NO. 12-1067

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.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE RETAIL LITIGATION CENTER, INC., BUSINESS ROUNDTABLE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Rule 23(b)(3) predominance requirement can be satisfied based solely on a determination that it would be "efficient" to decide a single common question at trial, without considering any of the individual issues that would also need to be tried, and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.

2. Whether a class may be certified on breach of warranty claims where it is undisputed that most members did not experience the alleged product defect and where fact of injury would have to be litigated on a member-by-member basis.

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INTEREST OF *AMICI CURIAE*[*]

Amici and their members represent a diverse array of businesses and business interests across the United States, including manufacturers, retail merchants, and professional organizations. They support the petition because they have a strong interest in ensuring that the lower courts undertake the rigorous analysis required under Federal Rule of Civil Procedure 23 before permitting a case to proceed as a class action.

Amici are deeply concerned that, in this case, the Seventh Circuit departed from this Court's controlling precedents and significantly relaxed the standards for class certification. In particular, the Seventh Circuit certified a massive breach-of-warranty class spanning six states over a period of multiple years, notwithstanding the absence of any common questions that predominate over individual ones, and even though many putative class members have not suffered any injury. Instead, the court of appeals created a new test for class certification, holding that a class should be certified whenever the class action device is an "efficient" procedure for resolving allegations that a product is defective because at some point in the future it might fail to

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[*] Pursuant to Sup. Ct. R. 37.2(a), *amici* timely notified the parties of their intent to file this brief, and the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

perform as expected under its warranty. Because many of *amici*'s members sell products in interstate commerce or manufacture products that are sold in interstate commerce, *amici* are concerned that the Seventh Circuit's decision will dramatically increase their members' exposure to expansive class-action liability, including in cases where there is no proof that any meaningful number of putative class members have suffered harm from any particular product.

The four organizations that are signatories to this brief include:

The Chamber of Commerce of the United States of America ("Chamber"). The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has contributed as *amicus curiae* to this Court's consideration of several recent class-action appeals. *See* http://www.chamberlitigation.com/cases/issue/class-actions.

Business Roundtable. The Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.3 trillion in annual revenues and employ nearly 16 million individuals. Business

Roundtable member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $150 billion annually in research and development, comprising some 61 percent of U.S. private research and development spending. Member companies pay $182 billion in dividends to shareholders and generate nearly $500 billion in sales for small- and medium-sized businesses annually. Business Roundtable companies give more than $9 billion a year in combined charitable contributions.

Retail Litigation Center, Inc. ("RLC"). RLC is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

The National Association of Manufacturers ("NAM"). The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general

public about the vital role of manufacturing to America's economic future and living standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

The class certification requirements of Federal Rule of Civil Procedure 23 are not mere conveniences for streamlining litigation, but crucial safeguards "grounded" in fundamental notions of constitutional due process. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Before a plaintiff may take advantage of the class action device, it must prove that class members share "the same injury" and possess claims that present a "common question" that, if adjudicated on a class basis, "will resolve an issue that is 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). In addition, the plaintiff must satisfy the "far more demanding" requirement of proving that any common questions "predominate" over individual ones. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *Comcast Corp. v. Behrend*, No. 11-864, slip op. at 5 (U.S. Mar. 27, 2013). These essential protections preserve the rights of both absent class members and defendants.

In a striking departure from this Court's precedents, the Seventh Circuit below certified a multi-state, breach-of-warranty class action in which class members are linked only by their purchases since 2001 of some 27 different models of the same brand of washing machine, which allegedly may allow mold to accumulate and to emit bad odors. *See* Pet. App. 4a. The class members do not share the same injury; in fact, the vast majority of them have

suffered no injury at all. In addition, as the lower court acknowledged, the different models have undergone several different design changes and whether any customer's particular machine is defective "may vary with the differences in design." *Id*.

Nonetheless, the court below brushed aside those considerations on the theory that whether the machines are defective is a common question and that a "class action is the more efficient procedure" for resolving the dispute. *Id*. According to the Seventh Circuit, even though most members of the class have not experienced any mold problems or any other injury, the class should still be certified and whether individual class members were actually harmed can be addressed at a later stage of proceedings. The court thus transformed the demanding predominance test into a malleable, less demanding "question of efficiency." *Id*.

The Seventh Circuit's expansive conception of class action procedures cannot be squared with this Court's precedents or the basic due process underpinnings of Rule 23. Efficiency is no substitute for the rigorous analysis of commonality and predominance that Rule 23 requires. Moreover, the decision below deepens an existing split in lower court authority by holding that it is appropriate to certify a consumer class action even though large numbers of the putative class have not been injured. The Seventh Circuit's decision thus effectively deems every product brand to have its own intrinsic consumer class and allows class actions to proceed whenever there is some customer somewhere that

can allege injury from a possible manufacturing defect. If left uncorrected, the decision threatens to greatly expand the class action exposure of merchants and manufacturers across the country. It also threatens to eviscerate Rule 23's protections as a fundamental bulwark against class action abuse and transform them into easily evaded formalities that turn on a court's gestalt judgment about the efficiency of class action litigation.

The petition thus presents an important question that has broad implications for consumers and businesses across the Nation, including *amici* and their members. Virtually all products carry manufacturer or retailer warranties and few, if any, are ever complaint free. For years, especially for businesses serving large and diverse customer bases, the warranty system has provided a fair (and efficient) mechanism for resolving customer complaints when a product does not function as expected. The system works well. There is no need to supplement it by loosening certification requirements and aggregating claims of customers who have suffered no injury into sprawling class actions. That would expose businesses to costly class action litigation based on the mere dissatisfaction of a small fraction of a product's buyers — an especially troubling specter given the increasing frequency of consumer class-action filings and the relative inability of any manufacturer, no matter where it is located, to curtail its exposure to them.

The decision below thus presents an important opportunity for the Court to reaffirm its earlier precedents, clarify the due process considerations

behind Rule 23's predominance requirement, and resolve confusion among the lower courts on an important issue of products-liability law. It also presents a good opportunity for the Court to control class action abuse and to address questions of great practical importance to consumers and the broader business community. It has been more than 15 years since this Court last considered issues concerning the proliferation of class actions in the product liability context. *See Amchem*, 521 U.S. at 598. It is time again for this Court to provide much-needed guidance in this important area of law. The Court should grant review.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to correct the Seventh Circuit's unwise and unwarranted expansion of federal class action procedures. The decision below directly conflicts with this Court's precedents and, instead of conducting the rigorous analysis that Rule 23 requires, creates a new "efficiency" test for determining when common issues in a proposed class action predominate over individual ones. It deepens an existing split in lower court authority on an important, recurring question of federal class action law. And the decision, if not corrected, poses grave threats to businesses and consumers by encouraging class action abuse and authorizing class actions even in circumstances where consumers have suffered no cognizable injury.

I. The Decision Below Directly Conflicts With This Court's Controlling Authorities.

Rule 23's class action prerequisites are not designed only for the litigating convenience of court and counsel. Instead, as this Court has long recognized, Rule 23's essential requirements protect the rights of both absent class members and defendants, ensuring that the procedures for aggregating claims and streamlining litigation are employed fairly and only in appropriate circumstances. *See Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (Rule 23's "procedural protections" are "grounded in due process"); *see also Unger v. Amedisys Inc.*, 401 F.3d 316, 320–21 (5th Cir. 2005) (there are "important due process concerns of both plaintiffs and defendants inherent in the certification decision"). As this Court has noted, aggregation of individual claims for joint resolution endangers the right of absent class members to press their distinct interests and undermines the right of defendants "to present every available defense." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Class actions under Rule 23 are therefore "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979).

No aspect of Rule 23 has tested the due process dimensions of class actions more than section 23(b)(3), the "most adventuresome" class certification provision. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). The drafters of that provision "were aware that they were breaking new ground and that

those effects might be substantial." Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. Pa. L. Rev. 1439, 1487 (2008). Rule 23(b)(3) thus contains special "procedural safeguards," including the requirement that courts take a "close look" to ensure that common issues predominate over individual ones. *Comcast Corp. v. Behrend*, No. 11-864, slip op. at 6 (U.S. Mar. 27, 2013). The drafters added those essential protections to avoid having "their new experiment . . . open the floodgates to an unanticipated volume of litigation in class form." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 401–02 (2000).

The predominance requirement works in tandem with Rule 23(a)'s commonality requirement to ensure that, at a minimum, "proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. That means that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (citation omitted). It also means that a "shared experience," without more, does not justify class certification. *Amchem*, 521 U.S. at 624.

As this Court recently reaffirmed, plaintiffs must "affirmatively demonstrate" their compliance with Rule 23's requirements to be entitled to litigate their claims in a class action. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). It is not enough merely to plead "a violation of the same provision of

law" and label it a common question, for any "competently crafted class complaint literally raises common questions." *Id.* (internal quotation marks and citation omitted). Instead, class litigation must generate common answers to common questions and resolve the ultimate validity of individual claims "in one stroke." *Id.* Equally important, the common questions must *predominate* over individual ones, which is a "demanding" requirement. *Amchem*, 521 U.S. at 624. Predominance "call[s] for caution when . . . disparities among class members [are] great." *Id.* at 623–25. Dissimilarities within the proposed class may defeat class certification even when some degree of commonality exists. *See* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009).

The Seventh Circuit's decision below dramatically departs from these basic principles and contravenes this Court's precedents in both letter and spirit. Instead of applying the "rigorous analysis" required under Rule 23, *Dukes*, 131 S. Ct. at 2551 (quoting *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)), the court of appeals identified a single common question defined at a remarkably high level of generality: whether class members' washing machines are "defective in permitting mold to accumulate and generate noxious odors." Pet. App. 4a. Then, although the court acknowledged that the answer to that generalized question "may vary with the differences in design" of the 27 washing machine models sold since 2001 to different customers in different states, *id.*, it did not pause to consider the individualized issues that would need to be tried. Instead, it simply concluded

that the common question predominated for one reason — it would be "efficient" to resolve that question on a class basis. *Id.*

The lower court's approach eviscerates Rule 23's essential prerequisites. As this Court explained in *Dukes*, alleging that class members "have all suffered a violation of the same provision of law" does not satisfy the commonality requirement. 131 S. Ct. at 2551. Defining the common issues at that level of abstraction renders Rule 23's protections meaningless, which is precisely why courts are supposed to dig deeper and consider both "the elements of the underlying cause of action" and the proof needed to establish each element. *See Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2184 (2011). That is also why the rigorous analysis required under Rule 23 will often "entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 131 S. Ct. at 2551. As the Court has explained, "[t]hat cannot be helped" because "'the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 2551–52 (citation omitted).

Nor are vague notions of "efficiency" any substitute for an exacting application of Rule 23's commonality and predominance requirements. In the class-certification context, efficiency is a byproduct of satisfying Rule 23's requirements; it is not an end in itself. In fact, efficiency and fairness are often at odds with one another — a coin flip is the essence of efficiency and the antithesis of fairness. But due process, Rule 23, and this Court's precedents

all require that when a proposed class action could sacrifice "procedural fairness," the case must be litigated on an individual basis regardless of any efficiency considerations. *Amchem*, 521 U.S. at 615; *see also Comcast*, slip op. at 8 (holding that predominance requirement was not satisfied by applying an arbitrary, speculative damages methodology, even though it would have been efficient to do so). Class certification is appropriate only when class adjudication can be conducted both "fairly and efficiently." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("[e]fficiency is a vital goal in any legal system," but it must be rejected when it "suppresses information that is vital to accurate resolution").

This case illustrates the shortcomings of the Seventh Circuit's new efficiency test. The petitioner's defenses in this sprawling class action undoubtedly turn on individualized considerations. *See* Pet. 7–9. Class members purchased different models of washing machines, constructed on different platforms, and built from different designs, some of which lessened or eliminated the alleged odor defect. Class members maintained their machines differently and placed their machines in different environments. *See id.* at 7–8. Most have not and will not suffer any injury, for most have not and will not experience any odor problems with their machines. *See id*. at 9. And the state laws applicable to their warranty defect claims vary from state to state. *See id*. at 25–26. In these circumstances, the petitioner should have been entitled to litigate its individual

defenses against each class member. *See* 28 U.S.C. § 2072(b) (prohibiting construction of the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right"). After all, due process requires affording a defendant "an opportunity to present every available defense." *Philip Morris*, 549 U.S. at 353.

The Seventh Circuit downplayed these concerns on the dubious theory that the trial court could sort out individual factual differences after liability is established, either by creating sub-classes or by making individual damages determinations. *See* Pet. App. 4a–6a; *see also id.* at 7a. But that "certify now, worry later" approach is flatly inconsistent with the rigorous analysis Rule 23 requires. *See Comcast*, slip op. at 8.

In fact, the Seventh Circuit's approach "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* Among other things, it would effectively force a defendant to reserve its defenses to liability until *post-liability* proceedings. Delaying individualized determinations until a later litigation phase would not make those determinations any less individualized or predominant. It would not even promote efficiency unless, as the court of appeals speculated, the defendant agrees to forgo its defenses completely and consents to a schedule of damages. *See* Pet. App. 4a–5a. Due process does not permit courts to force defendants into making that trade-off, regardless of any "efficiency" gains.

II. The Decision Below Deepens An Existing Split In Authority Among The Lower Courts.

The Court should also grant review because the decision below adds to growing confusion and conflict among the lower courts on an important, recurring issue of federal class action procedure. In particular, certain lower courts, in sharp conflict with others, have assumed away the need for plaintiffs to prove that class members "suffered the same injury," *Dukes*, 131 S. Ct. at 2551, by couching threshold liability issues as mere damages issues to be resolved at a later stage of proceedings.

As the petition explains, there is a clear division in the circuits over the proper approach to analyzing class actions when the proposed class includes customers who have not suffered any injury. *See* Pet. 24–29. In conflict with courts in the Second, Third, Fifth, Eighth, and Eleventh Circuits, courts in the Sixth and Ninth Circuits, and now the Seventh Circuit, have held that a "product can be the subject of a successful suit for breach of warranty even if the [alleged] defect has not yet caused any harm." Pet. App. 5a; *see also, e.g.*, *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006). The theory is that if a defendant sold a defective product to one customer, it has effectively deceived all of its customers by representing that its products lack any defects. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 420 (6th Cir. 2012); *Stearns v. Ticketmaster*

Corp., 655 F.3d 1013 (9th Cir. 2011); *Pella Corp. v. Saltzman*, 606 F.3d 391, 395 (7th Cir. 2010).

The Seventh Circuit thus effectively assumed that class members were injured even though many have not experienced any defect or suffered any actual damage. In doing so, the Seventh Circuit analogized owning an allegedly defective washing machine to suffering from elevated blood pressure. In the Seventh Circuit's view, having "high blood pressure" that "creates harm in the form of an abnormally high risk of stroke" is the same as owning a washing machine with an alleged defect that "c[ould] precipitate a mold problem at any time." Pet. App. 5a. That analogy does not work; it only underscores the problems with the lower court's undisciplined approach. Depending on the circumstances, it may or may not be reasonable to assume that suffering from high blood pressure is itself a concrete, particularized, and redressable injury sufficient to establish an actual case or controversy. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). But an owner of a washing machine does not incur concrete injury merely because a mold problem might or might not materialize at some unknown point in the future. *Cf. Clapper v. Amnesty Int'l USA*, No. 11-1025, slip op. at 2, 10–15 (U.S. Feb. 26, 2013) (even an "objectively reasonable likelihood" of "future injury" is "too speculative"). Those sorts of allegations of "possible future injury" are not sufficient. *Id.* at 10 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As long as the washing machine continues to operate properly, the owner has suffered no injury and is not entitled to relief.

The Seventh Circuit nonetheless concluded that the existence of a large number of class members who have suffered no injury is "an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate" the defendant. Pet. App. 5a. That misguided theory directly conflicts with decisions of other courts of appeals. In *McLaughlin v. American Tobacco Co.*, for example, the Second Circuit rejected that approach, noting that "proof of injury" required demonstrating that plaintiffs had suffered some amount of actual damages. 522 F.3d 215, 227 (2d Cir. 2008), *abrogated on other grounds*, *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). If plaintiffs have not been harmed in any amount, questions of liability do not predominate over individualized damages issues. *Id.* at 231–32. The Third Circuit has likewise rejected the Seventh Circuit's approach, recognizing that "[p]roof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 188 (3d Cir. 2001).

In addition to this irreconcilable conflict, the Seventh Circuit's approach is also out of step with this Court's precedents. As the Court has stated time and again, to invoke a federal court's jurisdiction a plaintiff must plead and prove a "distinct and palpable" injury that is fairly traceable to the defendant's conduct, as opposed to an "abstract injury" or a "generalized grievance." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475, 482–83

(1982); *see also Comcast*, slip op. at 10 (rejecting a "methodology that identifies damages that are not the result of the wrong"); *Clapper*, slip op. at 2, 10–11 (threatened injury must be "certainly impending"). Certifying classes primarily composed of uninjured parties improperly turns Rule 23 into a substantive provision granting remedies to parties whose rights have not been violated. *Cf.* 28 U.S.C. § 2072(b). Rule 23 is a procedural device for aggregating *actual* claims, not a substantive font of claims that would not otherwise exist. *See Shady Grove Orthopedic Ass'n, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). Rule 23 should not be transformed into a substantive device for inventing litigation based on hypothetical, future harms.

III. The Questions Presented Are Exceptionally Important.

Apart from correcting the Seventh Circuit's improper departures from precedent and resolving the yawning divide among lower court decisions, this Court's review would also bring much-needed discipline to products-liability cases by curtailing ongoing abuse of class action procedures. Class action filings in federal courts have nearly doubled in recent times. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 3 (Fed. Judicial Ctr. 2008). That explosive growth, combined with the lax approach to Rule 23's essential prerequisites embodied in the decision below (and in other recent decisions), threatens to expose merchants, manufacturers, and other businesses to frequent

litigation involving sprawling but loosely connected classes.

The lower court's efficiency *über alles* approach is especially alarming. A narrow focus on efficiency rewards plaintiffs for characterizing a generic grievance as a "common question." Broad, abstract questions tend to be inclusive and superficially common, while sweeping in huge numbers of class members. It is difficult to imagine a case in which a single adjudication would not be more efficient than tens or hundreds of thousands of individual trials. In other words, efficiency unleavened by fairness encourages exactly what this Court has forbidden: large, diverse classes that do not present truly common issues. *See Dukes*, 131 S. Ct. at 2551.

That puts sprawling, unwieldy classes on the fast-track to class certification, with acute consequences in the products-liability arena. Under the lower court's reasoning, a customer with a grievance may sue for breach of warranty on behalf of *everyone* who has purchased a product, regardless of customers' individual experiences. The prospect is daunting. Virtually all manufacturers and retailers provide warranties for their products, and virtually all products engender a small percentage of customer complaints. But that is precisely the reason the existing warranty system has worked well. By providing warranties, manufacturers are able to deal with the inevitable problems that arise when selling products to a large, diverse base of customers and in contexts where attempting to eliminate *all* potential defects is impracticable.

In contrast, the approach espoused below imposes a costly overlay of easy-to-satisfy class action requirements that "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). If left uncorrected, the Seventh Circuit's decision will mean that every potential glitch becomes a massive class-action-in-waiting. And for small businesses, every product sold may become a bet-the-company proposition.

By easing the path to certification, the Seventh Circuit's efficiency test also prejudices the outcome. Although nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, 84 N.Y.U. L. Rev. at 99; *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010). In light of the costs of discovery and trial, certification unleashes "hydraulic" pressure to settle. *Newton*, 259 F.3d at 165; *see also* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989).

That pressure is generally less rooted in the merits of the plaintiffs' claims than in the economic rationality of defendants, meaning that class certification — particularly certification based on a loose application of Rule 23's essential prerequisites — dramatically increases the chances that plaintiffs with even meritless claims will earn an unwarranted payout. As this Court has recognized, "[c]ertification

of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (noting defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

The resulting economic distortion harms not only defendants but also consumers. Businesses have little choice but to incorporate the cost of litigation and litigation avoidance into the prices paid by their customers. *See* Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995). Here, that would have the perverse effect of having the class itself pay for its own recovery, subject to a substantial tax in the form of attorneys' fees.

In these circumstances, the Court's intervention is warranted. This Court has frequently granted review to clarify the import and scope of the Federal Rules, and has been vigilant in ensuring that courts do not effectively negate its decisions by reading them too narrowly. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). In this regard, the Court has recently granted and resolved two cases raising important class certification issues. In *Amgen*, the Court approved certification of a class in the securities context that was "entirely cohesive" and would "prevail or fail in unison." 133 S. Ct. at 1191. In *Comcast*, the Court denied certification in the antitrust context because "[q]uestions of individual

damage calculations" in that case "overwhelm[ed] questions common to the class." *Comcast*, slip op. at 7. Because antitrust and securities cases may pose challenges and concerns distinct from those in product-liability cases, however, granting certiorari in this case would yield distinct benefits.

In fact, this case presents an ideal opportunity to further clarify Rule 23's predominance requirement and to resolve the considerable uncertainty surrounding consumer class actions involving alleged product defects and uninjured class members. This case is also an unusually good vehicle for addressing those issues. Although commonality and predominance are often fact-bound questions, because the court of appeals here replaced the required analysis with an "efficiency" test, the legal issues are teed up cleanly and in a posture that would facilitate the Court's review.

There can also be no doubt that granting review would have immediate benefits in a large number of cases. There are already dozens of massive class actions across the country that raise the same allegations about defective washing machines. More broadly, class actions alleging product defects have become an increasingly common and expensive area of business litigation.

These types of consumer class actions, moreover, pose a special threat to *amici*'s members. Any manufacturer that does business anywhere in the Nation may, especially in light of "permissive" rules of personal jurisdiction, face exposure to suit almost everywhere in the Nation, including the Seventh Circuit. Christopher A. Whytock, *The Evolving*

Forum Shopping System, 96 Cornell L. Rev. 481, 483, 491–93 (2011). And any product that a manufacturer may sell on any substantial scale may give rise to one or another allegation by one or another consumer, who may then purport to enlist all other purchasers of that same product, without distinction, as fellow members of a theoretical class. These consequences are profoundly concerning to *amici* and their membership and present issues of national significance.

The lower court's unwise departures from precedent pose an undeniable and growing threat to our Nation's businesses and consumers. That threat can and should be defused by this Court.

CONCLUSION

The Court should grant the petition.

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