No.

In the Supreme Court of the United States

WHIRLPOOL CORPORATION,

Petitioner,

v.

GINA GLAZER AND TRINA ALLISON, 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 Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiffs claim that all Whirlpool high-efficiency front-loading clothes washers sold since 2001 have a latent defect that potentially can cause moldy odors to develop. It is undisputed that most of the washers never developed any odor problem. The Sixth Circuit initially affirmed certification of a Rule 23(b)(3) class of some 200,000 Ohio residents. This Court granted certiorari, vacated, and remanded that decision in light of *Comcast*. On remand a two-judge panel of the Sixth Circuit, describing *Comcast* as having "limited application," reaffirmed its prior decision. The panel held certification proper based on two purportedly common questions: whether there is a defect that proximately causes odor, and whether Whirlpool adequately warned of that defect. The court swept aside a multitude of individualized factual inquiries needed to answer those questions. And it ignored the fact that neither injury nor damages can be determined on a classwide basis. The questions presented are:

1. Whether the Rule 23(b)(3) predominance requirement can be satisfied when the court has not found that the aggregate of common liability issues predominates over the aggregate of individualized issues at trial and when neither injury nor damages can be proven on a classwide basis.

2. Whether a class may be certified when most members have never experienced the alleged defect and both fact of injury and damages would have to be litigated on a member-by-member basis.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Whirlpool Corporation does not have a parent corporation. No publicly held company owns 10% or more of Whirlpool Corporation's stock.

Plaintiffs-Respondents are Gina Glazer and Trina Allison.

The contemporaneously filed petition for certiorari to the Seventh Circuit in *Sears, Roebuck and Co. v. Butler* presents similar issues arising in class actions involving Whirlpool-manufactured front-loading washers sold by Sears in six States.

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PETITION FOR A WRIT OF CERTIORARI

Whirlpool Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion on remand in light of *Comcast Corp. v. Behrend* (App., *infra*, 1a-38a) is reported at 722 F.3d 838. That court's initial opinion (App., *infra*, 40a-60a), which was vacated and remanded by this Court, is reported at 678 F.3d 409. The district court's order granting plaintiffs' motion for class certification (App., *infra*, 63a-72a) is available at 2010 WL 2756947.

JURISDICTION

The court of appeals entered judgment on July 18, 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*, 75a-76a.

STATEMENT OF THE CASE

After this Court granted, vacated, and remanded the Sixth Circuit's earlier decision in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the court of appeals once again held that class certification is appropriate to answer the purportedly "common" questions whether 21 different models of Whirlpool-brand high-efficiency front-loading clothes washers ("Washers") sold in Ohio since 2001 contained "a design defect" that caused moldy odors

to develop in some machines and "whether Whirlpool adequately warned consumers" about this alleged "propensity." App., *infra*, 32a-33a.

Despite this Court's GVR order, a two-judge panel deemed *Comcast* of "limited application." App., *infra*, 36a. In *Comcast*, Judges Stranch and Martin stated, "the district court certified a liability *and* damages class" and plaintiffs' damages model failed to overcome individual variations in damages. App., *infra*, 34a, 36a. "This case is different," the court held, because the district court here "certified only a liability class," "'leaving individual damages" to "subsequent proceedings.'" *Id.* at 35a-37a (quoting from the *Comcast* dissent).

In fact, *Comcast* establishes *a fortiori* that class certification is improper here. The Sixth Circuit's admission that "all issues concerning damages" were reserved for "individual determination" means this case fails the *Comcast* test for certification. App., *infra*, 35a. But beyond that, *liability* here also depends on individualized issues that permeate plaintiffs' claims and Whirlpool's defenses. It is undisputed that all washing machines have the potential to develop musty odors; only a minority of Washer buyers experienced an odor problem; throughout the class period Whirlpool made dozens of design changes that greatly reduced any risk of musty odors; Whirlpool's knowledge of the potential for musty odors changed over time, as did the knowledge of individual buyers; Whirlpool provided different instructions to customers regarding odor prevention and machine care; and many Washer buyers did not follow or followed to different degrees these use-and-care instructions.

As a result, neither liability *nor* damages can be determined for class members on a common basis using common evidence. The question of defect cannot be decided on a common basis because there are 21 different products with different designs that affect the odor issue. Injury and causation cannot be determined on a common basis because most Washer owners never experienced moldy odors and there are many potential causes of odors apart from the alleged defect. Adequacy of disclosure cannot be resolved on a common basis because knowledge of the issue changed over time and different disclosures were made. Defenses cannot be adjudicated on a common basis because some people followed use-and-care instructions and others did not and because some claims are timely and others are not. And as all concede, damages vary from buyer to buyer. This obvious predominance of individual issues bars Rule 23(b)(3) certification. In contrast to *Comcast*, where there was a single common antitrust violation at the heart of the case, here there is *no* central common liability issue and damages are even more fragmentary. That the jury would have to evaluate the circumstances of each of 200,000 Ohio Washer buyers individually to determine both liability and damages makes this case even less suitable for class resolution than *Comcast*.

The panel provided no answer when it theorized that all class members—regardless of whether their Washers will *ever* develop odor—may have been uniformly harmed at the point of sale by paying a "premium price." App., *infra*, 28a. Even if a premium-price theory were viable, the "premium" would vary with the circumstances described above and would not be common across purchasers

throughout the lengthy class period. But the theory is not viable. It is contrary to settled Ohio law and is therefore an "arbitrary" and "speculative" means of converting individualized liability inquiries into common ones. *Comcast*, 133 S. Ct at 1433. And the Sixth Circuit failed to explain how a satisfied purchaser whose Washer *never* developed odors suffered the "same injury" as plaintiffs, whether in the form of a purchase-price "premium" or otherwise.

Certification here contradicts all of this Court's recent class-action precedents. Rule 23, the Court explained in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), imposes "stringent requirements" that "in practice exclude most claims." Yet the Sixth Circuit's lax approach would approve class certification in any case alleging defects in mass-produced products—despite the rule-drafters' admonition that 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." Rule 23(b)(3), 1966 Adv. Cmte. Notes.

Amgen, Inc. v. Connecticut Retirement Plans, 133 S. Ct. 1184, 1197 (2013), confirms that class actions cannot proceed where there is "some fatal dissimilarity among class members" as to key issues that "would make use of the class-action device inefficient or unfair." And *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011), establishes that a question is not "common" unless it generates "'common *answers* apt to drive the resolution of the litigation'" and requires that "class members 'have sufffered the same injury.'" These precedents show that class certification is reserved for those cases where truly

common questions can be resolved with common evidence and the aggregate of common questions predominates over the aggregate of individual questions—cases with the "high degree of cohesion" that the rule drafters regarded as the *sine qua non* of certification. Rule 23(b)(3), 1966 Adv. Cmte. Notes; see *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). The decision below flouts these rules, threatening an "anything goes" approach to certification that has too often prevailed in the lower courts and driven defendants into countless blackmail settlements.

The practical need for this Court's review could not be more pressing. In this case alone the class comprises some 200,000 purchasers. But this is only one of 10 putative class actions consolidated in the district court. Those cases collectively include more than 4,000,000 Washer buyers—by far the biggest class proceeding ever to reach this Court. The Seventh Circuit has certified similar classes under the warranty laws of six other States against Sears, Roebuck and Company as retailer of high-efficiency front-loading washing machines made by Whirlpool (certiorari petition pending).[1] And nearly identical odor-defect class actions are pending in federal courts from coast to coast against *every* major washer manufacturer on behalf of tens of millions of

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[1] *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), certiorari granted, decision vacated, and remanded for reconsideration in light of *Comcast*, 133 S. Ct. 2768 (2013), initial judgment reinstated, 2013 WL 4478200 (7th Cir. Aug. 22, 2013), cert. petition filed Oct. 7, 2013.

additional buyers.[2] Certification of this bellwether Ohio class—filled with uninjured claimants—would create enormous pressure to settle without regard to the merits and would affect all the other suits, which collectively seek billions of dollars in damages.

The stakes go far beyond the appliance industry that is under attack in these cases. The Sixth Circuit's decision invites consumer class actions whenever a mass-produced product fails to meet the expectations of a single consumer—even though all such products have some failure rate, which warranties are designed to address. It does not matter that most owners have never had the alleged problem during the life of the product; that the products vary in design and performance; that the consumer failed to follow use-and-care instructions; or that the instructions changed over time. To obtain class certification, plaintiffs need only assert that all purchasers were injured when they bought a product that *might* malfunction. Such actions produce windfalls for multitudes of uninjured persons and class action lawyers, and ultimately harm consumers by discouraging product innovation and inflating prices. This Court should step in now and hold that

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[2] See, *e.g.*, *Spera v. Samsung Elecs. Am.*, 2:12-cv-05412 (D.N.J.); *Fishman v. Gen. Elec. Co.*, 2:12-cv-00585 (D.N.J.); *Montich v. Miele USA, Inc.*, 3:11-cv-02725 (D.N.J.); *Terrill v. Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga.); *Harper v. LG Elecs. USA, Inc.*, 2:08-cv-00051 (D.N.J.). A class was certified in *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), leave to appeal denied, 2013 WL 1395690 (9th Cir. Apr. 1, 2013), cert. petition pending (U.S. No. 13-138).

Rule 23(b)(3) does not countenance class actions in these circumstances.

A. Factual Background

In 2001, Whirlpool began manufacturing high-efficiency front-loading clothes washers for the United States market. D103-2 at 6.[3] The Washers include 21 different models introduced at different times throughout the 12-year class period. Year after year, *Consumer Reports* ranked the Washers among the best and most reliable, confirming that they outperform top-loading washers on efficiency, cleaning, capacity, and fabric-care measures. App., *infra*, 77a-81a.

Plaintiffs nonetheless allege that all Washers contain a design defect that has the *potential* to cause them to emit musty odors due to buildup of laundry residue ("biofilm") on interior surfaces. D80 at 1-2, 10-11. According to plaintiffs, biofilm develops because these high-efficiency Washers (1) use less water and lower water temperatures than top-loading washers, (2) are sealed to prevent leaks and so do not completely dry out between uses, (3) have components (including the tub and aluminum cross-piece) that collect residue, and (4) do not adequately "self-clean." D93-1 at 9-14; D93-9 at 8-11. Plaintiffs contend that Whirlpool knew of these issues but concealed them from the public. D80 at 11, 15-16.

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[3] "D" refers to docket numbers assigned in the district court.

B. Class Certification Proceedings

1. Plaintiffs moved to certify a class of all Ohio residents who bought any Washer since 2001. D93. Plaintiffs argued that all Washers have a uniform design defect that Whirlpool failed to disclose and that purportedly caused 35 to 50 percent of Washer owners to experience "mold problems." D93-1 at 9-16, 22-23.

Whirlpool presented abundant evidence that Washer owners' experiences are highly dissimilar and not susceptible to common proof. D100 at 9-21; D103. Unrefuted evidence also showed that Whirlpool's knowledge about the potential for mold odors changed materially over the class period, and that its pre-release testing revealed no such problem. D103-4 ¶¶ 30-34. It was not until Whirlpool and Sears—the largest service provider for the Washers—received a small number of complaints in late 2003 and early 2004, amounting to only a fraction of 1% of the machines in the field, that Whirlpool learned of a possible increased potential for odors and assembled a team to investigate. As this investigation progressed, Whirlpool made changes to the Washers' design, features, and user instructions to further reduce the already low potential for machine odor, including:

- December 2004: revised owner manuals to require use of high-efficiency (HE) detergent because regular detergent can cause excessive soap residue;

- January 2005: changed the material in aluminum cross-pieces on Access Washers to reduce the potential for biofilm accumulation;[4]
- July 2005: added a pre-programmed "maintenance" cycle to Access Washers, enabling consumers to rinse residue from their machines;
- July 2005: revised owner manuals to recommend leaving the door open between uses and running monthly maintenance cycles, and added a "Troubleshooting" section on preventing "Washer odor";
- 2006: added a "Clean Washer" cycle to Access Washers' control panel to enable owners to conveniently run the maintenance cycle;
- March 2006: launched Horizon Washers with a modified tub design, redesigned aluminum cross-pieces to reduce residue accumulation, improved drainage, and a "Clean Washer" cycle;
- May 2007: changed the shape of the Sierra Washer's aluminum crosspiece and introduced a new tub design to reduce residue accumulation;
- September 2007: introduced Duet Steam models with a steam-enhanced Clean Washer cycle;
- September 2007: introduced Affresh Washer Cleaner and included a free sample with each new Washer;

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[4] The Washers have been built on three different engineering platforms: Access, Horizon, and Sierra. D103-2 ¶¶ 6-15. Each platform underwent design changes over the years. D103-4 ¶ 35.

- February 2009: redesigned the tub in Access Washers to reduce residue accumulation;
- September 2009: further redesigned the tub in Horizon Washers to reduce residue accumulation.

D103-4 ¶ 35; D103-2 ¶¶ 25-35. Whirlpool also made multiple changes to its sales literature and website between 2004 and 2007 to advise owners of odor- and residue-preventing steps. D103-2 ¶¶ 20-36 & Ex. A.

As a result, the already low rate of reports of moldy odors was cut in half. D103-29 ¶ 10 & Table 1. Plaintiffs adduced no contrary evidence. Indeed, their engineering expert admitted he had not evaluated whether these changes were effective in limiting biofilm and preventing odors (D93-9 at 11; D103-28 at 11-13, 29), and conceded that some of them likely were effective (D103-28 at 12-13, 24-27). He also admitted that *all* washers accumulate biofilm over time, and that the amount of biofilm "depends on the use and habits" of the consumer. *Id.* at 9, 22. Evidence showed that Washer buyers had differing habits and failed to comply, or complied in different degrees, with Whirlpool's odor-prevention instructions. D101 § III; D103-1 at 2. Class members who kept the Washer door ajar or added chlorine bleach to the Clean Washer cycle experienced no odor. *E.g.*, D103-38.

The evidence showed that the vast majority of buyers has not experienced *any* machine odor. Whirlpool's undisputed field data showed that, between 2001 and 2008, Whirlpool and Sears received 23,401 calls potentially related to mold or moldy odors, or 0.86% of the 2,700,000 Washers shipped through October 2008. D103-29 ¶ 9. Sears' service data further showed that approximately 97%

of Access Washer buyers and 98% of Horizon Washer buyers who bought Sears' five-year extended service plan *never* reported *any* mold or odor. *Id.* ¶ 13 & Table 2. Data compiled by *Consumer Reports* showed that less than 1% of all the front-loading washer owners who were surveyed reported any mold or odors during the first four years of service. App., *infra*, 78a, 81a (of the 11% of Washers with a reported problem, only 8% of those problems were caused by mold); D103-4 ¶ 21; D103-14 at 5. Plaintiffs offered no empirical data or class member survey to counter this evidence.

2. The district court nonetheless certified a Rule 23(b)(3) class consisting of all current Ohio residents who bought a Washer in Ohio. App., *infra*, 63a. Certification broadly covered the liability elements of plaintiffs' Ohio tort claims for negligent design, negligent failure to warn, and tortious breach of implied warranty. The district court held that damages could not be proven on a class basis and so were left for litigation in a host of individual trials. *Id*. at 67a.

The district court's cursory analysis did not refer to any evidence or address any of the disputed facts central to whether plaintiffs satisfied Rule 23. To the contrary, it rested entirely on plaintiffs' "theor[ies]." App., *infra*, 68a-70a. The district court expressly declined to consider Whirlpool's empirical evidence showing that most putative class members did not experience mold or odors. *Id.* at 64a. The court reasoned that whether a "particular plaintiff has suffered harm is a merits issue not relevant to class certification." *Ibid.* (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

3. The Sixth Circuit affirmed. It acknowledged "dozens of changes" made by Whirlpool throughout the class period, but found that whether the various Washer designs are "defective" and whether Whirlpool "adequately warned consumers" are common questions that do not require different proofs. App., *infra*, 47a, 54a-55a.

The Sixth Circuit rejected Whirlpool's argument that because most class members never experienced moldy odors, commonality and predominance are lacking. Citing California law, the court suggested that "plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price," even if "some class members have not developed the mold problem." App., *infra*, 57a. The court did not cite any Ohio decision holding that such an "injury" is cognizable, and plaintiffs offered no basis for applying a premium price theory. D93-1 at 6-35.

4. This Court granted certiorari, vacated, and remanded for further consideration in light of *Comcast*. App., *infra*, 39a. On remand, the Sixth Circuit once again affirmed the district court's certification order.

The panel held that *Comcast* had "limited application" because here "the district court certified only a liability class and reserved all issues concerning damages for individual determination," whereas in *Comcast* "the court certified a class to determine both liability and damages." App., *infra*, 35a-36a. The panel cited the *Comcast dissent's* view that predominance is "generally satisfied" if class-wide adjudication "will achieve economies of time and expense." *Id.* at 36a-37a. Despite the GVR in

light of *Comcast*, the panel's analysis was guided by *Amgen*. *Id*. at 31a-33a.

The Sixth Circuit rejected Whirlpool's argument that the district court failed to decide factual questions bearing on certification. Because the parties submitted evidence and the district court "entertain[ed] oral argument," the panel was satisfied that the district court had "considered relevant merits issues with appropriate reference to the evidence." App., *infra*, 17a-18a.

Yet because the district court made no factual findings, the Sixth Circuit made its own. App., *infra*, 6a-12a, 22a-24a. It credited none of Whirlpool's *unrefuted* evidence, much less weighed Whirlpool's evidence against plaintiffs' conflicting evidence on crucial issues going to the propriety of class certification. For instance, despite uncontested evidence that Whirlpool and Sears, collectively, received only 23,401 mold and odor complaints nationwide through 2008 (D103-29 ¶ 9), the Sixth Circuit found that Whirlpool received 1,300,000 calls by late 2006. App., *infra*, 11a. But the record shows that this figure is the total number of calls received regarding *all* washing machine models and *all* questions—not just mold or odor complaints regarding front-loading models. D110-7 at 8.

The Sixth Circuit again ruled that two common questions—whether the Washers had a defect that caused mold and whether Whirlpool warned about the propensity for mold—justify class treatment. The court rejected Whirlpool's argument that the question "whether the alleged design defects caused biofilm and mold to accumulate" cannot be answered in a single stroke because of the many factual

dissimilarities in the class, including different washer designs, features, use-and-care instructions, buyer knowledge, and buyer behavior. App., *infra*, 12a-13a, 22a. Relying on a June 2004 email written *before* Whirlpool implemented any design changes, the panel found that mold problems "remai[n] across the manufacturing spectrum." *Id.* at 10a, 22a. It was enough that "'[t]he basic question in the litigation—were the machines defective'"—is "'common to the entire mold class,'" even though "'*the answer may vary with the differences in design*.'" *Id.* at 23a (quoting *Butler*, 702 F.3d at 361) (emphasis added).

Again invoking its "premium price" theory, the Sixth Circuit rejected Whirlpool's argument that because the vast majority of class members had not experienced odors, determining whether a class member was injured would require individual inquiries. The court said that "[b]ecause *all* Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class." App., *infra*, 28a. The court failed to explain how such a theory could apply to consumers who never experienced any problem throughout the lives of their machines. In holding that Ohio recognizes this theory, it cited only the law of foreign jurisdictions like California and cases applying Ohio law that allow consumers to "recover damages for economic injury" from products that *actually malfunctioned*. *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Sixth Circuit's erroneous decision conflicts sharply with this Court's precedents and exacerbates an existing circuit split. Given that the class stricken in *Comcast* was impermissible because damages were individualized, class certification is *a fortiori* impermissible here, where determination of liability, injury, and damages varies from owner to owner. The court of appeals' lax approach to Rule 23 would not "in practice exclude most claims" (*American Express*, 133 S. Ct. at 2310), but would allow certification of all claims involving mass produced consumer products.

The panel incorrectly ruled that "defect" is a common and predominant question, even though that inquiry will vary with differences in Washer design, instructions in user manuals, and customer usage, so that there are no "common answers" to the question whether a buyer has been harmed by a "defect." *Dukes*, 131 S. Ct. at 2551. In fact, *most* class members were unharmed—and identifying those few who did experience moldy odors, and what caused the odors, depends on individual evaluations. The court of appeals' authorization of a class filled with unharmed purchasers is contrary to holdings from other circuits and *Dukes*' instruction that class members must "have suffered the same injury." *Ibid.*

To overcome the gulf between the experiences of 200,000 purchasers of different products over a decade, the court of appeals relied on a "premium price" theory. But Ohio law has never adopted that theory and it has no logical application to purchasers of washers that have never malfunctioned. A legally

and factually unsupported theory is the very sort of "arbitrary" and "speculative" approach that this Court disapproved in *Comcast*. 133 S. Ct. at 1432-1433.

The court of appeals' faulty ruling invites a flood of class actions against manufacturers based on the experiences of a handful of purchasers. The threat of classwide liability will coerce settlements of meritless claims, affecting all cases involving mass-produced products. This inevitably will result in inflation of product prices and reduction of innovation in product design. The Sixth Circuit's endorsement of a fragmentary class full of buyers who have never experienced the alleged defect underscores the importance of adhering to this Court's Rule 23 precedents.

I. The Sixth Circuit's Commonality And Predominance Rulings Contradict This Court's Precedents.

A. The Sixth Circuit's decision cannot be reconciled with *Comcast*.

The Sixth Circuit held that *Comcast* did not "change the outcome of our Rule 23 analysis" because *Comcast* involved a "liability *and* damages class." App., *infra*, 34a. But *Comcast* contradicts the central premise of the Sixth Circuit's decision.

Comcast disapproved a class because plaintiffs had not shown that damages could be proved with classwide evidence, and individualized damages issues predominated over any common issues. It follows *a fortiori* that when issues of *both* liability *and* damages demand individualized inquiry, as here, the predominance requirement is not met. See

Amchem, 521 U.S. at 624-625. Unless the court can find "that the existence of individual injury" is "capable of proof at trial through evidence that was common to the class rather than individual to its members," class certification is improper. *Comcast*, 133 S. Ct. at 1430; see *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-253 (D.C. Cir. 2013) ("Common questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact," citing *Comcast*).

1. *Comcast* confirmed that plaintiffs seeking class certification must "affirmatively demonstrate" with "evidentiary proof" their compliance with Rule 23(b)(3)'s predominance requirement, and that the court must "take a close look at whether common questions predominate over individual ones." 133 S. Ct. at 1432. A court must ask itself, before concluding that plaintiffs can "measure and quantify damages on a classwide basis," whether the methodology used to do so is "a just and reasonable inference or speculative." *Id.* at 1433. Applying an "arbitrary" methodology to unify the class "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Ibid.*

Here, the Sixth Circuit relied on complaint allegations and conclusory statements by plaintiffs' counsel asserting common injury. App., *infra*, 26a-27a. But it offered no explanation for its assumption that *all* class members overpaid for their Washers because a small subset of class members experienced problems. That speculation cannot unify the class. To the contrary, the record establishes that class members bought 21 different Washer models that came with differing features and instructions to reduce potential for odors. Whirlpool's knowledge of

the potential for Washer odor changed over the class period, as did the knowledge of prospective consumers, and many received service from retailers that eliminated the problem at no cost whatsoever.

A small minority of buyers experienced odors; the vast majority did not. Some buyers knew of the potential for odors in front-loading washers; others did not. Some buyers misused their washers (*e.g.*, failed to use HE detergent, leave the door ajar after use, or run the Clean Washer cycle periodically); others did not. Some buyers installed their Washers in humid basements that transferred mold to the Washer; others did not.

In these circumstances, questions of defect, causation, knowledge, customer use, and damages all will require individualized evidence and evaluation. These are the "nearly endless" "permutations" in causes of alleged injuries that precluded certification in *Comcast*. 133 S. Ct. at 1434-1435. To allow certification based on an appellate court's "arbitrary" and "speculative" approach to predominance that brushes off widespread variations in claimants' circumstances would reduce the predominance requirement "to a nullity." *Comcast*, 133 S. Ct. at 1432-1433; see also *Dukes*, 131 S. Ct. at 2551.

2. The Sixth Circuit sought to bypass these differences with a theory that class members, whether they experienced moldy odors or not, had all paid a premium price. But Ohio law does not recognize a premium price theory where injury is unmanifested. See *Hoffer v. Cooper Wiring Devices, Inc.*, 2007 WL 1725317, at *7-8 (N.D. Ohio June 13, 2007) (economic loss is not recoverable under Ohio tort law unless the alleged defect has manifested in

the purchased product); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 2005 WL 6778678, at *11-12 (N.D. Ohio Feb. 22, 2005) (there is no injury "until the very product in question has caused some harm to person or property, even if the product in question contains a latent defect that has manifested in other, identical products"); *Delahunt v. Cytodyne Techs.*, 241 F. Supp. 2d 827, 832 (S.D. Ohio 2003) (dismissing claim alleging that class members experienced only diminished product value); *Bouchard v. Am. Home Prods. Corp.*, 213 F. Supp. 2d 802, 807 (N.D. Ohio 2002) ("Ohio law does not permit recovery for the 'mere possibility' that a plaintiff may develop a condition, because that would invite speculation by the jury").[5]

The court of appeals never addressed any of these Ohio rulings. It pointed instead to California and other foreign decisions. In doing so it contravened this Court's precedent, which establishes that using foreign law to expand a jurisdiction's substantive law in order to certify a class violates the Due Process and Full Faith and Credit Clauses. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-823 (1985); see *Amchem*, 521 U.S. at 609-610, 624.

Beyond this, whether a particular buyer overpaid for a Washer is an individual question. If a class

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[5] Ohio law is consistent with the law in most states. See 1 Joseph McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 5:56 (9th ed. 2012) ("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"); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 628 (8th Cir. 1999) (summarizing cases).

member purchased a Washer in 2002 that never developed odor (as is true for most Washer buyers), the buyer received precisely what he or she bargained for. See, *e.g.*, *In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006) (purchaser of a camera "that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for"); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320-321 (5th Cir. 2002). This is true even if a small percentage of *other* owners experienced an odor problem. See *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009) (rejecting argument that owners did not receive benefit of bargain for cribs that did not malfunction; bargain "did not contemplate the performance of cribs purchased by other consumers"). Determining which buyers did or did not receive what they bargained for turns on individual facts. See *Dukes*, 131 S. Ct. at 2561; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (warning against "novel" and "adventurous" applications of Rule 23 that override individualized factual issues).

The Sixth Circuit did not explain how the value of a washer that operated perfectly has been decreased by some *other* owner's experience, or how a buyer who purchased a Washer with actual knowledge of the potential for odors (*e.g.*, after reading *Consumer Reports* or online customer reviews) was harmed, much less how they were all harmed in the same way. *Comcast* makes clear that such a "speculative" method of proof of common injury cannot support class certification. 133 S. Ct. at 1432-1433.

B. The Sixth Circuit failed to engage in the rigorous analysis required by Rule 23.

On the "premise that there need be only one common question to certify a class" (App., *infra*, 20a), the Sixth Circuit deemed both commonality and predominance satisfied. *Id.* at 38a. But commonality and predominance are distinct inquiries, and predominance is "far more demanding" than commonality. *Amchem*, 521 U.S. at 623-624; accord *Comcast*, 133 S. Ct. at 1432. Commonality requires that at least one central question be subject to the *same answer* for the entire class. *Dukes*, 131 S. Ct. at 2551, 2556. Predominance requires in addition that any common questions "predominate over any questions affecting only individual members." Rule 23(b)(3). Neither requirement was satisfied here.

1. The court of appeals erroneously assumed that the existence of a defect is a question common to the class. It dismissed Whirlpool's numerous design and instruction changes as irrelevant. Citing an internal Whirlpool email (which predated all of the relevant changes) and plaintiffs' expert report, the court opined that these changes were ineffective in "eliminat[ing] the biofilm problem." App., *infra*, 24a. The court ignored the fact that Whirlpool at trial will submit evidence of different combinations of designs, features, and instructions, and that the jury will need to render a decision as to each different combination.

Whirlpool has a constitutional right to have a *jury* determine the impact of a particular design change on the potential for odor. The court's role at the certification stage is limited to deciding whether, based on the evidence presented, a jury could reach

an answer to the defect question "in one stroke." *Dukes*, 131 S. Ct. at 2551. "What 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* apt to drive the resolution of the litigation." *Ibid.* And "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Ibid.*

Had the Sixth Circuit followed this Court's precedents, it could not have ruled that the defect question satisfies the commonality requirement. If the jury finds, for example, that the "Clean Washer" self-cleaning cycle prevented odor, then buyers whose Washers had that feature would not have a defective machine. If the jury determines that the only defect was in the original aluminum crosspiece, then only class members owning 2001-2004 Access Washers would have a potentially viable claim. Those are just two of many important changes that occurred during the class period. The court of appeals itself recognized that "the answer" to the defect question "may vary with the differences in design." App., *infra*, 23a. For that reason alone, the defect question is not common.

The same is true of the question "whether Whirlpool adequately warned consumers." App., *infra*, 20a. It is undisputed that Whirlpool's disclosures to consumers and trade customers regarding odor changed throughout the class period. From those materials, as well as from retailers, service representatives, and press reports, buyers learned in varying ways and degrees about the potential for odors and how best to reduce any risk. Inadequate

warnings to one buyer in 2002 cannot show inadequate warnings to a different buyer in 2007.

2. To judge predominance, a court must first identify issues subject to common proof that will generate common answers for all class members, then identify all issues that will require individualized proof and generate different answers, and finally weigh the aggregates against each other to determine which predominates. See *Amchem*, 521 U.S. at 623-624; *Myers v. Hertz Corp.*, 624 F.3d 537, 550 (2d Cir. 2010); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004). That inquiry is a practical one focused on "the nature of the issues that actually will be presented at trial." Rule 23(c)(1), 2003 Adv. Cmte. Notes; see *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (inquiry "begins, of course, with the elements of the underlying cause of action" and requires the court to consider what kind of proof is needed to support each element and defense); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (courts must determine "how specific issues will play out in order to determine whether common or individual issues predominate in a given case"). A court that is "not satisfied that [predominance has] been met should refuse certification until [it has] been met"—not certify and speculate that the case will go away by settlement or the problem disappear in the litigation process. Rule 23(c)(1), 2003 Adv. Cmte. Notes.

The court of appeals failed to consider the individualized proofs needed to address liability, let alone engage in any comparison of the individual versus common elements. Instead of doing this, it relied on *Amgen*. App., *infra*, at 31a-33a. But *Amgen*

focused on the relevance of "materiality" to certification in securities cases involving the "fraud-on-the-market" presumption of reliance. Materiality was deemed common to the class because in securities cases it is by definition subject to an objective reasonable-person standard and market fluctuations affect investors in an identical fashion. *Amgen*, 133 S. Ct. at 1191.

Here, by contrast, individual questions of law and fact predominate over any common questions, as the elements of plaintiffs' claims show. Under Ohio law, negligent design requires a defect that proximately caused injury. 1 OJI-CV 451.03, 451.11. Breach of warranty claims require failure to provide a merchantable product fit for intended use that proximately caused injury. 1 OJI-CV 451.17. Failure to warn requires proof of a known hazard to health or safety (not alleged here) that proximately caused injury. 1 OJI-CV 451.15. Only individual inquiries can address these elements, which depend on the model purchased, the date of purchase, the buyer's knowledge, and the buyer's experience with the product.

The Sixth Circuit brushed aside individualized causation, knowledge, and use inquiries despite differences in laundry habits, remedial efforts, and home environments. But the court, like plaintiffs' expert, conceded that all washers accumulate biofilm and can develop odors (App., *infra*, 23a) and that consumer habits and home environments change the amount of biofilm. *Id.* at 23a-24a. It is beyond dispute that a vast array of consumer products, from sinks to refrigerators to bathtubs, will develop mold if not properly cleaned and maintained. The court also acknowledged that *most* Washer purchasers

have never had *any* odor problem. *Id.* at 25a-26a. Thus, questions as to whether, when, and why a particular purchaser experienced odor can be resolved only on a buyer-by-buyer basis.

Beyond this, an individualized and complex assessment of damages will be required for hundreds of thousands of buyers. See *Comcast*, 133 S. Ct. at 1433 (predominance is not satisfied where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"). A court's removal of damages determinations from any class trial does not dispense with the need to weigh them in the predominance inquiry. As *Comcast* shows *a fortiori*, the fact that damages, as well as injury and causation, must be addressed after any class trial overwhelms any common issues.

The court of appeals also was entirely silent on the individualized nature of Whirlpool's affirmative defenses, including product misuse and the statute of limitations, and how any class trial could be conducted without stripping Whirlpool of its Seventh Amendment right to present those defenses. Yet defenses too must be considered when assessing predominance under Rule 23(b)(3). *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"); *Amchem*, 521 U.S. at 623 & n.18.

By omitting consideration of individual questions inherent in plaintiffs' claims and Whirlpool's defenses, the Sixth Circuit failed in its "critical" duty to "determine how the case will be tried" and "tes[t]" whether the issues to be tried are "susceptible of class-wide proof." Rule 23(c)(1), 2003 Adv. Cmte.

Notes. The end result—a case with "fatal dissimilarit[ies] among class members" as to key issues to be tried—is precisely the type of case that this Court has deemed inappropriate for certification. *Amgen*, 133 S. Ct. at 1197.

3. The Sixth Circuit agreed with the *Comcast* dissent that Rule 23 is "generally satisfied" when classwide adjudication achieves "economies of time and expense." App., *infra*, 36a, quoting 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting). But the Sixth Circuit got the relationship between efficiency and predominance backwards. Rule 23's drafters insisted that it is "only" where "predominance exists that economies can be achieved by means of the class-action device." Fed. R. Civ. P. 23(b)(3) & 1966 Adv. Cmte. Notes. As *Comcast* recognized, "endless" "permutations" in establishing "liability" "will inevitably overwhelm questions common to the class" and thus eliminate any efficiencies in "treating [claimants] as members of a single class." 133 S. Ct. at 1433-1435. See *Amchem*, 521 U.S. at 615, 622-624 (disparities among class members overrode undoubted efficiencies in disposing of asbestos claims through a single settlement class); *Ortiz*, 527 U.S. at 858.

The Sixth Circuit also thought a class action justified here because "class members are not likely to file individual actions" where the cost of litigation "dwarf[s] any potential recovery." App., *infra*, 37a. But this Court has squarely rejected that rationale. In *American Express*—reversing a decision reinstated on remand after a GVR—the Court rejected an antitrust class action in favor of individual arbitration even though class resolution was the "only economically feasible" way to enforce the rights

of claimants who had "no economic incentive" to pursue claims individually. 133 S. Ct. at 2310-2311 & n.4; accord *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). Here, by contrast, Whirlpool has a large warranty department to redress customer complaints (D93-8 ¶ 31; D110-4; D110-7 at 8), and every incentive to fix problems to maintain customer loyalty. Some class members sought warranty service, others did not, creating another fissure in the purported class.

In short, the Sixth Circuit's decision was just as wrong after this Court's remand as before. Analyzing the parties' claims and defenses in light of governing Ohio law and undisputed facts in the record, and applying this Court's commonality and predominance decisions, leads to only one result: class certification should have been denied.

C. This Court's guidance on the predominance standard is needed now.

Sixteen years ago, this Court in *Amchem* insisted that a class be "sufficiently cohesive to warrant adjudication by representation." 521 U.S. at 623. But it did not elaborate on the criteria that judges should use in implementing the cohesion requirement. See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1060 (2005). This has resulted in "a myriad of vague and distinct formulations" by the lower courts. *Id.* at 1058-1060; accord 7AA Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 1778, at 119 (3d ed. 2005).

Although *Comcast* addressed predominance, the decision left open questions that cry out for clarification. How should a court determine whether

one or more common questions "predominate" over individual questions? How should courts treat the various elements of the claims? What weight must be given to fact-of-injury, affirmative defenses, and individual damages?

Since *Comcast* was announced, a split already has arisen regarding whether Rule 23(b)(3) class certifications are proper where damages require individual inquiries. See *Jacob v. Duane Reade, Inc.*, 2013 WL 4028147, at *3 (S.D.N.Y. Aug. 8, 2013) (discussing split "[i]n the wake of *Comcast*"); compare, *e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) ("damage calculations alone cannot defeat certification"), with *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d at 252 (certification is inappropriate unless plaintiffs "show that they can prove, through common evidence, that all class members were *in fact injured*") (emphasis added).

Without guidance from this Court, some lower courts are equating commonality with predominance and allowing subjective notions of "efficiency" to substitute for rigorous predominance examination. *E.g.*, *Butler*, 702 F.3d at 362; *Arlington Video Prods., Inc. v. Fifth Third Bancorp*, 515 F. App'x 426, 443-444 (6th Cir. 2013).

But the predominance inquiry must involve more than a "chancellor's foot" or "gestalt judgment" of the sort the Sixth Circuit rendered here. *Amchem*, 521 U.S. at 621. Careful predominance analysis is central to ensuring that any (b)(3) class protects the rights of the defendant as well as absent class members, and a mistaken certification exerts hydraulic pressure to settle. This Court should make clear that predomin-

ance must be rigorously analyzed by weighing the aggregate of common issues and the aggregate of individual issues that will need to be resolved at trial, and must not be reduced to mere commonality, distorted by speculative ideas of efficiency, or otherwise overriden with a judicial thumb on the scale.

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

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432. To justify this departure, putative class representatives must "demonstrate that they and class members 'have *suffered the same injury*.'" *Dukes*, 131 S. Ct. at 2551. Because most Washer buyers never experienced *any* moldy odor, as the Sixth Circuit recognized, they cannot all have "suffered the same injury." And among those who do claim moldy odors, the cause of those odors cannot be determined without individualized examination.

In eliminating the requirement of common injury to certify this sprawling class action, the Sixth Circuit glossed over two insuperable problems. First, the uninjured Washer buyers who fill the class would lack standing to sue in their own right, as this Court recently made clear. See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) ("allegations of *possible* future injury are not sufficient" to create standing because "threatened injury must be *certainly impending* to constitute injury in fact") (emphasis original). Second, their unmanifested-defect claims would not survive a motion to dismiss

under Ohio law. Throwing their claims into a single class action based on alleged harm to a few other buyers promises a windfall to countless uninjured people.

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 comprises thousands or even millions of consumers who never experienced the alleged defect. Some courts, like those below, have held that whether absent class members have experienced a defect is irrelevant to the Rule 23 inquiry; others have found it to be a fundamental obstacle to certification.

Consider two recent cases from the Central District of California, which reach irreconcilable conclusions on the issue. Compare *Tait*, 289 F.R.D. at 479-480 (certifying class on claims alleging latent defect causing moldy odors in Bosch front-loading washing machines), with *In re Toyota Motor Corp. Hybrid Brake Litig.*, 288 F.R.D. 445, 450 (C.D. Cal. 2013) (rejecting certification on claims alleging latently defective brakes). In *Tait*, the court reasoned, based on the Sixth Circuit's initial decision in this case, that because the plaintiffs alleged that all owners "overpaid" due to the presence of an undisclosed latent defect, they need not prove that any given washer developed odor. 289 F.R.D. at 479. In *Toyota*, by contrast, the court rejected this "creative damages theory" as insufficient as a matter of law to satisfy Rule 23. 288 F.R.D. at 450.

This division mirrors a sharp conflict among the circuits. The Eighth, Fifth, and Eleventh Circuits

generally reject no-injury class actions, holding that a class full of persons who did not experience the alleged problem cannot be certified. They offer several rationales for denying certification, including lack of Article III standing, failure to satisfy commonality or predominance requirements, and overbreadth of the defined class. 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).

Like the Sixth Circuit, the Seventh and Ninth Circuits have adopted the opposite position. *E.g.*, *Butler*, 702 F.3d at 362 (the fact that most class members did not experience a mold problem "is an argument not for refusing to certify the class but for certifying it"); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (rejecting argument that certification was improper because most absent class members had not been harmed); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (certification is proper regardless of whether any class members actually experienced premature tire wear). These courts view the question whether absent class members suffered any injury as a merits issue not appropriately addressed at the certification stage. See *Daffin v. Ford Motor Co.*, 458 F.3d 549, 550, 553 (6th Cir.

2006) (whether Ford's warranty permits an owner to recover for unmanifested defects is a merits inquiry).

Here, the Sixth Circuit reaffirmed its view that a class of product buyers may be certified even if most buyers are perfectly satisfied with their products. The court agreed with *Wolin* that "proof of the manifestation of a defect is not a prerequisite to class certification." App., *infra*, 28a-29a. Review by this Court is required to resolve this deep and mature conflict on a recurring issue with enormous practical consequences.

B. A class of mostly uninjured buyers may not be certified under Rule 23(b)(3).

This Court repeatedly has explained that Rule 23 cannot be used to alter the nature of the parties' claims or defenses. 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)); accord *Ortiz*, 527 U.S. 845; *Amchem*, 521 U.S. at 612-613. And "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 612-613. The "requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Lower courts should not be permitted to vault over these requirements by certifying a sweeping class full of uninjured persons merely because the named plaintiffs allege that the products *they* purchased malfunctioned. Buyers whose products function perfectly lack standing to sue in their own right (*Clapper*, 133 S. Ct. at 1147), and their claims fail on the merits in the majority of states, including

Ohio. Speculative assertions that buyers overpaid based on a latent defect fall far short of the requirement of "certainly impending"—not merely "possible future"—injury. *Ibid.*; see 1 MCLAUGHLIN ON CLASS ACTIONS, *supra*, § 5:56 ("plaintiffs, including absent class members, who allege only a hypothetical risk of defect and consequent future economic loss lack standing").

Before a class may be certified, the question whether members have suffered an actual injury must be answered in the affirmative for all (or at least the vast majority of) putative class members. If, as here, most putative class members have not been injured, certification should be denied.

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

Although class actions should be an exception to the general rule that claims are individual, the reality is otherwise. Companies spent billions of dollars defending class action lawsuits in 2012, and *half* of major companies are currently defendants in class-actions. *2013 Carlton Fields Class Action Survey* at 4, 6, 8.[6] On average, these companies faced over five class actions in 2012, representing a 16 percent increase over 2011. *Id.* at 9. More than a quarter of these lawsuits are consumer class actions. *Id.* at 12-13.

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[6] Available at www.carltonfields.com/files/uploads/Carlton-Fields-Class-Action-Report-2013-electronic.pdf.

The decision below, unless reversed, will accelerate this trend. It allows classes to be certified whenever a few consumers assert that a mass-produced product did not meet their expectations—regardless of whether most buyers had no problem with the product, whether buyers used the product as instructed, and whether a multitude of individual issues must be tried to resolve their claims. Armed with the Sixth Circuit's holding that all purchasers must have overpaid simply because the product *might* fail in the future, class counsel need only seek out jurisdictions welcoming these "no injury" class actions to impose massive liability on an entire industry. That harmful development cannot be reconciled with this Court's recent holding that the "stringent requirements" of Rule 23 "in practice exclude most claims." *Am. Express*, 133 S. Ct. at 2310. On the Sixth Circuit's theory, virtually every mass-produced product is subject to class-action attack.

Although the court below asserted that Whirlpool should "welcome class certification" because it will benefit if its defenses are accepted (App., *infra*, 29a), class actions hardly ever go to trial. See Barbara Rothstein & Thomas Willging, FEDERAL JUDICIAL CENTER, MANAGING CLASS ACTION LITIGATION 6 (2005) (90% of certified class actions settle). Settlements imposed by failure to insist on rigorous compliance with Rule 23 result in an unwarranted windfall to class members with no viable claim of their own. See *AT&T Mobility*, 131 S. Ct. at 1752; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). There is no reason why any defendant should "welcome" that sort of blackmail settlement.

This harm falls on consumers as well as manufacturers, retailers, and their employees. The costs of defense and settlement are passed on to consumers and undermine business expansion and new product development. See Theodore Frank, *The Supreme Court Must Stop the Trial Lawyers' War on Innovation*, FORBES, May 24, 2013 ("Given that every manufacturer is being sued, they can pass the costs along to consumers," who "are paying extra for products to subsidize wealthy trial lawyers"); J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, WASH. TIMES, Nov. 15, 2012, at B4 (allowing no-injury classes forces manufacturers to "pass on to consumers through higher prices the added costs" of coerced settlements). In the end, the only beneficiaries of improper class actions are "'the lawyers handling the case and perhaps the few consumers directly involved in the litigation.'" Sheila Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 741 (2012). No wonder commentators have called for this Court to grant review here. See, *e.g.*, Editorial, *Classy Action at the High Court*, WALL ST. J., Mar. 28, 2013, at A14 (criticizing Sixth Circuit's "wild expansion of liability" and urging this Court to grant certiorari to "make it clear [it] expect[s] other federal courts to honor [its] precedent").[7]

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[7] See also Editorial, *Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case*, WALL ST. J., Oct. 9, 2012, at A18; 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

In light of the importance of the issues presented to the courts, industry, and Nation, and given the mounting numbers of similar no-injury class actions pending across the country, this Court should grant the petition to clarify the predominance and common injury limits set forth in Rule 23. There is no warrant in Rule 23—or in common sense—for allowing classes of millions of consumers to be certified merely because a small portion of them encountered a problem that can be fully remedied by following straightforward user instructions.

CONCLUSION

The petition for a writ of certiorari should be granted.

B2; Editorial, *Supreme Court Decision Pending on Class Actions*, INVESTOR'S BUS. DAILY, May 28, 2013, at A12; 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*").

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