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 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 PETITIONERS

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 manufacturers of products. 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 800 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 decisions below endorse the certification of classes in consumer-protection cases even when the vast majority of the class has no injury. These rulings set the stage for a class trial in which plaintiffs will be able to establish liability to class members who could never prove Whirlpool liable in an individual trial – in derogation of the Due Process Clause and the Rules Enabling Act.

The rulings also presage a toxic litigation environment for manufacturers doing business in the United States. Under their reasoning, *any* defect – even if it befell only a single consumer of a mass-produced product – would become the basis for a consumer-fraud class action on behalf of all purchasers. Such a development would be bad for business and consumers alike. It would mean many more class actions, with far less merit. And because class actions often force settlement regardless of merit, manufacturers would be forced to pay more to resolve frivolous litigation, with a corresponding rise in consumer prices to cover increased litigation costs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition raises an important and recurring question that has divided the federal courts of appeals, particularly in consumer-fraud litigation: whether a class consisting primarily of uninjured individuals – i.e., those whose products never manifested an alleged defect and who could never recover in individual actions under governing state law – may be certified consistent with the dictates of due process and the Rules Enabling Act. The answer is a resounding no, and the Court should grant the petition and so hold.

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 in a way that results in moldy odors, and they 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.

In rubberstamping the district court's certification of such a class, the court of appeals approved a proceeding under which vast numbers of individuals would be eligible for compensation despite having no legally cognizable injury. This holding infringes Whirlpool's fundamental due-process rights by stripping it of its right to challenge a fundamental element of plaintiffs' claims. In addition, by elimi-

nating the substantive tort requirement of injury solely by dint of the class device, the court of appeals violated this Court's command that Rule 23 not be interpreted to "'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011) (quoting 28 U.S.C. § 2072(b)).

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 resolve a growing split among the federal courts of appeals over 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 Abridges Whirlpool's Due-Process Rights And Violates The Rules Enabling Act.

The decision below violates Whirlpool's rights – protected by the Due Process Clause and the Rules Enabling Act – to present individualized liability defenses with respect to the vast majority of class members who have no legally cognizable injury.

The court of appeals believed it sufficient for class-certification purposes that "the challenged conduct or lack of conduct [is] premised on a ground that is applicable to the entire class," and that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." Pet. App. 18a (internal quotation marks

and citation omitted).[3] In so holding, the court of appeals joined the minority view and deepened an already mature split over whether a class may be certified despite the presence of significant numbers of uninjured members. See Pet. 19-22 (collecting cases). It also erred profoundly because it foreclosed Whirlpool from asserting individualized defenses against the substantial majority of class members who have no legally cognizable claim under state law. As such, it sanctioned the deprivation of Whirlpool's due-process rights and violated the Rules Enabling Act.

This Court has long recognized that the "fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This due-process right, in turn, requires that, before a defendant is deprived of his property, a plaintiff must prove every element of his claim and a defendant must be given "'an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); see, *e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (the "right to litigate the issues raised" in a case is "a right guaranteed . . . by the Due Process Clause"); see also *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (recognizing that "to deny [the defendant] the

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[3] The court alternatively postulated that "class plaintiffs may be able to show that each class member *was* injured" based on a "premium price" theory. See Pet. App. 18a (emphasis added). As the petition details, this theory was neither raised by plaintiffs nor supported by Ohio law, and would in any event still present individualized issues precluding class treatment. See generally Pet. 3-4, 12-13, 16-17, 24-25.

right to present a full defense on the issues would violate due process").

Injury, of course, is traditionally an essential element of any product-liability claim. See, *e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("No injury, no tort, is an ingredient of every state's law."). It remains so under Ohio law. See, *e.g.*, *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 676 (N.D. Ohio 1995) ("[E]very [product-liability] case will necessarily . . . require[] [a] showing of injury"); see also *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2009 U.S. Dist. LEXIS 110524, at *21 (S.D. Ohio Nov. 4, 2009) (applying Ohio law to negligence and failure-to-warn claims; "an essential element to be proved in every tort case is injury or damages proximately caused by the defendant's tortious conduct").

But here, the district court certified – and the Sixth Circuit approved – a class that would permit a finding of liability without proof of injury. See Pet. App. 29a. Because any such verdict would operate on a classwide basis, it would potentially result in a finding of liability as to class members who would never be able to hold Whirlpool liable in individual suits. The lower courts' solution to this problem – to ignore it – violates due process by preventing the defendant from litigating the issues presented by the case, as a number of courts have recognized. See, *e.g.*, *Sanchez v. Wal Mart Stores, Inc.*, No. 2:06-CV-02573-JAM-KJM, 2009 U.S. Dist. LEXIS 48428, at *13 (E.D. Cal. May 28, 2009) ("any attempt to try these [consumer-fraud] claims on a classwide basis would deprive [d]efendants of their due process right to a fair trial, including the right to present 'every available defense' to those claims"); *Schirmer v. Citizens Property Ins. Co.*, No. 05-3974, 2012 WL 781878 (Fla.

Cir. Ct. Mar. 2, 2012) (holding that "the due process rights of class action defendants" include "the right to assert specific defenses to the claims of the absent class members").

The rulings also run afoul of the Rules Enabling Act for similar reasons. This Court expressly held just two Terms ago that a "class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims." *Dukes*, 131 S. Ct. at 2561. As the Court explained, the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Ibid.* (quoting 28 U.S.C. § 2072(b)). In other words, the requirement of proving injury (as well as the other essential elements of plaintiffs' claims) survives notwithstanding the certification of a class. *Ibid.*; see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of the Rule can ignore the Act's mandate that rules of procedure shall not abridge, enlarge, or modify any substantive right.") (internal quotation marks and citation omitted); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (a class action must "leave[] the parties' legal rights and duties intact and the rules of decision unchanged").

Thus, the Rules Enabling Act, just like due process, mandates "a full litigation of [each] element of the cause of action, and for *each* putative class member no less." *Corder v. Ford Motor Co.*, No. 3:05-CV-00016, 2012 U.S. Dist. LEXIS 103534, at *20 (W.D. Ky. July 24, 2012) (emphasis added). Because the decisions below would permit a finding of liability without proof of injury, their approach to class certi-

fication cannot be reconciled with the requirements of the Rules Enabling Act.

For all of these reasons, the Court should grant review to reconcile the competing approaches of the courts of appeals to overbroad cases and clarify that 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 decisions below also cry out for review because they threaten an explosion of overbroad class actions that seek classwide compensation based on idiosyncratic product defects that affect only a handful of consumers. Class actions already impose a significant burden on manufacturers. Because of the potentially devastating effect of a class verdict, companies often have to settle after certification – even when the claims in substance appear to be meritless. The decisions below will magnify this unfairness by promoting settlement with all purchasers of a product even in cases in which few if any consumers have any legally cognizable claim. This outcome would 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). This is so regardless of the merits of the case; "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique*

Challenges Presented by Multiple Enforcers and Follow-On Lawsuits, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "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); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail.").

The decisions below can only exacerbate this problem. In addition to existing pressures to settle substantively meritless claims, manufacturers will now face settlement pressures from wildly overbroad cases like the one certified here – in which only 3% of class members are even conceivably affected by the alleged defect.[4] And classwide settlements in such cases would indisputably result in overcompensation

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[4] Notably, the force of this pressure to settle will in most cases nullify safety valves like the one the district court thought it had secured in this case – i.e., that exposure would ultimately be limited by requirement of "proof of individual damages" at the end of the case. Pet. App. 28a n.1. As in other class actions, the defendant will be left to hope that the jury sees the evidence the way it does – a hope that has been too fragile to prevent most companies from settling once a class is certified.

by sending free money to class members who would never be able to recover (or even think to bring suit) individually against the defendant.

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. See *ibid.* 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." *Ibid.*; 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 courts embraced below.

For these reasons too, the Court should grant certiorari in order to 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 our

judicial system, our economy and American manufacturers and consumers.

CONCLUSION

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

Respectfully submitted,

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September 28, 2012

APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation

Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products

Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.

Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.