No. 13-138

In the Supreme Court of the United States

BSH HOME APPLIANCES CORPORATION,

Petitioner,

v.

SHARON COBB, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WHIRLPOOL CORPORATION AND SEARS, ROEBUCK AND CO. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Pursuant to Rule 37, amici Whirlpool Corporation ("Whirlpool") and Sears, Roebuck and Co. ("Sears") respectfully submit this brief in support of petitioner BSH Home Appliances Corporation ("BSH").[1]

Whirlpool, Sears, BHS, and other manufacturers and retailers of front-loading washing machines sold in the United States are defendants in dozens of similar product liability suits around the country alleging that some washers produce moldy odors. In response to class certification motions, Whirlpool and Sears introduced evidence showing that only a small proportion of washer owners reported mold or odors, that over the proposed class period the designs of the machines, as well as the instructions and disclosures given to owners, differed materially across the numerous models at issue, and that buyers treated their washers in materially different ways, including large variations in the extent to which they followed Whirlpool's use and care instructions regarding odor prevention.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' consents to the filing of this brief have been filed with the Clerk.

Despite the highly disparate experiences of washer owners, the Sixth and Seventh Circuits each held that a sweeping Rule 23(b)(3) class should be certified. Petitions for certiorari were then filed by both Whirlpool (No. 12-322) and Sears (No. 12-1067). Last Term this Court granted certiorari in both cases, vacated the courts of appeals' decisions, and remanded for reconsideration in light of *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013). The granted petitions presented the same issues that are now encompassed in BSH's first question presented—whether a class may be certified under Rule 23(b)(3) even though most class members have not been injured and proof of injury is highly individualized.

In the *Whirlpool* case, a two-judge panel of the Sixth Circuit has reaffirmed on remand its holding that class certification is proper. In the *Sears* case, the Seventh Circuit has followed the Sixth Circuit's lead and reinstated its prior judgment. Whirlpool and Sears will file timely certiorari petitions in early October seeking review of these erroneous decisions. Amici therefore have a vital and immediate interest in this Court's resolution of the *BSH* petition.

SUMMARY OF ARGUMENT

BSH's petition for certiorari presents important questions that require resolution by this Court. In particular, whether a class may be certified when most of its members have suffered no injury and whether the Rule 23(b)(3) predominance requirement is satisfied where resolution of product claims depends on highly individualized inquiries, are critical questions of immense importance to class certification law, as to which the courts of appeals are in disarray.

Nevertheless, the absence of an appellate ruling on class certification in *BSH* under Rule 23(f) makes the case a less than ideal candidate for plenary review. *Whirlpool* v. *Glazer* and *Sears* v. *Butler* sharply present these same questions and provide better vehicles for review. In those cases, the courts of appeals' Rule 23(f) decisions already have been reviewed and GVR'd by this Court in light of *Comcast*; the courts of appeals on remand each have reaffirmed their original erroneous decisions in extensive opinions; and certiorari petitions will be filed in early October (in time for consideration at a January conference and argument this Term if certiorari is granted).

Amici believe the most appropriate course would be for this Court either to grant BSH's petition, vacate the Ninth Circuit's decision, and remand for reconsideration in light of *Comcast* and *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), or alternatively to hold BSH's petition for consideration alongside the petitions that will be filed in *Whirlpool* v. *Glazer* and *Sears* v. *Butler* in early October.

ARGUMENT

1. Whirlpool, like petitioner BSH and other appliance manufacturers, is the defendant in putative class actions alleging that high-efficiency front-loading clothes washers sometimes emit moldy odors due to an accumulation of laundry residue and are therefore defective, and that defendants failed to disclose this defect. Ten such actions against Whirlpool have been consolidated in district court in Ohio, involving more than 4,000,000 buyers, making the consolidated litigation one of the largest class proceedings ever maintained. In *Glazer*, the bellwether case

in that consolidated litigation, two plaintiffs seek to represent some 200,000 current Ohio residents who bought any of 21 models of Whirlpool's Duet washers ("Washers") since 2001. They allege negligent design, failure to warn, and tortious breach of warranty.

The district court certified a Rule 23(b)(3) class in that case. *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 2010 WL 2756947 (N.D. Ohio July 12, 2010). After granting review under Rule 23(f), the Sixth Circuit affirmed. *Glazer* v. *Whirlpool Corp.*, 678 F.3d 409 (6th Cir. 2012).[2]

Whirlpool petitioned for certiorari, asking this Court to consider whether a Rule 23(b)(3) class may be certified (1) when most class members have not been harmed and could not sue on their own behalf, (2) without resolving factual issues that bear on the requirements of Rule 23, and (3) when factual dissimilarities among putative class members make individual issues predominant. This Court summarily granted certiorari, vacated the Sixth Circuit's decision, and remanded for reconsideration in light of its ruling in *Comcast*. *Whirlpool Corp.* v. *Glazer*, 133 S. Ct. 1722 (2013).

On remand, the Sixth Circuit once again upheld class certification. 2013 WL 3746205 (6th Cir. July 18, 2013). The opinion of Judges Stranch and Martin, sitting as a two-judge panel, is rife with outcome-determinative legal errors, including rulings flatly inconsistent with this Court's precedents.

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[2] The district court and initial Sixth Circuit opinions are set forth at Pet. App. 24a and 1a respectively, *Whirlpool Corp.* v. *Glazer*, No. 12-322.

While trumpeting its "rigorous analysis," the Sixth Circuit in fact merely rubber-stamped its prior ruling in a new opinion filled with serious errors.

- The Sixth Circuit described *Comcast*, cited by this Court in the remand order as a decision requiring reconsideration, as having "limited application," and treated it as largely irrelevant in Whirlpool's case, because it regarded *Comcast* as narrowly limited to damages issues. 2013 WL 3746205, at *17.
- Although this Court remanded only in light of *Comcast*, the Sixth Circuit treated *Amgen Inc.* v. *Connecticut Retirement Plans*, 133 S. Ct. 1184 (2013)—a securities case concerning the role of materiality and the securities-specific presumption of reliance in the class certification inquiry—as the relevant precedent. 2013 WL 3746205, at *15-*16.
- The court of appeals glossed over a host of individualized issues that would predominate at trial—including key issues of causation and injury—by misconstruing applicable state law, manipulating the level of generality at which the issues were described, and failing to acknowledge, much less resolve, disputes as to facts critical to the Rule 23 inquiry.
- The Sixth Circuit relied on Judge Posner's vacated opinion in *Sears* conflating injury with amount of damages and held that the abstract question whether many different Washer models were "defective" is a predominant common question. *Id.* at *11.

- The Sixth Circuit relied on "economies of time and expense" and the unlikelihood that Washer buyers would file individual actions to water down the predominance requirement, in conflict with *Comcast*, *American Express*, 133 S. Ct. at 2310-2311 & n.4, and *Amchem Prods.* v. *Windsor*, 521 U.S. 591, 615, 622-624 (1997). 2013 WL 3746205, at *18.
- The court of appeals again followed California law to support the incorrect proposition that Ohio recognizes a premium price theory. *Id.* at *14. And in violation of *Comcast*, it held that premium price theory is sufficient to create injury questions common to the class, despite the lack of any evidence that all Washer buyers paid a premium price and despite the fact that most *never* experienced *any* moldy odor.

2. Sears, Roebuck has been sued for breach of six States' warranty laws on behalf of all owners of Kenmore-brand front-loading washing machines manufactured by Whirlpool and sold in those States since 2001. Plaintiffs allege the same musty odors at issue in *Whirlpool*. In addition, plaintiffs allege that during a four-year period some washers had a manufacturing defect in the electronic central control unit ("CCU") that caused false error codes. It is undisputed that most class members experienced neither of these problems.

The district court in *Sears* denied certification of the odor class but certified the CCU class. In an opinion by Judge Posner, the Seventh Circuit reversed as to the CCU class and affirmed as to the odor class. It held class adjudication to be "the more efficient pro-

cedure," based on the single supposedly common question whether there is a "defect," despite a plethora of individual issues determinative of liability and damages. "Predominance," the court held, is solely "a question of efficiency."[3]

This Court in *Sears, Roebuck and Co.* v. *Butler*, 133 S. Ct. 2768 (2013), as in *Whirlpool*, GVR'd in light of *Comcast*. The Court granted certiorari on questions (1) whether breach of warranty claims may be certified where most putative class members did not experience the alleged defect, and (2) whether the supposed efficiency of class actions overrides the requirement that common issues predominate over individual ones that are rife in these cases.

On remand, the Seventh Circuit "reinstated" its prior judgment authorizing class certification. 2013 WL 4478200, at *6 (Aug. 22, 2013). The opinion by Judge Posner is flatly inconsistent with Rule 23 and this Court's precedents. For example:

- The Seventh Circuit, despite the GVR in light of *Comcast*, held *Sears* "a very different case from *Comcast*" because the class here was certified for liability, not amount of damages, and it speculated that this Court GVR'd merely to allow Sears to submit "amended argument" as to predominance. *Id.* at *4.
- The court of appeals reaffirmed that "efficiency is a proper basis for class certification," because the dissent in *Comcast* em-

[3] The district court and initial Seventh Circuit opinions are set forth at Pet. App. 9a and 1a respectively, *Sears, Roebuck and Co.* v. *Butler*, No. 12-1067.

braced that view and "the majority opinion does not contradict" it. *Id.* at *3.

- The court of appeals lauded the "efficient procedure" whereby—after a finding of liability to a class full of buyers who never experienced moldy odors—the case "would probably be quickly settled" using "a schedule of damages." *Id.* at *2.
- At odds with *Wal-Mart Stores* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011), the Seventh Circuit held that "'Rule 23(b)(3) does not impose'" on plaintiffs the "'heavy burden'" of showing "'common answers'" rather than simply "'common questions.'" *Id.* at *4 (quoting *Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 819 (7th Cir. 2012)).
- The court of appeals manufactured "a single, central, common issue of liability" by stating the issue at such a high level of generality as to be meaningless here—"whether the Sears washing machine was defective," glossing over design and literature changes and variant consumer conduct that fragment the issue of liability. 2013 WL 4478200, at *5.
- Conceding "[c]omplications" caused by these "design changes" and differences in six "separate state warranty laws," the court of appeals held that these disparities "can be handled by the creation of subclasses" (*ibid.*)—contradicting Rule 23's bar on "conditional" classes and inviting the excessive "Balkanization of the class action" which other circuits have disapproved. *In*

re Cendant Corp. Sec. Litig., 404 F.3d 173, 202 (3d Cir. 2005).

- The Seventh Circuit failed to make any record-based "qualitative assessment" of predominance based on how claims and defenses would be tried, substituting judicial fiat for rigorous analysis. 2013 WL 4478200, at *4.

3. Following the Sixth and Seventh Circuits' approach, few if any products liability or other cases would not proceed as class actions. Yet this Court explained in *American Express*, 133 S. Ct. at 2310, that "Rule [23] imposes stringent requirements for certification *that in practice exclude most claims*" (emphasis added). Whirlpool's and Sears' certiorari petitions will show that, as in *American Express*, the courts of appeals' failures to heed the message of a GVR warrant further review by this Court.

As reflected in the grants of certiorari in *Whirlpool* and *Sears*, the issues presented in these cases are of immense importance not only to the dozens of front-loading washer class actions pending against manufacturers and retailers, but also to Rule 23(b)(3) class actions generally. Accordingly, commentators roundly criticized the courts of appeals' decisions in both cases and urged this Court's review. See, *e.g.*, Editorial, *Classy Action at the High Court*, WALL ST. J., Mar. 28, 2013, at A14 (criticizing the Sixth Circuit's "wild expansion of liability" in *Whirlpool* and urging this Court to grant certiorari to "make it clear [it] expect[s] other federal courts to honor [its] precedent").[4]

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[4] See also, *e.g.*, Editorial, *Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case*, WALL ST. J., Oct.

In addition, numerous amici described the exceptional public importance of rejecting the Sixth and Seventh Circuits' destructive approach to class certification. *E.g.*, Am. Br. of U.S. Chamber of Commerce, Business Roundtable, and National Ass'n of Manufacturers at 3, 13 (Sept. 28, 2012) (No. 12-322) (warning of "massive class-action complaints alleging injuries from a product" that "has not in fact harmed (or as here, caused dissatisfaction in) more than a fraction of those on the plaintiffs' side of the caption," which would "dramatically increase the class-action exposure faced by *amici*'s members"); Am. Br. of Prod. Liab. Advisory Council at 4 (Sept. 28, 2012) (No. 12-322) (predicting "a mounting horde of purported 'class' litigation premised on alleged defects that affect but a handful of consumers," with the "inevitable increase in the cost of doing business" that would entail—costs that "would be passed along to consumers, leaving only plaintiffs' lawyers to benefit"); Am. Br. of Pac. Legal Found. at 7-11, 17 (Oct. 2,

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9, 2012, at A18; J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, WASH. TIMES, Nov. 15, 2012, at B4; Michael Hoenig, *Supreme Court Review Sought on Crucial Class Action Issues*, N.Y.L.J., Dec. 12, 2012; Editorial, *Reining in Class Action: The Supreme Court Applies A Smell Test to Jackpot Justice*, WASH. TIMES, Mar. 28, 2013, at B2; Editorial, *Supreme Court Decision Pending on Class Actions*, INVESTOR'S BUS. DAILY, May 28, 2013, at A12; Theodore H. Frank, *The Supreme Court Must Stop The Trial Lawyers' War On Innovation*, FORBES, May 24, 2013; Editorial, *Jackpot Justice: The Supreme Court Gets Another Chance To Crack Down*, WASH. TIMES, May 28, 2013, at B2; Greg Ryan, *By Ignoring High Court, 6th Circ. Risks 2nd Whirlpool Review*, LAW360, July 18, 2013, http://www.law360.com/articles/458419; Cory Andrews, *In Circuit Courts, SCOTUS's* Comcast *Ruling Doesn't Make It Through The Spin Cycle*, FORBES, Aug. 26, 2013 (*Whirlpool* and *Sears* "provide the Supreme Court ample opportunity to reinforce and expound on the holding in *Comcast*").

2012) (No. 12-322) (Sixth Circuit's decision violated Rules Enabling Act and Due Process; "by combining any legitimate claims with tens of thousands of uninjured plaintiffs," the ruling "bloats any properly joined or representative legal action" and allows class counsel to operate as "'bounty hunters'"); Am. Br. of Prod. Liab. Advisory Council at 5 (Mar. 29, 2013) (No. 12-1067) (the Seventh Circuit's "pliable approach to predominance" effectively "eliminat[ed] the substantive tort requirement of injury solely by dint of the class device"); Am. Br. of DRI at 2 (Apr. 1, 2013) (No. 12-1067) (the Seventh Circuit's ruling "will have a profound effect on business and individuals who may be subject to [multistate class actions] because it authorizes a trial court to certify a proposed class under Rule 23(b)(3), even where a choice-of-law analysis would reveal that individual issues of fact and law predominate"); Am. Br. of U.S. Chamber of Commerce, Retail Litigation Center, Business Roundtable, and National Ass'n of Manufacturers at 21 (Apr. 1, 2013) (No. 12-1067) (the *Sears* decision presents "an unusually good vehicle for addressing" critically important Rule 23 questions).

Although the *BSH* petition raises similar issues, the Ninth Circuit did not grant Rule 23(f) review in that case, so there is no Ninth Circuit opinion on which to focus this Court's analysis. The Ninth Circuit decided nothing in *BSH* other than to deny discretionary review. By contrast, the Sixth and Seventh Circuits have issued full pre- and post-GVR opinions.

Because this Court has considered these cases already and found them worthy of certiorari, and because the extensive opinions of the Sixth and Seventh Circuits sharpen the issues for review, these cases are better vehicles than *BSH* for plenary re-

view. And because the *Whirlpool* and *Sears* petitions will be filed within weeks, awaiting these more developed cases entails no appreciable delay. See Eugene Gressman *et al.*, SUPREME COURT PRACTICE 504 (9th ed. 2007) (Court may await "other cases in the pipeline [that] present better vehicles to resolve the issue"). *BSH* can be GVR'd as the Court found appropriate in *Whirlpool* and *Sears*, or held for a short time until the Court considers the petitions in those cases. Indeed, because the district court in *BSH* expressly relied on the now-vacated decision in *Whirlpool* (see Pet. App. 26a-27a), a grant, vacate, and remand in light of this Court's intervening decisions in *Comcast* and *American Express*, and GVRs in *Whirlpool* and *Sears*, may be especially appropriate.

CONCLUSION

Because the Sixth and Seventh Circuits' decisions in *Whirlpool* and *Sears* present better vehicles for plenary review of the important questions presented, the Court may wish to hold the *BSH* petition until it considers the certiorari petitions in those cases, or alternatively grant, vacate, and remand in *BSH* in light of *Comcast* and *American Express*.

Respectfully submitted.

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