

IN THE SUPREME COURT OF OHIO

MICHAEL E. CULLEN,	:	Case No. 12-0535
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga
	:	County Court of Appeals,
v.	:	Eighth Appellate District
	:	
STATE FARM MUTUAL	:	Court of Appeals
AUTOMOBILE INSURANCE CO.	:	Case No. 10-095925
Defendant-Appellant.	:	

**JURISDICTIONAL MEMORANDUM OF WASHINGTON LEGAL FOUNDATION
AND OHIO CHEMISTRY TECHNOLOGY COUNCIL
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS**

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States, including many in Ohio. WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive, unreasonable litigation. In particular, WLF regularly participates as *amicus curiae* in litigation in support of its view that lax certification of class actions can undermine the fairness of the court system. Among the many federal and state class-action cases in which WLF has appeared as an *amicus curiae* are *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *Wilson v. Brush Wellman Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, 817 N.E.2d 59 (2004); and *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141 (2004).

The Ohio Chemistry Technology Counsel, with offices in Columbus, is a state-wide trade association that represents over 80 companies involved in the chemical industry in the State of Ohio. Its members include large, medium, and small companies that work together to advance the common interests of the industry in a very competitive global market.

THE CASE IS OF PUBLIC AND GREAT GENERAL INTEREST AND RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The case is of public and great general interest because it raises fundamental questions regarding the fairness of our civil justice system. Although the rules permitting class actions are intended to serve legitimate purposes (such as promoting judicial economy by reducing the number of occasions on which courts will be required to consider the legal consequences of a recurring fact pattern), the certification of class actions that fail to satisfy the rigorous requirements for certification can create more work for courts and compromise the rights of parties and nonparties alike. *Amici* are concerned by the proliferation of class action lawsuits

being filed in state and federal courts and the inhibiting effects that such suits can have on the development and expansion of businesses. The appeals court's decision, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable. Its reasoning and legal premises are inconsistent with the requirements of Rule 23 and parties' and nonparties' due process rights as established by the U.S. Supreme Court in its recent *Wal-Mart* decision.

Wal-Mart comprehensively re-examined the circumstances under which certification of a class action serves the ends of justice, and the potential unfairness to defendants when a class is inappropriately certified. As many subsequent court decisions have recognized, the *Wal-Mart* decision "heightened the standards" for a plaintiff seeking class certification under federal Rule 23. *See, e.g., M.D. ex rel. Stukenberg v. Perry*, No. 11-40789, 2012 WL 974878, at *6 (5th Cir., March 23, 2012). In particular, *Wal-Mart* explained that, to meet Rule 23(a)'s "commonality" requirement, a plaintiff must do much more than simply show that class members "all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551, 180 L.Ed.2d 374. Rather, class members' claims must "depend upon a common contention," and the common contention "must be of a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*¹

¹Moreover, establishing Rule 23(A) "commonality" is just a first step in the long road a plaintiff must travel in order to establish the prerequisites for certification. For example, Rule 23(B)(3) requires that the plaintiff, in addition to establishing "commonality," must also show that the common issues he has identified "predominate" over individual issues. As the U.S. Supreme Court has explained, "the predominance criterion is far more demanding" than the "commonality" requirement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

This Court has instructed that Ohio courts should look to Fed.R.Civ.P. 23 for guidance in interpreting Civ.R. 23. *Marks v. C.P. Chem. Co.*, 31 Ohio St.3d 200, 201, 509 N.E.2d 1249 (1987). Yet the court of appeals paid scant heed to the U.S. Supreme Court’s warnings against inappropriate class certification, despite issuing its decision more than six months after *Wal-Mart* was handed down. In particular, the appeals court rested its “predominance” analysis on a statement that “use of a common script creates * * * a common, class-wide contention making this case suitable for class litigation” – without considering the individual issues of fact raised by State Farm that will make it virtually impossible for the claims of the 100,000 class members to be resolved “in one stroke.” Moreover, the decision to certify a non-opt-out Rule 23(B)(2) class raises serious due process concerns because a judgment adverse to the class likely would preclude class members from seeking damages on their own.

Amici recognize that a trial court’s class certification decisions are entitled to deference. But this Court has cautioned that there must be limits to that deference. *See Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 694 N.E.2d 442 (1998) (“[T]he trial court’s discretion in deciding whether to certify a class action is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.”). Both in light of *Wal-Mart* and in light of the failure of the trial and appeals courts to undertake any meaningful analysis of whether the common issues they identified could be resolved on a class-wide basis, review by this Court is urgently needed in order to provide lower courts with guidance on class certification.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee Michael Cullen is a former insurance policyholder of Defendant State Farm Mutual Automobile Insurance Co. In 2003, Cullen reported to State Farm that his car windshield had been damaged by a stone. Cullen agreed to have his windshield repaired instead of being replaced, and State Farm paid for the repairs in full (*i.e.*, it waived the \$250 deductible on Cullen's policy). Cullen never complained to the glass repair shop regarding the quality of the repair, and, as of September 2009, he was still driving his car with the same repaired windshield.

Cullen later sued State Farm, claiming breach of contract, bad faith, and breach of fiduciary duty. He contended that his insurance contract gave him the option to demand a cash payment equal to the cost of replacing his windshield (less his deductible) and then decide for himself whether to repair or replace his windshield or simply to retain the payment. He further contended that State Farm failed to inform him of this "cash out" option, and that he would have chosen that option if it had been offered to him. Because replacement of a windshield costs more than repair, he contends that he would have derived a financial benefit (even taking into account his \$250 policy deductible) if he had exercised the alleged "cash out" option and paid for the repairs himself.

In September 2010, the trial court granted Cullen's motion to certify a plaintiff class under both Rule 23(B)(2) and Rule 23(B)(3). The certified class comprises all Ohio policyholders insured by State Farm who, at any time after January 1, 1991, submitted a "glass-only" damage claim (*i.e.*, no damage to the car other than to the windshield) that was resolved by payment of the cost of repairing the windshield. The court created two subclasses: insureds

whose claims were administered by Lynx Services (post-1997) and insureds whose claims were not administered by Lynx (1991-1997 and 5% of policyholders after 1997).

In connection with its class certification order, the trial court made numerous findings in Cullen's favor. It found that: (1) State Farm's standard automobile insurance policy in effect throughout the class period provided a "cash out" option; (2) Ohio insurance regulations and the "duty of good faith" imposed an affirmative duty on State Farm to call to the attention of insureds "pertinent" policy information that they might otherwise fail to read; and (3) State Farm agents and representatives should have disclosed the "cash out" option to insureds who filed glass-only claims. In finding that Rule 23(B)(3) certification was appropriate, the court did not identify specific "common questions" of fact or law, or state whether such questions "predominated" but simply stated, "The Court is sufficiently convinced that Plaintiffs' claims for relief are founded squarely upon standardized policies and practices which had been adopted and employed by State Farm throughout Ohio on a systematic basis throughout the class period." In apparent reference to the practices of Lynx Services, the court added, "The use of standardized scripting by Defendant is an additional factor that this Court must consider in weighing the predominance issue."

In certifying a Rule 23(B)(2) class, the trial court's entire explanation was: "[I]t appears that the same practices which [Cullen] experienced are still ongoing. Declaratory and injunctive relief are thus potentially available remedies which can be issued on a class wide basis in the event that he prevails upon the merits of his claim."

In December 2011, a divided court of appeals affirmed class certification but ordered that the class definition be modified to exclude those policyholders who initially agreed to

windshield repair but later requested (and received) new windshields. Op. ¶ 35. It affirmed certification, despite concluding that the trial court's order granting certification was based in part on findings regarding merits-based issues that (it contended) the trial court should not have reached:

However, the trial court's findings of fact and conclusions of law do go too far into the merits of the case. One statement in particular is possibly outcome determinative. The trial court states that a cash pay-out option was available and that State Farm failed to disclose that option. This goes to the heart of the merits of the case and is inappropriate at this point. Class certification does not address the merits of the claim.

Op. ¶ 55. The court of appeals court did not explain why it was appropriate to defer to the trial court's class certification decision even though the decision was based on what it deemed a major error of law.

In upholding the trial court's finding that Cullen met Rule 23(B)(3)'s predominance requirement, the appeals court concluded, "[T]he use of a common plan to steer claimants to opt for repair rather than replacement or disclosure of a cash payment for the value of the glass, less deductible, is a significant class-wide issue." Op. ¶ 21. In particular, the court held that "the use of a common script" by Lynx employees made the case "suitable for class litigation." Op. ¶ 27. With respect to pre-1997 claims (with which Lynx had no involvement), the court stated that the common question of fact was whether (as alleged by Cullen) a windshield repair can *never* "restore vehicles to their preloss condition." Op. ¶ 56. The court held (without elaboration) that the trial court did not abuse its discretion in determining that these common questions predominated over individual questions of fact, but (as was also true of the trial court) it did not discuss any of the individual questions of fact. Op. ¶¶ 31, 33.

With respect to Rule 23(B)(2) certification, the appeals court dismissed the relevance of

the U.S. Supreme Court’s discussion (in its *Wal-Mart* decision) of federal Rule 23(b)(2), noting that *Wal-Mart* “did not address the specific question here – whether a class should be certified under both Civ.R. 23(B)(2) and (B)(3).” Op. ¶ 48. State Farm argued that Rule 23(B)(2) certification is inappropriate whenever (as was the case here) damage claims constitute a more-than-incidental part of the lawsuit. The appeals court disagreed, asserting that a 23(B)(2) assessment of whether damages play more than an incidental role in the suit “does not represent a useful expenditure of energy.” Op. ¶ 49. It went on to conclude that, in any event, money damages were an “incidental” part of Cullen’s claims. Op. ¶ 50. It did not address Cullen’s lack of standing to pursue equitable relief as a former policyholder, nor the inappropriateness of seeking declaratory relief solely as a predicate to a damages claim.

Judge Stewart dissented, concluding that Cullen had failed to meet Rule 23(A)’s commonality requirement because “this class encompassed far too many theories of recovery under a ‘common’ question to present a unified class.” Op. ¶ 62. She explained, “While there may be an initial common question of State Farm’s obligation to offer a cash payment in lieu of repair, the many permutations of the underlying claim do not present common issues sufficient to justify certification into a single class of policyholders.” *Id.*

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amici support each of the propositions of law set forth in State Farm’s memorandum in support of jurisdiction. In particular, they urge this Court to consider the following propositions:

Proposition of Law No. 1: Rule 23(B)(3)'s predominance requirement is not satisfied when there are numerous individual questions regarding whether the 100,000 class members were misled regarding their settlement options and/or were dealt with in bad faith.

This Court has indicated that “the test for commonality under Civ.R. 23(A) is typically

met without difficulty.” *Howland*, 104 Ohio St.3d 584, 2004-Ohio-6552, 821 N.E.2d 141, ¶ 19. The Court may wish to grant review in order to re-examine that position in light of *Wal-Mart*’s tightened interpretation of federal Rule 23(a)’s commonality requirement. While the court of appeals quoted that interpretation, it did not faithfully apply it. Even the broad “issue” of the alleged use of a “common script” does not raise a common question here, because the record does not and could not show that injury to each class member from its alleged use is a matter of common proof.

Moreover, even if the commonality requirement were satisfied, this Court has long recognized that the Rule 23(B)(3) predominance requirement is considerably more exacting than the commonality requirement, and that, to establish predominance, “it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.” *Id.*, quoting *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 473 N.E.2d 822 (1984).² Neither the trial court nor the appeals court made any effort to consider whether – in light of the numerous individual issues identified by State Farm – class-wide adjudication of the common questions they identified could actually resolve a significant portion of the claims presented by Cullen. Review is warranted to determine whether a trial court may properly certify a Rule 23(B)(3) class without undertaking that claim-by-claim analysis.

Cullen contends that State Farm’s automobile insurance policies include a “cash out”

² An action may proceed as a class action if all the prerequisites of Rule 23(A) are satisfied and in addition the requirements of either Rule 23(B)(1), (B)(2), or (B)(3) have been met. The trial court certified the class under Rule 23(B)(3), which requires a finding that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”

option to receive a cash payment equal to the cost of replacing his windshield (less his deductible) and then to decide for himself whether to replace or repair his windshield, or simply keep the payment. State Farm denies that its policies offer such an option. Resolution of that contractual issue in favor of class members will not resolve any of the class claims, because Cullen does not allege that class members actually requested cash pay-outs, and he concedes that State Farm was contractually entitled to pay for repair of a damaged windshield if the policy holder agreed. Rather, he alleges that by failing to inform glass-only claimants of their alleged right to exercise a “cash out” option and by improperly persuading them instead to allow State Farm to pay to repair their windshields, State Farm breached its contract, acted in bad faith, and breached its fiduciary duties to policyholders. The appeals court identified a “common issue” with respect to those claims: “[T]he use of a common plan to steer claimants to opt for repair rather than replacement or disclosure of a cash payment for the value of the glass, less deductible, is a significant class-wide issue.” Op. ¶ 21. But the appeals court made no effort to demonstrate that this “significant class-wide issue” is a common question that predominates over individual questions.

State Farm’s Memorandum in Support of Jurisdiction convincingly demonstrates that the single class-wide issue identified by the appeals court does not satisfy Rule 23(B)(3)’s predominance requirement. Cullen’s common-question argument is based on the claim that employees of Lynx Services (which handled most glass-only claims in Ohio after 1997) were instructed to use standardized scripts when speaking with claimants. As State Farm has shown, however, the phone conversations were not identical. The undisputed evidence showed that what was said to each policyholder varied with the questions, if any, asked by the individual

policyholder. Moreover, policyholders with damaged windshields routinely also spoke with their State Farm agents and glass repair shop employees regarding what claims options to pursue. Those were unscripted, unique discussions. In light of the thousands of alternative scenarios that policyholders faced before deciding to opt for repair of their windshields, one cannot credibly argue that the “common question” cited by the trial court and appeals court (use of standardized scripts to guide statements by Lynx employees) predominates over individual questions. Cullen cannot even remember what Lynx said to *him*, or whether he was offered the choice set forth in his policy of windshield replacement or repair when he agreed to windshield repair. Whether *the other 100,000* potential class members were misled, and whether *they* agreed to windshield repairs are issues that cannot be determined on a class-wide basis.

Furthermore, whether (as Cullen alleges) State Farm/Lynx employees acted in bad faith in recommending the repair option is almost entirely an individual question of fact. In order to demonstrate bad faith, class members will need to show not only that their policies entitled them to a “cash out” but also that the State Farm and Lynx representatives with whom they dealt both knew of the availability of a “cash out” option *and* deliberately steered policyholders away from that option. State Farm denies the existence of a “cash out” option. But even if the courts ultimately were to conclude that State Farm policies include such an option, each class member would need to provide individualized evidence regarding the state of mind of the State Farm representative with whom he or she dealt in order to establish bad faith.

As the court of appeals recognized, the allegedly “common” issue (use of “identical” scripted conversations to steer class members to the repair option) does not apply to claims submitted before Lynx was retained in 1997 or to the 5% of post-1997 claims that were handled

by State Farm claims personnel. Op. ¶ 32. With respect to pre-1997 claims, Cullen submitted expert testimony regarding the alleged inherent deficiencies of windshield repairs and will argue, based on that testimony, that State Farm breached the contracts of all class members by failing to pay to restore their cars to pre-loss condition. Op. ¶ 33.³ That testimony ignores the fact that whether a windshield has been restored to its pre-loss condition (assuming the policy even requires as much) is an inherently individualized factual question because it depends on the pre-loss condition of each windshield. *Augustus v. Progressive Corp.*, 8th Dist. No. 81308, 2003-Ohio-296, ¶ 25-27. For example, older windshields that have been subject to wear and tear may have been scratched or abraded, have lost their clarity, or have had earlier chips, cracks, or repairs. Based on variations in wind-shield age and quality, State Farm will have the right at trial to contest failure-to-restore claims on an individualized basis. *See Wal-Mart*, 131 S. Ct. at 2561 (“a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims”).

In sum, the lower courts upheld class certification without undertaking the requisite predominance analysis, and the evidence suggests that any such analysis would have led to the conclusion that certification was improper under Rule 23(B)(3) because individual issues predominate over any common issues. Review is warranted to provide guidance to the lower courts on the need to undertake such an analysis.

³ The appeals court stated that this expert testimony was “dubious.” Op. ¶ 56. Also, *amici* question how Cullen can adequately represent the pre-1997 subclass when he is not himself a member of that subclass. *Amici* also note that State Farm convincingly argues that its policy’s single reference to “pre-loss condition” has no applicability to windshield repairs.

Proposition of Law No. 2: A non-opt-out Rule 23(B)(2) class is not appropriately certified in a case in which the plaintiff seeks significant monetary damages and in which no “cohesiveness” finding has been made.

When the prerequisites of Rule 23(A) are satisfied, one permissible ground for certifying a class is that “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.” Civ.R. 23(B)(2). In addition to certifying a 23(B)(3) class, the trial court (in two sentences) certified the class under Rule 23(B)(2), and the court of appeals affirmed. Review is warranted because the 23(B)(2) certification sharply conflicts both with *Wal-Mart* and this Court’s precedents, and because it raises significant due process concerns.⁴

The appeals court recognized the conflict with *Wal-Mart*, noting that “the Supreme Court found that Rule 23(b)(2) ‘does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.’” Op. ¶ 48, quoting *Wal-Mart*, 131 S. Ct. at 2557. The court nonetheless sought to distinguish *Wal-Mart* by stating that the Supreme Court “did not address the specific question here – whether a class should be certified under both Civ.R. 23(B)(2) and (B)(3).” *Id.* That effort to distinguish *Wal-Mart* is unavailing; nothing in the Supreme Court’s decision (which *unanimously* overturned certification of a Rule 23(b)(2) class) suggested that the (b)(2) issue would have been decided differently if the lower courts had also certified a (b)(3) class.

Moreover, certification is never appropriate under Rule 23(B)(2) unless the plaintiff proves that the proposed class is “cohesive.” *Wilson*, 103 Ohio St.3d at 541, 2004-Ohio-5847,

⁴ Among those concerns is that Cullen, because he is no longer a policyholder and thus does not have an interest in prospective relief, does not have standing to pursue such relief and does not adequately represent the interests of the Rule 23(B)(2) class.

817 N.E.2d 59, ¶ 13. The appeals court upheld (B)(2) certification without even discussing the cohesiveness issue. Yet, as this Court has explained, “a (b)(2) class may require more cohesion than a (b)(3) class. This is so because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out.” *Id.* at 544, quoting *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). For the same reasons that Cullen cannot meet the (B)(3) predominance requirement, the (B)(2) class cannot plausibly be deemed cohesive. Furthermore, the class includes both Cullen and numerous other *former* State Farm policyholders who have no basis for seeking equitable relief against State Farm’s current claims-settlement practices.

In addition, because class members are denied the right to opt out, the (B)(2) class raises “serious due process concerns.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). Mandatory class actions “implicate the due process ‘principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.’” *Id.* at 846, quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Recognizing this “inherent tension between representative suits and the day-in-court ideal,” *id.*, the U.S. Supreme Court has authorized use of class actions but has made them subject to strict constitutional controls. For example, it has held that a State court may not bind absent class plaintiffs concerning *a claim for money damages or similar relief at law* unless it provides “minimal procedural due process protection.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Those “minimal” protections include: notice of the action, an opportunity to be heard and participate in the litigation, adequate representation “at all times” by the named plaintiffs, and a right to “opt out”

of the class. *Id.* at 812.

Certification of the (B)(2) class in this case appears to violate those constitutional principles. Absent class members have no opportunity to opt out; yet if the trial court ultimately determines that State Farm is *not* liable to the class, absent class members will be bound by the judgment (under normal preclusion rules) and will not be entitled to file suit on their own. That would be true even for absent class members who could present individualized evidence that they were affirmatively misled by State Farm. Review is warranted to determine whether certification under Rule 23(B)(2) is appropriate even when, as here, it raises serious due process concerns.⁵

Proposition of Law No. 3: Certification of a class action under the circumstances of this case will improperly encourage further attempts to certify essentially untriable classes in order to coerce settlements from defendants.

Underlying each of the issues raised by State Farm in its jurisdictional brief are the distortions being imposed on the litigation process by the many class actions being certified by Ohio courts under Rule 23. As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are “under intense pressure to settle.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.). Unless they want to “roll the dice,” they must settle, often without regard to the merits of the plaintiffs’ claims. *Id.* Such settlements can in many instances legitimately be deemed “blackmail

⁵ It is well settled that defendants such as State Farm have standing to complain that a court has improperly failed to provide an opt-out right to absent class members. *Shutts*, 472 U.S. at 805 (“The only way that a class action defendant like petitioner can assure itself [that class members will be bound by an adverse judgment] is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit.”).

settlements.” H. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

When a lack of predominance of common questions over individual questions means that many issues will have to be tried on an individual basis, a putative class action is unlikely to result in a significant saving of judicial resources. The only result of certifying such a class is to pressure defendants into settling the claims, regardless of their merits. This is not a proper purpose of class certification. The appeals court’s ruling, if allowed to stand, is likely to result in a significant increase in the filing of class actions that do not serve any of the purposes for which class actions were created. By permitting class actions without any demonstration of predominance or cohesion, the court of appeals has opened the door to a whole new category of class actions that will only serve to further clog the judicial process. *Amici* respectfully requests that this Court grant review to consider closing that door.

CONCLUSION

Amici curiae respectfully request that the Court grant State Farm’s discretionary appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2012, copies of the foregoing Jurisdictional Memorandum of Washington Legal Foundation, *et al.* as *Amici Curiae* in Support of Defendant-Appellant were served on counsel in this case by email, by sending the brief to the email addresses listed below:

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