No. 13-431

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.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioner Whirlpool Corporation ("petitioner" or "Whirlpool").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 1,000 briefs as *amicus curiae* in both state and federal courts, in-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that petitioner and respondents, upon timely receipt of notice of PLAC's intent to file this brief, have consented to its filing.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

cluding this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC's members have an interest in this case because the decision below endorses a lax and misguided approach to Rule 23's predominance requirement. Under the Sixth Circuit's ruling, predominance is satisfied as long as there is a single purportedly common issue, without regard to whether countless other individualized issues pervade. The Sixth Circuit's approach also endorses consumer class actions in which the vast majority of the class has no injury. These holdings contravene *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and other recent Supreme Court precedent, as strongly suggested by the Court's decision to vacate the Sixth Circuit's first ruling in this case.

The Sixth Circuit's approach to class treatment also presages a toxic litigation environment for manufacturers doing business in the United States. Under the Sixth Circuit's reasoning, predominance would be satisfied in all low-value putative consumer class actions involving *any* alleged defect – even if it affected only a single consumer of a mass-produced product. This approach poses a significant threat to businesses and consumers alike because it will translate into many more class actions, with far less merit, driving up litigation costs for manufacturers – and ultimately, consumer prices.

INTRODUCTION AND SUMMARY OF ARGUMENT

Earlier this year, the Court vacated the Sixth Circuit's decision affirming certification of a class of front-load washing machine purchasers, ordering the court of appeals to reconsider its ruling in light of *Comcast*. On remand, the Sixth Circuit found that *Comcast* had "limited application" to the case before it and reinstated its prior ruling. Pet. App. at 36a. Because the Sixth Circuit's approach evinces, at best, a fundamental misunderstanding of the commonality and predominance standards of Rule 23 and, at worst, a blatant disregard for this Court's class action jurisprudence, the ruling should be reversed and class certification denied.

In this case, the plaintiffs sought (and obtained) certification of a class that – even under plaintiffs' most optimistic (and entirely unsupported) view of the facts – consists mainly of uninjured consumers. Specifically, plaintiffs allege that a range of Whirlpool's front-loading washing machines are defectively designed, making them prone to moldy odors. Plaintiffs seek recovery under theories of breach of warranty, negligent design and negligent failure to warn. But the only relevant evidence shows that 97% of the class reported no mold problems with their washers, and even plaintiffs assert that only 35% of the class experienced mold problems.

On appeal, the Sixth Circuit approved a proceeding under which vast numbers of individuals would be eligible for compensation despite having no legally cognizable injury. The court of appeals attempted to justify inclusion in the class of owners who had not experienced any odor problems with their machines

on the ground that "class plaintiffs may be able to show that each class member was injured at the point of sale" by overpayment of a "premium price" for a product allegedly prone to excessive mold and odors. Pet. App. at 57a. The Sixth Circuit recommended that, "[f]or the purpose of determining damages, class members who were injured at the point of sale and also experienced a mold problem might be placed in one Rule 23(b)(3) subclass, while class members who were injured at the point of sale but have not yet experienced a mold problem might be placed in a separate Rule 23(b)(3) subclass." *Id.* at 59a.

On remand, the Sixth Circuit rejected this Court's invitation to reconsider its ruling, relying on the *Comcast* dissent's position that "'the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).'" *Id.* at 36a (quoting *Comcast*, 133 S. Ct. at 1436 (Ginsburg and Breyer, J.J., dissenting)). That interpretation badly misread *Comcast*, which teaches that predominance is not satisfied where, as here, injuries and damages vary within the class.

If left to stand, the court's opinion would bode ill for American businesses, which would face a mounting horde of purported "class" litigation premised on alleged defects that affect but a handful of consumers. The inevitable increase in the cost of doing business would be passed along to consumers, leaving only plaintiffs' lawyers to benefit. This Court should grant review to prevent these results and to clarify whether classes may be certified where only a small portion of the class members were actually injured by an alleged defect in a defendant's product.

ARGUMENT

I. The Sixth Circuit's Decision Cannot Be Reconciled with *Comcast*.

In *Comcast*, this Court reversed certification of a class alleging federal antitrust claims on the ground that the plaintiffs' damages theory did not fit their theory of liability. 133 S. Ct. at 1433. In so ruling, the Court explained that damages must be "capable of measurement on a classwide basis." *Id.* According to the Court, the damages model put forth by plaintiffs, which "assumed the validity of all four theories of antitrust impact initially advanced by respondents," *id.* at 1434, fell well short of this standard because it "failed to measure damages resulting from the particular antitrust injury on which [the defendants'] liability [was] premised," *id.* at 1433. The district court had only accepted one of the four theories of antitrust impact advanced and, thus, any damages awarded to the class had to be attributed to that theory alone. Because the proffered damages model was not so limited, the Court concluded that "[q]uestions of individual damage calculations [would] inevitably overwhelm questions common to the class," defeating predominance and rendering classwide treatment improper. *Id.*

In reaffirming the district court's ruling notwithstanding *Comcast*, the Sixth Circuit viewed the *Comcast* decision as applying only to cases where damages cannot be resolved on a classwide basis – a rule it found irrelevant because the district court "certified only a liability class and reserved all issues concerning damages for individual determination." Pet. App. at 35a. The Sixth Circuit justified its narrow view of *Comcast* on the belief that this Court

merely "reaffirm[ed]" the settled rule that "liability issues relating to injury must be susceptible of proof on a classwide basis." Pet. App. at 36a. Quoting the *Comcast* dissent, the Sixth Circuit was satisfied that when "'adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.'" *Id.* (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, J.J., dissenting)).[3]

The Sixth Circuit's suggestion that *Comcast* would have come out differently if only the plaintiffs had sought to bifurcate damages is not plausible. Indeed, the *Comcast* dissent proposed precisely this approach. See 133 S. Ct. at 1437 n.* (Ginsburg and Breyer, J.J., dissenting) (noting that a "class may be divided into subclasses for adjudication of damages"

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[3] In further support of this proposition, the Sixth Circuit cited the Seventh Circuit's decision in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 361 (7th Cir. 2012) ("*Butler I*"), which held that individualized issues of damages in a similar washing-machine lawsuit did not preclude class treatment. But this Court had already vacated *Butler I* and remanded it for further consideration in light of *Comcast*, a fact that the Sixth Circuit only acknowledged in passing in a footnote. On remand, the Seventh Circuit reinstated its prior opinion, concluding that the problem in *Comcast* was the effort to try liability and damages in the same proceeding – and thus, that *Comcast* had no relevance because "the district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine damages on a class-wide basis." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013). The defendant in *Butler* has also filed a petition for certiorari. See *Sears, Roebuck & Co. v. Butler,* No. 13-430 (U.S. filed Oct. 7, 2013). In light of the overlapping issues in *Butler* and *Glazer*, *amicus curiae* in the present case has also filed a brief in support of certiorari in *Butler*.

or that, "at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings," citing the issues-class provision of Rule 23 and other sources). But this view did not carry the day. See Sean Wajert, *Seventh Circuit affirms ruling despite Comcast*, Shook Hardy & Bacon LLP, Aug. 23, 2013, http://www.lexology.com/library/detail.aspx?g=25297 8f4-f0bc-4481-ad5c-33783cda6fbd (noting that in *Comcast*, the Supreme Court "clearly disapproved of the traditional approach that damages were not part of the predominance requirement").

This case illustrates why damages cannot be ignored in the predominance analysis. Based on the premise that "there need be only one common question to certify a class," Pet. App. at 20a, the Sixth Circuit concluded that the purportedly common questions of "whether the alleged design defects in the [washers] proximately caused mold to grow in the machines and whether Whirlpool adequately warned consumers about the propensity for mold growth," *id.* at 33a, warranted class treatment. But answers of "yes" to these questions in a common proceeding would establish nothing by themselves because the liability determination is incomplete without resolving whether each class member was actually injured. The costs of litigating that question in individual follow-on proceedings would be certain to exceed the value of any recovery – particularly in light of the fact that the overwhelming majority of class members have not sustained any of the alleged injuries. This hardly achieves the "economies of time and expense" heralded by the Sixth Circuit in reaffirming class certification.

The Sixth Circuit's ruling also overlooks the implications of *Comcast* for variations in injury within a putative class. Although this Court focused its discussion in *Comcast* on the model proposed by plaintiffs for measuring damages, the Court also reiterated that Rule 23 requires plaintiffs to establish "that the existence of individual injury . . . [i]s capable of proof at trial through evidence that [is] common to the class rather than individual to its members." 133 S. Ct. at 1430, 1433-34, 1436 (internal quotation marks and citation omitted).

The Sixth Circuit attempted to side-step this problem by recasting the purported injury as the alleged overpayment of a premium price at the point of sale.[4] The court concluded, based upon its unsupported reading of Ohio law, 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." Pet. App. at 28a.

Even if the Sixth Circuit's expansive reading of Ohio law were correct, the Sixth Circuit's revised analysis would still be contrary to this Court's class action jurisprudence because the entire class is not bound together by a common theory of injury. As the petition makes clear, the alleged defect in this case – an odor problem – manifested in only a small per-

[4] Notably, the Sixth Circuit's attempt to support its position that plaintiffs sought certification based on a premium-price theory underscores the thin grounds for certification in this case. Instead of citing to evidentiary proof in the record, as required by *Wal-Mart*, the court of appeals could point to nothing more than the complaint and a handful of statements made by plaintiffs' counsel at oral argument.

centage of the putative class members' washing machines. The Sixth Circuit incorrectly treated the manifest odor claims as additive, a source of "additional consequential damages" beyond any damages claims from the baseline set by the diminished value claims, when in fact the two types of claims are based on materially different injuries. After all, contrary to the court of appeals' assertion, manifest odor claims are unquestionably not injuries that arose "immediately upon purchase," but rather, only after product use. Pet. App. at 30a. As such, consumers who actually experienced an odor problem claim an injury that is different in kind, not just in degree, from those class members who allege diminished product value due to the speculative risk that an odor problem *could* develop. See, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (class members must suffer the "same injury").

In sum, the Sixth Circuit gave short shift to this Court's order that it reconsider the case in light of *Comcast*. The Court should grant review to clarify that under *Comcast*, certification is not appropriate where, as here, substantial numbers of class members have no injury.

II. The Sixth Circuit's Decision Threatens To Create Grave Risks For American Business.

The decision below also cries out for review because it threatens an explosion of overbroad class actions that seek classwide compensation based on idiosyncratic product defects that affect only a handful of consumers.

The Sixth Circuit's reasoning loosens class certification requirements by approving class treatment without proof of uniform injury or damages. Indeed,

plaintiffs' lawyers have already taken note of the lax approach to class certification signaled by the ruling in *Glazer*. See, *e.g.*, *Glazer v. Whirlpool: In Post-Comcast Review, Sixth Circuit Again Upholds Grant of Class Certification*, Impact Litigation Journal (July 22, 2013), http://www.impactlitigation.com/2013/07/22/glazer-v-whirlpool-in-post-comcast-review-sixth-circuit-again-upholds-grant-of-class-certification/ (touting the "Sixth Circuit's decisive analysis" as a "major victory for consumers" because it will allow "plaintiffs' counsel . . . [to] style class actions akin to the liability-damages bifurcation in *Glazer v. Whirlpool* that kept the Sixth Circuit's predominance analysis outside the ambit of *Comcast*").

This development will adversely affect businesses and consumers alike. Loose certification requirements raise the stakes of litigation and the risk of gargantuan verdicts – not to mention bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, Regulation 50, 53 (Summer 2007). In reaffirming certification notwithstanding *Comcast*, the court of appeals attempted to sweep aside this concern, asserting that Whirlpool ought to "welcome class certification" of a class of uninjured consumers because any judgment adverse to the plaintiffs will "bind[] all class members who do not opt out of the class." Pet. App. at 29a. But this is not a realistic proposition. For one thing, a class trial would feature the claims of just two named plaintiffs, not those of the absent class members. The most fundamental weakness in the class claims – i.e., the general lack of injury – would not necessarily be apparent in a trial involving two named plaintiffs who allege actual problems with their machines.

In any event, class actions rarely go to trial, as the district court recognized in this case. See Pet. App. at 69a n.3 ("Because class actions are exceedingly unlikely to go to trial, class actions are likely to obtain at least some recovery via settlement – and something is better than nothing.") (citation omitted). This is so because the potentially devastating effect of a class verdict often pressures companies to settle cases after class certification. As one commentator explained, "certification is the whole shooting match" in most cases, and defendants faced with improvidently certified, meritless lawsuits feel intense pressure to settle before trial, culminating in "judicial blackmail." See David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."). Thus, the notion that any defendant would "welcome" class certification is highly unrealistic.

The decision below will only exacerbate this problem. In addition to existing pressures to settle substantively meritless claims, manufacturers will now face settlement pressures from wildly overbroad classes like the one certified here – in which only 3% of class members are even conceivably affected by the alleged defect. And classwide settlements in such cases would indisputably result in overcompensation by sending free money to class members who would never be able to recover (or even think to bring suit) individually against the defendant. See *Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions be-

come the tool of plaintiffs lawyers who gin up massive claims in the hope that companies will settle").

Overcompensation is as much a problem for consumers as it is for business. As Judge Minor Wisdom once explained, damages paid in litigation to those consumers who are actually injured "are presumably incorporated into the price of the product and spread among" all purchasers. *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991). But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers will act to include those costs in the price of goods. See *id.* The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price . . . in the first instance." *Id.*; see also, *e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted). It is precisely this sort of economic system – which Judge Wisdom saw "little reason to adopt" – that the court embraced below.

For these reasons too, the Court should grant certiorari and ensure that the Sixth Circuit, and other courts of appeals that continue to embrace overbroad class actions, do not become the next haven for class action abuse, to the detriment of the judicial system, our economy and American consumers.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Whirlpool Corporation, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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November 6, 2013

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics, Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company

Eisai Inc.
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corp.
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products

Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
Novo Nordisk, Inc.
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.