No. 12-322

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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This is one of many nearly identical class actions against Whirlpool and other appliance manufacturers and retailers in which plaintiffs seeking to represent more than 10,000,000 consumers allege that all high-efficiency front-loading clothes washers emit moldy odors due to laundry residue and are therefore defective. In this bellwether case, the Sixth Circuit affirmed certification of a Rule 23(b)(3) class of some 200,000 Ohio residents who bought Whirlpool-brand front-loading washers from 2001 to the present, even though most of the buyers did not experience the alleged odor problem. The questions presented are:

1. Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf.

2. Whether a class may be certified without resolving factual disputes that bear directly on the requirements of Rule 23.

3. Whether a class may be certified without determining whether factual dissimilarities among putative class members give rise to individualized issues that predominate over any common issues.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner.[1] PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project seeks, among other things, to uphold the constitutional limitations on government action, including limits on the judiciary mandated by Article III standing requirements. PLF has litigated numerous cases involving Article III standing, as well as the consequences of permitting class actions to include noninjured class members. *See*, *e.g.*, *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of*

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or 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.

Wildlife, 504 U.S. 555 (1992); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

In addition, PLF staff have published extensively on the effects of tort liability on the business community. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006). PLF believes its public policy experience will assist this Court in considering the merits of this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Article III, Section 2, of the Constitution limits the jurisdiction of the federal courts to the resolution of cases and controversies. This limitation reflects "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant . . . is the threshold question in every federal case, determining the power of the court to entertain the suit." *Id.* This is no less true in the context of class action litigation because a federal rule cannot alter a constitutional requirement. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which

they purport to represent." (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))).

The judicial economy that justifies the use of class actions in appropriate circumstances does not mean that class actions are appropriate in all circumstances. The Constitution mandates a strong standing requirement. And while this Court has addressed the question of named plaintiffs' standing, there is confusion in the lower courts as to the constitutional standing requirements applied to unnamed, uninjured class members. As with any case that involves uninjured plaintiffs, the potential for litigation abuse, and waste of judicial resources, is compounded when the issues arises in class actions. Moreover, this Court has yet to address important issues related to the factual record that trial courts must allow both plaintiffs and defendants to develop in accordance with due process rights. The decision below adopted an open-ended theory, previously unknown in its jurisdiction, permitting people who are not harmed and who do not claim to be harmed to sue in the name of those who may be able to allege such harm, and thus warrants a grant of certiorari.

ARGUMENT

I

THE SIXTH CIRCUIT DECISION UNCRITICALLY COMBINING INJURED AND UNINJURED PLAINTIFFS INTO A CLASS CONFLICTS WITH OTHER COURT DECISIONS AND REQUIRES RESOLUTION BY THIS COURT

A properly defined class is necessary to realize both the protections and benefits for which the class

action device was created. As the Ninth Circuit explained in *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973):

> Class actions, we believe, must be structured so as to conform in the essential respects to the judicial process. This is the principle by which we are guided. It dictates, *inter alia*, that the courts not be available to those who have suffered no harm at the hands of them against whom they complain. They have no standing to sue.

For this reason, a "class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008) (rejecting class certification where court found that 80% of the putative class suffered no injury). *See also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (plaintiffs seeking certification of all state residents active in the "peace movement" was unworkably overbroad to challenge a city ordinance restricting leafleting activities); *Tietsworth v. Sears, Roebuck and Co.*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) (purported class action of consumers alleging problems with the electronic control panel of their washing machines could not be certified because the putative class "include[s] members who have not experienced any problems with their Machines' Electronic Control Boards—or for that matter with any other part of the Machine. Such members have no injury and no standing to sue."); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 2008) (rejecting putative class action of Bronco II SUV owners who alleged their vehicles' propensity to roll-

over, and claiming they had been damaged by being induced to purchase vehicles that they say were worth less than they would have been worth if they had been what Ford had represented them to be because, in part, the "overwhelmingly vast majority of Bronco II[] have never manifested the alleged defect").

In *Oshana v. Coca-Cola, Co.*, 472 F.3d 506 (7th Cir. 2006), a plaintiff invoked the Illinois consumer protection act to pursue a class action against Coca-Cola on a claim that the company deceptively marketed fountain Diet Coke and bottled Diet Coke. The difference between the two beverages was that fountain Diet Coke was sweetened with a combination of aspartame and saccharin, while bottled Diet Coke was sweetened only with aspartame. *Id.* at 509. Ms. Oshana sought certification of a class comprised of all consumers who purchased a fountain Diet Coke on or after March 12, 1999. *Id.* at 514. The Seventh Circuit noted the obvious problems with such an overinclusive class:

> Such a class could include millions who were not deceived and thus have no grievance under the [Illinois consumer protection act]. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.

Id. Because Oshana claimed she was deceived and injured, as opposed to every other possible member of the class, the court held that her claims were not

"typical," and upheld the trial court's denial of certification. Even for her "per se" misrepresentation claim that did not require proof of deceit, the court rejected her proposed class because the consumer protection act still requires proximate causation, which she could not allege on behalf of such a broad, indefinite class. *Id.* at 515.[2]

[2] District courts similarly refuse to certify class actions based on "tendency to fail" theories because the purported class includes members who suffered no injury, and therefore lack standing to sue. *See*, *e.g.*, *Yost v. General Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (purported class action dismissed where plaintiff only alleged that a "potential" oil leak in certain Cadillac models was "likely" to cause damage and "may" create safety hazards); *American Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1295 (1995) (class certification denied where "multiple" purported plaintiffs could demonstrate a plausible cause of action against the defendant); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 601-02 (S.D.N.Y. 1982) (class certification denied in case alleging breach of implied warranty and merchantability for tires, where the "considerable majority" of tires covered by the litigation functioned "without incident, during their predicted lives of service"); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982) (certification denied to purported class of all persons exposed to a toxic chemical in utero, who resided in South Dakota because the class definition had no requirement that the members sustained any injury or damage and therefore "would lack standing to bring suit in their own right").

II

WHETHER FEDERAL COURTS MAY HEAR CLASS ACTIONS COMPRISED PRIMARILY OF UNINJURED PARTIES IS AN ISSUE OF NATIONAL IMPORTANCE

A. Unnamed Class Members Must Suffer the Same Injury as the Representative Plaintiffs

The requirement that all members of the class have Article III standing reflects the constitutional limitations on federal courts. If that were not the rule, a class could include members who could not themselves bring suit to recover, thus permitting a windfall to those class members and allowing Federal Rule of Civil Procedure 23—a procedural rule—to enlarge substantive rights. *See*, *e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (a class must be defined in such a way that all members have Article III standing); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) (same); *Kohen v. Pac. Inv. Mgmt. Co. LLC, & Pimco Funds*, 571 F.3d 672, 677 (7th Cir. 2009) (A class cannot be defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct.").

This Court has addressed—and soundly rejected—the situation where a representative plaintiff seeks to use the procedural requirements of Rule 23 to create Article III standing by bootstrapping his own standing from the alleged injuries of unnamed class plaintiffs. *See Allee v. Medrano*, 416 U.S. 802, 828-29 (1974):

> [A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of

> others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

(Burger, C.J., concurring in the result in part and dissenting in part).[3]

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[3] This has not been a controversial principle; both federal and state courts (relying on federal law as persuasive authority) have long demanded standing from lead plaintiffs in class actions. *See Fernandez v. Takata Seat Belts, Inc.*, 108 P.3d 917, 920 (Ariz. 2005) (plaintiff who cannot state an individual claim for lack of injury has no standing to represent a class of potentially injured plaintiffs); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-08 (Tex. 2001) (without actual injury, plaintiff had no standing to bring class action); *Landesman v. General Motors Corp.*, 377 N.E.2d 813, 815 (Ill. 1978) (where the plaintiff has no individual cause of action, it necessarily follows that any attempted class action must also fail); *Kid's Care, Inc. v. Ala. Dep't of Human Res.*, 843 So. 2d 164, 167 (Ala. 2002) (if named plaintiff has not been injured by wrong alleged in complaint, then no case or controversy is presented and plaintiff has no standing to sue either on his own behalf or on behalf of a class); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 450 (Ohio 1998) (to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent); *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys.*, 950 S.W.2d 854, 857-58 (Mo. 1997) (named plaintiffs who represent class must allege and show that they personally have been injured, not that injury has been suffered by other members of class which they purportedly represent); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985) (while class membership is not expressly required by the Iowa class actions rule, it is implicit in that rule that class representative be class member); *Doe v. The Governor*, 412 N.E.2d 325, 327 (Mass. 1980) (if the individual plaintiffs may not

(continued...)

Just as representative plaintiffs may not bootstrap their own standing from the alleged injuries to unnamed class members, this case cleanly presents the question as to whether the converse is true: Can the vast majority of the unnamed plaintiffs (not just some small fraction) bootstrap their own standing from a representative plaintiff? This Court's previous decisions suggest, contrary to the Sixth Circuit decision in this case, that the answer would be no; that class certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. That result would violate the Rules Enabling Act because "no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right,"'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints.")). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010):

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

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[3] (...continued)
maintain the action on their own behalf, they may not seek relief on behalf of class).

B. The Decision Below Violates Defendants' Due Process Rights

Because defendants as well as plaintiffs enjoy full protection of the Constitution's Due Process Clause, this Court in *Wal-Mart Stores Inc. v. Dukes* demanded that courts investigate seriously whether class certification is warranted under the federal Rule. In that case, this Court emphasized that "the class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" *Dukes*, 131 S. Ct. at 2550 (internal quotation omitted), and asserted that "to justify a departure from that rule" all the requirements of Rule 23 must be met. *Id.* A party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are, in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 2551. When considering the type and quantity of evidence required for a plaintiff to meet these standards, the Court compared the evidence in *Dukes* with a prior case, *Teamsters v. United States*, 431 U.S. 324 (1977), in which the plaintiff provided 40 accounts of discrimination for a class of 334 alleging discrimination. *Dukes*, 131 S. Ct. at 2556. While the *Teamsters* plaintiffs provided an anecdote for one out of every eight members of that class, the *Dukes* plaintiffs offered one for every 12,500 members. *Id.* This suggests that the larger the proposed class is, the more evidence will be required to adequately show that commonality and typicality exist among the class members. Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post*-Dukes*?*, 2011 B.Y.U. L. Rev. 1259, 1269. The Seventh Circuit also differs from the

Sixth Circuit approach in this case, arguing that simple judicial acceptance of the plaintiff's proffered evidence when there is conflicting counter-evidence offered by the defendant, "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). This Court, however, did not discuss the nature and extent of Wal-Mart's counter-evidence, an important issue presented by the petition this case.

The importance of developing rules for lower courts to approach the factual issues raised by class certification cannot be overstated. Our legal system depends on discovery and evidentiary rules to allow each side to uncover the specific facts necessary to develop its case. With the facts revealed through discovery, each side can test the other sides' assertions and develop appropriate lines of argumentation. "Aggregate litigation does not in any way diminish plaintiffs' ability to do these things. But it can threaten the ability of defendants to do so." John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 676 (2011). Without judicial constraint, the procedural class action device can "turn into a mechanism for putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." *Id.* at 677. *Dukes* rejected one particular type of trial by formula because it presented unacceptable risks to both plaintiffs' and defendants' participatory rights. The logic of that decision should be applied to this case, in which the lower courts deemed 200,000 plaintiffs to have

standing to sue, while disallowing Whirlpool from presenting individualized proof.

C. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom they purport to represent. The "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a "representative" who is not a member of the class is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who happens to have the least information." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Actions*, 77 Tex. L. Rev. 215, 244 (1998). Because the class action binds these absent and informationally impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the

members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *Id.*

Essentially, this requires that the representative's stake in the case, whatever that may be, rises or falls on the claims of the other class members. Commonality among plaintiff class members is important because individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See*, *e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Moreover, the aggregation of claims detracts from the acknowledgment of each plaintiff's particular injuries, a value recognized as a legitimate end in itself, apart from the end of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812-13 (2000); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." Gaston, 77 Tex L. Rev. at 238.

Permitting class members without Article III standing to proceed will flood the federal courts with "lawyers' lawsuits." The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For "[i]f passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984). These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18). This is certainly the situation in this case, in which the

present litigation is serving as the "bellwether" for identical suits filed nationwide.

"Noninjury" standing, combined with the class action procedure, also tends to result in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *West*, 282 F.3d at 937 ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.") (internal citations omitted); *In re GMC Pickup Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

The "blackmail" charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752

(2011). This Court and "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail." *Id.* (citations omitted). For this reason, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, "[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 Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic pressure" to settle.)[4] "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Nagareda, *supra.*

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[4] This pressure to settle was a key factor for courts denying certification in several jurisdictions. *See*, *e.g.*, *In re Bridgestone/Firestone Tires Prod. Liab. Litig.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years 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."); *Griffin v. GK Intelligent Sys.*, 196 F.R.D. 298, 305 (S.D. Tex. 2000) (citing the language in *Castano*, cited *supra*); *Marascalco v. Int'l Computerized Orthokeratology Soc'y*, 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998) (same); *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part) ("Class actions often place immense pressure on defendants to settle, considering the 'all or nothing' nature of class action verdicts."); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 217 (Md. 2000) ("[G]ranting class certification significantly increases the pressure on a risk-adverse defendant to settle pending class claims rather than face the threat of an exceptional award of damages.").

Such litigation is used not primarily to redress injury (especially where a significant portion of the class can demonstrate no injury); it therefore exists as a sham to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Class members "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.* Thus, noninjury class actions to recover compensation simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id.* The decision below, by combining any legitimate claims with tens of thousands of uninjured plaintiffs, bloats any properly joined or representative legal action and opens the door to the federal courts wide for gross misuse of the justice system.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: October, 2012.

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