IN THE SUPREME COURT OF OHIO

CINDY SATTERFIELD, et al., *Plaintiffs-Appellees,* v. AMERITECH MOBILE COMMUNICATIONS, INC., et al., *Defendants,* and CINCINNATI SMSA LIMITED PARTNERSHIP, *Defendant-Appellant.*	)	Supreme Court Case No. 2017-0684 On Appeal from the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County Court of Appeals Case No. 16-104211

MEMORANDUM IN SUPPORT OF JURISDICTION BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE OHIO CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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The Chamber of Commerce of the United States of America and the Ohio Chamber of Commerce respectfully submit this jurisdictional memorandum as *amici curiae* in support of Appellant Cincinnati SMSA Limited Partnership ("Ameritech").

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Class litigation so magnifies the expense and risk of litigation that certification of a class often creates inexorable pressure for defendants to settle even meritless claims. As a result of this pressure, the entire outcome of a case often hinges on the critical class-certification decision. The requirements to certify a class in Ohio are thus important to define and rigorously apply because failure to do so can invite litigation abuse, increase cost, and cause meritless cases to result in unjustified settlements. In this case, the Eighth Judicial District Court of Appeals gave short shrift to two of the most important aspects of the certification inquiry, affirming certification of a class where: (i) not all class members suffered an injury-in-fact; and (ii) the plaintiffs' expert did not have a damages model that measured damages on a class-wide basis, consistent with the plaintiffs' theory of liability.

Absent intervention by this Court, the Court of Appeals' decision potentially opens the floodgates for plaintiffs' attorneys to flock to Ohio in pursuit of certification of overly broad classes in order to strengthen their leverage to extract unwarranted settlements. Burdened with such settlement and litigation costs, businesses oftentimes must pass those costs along to consumers through increased prices of goods and

services, to employees through decreased wages, and to investors through decreased returns. The Court of Appeals' decision creates an untenable situation for our Nation's businesses and residents, as well as for the Ohio judicial system.

This case presents an opportunity for this Court to affirm that Ohio will not entertain "no-injury" class actions that risk arbitrary class-wide damages awards that have no relationship to a consumer's actual pecuniary loss. The Court should grant jurisdiction to clarify that, in certifying a class, Ohio courts must conduct a rigorous analysis to ensure that plaintiffs have established the predominance prerequisite to class certification and, specifically, must determine: (i) that all members of the proposed class suffered an injury-in-fact; and (ii) that plaintiffs' proposed damages model measures damages on a class-wide basis, consistent with plaintiffs' theory of liability.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases addressing the requirements for class certification.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

Many of *amici curiae's* members and affiliates are defendants in class action lawsuits. Accordingly, *amici curiae* and their members have a keen interest in ensuring that courts rigorously analyze whether plaintiffs in class action suits satisfy the requirements for class certification.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt Ameritech's Statement of the Case and Facts.

ARGUMENT

Proposition of Law: To certify a class, Ohio courts must conduct a rigorous analysis to confirm that plaintiffs have established predominance and, specifically, must determine that all class members suffered an injury-in-fact for which plaintiffs' proposed damages model measures damages on a class-wide basis, consistent with plaintiffs' theory of liability.

In certifying a class, "a trial court must conduct a rigorous analysis" to determine "that sufficient evidence proves that all requirements of Civ.R. 23 have been satisfied." *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 2. One prerequisite to class certification is that "questions of law or fact common

to class members predominate over any questions affecting only individual members[.]" Civ.R. 23(B)(3).

In this case, the two lower courts certified a class of "all retail subscribers of [Ameritech] who purchased service with an Ohio area code within geographic areas in which the PUCO decision found wholesale price discrimination during the period October 18, 1993 through September 8, 1995." *Satterfield v. Ameritech Mobile Commc'ns, Inc.*, 8th Dist. Cuyahoga No. 16-104211, 2017-Ohio-928, ¶ 10 (March 16, 2017) (the "Court of Appeals Opinion"). In doing so, the courts failed to conduct the necessary rigorous analyses of two important standards underlying the predominance prerequisite to class certification. First, the lower courts disregarded this Court's rule, articulated most recently in *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015-Ohio-3430, 49 N.E.3d 1224, that "[p]laintiffs in class-action suits must demonstrate that they can prove, through common evidence, that all class members were *in fact injured* by the defendant's actions." *Id*. at ¶ 33 (emphasis added) (citation omitted). Second, the courts disregarded *Comcast Corp. v. Behrend*, 569 U.S. --, 133 S.Ct. 1426 (2011), in which the Supreme Court of the United States held that plaintiffs must "establish that damages are susceptible of measurement across the entire class" by presenting a

damages model that "measure[s] only those damages attributable to [plaintiffs' liability] theory." *Id*. at 1433 (citations omitted).[1]

Ameritech's memorandum in support of jurisdiction convincingly demonstrates that had the lower courts carefully considered the plaintiffs' proposed class—one in which the class representative claims harm from a regulatory violation but seeks to represent thousands of consumers who experienced no injury—they would have found that the class is overly broad and that common issues of fact do not predominate. *Amici curiae* write to underscore the devastating impact that the courts' class certification in this case could have by inviting further abuse of class action litigation as a tool for extracting undue settlements from defendants. Absent a decision by this Court, the Court of Appeals' decision will serve as an invitation to the plaintiffs' bar to treat Ohio as the venue-of-choice for abusive class action suits that attempt to leverage the costs and risks that follow class certification to extract settlements from the Nation's businesses without regard to the merits of the underlying claims. The Court of Appeals' decision should not be permitted to stand.

[1] Civ.R. 23(B) and Fed. R. Civ. P. 23(b) are identical and, therefore, Ohio courts consider federal authority "an appropriate aid to interpretation of the Ohio rule." *See State ex rel. Davis v. Pub. Employees Ret. Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, 855 N.E.2d 444, ¶ 28 (quotation omitted).

I. ABSENT RIGOROUS ANALYSIS OF THE CLASS-CERTIFICATION REQUIREMENTS, THERE IS SERIOUS RISK FOR LITIGATION ABUSE AND THE EXTRACTION OF UNDUE SETTLEMENTS

The most important part of a class action is often the class-certification decision. "As a practical matter, the certification decision is typically a game-changer, often the whole ballgame, for plaintiffs and plaintiffs' counsel." *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012) (citation omitted). As the Supreme Court of the United States has recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Gen. Motors Corp. v. City of New York*, 501 F.2d 639, 657 (2d Cir. 1974) (Mansfield, J., concurring in granting interlocutory appeal of class certification) ("[B]ecause of the sheer size and complexity of the action, the added time, expense and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route required for review of the class action certification.") (citations omitted).

Defendants often settle even the most tenuous claims following an adverse class-certification decision. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987) (affirming approval of a $180 million class settlement even though the trial court "viewed the plaintiffs' case as so weak as to be virtually baseless" and had

granted summary judgment against plaintiffs who had opted out). This is especially true where a large class is certified: "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even a defendant with the most surefire defense "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

Given the high post-certification settlement rates and enormous defense costs, class action suits take a heavy toll on our Nation's businesses. The cost to defend against a class action can range from "$5 million to $100 million." Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011).[2] In addition, businesses involved in class action disputes may suffer, as an indirect cost, significant harm to their reputation. *See, e.g.*, Matthew Grimsley, What Effect Will *Wal-Mart v. Dukes* Have on Small Businesses, 8 Ohio St. Entrepreneurial Bus. L.J. 99, 101 n.7, 124-25 (2013) (citations omitted). In the end, businesses subjected to class action litigation can either fight on, bearing significant defense costs and risking potentially ruinous liability, or yield to what amount to "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

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[2] Available at http://usa.marsh.com/Portals/9/Documents/FINPROFocusDukesvWalMartJuly2011.pdf (last visited May 19, 2017). *See also The 2015 Carlton Fields Jorden Burt Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), available at http://classactionsurvey.com/pdf/2015-class-action-survey.pdf (last visited May 21, 2017) ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million[.]").

It is for these reasons—put simply, to mitigate class action abuse—that Ohio courts *must* conduct a rigorous analysis to ensure that the requirements for class certification set forth in Civ.R. 23 have been satisfied.

II. THE LOWER COURTS' DISREGARD FOR *FELIX* AND *COMCAST* PAVES THE WAY FOR ABUSIVE CLASS ACTION LITIGATION IN OHIO

Against the above backdrop, the practical implication of the Court of Appeals' decision is to invite abuse by dramatically lowering the bar for class certification in Ohio state courts. It is no secret that class actions are a "powerful tool [that] can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly." S. Rep. No. 109–14, at 20 (2005) (Class Action Fairness Act) ("Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigation—frivolous lawsuits."). "The larger the claim, the greater the leverage plaintiffs' attorneys have to obtain a settlement. This leverage exists even for claims lacking merit." Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 617-18 (2010). In addition, permitting plaintiffs' attorneys to pursue class action suits where individualized inquiry is necessary to determine *whether* class members suffered damages (as opposed to the *amount* of such damages) seriously undercuts the predominance requirement. The

Court of Appeals' failure to apply the limitations set forth in *Felix* and *Comcast* creates imminent risk of erroneous, overly broad class certification, for at least three reasons.

First, the Court of Appeals inappropriately narrowed the injury-in-fact requirement to a small subset of cases dealing with violation of a single statute. A critical requirement for proof of predominance under Civ.R. 23(B)(3) in all cases is that plaintiffs affirmatively "demonstrate that they can prove, through common evidence, that all class members were *in fact injured* by the defendant's actions." *Felix*, 2015-Ohio-3430, ¶ 33 (emphasis added) (citation omitted). Specifically, this Court in *Felix* held that, to obtain class certification, the proposed class representative "must adduce common evidence that shows *all* class members suffered *some* injury." *Id*. (first emphasis added). The Court of Appeals, however, distinguished *Felix* on the grounds that it was an Ohio Consumer Sales Protection Act ("OCSPA") case. Court of Appeals Opinion, ¶ 27 n.2. While this Court most recently articulated its injury-in-fact rule in *Felix*, the rule is not new and should not be narrowly interpreted as OCSPA-specific.[3]

[3] This Court has twice before recognized the injury-in-fact predominance requirement in non-OCSPA cases, placing the Court of Appeals' decision in tension with this Court's precedents. In *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, which was not an OCSPA case, this Court made clear that when a class "include[s] a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." *Id*. at ¶ 53 (decertifying a class where individualized inquiries would be necessary to determine whether each class member authorized the third-party charges at issue) (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)). Similarly, in *Cullen*, also not an OCSPA case, this Court emphasized that a proposed class cannot satisfy the predominance requirement of Rule 23(B)(3) if its

This Court should grant jurisdiction in this case to ensure that its no-injury rule is properly applied to *all* class actions in Ohio.

Second, the Court of Appeals did not require the plaintiffs to prove a class-wide damages model—a decision that is inconsistent with the decision of the Supreme Court of the United States in *Comcast*. As the Supreme Court explained, damages must be "susceptible of measurement across the entire class for purposes of Rule 23(b)(3)," and a plaintiff's damages model must be consistent with its theory of liability. *Comcast*, 133 S.Ct. at 1433 (citations omitted). The Court further stated that "for purposes of Rule 23, courts must conduct a 'rigorous analysis' to determine whether" these requirements have been satisfied. *Id*. (citation omitted). The trial court here certified the plaintiffs' proposed class, and the Court of Appeals affirmed, despite recognizing that the plaintiffs' expert did not offer a damages model for alleged damages in this case. The model plaintiffs' expert previously constructed in the *Cellnet* case purported to measure damages to *one reseller*, not to the class of *retail purchasers* for whom the plaintiffs claim damages. Court of Appeals Opinion, ¶ 26. Because the plaintiffs relied on a mere promise that its reseller model could somehow be amended to measure damages across the entire class such that common issues predominated, the decisions of the courts

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members cannot show a common loss stemming from the defendant's conduct. 2013-Ohio-4733, ¶¶ 48-50.

below improperly disregarded *Comcast*.[4] This case presents the opportunity for this Court to make clear that the damages requirement of *Comcast* applies to class actions in Ohio state courts.

Third, the Court of Appeals' decision likely invites abusive class action suits and expensive settlements of meritless claims. The features of this case highlight that concern. This is an extraordinarily stale case (filed in 2003) concerning a class period that is even older (1993–1995). Injuries are speculative; damages, at least on a class-wide basis, even more so. Yet, the case is brought under a statute that was enacted in the early 1900s, pre-dates the passage of Civ.R. 23, and imposes trebles damages. All of these factors taken together suggest that the class-certification decision in this case *was the whole case*, and that, if left to stand, the decision may drive this matter to an unjustified settlement, with the costs potentially being passed on to the consumers.

Class actions of this kind do not compensate people for actual losses; they harm businesses and consumers by needlessly increasing prices for goods and services. In

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[4] "*Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues," and a court errs where it does "not evaluate whether the individualized damages questions predominate over the common questions of liability." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015) (citing *Comcast*, 133 S.Ct. 1426) (collecting cases); *see also Bussey v. Macon County Greyhound Park, Inc.*, 562 Fed. Appx. 782, 791 (11th Cir. 2014) (reversing class certification where trial court failed "to conduct the 'rigorous analysis' required by the Supreme Court's *Comcast* decision regarding whether calculation of the class members' damages would necessitate such individual inquiry that individual issues would predominate over common ones").

addition, they have the potential to make Ohio a destination for needless and meritless class action litigation. This Court should accept jurisdiction to ensure that the predominance standards noted above are clearly defined and rigorously applied.

CONCLUSION

The Court of Appeals' decision fails to rigorously apply important class-certification requirements and, therefore, has the potential to invite class action abuse. This Court should, respectfully, accept jurisdiction of Ameritech's appeal to consider the class-certification issues, among any other issues implicated by the lower courts' decisions.

Dated: May 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

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