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

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Constitution prohibit the use of a class action to answer the question whether a mass-marketed consumer product was defective for its ordinary and intended use?

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OPINIONS BELOW

The opinion of the court of appeals is found at Pet. App. at 1a-21a. The circuit court's order granting Whirlpool's Petition for Permission to Appeal under Rule 23(f) is found at Pet. App. at 22a-23a. The district court's opinion is found at Pet. App. at 24a-33a. The order denying en banc review is found at Pet. App. at 34a-35a.

JURISDICTION

This Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1) from denial of a timely petition for rehearing en banc.

INTRODUCTION

Every class action, whatever the substantive area of law, asks whether a defendant is liable to a group of similarly situated claimants. Class actions are appropriate when it is possible to resolve efficiently and effectively whether a defendant is liable on the basis of "if as to one, then as to all." Few cases are better suited to such resolution than a dispute that arises from the claim that a certain durable good does not perform its ordinary and intended function. Indeed, this particular litigation is unremarkable. Owners of substantively identical washing machines that breed mold, require the purchase of a special product to limit the risk of contamination from that mold, produce odor that contaminates clothes, and require constant, unanticipated maintenance, collectively assert that the manufacturer of such machines has denied them the benefit of the bargain they struck at the time of purchase: a non-defective washing machine in exchange for a particular amount of money.

Whirlpool and its amici challenge this routine claim by seeking to impose a requirement on absent class members that would never be imposed on an individual claimant — they demand that a class member's

entitlement to damages be proven prior to a determination of the defendant's liability. The extraordinary claim at the heart of the Petition is that, absent such threshold proof of remedial entitlement by every class member, there cannot be constitutional standing for want of an Article III case or controversy and a class cannot be certified. There is simply no basis in the Court's constitutional or class action jurisprudence for these extravagant claims, nor does the argument find support in the law of any court of appeals.

The relevant facts are straightforward. Whirlpool sold some 160,000 front-loading washing machines ("Duets") in Ohio, all of which share a design that its own engineers concluded make them the "ideal environment" for mold, and none of which adequately clean themselves of the mold. Pet. App. at 4a, 7a-8a, 17a. Whirlpool's attempt to invoke constitutional defenses must fail — there is no constitutional right to sell a defective product simply because one sells many of them.

For all the rhetoric about Due Process, Article III, and circuit splits, the only issue raised by Petitioner is whether a court may certify a class that includes not only purchasers whose Duets have already experienced the mold problem, but also those who did not receive the benefit of their bargain because they remain in harm's way as purchasers of the allegedly defective machines. Even under Petitioner's creative rendition of the facts — which is contrary to the conclusions of two courts below and the overwhelming weight of the evidence in the record — thousands of Ohio residents have already experienced the mold problem. As to such consumers, who purchased a defective product that has failed to perform its ordinary and intended purpose, Petitioner raises no question about the propriety of class treatment. Petitioner asks only whether other unwitting Ohio purchasers who did not receive the full benefit of the bargain to which they were entitled under Ohio warranty law must come forward and establish their individual

entitlement to damages before they can be part of the class. They do not.

In keeping with this Court's jurisprudence and the law of all circuits, no further review is warranted. Indeed, only a few weeks ago, Judge Richard Posner agreed with every one of the Sixth Circuit's conclusions in a case involving the same defect, the same Whirlpool-manufactured machines (marketed by Sears Roebuck), and substantially the same record. *See Butler, et al. v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030, __ F.3d __, 2012 U.S. App. LEXIS 23284, at *8-9 (7th Cir. Nov. 13, 2012). Of particular relevance, the court addressed head-on Whirlpool's argument that a subset of purchasers had not actually experienced the mold problem and thus (according to Sears) could not recover under state law. The court explained that this "is an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate" Whirlpool (which is indemnifying Sears), "a course [defendant] should welcome, as all class members who did not opt out of the class action would be bound by the judgment." *Id.* at *6. Under these circumstances, the class action works exactly as intended:

> A class action is the more efficient procedure for determining liability and damages in a case such as this involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit. . . . The class action procedure would be efficient not only in cost, but also in efficacy, if we are right that the stakes in an individual case would be too small to justify the expense of suing, in which event denial of class certification would preclude any relief.

Id. at *5-6. The Seventh Circuit went on to endorse the exact class procedure employed in this case, in which "a

determination of liability could be followed by individual hearings to determine the damages sustained by each class member," damages that would be "capped at the cost of replacing a defective washing machine" because there is no "claim that the odors caused an illness that might support a claim for products liability as distinct from one for breach of warranty[.]" *Id.*

STATEMENT OF THE CASE

As the Sixth Circuit explained, this is a case brought by Gina Glazer and Trina Allison ("Respondents") about Whirlpool front-loading washing machines (the "Duets") designed in such a way that they trap mold, do not adequately self-clean, and require undisclosed maintenance to attempt to ameliorate the development of mold and resulting noxious odors. Pet. App. at 2a. Whirlpool's engineers explained that the Duets are the "ideal environment for bacteria and mold to flourish" because of their "lower water levels, higher moisture, and reduced ventilation." Pet. App. at 4a, 17a. So pervasive was the problem that, post-sale, Whirlpool instructed all consumers — not simply those who had complained of mold — to purchase another product from Whirlpool because of the mold problem. Pet. App. at 7a ("Whirlpool marketed Affresh™ as 'THE solution to odor causing residue'"); *see also* D. 93-11 (9/20/07 Affresh Memo) at 2 (explaining that no other "cleaning product provided a complete solution to effectively combat" the buildup of "mold and mildew" within the Duets). Whirlpool likewise provided to *all* purchasers written materials — again, only post-sale — instructing them to follow elaborate procedures also designed to forestall the mold problem, including running extra cycles with bleach, wiping and cleaning the machine after each use, and leaving the washer door open at all times. Pet. App. at 3a, 7a. Most tellingly, as recounted by the court of appeals, Whirlpool itself concluded that the mold problem would affect large numbers of Duets, estimating that fifty percent of "current front-load washer owners might be

looking for a solution to an odor problem with their machines." Pet. App. at 7a; *see also* D. 93-30 (7/02/05 Memo) at 2 ("[H]igh # of customers (35%) complaining about bad odors in Whirlpool Duet Washers.").

A. The Findings of the Courts Below Are Supported by the Record.

Whirlpool is only able to assert that this class presents some form of constitutional issue by twice mischaracterizing the factual record.

1. The Duets Are Uniform.

Whirlpool claims that it sold 21 different models of washing machines during the class period (Pet. at 1), and implies that the number of models indicates that the underlying problem is not uniform. Not so. The question is not whether some Duets are white while others are red, but whether they share uniform design features that cause them to develop mold and inadequately self-clean. They do. *See* Pet. App. at 5a ("[T]he mold problem was not restricted to certain models or certain markets."); D. 93-19 (10/26/04 Minutes) at 1-2 (same).

As for the contention that there are 21 different models of washing machines, Duets are, as both courts below found on undisputed facts, built on only two slightly different engineering platforms, known as "Access" and "Horizon." Pet. App. at 3a-4a. These platforms, moreover, are uniform for purposes of the claims in this litigation. Pet. App. at 3a. Indeed, Whirlpool itself admitted that every washer within each platform is "nearly identical from an engineering standpoint" and that "most of the differences" are "aesthetic." (D. 93-8 (Hardaway Aff.) at ¶¶ 6, 8); *see also* Pet. App. at 6a ("Chemical analysis Whirlpool conducted showed that the composition of biofilm found in the 'Horizon' and 'Access' platforms was identical."); D. 93-18 (10/18/04 Email Chain) at 3 (same).

At bottom, contrary to Whirlpool's implication that this litigation involves substantively different product models, all Duets are designed with the identical problem: none prevents mold from forming, eliminates mold during a self-cleaning cycle, or allows consumers to remove mold manually. *See* Pet. App. at 3a-5a ("[N]ot restricted to certain models . . . ."). The courts below fully examined the evidence of model alterations during the class period, and credited the testimony of Respondents' expert — Whirlpool's own former Director of Laundry Technology — to find that "plaintiffs have produced evidence of the alleged common design flaws in the Duet platforms," Pet. App. at 16a-17a, thereby rendering the model changes irrelevant.

2. 35-50% of Purchasers Have Experienced the Mold Problem.

Petitioner asserts that "only a tiny fraction of the putative class members ever reported mold or odors." Pet. at 2. For support, Petitioner refers to documents showing that a small percentage of owners submitted odor complaints through Whirlpool's formal warranty process, a curious construct given that the gravamen of the lawsuit is that Whirlpool refused relief under the warranty. Nor is the number of complainants within Whirlpool's warranty process legally (or practically) relevant; Ohio does not require pre-suit exhaustion of administrative remedies as a predicate to any of Respondents' claims.

Furthermore, Whirlpool's internal pre-litigation documents show that Whirlpool itself never believed the 3% or 0.3% numbers it now touts. To the contrary, Whirlpool created a special "biofilm team" (D. 110-2 (Hardaway Dep.) at 32:5-22) to try to deal with the mold problems, going so far as to develop and market an entirely new product (Affresh) to capitalize on the widespread nature of the mold problem Whirlpool had created. It took these steps, moreover, because it

estimated that between 35 and 50 percent of purchasers had already experienced odors as a result of the mold problem within just a few years. *See* Pet. App. at 7a (explaining that Whirlpool assumed "that fifty percent of . . . current front-load washer owners might be looking for a solution to an odor problem with their machines"); *see* D. 93-5 (2005 Quickfix Presentation) at 11 ("35% of Duet customers complain of odors[.] . . . Complaints are increasing from all other markets[.]"); D. 93-30 (7/02/05 Memo) at 2 ("[H]igh # of customers (35%) complaining about bad odors in Whirlpool Duet Washers.").

In other words, Whirlpool itself always believed that the mold problem was widespread, and its current contention that the problem is limited to a small fraction of purchasers is not plausible. The lower courts were correct to reject it.

B. The Opinions Below.

1. The District Court.

Based on an extensive evidentiary record, the district court concluded that the core of the case is based on "common contention[s]," the ultimate resolution of which will resolve issues "central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).[1] The court found commonality based in part on the presence of a uniform, and allegedly defective, design. (*See generally* D. 134 (hearing transcript) at 29, 40.) For example, the court

[1] Prior to the hearing on Respondents' Motion for Class Certification, Whirlpool filed numerous evidentiary motions, though none to exclude experts under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and prevailed on all of them. (*See* D. 99; D. 140.) It also won the right to present live testimony at the hearing, but chose not to do so. (*See* D. 116; *see generally* D. 134.).

relied on a sworn declaration from Whirlpool's Lead Engineer for the Duets, Anthony Hardaway, stating that all of the washers at issue in this case are based on only two platforms, and that Duets within each platform are "nearly identical from an engineering standpoint" (*id.* at 29), as well as a memo from Hardaway stating that the mold problem "occurs under all, any common laundry conditions" (*id.* at 40). The district court also credited Respondents' evidence that the mold problem itself was common based on the high number of consumer complaints. (See *id.* at 24 ("[The Court:] You may have a different take on all these and other evidence, but it sounds like there is, at least, some admissible evidence that [the complaint rate] is as high as 35 percent or more.").)

The record evidence — uncontradicted by a single pre-litigation Whirlpool document — fully supports these findings.[2]

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[2] Anthony Hardaway explained in an internal memorandum that the Duets were the "ideal environment for mold[] and bacteria[] to fl[o]urish" and cautioned that Whirlpool was "fooling [itself]" if it thought that it could "eliminate mold and bacteria," given the Duets' design. (D. 93-3 (6/24/04 Hardaway Memo) at 2; *see also id.* ("Data to date show Consumer habits are of little help since mold (always present) fl[o]rished under all conditions seen in the Access platform.")). Whirlpool, moreover, admitted specifically that the Duets are uniform from an engineering perspective because "most of the differences" between Duets in either platform "are aesthetic." (*See* D. 93-8 (Hardaway Aff.) at ¶¶ 6, 8.) And, indeed, it marketed and sold all purchasers a single product, Affresh™, as 'THE solution to odor causing residue" for all of the Duets (D. 93-6 (Affresh Presentation) at 3) and explained that no other "cleaning product provided a complete solution to effectively

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After enumerating the elements of Respondents' claims, the district court concluded that common answers would drive the resolution of this litigation: (1) the existence of a design defect; (2) whether that defect was a "substantial factor" leading to the mold problem in all machines; (3) Whirlpool's knowledge of the design defect; (4) whether Whirlpool was required to warn purchasers about the mold problem prior to sale; and (5) whether the withheld information about the mold problem was "material," which triggers a presumption of reliance under Ohio law. Pet. App. at 27a-33a. The district court also found that those common questions predominated over Whirlpool's arguments concerning design changes to the Duets, purported misuse by owners, and the timeliness of class members' claims. Pet. App. at 29a. The court certified a class asserting three Ohio state law claims: tortious breach of warranty (Ohio's common law consumer warranty claim), negligent design, and failure to warn.[3] It denied certification of another claim brought under the Ohio Consumer Sales Protection Act, Ohio Rev. Code Ann. § 1345, *et seq*. Pet. App. at 32a-33a.

2. The Sixth Circuit.

The court of appeals affirmed on all grounds based upon a thorough review of the entire factual record. Pet. App. at 2a-9a. Indeed, after discussing *Dukes* extensively, the court of appeals found that "[t]he district court closely examined the evidentiary record and conducted the

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combat" the buildup of "mold and mildew" within them (D. 93-11 (9/20/07 Affresh Memo) at 2).

[3] None of these claims involves personal injury or property damage. Under Ohio law, any such claims arising from a defective product must be brought under the Ohio Product Liability Act, Ohio Rev. Code §§ 2307.71(A)(7), 2307.79(A).

necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." Pet. App. at 13a. A petition for rehearing and rehearing en banc was filed; no judge of the Sixth Circuit requested a vote on rehearing en banc. Pet. App. at 34a.

REASONS TO DENY THE WRIT

I. There Is No Circuit Conflict.

Petitioner claims that the opinion of the Sixth Circuit broadens a circuit split over the propriety of certifying a class that includes "uninjured" class members. Pet. at 19. This is wrong on two levels. First, there is no circuit split. Second, Petitioner is incorrect in characterizing purchasers of a defective product as uninjured for purposes of standing. Respondents address each point in turn, followed by a brief discussion of the rationale underlying the circuits' uniform application of these principles.

A. All Circuits Permit Claims by Individuals Exposed to Harm Who Have Not Yet Proved Entitlement to Damages.

According to Whirlpool, certiorari is required to resolve "a deep and mature circuit conflict" because, Whirlpool asserts, the Third, Sixth, and Ninth Circuits permit Respondents' claims, but the Second, Seventh, and Eighth do not. Pet. at 20-22. In particular, Whirlpool contends that the latter group of circuits does not permit claims by absent class members who may not ultimately recover damages under state law even if the class is otherwise successful. Petitioner is simply wrong — mere weeks ago, for example, the Seventh Circuit reversed a district court's refusal to certify a class in a case "identical" to this one because "refusal to certify such a class would be to create" a "gratuitous" conflict with the Sixth Circuit's decision in this case. *Butler, supra*, at *8-9.

There is also no conflict with the Second Circuit, as demonstrated by the very case cited by Petitioner, *Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006). *Denney* held specifically that class members could bring suit even though some of them might not ultimately have a compensable injury. *Id.* at 265. A brief recitation of the facts of *Denney*, moreover, demonstrates that it strongly supports the result in this case. In *Denney,* the Second Circuit considered a class complaining of the improper tax advice they had received. The defendant in *Denney* claimed that the class could not be certified to include individuals who had received the allegedly improper advice but who had not been audited, or for whom the statute of limitations had run for adverse governmental action. 443 F.3d at 264-65. The Second Circuit rejected these arguments in favor of a class comprised of *all* recipients of the tax advice in question. *Id.* at 265. As the Second Circuit explained, "[t]he future-risk members of the Denney class have suffered injuries-in-fact, irrespective of whether their injuries are sufficient to sustain any cause of action." *Id.*

There is no conflict with the Eighth Circuit either. Of particular relevance, the most recent case in that circuit to address these issues, *In re Zurn Pex Plumbing Prods. Liab. Litig.,* 644 F.3d 604, 617 (8th Cir. 2011) is almost indistinguishable from this case — yet Petitioner fails to cite it. *Zurn* involved claims by purchasers of home plumbing pipe with an alleged defect that ultimately caused it to leak water into homes, making the pipe clearly unfit for its ordinary and intended use. The manufacturer challenged certification of a class of all purchasers of the defective pipe on the grounds that some purchasers had not yet experienced an actual leak. According to the defendant, no class could be certified that would include the so-called "dry plaintiffs": those who had not experienced product failure. The Eighth Circuit, applying Minnesota warranty law, ruled that the burden on the plaintiffs at certification was to show that

there was a uniform defect, not a uniform harm: "the district court did not err in concluding that the claims of the dry plaintiffs are cognizable under Minnesota warranty law and that they may seek damages if they succeed in proving their claim of a universal inherent defect in breach of warranty." *Zurn Pex*, 644 F.3d at 617.

The Eighth Circuit cases Petitioner does cite predate *Zurn* and fail in their own right to create a conflict. The primary case relied upon by Petitioner, *Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023 (8th Cir. 2010), concerns the denial of class certification in a case turning on reliance on oral representations. The proposed class in *Avritt* could not be certified because there was no evidence that *any* members of the putative class, other than the named plaintiffs, had been exposed to the potential misrepresentations; *i.e.*, there was insufficient evidence that any putative class member had been put in harm's way. *Id.* at 1034. As such, *Avritt* does not support Petitioner's argument that "exposure-only" plaintiffs lack standing in the Eighth Circuit. *Cf. Zurn Pex,* 644 F.3d at 617 (affirming certification of an "exposure-only" claim).[4]

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[4] The other Eighth Circuit case Petitioner claims establishes a circuit conflict, *Blades v. Monsanto Co.,* 400 F.3d 562 (8th Cir. 2005), is even farther afield. The issue in *Blades,* an antitrust conspiracy suit, was *not* that only some class members had been subjected to antitrust injury, but rather the inability to prove that *any* class members had been harmed. The substantive claim of antitrust injury under the Clayton Act required proof of market-wide harm, meaning that no individual could be injured absent proof of harm to all other class members. The district court held that the plaintiffs had failed to produce evidence of any classwide harm — as required by the substantive law — and the court of appeals affirmed. *Id.* at 574.

Put simply, there is nothing remarkable about a class with members who may not ultimately recover, so long as those class members claim a constitutionally sufficient injury. *See, e.g.*, *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 302-03, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.") (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 677 (7th Cir. 2009)). As Judge Easterbook aptly noted, "Rule 23 allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010).

B. The Constitution Requires Only "Imminent or Actual Harm," Which Is Distinct from the Question of Remedy.

Petitioner contends that whether each absent class member may ultimately recover under a particular state's laws somehow implicates constitutional standing under Article III. But constitutional standing requires only that every absent class member have a "concrete and particularized" injury, not that each necessarily will ultimately prevail in his proof. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011); *see also Denney*, 443 F.3d at 264-65.

In this case, every class member paid money for a non-defective product, and Respondents have presented evidence that every class member received a defective one. Pet. App. at 17a. That is all Article III requires. *See Sprint Communs. Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008) (describing the three elements of Article III standing: injury in fact, causation, and redressability); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The situation here is remarkably similar to the one in *Denney* (a purported source of a circuit split), where the Second Circuit upheld certification of a class of tax shelter advice consumers. In deciding that recipients of allegedly unlawful tax advice had standing to sue, regardless of whether they had yet been audited or otherwise subjected to adverse tax treatment as a result of having received incorrect tax advice, *Denney* reaffirmed a basic thesis articulated by this Court that an injury-in-fact must be "actual *or imminent*." 443 F.3d at 264 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990)) (emphasis added).

This Court's use of the disjunctive (actual *or* imminent) in *Whitmore* vests constitutional jurisdiction in parties who have been placed at substantial risk of harm, even if not yet realized. This is exactly the test used by both the Second Circuit and the Sixth Circuit in affirming classes made up of individuals put in harm's way by the sale of a defective product. As stated by the Second Circuit: "exposure to toxic or harmful substances has been held sufficient to satisfy the Article III injury-in-fact requirement even without physical symptoms of injury caused by the exposure, and even though exposure alone may not provide sufficient ground for a claim under state tort law." *Denney*, 443 F.3d at 264-65 (citation omitted). Thus, the Second Circuit held, in complete harmony with the Sixth Circuit here, that "[a]ll Denney class members — by definition — received allegedly negligent or fraudulent tax advice, and took some action in reliance on that advice." *Id.* at 265. That was sufficient for Article III standing, regardless of whether those class members had already been audited or would eventually recover damages.

Accordingly, as Judge Posner explained in *Butler*, there is little question that every member of the class has standing:

> If, as appears to be the case, the defect in a Kenmore-brand washing machine can precipitate a mold problem at any time, the defect is an expected harm, just as having symptomless high blood pressure creates harm in the form of an abnormally high risk of stroke. A person who feels fine, despite having high blood pressure, and will continue feeling fine until he has a stroke or heart attack, would expect compensation for an unlawful act that had caused his high blood pressure even though he has yet to suffer the consequences. Every class member who claims an odor problem will have to prove odor in order to obtain damages, but class members who have not yet encountered odor can still obtain damages for breach of warranty, where state law allows such relief — relief for an expected rather than for only a realized harm from a product defect covered by an express or implied warranty.

Butler, supra, at *2.

C. Purchasers Are Entitled to the Benefit of the Bargain.

That there is no circuit conflict over standing is plain. The *reason* there is no circuit conflict over standing is that there is nothing remarkable about the idea that a purchaser has a right to expect a non-defective product, and has been injured even if the defect has not yet caused a sufficient level of harm to establish entitlement to damages. It is a matter of black letter law that a purchaser is entitled to the benefit of the bargain: "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special

circumstances show proximate damages of a different amount." 2 U.C.C. § 2-714(2).

1. Defective Products Deprive a Purchaser of the Benefit of the Bargain.

There should be no question that a defective product deprives a purchaser of the benefit of the bargain. As Judge Edith Brown Clement explained in a similar context:

> [Defendant] emphasizes that the [Plaintiffs] have not shown *any* class members were actually injured. These arguments misapprehend the nature of the implied warranty of merchantability cause of action. . . . Here, the damages sought by the [Plaintiffs] are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain.

McManus v. Fleetwood Enters., 320 F.3d 545, 552 (5th Cir. 2003) (citations and internal quotation marks omitted).

In *McManus,* the defendant sold a motor home represented to be capable of towing a family's passenger car. What the defendant did not disclose (until after the sale) was that in order to tow a car and also be able to stop safely, an additional purchase of supplemental brakes was necessary. Class certification was challenged on the grounds that some purchasers had not been injured while attempting to tow a vehicle, and that others had not even tried to tow a vehicle. The Fifth Circuit rejected both arguments: "whether or not any member of the class actually suffered any *physical* injury is immaterial. Likewise, it is immaterial whether or not the class members even intended to use their motor homes

for towing because all a jury need determine is that the motor homes were defective with respect to a motor home's *ordinary* purpose." *Id.* (emphasis in original) (citation omitted).

Judge Easterbrook has well-captured this unremarkable concept of injury: "[p]aying too much, or getting an inferior product for the same money, or getting a product that causes deferred injury and medical expenses, causes a loss of one's money, which is 'property.'" *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris*, 196 F.3d 818, 823 (7th Cir. 1999).

2. Ohio Recognizes Claims for Purely Economic Damages.

Ohio law does not compel a different result than the one reached by Judge Clement in *McManus*.[5] Petitioner is incorrect that Ohio does not recognize what it pejoratively describes as a "premium price" claim (Pet. at 3-4) — *i.e.*, the claim that a party did not receive the benefit of its bargain: Ohio *does* recognize this claim. *See Bedford v. Hamad,* No. 16102, 1993 Ohio App. LEXIS 4056, at *4 (Ohio Ct. App. Aug. 18, 1993) ("[T]he proper measure of recovery for a breach of warranty is the 'benefit of the bargain.' The difference between the value

[5] Even assuming that the issue of Ohio substantive law is properly raised in an interlocutory appeal under Rule 23(f), there is no basis for the Court to grant certiorari on an interpretation of Ohio state law that has not even been reduced to judgment. *See, e.g.*, E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), at 351 (9th ed. 2007) (error correction "outside the mainstream of the Court's functions"); *see also* S. Ct. Rule 10 (indicating that purported misapplication of state law is not a reason for which this Court will usually grant review).

of goods as accepted and the value they would have had as warranted, is usually the proper measure of the 'benefit of the bargain' . . . .") (citing Ohio Rev. Code Ann. § 1302.88).

Petitioner contends otherwise by citing only to the Ohio Product Liability Act ("OPLA"), Ohio Rev. Code §§ 2307.71(A)(7), 2307.79(A), a statute that does not allow any claim for purely economic harm. Yet, Respondents do not assert claims under the OPLA. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 951 (N.D. Ohio 2009) (denying Whirlpool's motion to dismiss and holding that Respondents' claims are neither brought under nor preempted by the OPLA). Petitioner's argument here is not only wrong, but backwards: Respondents' common law claims survived Whirlpool's motion to dismiss *only* because Respondents seek purely economic damages. *Cf. Hale v. Enerco Group, Inc.*, No. 1:10-cv-867, 2011 U.S. Dist. LEXIS 781, at *21-22 (N.D. Ohio Jan. 5, 2011) (finding that under Ohio law, "Plaintiffs' common law negligent design and failure to warn claims, not sounding in products liability law, survive dismissal, but only to the extent that Plaintiffs seek economic damages.") (citation omitted).

Petitioner is thereby mistaken on both procedural and substantive grounds. The Petition improperly asks this Court to resolve an interlocutory issue of state law, a matter that does not itself pose a certiorari-worthy question. Petitioner errs substantively as well in its characterization of Ohio law. *Hale*, 2011 U.S. Dist. LEXIS 781, at *21-22 (explaining that purely economic damages are recoverable under Plaintiffs' state law claims).

More significantly, there is nothing the least bit startling about a claim that purchasers are entitled to receive products suitable for their intended and customary use. Nor is it surprising that every circuit would allow purchasers of uniformly defective products to

sue for breach of warranty or under some other consumer protection law.

II. The Petition Presents No Issue of Pressing Significance.

A. Courts Routinely Address Classwide Liability Before Resolving Individual Damages.

Petitioner and its Amici sound grave alarm bells over the crisis that would befall American law should a class action determine liability in the first instance and leave the remedies to a later phase. Hornbook law, however, explains that it is absolutely routine for courts to consider a defendant's liability for its conduct on a classwide basis before considering individual questions of damages. One treatise, under the heading, "Issues of Liability and Damages Are Often Severed," states flatly that, "[i]n order to make class action litigation efficient, courts often bifurcate trials into liability and damages phases, severing common liability questions from individual damages issues." 5-23 Moore's Federal Practice – Civil § 23.45 (3d ed. 2011). Another leading treatise explains that it is *necessary* to consider liability prior to damages:

> Logically, the existence of liability must be resolved before damages are considered. . . . Moreover, the evidence pertinent to the two issues often is wholly unrelated and there is no efficiency in trying them together. Thus it is not surprising that a significant number of federal courts, in many different kinds of civil litigation, have ordered the questions of liability and damages to be tried separately[.]

9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2390 (3d ed. 2008).[6] This Court's case law is in full accord with the treatises' focus on efficiency. *See Credit Suisse Sec. (USA) LLC, et al. v. Simmonds*, 132 S. Ct. 1414, 1418 n.6 (2012) ("[T]he efficiency and economy of litigation . . . is a principal purpose of Fed. Rule Civ. Proc. 23 class actions") (citing and quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440 (2010) ("Rule 23 . . . [is] designed to further procedural fairness and efficiency . . . .").

B. This Court Has Heard Many Class Actions in Which Some Members of the Plaintiff Class Would Not Receive an Individual Remedy.

The crux of Petitioner's argument is that Article III prohibits certification of any class absent threshold proof that each class member will be entitled to a particular remedy. There is simply nothing new here: courts have never required proof that class members will be entitled to a specific remedy, much less proof that all

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[6] This is also the uniform account in all the leading hornbooks on class action procedure. *See* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:2 (8th ed. 2011) ("The most commonly employed bifurcation in class actions and other contexts is the trial of the issue of the defendant's liability in Phase I, followed by determinations of the amount of recovery by individual plaintiffs or class members in follow-on trials."); William B. Rubenstein, Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 9:47 (4th ed. 2002 & supp. 2012) ("Not infrequently, actions filed as class actions present predominating common issues of liability, while proof of damages may remain as individual issues for the several class members.").

will recover precisely the same damages. Rather, classes are comprised of persons similarly exposed to challenged conduct irrespective of whether each class member will ultimately obtain a benefit.

In *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), for example, this Court addressed the standing of alfalfa farmers who feared potential contamination of their crops if genetically-altered seeds were allowed to come on the market. The "conventional alfalfa farmers" claimed "a reasonable probability" of potential future harm, as well as costs of testing and obtaining foreign seeds to avoid compromised alfalfa. *Id.* at 2743, 2754. This Court concluded that "[s]uch harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." *Id.* at 2755.

Similarly, in this case, all class members purchased a Whirlpool washer that they contend is not fit for its ordinary, intended use because of an undisclosed design defect that fosters mold contamination. That is a legal harm recognized under Ohio law whether or not particular individuals ultimately obtain specific relief. Where exposure to the harm has already occurred (*e.g.*, by purchase of a defective washing machine), a class action is the ideal means for determining whether or not there is liability. This is so particularly in a case such as this one, where members of the affected group have already been forced to undertake affirmative steps to alleviate the harm (*e.g.*, buying additional cleansers or having to hand-clean their washing machines). *See id.* at 2754-55 (explaining that the alfalfa farmers had standing in part because they were forced to take steps in anticipation of the possibility that genetically modified seeds would be allowed on the market). This is by no means a novel proposition.

Further, the Court has repeatedly confronted class actions that necessarily include persons who will not recover a specific remedy, yet are subject to the complained of conduct by the defendant. This is necessarily the case in *all* disparate impact claims where the class is defined by exposure to unlawful conduct, notwithstanding the fact that not all class members would be entitled to a remedy. *See, e.g.*, *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (invalidating height and weight requirements for prison guards as discriminatory against women as a class, without any showing of who, if anyone, would gain employment).

The same obtains in cases challenging allegedly unlawful conduct directed at a similarly situated group without any proof of entitlement to a remedy. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), for example, the Court reviewed a challenge to law school admissions practices brought by a class comprised of disappointed applicants for admission to the University of Michigan Law School. The entire plaintiff class claimed that it had been disadvantaged by racial preferences, without any proof that specific individuals would have benefitted from a remedy. The trial court had ordered "bifurcation of the trial into liability and damages phases," *id.* at 317, meaning that this Court reviewed claims before there had been any determination of which, if any, class members stood to gain from the remedy. *See also Gratz v. Bollinger*, 539 U.S. 244, 267 (2003) (permitting challenges by anyone who "might have" been harmed by a biased test or application).

There is ample support for the use of class actions to test common legal claims: "the class-action device save[s] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *Califano v. Yamasaki,* 442 U.S. 682, 701 (1979). *Califano* granted classwide relief to all persons subject to challenged social security regulations, regardless of

whether a harm had been visited upon them. The Court upheld the certification of a class defined as "all individuals eligible for [old-age and survivors' benefits] whose benefits have been or *will be* reduced or otherwise adjusted without prior notice and opportunity for a hearing." *Id.* (emphasis added). By definition, this is a class that includes individuals who have not yet realized the asserted harm. The Court went on to explain:

> [C]lass relief for claims such as those presented by respondents in this case is *peculiarly appropriate*. The issues involved are common to the class as a whole. They turn on questions of law applicable in the same manner to each member of the class. The ultimate question is whether a pre-recoupment hearing is to be held, and each individual claim has little monetary value. It is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue. And the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every social security beneficiary to be litigated in an economical fashion under Rule 23.

Id. at 701 (emphasis added).

Nowhere has this Court demanded threshold proof that each class member was adversely affected and would receive the claimed benefit. Rule 23(b)(3) speaks to the comparative efficiencies of aggregate dispute resolution by invoking the terms "predominance" and "superiority," not identity or uniformity.[7] Indeed, this Court has been

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[7] Rule 23 itself follows from Fed. R. Civ. P. 1, which mandates that the federal rules "be construed and administered to secure the just, speedy, and inexpensive

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clear that the purpose of a class action is to resolve common questions, the very standard employed by the courts below: "[c]lass relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'" *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano*, *supra,* 442 U.S. at 701).[8]

C. Constitutional Standing Does Not Require Proof of Entitlement to a Remedy.

Equally unavailing is Petitioner's attempt to recast its argument as a matter of constitutional standing or — even more fancifully — due process. In the non-class context, this Court has entertained challenges to unlawful conduct by those who have been exposed to the conduct, regardless whether each individual has proven a realized harm. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713 (2007) (allowing challenge to school assignment by Parents Involved based on behalf of individuals "who have been *or may be* denied assignment to their chosen high school in the district because of their race.") (emphasis added); *see also Monsanto, supra*, 130 S. Ct. at 2752 ("[R]espondents

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determination of every action and proceeding."

[8] The *General Telephone*/*Califano* prescription for use of the class mechanism to promote economical and efficient adjudication [457 U.S. at 155, quoting 442 U.S. at 701] has been quoted and applied throughout the circuits. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3rd Cir. 2008); *In re A.H. Robins Co.*, *Inc.,* 880 F.2d 709, 744 (4th Cir. 1989); *In re Am. Med. Sys.*, *Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005).

contend that petitioners lack standing to seek our review of the lower court rulings at issue here. We disagree.").

The same standard applies even to claims brought by individuals. Thus, "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 665 (1993) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978)); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (same). As the Court added in *Northeastern Florida*, "'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." 508 U.S. at 666.

The alleged infringement of a legally cognizable right is what confers standing upon the named class representative. From that point of departure, Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove, supra,* 130 S. Ct. at 1437.

III. The Sixth Circuit Did Not Err.

A. The Court Below Properly Applied *Wal-Mart v. Dukes.*

1. The District Court Conducted an Inquiry into the Evidentiary Basis for Respondents' Claims.

Petitioner's repeated invocation of *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011), is without foundation. Unlike in *Dukes,* the class below was certified under Rule 23(b)(3), with all of its attendant procedural protections — not under Rule 23(b)(2). And unlike in *Dukes,* the courts below conducted a factual inquiry into

the evidentiary basis for Respondents' claims. As the circuit court explained, "[t]he district court closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." Pet. App. at 11a-13a. Further, the circuit court found that the district court had completed the *Dukes* inquiry, and "reached the [correct] conclusion that the issues relating to the alleged design defects and the adequacy of Whirlpool's warnings to consumers are likely to result in common answers, thus advancing the litigation." Pet. App. at 15a.

Petitioner's focus on the brevity of the district court's opinion ignores the record: during the class certification hearing, the district court comprehensively examined numerous documents, discussed expert witness opinions, and heard the parties' arguments regarding those materials, including with respect to the evidence Respondents presented. (*See, e.g.*, D. 134 at 19-21, 24-29, 33-37, 43-46, 48-51, 53-54). Based upon this record, the circuit court properly concluded that the claims "are capable of classwide resolution because [the common questions] are central to the validity of each plaintiff's legal claims and they will generate common answers likely to drive the resolution of the lawsuit." Pet. App. at 16a. This is exactly the analysis required by *Dukes*: "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (citation omitted).

2. Win or Lose, a Common Answer Will Bind the Class.

In *Dukes,* certification was inappropriate because common questions could not resolve the legal claims of any given two employees: "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class

members' claims for relief will produce a common answer to the crucial question why was I disfavored." *Dukes,* 131 S. Ct. at 2552. There were thus no common answers for a jury to find. *Id.* In the present case, by contrast, the court below found that trial will turn on dispositive answers to one or two central questions. Pet. App. at 15a ("[T]he district court reached the conclusion that the issues relating to the alleged design defects and the adequacy of Whirlpool's warnings to consumers are likely to result in common answers, thus advancing the litigation.") (quoting *Dukes*, 131 S. Ct. at 2551). A jury will either conclude that the Duets' design is defective or that it is not, resolving the claims of the entire class in a single stroke. *Id*.

B. The Court Below Properly Found That Common Questions Predominate.

Petitioner complains that the courts below addressed predominance only briefly and thereby violated *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997) (explaining that the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). The Petition does not specify what portion of the predominance test is unmet, and mischaracterizes what the court below actually ruled. A large part of the Sixth Circuit's analysis is devoted to the question of whether common questions would drive the resolution of this case, as required under Rule 23(a)(2). Of necessity, that inquiry overlaps with the predominance inquiry, and the opinion expressly incorporates the commonality analysis into its determination of predominance: "[i]n light of all that we have said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones. . . ." Pet. App. at 19a. Indeed the entirety of the opinion of the court below is devoted to whether unitary adjudication is the proper way to proceed. *See* 2 Rubenstein, Conte & Newberg, *Newberg on Class Actions*, § 4:25 (4th ed. 2010 & supp. 2012) ("[T]he predominance

test asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit.").

For all its talismanic invocations of *Dukes*, Petitioner disregards the necessary overlap in *Dukes* between predominance and the commonality requirement of Rule 23(a)(2). As *Dukes* held, commonality requires that there be a common question capable of yielding common answers. The predominance requirement, of course, compares the significance of the common questions relative to those that affect only individual members. 131 S. Ct. at 2556. Under this standard, much of the work of the predominance analysis is, as the Sixth Circuit found here, likely to be done in the first instance by assessing the existence of common questions, which in turn requires assessing the elements of the specific claims asserted. As this Court explained: "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund v. Halliburton, Co.,* 563 U.S. ___, 131 S. Ct. 2179, 2184 (2011).[9]

Thus, in performing the Rule 23(a)(2) analysis, the courts below made findings about the centrality of the common questions, thereby setting out the criteria for

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[9] In *Halliburton,* the Court addressed class certification in the context of a fraud-on-the-market claim. The Court expressly rejected the argument that all investors had to show that they were entitled to recover damages as a precondition to suit — the "loss causation" theory adopted by the Fifth Circuit: "[t]he fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory." 131 S. Ct. at 2186.

assessing the predominance requirement of Rule 23(b)(3). *See, e.g.*, Pet. App. at 16a (common "issues capable of classwide resolution because they are *central* to the validity of each plaintiff's legal claims") (emphasis added); *id.* ("Whirlpool asserts that proof of proximate cause will require individual determination, but the record shows otherwise"); Pet. App. at 29a (district court) ("[T]he first two elements of the plaintiffs' negligent design claim — the existence of a design defect and actual causation — are common to the class. . . . Resolution of those common questions will significantly advance the litigation, leaving only the damages issue for individual determination.").

Petitioner's formalistic invocation of predominance as a bar to certification is unsupported by the record. This is a case about whether Whirlpool sold a defective product to many thousands of purchasers, one whose defect compromises the ordinary and intended use of the product. People buy washing machines expecting many years of clean clothes, not endless instructions on special elixirs and cleaning procedures. Whether purchasers received the benefit of the bargain from Whirlpool is, as the courts below found, the heart of the matter. This is the common question that drives this litigation, and the common facts and legal issues that will answer it predominate over all others.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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