

Nos. 13-430, 13-431

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.

WHIRLPOOL CORPORATION,
Petitioner,

v.

GINA GLAZER AND TRINA ALLISON, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

**On Petitions for Writs of Certiorari to the
United States Court of Appeals for the
Seventh Circuit and Sixth Circuit**

**BRIEF *AMICUS CURIAE*
OF THE ASSOCIATION OF
HOME APPLIANCE MANUFACTURERS
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

The Association of Home Appliance Manufacturers (“AHAM”),¹ respectfully submits this brief as *amicus curiae* in support of the petitions for certiorari in *Sears, Roebuck and Co. v. Butler*, No. 13-430 (“*Butler*”), and the related case of *Whirlpool Corporation v. Glazer*, No. 13-431 (“*Glazer*”).

AHAM is a not-for-profit trade association, incorporated in the State of Illinois and headquartered in Washington, D.C., representing over 150 manufacturers of major, portable and floor care residential appliances. Whirlpool Corporation (“Whirlpool”), the petitioner in *Glazer* and the manufacturer of the front-loading clothes washers underlying the plaintiffs’ claims in *Butler*, is a member of AHAM. The home appliance industry contributes significantly to U.S. jobs and economic security. There are approximately 65,000 direct appliance industry employees in the United States.

AHAM supports petitioners’ request that this Court grant certiorari and decertify the classes certified below in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) (Sears Pet. App. A); and *Glazer v. Whirlpool Corporation*, 722 F.3d 838 (6th Cir. 2013) (Whirlpool Pet. App. A). The members of AHAM rely on the federal courts for the reasonable interpretation of the laws governing class certification to mitigate the cost and burden of class action lawsuits to which they are subjected. Classes that do not meet the requirements of Fed. R. Civ. P. 23 unfairly expand

¹ Pursuant to Sup. Ct. R. 37.6, AHAM states that no counsel representing a party authored this brief in whole or in part, and no person or entity other than AHAM made a monetary contribution to the preparation or submission of this brief.

defendants' substantive exposure, coercing businesses to settle claims without regard to their merit. Certification of classes in *Butler* and *Glazer*, which include hundreds of thousands of individuals—the vast majority of whom have not suffered, will not suffer, and do not claim injury—poses just such a risk.

The potential adverse impact of the decisions in *Butler* and *Glazer* extends beyond the petitioners' exposure in these actions. There is an immediate risk that those decisions could be used to justify certification of classes that include uninjured purchasers in a number of copycat lawsuits concerning front-loading clothes washers currently pending against AHAM members. If left undisturbed, the decisions below would sanction the certification of such artificially-constructed classes in the Sixth Circuit, the Seventh Circuit, and beyond. Acceptance of these precedents by other jurisdictions would have a significant and deleterious impact on the national business activities of AHAM's members by increasing their legal and business costs, and creating disincentives that will chill development of innovative new technologies that effectuate important national public policy goals. AHAM members would face a heightened risk that courts would increasingly rely on these decisions to certify similarly ill-founded and coercive classes in cases brought against them on equally specious grounds.²

SUMMARY OF ARGUMENT

The erroneous precedents established in *Butler* and *Glazer*, if allowed to stand, would have an adverse

² Pursuant to Sup. Ct. R. 37.3(a), counsel of record for both Petitioner and Respondent have consented to the filing of this brief in letters that have been lodged with the Clerk.

impact on AHAM's members and the consumers who purchase their products. Permitting certification of no-injury classes to assert design defect claims whenever complaints arise in connection with new or improved products will discourage product innovation, including in this case energy and water efficient products that save consumers money while protecting the environment and enhancing national energy security.

Although *Butler* and *Glazer* justify certification of no-injury classes in the name of efficiency, doing so actually yields an inefficient case resolution, by pressuring defendants to enter into settlements that misallocate resources to uninjured consumers and class counsel. Manufacturers would ultimately pass the cost of those settlements on to future purchasers in the form of increased prices for the products they sell. As of the date of this brief, there are twenty class actions pending against AHAM's members asserting claims identical to those advanced in *Butler* and *Glazer* (referred to herein, collectively, as the "front-loading clothes washer cases"), meaning that the adverse impact of those decisions will be immediate and all but certain. In addition, there are many more putative class actions pending against AHAM's members involving almost every conceivable type of home appliance, including vacuum cleaners, refrigerators, dishwashers, water heaters, air conditioners, and microwave ovens, such that the class-action threat to the industry is much broader in scope than just these twenty-two front-loading clothes washer class actions. In order to avoid such consequences, AHAM respectfully submits that the Court should grant the petitions for *certiorari* in *Butler* and *Glazer*, in order to clarify the standards governing class certification pursuant to Fed. R. Civ.

P. 23(b)(3) and decertify the no-injury classes in those cases.

ARGUMENT

I. PERMITTING CERTIFICATION OF NO-INJURY CLASSES DAMPENS PRODUCT INNOVATION

The front-loading clothes washer cases treat product innovations as design defects based on isolated complaints about mold odors in front-loading clothes washers. The classes certified in *Butler* and *Glazer* pursue that theory of liability on behalf of all purchasers of the subject clothes washers, whether or not the purchasers have experienced moldy odors or otherwise claimed injury. Based on these precedents, product innovators in many U.S. industries now run the unwarranted risk that every product improvement is likely to become the wellspring of class action exposure to every purchaser of the product. The net result will be to discourage product innovation, including innovations that enhance consumers' lives and fulfill regulatory requirements.

Proving the maxim that no good deed goes unpunished, the claims in *Butler* and *Glazer* target innovative technologies developed to address ambitious federal energy and water efficiency requirements. The very features that accomplished those aims—reduced water consumption and reduced water temperature³—

³ Although Plaintiffs allege that front-loaders use lower water temperatures than conventional top-loading washers, that is false. Reduced water temperatures were implemented in all clothes washers, not just front-loading washers, in order to achieve compliance with the federal government's energy regulations. Whirlpool pointed this out repeatedly in the district and circuit courts. Whirlpool also pointed out that, just like top-

are cited as design defects, with the existence of a small number of complaints justifying certification of classes to assert product defect claims on behalf of all product purchasers.

The appliance industry implemented innovations in front-loading clothes washer design in response to regulations that were over twenty years in the making.⁴ As early as 1975, Congress responded to the threat of oil supply disruptions by adopting the Energy Policy and Conservation Act (“EPCA”), which mandated increased energy efficiency for consumer products sold in the United States.⁵ Congress amended the EPCA through the National Appliance Energy Conservation Act of 1987 (“NAECA”),⁶ which obligated the Department of Energy (“DOE”) to engage in a series of rulemaking procedures between 1989 and 2001 to develop, implement and refine energy conservation requirements for home appliances, including washers.⁷ A Final Rule for clothes washers

loading washers, water temperature is a consumer-selectable feature on front-loading washers, and a consumer’s decision to use only cold water wash cycles is an individual use habit that can contribute to mold growth and odors.

⁴ “The Department of Energy (DOE) has regulated the energy efficiency level of residential clothes washers since 1988.” U.S. Dept. of Energy, *Residential Clothes Washers*, Oct. 26, 2013, http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/39.

⁵ See Pub. L. 94-163, 89 Stat. 923 (1975) (codified as amended at 42 U.S.C. § 6295 (2012)) (requiring products manufactured in 1980 to be at least 20% more efficient than those manufactured in 1972).

⁶ Pub. L 100-12, 101 Stat. 107 (1987).

⁷ See Proposed Rule: Energy Conservation Standards for Three Types of Consumer Products, 54 Fed. Reg. 32744 (proposed Aug. 9, 1989) (first round of NAECA rulemaking); Final Rule: Energy

went into effect in two stages—Stage I, commencing January 1, 2004, and Stage II, commencing January 1, 2007—and required that manufacturers improve the efficiency of all new clothes washers by 22% in Stage I and 35% in Stage II.⁸

The Final Rule quantified the anticipated benefits of those improved efficiency goals. Consumers were expected to recoup the higher initial cost of the washers in 3.5 years for Stage I, and in 5.0 years for Stage II, with cost savings of \$103 over the life of the appliance in Stage I and \$260 over the life of the appliance in Stage II. These savings would result from energy conservation (239 fewer kilowatt-hours per year in Stage I and 533 kilowatt-hours per year in Stage II) and reduced water consumption (1,568 gallons of water per year in Stage I and 7,095 gallons of water per year in Stage II).⁹ Nationwide, over a period of twenty-seven years (from 2004 to 2030), these conservation measures are expected to: (i) save 5.52 quads of energy; (ii) reduce greenhouse gases by 95.1 million metric tons of carbon dioxide; (iii) reduce air pollutants by 253.5 thousand metric tons of nitrous oxides and 28.1 thousand metric tons of sulfur dioxide;

Conservation Standards for Three Types of Consumer Products, 56 Fed. Reg. 22250 (May 14, 1991) (to be codified at 10 C.F.R. pt. 430) (first round of NAECA rulemaking completed); Advance Notice of Proposed Rulemaking: Energy Conservation Standards for Three Cleaning Products, 59 Fed. Reg. 56423 (proposed Nov. 14, 1994) (second round of NAECA rulemaking resumes); Final Rule: Clothes Washer Energy Conservation Standards, 66 Fed. Reg. 3314 (Jan. 12, 2001) (to be codified at 10 C.F.R. pt. 430).

⁸ See 66 Fed. Reg. 3314.

⁹ Final Rule: Clothes Washer Energy Conservation Standards, 66 Fed. Reg. at 3315.

and (iv) save 11 trillion gallons of water.¹⁰ Combined, these innovations are expected to yield a net economic benefit of \$15.3 billion.¹¹

Achieving the aggressive DOE efficiency targets and attaining the anticipated individual and societal benefits required groundbreaking product innovation by appliance manufacturers. They met that challenge. Manufacturers turned, in large part, to front-loading designs, which previously had not been commonly used in the United States, but generally consume less water than conventional top-loading machines. The water- and energy-conserving capabilities of these new front-loaders were enhanced by using more accurate sensors that can detect the clothing load and use only as much water for washing as is necessary, resulting in more efficient use of hot and cold water. Many front-loading models also were designed to clean clothes using lower water temperatures than conventional top-loaders used in the 1990s, and front-loaders incorporated higher spin speeds to remove more water from the clothes to reduce the time and energy needed for drying. Over time, manufacturers also developed excellent high-efficiency top-loading clothes washers that met these energy-saving objectives, but for the better part of the last decade, the high-efficiency front-loading washers were much more popular with consumers than high-efficiency top-loaders. Statistics that AHAM compiles from its members indicate that between 2007 and 2012, 34% of all clothes washers shipped were front-loaders. These figures represent significant growth in sales of front-loading clothes washers—which comprised less than

¹⁰ *Id.* at 3316.

¹¹ *Id.*

5% of all new washer sales in the late 1990s—showing that these innovative appliances were extremely popular with consumers, and not notorious for alleged moldy odors.

The implementation of the DOE energy and water conservation goals through innovative front-loading clothes washer design has proved enormously successful. By way of example, in 1997, the DOE and Maytag conducted a field study in the small rural town of Bern, Kansas, and replaced 204 conventional top-loading washers with new Maytag high-efficiency front-loading clothes washers. According to the study, the front-loading clothes washers used about 40% less water and 60% less energy than the conventional top-loading machines.¹² Five years later, the new front-loading clothes washers had saved Bern's residents 4.3 million gallons of water and more than 133,000 kilowatt-hours of electricity.¹³ More recent reports, including a June 2013 white paper released by the American Council for an Energy Efficient Economy, in conjunction with the Natural Resources Defense Council, confirm that the front-loading clothes washer design continues to be more efficient than older models, "largely due to lower water consumption since there is no need to completely submerge clothes" and "advanced electronic controls to automatically adjust the water level depending on the load size."¹⁴

¹² C.A. Pugh and J.J. Tomlinson, *High-efficiency washing machine demonstration, Bern, Kansas*. CONSERV99 Conference, Monterey, Cal. (1999).

¹³ Nancy Gaarder, *Washer Study Volunteers Take a Spin through D.C.*, OMAHA HERALD, Sept. 16, 2002, available at <http://www.krwa.net/news/bern2.html>.

¹⁴ Rachel Cluett, et al., AMERICAN COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY, SAVING ENERGY AND WATER THROUGH

As reported by third-party organizations like Consumer Reports, J.D. Power & Associates, and the Good Housekeeping Research Institute, manufacturers have achieved all of these energy-savings goals while simultaneously improving cleaning and fabric care performance compared to conventional top-loaders. In February 2005, Consumer Reports recommended front-loading clothes washers as “the best-all-around” performance-wise.¹⁵ In June 2012, the Good Housekeeping Research Institute awarded all of the leading front-loading clothes washers a grade of “B” or higher.¹⁶ Most recently, in July 2013, Consumer Reports continued its praise for high-efficiency front-loading clothes washers, writing that the models combined “superb washing performance and efficiency.”¹⁷

How then, have beneficial product innovations served as the wellspring for no-injury class actions? Plaintiffs in *Butler* and *Glazer* (and all of the front-loading clothes washer cases) argue that the innovative features that foster those efficiency goals—in particular use of less water and lower water temperature¹⁸—are design defects because of the alleged

STATE PROGRAMS FOR CLOTHES WASHER REPLACEMENT IN THE GREAT LAKES REGION 1 (2013), available at <http://aceee.org/files/pdf/white-paper/great-lakes-clothes-washers.pdf>.

¹⁵ *Washer and Dryer Update: A New Spin*, CONSUMER REPORTS, Feb. 2005, at 42.

¹⁶ Good Housekeeping Research Institute, *Best Washing Machines*, GOOD HOUSEKEEPING, June 2012.

¹⁷ *Save by Switching to a More Efficient Washer*, CONSUMER REPORTS, July 2013, at 1.

¹⁸ Lower water temperatures cannot constitute a defect because this feature was implemented in all clothes washers, not

potential to result in excessive biofilm and resulting moldy odors for a small minority of purchasers. *See* Sears Pet. App. 3a (“The claim in the mold class action is that because of the low volume and temperature of the water in the frontloading machines compared to its volume and temperature in the conventional top-loading machines, they don’t clean themselves adequately and as a result mold accumulates that emits bad odors.”); Whirlpool Pet. App. 6a. In *Glazer* and *Butler*, complaints by a limited cohort of purchasers were deemed sufficient to certify classes—consisting mostly of uninjured purchasers who will never be injured—to assert claims that treat product innovations as product defects.

The lesson of *Butler* and *Glazer* is that routine levels of customer complaints for a new design can be the wellspring for ruinous class action exposure. A small incidence of component defects and complaints is ordinary and expected for any mass-produced appliance. For example, the October 2005 issue of Consumer Reports magazine reports the percentage of five-year-old products with and without a warranty that have ever been repaired or had a serious problem, and indicates that every product has some percentage of units that require repair during that time frame.¹⁹ Further, all products—especially home appliances—must be routinely cleaned and cared for, and manufacturer-provided owners’ manuals inform customers how to do this. Air conditioners, dehumidifiers, ovens, dishwashers, clothes dryers, furnaces, water heaters, and refrigerators all have to

just front-loaders, and because water temperature remains a consumer-selectable feature on front-loading washers.

¹⁹ *Repair It or Replace It?*, CONSUMER REPORTS, Oct. 2005, at 29.

be periodically cleaned. So, too, do bathtubs, kitchen sinks, shower heads, and toilets. These products are not defective simply because some of them get excessively dirty and accumulate some mildew. Yet *Butler* and *Glazer* hold that any product that must be cleaned and cared for could become the subject of a massive class action simply by pointing to a few owners that neglected to keep the product clean.

In the front-loading clothes washer cases, the fortuity of product design changes associated with energy and water efficiency improvements provided the hook that allowed class plaintiffs to characterize mold issues as design defects, despite a low incidence of mold complaints that would appear to render such a claim facially implausible. *Butler* and *Glazer* then go one step further, holding that uninjured purchasers are appropriately included in a class to pursue plaintiffs' design defect claims, notwithstanding the fact that their vast numbers and lack of injury refute those claims.

If *Butler* and *Glazer* are permitted to stand, any product innovator that fails to achieve zero product complaints in connection with a new or improved product—which is a virtual impossibility—can expect that any product complaints that do occur will be attributed to the product innovation and provide the basis for assertion of class claims on behalf of every single purchaser of that product. If innovators are exposed to the risk that uninjured consumers will routinely be entitled to participate in class actions that characterize product innovations as product defects, the threat of exposure will make them less likely to explore and implement useful and beneficial product innovations.

It is no answer to suggest that innovation will continue to occur in response to further government regulation. It would bode ill for the economy and society if innovation were to occur only when compelled by government regulation. Moreover, the dysfunctional dynamic described above would occur whenever there are product innovations, no matter what the impetus. The only difference is that manufacturers would be compelled to accept exposure to no-injury products liability class actions whenever it is necessary to modify product design to comply with new government regulations.

The risk of future exposure is not hypothetical for manufacturers of front-loading clothes washers. The federal government is continuing to expand energy conservation requirements for home appliances, with new regulations affecting front-loading clothes washers scheduled to take effect in March 2015.²⁰ Satisfying these heightened standards will necessitate further energy-efficient innovations or improvements. If *Butler* and *Glazer* are left undisturbed, manufacturers will face the burden to satisfy government regulations while simultaneously risking increased liability exposure from no-injury class actions. Being unable to decline to comply with government regulation, manufacturers will be constrained to risk exposure to uninjured consumers predicated on the very product improvements that are implemented to comply with regulatory change.

²⁰ See Direct Final Rule: Energy Conservation Standards for Residential Clothes Washers, 77 Fed. Reg. 32308 (proposed May 31, 2012) (to be codified at 10 C.F.R. pts. 429 and 430).

II. BY RELAXING CLASS CERTIFICATION STANDARDS IN THE NAME OF “EFFICIENCY,” *GLAZER* AND *BUTLER* ACTUALLY PROMOTE INEFFICIENCY

Butler and *Glazer* certify plaintiff classes consisting primarily of uninjured purchasers who will likely never suffer injury. Both courts do so in the name of efficiency, rationalizing that class members’ individual small dollar value claims might not otherwise be asserted or vindicated. *See* *Sears* Pet. App. 4a (“A class action is the efficient procedure for litigation of a case such as this, a case 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.”); *Whirlpool* Pet. App. 37a (“class certification is the superior method to adjudicate this case fairly and efficiently” because “class members are not likely to file individual actions [where] the cost of litigation would dwarf any potential recovery.”). But the efficiency of this approach is illusory, at best. Instead, by relaxing class certification standards in the name of efficiency, *Butler* and *Glazer* actually increase inefficiency, exposing manufacturers to the claims of vast numbers of uninjured class members, while failing to provide meaningful remedies for the small minority of purchasers who claim to have experienced mold odors resulting from excessive biofilm.

Ultimately, certification of no-injury classes misallocates resources because the enormous exposure that results from class certification coerces defendants to enter into overinclusive class-wide settlements of predominately meritless claims. Such settlements primarily reward uninjured purchasers—who comprise

an overwhelming majority of the class—and class counsel. The net result of the no-injury classes endorsed by *Butler* and *Glazer* is to increase downstream costs to consumers, who will bear the cost and risk of litigation in the form of higher prices for the products that they purchase.

A realistic appraisal of *Butler* and *Glazer* requires consideration of how certification of a no-injury class predetermines the ultimate resolution of the action. The late Professor Richard Nagareda observed that “[t]he stark operational fact today is that civil procedure is not about the preparation of cases for trial.” Instead, Prof. Nagareda wrote, “the Federal Rules of Civil Procedure effectively operate now, in the age of ‘the vanishing trial,’ as rules of civil settlement procedure. They define the process by which the civil justice system sends signals about the valuation of claims—signals that, in turn, inform claim resolution by private settlement, not by jury verdict.” Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 171 (2009). Where class certification exponentially raises the stakes in the litigation through vast multiplication of the defendant’s exposure, the urgent signal that the defendant receives is “settle.”

This phenomenon is well-known to the courts that adjudicate large class actions. Thirty-five years ago, this Court stated, “Certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). More recently, the Court noted that defendants “[f]aced with even a small chance of a devastating loss . . . will be pressured into settling

questionable claims.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). Erroneous certification rulings create “inordinate or hydraulic pressure on defendants to settle.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001). The mere act of certifying a class consisting of thousands of mostly uninjured purchasers “makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.” *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002). It is because of these risks that “a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight.” *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Indeed, when amending Rule 23 in 1996, the Advisory Committee on Civil Rules acknowledged this danger and sought to address the real concern that class actions were being used as a “means to coerce a defendant into settling rather than risking defeat and ‘losing the company.’” See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 351 (2005).

Naturally, settlement pressure only increases as the size of a plaintiff class grows. See Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2512-13 (2013). Given this reality, the facile supposition in *Glazer* and *Butler* that there is a meaningful opportunity to sort out injury and damages issues after the no-injury class is certified is simply not well-founded. From the perspective of a defendant facing even a small

probability of a multi-billion dollar judgment, the die is cast once the class is established.

Where the settlement class overwhelmingly consists of purchasers who are uninjured (and will never be injured), settlement pressure yields a highly inefficient outcome, because the settlements are structured to distribute the bulk of the settlement proceeds to uninjured class members and class counsel, potentially at the expense of other class members who may have stronger injury and liability claims. See Steven B. Hantler, et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?* 38 LOY. L.A. L. REV. 1121, 1139 (2005) ("Class certification also can lead to unfair treatment of plaintiffs. Class counsel, not their clients, call the shots; class members with more serious and complex claims may be simply 'lumped into' the class and not given the individualized attention needed to fully adjudicate their claims."). The risk of an adverse outcome usually means that a liability determination that dispenses with claims of uninjured class members never occurs. In order to buy peace, the defendant is constrained to provide settlement consideration to the entire class, even those who would be unable to establish injury if put to their individual proof. Although such settlements attempt to account for the weakness of most class members' claims by providing negligible returns to individual class members, the aggregation of nominal individual settlements across enormous classes of the type certified in *Glazer* and *Butler* still has the potential to yield large sums.

It is not appropriate, as the Sixth Circuit suggests in *Glazer*, to attempt to cure the procedural and substantive defects associated with a no-injury class by means of a post-settlement adjudicative process

that belatedly addresses material differences in class members' injury and damages. *See* Whirlpool Pet. App. 59a. The expense and complexity of an individualized claim resolution process would dispel any illusion that certification of the no-injury class has achieved any efficiencies in comparison to separate adjudications of class members' claims. The very need to have such a process highlights the fundamentally individualized nature of the claims in these actions, and thus refutes the logic of even certifying a class in the first place. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (even where a class is certified for settlement purposes, "[t]he Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

Finally, the cost of no-injury class actions is inevitably borne by consumers. Products litigation is a cost of doing business for manufacturers. *See* Hylton, *supra*, at 2459. And it is an unnecessary cost when added on top of the pre-existing costs of manufacturers' warranty programs. Lowering the bar to facilitate easier certification of classes bolstered by uninjured purchasers will likely increase the number of such cases seeking to replace those warranty programs. The cost of defending and settling no-injury class actions flows downstream to consumers in the form of higher product prices (and, often, decreased choice), resulting in further waste and inefficiency. These increased costs will diminish the very consumer, environmental and societal benefits the federal government sought to achieve in implementing energy conservation requirements over the past two decades.

III. THE PRECEDENTS ESTABLISHED IN GLAZER AND BUTLER POSE A SIGNIFICANT THREAT TO AHAM'S MEMBERS

The large number of pending front-loading clothes washer cases demonstrates that the potential impact to the business of AHAM's members is real, and not hypothetical.²¹ The aggregate potential class action

²¹ In addition to *Glazer* and *Butler*, there are currently twenty front-loading clothes washer cases pending throughout the country. See *Seratt v. Sears Roebuck & Co.*, No. 1:07-cv-00412 (N.D. Ill. filed Jan. 22, 2007) (Kenmore washers); *Terrill v. Electrolux Home Products, Inc.*, No. 1:08-cv-00030-LGW-BKE (N.D. Ga. filed March 5, 2008) (Frigidaire washers); *Dunham v. LG Elecs. USA, Inc.*, No. 2:08-cv-01888-FSH-PS (D. N.J. filed April 18, 2008) (LG washers, consolidated with *Harper, infra*); *Harper v. LG Elecs. USA, Inc.*, No. 2:08-cv-00051-FSH-JBC (D. N.J. filed Jan. 4, 2008) (LG washers); *Napoli v. Sears, Roebuck and Co.*, No. 1:08-cv-01832 (N.D. Ill. filed March 31, 2008) (Whirlpool washers); *Tait v. BSH Home Appliances*, No. 8:10-cv-00711-DOC-AN (C.D. Cal. filed June 3, 2010) (Bosch and Siemens washers); *Montich v. Miele USA, Inc.*, No. 3:11-cv-02725-MAS-DEA (D. N.J. filed May 12, 2011) (Miele washers); *Fishman v. Gen. Elec. Co.*, No. 2:12-cv-00585-WJM-CLW (D. N.J. filed Jan. 31, 2012) (GE washers); *Durso v. Samsung Elecs. Am.*, No. 2:12-cv-05352-DMC-JBL (D. N.J. filed Aug. 24, 2012) (Samsung washers); *Spera v. Samsung Elecs. Am.*, No. 2:12-cv-05412-DMC-JBC (D. N.J. filed Aug. 28, 2012) (Samsung washers); *Chowning v. Samsung Elecs. Am.*, No. 2:12-cv-05440-DMC-JBC (D. N.J. filed Aug. 29, 2012) (Samsung washers); *Huffman v. Electrolux N. Am., Inc.*, No. 3:12-cv-02681-JGC (N.D. Ohio filed Oct. 26, 2012) (Frigidaire washers). Eight of these cases—*Gardner v. Whirlpool Corp.*, No. 1:08-cv-03555 (N.D. Ill. filed June 20, 2008); *Beierschmitt v. Whirlpool Corp.*, No. 1:08-cv-03177-JBS-JS (D. N.J. filed June 19, 2008); *Sandholm-Pound v. Whirlpool Corp.*, No. 1:08-cv-04098-JBS-JS (D. N.J. filed Aug. 13, 2008); *Seeherman v. Whirlpool Corp.*, No. 1:08-cv-07289-LAK (S.D.N.Y. filed Aug. 18, 2008); *Dijols v. Maytag Corp.*, No. 1:09-wp-65004-CAB (S.D. Fla. filed Nov. 4, 2009); *Cloer v. Whirlpool Corp.*, No.

exposure associated with these cases alone is enormous. And the risk to AHAM's members and to other manufacturers is not limited to claims concerning front-loading clothes washers, as there are many more putative class actions pending involving almost every conceivable type of home appliance, including vacuum cleaners, refrigerators, dishwashers, water heaters, air conditioners, and microwave ovens.²² Permitting the decisions in *Butler* and *Glazer* to stand will establish a harmful precedent that will increase the likelihood of an adverse outcome in all of those pending cases and invite future copycat litigation seeking large recoveries on behalf of substantially uninjured classes. The consequences for AHAM's members—and by extension, the entire home appliance industry—will be severe.

1:09-cv-11707-MLW (D. Mass. filed Oct. 13, 2009); *Scott v. Whirlpool Corp.*, No. 4:09-cv-00002-D (E.D. N.C. filed Jan. 6, 2009); and *Klein v. Whirlpool Corp.*, No. 3:10-cv-02019-RDM (M.D. Penn. filed Sept. 29, 2010)—all involving Whirlpool washers, have been consolidated by the United States Panel on Multidistrict Litigation. See *In re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, U.S. Dist. Court, N.D. Ohio, No. MDL-2001 (transferring cases to Northern District of Ohio).

²² See, e.g., *Helm v. Goodman Global, Inc.*, No. 8:13-cv-01213-EAK-TBM (M.D. Fla. filed May 7, 2013). (air conditioners); *Chenier v. Oreck Corp.*, No. 2:11-cv-05321-CAS-JEM (C.D. Cal. filed June 24, 2011) (vacuum cleaners); *Weske v. Samsung*, No. 2:10-cv-04811-WJM-MF (D. N.J. filed Sept. 20, 2010) (refrigerators).

CONCLUSION

For all of the above-stated reasons, AHAM respectfully submits that the petitions for certiorari from the Sixth and Seventh Circuits' decisions in *Glazer* and *Butler* should be granted.

Respectfully submitted,

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