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WLF URGES HIGH COURT TO SCRUTINIZE EVIDENCE FOR CLASS CERTIFICATION

***(Comcast Corp. v. Behrend)*
United States Supreme Court**

The Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to overturn a lower-court decision that certified a class action against the cable television provider Comcast. The case arises from a suit filed by six cable subscribers in the Philadelphia area who claim that Comcast violated federal antitrust laws. As a result, the plaintiffs complain that they currently pay too much for their cable television and seek money damages.

The trial court certified the plaintiffs as representatives of a class of all Comcast cable television subscribers from the 650 franchise areas that comprise the entire Philadelphia market. A federal district court in Pennsylvania certified the class more than five years ago. A divided panel of the U.S. Court of Appeals for the Third Circuit affirmed the certification order in 2011. The U.S. Supreme Court granted discretionary review earlier this year. The case will be argued on November 5, 2012.

In a brief filed in *Comcast Corp. v. Behrend*, WLF argued that the plaintiffs failed to establish that the case could manageably be tried as a class action. On the required element of money damages, WLF argued that the plaintiffs failed to provide reliable evidence that common issues of fact and law predominated over individual issues—an absolute prerequisite for certification of a class action. WLF's brief was filed on its own behalf and on behalf of its clients: the Allied Educational Foundation (AEF) and the International Association of Defense Counsel (IADC).

“In this case, there was no reliable or admissible evidence that the commonality requirements of Rule 23 had been met, yet the trial court certified the class on the basis of one expert's flimsy testimony on damages,” said WLF Senior Litigation Counsel Cory Andrews after filing WLF's brief with the Supreme Court. “This case is an excellent vehicle for the Supreme Court to clarify that expert testimony must be sufficiently scrutinized before it can ever serve as the basis for class certification.”

In its brief, WLF argued that no justification exists for applying a lesser reliability standard for evidence at class certification than at any other point in the litigation. WLF was particularly critical of the trial court's decision to avoid evaluating the plaintiffs' expert's methodology at the certification stage because such an inquiry “overlapped with

the merits.” WLF explained in its brief that, only last term, the Supreme Court squarely rejected that very approach to class certification in its decision in *Wal-Mart v. Dukes*. Such an approach is not only inefficient and illogical, WLF argued, but it also threatens to harm absent class members.

WLF also emphasized the crucial role that certification decisions play in the outcome of high-stakes class-action litigation. Empirical research demonstrates that litigation costs make it very difficult for the party who loses the class certification decision to continue with the litigation—with the result that erroneous certification decisions are effectively unreviewable. In light of that concern, WLF urged the Supreme Court to adopt a clear rule that would encourage district judges to grant certification motions only after first determining the admissibility of evidence relied on by plaintiffs to prove that the requirements of Rule 23 have been satisfied.

WLF is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending economic liberty, free enterprise, and a limited and accountable government.

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For further information, contact WLF Senior Litigation Counsel Cory Andrews, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.