language indicating that ... it was the intention of the employer to form a contract" and "specifically stat[ed]" that they were not a contract); *Morosetti v. La. Land and Exploration Co.*, 564 A.2d 151, 152-53 (Pa. 1989).

employment handbook was intended to be a contractual offer – despite the specific language to the contrary.

The Superior Court's ruling departs from the law that has prevailed in Pennsylvania until now. It also puts Pennsylvania at odds with most neighboring jurisdictions, most notably its regional sister states, Delaware, New Jersey, New York, and Ohio. *See, e.g.*, *Martin v. Southern Container Corp.*, 92 A.D.3d 647, 665 (N.Y.A.D. 2 Dept. 2012) (admonishing that "[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements. . . . It would subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision. Clearly that cannot be, especially in light of conspicuous disclaiming language.").[2]

2. The Superior Court's Ruling May Affect Employment Relationships Detrimentally

Under the Superior Court's reasoning, essentially anything an employer sets forth in an employee handbook, even if the handbook disclaims the intent to enter into a contract, might be deemed an offer and therefore capable of creating a contract that binds an employer. If allowed

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[2] In Delaware, a handbook can serve as the basis for a breach of contract claim only if it changes the terms of an at-will employment agreement, and policies and procedures within a handbook cannot serve as the basis for such a claim on their own. *See Elite Cleaning Co., Inc. v. Capel*, No. Civ.A. 690-N, 2006 WL 1565161, at *4-5 (Del. Ch. June 2, 2006) (a handbook that does not change the terms of at-will employment cannot be a contract under Delaware law and therefore cannot serve as the basis for a breach of contract claim seeking to enforce noncompetition provision in the handbook); *Bray v. L.D. Caulk Dentsply Intern.*, 748 A.2d 406, 2000 WL 313423, at *1 (Del. Supr. 2000) (upholding grant of summary judgment on a breach of contract claim for violation of a procedure within an employee handbook because the employee handbook did not set forth terms, conditions, or duration of employment, and therefore could not be held to create a contract under Delaware law).

In New Jersey, a "clear and prominent disclaimer" prevents a handbook from creating an implied contract. *Woolley v. Hoffman-La Roche*, 99 N.J. 284, 285 (1985). *See also Holodak v. Rullo*, 210 Fed.Appx. 147, 151-152 (3d. Cir. 2006) (reviewing the reasonable expectation of employees under the New Jersey standards set forth in *Woolley* and *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 392, 643 A.2d 546 (1994), and determining that handbook that contained a disclaimer providing that it was "not a contract" did not rise to the level of contract).

In Ohio, a disclaimer negates any inference of contractual obligations between the parties, making a handbook "merely a unilateral statement of rules and policy which creates no obligations and rights." *Tohline v. Cent. Trust Co., N.A.*, 48 Ohio App.3d 280, 282, 549 N.E.2d 1223 (1988); *see also Dunlap v. Edison Credit Union, Inc.*, 186 Ohio App.3d 370, 928 N.E.2d 464 (2010) (handbook containing disclaimer did not create contractual obligation).

to stand, the ruling could affect employer/employee relationships in undesirable ways. Employees and employers benefit when employment policies are memorialized in handbooks: expectations are clear, goals are set, and the tone and culture of the workplace are conveyed with certainty and uniformity. Handbooks are also used to inform employees of the employer's policies; for example, they may state that certain days are holidays, allow employees to take additional personal days, announce and set terms of use of voluntary benefits such as child-care or fitness facilities, or set business hours that are favorable to employees, such as closing at 5 p.m. or on Sundays. Exposing Pennsylvania employers to potential class-action litigation and liability (and, as in this case, very substantial penalties) for virtually anything that might be useful to include in an employee handbook would create a strong disincentive for employers to provide handbooks and limit their value in the first instance. And if employers who do provide a handbook are held to have entered into a contract to provide every benefit or continue every policy described in a handbook, they must think twice about providing the benefit or policy at all. Holding that everything in employee handbooks has the capacity to become contractually binding would also constrain employers in making workplace changes and put them at a disadvantage in today's dynamic and competitive economy.

3. The Ruling Essentially Legislates Employment Benefits That the General Assembly Has Never Required Pennsylvania Employers to Provide

The Superior Court's ruling not only hamstrings employers, it effectively allows courts and class-action plaintiffs to legislate benefits the General Assembly has never chosen to require. To illustrate, some states – including California, Massachusetts, and New York[3] – have enacted statutes that require employers to provide employees with paid rest breaks. Although

[3] *See* Cal. Lab. Code §226.7 (West 2012); Cal. Lab. Code §512 (West 2012); Mass. Gen. Laws ch. 149, §100 (West 2012); N.Y. Lab. Law §162 (McKinney 2012).

Pennsylvania has never imposed such a requirement, Wal-Mart voluntarily chose to provide paid rest breaks to its Pennsylvania employees. It announced that policy in employee handbooks, together with straightforward and emphatic disclaimers stating that its handbooks were not contractually binding. By ruling that, despite its disclaimers, Wal-Mart was obligated to provide rest breaks to the entire class of nearly 187,000 employees, the Superior Court applied class-action procedure in a way that effectively legislates benefits for Wal-Mart's employees that Pennsylvania's General Assembly has not chosen to require.

In rejecting an attempt to make changes in substantive law through the application of class action procedures, this Court recently recognized "the limited policymaking role of the courts (as compared with the legislative branch) in terms of manipulating substantive law," as well as "'the General Assembly's superior ability to examine social policy issues and to establish appropriate legal standards.'" *Basile v. H & R Block, Inc.*, __ A.3d __, 2012 WL 3871504, at *8 (Pa. Sept. 7, 2012) (quoting *Naylor v. Twp. of Hellam*, 565 Pa. 397, 408, 773 A.2d 770, 777 (2001)). Notably, states whose legislatures have required rest breaks by statute have seen large increases in the number of class actions on those benefits – a policy implication that Pennsylvania's General Assembly might well consider in weighing the desirability of such a requirement here. *See, e.g.*, J. Vogelzang, "The Tidal Wave of Wage and Hour Class Actions," San Francisco Daily Journal (Apr. 23, 2010); S. Maier, "California's Wage and Hour Class Action Epidemic: Updates and Solutions" (Dec. 3, 2007), http://www.martindale.com/legal-management/articleDorsey-Whitney-LLP338638.htm (last visited October 19, 2012).

For these and other reasons, courts and class action litigants should not be allowed to set employment terms in this Commonwealth. Where an employer provides a benefit that the law does not require, the employer should have the right to control whether it intends to be

contractually bound to do so, and the law should respect its exercise of that control – as Pennsylvania has long recognized.

B. The Superior Court Departed From Established Pennsylvania Law in Holding That the Rest Break Policy in the Employment Manual Was a Contract, Despite the Lack of Proof That the Class Members Actually Relied on the Policy

Apart from whether Wal-Mart's employment manual could be construed as an offer, the Superior Court's opinion also misapplied the law of acceptance. In the absence of express acceptance, Pennsylvania law has consistently required proof of **actual** reliance to establish acceptance of any offer to make a unilateral contract.[4] The Superior Court excused plaintiffs from proving reliance as to all but one of the nearly 187,000 class members who were claimed to have entered into contracts with Wal-Mart for paid rest breaks. It found instead that each class member had accepted the purported offer, and therefore that contracts had been created between Wal-Mart and **every one** of the class members, solely by **presuming** as a factual matter that each class member had relied on Wal-Mart's purported offer to provide paid rest breaks. The ruling departs from longstanding Pennsylvania law and that of many other jurisdictions, which requires actual proof of reliance to establish a unilateral contract.[5] It also stands on its head the fundamental principle that contract law is intended to protect **justifiable** expectations: it gives all class members a windfall in the form of breach of contract damages, without regard to

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[4] *See, e.g., Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001); *Klemow v. Time, Inc.*, 352 A.2d 12, 16 (Pa. 1976); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 158 (Pa. Super. 2002); *Luteran*, 688 A.2d at 215; *Vincent v. Fuller Co.*, 582 A.2d 1367, 1370-71 (Pa. Super. 1990), *rev'd in part*, 616 A.2d 696 (Pa. 1991); *Darlington v. Gen. Elec.*, 504 A.2d 306, 316 (Pa. Super. 1986); *Bauer v. Pottsville Area Emergency Med. Servs., Inc.*, 758 A.2d 1265, 1268 (Pa. Super. 2000).

[5] *See, e.g., Hitchens v. Yonker*, 943 F.Supp. 408, 412 (D. Del. 1996) (under Delaware law, for an employee handbook to form a unilateral contract, acceptance must be shown through reliance after employee became aware of offer); *Woolley*, 491 A.2d at 1267 (noting "the requirement under contract law that consideration must be given in exchange for the employer's offer in order to convert that offer into a binding agreement"); *Lawson v. New York Billiards Corp.*, 331 F. Supp. 2d 121, 128-129 (E.D.N.Y. 2004) (for a handbook to form a unilateral contract, employee must show that he detrimentally relied upon the handbook); *Rudy v. Loral Defense Sys.*, 619 N.E.2d 449, 453 (Ohio App. Ct. 1993) ("[a] unilateral contract contemplates an offer which is accepted by the performance of the offered terms and conditions, rather than by a return promise").

whether they ever knew about the rest break policy, believed they had a contract for rest breaks, or relied on any purported offer of rest breaks. Indeed, it does so even though some Wal-Mart employees testified that they had **not** relied on the policy. *See* Appellants' Brief at 46-47.

The ruling's class-wide presumption of reliance is also inconsistent with this Court's recent decision in *Basile*, which faulted the Superior Court's decision for "fail[ing] to account for the inherently discrete and subjective aspects" of the class-wide question that was at issue there – how an entire class would perceive and understand a mass marketing campaign. 2012 WL 3871504, at *6.

II. THE SUPERIOR COURT ERRED IN HOLDING THAT PLAINTIFFS HAD ESTABLISHED CLASS-WIDE BREACHES WITH A "TRIAL BY FORMULA" APPROACH DRIVEN BY NON-PROBATIVE EVIDENCE

Even if plaintiffs had proven that Wal-Mart made a contract with every Pennsylvania employee to provide rest breaks, whether Wal-Mart **breached** any such contract would turn on facts that are particular to each class member: **whether** any class member actually missed any rest breaks, and if so, **why** the rest breaks were missed.[6] The Superior Court erred in endorsing plaintiffs' ineffective attempt to prove these individual facts on a class-wide basis. Plaintiffs sought to prove that all the class members had missed rest breaks by relying on two types of evidence: (1) anecdotal testimony from only six of the nearly 187,000 employees; and (2) testimony from two experts who reviewed employee time-clock swipe records and cash-register logging records (records that showed when employees had clocked in and out) for some of the years, and some of the stores, at issue. Neither type of evidence logically can support a class-wide factual determination that Wal-Mart prevented each class member from taking rest breaks.

[6] Wal-Mart's rest break policy stated that "[a]ssociates will be provided break and meal periods during their scheduled work time consistent with the policy guidelines," which depended on the length of their shifts. Appellants' Brief at 8.

No evidence was offered to support the premise that the experiences of the six employees who testified (a miniscule percentage of the total class) represented the experiences of the nearly 187,000 class members. The testimony of plaintiffs' experts was likewise inadequate to establish breach on a class-wide basis: the expert on swiping, for example, admitted that the records he reviewed, and on which he based his opinions, did not actually show whether a missed swipe meant a missed break, why a rest break might be missing, or whether the break was missed voluntarily or involuntarily. The expert acknowledged that the swipe records "do not show in any way the reasons why a rest break or meal break swipe might be missing." He also admitted that – for those records that appeared to show a missing break – he did not know and had "no way of knowing whether it was by the employee's own voluntary choice." *See* Appellants' Brief at 11-12, 32-34.

The expert's reliance on the swipe records was further impugned by evidence that swipe records that appeared to indicate a missed break did not always mean that an employee had actually missed the break. One employee whose records were said to show 82 missed breaks testified that, in fact, he had never missed a break. *See id.* at 14-15. Not only did the swipe records lack any tenable probative value, the trial court allowed the jurors to draw an adverse inference from the absence of swipe records after February 2001 – even though no swipe records had **ever** existed after February 2001, Wal-Mart was not legally obligated to maintain swipe records, and Wal-Mart understood the swipe records to be unreliable. Nor was any evidence offered to suggest that, if swipe records had existed after February 2001, they would have shown the same percentage of purportedly missed breaks as the swipe records before February 2001. In sum, there was a fundamental and fatal lack of connection between the evidence plaintiffs

offered and the question of whether any (let alone each) of the nearly 187,000 class members had actually missed any breaks, or if they had, why they had missed them.[7]

The method by which plaintiffs tried to prove breach on a class-wide basis is the same sort of inadequate approach the Supreme Court rejected in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555-56 (2011): statistical and anecdotal evidence that is inadequately probative of a fact that plaintiffs bear the burden of proving as to **each** class member. As in *Dukes*, there was no basis to believe that plaintiffs' proof could be extrapolated validly across the class to establish whether Wal-Mart as a matter of fact had caused any class member to miss a break, let alone **each** class member. In fact, the extrapolation of the swipe record statistics across the entire class had even less validity here than the attempt to create class-wide proof in *Dukes*.

The error in the Superior Court's ruling is attributable not only to the inadequacy of class-wide proof, but also the related fact that the claims at issue – whether nearly 187,000 employees missed any rest breaks, and if so, why – involve inherently individualized questions. In *Basile*, this Court recently rejected attempts to prove individualized issues in a class action. 2012 WL 3871504, at *7-9. The United States Supreme Court has recognized the concerns in applying procedural rules to modify substantive law by eliminating individualized determinations in a class action. *See, e.g.*, *Dukes*, 131 S. Ct. at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay"); *see also Philip Morris USA v, Williams*, 549 U.S. 56, 66 (2007) (due process requires affording a defendant "an opportunity to present every available defense").

The Superior Court's ruling also departs from the law of sister states that have refused to certify, or have decertified, similar class actions against Wal-Mart based on the same inadequacy

[7] For the same reasons, plaintiffs' evidence was inadequate to prove on a class-wide basis their claims that Wal-Mart had required employees to work off the clock.

or impossibility of class-wide proof.[8] The error in the ruling is particularly evident in the fact that, even when employees have sued for violations of break requirements that California has mandated by statute, courts in California have repeatedly held that meal and rest break claims are not appropriate for class treatment because individual inquiries predominate.[9] Thus, the Superior Court awarded class-wide recovery here on an even more liberal basis than would be allowed in California, and it did so with respect to a benefit that Pennsylvania, unlike California, has never required employers to provide.

A defendant, whether in a class or an individual action, should be held liable only for harm it is fairly proven to have caused. Here, tens of millions of dollars of damages were awarded on a class-wide basis for breaks that plaintiffs failed to prove the class was actually prevented from taking. The trial-by-formula approach the Superior Court endorsed was not probative, was fundamentally unfair, had the effect of changing existing law, and resulted in a

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[8] *See Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548 (Tex. App. 2002); *Petty v. Wal-Mart Stores, Inc.*, 773 N.E.2d 576 (Ohio Ct. App. 2002); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 602-03 (E.D. La. 2002); *Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10-12 (Md. Ct. Spec. App. 2007); *Harrison v. Wal-Mart Stores, Inc.*, 613 S.E.2d 322, 327-28 (N.C. Ct. App. 2005).

[9] *See Tien v. Tenet Healthcare Corp. et al.*, __ Cal. Rptr. 3d __, 2012 WL 4712520 (Cal. App. 2012) (individualized inquiries as to why employees did not or could not take breaks would predominate because employer did not have a formal policy prohibiting breaks); *In re Lamps Plus Overtime Cases*, 209 Cal. App. 4th 35, 146 Cal. Rptr. 3d 691 (Cal. App. 2 Dist. Aug. 20, 2012) (affirming denial of class certification due to predominantly individualized questions regarding meal and rest period claims); *Chavez v. Lumber Liquidators, Inc.*, 2012 WL 1004850, at *8 (N.D. Cal. Mar. 26, 2012) (where there was a uniform meal policy – in compliance with California Law – Rule 23(b) could not be satisfied because "the Court would need to engage in individual factual inquiries to determine whether certain stores or Store Managers deviated from that policy. Specifically, for each alleged violation, the Court would need to determine, among other things: (1) whether an employee actually took a meal break; (2) whether that employee worked more than a five-or-six-hour shift; (3) whether LLI forced that employee to work through the meal break; and (4) whether that employee was compensated for the missed meal period in accordance with Section 226.7 of the Labor Code"); *Cortez v. Best Buy Stores, LP*, Case No. CV-11-05053 SJO (FFMx), 2012 WL 255345, at *7-11 (C.D. Cal. Jan. 25, 2012) (meal and rest break claims inappropriate for certification because they could not be established on common proof as required by *Dukes*); *Hughes v. Winco Foods.*, Case No. ED CV11-00644 JAK (Opx), 2012 WL 34483, at *5 (C.D. Cal. Jan. 4, 2012) ("[T]he decision-making with respect to when employees may take meal and rest breaks is diverse. It varies from store to store, and from department-to-department within the same store. There is simply no manner in which the timing of such breaks can be proven reliably with evidence of 'a single stroke.'"); *Salazar v. Avis Budget Group, Inc.*, 251 F.R.D. 529, 534 (S.D. Cal. 2008) ("plaintiffs must show defendants forced plaintiffs to forego missed meal periods"); *Washington v. Joe's Crab Shack, et al.*, 271 F.R.D. 629, 640-43 (N.D. Cal. 2010) (putative class failed to show common issues predominated because individualized inquiries would be necessary to determine why breaks were not taken in light of defendant's written policy providing for breaks).

miscarriage of justice. To avoid fundamental injustice, as well as inconsistency with the prevailing law in other jurisdictions, the amici urge that the Superior Court's ruling be reversed.

III. THE HARM CAUSED BY THE SUPERIOR COURT'S ERRORS IN ENDORSING CLASS-WIDE RECOVERY BASED ON INADEQUATE PROOF WAS MAGNIFIED BY ITS APPROVAL OF A $62 MILLION CLASS-WIDE PENALTY

The Superior Court held that Wal-Mart not only had breached contracts with all class members to provide rest breaks, but had violated the Wage Payment and Collection Law ("WPCL"), 43 P.S. §260.1 *et seq.*, by refusing to pay plaintiffs' demands in this action. It imposed a $62 million "liquidated damages" penalty on Wal-Mart under § 10 of the WPCL for the alleged violations. The penalty highlights the unfairness in the Superior Court's endorsement of the inadequate approach to class-wide proof. Given the absence of valid proof of class-wide breaches, there is a high probability that the $62 million penalty was imposed for conduct that was lawful as to many if not substantially all of the class members. This additional class-wide sanction magnified the harm caused by the Superior Court's erroneous endorsement of plaintiffs' inadequate approach to class-wide proof.

The penalty is particularly unfair because it was imposed for Wal-Mart's failure to capitulate to plaintiffs' class-wide demands for payment of damages for purported breaches of purported contracts to provide rest breaks. The class-wide demands were questionable on their face, both as to their substance and because they depended on class-wide proof of highly individualized issues that could not be (and was not) provided.[10] On this point too, the Superior

[10] Plaintiffs did not seek to recover any element of compensation that Wal-Mart had failed to pay, but demanded contract damages for a purported failure to provide a **non-monetary** benefit, *i.e.*, rest breaks. The amici agree with Wal-Mart's position that the failure to provide a rest break, when employees were paid the same amount regardless of whether they actually took a break, is not a "wage" under the WPCL. Plaintiffs' contract claim was also inconsistent with existing Pennsylvania precedents, as the purported contract was based on statements in employee handbooks that expressly disclaimed the intent to be contractually bound.

Court departed from the prevailing law, which generally does not penalize employers under wage laws if they respond reasonably to questionable claims.[11]

IV. THE SUPERIOR COURT'S RULINGS ARE BAD FOR PENNSYLVANIA AND BAD FOR BUSINESSES, EMPLOYERS, EMPLOYEES, AND THE ECONOMY IN PENNSYLVANIA AND THE UNITED STATES GENERALLY

That the Superior Court's decision erroneously departed from Pennsylvania law is enough to justify reversal. Its potential ill effects make it imperative that Pennsylvania law return to what it always has been. By holding that almost anything in an employee handbook is an offer, even if the handbook contains a disclaimer, the ruling threatens to undermine the usefulness of employee handbooks; creates disincentives for employers to offer unlegislated benefits voluntarily; and deprives employers of the flexibility they need to set and change employment policies in a fast-changing and competitive economy. The decision below is also inconsistent in several respects with the law in many of Pennsylvania's sister states.

These holdings would be bad enough for employers and businesses had they been made in an individual case. But the Superior Court magnified the harm by applying its holdings across a class of nearly 187,000 members, and using that class-wide finding of liability as a springboard to impose an even greater class-wide penalty. And in reaching that result, the Superior Court departed decidedly from United States Supreme Court precedents on class action procedure and allowed a large class-verdict to be imposed based on the same type of inadequate attempts at class-wide proof that *Dukes* rejected. Because many states have modeled their class-action procedures on the federal rules, and Supreme Court precedents carry significant weight in interpreting and applying those procedures, the Superior Court's extremely liberal application of class action rules – even more liberal than California – makes Pennsylvania a decided outlier.

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[11] *See Marroquin v. Canales*, 505 F. Supp. 2d 283, 299 (D. Md. 2007); *New England Homes, Inc. v. R.J. Guarnaccia Irrevocable Trust*, 846 A.2d 502, 507-08 (N.H. 2004); *Morris v. Rochester Midland Corp.*, 612 N.W.2d 921, 925 (Neb. 2000); *Apache East, Inc. v. Wiegand*, 580 P.2d 769, 773-74 (Ariz. App. 1978).

Under the Superior Court's ruling, even plaintiffs who obviously cannot establish the defendant's liability on the asserted claims on a class-wide basis may recover a large judgment – and even class-wide monetary penalties – if they bring their suit in Pennsylvania state court.

The Superior Court's decision creates the risk that Pennsylvania's class-action standards will be perceived as much looser than the standards the Supreme Court set forth in *Dukes*. The perception of such laxity risks making Pennsylvania a magnet for class actions generally. As commentators have recognized, relaxed class action rules in one jurisdiction may attract a variety of class actions against a host of different industries. *See* Antitrust Chronicle, Competition Policy International (Aug. 10, 2010) (noting, before *Dukes*, that because the Ninth Circuit decision that *Dukes* reversed "lowers the bar to class certification in the Ninth Circuit, businesses that may be targeted by antitrust class actions should be prepared to face more litigation there...."); *see also* J. Beisner & J. Miller, Class Action Magnet Courts: The Allure Intensifies, No. 5 Civil Justice Report (Center for Legal Policy at the Manhattan Institute, July 2002) (discussing "judicial system anomalies" that made Illinois state courts in Madison County a "magnet" for class action litigation).

A perception of laxity in Pennsylvania's class action procedures would likely worsen Philadelphia's reputation as a "judicial hellhole" and increase the number of meritless class actions in Philadelphia. *See, e.g.*, Judicial Hellholes 2011/2012, http://www.judicialhellholes.org/2011-12/philadelphia (last visited October 19, 2012) (ranking Philadelphia as the worst "judicial hellhole" in the country, with "nearly twice the litigation per capita of other Pennsylvania counties, and "clearly the plaintiffs' choice"; "[p]laintiffs' attorneys are drawn to Philadelphia courts because they believe their clients will receive favorable treatment in the way the laws are administered, essentially getting a better deal there than they

would likely get at home in front of their local judges and juries"). Indeed, that reputation already has made Philadelphia a magnet for lawsuits, even lawsuits where the parties have little connection to the city. *See* L. Rickard, Pennsylvania's Poor Lawsuit Climate Puts Keystone State at Crossroads, Institute for Legal Reform (Sep. 10, 2012), http://www.instituteforlegalreform.com/blog/commentary/pennsylvania%E2%80 (last visited October 19, 2012) ("in today's Philadelphia courts, lawsuits are routinely filed by plaintiffs who have little or no connection to the city against defendants with only a tangential presence"); Press Release, American Tort Reform Association (Feb. 6, 2012), http://www.atra.org/newsroom/new-data-add-hellholes-case-against-Philadelphia (last visited on October 19, 2012) ("plaintiffs in 7 out of 10 personal injury lawsuits filed in the CLC [in Philadelphia] had no connection whatsoever to the state of Pennsylvania, much less to the city of Philadelphia or its surrounding county").

Loose class action standards threaten to harm businesses as well. They raise the stakes of litigation and the risk of large verdicts and increase the cost of doing business. Frivolous class actions also threaten to affect the free flow of commerce and the economy in general, as they may force companies to scale back operations or discontinue certain products or services, and have the unfortunate effects of "jeopardizing jobs and driving up prices for consumers." William Branigin, Congress Changes Class Action Rules, Wash. Post, Feb. 17, 2005 (quoting then-House Majority Whip Roy Blunt); *see also* Anne Freedman, A Look at 2010 Employment-Law Cases, The Leader Board (Jan. 6, 2011) (observing, in response to Wal-Mart's legal battles in class action lawsuits, that it "[m]ust be getting harder to keep those prices low when they're paying those kinds of legal costs"). By endorsing lax class action procedures that encourage meritless class actions, the ruling risks making Pennsylvania a less attractive place for companies to locate

their businesses and create jobs – the opposite of what Pennsylvania needs when facing high levels of unemployment in difficult economic times. *See, e.g.*, Economy Watch: Tracking the Pennsylvania Economy, The Pennsylvania Budget and Policy Center, http://pennbpc.org/economy-watch (last visited on October 19, 2012) ("In August 2012, the state's unemployment rate rose to the same level as U.S. unemployment for the first time in years").

In sum, if the Superior Court's ruling is approved, Pennsylvania will be left a lonely backwater amid the progress other jurisdictions have made in ensuring that class-action procedures are just. The Superior Court's outlier (and unfair) approach would encourage class-action abuse in Pennsylvania; make Pennsylvania generally, and Philadelphia in particular, which already is saddled with the dubious distinction of being a "judicial hellhole," even more of a magnet for meritless class-action litigation; discourage companies from locating their businesses and creating jobs in Pennsylvania; and undermine the vitality of Pennsylvania and American businesses, to the detriment of the economy, employees, and consumers in Pennsylvania and the United States. For these reasons too, the ruling should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by Appellants, the judgment of the Superior Court should be reversed.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS, LLP

By:

Marc J. Sonnenfeld (#17210
Howard L. Meyers (#17184)
Joseph B.G. Fay (#33480)
Michael J. Puma (#94463)
A. Lauren Carpenter (#205410)
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000
fax: (215) 963-5001
msonnenfeld@morganlewis.com

Counsel for the Amici Curiae, The Pennsylvania Chamber of Business and Industry, The Greater Philadelphia Chamber of Commerce, The Greater Pittsburgh Chamber of Commerce, and Chamber of Commerce of the United States of America

Of Counsel
Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

In The

Supreme Court of Pennsylvania

MICHELLE BRAUN, on behalf of herself and all others similarly situated, Respondent	:	NOS. 22, 23, EAP, 2012
v.	:	Superior Court No. 3373 EDA 2007 (Consolidated with
WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an operating segment of Wal-Mart Stores, Inc., Petitioners	:	Superior Court No. 3376 EDA 2007)

CERTIFICATE OF SERVICE

I, Marc J. Sonnenfeld, hereby certify that I am this day serving the foregoing Brief of *Amici Curiae* the Pennsylvania Chamber of Business and Industry, the Greater Philadelphia Chamber of Commerce, the Greater Pittsburgh Chamber Of Commerce, and the Chamber of Commerce of the United States of America in Support of the Appeal of Wal-Mart Stores, Inc. and Sam's Club upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service of two copies by First-Class Mail Addressed as Follows:

Michael D. Donovan
Donovan Searles, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103

Judith L. Spanier
Meagan A. Zapotocky
Abbey Spanier Rodd Abrams & Paradis, LLP
212 East 39th Street
New York, NY 10016

Rodney P. Bridgers
Azar & Associates
14426 E Evans Ave
Aurora, CO 80014

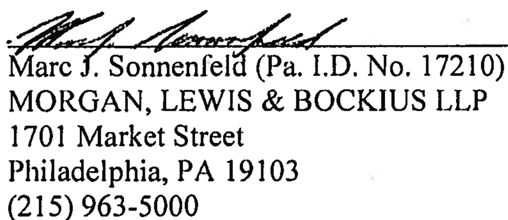
Gerald L. Bader, Jr.
Bader & Associates, LLC
Ste 1110
1873 S Bellaire St
Denver, CO 80222

Julian W. Poon
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Daniel Segal
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square, 27th floor
Philadelphia, PA 19103

James C. Sargent, Jr.
Lamb McErlane PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381

Dated: October 22, 2012



Marc J. Sonnenfeld (Pa. I.D. No. 17210)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5000

Attorneys for Amici Curiae the Pennsylvania Chamber of Business and Industry, the Greater Philadelphia Chamber of Commerce, the Greater Pittsburgh Chamber Of Commerce, and the Chamber of Commerce of the United States of America