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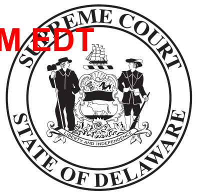

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, HELMSMAN MANAGEMENT SERVICES, LLC, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LM INSURANCE CORPORATION, THE FIRST LIBERTY INSURANCE CORPORATION, and WAUSAU UNDERWRITERS INSURANCE COMPANY, Defendants-Below, Appellants/Cross-Appellees, v. FIRST STATE ORTHOPAEDICS, P.A., on behalf of itself and all others similarly situated, Plaintiff-Below, Appellee/Cross-Appellant.	No. 27, 2023 Appeal from the Superior Court of the State of Delaware, C.A. No. S19C-01-051 CAK

CORRECTED BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE DELAWARE STATE CHAMBER OF COMMERCE AS *AMICI CURIAE* SUPPORTING CROSS-APPELLEES AND AFFIRMANCE OF DENIAL OF CLASS CERTIFICATION

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IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts.

The Delaware State Chamber of Commerce ("Delaware Chamber") is the largest business organization in the state of Delaware. The Delaware Chamber serves as a unified voice for business with a mission to promote an economic climate that enables businesses of all sizes and types to become more competitive in a constantly changing, increasingly global, and unpredictable environment.

To that end, the Chamber and Delaware Chamber (collectively the "*Amici*") regularly file amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. This case is of interest to the *Amici* because hundreds of thousands of businesses organized in the state, including members of the *Amici*, are or may become defendants in putative class actions. Members of the *Amici* and the broader business community have a vital interest in predictable and fair administration of the Superior Court Civil Rules related to class actions.

In this case, reversing the Superior Court's denial of class certification under Superior Court Civil Rule 23(b)(2) would be tantamount to stripping trial courts of their well-established and necessary discretion to decide the propriety of class certification. Such a sea-change in class certification jurisprudence under Delaware law would be incredibly disruptive to the national marketplace, given the number of businesses over which Delaware exercises personal jurisdiction. It would also make Delaware a hotbed for declaratory-only-relief class actions that would not be certified elsewhere. The Court should uphold the Superior Court's discretion to deny class certification in this case.

SUMMARY OF ARGUMENT

1. Superior Court Civil Rule 23 preserves trial courts' discretion in deciding whether to certify putative class actions. The rule states that class actions "may" be maintained if certain criteria are met, not that such putative classes "must" be certified. Federal courts have interpreted the same language in Federal Rule of Civil Procedure 23 to mean that trial courts have the discretion to consider factors other than those listed in Rule 23 itself when determining whether class certification is appropriate. Given that Superior Court Civil Rule 23 is the "near twin" of Federal Rule of Civil Procedure 23, the Court should follow the federal Rule 23 decisions on this issue.

2. Federal courts applying the corollary to Superior Court Civil Rule 23 have consistently held that trial courts have the discretion to consider the potential impact (or lack thereof) of class-wide relief when determining whether certification is appropriate under Rule 23(b)(2). The Superior Court exercised precisely that discretion when it determined in this case that a class-wide declaratory judgment would provide no meaningful benefit beyond the declaration the court awarded to the named plaintiff and that class treatment was therefore inappropriate. The Court should affirm that decision as a proper exercise of the discretion preserved in Superior Court Civil Rule 23.

3. Reversal of the Superior Court's certification decision in this case would effectively strip Delaware trial courts of their well-established discretion in class certification matters. That would, in turn, open the floodgates to putative, declaratory-only-relief class actions that would not be certified elsewhere. Delaware courts could be inundated by enterprising plaintiffs filing class actions against companies seeking declaratory relief each time they disagree with a company policy, because they would be virtually guaranteed class certification, regardless of whether class treatment would provide any meaningful benefit. This policy consideration buttresses the existing precedent interpreting Rule 23.

ARGUMENT

I. Superior Court Civil Rule 23 Preserves Discretion in Trial Courts to Decide Whether Certification of a Particular Class Action Would Be Appropriate.

The proposition that a trial "court has broad discretion in deciding whether a suit may be maintained as a class action" "has repeatedly been embraced by the [United States] Supreme Court as a necessary starting point when interpreting and applying [Rule 23] in modern practice." Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897, 1897-98 (2014).[1] It has similarly been embraced by Delaware courts, *e.g.*, *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co., Inc.*, 2022 WL 2255258, at *3 (Del. Ch. June 23, 2022), which look to cases interpreting the Federal Rules of Civil Procedure as persuasive authority when analyzing their state counterparts. *Appriva S'holder Litig. Co. v. ev3, Inc.*, 937 A.2d 1275, 1286 (Del. 2007).

The trial court's discretion to determine the propriety of class certification is memorialized in the rule itself. Superior Court Civil Rule 23 states that "[o]ne or more members of a class ***may*** sue … as representative parties" and that "[a]n action

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[1] *See, e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 [are] committed in the first instance to the discretion of the district court."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (explaining that district courts have "broad power and discretion … with respect to matters involving the certification" of class actions); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., concurring in part and dissenting in part) ("The law gives broad leeway to district courts in making class certification decisions ….").

may be maintained as a class action" if Rule 23(a) and one of the prongs of Rule 23(b) are satisfied. Del. Super. Ct. Civ. R. 23 (emphases added). The federal analogue uses the same discretionary "may" language. *See* Fed. R. Civ. P. 23. "May" does not mean "must." "May" is "used to indicate possibility or probability" and does not command a particular outcome. *May*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/may (last visited July 11, 2023); *see Must*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/must (last visited July 11, 2023).

Federal courts applying Rule 23 have recognized that trial courts have discretion that is broader than what the Superior Court exercised in this case. While the Superior Court here denied certification because the Rule 23(b)(2) requirements were not met,[2] federal courts have interpreted the "may" language of Rule 23 to mean that trial courts have discretion to deny class certification, *even when* the listed requirements are met, if other factors make certification inappropriate. For example, the Fourth Circuit has found:

> Rule 23 states that an action "may" be maintained as a class action if the listed requirements are met. The Rule does not say that, once the requirements are met, the district court "must" certify and maintain the suit as a class action. … [W]e have previously held that district courts have broad discretion in deciding whether to certify a

[2] *First State Orthopaedics, P.A. v. Emps. Ins. Co. of Wausau*, 2022 WL 18228287, at *3-4 (Del. Super. Ct. Dec. 29, 2022).

> class. This broad discretion necessarily implies that the district court may appropriately consider factors other than those listed in Rule 23 in determining whether to certify a class action …. If … other factors exist that militate against trying the case as a class action, it is appropriate for the district court to decertify the class. … [T]he district court has such broad discretion to certify a class because it is intimately familiar with such practical and factual intricacies of the suit.

Lowery v. Cir. City Stores, 158 F.3d 742, 757-58 (4th Cir. 1998), *vacated*, 527 U.S. 1031 (1999), *aff'd in pertinent part*, 206 F.3d 431 (4th Cir. 2000) (internal citations omitted).

"The substance of the *Lowery* court's interpretation … represents the dominant sentiment among the lower federal courts throughout the post-1966 period." Wolff, *supra*, at 1936; *see, e.g.*, *Yamasaki*, 442 U.S. at 702 (recognizing trial court authority to consider grounds not specified in Rule 23, including systemic impact, in deciding how to exercise its discretion on class certification); *Shook v. El Paso Cnty.*, 386 F.3d 963, 973 (10th Cir. 2004) ("We agree with the *Lowery* court" that considerations not expressly addressed in Rule 23 "are not categorically precluded in determining whether to certify a 23(b)(2) class."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-1304 (7th Cir. 1995) (analyzing potential impact of class certification on shared social policies as a basis to decertify a class); *Mills v. Dist. of Columbia*, 266 F.R.D. 20, 22 (D.D.C. 2010) ("Even though the proposed classes satisfy the eligibility criteria in Rule 23, the Court may nevertheless deny

class certification based on other relevant considerations," including "factors not expressly delineated in Rule 23."); *see also* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1785.2 (3d ed. updated Apr. 2023) ("[I]n exercising its discretion to certify a class action, the court may take account of considerations not expressly dealt with in Rule 23."). And because Superior Court Civil Rule 23 "is the near twin of the well-established … Federal Rule of Civil Procedure 23, it stands to reason that case law interpreting those rules will apply with equal force here." *PaineWebber R&D Partners, L.P. v. Centocor, Inc.*, 1997 WL 719096, at *4 (Del. Super. Ct. Oct. 9, 1997).

Amicus curiae Public Citizen argues that this Court should read the "may" out of Rule 23. Relying on *Shady Grove Orthopedic Associates v. Allstate Insurance Company*, 559 U.S. 393 (2010), it argues that "[t]he use of the word 'may' 'confer[s] categorical permission' for the plaintiff to bring a class action." (Brief for Public Citizen as Amicus Curiae Supporting Plaintiff-Cross-Appellant ("Public Citizen Brief") at 7 (second alteration in original).) On this view, the Court should interpret "may" to mean "must," such that any time the Rule 23(a) and (b) factors are satisfied, a trial court has no discretion to deny class certification.

While *Shady Grove* is irrelevant because the Superior Court here found that Rule 23(b)(2) was not satisfied, Public Citizen also reads far too much into *Shady Grove*. The U.S. Supreme Court subsequently made clear that *Shady Grove* does

not require that suits must proceed as class actions whenever they "meet[] the requirements of Rule 23(a) and (b)." *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1809 (2018). As the Court explained, *Shady Grove*'s holding is limited to the particular situation that case presented, "in which a Rule 23 class action could have been maintained absent a contrary state-law command." *Id.* (citation omitted). The focus of *Shady Grove* was whether a state law could statutorily limit the availability of class actions in federal diversity cases when class certification would have been appropriate under Rule 23. *Shady Grove* did not up-end trial courts' well-established discretion on matters of class certification, and did not convert the term "may" into "must."

Indeed, "[i]n the years since the Court decided *Shady Grove*, the lower federal courts have treated the case almost exclusively as a Rules Enabling Act decision and have given it little attention in the class certification analysis." Wolff, *supra*, at 1950. Multiple federal circuit courts have declined to hold that *Shady Grove* "creat[es] an absolute entitlement to proceed with a class action lawsuit" if the requirements of Rule 23 are met. *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 442 F. App'x 2, 6 (4th Cir. 2011); *In re Deepwater Horizon*, 713 F. App'x 360, 362-63 (5th Cir. 2018) (holding that *Shady Grove* did not give plaintiffs whose suits meet Rule 23 the "absolute right to file … class claims"). And no Delaware state court

has relied on *Shady Grove* to hold that trial courts lack discretion to decline to certify classes that meet the Rule 23 requirements.

"[D]iscretion in class certification—in particular, the discretion not to certify a class even though the threshold requirements of the Rule appear to be satisfied—serves a vital systemic role." Wolff, *supra*, at 1899. That discretion operates as a "safety valve" that enables courts "to avoid issuing certification orders that would undermine substantive policies or set in motion unnecessary and counterproductive remedies." *Id.* This discretion has been recognized in state and federal decisions analyzing Rule 23, and *Shady Grove* did not destroy it.

II. Whether Class Treatment Confers Additional Benefits is a Proper Consideration in the Rule 23(b)(2) Class Certification Analysis.

Class actions are founded on the "[e]quitable notions of fairness and efficiency." *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 434 (Del. 2012). As a result, "[t]he vehicle of class action litigation must ultimately satisfy practical as well as purely legal considerations." *Shook*, 386 F.3d at 973. The discretion recognized by Rule 23 permits trial courts to weigh such pragmatic factors as part of the class certification analysis.

One practical consideration that trial courts have discretion to weigh is whether class-wide relief would confer any additional benefit beyond individual relief. This factor is especially relevant in putative class actions under Rule 23(b)(2) that seek only declaratory or injunctive relief because absent class members have no opportunity to opt out of having their claims adjudicated. It is a weighty decision for a court to bind absent class members in such circumstances, and a court can properly consider the utility in doing so before taking that step. A court's declaration, for example, has value to parties and non-parties alike, and injunctive relief prohibiting or commanding that a defendant take particular actions can benefit all who interact with the defendant. Accordingly, "the vast majority of courts" accept that the specific need for class relief in a particular case is "an appropriate consideration when certifying a Rule 23(b)(2) action." 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1785.2 (3d ed. updated Apr. 2023).

For example, in *Gayle v. Warden Monmouth County Correctional Institution*, 838 F.3d 297, 310 (3d Cir. 2016), the Third Circuit held that necessity "may be considered to the extent it is relevant to the enumerated Rule 23 criteria," including the requirement that the declaratory or injunctive relief be "appropriate." It recognized that there "may be circumstances where class certification is not appropriate because in view of the declaratory … relief ordered on an individual basis, there would be no meaningful additional benefit to prospective class members in ordering classwide relief." *Id.*

Other federal courts have similarly held that it is proper to consider the potential impact (or lack thereof) of certification on the relief available to absent class members when determining whether class-wide relief is "appropriate" under federal Rule 23(b)(2). *See Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016) ("[T]he district court should []consider whether class certification [is] necessary and appropriate in this case …."); *Kansas Health Care Ass'n v. Kansas Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994) (affirming denial of class certification because "class certification is unnecessary if all the class members will benefit from an injunction issued on behalf of the named plaintiffs" (internal quotation mark and citation omitted)); *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) ("[W]hen the same relief can be obtained without certifying a class, a court may be justified in concluding that class relief is not 'appropriate.'" (internal

citation omitted)); *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (affirming district court's refusal to certify a class where "the requested injunctive and declaratory relief will benefit not only the individual appellants … but all other persons subject to the practice under attack" (citations omitted)).[3]

That trial courts have discretion to consider whether class certification confers any additional benefit does not "effectively eliminate Rule 23(b)(2)'s reference to appropriate declaratory relief," as argued by Public Citizen. (Public Citizen Brief at 2.) A trial court can always *consider* the potential benefits of a declaratory relief class and determine that class treatment is "appropriate."

For example, class certification may be appropriate in a declaratory-relief-only class if there is a significant risk that the named plaintiff's case may become moot during the pendency of the litigation, imperiling the rights of unnamed class

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[3] *See also Planned Parenthood of S. Atl. v. Baker*, 2020 WL 1434946, at *4 (D.S.C. Mar. 23, 2020) (denying motion for class certification because "relief from the individual case would 'have the same purpose and effect as a class action'" (quoting *Sandford v. R.L. Coleman Realty Co.*, 573 F.2d 173, 178 n.9 (4th Cir. 1978))); *DiFrancesco v. Fox*, 2019 WL 145627, at *3 (D. Mont. Jan. 9, 2019) (holding that because "[n]o useful need or purpose is served by certification," "[c]lass certification is inappropriate and unnecessary"); *Fish v. Kobach*, 318 F.R.D. 450, 454-57 (D. Kan. 2016) (denying class certification because the relief would flow to all potential class members and the benefits of certification were slight compared with the burdens). The Seventh Circuit is the outlier federal circuit in holding that class certification should not be refused because of lack of need. *Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979).

members with live claims. If the class is certified, the case can continue on with the substitution of a new named plaintiff. If, however, the class is not certified, then the case ends with the mooting of the individual plaintiff's case. Courts often recognize potential mootness of the named plaintiff's case as a reason why (b)(2) certification may be appropriate. *E.g.*, *Dionne*, 757 F.2d at 1356 (recognizing that (b)(2) certification may be appropriate when the individual claim might become moot); *Gayle*, 838 F.3d at 312 (same); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981) (same). It is precisely because of these case-specific circumstances that trial courts have (and need) the discretion to consider the propriety of class certification.

The Superior Court properly weighed the practical considerations and specific circumstances of this case in its class certification analysis. Plaintiffs sought only declaratory relief regarding an explanation of benefits code that Defendants stopped using before this case began. *First State Orthopaedics*, 2022 WL 18228287, at *1, 4. The Superior Court ruled on the merits, declaring that the code did not comply with the Delaware Worker's Compensation Law simultaneously with its class certification decision. *Id.* at *10. That decision "binds the parties" and "bind[s] Defendants even [though] no class [wa]s certified." *Id.* at *3-4. Defendants also signaled that they had no intention of reinstating their use of the code by offering "to enter a consent judgment that would prevent them from using [the code] in the

future." *Id.* at *7. Exercising its discretion under Rule 23 to consider such practical factors, the court found under that these circumstances, class certification was not appropriate under Rule 23(b)(2). *Id.* at *3-4.

The Superior Court's decision is analogous to the decision in *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973). There, the Second Circuit affirmed the denial of class certification under Rule 23(b)(2) in a case challenging an allegedly discriminatory policy. *Id.* at 1257, 1262. The court held that the district court's judgment ran "to the benefit not only of the named plaintiffs but of all others similarly situated"; the defendant "ha[d] made clear that it understands the judgment to bind it with respect to all claimants"; and the defendant "withdrew the challenged policy" before the entry of judgment and "stated it did not intend to reinstate the policy." *Id.* at 1261 (citations omitted). For the same reasons, the Superior Court's decision to deny class certification here was well within the scope of its discretion under Rule 23.

Rule 23 preserves the discretion of trial courts considering how to handle representative litigation. Under longstanding precedent, this discretion includes the ability to weigh practical considerations, such as whether class-wide relief would confer meaningful benefit beyond individual relief. Because the Superior Court's decision falls within the heartland of both principles, the Court should affirm.

III. Stripping Delaware Trial Courts of Discretion to Consider Whether Certification Is Appropriate Could Make Delaware a Hotbed for Declaratory-Relief-Only Class Actions.

Reversing the Superior Court's certification decision would "effectively negate the discretion of a [trial] court to certify a class" in Delaware. *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 404 (6th Cir. 1980). If the trial court could not exercise its discretion to decline certification in this case—where the only relief sought was declaratory, the offending conduct ended before the case began, and the court entered a declaration that bound the defendant—one wonders what circumstances would permit a court to do so.

A decision effectively revoking the discretion of Delaware trial courts to consider whether class treatment is necessary and appropriate risks a tidal wave of declaratory-relief class actions. Any plaintiff dissatisfied with a policy of a company incorporated in Delaware could conceivably initiate a declaratory-relief-only class action in a Delaware trial court challenging the policy. Without the safety valve of trial court discretion to deny class certification, plaintiffs in such cases would be virtually guaranteed class certification and its associated trappings. Not only would that result unduly burden Delaware courts, it would be disruptive to the two-thirds of Fortune 500 companies that are incorporated in Delaware and subject to personal jurisdiction in the state. *See* Delaware Division of Corporations, *2021 Annual Report*, *available at* https://corpfiles.delaware.gov/Annual-Reports/Division-of-

Corporations-2021-Annual-Report.pdf.

Among the incentives to bring such suits is the potential for awards of attorneys' fees. As both First State Orthopaedics, P.A. and its amicus Public Citizen recognize, the prospect of attorneys' fees in class actions is a driver of such suits. (Appellee/Cross-Appellant Br. at 39-41; Public Citizen Brief at 20.) While there are certainly class actions certified under Rule 23(b)(2) that result in appreciable benefits for the class beyond what would have been provided by an individual judgment, there are many others (like this case) in which class-wide relief would provide no additional benefit to any person other than the plaintiffs' attorney. Among the reasons that it is appropriate for courts to consider this factor as part of class certification decisions is to avoid the prospect of attorneys' fees where counsel has provided no meaningful benefit to class members.

The Seventh Circuit's decision in *In re: Subway Footlong Sandwich Marketing and Sales Practices Litigation*, 869 F.3d 551 (7th Cir. 2017), provides a good example of a court's use of Rule 23 to avert this problem. Plaintiffs sued under state consumer protection laws, seeking damages, injunctive relief, and class certification because Subway's "Footlong sandwich" was only eleven inches long. *Id.* at 552, 554. The parties reached a class settlement pursuant to Rule 23(b)(2), under which "Subway agreed to implement certain measures to ensure, to the extent practicable, that all Footlong sandwiches are at least 12 inches long," but the

settlement acknowledged that "even with these measures in place, some sandwich rolls will inevitably fall short due to the natural variability in the baking process." *Id.* at 553. The proposed settlement included hundreds of thousands of dollars for class counsel. *Id.* After the district court approved the class settlement, the Seventh Circuit reversed because class relief did "not benefit the class in any meaningful way." *Id.* at 557. Rather, because the class settlement benefited only class counsel by way of attorneys' fees, the court held "the class should not have been certified and the settlement should not have been approved." *Id.* (citation omitted). As the court summarized, a class action that does not provide meaningful benefits for the class and '"yields [only] fees for class counsel' is 'no better than a racket' and 'should be dismissed out of hand.'" *Id.* at 553 (alteration in original) (quoting *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016)).

Reversing the Superior Court's certification decision would invite many more such cases in Delaware. Class counsel could file declaratory-relief-only class actions, including demands for attorneys' fees, and Delaware courts would have no discretion to consider the benefits of certification in the given circumstances. That is not—and should not be—the law. Rule 23 and the case law applying it give trial courts the discretion to deny class certification in putative (b)(2) cases when they deem class treatment inappropriate because it would provide no meaningful benefit. The Court should reject the invitation to deprive Delaware trial courts of their ability

to weigh such practical considerations to arrive at sensible results. "It would be worse in the long run to maim or kill … Rule [23] with universal but improvident kindness than to limit on a case by case basis within sound judicial discretion its application to situations offering sensible results." *Wilcox v. Com. Bank of Kansas City*, 474 F.2d 336, 349 (10th Cir. 1973).

[SIGNATURE PAGE FOLLOWS.]

CONCLUSION

For the forgoing reasons, the Chamber urges the Court to affirm the Superior Court's decision denying class certification.

Dated: July 18, 2023

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CERTIFICATE OF COMPLIANCE UNDER RULE 13(d)(ii)

Counsel for Amici Curiae the Chamber of Commerce of the United States of America and the Delaware State Chamber of Commerce hereby certifies:

1. This brief complies with the typeface requirement of Rule 13(a)(1) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitations of Rule 14(d)(1) and Rule 28(d) because it contains 4,102 words, which were counted in Microsoft Word 2016.

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