Nos. 13-430 & 13-431

In the Supreme Court of the United States

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

WHIRLPOOL CORPORATION,

Petitioner,

v.

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

Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Sixth and Seventh Circuits

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INTRODUCTION

After this Court GVR'd, the Sixth and Seventh Circuits "reinstated" their prior judgments. S.App. 12a; W.App. 38a.[1] Each certified huge classes of Washer buyers, most of whom never experienced any moldy odors, by stating a question—is there a defect that can cause mold to accumulate?—at such a high level of generality as to appear "common" and then declaring class adjudication of this abstract issue "efficient." S.App. 4a; W.App. 22a-23a, 33a, 36a. The courts nullified commonality and predominance requirements by gliding over dozens of changes in Washer design and consumer care instructions; large variations in consumer knowledge, expectations, conduct, and warranty experience; and diverse state laws. Those disparities would fragment any trial of plaintiffs' claims, whether sounding in tort or contract.

It is impossible to reconcile these rulings with this Court's precedents—so plaintiffs scarcely try. The Seventh Circuit frankly acknowledged, in brushing aside differences among members of classes full of buyers who never experienced odors, that class resolution of the abstract "defect" question would be "efficient" because it would force defendants to "quickly settl[e]" using a mechanical "schedule of damages." S.App. 4a. But hydraulic pressure to accept blackmail settlements has led this Court to insist on rigorous enforcement of "stringent" Rule 23 requirements that "exclude most claims." *Am. Express*, 133 S. Ct. at 2310. The rulings of the courts

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[1] "W.Pet.," "S.Pet.," "W.App.," and "S.App." refer to the Whirlpool and Sears petitions and petition appendices, respectively, and "WD" and "SD" to the district court dockets.

below would permit certification of "most claims"—and these rulings were made in the largest class actions ever to reach this Court. W.Pet. 5-6.

Comcast teaches that predominance cannot be satisfied by formulating abstract questions that hide divergent issues of law and fact that would have to be resolved at trial and would "inevitably overwhelm questions common to the class." 133 S. Ct. at 1433; see S.Pet. 14-17. When "significant questions" of "liability," "defenses," and "damages" affect "individuals in different ways," the case is "not appropriate for a class action." Rule 23, 1966 Advisory Cmte. Notes.

Plaintiffs and the courts below never come to grips with this Court's key precedents. Judge Posner acknowledged that a "classwide proceeding" here cannot "generate common *answers*" to any significant question, as *Dukes* expressly requires. 131 S. Ct. at 2551. Requiring "common answers," he said, would place too "heavy" a "burden" on plaintiffs. S.App. 10a. Both courts of appeals thought certification justified because individual claims are too "meager" to make "suing worthwhile" (S.App. 10a-11a; W.App. 37a)—a rationale this Court has rejected (*e.g.*, *Am. Express*, 133 S. Ct. at 2310-2311 & n.4), for good reason. See Henry Friendly, FEDERAL JURISDICTION 118-119 (1973). Plaintiffs never mention *Dukes*, *American Express*, *Amchem*, or *Ortiz*. Those precedents require that class members all "have suffered the same injury"—whereas here most never experienced *any* moldy odors. *Dukes*, 131 S. Ct. at 2551. And they reject certification when any common issues would be swamped by buyer-specific inquiries. Plaintiffs, like Judge Posner, treat this Court's precedent as merely a "sourc[e] of information," not

binding authority. S.Pet. 24 n.2; see http://tinyurl.com/o36fqrv ("I don't like the Supreme Court" and "don't think it's a real court").

Nine amicus briefs detail the consequences of these "gestalt" certifications. *Amchem*, 521 U.S. at 621. Appliance manufacturers explain that if a small complaint rate is enough for a sweeping class action, product innovation will be deterred and the costs of litigation will be passed on to consumers. Ass'n of Home Appliance Mfrs. Br. 4-12, 17. It is undisputed that small percentages of all new, mass-produced products generate complaints. *E.g.*, WD93-8 ¶25. That reality now threatens class suits by all purchasers in every instance, regardless of injury. The high-technology industry shows that rapid innovation makes it especially vulnerable to class-action strike suits under the theories adopted below. Technology Ass'n of America and TechNet Br. 11, 22. The "daunting" prospect now is that "every potential glitch—no matter how minor—becomes a massive class-action-in-waiting." U.S. Chamber of Commerce and Nat'l Ass'n of Mfrs. Br. 18-20. And retailers show that class actions undermine their efficient, consumer-friendly warranties. Retail Litigation Center Br. 12-14.

Rarely has so broad a cross-section of the business community urged this Court to intervene. Commentators agree. W.Pet. 35 & n.7; Editorial, *Supreme Disregard*, WALL ST. J., Oct. 25, 2013, at A14; Michael Hoenig, *Supreme Court Should Review Washing Machine Class Cases*, N.Y.L.J., Dec. 9, 2013. Plaintiffs' contrary arguments have no merit.

A. Individual Issues Would Predominate In Trying Plaintiffs' Claims.

Plaintiffs' opposition does not address this Court's key precedents, or deny that allowing class suits here would throttle innovation, increase consumer costs, undermine warranty programs, and force settlements regardless of the merits. Instead, plaintiffs rest on the assertion that individualized issues may be brushed aside in breach-of-warranty suits. That is incorrect.

1. Plaintiffs' argument that all Washer owners were denied the benefit of the bargain because they bought Washers that require leaving the door ajar or running occasional self-cleaning cycles is irrelevant to *Glazer*, which involves no "breach of contract claims under warranty." Opp. 16. The only claims certified in *Glazer* are for "*negligent* design," "*negligent* failure to warn," and "*tortious* breach of warranty." W.App. 20a-21a. Plaintiffs concede that economic loss is not recoverable through Ohio tort claims unless the alleged defect manifested itself. Opp. 16-17; see W.Pet. 18-20. Certification was therefore error under plaintiffs' own reasoning: Whether moldy odor occurred, and why, depends upon individual inquiry into changing Washer designs and care instructions, and disparate buyer knowledge, conduct, and warranty experience. See W.Pet. 2-4 (describing variations among *Glazer* class members); WD103-37 to 41 (owner declarations). Whether a buyer sought warranty service, and what service was received, varied. See SD230-1 at 48-55; SD230-2; WD103-1.

2. That *Butler* involves contract-based warranty claims makes no difference. State warranty law typically requires that a defect manifested itself or was substantially certain to do so. S.Pet. 31-32. The authorities cited in plaintiffs' Appendix permit recovery if a product does not perform as warranted. They do *not* suggest that buyers have warranty claims for unmanifested defects or products that performed as intended throughout the warranty period. The "majority view," "regardless of [legal] theory," is that they do not. 1 MCLAUGHLIN ON CLASS ACTIONS § 5.56; see *Cole v. Gen. Motors*, 484 F.3d 717, 729 (5th Cir. 2007) (rejecting "maneuver" distinguishing contract from tort claims because "'most states'" require a manifest defect "regardless of whether the claim is brought under contract or tort").

Plaintiffs miss the mark when they assert that class treatment is proper because buyers suffered uniform injury at the point of purchase when they received a product that was not what was promised. Plaintiffs have never identified any express warranty that the care instructions would contravene. To the contrary, the terms of the warranties require adherence to those instructions. And the evidence shows that *all* front-loading washer manufacturers require similar care (WD103-29 at 20-24), so those requirements cannot render the Washers unmerchantable.

The vast majority of Washer buyers who never experienced odor have no warranty claim under most states' laws. The few who did experience odor had diverse knowledge about care requirements at the time of purchase, received diverse instructions, bought differently designed machines, used Washers

under different conditions, followed care instructions to different degrees, and had different experiences seeking warranty service. *E.g.*, WD104-28 ¶11 (buyer was aware of care instructions when she bought Washer). Any reasonable consumer knows that appliances can develop problems if not maintained, and every appliance, including top-loading washers, must be cleaned. WD103-30 ¶17.

Plaintiffs' analogy to a dealer selling a Chevrolet as a Cadillac is beside the point. Every buyer of a misbranded Chevy is defrauded and suffers immediate economic consequences. By contrast, Whirlpool made Washers with the highest performance characteristics and reliability, as *Consumer Reports* repeatedly concluded. S.App. 48a-52a; SD231-2 ¶¶27-28. Virtually all buyers had a problem-free experience. SD231-2 ¶28. Most who experienced problems received free warranty remedies, including some named plaintiffs in both cases. WD103-42 at 5; SD230-1 at 48-61. Thus, most buyers got precisely what they bargained for—a Cadillac in plaintiffs' example.

The decisions below flout *Amchem*, where predominance was not satisfied even though every claimant was exposed to asbestos, some had developed disease, and all were at risk. "[D]isparities among class members" as to injury, liability, defenses, and state law meant individual questions predominated. Forcing claims into a class action format would violate defendants' substantive rights. 521 U.S. at 620, 625. *Amchem* is controlling here.

3. It is ironic that plaintiffs rely on warranty law. Certification would undermine a warranty system that, unlike class litigation, efficiently resolves customer complaints.

Consumer class actions take years to resolve, impose staggeringly high costs, and result in low recoveries—with a quarter diverted to plaintiffs' lawyers. See Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010); Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, FORBES, Dec. 11, 2013, http://tinyurl.com/pj9rluh. Warranty systems, by contrast, "optimiz[e] the productive services of goods by allocating responsibility" by contract "between a manufacturer [or retailer] and consumer for investments to prolong the useful life of a product." George Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1298 (1981). Warranty terms are responsive to the coverage consumers want, Alan Schwartz & Louis Wilde, *Imperfect Information in Markets for Contract Terms*, 69 VA. L. REV. 1387, 1414 (1983), and are well understood by consumers. Alan Schwartz, *Proposals for Products Liability Reform*, 97 YALE L.J. 353, 372 (1988).

Federal law establishes minimum warranty standards and encourages resolution of disputes "fairly and expeditiously" through "informal" mechanisms. Magnuson-Moss Warranty Act, 15 U.S.C. § 2301; *id.* §§ 2302, 2304, 2310(a)(1); 16 C.F.R. Part 703. States have parallel laws. The FTC and state consumer protection agencies enforce these laws, *e.g.*, 15 U.S.C. § 2310(c), and many states provide a complaint process. *E.g.*, http://tinyurl.com/nr5wc6r (Ohio).

Compared to class litigation—which has been likened to "a person using an ATM at which a withdrawal of $100 results in a service fee of $100," A. Mitchell Polinsky & Steven Shavell, *The Uneasy*

Case for Product Liability, 123 HARV. L. REV. 1437, 1470 (2010)—warranty programs efficiently resolve complaints about any real problems on an individualized basis. Manufacturers and retailers have economic incentives to remedy warranty claims to maintain customer satisfaction and loyalty, and devote substantial resources to doing so. A defective machine that is not fixed or replaced means a lost customer and a negative review on popular consumer websites. Watering down Rule 23 requirements to allow class actions for alleged defects that affect only a tiny fraction of buyers is unnecessary and grossly inefficient.

4. The advantage of the warranty system over class-action lotteries is evident in the fanciful damage theories that drive settlement in class actions like these. Plaintiffs' expert opined that "a simple formula" proves consumers would have demanded a $419 per-Washer discount had they known that leaving the door ajar and occasionally running bleach through the machine would prevent odors, even though *all* manufacturers gave the same care instructions. Opp. 31 n.14; SD231-6 at 59. As with the "fluid recovery" rejected in *Eisen*, 479 F.2d at 1017-1019, under this "fantastic" scheme the "claims of the individual members of the class" are "of little consequence."

Even taking plaintiffs' damages theory at face value, any "discount" would turn on each buyer's knowledge of care instructions, the value the buyer placed on avoiding routine care, and what care the buyer performed. The record shows that most buyers had no problems, most who did resolved them free of charge, care instructions changed over the class period, and some class members specifically knew of

those instructions before purchase and were not deterred. *E.g.*, SD231-2; WD103-2 & Ex. A; WD104-28 ¶11; WD104-29 ¶9. Plaintiffs' "discount" theory ignores these variations and turns courts into price-setting agencies. See *Arora v. Whirlpool Canada*, 2013 ONCA 657 ¶105 (Can.) (affirming dismissal of Canadian copycat action; refusing to "burden an already taxed court system" with inquiry into "whether the consumer received value" in "a myriad of consumer transactions"); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.).

B. Plaintiffs Mischaracterize The Record.

Plaintiffs mischaracterize uncontradicted facts. *All* the empirical data show that less than 5% of owners ever complained of mold or odors—not 35-50%. S.Pet. 8. The Washers did not have a uniform design; Whirlpool modified designs to combat mold in different ways at different times for 21 different Whirlpool and 27 different Kenmore models. S.Pet. 6-7; W.Pet 8-10. Washer purchasers were not "all" given the same instructions to avoid mold; care instructions changed substantially across the class period. W.Pet. 8-10. Recommended care was not "costly and time-consuming," but ultimately involved using detergent designed for high-efficiency machines, leaving the door ajar, putting in a teaspoon of bleach, or running a self-cleaning cycle. WD103-2. When Whirlpool introduced Affresh in 2007 it told buyers they could use bleach *or* Affresh. *Id.* ¶35. Plaintiffs assert that Whirlpool's measures were ineffective, but unrefuted evidence shows that they worked. WD103-30 at 11-18; WD103-1.

Equally clear-cut errors underpin plaintiffs' argument regarding the CCU claim. Uncontradicted

evidence shows that the manufacturing defect resulted from *intermittent* operator error—operators *sometimes* pressed in the wrong place when plugging the CCU into its housing, which *sometimes* caused the solder to crack, which *sometimes* caused a Washer malfunction—until Whirlpool eliminated the problem during the class period through a series of process and design improvements. SD231-15 ¶¶17-19, 22. Plaintiffs *concede* (at 26 n.11) that a manufacturing defect of *that* sort does not permit certification.

C. Standing Deficiencies Prevent Class Certification.

Plaintiffs do not dispute that "a class cannot be certified if it contains members who lack standing." *Avritt*, 615 F.3d at 1034. It was improper to certify classes of mostly uninjured Washer buyers because those buyers lack injury and hence standing. S.Pet. 31; W.Pet. 32-33.

Plaintiffs' assertion that all buyers were injured is wrong. Opp. 22-24. Most buyers received the properly operating Washer they paid for, never experiencing mold—some buyers performing routine care, some not. The CCU defect was sporadic, leaving most buyers unaffected. SD230-1 at 34-40. These facts distinguish plaintiffs' only authority finding standing for unmanifested defects, *Cole*, 484 F.3d at 722-723, where *all* defective parts were recalled.

Monsanto Co. v. Geertson Seed Farms involved individual—not class—claims and found standing based on the kind of plaintiff-specific evidence that here proves that most class members have no injury at all. Compare 130 S. Ct. at 2754-2755, with SD230-1 at 19-40. Directly relevant here is *Clapper*, which

held that an "objectively reasonable likelihood" that communications would be intercepted did *not* confer standing to challenge a law allowing interceptions, even though measures to prevent interception were "costly and burdensome." 133 S. Ct. at 1147-1153. Like the odor and CCU problems, interceptions were not "certainly impending" and remedial measures could not "manufacture standing." *Id.* at 1150-1151.

D. The Circuits Are Divided.

Plaintiffs cannot wish away circuit conflicts. The Fifth and Eleventh Circuits reject certification where many members "never experienced any manifestation of the alleged defect." *Cole*, 484 F.3d at 729 (5th Cir.); see *Walewski v. Zenimax Media*, 502 F. App'x 857, 861 (11th Cir. 2012). *Cole* did not turn solely on differences in state law. It held that a class including buyers whose products function properly cannot be certified under the law of states requiring that "the alleged defect manifest itself" (484 F.3d at 729)—like most (if not all) of the states at issue here. S.Pet. 31-32; W.Pet. 18-19. *McManus v. Fleetwood Enterprises* involved a *manifest* defect depriving *all* purchasers of the benefit of their bargain. 320 F.3d 545, 551-552 (5th Cir. 2003). None of defendant's motor homes were fit for their "ordinary purpose" because none could "safely tow a normal car" with the standard installed brakes. *Ibid.*

The Eighth Circuit has held in the plainest terms that a class containing uninjured buyers "cannot be certified." *Avritt*, 615 F.3d at 1034. Plaintiffs contend that *Zurn Pex Plumbing Products*, 644 F.3d 604 (8th Cir. 2011), is the "apposite case," not *Avritt*. But *Zurn* reaffirmed that products must "'actually exhibi[t] the alleged defect.'" *Id.* at 616. *Zurn* approved class certification because plaintiffs proved

that the defect was "'already manifest'" in "all" pipes, and "99% of homes would experience a leak." *Id.* at 610, 617. As with the motor home in *McManus*, ordinary consumer care would not fix the pipe defect in *Zurn*. The Eighth Circuit recently reaffirmed *Avritt*, rejecting a class with uninjured members. *Halvorson v. Auto-Owners Ins.*, 718 F.3d 773, 778-779 (8th Cir. 2013); see also *Rail Freight*, 725 F.3d at 253 (D.C. Circuit rejection of class action involving "individualized proof of injury").

This circuit conflict is deep and stark. The decisions below certifying huge classes full of buyers who never experienced odors would have come out differently in the Fifth, Eighth, or Eleventh Circuits. And they are completely irreconcilable with this Court's recent class action rulings.

* * *

"[S]afeguards provided by the Rule 23(a) and (b) class-qualifying criteria," which "inhibit appraisals of the chancellor's foot kind," cannot be avoided by stating issues at such a high level of generality that they hide individual differences among claimants—something an imaginative judge could do in *any* case. *Amchem*, 521 U.S. at 621; see *Martin v. Blessing*, 134 S. Ct. 402, 403 (2013) (statement of Alito, J.) ("it would be intolerable if each judge adopted a personalized version" of Rule 23 criteria). This Court should grant certiorari and require that courts test commonality and predominance against the issues that will actually need to be tried to adjudicate claims, defenses, and damages, not abstract generalizations that turn weak claims by uninjured consumers into windfall settlement devices.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

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