No.

In the Supreme Court of the United States

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiffs filed class action breach of warranty claims on behalf of buyers of front-loading washing machines sold by Sears, Roebuck in six states. They allege a design defect that causes musty odors and a manufacturing defect that produces false error codes, even though it is undisputed that most washers never developed either problem. The Seventh Circuit initially ordered classes certified under Rule 23(b)(3) based on a single abstract question: whether there is a defect. This Court granted certiorari, vacated, and remanded in light of *Comcast*. The Seventh Circuit now has "reinstated" its prior decision, holding that a class trial on the purportedly common "defect" issue is the "efficient procedure." The court of appeals swept aside a multitude of individual liability and damages issues as irrelevant to Rule 23's predominance requirement. The questions presented are:

1. Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported "efficiency" of a class trial on one abstract issue, without considering the host of individual issues that would need to be tried to resolve liability and damages and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.

2. Whether a product liability class may be certified where it is undisputed that most members did not experience the alleged defect or harm.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Sears, Roebuck and Co. is a subsidiary of Sears Holding Corporation, which is a publicly held company that owns 10% or more of Sears, Roebuck and Co.'s stock.

Plaintiffs-Respondents are Larry Butler, Joseph Leonard, Kevin Barnes, Victor Matos, Alfred Blair, and Martin Champion.

The contemporaneously filed petition for certiorari to the Sixth Circuit in *Whirlpool Corporation v. Glazer* presents similar issues arising in class actions involving Whirlpool-manufactured front-loading washing machines.

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PETITION FOR A WRIT OF CERTIORARI

Sears, Roebuck and Co. ("Sears") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion on remand in light of *Comcast Corp. v. Behrend* (App., *infra*, 1a-12a) is reported at 2013 WL 4478200. The Seventh Circuit's initial opinion (App., *infra*, 14a-21a), which was vacated and remanded by this Court, is reported at 702 F.3d 359. The district court's order granting in part and denying in part plaintiffs' motion for class certification (App., *infra*, 22a-35a) is unpublished. The district court's order denying reconsideration (App., *infra*, 36a-41a) is unpublished.

JURISDICTION

The Seventh Circuit's judgment was entered on August 22, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Relevant portions of Federal Rule of Civil Procedure 23 are reproduced at App., *infra*, 44a-47a.

STATEMENT OF THE CASE

Treating this Court's GVR in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), as a pointless exercise, the Seventh Circuit reinstated its vacated judgment requiring certification of two Rule 23(b)(3) class actions brought on behalf of 800,000 purchasers of front-loading washing machines manufactured by Whirlpool and sold by Sears in six states (the "Washers"). App., *infra*, 1a-12a. One class action

addresses the purportedly common question whether 27 different Washer models sold since 2001 have a design defect that in a few instances caused musty odors. The other addresses the purportedly common question whether Washers sold between 2004 and 2007 have a manufacturing defect that in a few instances caused false error codes. Plaintiffs allege that Sears breached written and implied warranties under the laws of the six states. Copycat class actions covering 1.7 million buyers in other states have been filed.

In an opinion authored by Judge Posner, the Seventh Circuit called this "a very different case from *Comcast*." App., *infra*, 8a. "Unlike the situation in *Comcast*," the court of appeals wrote, "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis." *Id.* at 7a. The Seventh Circuit's attempt to salvage its original judgment rests on mischaracterizations of *Comcast*'s holding and disregard of this Court's other recent class certification precedents.

Under *Comcast*, the need for individual injury and damages inquiries "will inevitably overwhelm questions common to the class," precluding class certification. *Comcast*, 133 S. Ct. at 1433. *Comcast* cannot be dodged by attributing all damages here to supposed classwide defects. Only a small minority of Washer buyers experienced moldy odors or false error codes. And the causes of those purported harms turn on individual model designs, laundry habits, user environments, and sporadic manufacturing deviations—generating the array of "nearly endless" "permutations" that foreclosed class certification in *Comcast*. *Id.* at 1434-1435.

In approving certification based on the abstract question of "defect," the Seventh Circuit also cast aside this Court's instruction that "[w]hat matters to class certification is not the raising of common 'questions'—even in droves—but rather the capacity of a classwide proceeding to generate common *answers*." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Instead, according to the court of appeals, "Rule 23(b)(3) does not impose" the "heavy burden" of showing "common answers." App., *infra*, 10a. Relying on that holding—which flatly contradicts *Dukes*—and ignoring design differences among the 27 Washer models, a host of additional individualized issues, and differences in state laws (*id.* at 11a), the court vaulted over enormous variation in claims and defenses.

According to the Seventh Circuit, common questions predominate because certifying a class based on a "single, central, common issue of liability," followed by a "quic[k] settle[ment]" based on an agreed "schedule of damages," supposedly would be "efficient." *Id.* at 4a, 10a-11a. But that would authorize certification in virtually *every* case. This Court has squarely rejected the notion that predominance is simply "a question of efficiency" (*id.* at 7a) and that class actions are appropriate whenever "the costs and distraction" of individual litigation would deter putative class members. *Id.* at 10a; see *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-2311 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Amchem Prods. v. Windsor*, 521 U.S. 591, 623-624 (1997).

The proper Rule 23(b)(3) analysis—which the Seventh Circuit never performed—requires a record-based assessment of whether common issues in the

aggregate predominate over individual questions in the aggregate. Such an analysis here shows that any common questions could never predominate over individual questions of merchantability, breach, injury, causation, customer use, warranty service, and damages. Litigation of the liability issues underlying the class odor claims would quickly degenerate into a multitude of proceedings to determine which of the 27 models (if any) have a defective design, which class members bought those models, whether they followed maintenance instructions, whether they experienced moldy odors, whether any moldy odors resulted from laundry habits or Washer environment, and whether the buyer timely requested and received adequate warranty service. If classwide liability were found, each class member then would have to prove damages traceable to an unremedied defect.

Error code claims likewise would fragment into machine-specific evaluations of whether the buyer's control-unit soldering was cracked, whether the buyer experienced false error messages as a result, whether any temporary malfunction rendered the machines unfit for their ordinary purpose, whether the buyer requested and received adequate warranty service, and what damages (if any) resulted.

The Seventh Circuit's erroneous class certification ruling urgently calls for plenary review. Its interpretation of Rule 23's commonality and predominance requirements conflicts directly with this Court's *Comcast*, *Dukes*, and *Amchem* decisions. And its certification of classes filled with uninjured buyers flouts the rule that class members must "have suffered the same injury" (*Dukes*, 131 S. Ct. at 2551), while deepening a mature circuit split over whether such classes can be certified. The court of appeals'

lax approach to Rule 23 would not "in practice exclude most claims" (*Am. Express*, 133 S. Ct. at 2310), but rather would allow certification of all claims involving mass-produced consumer products.

This case is at the crest of a flood of similar class actions asserting claims by tens of millions of buyers against every front-loading washer manufacturer. See *Whirlpool Corp. v. Glazer*, Cert. Pet. 5-6 & n.2 (filed Oct. 7, 2013) ("*Whirlpool* Cert. Pet."). Allowing the Seventh Circuit's decision—and the similar Sixth Circuit decision against Whirlpool—to stand would heavily influence dozens of cases still in the lower courts and pressure the entire industry into black-mail settlements unrelated to the merits. The harm would not be limited to appliance manufacturers and retailers. The Seventh Circuit's decision opens the door to class actions based on any mass-produced product's failure to meet expectations of a handful of consumers, no matter how few other buyers had the same problem. In the Seventh Circuit's view, it is enough that "whether the product is defective" is a common question—even if stated at such a high level of generality as to obscure a multitude of individual liability inquiries necessary to resolve even a single buyer's claim.

The Seventh Circuit's approach allows aggregation of disparate claims into a hodgepodge proceeding that no manufacturer or retailer could possibly defend. The risks of a trial with massive classes, no need to prove the elements of each buyer's claims, and no opportunity to present individual defenses will force settlements resulting in a windfall to uninjured plaintiffs and their lawyers. Consumers inevitably will bear the costs of these suits. This Court should step in now to ensure that certification

is reserved for claims that can be resolved *fairly* on a classwide basis.

A. Factual Background

In 2001, Whirlpool began manufacturing high-efficiency front-loading Kenmore-branded clothes washers exclusively for resale by Sears ("Washers"). D231-1 ¶ 7.[1] Sears issued warranties for these Kenmore appliances. D231-3 at 4; D231-4 at 50. Year after year, *Consumer Reports* ranked the Washers among the best and most reliable, finding that they surpass top-loading washers under many performance criteria. D231-2 ¶ 27.

Plaintiffs nonetheless allege that all these Washers have a design defect that causes some of them to emit moldy odors. They also allege a manufacturing defect in some central control units of some Washers that can cause false error messages and temporarily interrupt operation. Plaintiffs assert claims for breach of written and implied warranties under the laws of California, Illinois, Indiana, Kentucky, Minnesota, and Texas on behalf of all Washer buyers in those states. D207 at 8.

1. *The Musty Odor Class*

On their odor claims, plaintiffs moved to certify a class of all residents of the six states who bought any of 27 different Washer models sold since 2001. D206 at 2; D207 at 8. Plaintiffs allege that because the Washers use significantly less water than top-loading washers, are sealed to prevent leaks, have interior surfaces that can capture residue, and do not "self-clean," they accumulate too much laundry

[1] "D" refers to district court docket numbers.

residue or "biofilm," which *all* washers accumulate and which can produce a moldy odor. D207 at 12-19.

The record shows that class members bought Washers differing fundamentally in design and relevant features. D231-2 ¶ 9. More than a dozen times between 2003 and 2009, as Whirlpool and Sears acquired information regarding biofilm and odors, Whirlpool made design changes and Sears and Whirlpool jointly revised the relevant use-and-care instructions. See *Whirlpool* Cert. Pet. 8-10. The design changes included eliminating residue collection points on components that plaintiffs' expert opined were central to the "defect" (D208-3 at 9) and adding a self-cleaning cycle to remove biofilm. D231-8 ¶ 41(B)-(G), (J); D231-9 at 71-75. Sears advised owners to take simple maintenance steps to prevent excessive biofilm and odors, such as using only high-efficiency ("HE") detergent, leaving the door ajar after use, and running a monthly self-cleaning cycle. D231-2 ¶¶ 14-19. Some models introduced features to further limit biofilm, including mechanisms that clean interior surfaces. D231-8 ¶ 42. Plaintiffs' engineering expert conceded that some of these changes likely reduced biofilm buildup. D231-12 at 13-14, 23. In fact, they cut the already low rate of odor reports in half. D231-13 at 6, 10-12.

Plaintiffs' engineering expert also admitted that all washing machines—top-loading and front-loading—accumulate biofilm over time, and that the *amount* "depends on the use and habits" of "the consumer." D231-12 at 7-8, 11, 21. Plaintiffs acknowledged treating their Washers in very different ways and failing to comply, or complying in different degrees, with Sears' odor-prevention and remedy instructions. D230-1 § III; D230-2 ¶¶ 13-19.

Other Washer buyers attested to similarly disparate laundry habits. D231-23 at 137-148; D231-24 at 43-51; D231-25 at 44-47.

It is undisputed that four of the six plaintiffs and most other buyers have not experienced *any* moldy odor problem. Sears' field data show that only 0.37% of all U.S. owners reported any mold or odor problem in the first year of service. D231-13 ¶¶ 10-11 & Table 1. Sears' service data likewise show that over 95% of Washer buyers who bought Sears' five-year extended service plan never reported any mold or odor. *Id.* ¶ 13 & Tables 2-3. *Consumer Reports* data similarly show that less than 1% of all surveyed Washer owners reported any odor during the first four years of service. See App., *infra*, 49a, 52a (reporting rate of problems "caused by mold or mildew"); D231-2 ¶ 28; D231-7 at 5, 8.

Only two named plaintiffs—Leonard and Blair—claim they experienced any moldy odor, and neither contacted Sears or requested warranty service. D230-1 §§ IV(A), (E), VII(A), (E). The other four named plaintiffs used their Washers for five years or more without odor problems. *Id.* § IV(B)-(D), (F). Other Washer purchasers have attested that they too never experienced any musty odor or that all odor problems ended quickly once they followed the use and care instructions. D231-23 at 138-148; D231-24 at 44-51; D231-25 at 44-47.

2. *The Control Unit Class*

On their control unit claims, plaintiffs sought certification of a class of residents of the six states who bought 2004-2007 model-year Washers. D207 at 35-36. They allege that a manufacturing flaw in the assembly of some control units resulted in cracked

solder pads that could lead to false error codes that temporarily stop the Washer. *Id.* at 31-32.

But this manufacturing flaw was sporadic—caused by the errors of individual assembly operators that did not affect the vast majority of control units. D231-15 ¶¶ 17-20. A machine-specific engineering analysis is required to determine whether cracked solder pads are present in any given unit and whether any "false" error code was caused by the alleged defect. *Id.* ¶¶ 9, 11-13, 18. During the putative class period, manufacturing and design changes eliminated this assembly error problem. *Id.* ¶¶ 7-8, 16, 22.

For Washers sold in 2004 and 2005, the complaint rates for *all* error codes (not just those related to the alleged defect) were 4.9% and 6.1%, respectively. D231-19 ¶ 6 & Table 2. This dropped to 1.4% in 2006 and 0.8% in 2007. *Ibid.* And of the few buyers who experienced this problem, many asked for and received free warranty repairs. The plaintiffs who contacted Sears within the warranty period have conceded that they received free repairs that eliminated the false error codes. D230-1 §§ VI, VII.

B. The District Court's Class Certification Rulings

The district court denied class certification on the odor claims. App., *infra*, 22a-35a. The court ruled that plaintiffs did not satisfy the Rule 23(b)(3) predominance requirement because they failed to show that common evidence could prove that all Washers were defective. App., *infra*, 32a-33a. The court found that because the different Washer models incorporated various biofilm-limiting designs and features over time, plaintiffs' claims presented "questions

whose answers will differ from model to model." *Id.* at 32a. The district court also explained that "Sears will raise in its defense issues that are not common to all the models." *Id.* at 39a.

The district court certified the control unit class, ruling that "the individual issues identified by Sears do not outweigh the common issues raised by this class." App., *infra*, 34a. The court did not identify the elements of plaintiffs' warranty claims or compare common and individual issues. And it gave no weight to unrefuted evidence that the vast majority of class members never had an error code problem and that only individual engineering analyses could distinguish between "false" and "true" error codes. *Ibid.*

C. The Seventh Circuit's Initial Class Certification Ruling

The Seventh Circuit ruled that both classes should be certified. "Predominance," Judge Posner wrote, "is a question of efficiency." App., *infra*, 17a. On that premise, the court ordered class certification for both claims because "[a] class action is the more efficient procedure for determining liability and damages in a case such as this involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit." *Ibid.*

Thus, for the odor claims, it was enough that "[t]he basic question in the litigation—were the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class," even though "*the answer may vary with the differences in design*." App., *infra*, 17a (emphasis added). The court dismissed the need for

highly individualized inquiries, calling it "an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears." *Id.* at 18a.

The court also brushed aside the fact that only a small minority of the class had experienced moldy odors by speculating that two or three of the relevant states may allow claims based on unmanifested harms. *Ibid.* Finally, the court deemed irrelevant the acknowledged fact that the amount of damages could not be proven classwide on an assumption that "the parties would agree on a schedule of damages"—that is, Sears would waive its constitutional right to a jury trial. *Id.* at 17a-18a.

For the control unit claims, the court of appeals likewise concluded that it would be "more efficient for the question whether the washing machines were defective" to be "resolved in a single proceeding." *Id.* at 20a-21a. Although it recognized that only "some" control units contained the alleged defect, it deemed the issue "whether the control unit was indeed defective" to be common, stating that the "only individual issues" concern "the amount of harm to particular class members." *Id.* at 20a.

D. The Seventh Circuit's Reinstatement Of Its Ruling After The GVR Order

This Court granted certiorari, vacated, and remanded for consideration in light of *Comcast*. App., *infra*, 13a. On remand, the Seventh Circuit "reinstated" its vacated judgment. *Id.* at 12a.

The court of appeals' decision rested on an erroneous commonality standard. At odds with *Dukes*, 131 S. Ct. at 2551, the Seventh Circuit held that "Rule 23(b)(3) does not impose" the "heavy

burden" of showing "common answers" rather than simply "common questions." App., *infra*, 10a. Under that erroneous standard, the court focused on the supposedly "common question" whether the Washers had a "defect," ignoring the multitude of variant Washer designs, use-and-care instructions, and state laws that preclude common answers to that question.

The court also deemed this "a very different case from *Comcast*." *Id.* at 8a. First, the court asserted that "there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis." *Id.* at 7a. In fact, Sears' "acts"—selling 27 different models and providing different user instructions—will have to be evaluated individually (or in varying combinations) to determine whether Sears breached any warranty and caused damages to a particular buyer. Second, the court assumed that the individualized nature of damages should play no role in the Rule 23 inquiry because the district court "neither was asked to decide nor did decide whether to determine damages on a class-wide basis." *Id.* at 8a. In fact, plaintiffs requested class litigation of damages (D239 at 30), but the district court denied certification of the odor claims altogether and certified the control unit class without excluding damages questions. App., *infra*, 34a-35a.

The Seventh Circuit stood by its previous ruling that "predominance is a question of efficiency." App., *infra*, 7a. It held once again that "efficiency is a proper basis for class certification" because the *Comcast* **dissent** embraced that view and "the majority opinion does not contradict" it. *Ibid.* (quoting dissent's view that "economies of time and expense" favored certification. 133 S. Ct. at 1437).

The court acknowledged that "complications" would necessarily arise from variations in Washer designs, applicable state laws, and damages. But it speculated that these could be addressed in later proceedings or by creating subclasses. App., *infra*, 11a.

On those premises, the Seventh Circuit reaffirmed its holding that odor and control unit classes must be certified based on a single, abstract question: "whether the Sears washing machine was defective." *Ibid.*

REASONS FOR GRANTING THE PETITION

The petition should be granted because the Seventh Circuit's decision conflicts sharply with this Court's precedents, including the *Comcast* decision that this Court ordered the lower court to consider on remand, and exacerbates an existing circuit split. Ordering certification based on the supposed "efficiency" of trying one abstract issue—defect—in a class proceeding contradicts the plain language of Rule 23(b)(3), which requires that common questions predominate over individual questions. It also contradicts the drafters' insistence that "procedural fairness" may not be sacrificed to achieve purported "efficiency." Rule 23(b)(3), Adv. Cmte. Notes to 1966 Amend.

The court's dismissal of the fact that the defect question can generate different jury answers depending on Washer designs, instructions, and customer use clashes with this Court's holding in *Dukes*, 131 S. Ct. at 2551, that commonality requires "common answers." And its attempt to override the predominance of these individualized questions by taking a "certify now, analyze later" approach violates

Rule 23, which bars conditional certification and use of subclasses unless predominance and the other requisites of certification have been met.

The Seventh Circuit's certification of a class filled with unharmed purchasers also deviates sharply from this Court's instruction in *Dukes* that class members must "have suffered the same injury." 131 S. Ct. at 2551. And it conflicts with rulings from other circuits that reject sweeping no-injury classes. *E.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (rejecting class action "[w]hen a case turns on individualized proof of injury").

In short, the Seventh Circuit's decision cannot be reconciled with Rule 23 or this Court's and other circuits' precedents. This ruling and the Sixth Circuit's *Whirlpool* decision will result in certification of pending class actions brought on behalf of tens of millions of claimants against all washer manufacturers. And it invites a flood of massive class actions against retailers and manufacturers of *any* mass-produced product based on a handful of purchasers' experiences. The Court should step in now to review and reverse these misinterpretations of Rule 23's key requirements.

I. The Seventh Circuit's Predominance Ruling Conflicts With This Court's Precedents.

A. The Seventh Circuit's ruling conflicts directly with *Comcast*.

This Court vacated and remanded this case to the Seventh Circuit "in light of" *Comcast*. Such a GVR order reflects "substantial doubt on the correctness" of the vacated decision and a "reasonable probability that the decision below rests upon a premise

that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167-168, 170 (1996) (per curiam).

The Seventh Circuit did not get the message. In its view, this Court GVR'd this case in light of *Comcast* merely because "the emphasis that the majority opinion places on the requirement of predominance" made it appropriate to allow Sears to submit "amended argument." App., *infra*, 8a-9a. The court then narrowed "the majority opinion" in *Comcast* to insignificance, equating the supposed efficiency of a class trial on a single issue with predominance.

The Seventh Circuit viewed *Comcast* as applying only where district courts determine "damages on a class-wide basis." App., *infra*, 8a. But the predominance test, construed in *Comcast*, applies to issues of liability as well as damages, and when *neither* liability nor damages can be adjudicated on a common basis, certification must be denied. See Rule 23(b)(3), Adv. Cmte. Notes to 1966 Amend. (a mass occurrence affecting "numerous persons" is "not appropriate for a class action" where "significant questions, not only of damages but of liability and defenses of liability," would affect "individuals in different ways").

Comcast contradicts the central premises of the decision below. First, *Comcast* requires plaintiffs seeking class certification to "affirmatively demonstrate" with "evidentiary proof" that common questions will "predominate over *any* questions affecting only individual members" at trial. 133 S. Ct. at 1432 (emphasis added). The Seventh Circuit did not require this affirmative demonstration, instead declaring that class resolution of a single purportedly common question at trial would be "the sensible way to proceed." App., *infra*, 8a. But it is neither "sensi-

ble" nor "efficient" to order a costly class action trial on one liability issue and leave for the future thousands of individual trials on myriad other liability and damages issues.

Second, *Comcast* precludes class certification if there are numerous "permutations" among claims. 133 S. Ct. at 1434-1435. The Seventh Circuit, by contrast, dismissed the significance of such permutations by focusing solely on the purportedly common defect question. Yet this case—with hundreds of thousands of purchasers of 27 different Washer models in six states, many generations of new products and care instructions, and wide variation in product uses—offers *far greater* permutations than *Comcast*. Even more than in *Comcast*, therefore, individual questions "will inevitably overwhelm questions common to the class." *Id*. at 1433.

Third, this Court in *Comcast* did not accept the dissent's view that "economies of time and expense" are sufficient to satisfy predominance. 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting). Yet the Seventh Circuit focused solely on whether it would be "efficient" to try a single "defect" question without regard to the many individualized liability questions that must be answered before a jury could reach a verdict on any breach of warranty claim. Judge Posner explained that he relied on the dissent on that point because "the *majority opinion* does not contradict" it—even though the majority was unpersuaded by it. App., *infra*, 7a (emphasis added).

Finally, *Comcast* precludes acceptance of an "arbitrary" or "speculative" method of resolving factual disputes on a classwide basis, which would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." 133 S. Ct. at 1433. That did not stop the

Seventh Circuit from ordering class certification based on the arbitrary and speculative theory that certifying a single abstract question would lead Sears to waive defenses to damages and "quickly settl[e]." App., *infra*, 4a. This Court has not accepted prior attempts to distort the requirements of Rule 23 to encourage settlement. *E.g.*, *Amchem*, 521 U.S. at 620; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-849 (1999). And here—unlike *Amchem—there is no settlement.*

Denial of class certification in this case follows *a fortiori* from *Comcast*. The "amount of harm" is not the only individual question here. App., *infra*, 5a. Merchantability, causation, injury, notice, warranty service, defenses, and other *liability* questions—under the laws of six different states—also require individual proofs. The Seventh Circuit's failure to follow this Court's direction to consider—"in light of" *Comcast*—whether these individual questions predominate cries out for this Court's review. See *Am. Express*, 133 S. Ct. at 2308 (reversing after court of appeals "stood by" earlier GVR'd decision).

B. The Seventh Circuit's reduction of predominance to "efficient" resolution of a single abstract question conflicts with Rule 23 and this Court's precedents.

The Seventh Circuit approved certification because class resolution of a single "common" question—whether the Washers are defective—is the "more efficient" procedure. App., *infra*, 5a. The court's focus on that purported efficiency, without identifying or weighing the individual questions that must be tried, reads the predominance requirement out of Rule 23(b).

A Rule 23(b) class cannot be certified unless the plaintiffs prove commonality and predominance. Each helps to ensure the goals of Rule 23. Fed. R. Civ. P. 23(b)(3); see 1966 advisory committee note ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense * * * *without sacrificing procedural fairness*") (emphasis added)). Commonality serves as one "guidepost." *Dukes*, 131 S. Ct. at 2551 n.5. The predominance requirement, which is "far more demanding" than commonality (*Amchem*, 521 U.S. at 623-624), guarantees efficiency and fairness by ensuring that common questions "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); see 1 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 5:23, at 1225 (9th ed. 2012) ("The requirement that common issues predominate over individual issues assures that the goal of judicial economy is served").

This Court should make clear that Rule 23(b)(3) requires courts to identify all individual and common issues and to weigh the individual issues against the common ones. Only if the aggregate of common questions predominates over the aggregate of individual ones may a court deem the test satisfied. See *Madison v. Chalmette Refining, L.L.C.*, 637 F.3d 551, 557 (5th Cir. 2011) ("Absent this analysis," it is "impossible for the court to know * * * whether the common issues predominate").

As the drafters of Rule 23 explained, "**[i]t is *only* where this predominance exists that economies can be achieved by means of the class-action device.**" Rule 23(b)(3), 1966 Adv. Cmte. Note (emphasis added). Requiring that common issues predominate protects against the inherent unfair-

ness (to both class members and defendants) of trying a bewildering mass of individual issues in a single proceeding. See *Amchem*, 521 U.S. at 623 (predominance tests whether "proposed classes are sufficiently cohesive to warrant adjudication by representation").

The Seventh Circuit's myopic focus on single-issue "efficiency" departs sharply from these standards. In *Amchem*, this Court held that courts may not ignore "disparities among class members" to achieve undeniable efficiencies by disposing of "hundreds of thousands" of current and future injury asbestos claims through a single (b)(3) settlement class. 521 U.S. at 625. In rejecting class certification where claims turned on exposure to "different * * * products," in "different ways," over "different periods," under "differen[t]" state laws—creating individual issues of "damages," "injury," "liability," and "affirmative defenses"—this Court made clear that efficiency alone does *not* override the need to prove predominance. 521 U.S. at 603, 624-625; accord *Ortiz*, 527 U.S. at 858. The decision below conflicts directly with *Amchem* on this point.

The Seventh Circuit trivialized the predominance standard as merely "counting noses" or "bean counting." App., *infra*, 8a-9a. But the predominance requirement forecloses exactly what occurred here: subjective "appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment." *Amchem*, 521 U.S. at 621. A meaningful predominance assessment cannot be performed without correct identification of the common and individual questions that must be resolved at trial. Yet the Seventh Circuit ordered this class certified without even identifying the elements of plain-

tiffs' claims and Sears' defenses or analyzing how they can be adjudicated with common proof, much less explaining how claims and defenses would be tried in a class action format. See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (the class certification inquiry "begins, of course, with the elements of the underlying cause of action").

In fact, the supposedly common issue here is not common at all. The Seventh Circuit proclaimed that "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective." App., *infra*, 11a. But that states the issue at such a high level of generality as to be meaningless. See *Dukes*, 131 S. Ct. at 2551; *Love v. Johanns*, 439 F.3d 723, 729-730 (D.C. Cir. 2006) ("at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality"). The "defect" question encompasses a host of buyer-, model-, and state-specific inquiries into the adequacy of various Washer designs in preventing odors, the presence of a sporadic manufacturing defect in particular Washer control units, the merchantability (ability to launder clothes properly) of each Washer, and the differences in state warranty laws regarding design defects.

Other liability questions also require individual evaluations of each buyer's experience. Whether a particular Washer emitted musty odor, did so during the warranty period, and did so due to the alleged defect are buyer-specific questions. Changes in care instructions, and variations in buyers' adherence to them, raise additional individual questions. See Rule 23(b)(3), 1966 Adv. Cmte Note ("although having some common core," a "case may be unsuited for

treatment as a class action if there was material variation in the representations made"). Likewise, whether a Washer displayed false error codes, did so during the warranty period, and did so due to the alleged control-unit defect rather than other causes are buyer-specific questions. And only buyer-specific inquires can show whether warranty service was timely requested and how Sears responded. Thus, the trial will not turn on any common "defect" question but rather on the varying impact of each buyer's model design and manufacture, Washer performance, instructions, usage, and warranty experience.

The Seventh Circuit sought to bypass this plethora of individual issues by stating that "all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit," making all "harmed by a breach of warranty." App., *infra*, 7a. But it is undisputed that most buyers did *not* experience mold or false error codes. The Seventh Circuit never explained how the owner of a perfectly functioning washer has been harmed or incurred damages.

Moreover, the few buyers who experienced these problems may not have a claim for breach of warranty. Sears does not warrant, for example, that a Washer will be problem-free if its instructions are ignored. If the owner of a 2008 washer, for which the manual required use of HE detergent and recommended leaving the door ajar and running a monthly self-cleaning cycle, failed to take these steps, a jury could easily find that Sears did not breach its warranty even if moldy odors developed. Conversely, if moldy odors were experienced by an owner of a 2001 washer, for which the manual recommended HE detergent but did not require it, a jury might find that

Sears breached its warranty—assuming proof of pre-suit notice, Sears' inability to eliminate the odor, and damages—but Sears would have a statute-of-limitations defense. By not even considering these individual questions, the Seventh Circuit failed to engage in the "rigorous analysis" of predominance required by this Court. *E.g.*, *Comcast*, 133 S. Ct. at 1432.

Unable to deny the multiplicity of answers to the supposedly common defect question, the court below held that Rule 23(b)(3) "does not impose [the] heavy burden" of showing that there are "common answers." App., *infra*, 9a. That ruling conflicts irreconcilably with this Court's decision in *Dukes* that "[w]hat matters to class certification" is "not the raising of common 'questions'—even in droves," but "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. at 2551.

The Seventh Circuit also deemed a class action to be "the efficient procedure" because the costs imposed on injured consumers would not be "large enough to justify the expense of an individual suit." App., *infra*, 4a. Unlike the drafters of Rule 23, the court of appeals did not consider the costs imposed on defendants and the judicial system from certifying classes bristling with individual issues. This Court repeatedly has rejected similar attempts to weaken Rule 23 requirements. Most recently, this Court found it legally irrelevant that plaintiffs had "no economic incentive to pursue their antitrust claims individually" or that only a class action was "economically feasible." *Am. Express*, 133 S. Ct. at 2310-2311 & n.4; see also *AT&T Mobility*, 131 S. Ct. at 1753. Whereas this Court explained that Rule 23 "imposes stringent requirements for certification that ***in***

practice exclude most claims" (*Am. Express*, 133 S. Ct. at 2310 (emphasis added)), the Seventh Circuit's rationale in practice ***includes*** "most claims."

Moreover, it is not true, as the court of appeals suggested, that the only "realistic alternative" to a class action is "17 million individual suits." App., *infra*, 10a. Sears has a substantial warranty service department that quickly redresses individual customer complaints. See D218-1; D218-4 at 6-7, 57; D231-2 ¶ 25; D231-19. And Sears has strong incentives to fix problems to maintain customer loyalty and goodwill. D231-2 ¶ 30. There is nothing efficient about sweeping the many buyers who sought and obtained adequate warranty service, as well as those who completely disregarded or had no need for warranty service, into a mammoth class.

Finally, the Seventh Circuit praised the efficiencies generated by class certification to force Sears into a settlement with this sprawling class. According to Judge Posner:

> A determination of liability could be followed by individual hearings to determine the damages sustained by each class member. The parties probably would agree on a schedule of damages * * * [and] the case would probably be quickly settled.

App., *infra*, 4a. But Rule 23 was not designed to coerce unwarranted settlements. Here the proposed class, as in *Amchem*, is filled with claimants who have not been injured but assert they might be injured in the future, and individual issues are overwhelming. If a class could not be certified for lack of predominance in *Amchem*, where defendants and most claimants supported settlement, the Seventh

Circuit's attempt to force Sears into an unwanted settlement with an even larger class filled with uninjured buyers is even less justifiable. The conflict with *Amchem*, *Comcast*, and *Dukes* is stark and extraordinarily important.[2]

C. This Court should provide guidance on the Rule 23(b)(3) predominance inquiry.

This Court has emphasized that a class may not be certified where individual questions "will inevitably overwhelm questions common to the class" (*Comcast*, 133 S. Ct. at 1433) and that a class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. But the Court has not elaborated on the criteria to be used in implementing these principles. See Allan Erbsen, *From "Predominance" to "Resolvability*," 58 VAND. L. REV. 995, 1060 (2005) (*Amchem* did not articulate standards "to evaluate the relative significance of unity and disunity (or similarity and dissimilarity) among claims and defenses"). The result has been "a myriad of vague and distinct formulations" by lower courts. *Id*. at 1058-1060 (citing various predominance standards); see 7AA Charles A. Wright, Arthur R. Miller, & Mary K. Cooper, FEDERAL PRACTICE AND PROCEDURE § 1778, at 119 (3d ed. 2005) (courts have

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[2] Judge Posner recently explained his "pragmatic" view of judicial precedent in these words: When "orthodox materials do not yield an answer to the legal question presented," or "*the answer they yield is unsatisfactory*, the *judge's role is legislative: to create new law* that decides this case and governs similar future ones." Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 540 (2012) (emphasis added); see Richard A. Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 242 (1999) (precedent is merely a "sourc[e] of information" and a "limited constrain[t]").

not "developed any ready quantitative or qualitative test for determining whether the common questions satisfy the rule's test").

Given the centrality of the predominance inquiry to ensuring protection of the rights of both the defendant and class members, this Court should make clear how courts are to determine predominance and instruct that it is *not* merely commonality by another name or simply a matter of one-issue efficiency. Under any approach to predominance, certification is improper here because disparate circumstances across the class would require a host of individual inquiries to try plaintiffs' claims and Sears' defenses.

The Court also should confirm that defenses cannot be ignored. The Seventh Circuit failed to consider Sears' defenses at all, including product misuse and the statute of limitations, and how any class trial could be conducted without stripping Sears of its Seventh Amendment right to present those individualized defenses. See *Dukes*, 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").

The Court should further explain that differences in controlling state law may not be glossed over to facilitate certification. Here, the class claims are governed by divergent warranty laws of six different states. These "[d]ifferences in state law" greatly "compound" the other disparities among the class and weigh heavily against a finding of predominance, as held in *Amchem*, 521 U.S. at 609-610, 624 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985)).

The Seventh Circuit's only answer to the admitted "[c]omplications" caused by many "design changes" and "separate state warranty laws" was to speculate that these disparities somehow might "be handled by the creation of subclasses." App., *infra*, 101. But Rule 23(c)(5) makes clear that only "a *class* may be divided into subclasses" (emphasis added). Plaintiffs "thus cannot evade compliance with the requirements of Rule 23 by dispersing class members among subclasses." 1 MCLAUGHLIN ON CLASS ACTIONS § 4:45. Numerous subclasses lead to "Balkanization of the class action" and loss of "the benefits of the class action format." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 202 (3d Cir. 2005). Here, a separate subclass would be needed for each combination of the dozen design changes and multiple instruction changes, each of which would then be further subdivided by state law—producing more than 72 subclasses. And even those dozens of subclasses would not account for differing product usage and warranty experience, statute of limitations issues, proximate causation, or damages. Attempting to address those disparities with subclasses would produce chaos, not efficiency.

The Seventh Circuit said decide "defect" now in a class trial and worry about individualized issues in future proceedings if the case does not settle. But a provision allowing "conditional" certification was "deleted" from Rule 23 in 2003. The drafters thereby made clear that if the requirements of Rule 23 have not been met, the court "should refuse certification until they have been met." Rule 23(c)(1)(A), 2003 Adv. Cmte. Note. Judge Posner's opinion postponing any real inquiry into how the case could be tried—confident that certification will coerce a settlement—cannot be reconciled with that amendment, which

bars certification prior to rigorous proof that common issues actually predominate over individual ones. See *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 358 (3d Cir. 2013) (rejecting "wait-and-see approach" to Rule 23 requirements).

The Seventh Circuit's approach guts predominance, turning it into a requirement that can be satisfied in virtually every case, no matter how disparate and individualized the issues may be—as the certification here clearly shows. This Court should grant certiorari to guide the lower courts as to how predominance is to be determined and restore predominance to the safeguard function intended by the Rule 23(b)(3) drafters.

II. Certifying A Class Full Of Uninjured Buyers Conflicts With This Court's Precedents And Deepens A Circuit Conflict.

It is uncontested that most Washer buyers have never had a mold or odor problem. See *supra* p. 8. The same is true for the control-unit issue, where human error—deviations from manufacturing standards by individual assemblers—caused cracked solder pads in only a small fraction of Washers. See *supra* pp. 8-9. Yet the Seventh Circuit has approved a class composed of *all* Washer buyers, including the vast majority whose Washers are functioning perfectly after many years of use. According to Judge Posner, Sears "should welcome" certification of a class where most members have not experienced any problem and pursue a judgment that would "exonerate" it. App., *infra*, 5a.

The consequences of that ruling are easy to envision. Consider a product like the Apple iPhone. Apple sold nearly 48 million iPhones in the quarter ending

December 29, 2012.[3] If 1% of those buyers had a power-button problem that Apple did not resolve, some 480,000 buyers might have a complaint. But under the Seventh Circuit's ruling here, a class of *all 48 million* buyers would be certified, including the 47,520,000 who never had the problem. How could Apple—or any company—risk (much less "welcome" the risk of) liability to so many buyers in a single "defect" trial? Class certification of all product buyers, where only a small percentage has an unresolved complaint, makes no sense, cannot be reconciled with the common injury requirement of Rule 23, and inevitably will force blackmail settlements.

A. Lower courts are in conflict over the relevance of uninjured class members to class certification.

Federal courts are profoundly divided over how to analyze a putative class that includes large numbers of consumers who never experienced the alleged defect. Some courts have held that it makes no difference to the certification inquiry whether absent class members incurred any injury; others have found a class filled with uninjured members to be ineligible for class certification.

The Fifth, Eighth, and Eleventh Circuits hold that a class containing persons who did not experience the alleged problem cannot be certified. Their rationales include lack of Article III standing, failure to satisfy commonality or predominance requirements, and inability of uninjured buyers to state a

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[3] See Press Release, Apple, Inc., *Apple Reports Record Results*, Jan. 23, 2013, available at http://www.apple.com/pr/library/2013/01/23Apple-Reports-Record-Results.html.

cause of action. See, *e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) (injured person may not bring a class action on behalf of persons who lack Article III standing); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (no predominance where most class members could not recover for an unmanifested defect); *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 861 (11th Cir. 2012) (rejecting class that included purchasers with "no complaints" about the allegedly defective product because it "impermissibly includes members who have no cause of action").

Like the Seventh Circuit, the Sixth and Ninth Circuits take the opposite position. *E.g.*, *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 722 F.3d 838 (6th Cir. 2013) ("*Whirlpool*") (approving certification of class filled with Ohio washer buyers who did not experience mold or odor); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (approving certification despite lack of harm to most class members); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (holding certification proper regardless whether any class members actually experienced premature tire wear). These courts view the question whether absent class members suffered any injury as "a merits inquiry" not appropriately addressed at the class certification stage. See *Daffin v. Ford Motor Co.*, 458 F.3d 549, 550, 553 (6th Cir. 2006).

This inter-circuit conflict urgently requires this Court's resolution. Many consumer class actions, including this one, are multi-state or national in scope. Whether classes filled with uninjured buyers may be certified under Rule 23 should not depend on where the case is filed. Only this Court can bring uni-

formity to this important issue of federal law and procedure.

B. Certifying a class of mostly uninjured buyers conflicts with the *Dukes* common injury requirement.

This Court reaffirmed in *Dukes* that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." 131 S. Ct. at 2550. To justify this departure, class plaintiffs must prove commonality—that they and the class members "have suffered the same injury." *Id.* at 2551. Yet the Seventh Circuit has ordered certification of a class full of persons who have not been injured at all and thus cannot "have suffered the same injury" as plaintiffs.

That abandonment of the *Dukes* common injury requirement transforms the class action mechanism from a narrow "exception" into a blunderbuss aimed at every consumer product or service. In a properly certified class action, any judgment would be based only on the claims of the named plaintiffs, and that judgment would then apply to the entire class. See *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) ("as goes the claim of the named plaintiff, so go the claims of the class"). Here, the claims pursued at trial would be those of the six plaintiffs handpicked from the minority of purchasers who experienced an odor or control-unit problem. Yet a liability judgment in their favor would bind both Sears and the majority of class members who never experienced any such problem. It would be manifestly unfair and inefficient to rest a classwide liability determination on the idiosyncratic experiences of these few selected plaintiffs. Such a class ac-

tion would not produce even rough justice, but only mass injustice.

Moreover, absent class members who have not experienced an odor or control-unit problem lack standing to bring a claim on their own behalf. Nothing in Rule 23 allows persons without standing to ride the coattails of those who do to pursue claims for liability and damages. To the contrary, the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). And "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 612-613. Plaintiffs contend that non-injured buyers should be included in the class because they face a risk of future injury. But as this Court recently held, "allegations of *possible* future injury are not sufficient" to create standing because "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013).

Further, even if non-injured buyers had standing, they could not prove the elements of a breach of warranty claim. In the vast majority of states—including most if not all of the six at issue here—a plaintiff cannot bring a warranty claim where the alleged defect has not manifested itself. See 1 MCLAUGHLIN ON CLASS ACTIONS, *supra*, § 5:56, at 1572 ("The majority view is that there is no legally cognizable injury in a product defect case, regardless of [legal] theory, unless the alleged defect has manifested itself in the product used by the claimant").

For example, California courts hold that a latent defect supports a warranty claim only if it is "substantially certain to result in malfunction during the

useful life of the product" (*Am. Honda Motor Co. v. Super. Ct.*, 132 Cal. Rptr. 3d 91, 98 (Ct. App. 2011)); Texas courts forbid warranty claims if the injury "might never happen" (*DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 306 (Tex. 2008)); Minnesota courts require products to "actually exhibit the alleged defect" (*O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009)); and Illinois courts require proof of "present personal injury and/or damages" to sustain a breach of warranty claim. *Kelly v. Sears Roebuck & Co.*, 720 N.E.2d 683, 692 (Ill. App. Ct. 1999). Even if the law of a state allowed warranty claims for unmanifested defects, the difficulty of conducting a manageable trial that respects state law variations is precisely why courts routinely refuse to certify the kind of multi-state class action certified here. *E.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011); *Casa Orlando Apartments, Ltd. v. Fed. Nat'l Mortg. Ass'n*, 624 F.3d 185, 194-195 (5th Cir. 2010).

The Seventh Circuit ended its opinion by expressing a "concordance in reasoning" with the Sixth Circuit's decision in *Whirlpool*. App., *infra*, 12a. *Whirlpool* held that all buyers were inherently injured by overpaying for their Washers—even those buyers whose Washers have no odor problem and never will. This "premium price" theory exemplifies the sort of "arbitrary" and "speculative" approach that *Comcast* forbids. 133 S. Ct. at 1433; see also *Ortiz*, 527 U.S. at 845 (cautioning against "novel" and "adventurous" class certification theories).

A class member who bought a Washer in 2002 that never developed an odor or control-unit problem over the life of the Washer received precisely what he

or she bargained for, making any "premium price" injury entirely fictitious. See *O'Neil*, 574 F.3d at 504 (rejecting argument that owners of non-malfunctioning cribs failed to receive the benefit of a bargain that "did not contemplate the performance of cribs purchased by other consumers"). Determining whether particular buyers, who purchased different Washer models at different times in different parts of the country, paid a premium price would require inherently individualized inquiries that would overwhelm any class proceeding.

III. The Questions Presented Have Exceptional Practical Importance To The Administration Of Civil Justice.

The Seventh Circuit's decision, combined with the Sixth Circuit's *Whirlpool* and Ninth Circuit's *Wolin* decisions, opens up new territory for sweeping class actions. Classes now may be certified in three circuits whenever a few consumers assert that a mass-produced product did not meet their expectations—regardless of whether most buyers are satisfied with the product and how many individual questions must be tried. Class counsel need only seek out these jurisdictions to impose massive liability risk on a company or (as here) an entire industry. That evisceration of class certification standards cannot be reconciled with this Court's recent admonition that the "stringent requirements" of Rule 23 "in practice exclude most claims." *Am. Express*, 133 S. Ct. at 2310. The rare case becomes every product case under the ruling below.

Most defendants "will be pressured into settling [these] questionable claims." *AT&T Mobility*, 131 S. Ct. at 1752. As Judge Friendly explained in concluding that "[s]omething seems to have gone radi-

cally wrong" with class actions, "[w]hile the benefits to the individual class members are usually miniscule, the possible consequences of a judgment to the defendant are so horrendous that these actions are almost always settled"—"for a small fraction of the amount claimed but large enough to yield compensation to the plaintiffs' lawyers which seems inordinate." Henry J. Friendly, FEDERAL JURISDICTION 119-120 (1973); see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 99 (2009) (trial after class certification is "vanishingly rare"). And settlements imposed by failure to insist on a rigorous predominance analysis will result in unwarranted windfalls to class members who have no viable claim of their own. The price of such windfalls is borne by consumers, businesses, and the larger economy. See J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, WASH. TIMES, Nov. 15, 2012, at B4 (these Washer class actions will force manufacturers to "pass on to consumers through higher prices the added costs" of coerced settlements).

The issues presented here are immensely important not only to the dozens of pending front-loading washer class actions (see *Whirlpool* Cert. Pet. 6 n.2), but also to Rule 23(b)(3) class actions generally. Accordingly, commentators have roundly criticized the courts of appeals' decisions in both this case and *Whirlpool* 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] Given the extraordinary number and size of similar class actions pending nationwide, this Court should grant the petition to address the critical issues it raises, which repeatedly confront class litigants and the federal courts, and to ensure application of Rule 23 criteria to this "Frankenstein monster posing as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[4] For a list of additional commentaries, see *Whirlpool* Cert. Pet. 35 n.7.