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 a Writ of Certiorari to the United States Courts of Appeals for the Seventh and Sixth Circuits

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Coffee, Jr., John C.
Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,
100 Colum. L. Rev. 370 (2000)..... 9

Easterbrook, Frank H.
Discovery as Abuse,
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Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments 20

Grundfest, Joseph A. *Why Disimply?*, 108 Harv. L. Rev. 727 (1995) 21

Nagareda, Richard A. *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 20

Rothstein, Barbara J. & Willging, Thomas E. *Managing Class Action Litigation: A Pocket Guide for Judges* (Fed. Judicial Ctr. 2010) 20

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U.S. Small Bus. Admin., *The Small Business Economy: A Report to the President* (2009). 19

Whytock, Christopher A. *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481 (2011) 21

INTEREST OF *AMICI CURIAE*[*]

Amici and their members represent a diverse array of businesses and business interests across the United States, including manufacturers, retail merchants, and professional organizations. They support the petitions because they have a strong interest in ensuring that the lower courts undertake the rigorous analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

In these cases, the Sixth and Seventh Circuits have continued to disregard this Court's controlling precedents by significantly relaxing the standards for class certification. Although this Court previously vacated both judgments and remanded for further consideration in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the courts below deemed *Comcast* irrelevant and reinstated their earlier decisions. As a result, the Sixth Circuit certified a 200,000-member class notwithstanding the absence of any common questions of law or fact that predominate over individual ones. The Seventh Circuit likewise certified a massive breach-of-warranty class spanning six states over a period of multiple years, notwithstanding the absence of any

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[*] Pursuant to Sup. Ct. R. 37.2(a), *amici* timely notified the parties of their intent to file this brief, and the parties have consented to the filing. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

common questions that predominate over individual ones, and even though many putative class members have not suffered any injury. Both rulings considerably relax the standards for class certification. If allowed to stand, the decisions will dramatically increase the class-action exposure faced by *amici*'s members, who sell or manufacture products in interstate commerce, including in cases where there is no proof that any meaningful number of putative class members have suffered harm.

The three organizations that are signatories to this brief consist of:

The Chamber of Commerce of the United States of America ("Chamber"). The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has filed *amicus curiae* briefs in several of this Court's recent class-action cases, including *Comcast* and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.4 trillion in annual revenues and employ nearly 16 million individuals. Business

Roundtable member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $158 billion annually in research and development, comprising some 62 percent of U.S. private research and development spending. Member companies pay more than $200 billion in dividends to shareholders and generate nearly $540 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $9 billion a year in combined charitable contributions.

The National Association of Manufacturers ("NAM"). The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere conveniences for streamlining litigation, but crucial safeguards "grounded" in fundamental notions of constitutional due process. *Taylor v. Sturgell*, 553 U.S. 880, 900–01 (2008). Before a plaintiff may take advantage of the class action device, it must prove that class members share "the same injury" and possess claims presenting a "common question" that, if adjudicated on a class basis, "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In addition, the plaintiff must satisfy the "far more demanding" requirement of proving that any common questions "predominate" over individual ones. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997). These essential protections preserve the rights of both defendants and absent class members.

The courts below have disregarded these requirements twice in the same cases. Last Term, the Court granted certiorari in both cases, vacated the lower courts' judgments, and remanded for further consideration in light of *Comcast*. *See Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (mem.); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (mem.). On remand, however, the courts of appeals reinstated their earlier decisions with only a cursory nod to this Court's instructions. Both courts rejected *Comcast* as irrelevant, distinguishing it on

its facts as addressing only the determination of damages on a class-wide basis, not liability. *See* Butler Pet. App. 6a–7a; Glazer Pet. App. 35a–36a. More specifically, the Seventh Circuit reinstated its earlier decision approving a multi-state breach-of-warranty class action in which class members are linked only by their purchases since 2001 of 27 different models of washing machines that allegedly may allow mold to accumulate and to emit bad odors. *See* Butler Pet. App. 3a–4a, 17a. The Sixth Circuit likewise reinstated its earlier decision affirming certification of a class of some 200,000 Ohio consumers who allege defects in a variety of washing machines they purchased, even though they purchased different models and operated them differently. Glazer Pet. App. 12a–13a.

The vast majority of class members in both cases have suffered no injury at all. Moreover, as the lower courts acknowledged, the different washing machine models have undergone several design changes, and whether any customer's particular machine is defective "may vary with the differences in design." Butler Pet. App. 17a; Glazer Pet. App. 22a–23a. But neither court viewed those considerations as prohibiting class certification; they thought that Rule 23 was satisfied on the theory that whether the machines are defective is a common question and, as the Seventh Circuit put it, a "class action is the more efficient procedure" for resolving the dispute. Butler Pet. App. 17a; *see also id.* at 7a.

The Sixth and Seventh Circuit's expansive conception of class action procedures cannot be squared with either this Court's precedents or Rule

23's basic due process underpinnings. Efficiency is no substitute for the rigorous analysis of commonality and predominance that Rule 23 requires. Moreover, the decisions below deepen an existing split in lower court authority by approving the certification of consumer class actions with large numbers of uninjured class members. They also threaten to eviscerate Rule 23's protections as a fundamental bulwark against class-action abuse and transform them into easily evaded formalities.

The petitions present an important question that has broad implications for consumers and businesses across the Nation. Virtually all products carry manufacturer or retailer warranties and few remain complaint free. For years, especially for businesses serving large and diverse customer bases, the warranty system has provided a fair (and efficient) mechanism for resolving customer complaints when a product does not function as expected. That system works. There is no need to supplement it by loosening certification requirements and aggregating claims of customers who have suffered no injury. Such class-action sprawl would expose businesses to costly class litigation based on the mere dissatisfaction of a small fraction of a product's buyers—an especially troubling specter given the increasing frequency of consumer class-action filings.

By granting review, the Court will signal that courts of appeals should not again mistake its GVR orders for meaningless gestures. It will allow the Court to reaffirm the important due process considerations behind Rule 23's predominance requirement and resolve confusion among the lower

courts on an important issue of products-liability law. These cases are particularly good vehicles for the Court's plenary consideration, as it has been more than 15 years since this Court last addressed the proliferation of class actions in the product liability context. *See Amchem*, 521 U.S. at 598. By reviewing these judgments, the Court can eliminate the nascent doubt festering in some lower courts about whether the important developments in *Dukes* and *Comcast* apply with equal force in this context.

REASONS FOR GRANTING THE PETITIONS

The Court should grant the petitions to correct the courts of appeals' continued failure to comply with Rule 23. The decisions below directly conflict with this Court's precedents. Instead of conducting the rigorous analysis of individualized claims that Rule 23 requires, the lower courts approved massive classes that include large numbers of uninjured individuals, which precludes any theoretical common issues from predominating over individual ones. The decisions also deepen an existing split in lower court authority on important, recurring questions of federal class action law. And the decisions, if not corrected, pose grave threats to businesses and consumers by sanctioning class-action abuse.

I. The Decisions Below Directly Conflict With This Court's Precedents.

Rule 23's class action prerequisites protect the rights of both defendants and absent class members, ensuring that the procedures for aggregating claims are employed fairly and only in appropriate circumstances. *See Taylor*, 553 U.S. at 901 (Rule 23's

"procedural protections" are "grounded in due process"); *see also Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision"). As this Court has noted, aggregation of individual claims for joint resolution endangers the right of absent class members to press their distinct interests and undermines the right of defendants "to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Class actions under Rule 23 are therefore "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

No aspect of Rule 23 has tested the due process dimensions of class actions more than section 23(b)(3), the "most adventuresome" class certification provision. *Amchem*, 521 U.S. at 614. The drafters of that provision "were aware that they were breaking new ground and that those effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487 (2008). Rule 23(b)(3) thus contains special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast*, 133 S. Ct. at 1432. The drafters added those essential protections to avoid having "their new experiment . . . open the floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability:*

Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 401–02 (2000).

As this Court recently reaffirmed, plaintiffs must "affirmatively demonstrate" their compliance with Rule 23's requirements to be entitled to litigate their claims in a class action. *Comcast*, 133 S. Ct. at 1432 (quoting *Dukes*, 131 S. Ct. at 2551). "[C]ourts must conduct a 'rigorous analysis' to determine whether" Rule 23 has been satisfied, "even when that requires inquiry into the merits of the claim." *Id.* at 1433 (quoting *Dukes*, 131 S. Ct. at 2551–52). Moreover, plaintiffs must offer "a theory of liability that is . . . capable of classwide proof." *Id.* at 1434. It is not enough that a class propose "*any* method[ology] . . . so long as it can be applied classwide." *Id.* Nor can the answers generated thereby be "arbitrary" or "'speculative.'" *Id.*

The decisions below dramatically depart from these basic principles and contravene this Court's precedents in both letter and spirit. Instead of applying the "rigorous analysis" required under Rule 23, *id.* at 1432, the lower courts identified a single common question defined at a remarkably high level of generality: whether class members' washing machines are "defective in permitting mold to accumulate and generate noxious odors." Butler Pet. App. 17a; Glazer Pet. App. 33a.

The Seventh Circuit acknowledged that the answer to that generalized question "may vary with the differences in design" of the 27 washing machine models sold since 2001 to different customers in different states. But it did not pause to consider the individualized issues inherent in that answer—each

of which would need to be tried separately. Butler Pet. App. 17a. Instead, the lower court concluded that the common question predominated because it would be "efficient" to resolve that question on a class basis. *Id.* at 4a, 5a, 7a; *see also id.* at 17a, 18a, 20a. Similarly, the Sixth Circuit believed that the presence of a "design defect" in any of the washing machines was the only relevant question, thus allowing that question to predominate over individual issues. Glazer Pet. App. 32a–33a.

The approach embraced by the lower courts eviscerates Rule 23's essential prerequisites. As this Court explained in *Dukes*, class members do not establish commonality by alleging that they "have all suffered a violation of the same provision of law," but instead by showing that class litigation will generate common *answers* to the identified questions. 131 S. Ct. at 2551. Predominance is satisfied only where a court can resolve the ultimate validity of individual claims "in one stroke." *Id.*

In these cases, because the classes contain uninjured purchasers, a class-wide answer to the question whether individual washing machines are defective cannot possibly be obtained. Class members purchased different models of washing machines, constructed on different platforms, and built from different designs, some of which lessened or eliminated the alleged odor defect. Class members maintained their machines differently and placed their machines in different environments. *See* Butler Pet. 7–8. Most have not suffered and will not suffer any injury, for most have not experienced and will not experience any odor problems with their

machines. *See id.* at 8–9. And the state laws applicable to their warranty defect claims vary from state to state. *See id.* at 25. The individual variability inherent in these circumstances necessarily precludes any court or jury from answering—"in one stroke"—the question whether the washing machines were defectively designed.

The lower courts downplayed these concerns on the dubious theory that the trial court could sort out individual factual differences after liability is established, either by creating sub-classes or by making individual damages determinations. *See* Butler Pet. App. 4a–5a, 17a; Glazer Pet. App. 27a–28a. According to both courts, *Comcast* is not relevant because it addressed only the certification of *damages* classes—not *liability* classes like those certified here. Butler Pet. App. 6a–7a; Glazer Pet. App. 35a–36a. But that distinction has already been effectively rejected by this Court. In supplemental briefing before this Court, when the earlier petitions for certiorari remained pending, respondents argued that "Whirlpool did not raise any issues relating to damages calculations below" and *Comcast* therefore did not apply. *See* Supp. Br. of Resp. at 2, *Glazer*, No. 12-322 (Mar. 28, 2013). This Court did not accept this argument; instead, it granted the petitions, vacated the decisions below, and remanded "for further consideration in light of *Comcast*." 133 S. Ct. at 2768. There is no support for the assumption that the Court would have overlooked the basic distinction seized on by the courts below when it considered these cases.

In any event, as compared to showing liability, the plaintiff's burden is arguably *relaxed* when calculating damages. *BCS Servs., Inc. v. Heartwood, 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011) (Posner, J.). This Court's concerns with the proposed methodology in *Comcast* thus apply with even more force in the liability phase—not less. And the lower courts' certify-now-and-worry-later approach is impermissible no matter the phase of the case in which it is introduced. *Comcast* rejects the use of arbitrary and speculative methodologies for establishing class-wide proof, whether for the purposes of determining liability or damages. 133 S. Ct. at 1434. Were it otherwise, a court could certify a class action that encompasses the country's entire population, no matter how arbitrary the theory of harm, as long as each damages claim were individually calculated.

Nor are vague notions of "efficiency" any substitute for an exacting application of Rule 23's commonality and predominance requirements. In the class-certification context, efficiency is a byproduct of satisfying Rule 23's requirements; it is not an end in itself. In fact, efficiency and fairness can be at odds with one another—a coin flip in a judicial proceeding is the essence of efficiency and the antithesis of fairness. But due process, Rule 23, and this Court's precedents all provide that class certification is appropriate only when class adjudication can be conducted both "fairly and efficiently." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("[e]fficiency is a vital

goal in any legal system," but it must be rejected when it "suppresses information that is vital to accurate resolution").

If not corrected, the lower courts' approach would effectively force a defendant to assert its defenses to each class member's liability claims only after its liability is established. Due process does not permit courts to force defendants into making that trade-off, regardless of any "efficiency" gains. And delaying individualized determinations until a later phase would not make those determinations any less individualized or predominant. This Court should grant review to bring the courts of appeals back into conformance with this Court's teachings.

II. The Decisions Below Deepen An Existing Split In Authority Among The Lower Courts.

The Court should also grant review because the decisions below add to growing confusion and conflict among the lower courts on an important, recurring issue of federal class action procedure. Certain lower courts, in sharp conflict with others, have assumed away the need for plaintiffs to prove that class members "suffered the same injury," *Dukes*, 131 S. Ct. at 2551, by couching threshold liability issues as mere damages issues to be resolved at a later stage of proceedings.

As the petition explains, there is a clear division in the circuits over the proper approach to analyzing class actions when the proposed class includes customers who have not suffered any injury. In conflict with courts in the Second, Third, Fifth,

Eighth, Eleventh, and D.C. Circuits, courts in the Sixth, Seventh, and Ninth Circuits have held that the presence of uninjured class members poses no obstacle to class certification. Butler Pet. 28–30; *see, e.g.*, *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006). The theory some of these courts have adopted is that if a defendant sold a defective product to one customer, it has effectively deceived all of its customers by representing that its products lack any defects. *See Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011); *Pella Corp. v. Saltzman*, 606 F.3d 391, 395 (7th Cir. 2010).

The decisions below adopted this theory, effectively assuming that class members were injured despite not experiencing any actual injury. For example, in the Seventh Circuit's now-vacated opinion, the court analogized owning an allegedly defective washing machine to suffering from elevated blood pressure. In the Seventh Circuit's view, having "high blood pressure" that "creates harm in the form of an abnormally high risk of stroke" is the same as owning a washing machine with an alleged defect that "c[ould] precipitate a mold problem at any time." Butler Pet. App. 18a. That analogy does not work; it only underscores the problems with the lower courts' undisciplined approach. Depending on the circumstances, high blood pressure itself may be a concrete, particularized, and redressable injury sufficient to establish an actual case or controversy. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). But an owner of a washing machine does not have a current, concrete injury

merely because a mold problem *might* materialize at some unknown future point—precisely because a mold problem may never materialize. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1143 (2013) (even an "objectively reasonable likelihood" of "future injury" is "too speculative"). Those sorts of allegations of "possible future injury" are not sufficient. *Id.* at 1147 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As commentators have noted, "risk is not harm." Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 Harv. J.L. & Pub. Pol'y 681, 694, 740–41 (2012). As long as the washing machine continues to operate properly, the owner has suffered no injury and is not entitled to relief.

The Sixth Circuit committed a similar error by crediting (in passing) a "premium price" theory that no party urged. According to its speculation, "*all* [washing machine] owners were injured at the point of sale upon paying a premium price for the [machines] as designed." Glazer Pet. App. 28a. Such offhand theorizing about potential merits theories—at odds with the merits theories actually advanced by the putative class—departs from the rigor required when determining whether a proposed class has suffered a shared injury.

The courts defended their conclusions by hypothesizing that the existence of a large number of class members who have suffered no injury is "an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate" the defendants. Butler Pet. App. 5a; *see also* Glazer Pet. App. 29a. That misguided

theory directly conflicts with decisions of other courts. In *McLaughlin v. American Tobacco Co.*, for example, the Second Circuit rejected that approach, noting that "proof of injury" required demonstrating that plaintiffs had suffered some amount of actual damages. 522 F.3d 215, 227 (2d Cir. 2008), *abrogated on other grounds*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *see also, e.g.*, *In re Canon Cameras*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (rejecting certification where less than 1% of class members reported a malfunctioning camera); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 602–03 (S.D.N.Y. 1982) ("tire owners whose tires performed to their entire satisfaction cannot demonstrate" injury sufficient to maintain a class action). If plaintiffs have not suffered a common harm, questions of liability cannot predominate over the issue of individualized damages attributable to that (nonexistent) harm. *McLaughlin*, 522 F.3d at 231–32. The Third Circuit has likewise rejected this procrustean approach, recognizing that "[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 188 (3d Cir. 2001); *see also Payne v. FujiFilm U.S.A., Inc.*, No. 07-385, 2010 WL 2342388, at *5 (D.N.J. May 28, 2010) (rejecting class action where very few class members experienced a defect in the product, and where "a variety of factors" could have contributed to the defects that did manifest); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 451 (E.D. Pa. 2000) (rejecting proposed class action based on purported paint

problems with vehicles where each customer's vehicle would have had to be inspected to determine if he or she experienced the alleged defect). The D.C. Circuit recently joined the Second and Third Circuits. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) (rejecting "cases from other circuits suggesting that false positives do not indict the viability of a class").

Moreover, the reinstatement of the decisions below now presents an additional division in authority: how to interpret the effect of this Court's *Comcast* decision. The D.C. Circuit has correctly interpreted *Comcast* to "command" "a hard look at the soundness of statistical models that purport to show predominance." *Id.* (noting that before *Comcast*, "the case law was far more accommodating to class certification under Rule 23(b)(3)"). After *Comcast*, models that do not "offer common evidence of classwide injury" must be rejected. *Id.* at 253. The D.C. Circuit's decision stands in sharp contrast to the decisions below.

In addition to these irreconcilable conflicts, the lower courts' approach is out of step with this Court's precedents requiring a rigorous analysis of standing in the class action context. As the Court has stated time and again, to invoke a federal court's jurisdiction, a plaintiff must plead and prove a "distinct and palpable" injury that is fairly traceable to the defendant's conduct, as opposed to an "abstract injury" or a "generalized grievance." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 482–83 (1982); *see also Comcast*, 133 S. Ct. at 1434 (rejecting

a "methodology that identifies damages that are not the result of the wrong"); *Clapper*, 133 S. Ct. at 1143, 1147 (threatened injury must be "certainly impending"). Certifying classes primarily composed of uninjured parties improperly turns Rule 23 into a substantive provision granting remedies to parties whose rights have not been violated. *Cf.* 28 U.S.C. § 2072(b). Rule 23 is a procedural device for aggregating *actual* claims, not a substantive font of claims that would otherwise not exist. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408–09 (2010) (plurality op.). This Court should grant review to prevent courts from transforming Rule 23 into a substantive device for litigating class claim based on hypothetical, future harms.

III. The Questions Presented Are Exceptionally Important.

The cases before the Court have taken on even greater importance in light of the lower courts' failure to correct their errors on remand. There can be no doubt anymore that the decisions below are not isolated errors. Instead, they reflect fundamental and continuing confusion among the lower courts on the proper approach to class action procedures.

This Court's review is needed to bring discipline to products-liability cases by curtailing ongoing abuse of class action procedures that expose merchants, manufacturers, and other businesses to frequent litigation involving sprawling but loosely connected classes. Virtually all manufacturers and retailers provide warranties for their products, and many products engender a small percentage of

customer complaints. But that is precisely the reason the existing warranty system has worked well. By providing warranties, manufacturers are able to deal with problems that arise when selling products to a large, diverse base of customers in contexts where attempting to eliminate *all* potential defects is impracticable.

In contrast, the approach taken by the courts below imposes a costly overlay of easy-to-satisfy class action requirements that "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Under the lower courts' reasoning, a customer with a grievance may sue for breach of warranty on behalf of *everyone* who has purchased a product, regardless of any individual customer's particular experience. The prospect is daunting. If left uncorrected, the decisions will mean that every potential glitch—no matter how minor—becomes a massive class-action-in-waiting. And for small businesses, every product sold may become a bet-the-company proposition (at least in the Sixth and Seventh Circuits). Our Nation can ill afford such an innovation-stifling rule. "Small businesses create most of the nation's new jobs, employ half of the nation's private sector work force, and provide half of the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., *The Small Business Economy: A Report to the President* 1 (2009).

By easing the path to certification, the Seventh Circuit's efficiency test also predetermines the case's

ultimate outcome. Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In light of the costs of discovery and trial, certification unleashes "hydraulic" pressure to settle. *Newton*, 259 F.3d at 165; *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989).

That pressure is generally less rooted in the merits of the plaintiffs' claims than in the economic rationality of defendants, meaning that class certification—particularly certification based on a loose application of Rule 23's essential prerequisites—dramatically increases the chances that plaintiffs with even meritless claims will obtain an unwarranted payout. As this Court has recognized, "[c]ertification 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); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (noting defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). The resulting economic distortion harms not only defendants but also consumers. Businesses have little choice but to

incorporate the cost of litigation and litigation avoidance into the prices paid by their customers. *See* Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). Here, that would have the perverse effect of having the class itself pay for its own recovery, subject to a substantial tax in the form of attorneys' fees.

Finally, there can be no doubt that granting review would have immediate benefits in a large number of cases. Dozens of class actions currently pending across the country raise the same allegations about defective washing machines. More broadly, class actions alleging product defects have become an increasingly common and expensive area of business litigation. A manufacturer that does business anywhere in the Nation may, especially in light of "permissive" rules of personal jurisdiction, face exposure to suit almost everywhere in the Nation, including the Sixth and Seventh Circuits. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 Cornell L. Rev. 481, 483, 491–93 (2011). Any product that a manufacturer may sell on any substantial scale may give rise to one or another allegation by one or another consumer, who may then purport to enlist all other purchasers of that same product, without distinction, as fellow members of a theoretical class. Those consequences are profoundly concerning to *amici* and their members. Because the lower courts' unwise departures from precedent pose an undeniable and growing threat to our Nation's businesses and consumers, the Court should defuse that threat by granting review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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