No.

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.

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

PETITION FOR A WRIT OF CERTIORARI

MALCOLM E. WHEELER
MICHAEL T. WILLIAMS
GALEN D. BELLAMY
ALLISON R. COHN
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street
Denver, CO 80202
(303) 244-1800

STEPHEN M. SHAPIRO
Counsel of Record
JEFFREY W. SARLES
TIMOTHY S. BISHOP
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
sshapiro@mayerbrown.com

Counsel for Petitioner Whirlpool Corporation

QUESTIONS PRESENTED

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

1. Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf.
2. Whether a class may be certified without resolving factual disputes that bear directly on the requirements of Rule 23.
3. Whether a class may be certified without determining whether factual dissimilarities among putative class members give rise to individualized issues that predominate over any common issues.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioner Whirlpool Corporation does not have a parent corporation. No publicly held company owns 10% or more of Whirlpool Corporation's stock.

Plaintiffs-Respondents are Gina Glazer and Trina Allison.

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PETITION FOR A WRIT OF CERTIORARI

Whirlpool Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 678 F.3d 409. The court of appeals' order denying rehearing en banc (App., *infra*, 34a-35a) is unpublished. The district court's order granting plaintiffs' motion for class certification (App., *infra*, 24a-33a) is available at 2010 WL 2756947.

JURISDICTION

The court of appeals issued its decision on May 3, 2012. A timely petition for rehearing en banc was denied on June 18, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Relevant portions of Federal Rule of Civil Procedure 23 are reproduced at App., *infra*, 36a-37a.

STATEMENT OF THE CASE

Plaintiffs-Respondents Gina Glazer and Trina Allison ("plaintiffs") claim that 21 different models of Whirlpool-brand high-efficiency front-loading clothes washers sold since 2001 contain a common design defect that causes, or will cause at some indeterminate time, moldy odors due to an accumulation of laundry residue ("biofilm"). Plaintiffs do not allege any safety issue. Pursuant to Fed. R. Civ. P. 23(b)(3), plaintiffs sought certification of a statewide class of approximately 200,000 Ohio residents who bought any of the 21 models of Whirlpool's Duet, Duet HT,

and Duet Sport washers (collectively, the "Washers") since 2001.[1]

Whirlpool opposed certification. It submitted voluminous evidence, much of it undisputed, showing that:

- the designs of the 21 models changed materially over the nine-year class period;
- buyers treated their Washers in materially different ways, including failing to comply with Whirlpool's use and care instructions regarding odor prevention;
- Whirlpool's knowledge of and disclosures regarding the potential for odors changed materially over the class period;
- only a tiny fraction of the putative class members ever reported mold or odors in their Washers; and
- Whirlpool's affirmative defenses, including product misuse and statutes of limitations, will require individualized fact-finding at trial.

Whirlpool's evidence showed that plaintiffs' claims are not susceptible to common proof and do not satisfy Rule 23(a)(2), (a)(3), or (b)(3).

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[1] *Glazer* is one of nine putative class actions that have been consolidated in the district court under the caption *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation*, No. 1:08-wp-65000. The eight related actions seek certification of 13 non-Ohio statewide classes that include more than 1,500,000 buyers of Whirlpool-brand washers.

In a 7.5-page order providing only a cursory four-page "Rule 23 Analysis" (App., *infra*, 27a-32a), the district court certified a class for trial of all liability issues arising from plaintiffs' Ohio common-law claims of negligent design, failure to warn, and tortious breach of warranty. *Id.* at 33a. The court did not cite any evidence or resolve any factual disputes bearing on satisfaction of the Rule 23 requirements. Instead, the court expressly relied solely on plaintiffs' allegations and "theor[ies]." *Id.* at 27a-31a.

The Sixth Circuit granted Whirlpool's Rule 23(f) petition to consider "the standard a district court must apply to factual disputes relevant in determining whether the plaintiff class satisfied the criteria for certification." App., *infra*, 22a. After briefing, but before oral argument, this Court decided *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Instead of applying *Dukes*, which would have required reversal of the district court's class certification order, the Sixth Circuit affirmed in an opinion that contains multiple errors of law and cannot be reconciled with *Dukes* and other decisions of this Court.

Although at least 97% of all Washer buyers have never experienced a problem with mold or moldy odors and therefore cannot show any cognizable injury under Ohio tort law, all Washer buyers in Ohio are now members of the certified "liability" class. This ruling contravenes *Dukes*' holding that named plaintiffs and absent class members must suffer "the same injury." 131 S. Ct. at 2551.

In an attempt to overcome this infirmity, the Sixth Circuit pronounced a "premium-price" injury theory under which class members could be deemed uniformly injured at the time of purchase, regardless

of the nonexistence of odor or mold during ownership, and regardless of model purchased or price paid. But plaintiffs had not even argued for (much less submitted evidence supporting) that liability theory, and Ohio tort law does not recognize it. See *infra* pp. 17-18. The Sixth Circuit did not cite a single case recognizing a "premium price" theory of harm under Ohio law, instead relying solely on out-of-circuit cases applying California law. It thereby ran afoul of this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-823 (1985), that using foreign law to expand the applicable jurisdiction's substantive law in order to certify a class violates the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1.

The impact of this case extends far beyond the 200,000 Ohio certified class members. This lawsuit is the bellwether action for eight similar cases against Whirlpool, involving more than 1,500,000 buyers and making this litigation one of the largest class proceedings ever maintained in federal court. Moreover, many other purported class actions, alleging nearly identical mold problems, are pending against other manufacturers and sellers of front-loading washers, including Samsung, General Electric, LG, Electrolux, BSH Home Appliances, Miele, and Sears.[2] In each case, only a small

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[2] See*, e.g., Spera v. Samsung Elecs. Am.*, 2:12-cv-05412 (D.N.J.); *Fishman v. Gen. Elec. Co.*, 2:12-cv-00585 (D.N.J.); *Montich v. Miele USA, Inc.*, 3:11-cv-02725 (D.N.J.); *Tait v. BSH Home Appliances Corp.*, 8:10-cv-00711 (C.D. Cal.); *Terrill v. Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga.); *Harper v. LG Elecs. USA, Inc.*, 2:08-cv-00051 (D.N.J.); *Butler v. Sears Roebuck & Co.*, 1:06-cv-07023 (N.D. Ill.).

minority of putative class members experienced any mold or odor problem. Consumers Union's annual reliability surveys of tens of thousands of owners of front-loading washers have repeatedly shown that less than 1% of all Washer owners reported any odor issue during the first four years in service. See *infra* pp. 7-8. If the class certification order in this case is permitted to stand, it is likely to influence the class certification decisions in these similar actions. Collectively, the proposed classes alleging mold problems would greatly exceed in size "one of the most expansive class actions ever" considered by this Court. *Dukes*, 131 S. Ct. at 2547.

This Court should grant review to decide whether a class composed primarily of uninjured class members—consumers who would lack Article III standing to sue on their own behalf—may be certified, and to clarify the extent to which lower courts must resolve disputed factual questions bearing on class certification, particularly as they relate to the predominance requirement of Rule 23(b)(3).

A. Factual Background

Whirlpool began manufacturing and selling high-efficiency front-loading clothes washers for the United States market in 2001. D103-2 at 2.[3] The Washers were sold under the Whirlpool brand with the model names "Duet" and "Duet HT" and were built in Germany on an engineering platform referred to as the "Access platform." *Ibid.* Since 2007 Whirlpool also has manufactured in Mexico different Access-platform models referred to as "Sierra

[3] "D" refers to docket numbers assigned in the district court.

platform" models. *Id*. at 4. From 2001 through 2009 Whirlpool manufactured and sold seventeen differently engineered Access and Sierra models over a combined seven different platform generations. *Id*. at 2-4.

In 2006 Whirlpool began selling a smaller, lower-priced model built on a "Horizon" platform and sold under the model names Duet Sport and Duet Sport HT. *Id*. at 3. All Horizon models differ markedly from all Access/Sierra models, with the two platforms sharing only a few components. *Ibid*. Between 2006 and 2009, Whirlpool manufactured and sold four different Horizon models over two different platform generations. *Id*. at 3-4.

Plaintiffs Allison and Glazer are Ohio residents who bought a 2005 Duet HT model (the second of seven generations of Access/Sierra designs) and a 2006 Duet Sport model (the first of two generations of Horizon machines). D103-1 at 2. Both plaintiffs allegedly experienced moldy odor within a year after purchase. *Ibid*.; D103-42 at 5; D103-44 at 23. Although each claimed that she had followed all of Whirlpool's owner-manual instructions related to reducing the likelihood of odor, discovery revealed otherwise. D103-1 at 2; D104-31 at 3-11; D103-42 at 11, 15; D103-44 at 19, 22, 29-30, 32.

B. Class Certification Proceedings

Plaintiffs moved to certify a class of all current Ohio residents who bought any of the various Washer models since 2001. D93 at 1. Plaintiffs asserted that all of the Washers have a uniform design and contain a uniform defect that, at some indeterminate time, will result in noticeable moldy odors, even if the buyers follow Whirlpool's user

instructions. D93-1 at 4-8, 10, 16. Plaintiffs also asserted that Whirlpool knew of the defect before selling any of the Washers and uniformly concealed that defect for a decade. *Id.* at 11, 14-15. Plaintiffs further contended that Whirlpool's admittedly different and evolving user instructions and disclosures regarding the potential for moldy odors, as well as its recommended preventive maintenance steps, were "uniformly" inadequate. *Id.* at 7. Plaintiffs argued that "[i]n reviewing a class certification motion," the court should accept "as true the allegations in the complaint." *Id.* at 18.

In opposition, Whirlpool submitted voluminous evidence disputing plaintiffs' claims of "uniformity." D100 at 3-15; D103. For example, the evidence showed that most putative class members had not experienced any moldy odor at all and thus had incurred no cognizable tort injury from the alleged defects. Specifically, Whirlpool submitted undisputed field data showing that only 0.3% of all U.S. owners reported any odor problem in the first year of service. D103-29 at 6-7. Service data compiled by Sears—one of the largest retailers, and the largest service provider, of the Washers—showed that 97% of Access-platform Washer buyers and 98% of Horizon-platform Washer buyers who bought a three- or five-year extended service plan *never* reported any moldy odor. *Id.* at 8-10. Further, survey data compiled by Consumers Union—the nation's leading independent consumer organization whose *Consumer Reports* magazine is read by appliance shoppers and whose Annual Reliability Survey results are closely monitored by Whirlpool—showed that less than 1% of all Washer owners reported any odor issue during the first four years in service. See, *e.g.*, App., *infra*, 39a-42a (of the 11% of front-load washers with

reportable problems, only 8% had problems that "were caused by mold or mildew"); see also D103-4 ¶ 21; D103-14.

Plaintiffs offered no empirical data or analysis to counter this evidence. Instead, they relied on an Internet survey summary, and two documents that misstate the survey's substance, to argue that 35% of Washer buyers had "actual[ly] report[ed]" experiencing moldy odor. D93-1 at 17 (referencing D93-5, D93-30, and D93-31). The survey summary showed on its face, however, that it elicited information about dishwashers and about clothes washers in general, rather than the Whirlpool washers at issue here. D103-4 at 16-17. None of plaintiffs' experts determined the percentage of Whirlpool buyers who had complained of, or would experience, the alleged moldy odor. D103-28 at 3, 14; D103-31 at 4.

Whirlpool also submitted unrefuted evidence showing that Whirlpool's knowledge about combating Washer odor changed materially over the class period and that Whirlpool's laboratory and field testing of prototype Washers had not revealed the existence of any odor issue when Whirlpool first sold them in 2001. D103-4 at 11-13.

Whirlpool submitted additional evidence showing that in late 2003 and early 2004, when several hundred thousand Access washers were in consumers' homes, Whirlpool's and Sears' call centers were receiving complaints at a rate less than *two-tenths of one percent per year* related to mold and moldy odors. *Id*. at 7-8. Nevertheless, in April 2004, Whirlpool assembled an engineering team to identify the root causes of the complaints and recommend design, manufacturing, and product literature changes that would reduce the already remote

chance of noticeable mold or odor. *Ibid.* By December 2004, the team identified several factors that could further reduce the rate, including owner-use factors that arose from owners' unfamiliarity with the new machines—*e.g.*, failure to use high-efficiency detergents that prevent excess suds, to keep the Washer door ajar between uses, and to clean the machine periodically. *Id.* at 8-10.

Whirlpool's evidence opposing class certification showed that as Whirlpool acquired information over time, it made dozens of Washer design and literature changes to reduce the chance of noticeable odor and to make the Washers more resistant to different consumer use and care practices. *Id.* at 13-16. These design modifications included changes to the plastic tub and aluminum crosspiece, two key Washer components that plaintiffs allege are part of the "defect." *Id.* at 15. Due to these feature, design, and literature changes, material differences exist among the various Washer models. *Id.* at 3-4.13-16. These changes also resulted in even fewer moldy odor reports. D103-29 at 6-8, 12.

Plaintiffs adduced no evidence to dispute these facts. To the contrary, their engineering expert, Dr. Wilson, admitted that some of Whirlpool's design changes reduced biofilm buildup. D103-28 at 12-13, 24-27. He testified that Whirlpool's tub design change prevented it from collecting debris, which he saw as a "major design flaw" in the original design that caused "the eventual growth of odor producing bacteria." D93-4 at 10; D103-28 at 23-24. He further admitted that he had not conducted any test to evaluate whether any of Whirlpool's design or literature changes were effective in limiting biofilm. D100 at 8; D103-28 at 11. And he conceded that

biofilm exists in *all* clothes washers after a period of use and that the amount "depends on the use and habits * * * of the consumer" and the "environment that the machine sits in." D103-28 at 9, 22.

C. The District Court's Certification Order

The district court certified a Rule 23(b)(3) class consisting of all current Ohio residents who bought a Washer in Ohio for personal, family, or household purposes. App., *infra*, 33a. The order's short "Rule 23 Analysis" (*id*. at 27a-32a) does not refer to *any* evidence submitted by the parties, or resolve any of the disputed fact questions central to whether plaintiffs satisfied Rule 23. Those questions include whether there was a common Washer design, whether there were common Washer instructions and "warnings," what percentage of buyers experienced moldy odor, and whether moldy odor is caused by factors other than the alleged defect. *Ibid.* Instead, the court relied exclusively on plaintiffs' allegations and "theory of the case" to conclude that their tort claims satisfy the Rule 23(a) and (b)(3) requirements. *Id*. at 29a-32a. The court declined to certify the question of damages for class determination, leaving damages for innumerable individual trials. *Id*. at 32a.

The district court expressly declined to consider Whirlpool's empirical evidence showing that the supposedly uniform harm is exceedingly rare and not common to the putative class members. App., *infra*, 25a. Even though Whirlpool's evidence was crucial to determining whether the class definition was fatally over-inclusive because it included tens of thousands of members who suffered no tort injury, and because the liability elements of causation and injury were not susceptible to class-wide proof, the court refused

to consider that evidence or resolve the disputed issues. Instead, the court stated that whether a "particular plaintiff has suffered harm is a merits issue not relevant to class certification," citing this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Id.* at 25a.

Although recognizing that Whirlpool had made design changes to the Washers throughout the class period, the district court ignored Whirlpool's evidence showing that those differences produced nonuniformity among the various designs and that the changes were intended to and did reduce the odor complaint rate. App., *infra,* 29a, 30a n.3. Instead, the court based its commonality and predominance analyses solely on plaintiffs' "theory" that all Washers are uniformly defective in design, and on plaintiffs' allegations that Whirlpool "knew at the outset" that all Washers "had a defect" and that "none of Whirlpool's public disclosures about the mold problems were sufficient." *Id.* at 29a-30a. In short, the court failed to explain why the many factual dissimilarities within the proposed class do not preclude plaintiffs' tort claims from being resolved on a class-wide basis.

D. The Sixth Circuit's Decision

The Sixth Circuit granted Whirlpool's Rule 23(f) petition. App., *infra*, 22a-23a. After briefing, but before argument, this Court decided *Wal-Mart, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), a decision important to the issues here. Despite *Dukes*, the court of appeals affirmed. App., *infra*, 1a-21a.

In an opinion authored by Judge Stranch, the Sixth Circuit first rejected Whirlpool's argument that the district court had improperly avoided considera-

tion of the merits and failed to conduct the required "rigorous analysis." App., *infra*, 13a. The panel pronounced, without citation to the record, that the district court had "closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." *Ibid*. In fact, the Sixth Circuit engaged in its own selective, *de novo* review of the evidence and made its own evidentiary findings. *Id.* at 13a-21a. Its opinion credited literally *none* of Whirlpool's unrefuted evidence, much less weighed Whirlpool's evidence against plaintiffs' conflicting evidence on the crucial factual issues.

The Sixth Circuit also rejected Whirlpool's argument that, because the vast majority of class members had not experienced moldy odor, commonality and predominance were lacking and the class was fatally overbroad. The court instead held that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." App., *infra*, 18a. According to the court, class certification is appropriate so long as "class members complain of a pattern or practice that is generally applicable to the class as a whole," thereby relying on the standard stated in Rule 23(b)(2) to affirm certification under Rule 23(b)(3). *Ibid.*

The court of appeals then imported into this Ohio tort case a "premium price" injury theory not recognized under Ohio law: "[T]he class plaintiffs may be able to show that each class member was injured at the point of sale upon paying a premium price for the Duet as designed, even if the washing machines purchased by some class members have not developed the mold problem." App., *infra*, 18a. In

so holding, the court relied on Ninth Circuit cases applying California, not Ohio, consumer-protection laws. *Id.* at 18a-19a. Plaintiffs had not argued this theory to either the district court or the Sixth Circuit, and the district court never addressed it. D93-1 at 1-30; App., *infra*, 24a-33a.

The Sixth Circuit next affirmed the district court's commonality analysis. Despite acknowledging the "dozens of changes," the court found the question whether the Washer designs are "defective" to be common. App., *infra*, 8a. The court further found that issues of proximate causation and the adequacy of Whirlpool's warnings "are capable of classwide resolution because they 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." *Id*. at 15a-16a. In so holding, the court failed to acknowledge that Whirlpool's evidence regarding those design and disclosure differences requires individualized trial determinations and precludes the generation of common answers. See *Dukes*, 131 S. Ct. at 2551.

The Sixth Circuit focused almost exclusively on commonality, addressing the "far more demanding" predominance requirement (*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-624 (1997)) only abstractly in a single sentence: "In light of all that we have already said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently." App., *infra*, 19a. The court failed to identify the elements of the Ohio tort claims actually at issue, much less consider how plaintiffs could overcome all the differences among

Washer buyers to prove each element through common proof at trial. And the court omitted any mention of Whirlpool's fact-specific defenses, such as product misuse and statutes of limitations, which apply differently among named plaintiffs and absent class members.

The court further recommended that those "class members who have not experienced a mold problem * * * be placed in a Rule 23(b)(2) subclass to allow any declaratory or injunctive relief necessary to protect their interests." App., *infra*, 20a. But plaintiffs had not sought certification under Rule 23(b)(2), much less proved that Rule 23(b)(2) subclass certification is appropriate.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision contradicts *Dukes* on commonality, *Amchem* on predominance, and other decisions of this Court. It also exacerbates a circuit split over the significance of unharmed class members to class certification. If uncorrected, the decision will adversely affect not only Whirlpool and clothes-washer manufacturers in many related actions, but thousands of manufacturers and other businesses throughout the United States that repeatedly are sued for alleged performance problems with products or services that affect only a small fraction of purchasers. Review should be granted to address these frequently recurring questions of broad importance to class-action litigants and the lower courts.

I. Certification Of A Class Composed Primarily Of Uninjured Product Buyers Is Inconsistent With This Court's Precedents And Deepens A Circuit Conflict.

A. The decision below conflicts with the *Dukes* requirement that named plaintiffs and absent class members share a common injury.

This Court made clear in *Dukes* that merely pleading "common questions" of fact or law cannot satisfy Rule 23(a)(2)'s commonality requirement. Putative class representatives must "demonstrate that the class members 'have *suffered the same injury*'" and identify a common question for trial that will generate a common answer for all proposed class members. 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982)) (emphasis added).

Although the Sixth Circuit gave lip-service to *Dukes*, see App., *infra*, 14a, it failed to adhere to that precedent. It is undisputed that most absent class members have not experienced the moldy odor allegedly experienced by plaintiffs—97% according to Whirlpool's and Sears' undisputed service records, 99% according to Consumer Reports surveys, and 65% according to plaintiffs' own refuted theory. Although the court of appeals acknowledged that "[t]o demonstrate commonality, plaintiffs must show that class members have suffered the same injury" (App., *infra*, 14a), the court bypassed the "same injury" requirement by ruling that "[e]ven if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* at 18a. The court of appeals thereby sustained the district court's erroneous ruling that "whether any particular plaintiff has suffered harm

is * * * *not relevant* to class certification." App., *infra*, 25a (emphasis added).

The Sixth Circuit made no attempt to square its opinion with *Dukes*. Instead, the court relied on language from Rule 23(b)(2)—a provision neither invoked by plaintiffs nor cited in the district court's certification order—and a Sixth Circuit decision in a Rule 23(b)(2) declaratory relief action (one that did not even discuss Rule 23(a)(2)'s common-injury requirement). According to the court of appeals, certification of a Rule 23(b)(3) class comprising mostly uninjured members is appropriate because "the challenged conduct" is "premised on a ground that is applicable to the entire class." App., *infra*, 18a (quoting *Gooch v. Life Investors Ins. Co.*, 672 F.3d 402, 428 (6th Cir. 2012)). That conclusion contradicts this Court's holding in *Dukes* that the circumstances warranting certification of a Rule 23(b)(2) class are insufficient to certify a class under Rule 23(b)(3). See *Dukes*, 131 S. Ct. at 2558-2559 (Rule 23(b)(3)'s predominance and superiority requirements "are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*").

The Sixth Circuit next side-stepped *Dukes* by suggesting, illogically, that all class members—including, for example, persons who sold their houses with their Washers in place after years of use without any moldy odor issue—might have been injured when they bought their Washers even if they never experienced any odor problem. The court raised *sua sponte* a theory that "each class member was injured at the point of sale upon paying a premium price for the Duet as designed." App., *infra*, 18a. Plaintiffs did not make that argument below or

in the court of appeals, and it is not supported by any evidence in the record or by Ohio law. The panel's speculation that plaintiffs "may be able" to show a common injury contravenes *Dukes'* holding that the proponents of class certification *must* "affirmatively demonstrate" satisfaction of each Rule 23 prerequisite, including that class members have "suffered the same injury." *Dukes*, 131 S. Ct. at 2551.

Furthermore, the Sixth Circuit's ground for certifying this class violates Whirlpool's constitutional rights and runs afoul of other decisions of this Court. In proposing its "premium-price" theory, the Sixth Circuit relied on three California state and federal cases, each of which interpreted *California*'s consumer protection laws. App., *infra*, 19a (citing *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011); *Montanez v. Gerber Childrenswear, LLC*, 2011 WL 6757875, at *1-2 (C.D. Cal. Dec. 15, 2011)[4]; *Kwikset Corp. v. Superior Ct.*, 246 P.3d 877, 895 (Cal. 2011)). The Sixth Circuit did not cite any decision applying Ohio law that recognizes such a tort injury theory, and there is none. See Ohio Rev. Code §§ 2307.71(A)(7), 2307.79(A) (product liability plaintiffs may recover economic loss only if they prove "harm" in the form of personal injury or physical damage to property other than the product in question); *Delahunt v. Cytodyne Techs.*, 241 F. Supp. 2d 827, 832-834 (S.D. Ohio 2003) (dismissing fraud claim alleging that class members experienced only financial harm in the form of diminished

[4] In *Montanez*, the plaintiffs' attorneys include the husband and son of Judge Stranch, who authored the Sixth Circuit opinion in this case. They are class action attorneys at Judge Stranch's former law firm.

product value); *Hoffer v. Cooper Wiring Devices, Inc.*, 2007 WL 1725317, at *7-*8 (N.D. Ohio June 13, 2007) (economic loss is not recoverable under Ohio tort law unless the alleged defect is manifest in the product purchased by plaintiff); *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 2005 WL 6778678, at *11 (N.D. Ohio Feb. 22, 2005) ("a plaintiff has not suffered a present injury * * * until the very product in question has caused some harm to person or property, even if the product in question contains a latent defect that has manifested in other, identical products").

By applying California substantive law to a class of Ohio residents who bought and used their Washers in Ohio, the Sixth Circuit contravened this Court's precedent establishing that due process requires application of the law of the relevant State when addressing class certification. See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In *Shutts*, Kansas courts had applied Kansas substantive law to every transaction at issue in that class action, even though 97% of the plaintiffs had no connection to Kansas. 472 U.S. at 815-816. This Court reversed, holding that applying Kansas law to all class members—and relying on the uniform elements of Kansas law to certify a class—violated constitutional limitations on choice of law mandated by the Due Process and Full Faith and Credit clauses. *Id.* at 821-822. Instead, the substantive law "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of * * * law is not arbitrary or unfair." *Ibid.* (quoting *Hague*, 449 U.S. at 312-313).

By relying on a novel injury theory under California law to uphold class certification in a case governed by Ohio law, which does not recognize that theory, the Sixth Circuit did precisely what *Shutts* prohibited: it applied the law of an unrelated jurisdiction solely to facilitate class certification, thereby violating Whirlpool's constitutional rights. See also *Hague*, 449 U.S. at 312-313.

B. The Sixth Circuit's decision broadens a circuit split regarding certification of classes that include uninjured members.

The inclusion of uninjured absent class members in a proposed class is an issue that arises frequently. See, *e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012); *Stearns*, 655 F.3d at 1021; *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-264 (2d Cir. 2006). It has been addressed in different ways by the lower courts, creating a mature circuit split. See Poon & Evanson, *Class Distinctions: The Circuits Have Invoked a Variety of Different Standards in Certifying Classes for Litigation*, L.A. Law., Feb. 2011, at 18, 21 (discussing circuit split over whether a class containing members without standing may be certified). The circuits that have addressed the issue are divided into three camps.

The Second and Eighth Circuits have made clear that a class cannot be certified if it includes persons who lack Article III standing. See *Avritt*, 615 F.3d at 1034; *Denney*, 443 F.3d at 263-264; see also 7AA Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1785.1 (3d ed. 2005).

In *Denney*, 443 F.3d at 263-264, the Second Circuit explained that, while each member of a class need not submit evidence of personal standing, the class must be defined in such a way that anyone within it would have standing, and "no class may be certified that contains members lacking Article III standing." The court reasoned that standing is a threshold, constitutional requirement that may not be relaxed or modified through the procedural device of Rule 23. *Id.* at 264 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999)). In *Avritt*, 615 F.3d at 1034, the Eighth Circuit likewise held that enabling "a single injured plaintiff [to] bring a class action on behalf of a group of individuals who may not have had a cause of action themselves" would be "inconsistent with the doctrine of standing," which "is equally applicable to class actions." See also *Blades v. Monsanto Co.*, 400 F.3d 562, 571-574 (8th Cir. 2005) (denying certification where "not every member of the proposed classes can prove with common evidence that they suffered impact" from the alleged violation).

The Seventh Circuit has taken an intermediate position: class members need not have Article III standing, but the class definition cannot be overbroad. In *Kohen*, 571 F.3d at 676, the court held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." The court reasoned that proving a class member was not injured leads to a dismissal on the merits, not a dismissal for lack of jurisdiction. *Id.* at 677. However, *Kohen* also held that certification is improper when "it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant." *Ibid.* That is because "a proper class

definition cannot be so untethered from the elements of the underlying cause of action that it wildly overstates the number of parties that could possibly demonstrate injury." *Id.* at 679. Because the defendant in *Kohen*, unlike Whirlpool here, had failed to adduce evidence of how many class members were uninjured by the challenged conduct, certification was upheld. *Ibid.*

The Third, Ninth, and now the Sixth Circuits represent the other end of the spectrum. In these circuits, class-member standing is irrelevant to the class-certification determination. See *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 275 (3d Cir. 2009) ("the critical question is whether the named plaintiffs who were actually before the District Court had standing irrespective of whether each absent class member could establish standing"); *Stearns*, 655 F.3d at 1021; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010). These courts view the question whether absent class members suffered any injury at all as a damages issue, not a standing issue.

In *Stearns*, for example, the Ninth Circuit ruled that Article III standing in the class certification inquiry focuses only on whether at least one named plaintiff meets the standing requirement. 655 F.3d at 1021. The court rejected the defendant's argument that certification was improper because most absent class members had not been harmed by the challenged conduct and, thus lacked standing to assert a claim. The court stated that "our law keys on the representative party, not all of the class members," and "has done so for many years." *Ibid.*

The Ninth Circuit went a step further in *Wolin*, holding that a class can be certified regardless of

whether anyone in that class actually had experienced the alleged defect. The plaintiffs there alleged that a vehicle had a defect that caused its tires to wear out too quickly. The district court denied certification on predominance grounds because the plaintiffs had not credibly shown that "even a majority of the class members have experienced the defect." *Gable v. Land Rover N. Am., Inc.*, 2008 WL 4441960, at *4-5 (C.D. Cal. Sept. 29, 2008). The Ninth Circuit reversed, holding that "proof of the manifestation of a defect is not a prerequisite to class certification" but rather goes to "whether class members can win on the merits." *Wolin*, 617 F.3d at 1173.

The Sixth Circuit here followed the Ninth Circuit, citing *Stearns* and *Wolin*. App., *infra*, 18a-19a. As in *Wolin*, the district court below ruled that "whether any particular plaintiff has suffered harm is a merits issue not relevant to class certification." App., *infra*, 25a. In affirming, the Sixth Circuit rejected Whirlpool's argument that a class comprising primarily uninjured persons without standing in their own right cannot be certified. Instead, the court agreed with *Wolin* that "proof of the manifestation of a defect is not a prerequisite to class certification" and held that "[c]lass certification is appropriate * * * [e]ven if some class members have not been injured by the challenged practice." App., *infra*, 18a-19a.

Review by this Court is required to resolve this deep and mature circuit conflict.

C. A class of mostly uninjured product buyers may not be certified under Rule 23(b)(3).

This Court has noted time and again that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Dukes*, 131 S. Ct. at 2550; accord *Falcon*, 457 U.S. at 155. Filing a suit as a class action—on behalf of unnamed absent parties—does not override the substantive requirement that each tort claimant must suffer actual injury. See Ohio Rev. Code § 2307.73(A); *Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977); *Hanlon v. Lane*, 648 N.E.2d 26, 28 (Ohio Ct. App. 1994); *Kurczi v. Eli Lilly & Co.,* 160 F.R.D. 667, 675 (N.D. Ohio 1995) ("It is obvious that each plaintiff will have to show that she has sustained an injury, just as it is obvious that any plaintiff in any tort action must show that she or he has sustained an injury").

As this Court repeatedly has explained, the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)); accord *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 612-613. Moreover, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 612-613. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Thus, a class cannot be certified if it is composed primarily of consumers who were not actually injured by the alleged tort and who therefore lack Article III standing.

Lower courts should not be permitted to gloss over these Article III and substantive liability requirements by certifying a sprawling class of uninjured persons who cannot sue in their own right. Before a class may be certified, the question whether class members have suffered an injury sufficient to bestow standing must be answered in the affirmative for all (or, at a minimum, the vast majority of) class members with evidence common to the class. If, as here, a determination of class-member injury can be made only on an individual basis, the proposed class does not satisfy either the common-injury requirement of Rule 23(a)(2) or the predominance requirement of Rule 23(b)(3).

The Sixth Circuit's "premium-price" injury theory cannot avoid this common-injury requirement. Whether any particular class member overpaid for a Washer is an individual question. See *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 748 (7th Cir. 2008) (rejecting argument that all class members paid a premium for dryers, because some may have bought the dryer at a discount and others may prefer even an allegedly defective dryer over other dryers). If, for example, a class member paid $800 for a Washer in 2002 that never developed any moldy odor during the life of the Washer (as the vast majority of all Washers have not), the buyer did not pay a "premium price." This is true regardless of whether some small percentage of other owners experienced a moldy odor. Those who did not experience odors received precisely what they bargained for, and determining which members did or did not receive what they bargained for is an inherently individualized inquiry. See *Dukes*, 131 S. Ct. at 2561, and *Ortiz*, 527 U.S. at 845 (warning

against "novel" and "adventurous" applications of Rule 23 that override individualized factual issues).

In sum, allowing a class to be certified even though it encompasses many individuals without injury contravenes Article III, as well as the Rules Enabling Act and Rule 23. Identifying which of the vast number of Washer buyers actually suffered injury requires individual fact inquiries that cannot be conducted in a single class action. Certiorari is warranted to resolve the inter-circuit conflict on these points and to ensure proper and uniform application of this Court's precedents.[5]

II. This Court's Precedents Require Resolution Of Factual Disputes Relevant To Class Certification Before A Class May Be Certified.

This Court confirmed in *Dukes* that "Rule 23 does not set forth a mere pleading standard." 131 S. Ct. at 2551. "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Ibid*. The district court must make findings as to whether this burden has been satisfied, which requires the court to engage in a "rigorous analysis" that "[f]requently * * * will entail some overlap with the merits of the

[5] Underscoring the need for this Court's guidance, the Northern District of Illinois recently denied certification of a proposed moldy odor class in *Butler v. Sears Roebuck & Co.*, No. 1:06-cv-07023 (N.D. Ill. July 20, 2012), after the plaintiffs submitted the Sixth Circuit's opinion in this case as supplemental authority. See *id*., Docket Nos. 323, 328.

plaintiff's underlying claim." *Ibid.* (quoting *Falcon*, 457 U.S. at 161).

Dukes emphasized the "necessity of touching aspects of the merits in order to resolve [the] preliminary matte[r]" of class certification. 131 S. Ct. at 2552. The Court thereby dispelled confusion that had arisen in the lower courts following this Court's opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), which stated in dictum that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." This language "led some courts to think that in determining whether any Rule 23 requirement is met, a judge may not consider any aspect of the merits." *In re IPO Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006).

The district court here showed that it is one of those misguided courts. Even though common injury is needed for certification, and even though manifestation of the defect and actual harm in the form of moldy odors is necessary to prove liability under Ohio tort law, the district court refused to consider Whirlpool's undisputed evidence showing that the supposedly uniform harm is, in fact, experienced by only a small minority of class members. Relying on *Eisen*, the court deemed this evidence irrelevant because it goes to "a merits issue not relevant to class certification." App., *infra*, 25a. The court instead relied exclusively on plaintiffs' allegations and "theor[ies]" to find the Rule 23 elements satisfied. *Ibid.*

Before the Sixth Circuit issued its decision, this Court held that such an expansive reading of *Eisen*

was "mistaken[]." *Dukes*, 131 S. Ct. at 2552 n.6. This Court emphasized that its *Eisen* dictum is not applicable in "determin[ing] the propriety of certification under Rules 23(a) and (b)." *Ibid.* Instead, courts must consider and resolve any "merits question" that bears on class certification, even if the plaintiff "will surely have to prove [the point] *again* at trial in order to make out their case on the merits." *Ibid.*

Despite *Dukes*, the Sixth Circuit refused to acknowledge that the district court relied entirely on plaintiffs' allegations and theories, not on evidence, and failed to resolve disputed fact questions essential to determining the propriety of class certification. The Sixth Circuit merely pronounced, without citation to the record or the certification order, that the district court had "closely examined the evidentiary record and conducted the necessary 'rigorous analysis' to find that the prerequisites of Rule 23 were met." App., *infra*, 13a. But the face of the cursory certification order shows that the district court did nothing of the sort. App., *infra*, 24a-33a.

The Sixth Circuit's decision conflicts not only with *Dukes* but with post-*Dukes* decisions in other courts of appeals. See, *e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (a district court must resolve disputed facts relevant to Rule 23's criteria by "judging the persuasiveness of the evidence presented"); *Bennett v. Nucor Corp.*, 656 F.3d 802, 814-816 (8th Cir. 2011) (affirming denial of certification where the district court "was confronted with contradictory evidence in a voluminous class certification record" and made findings that rejected plaintiffs' assertions that defendant's practices were uniform). This Court should review the ruling below

to ensure that district courts weigh conflicting evidence and resolve disputed factual questions that bear on the propriety of class certification.

III. The Sixth Circuit's Perfunctory Predominance Ruling Conflicts With This Court's Precedents And Underscores The Need For Further Guidance.

A. The Sixth Circuit's predominance ruling conflicts with this Court's precedents.

In affirming the district court's order, the Sixth Circuit devoted a single cursory sentence to Rule 23(b)(3)'s predominance requirement: "In light of all that we have already said, we have no difficulty affirming the district court's finding that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently." App., *infra*, 19a.

That is a remarkable conclusion because predominance was mentioned in only two sentences in the district court's order. See App., *infra,* 27a-28a. And what the Sixth Circuit had "already said" was merely that "plaintiffs have produced evidence of alleged common design flaws in the Duet platforms." App., *infra*, 17a. At best, this amounts to a "some evidence" standard that other circuits have rejected. See *IPO*, 471 F.3d at 33 ("the requirements of Rule 23 must be met, not just supported by some evidence"); accord *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321 (3d Cir. 2008). The Sixth Circuit's ruling cannot be reconciled with this Court's insistence in *Dukes* that "[a] party seeking class certification must *affirmatively demonstrate*" and provide "*convincing*

proof" of compliance with Rule 23. 131 S. Ct. at 2551, 2556 (emphasis added).

This Court has made clear that "the predominance criterion is far more demanding" than the commonality requirement. *Amchem*, 521 U.S. at 623-624. It requires courts to engage in a "rigorous" inquiry regarding "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Ibid*. Such inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). Affirmative defenses also must be considered under Rule 23(b)(3) because they may create individual questions of fact or law that predominate over common questions, thereby precluding class certification. *E.g.*, *Ortiz*, 527 U.S. at 844 n.20 (a class that raises "the likelihood that significant questions * * * of liability and defenses of liability" affect "individuals in different ways" does not comply with Rule 23).

In *Dukes*, this Court discussed, in the commonality context, the importance of analyzing dissimilarities before certifying a trial class:

> 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. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 131 S. Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The Court noted that it had

"consider[ed] dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a single [common] question.'" *Dukes*, 131 S. Ct. at 2556. Under Rule 23(b)(3), the existence of a liability question common to all class members must be weighed against individual questions to determine which would predominate at trial. That is, predominance requires inquiries reaching far *beyond* commonality (see *Amchem*, 521 U.S. at 623-624), and factual dissimilarities among class members are even more important to the predominance inquiry.

But no rigorous inquiry into predominance occurred below. The Sixth Circuit concluded—in the portion of its opinion addressing commonality—that the presence of one or two common questions was sufficient. The court did not identify the elements of the Ohio tort claims that plaintiffs seek to try on a classwide basis, much less consider whether plaintiffs could prove the elements of those claims with evidence common to the class or whether any common issues would predominate over individualized issues at trial.

For example, the court offered no means (other than the legally flawed "premium-price" theory imported from California) to overcome the undisputed fact that most class members had never experienced the injury alleged by plaintiffs. See *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 611 (3d Cir. 2012) ("If class members could have known of the alleged defects and the evidence shows that they do not react to information about the cars and tires they purchased or leased in a sufficiently uniform manner, then individual questions related to

causation will predominate"). Nor did the court of appeals consider the individualized nature of Whirlpool's affirmative defenses of product misuse or statutes of limitations, or how any class trial could be conducted without stripping Whirlpool of its right to present those defenses. See *Dukes*, 131 S. Ct. at 2561 ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims"). Individualized defenses on injury and causation often lead courts to reject requests for class certification. *E.g.*, *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007) (rejecting certification of class of car buyers alleging unexpected air bag deployments).

In short, the court of appeals treated the predominance requirement dismissively, contrary to this Court's insistence on a rigorous analysis.

B. This Court's guidance is needed to clarify the scope of the Rule 23(b)(3) predominance inquiry.

Although *Dukes* clarified the commonality requirement, this Court has not similarly clarified or addressed the impact of *Dukes* on Rule 23(b)(3)'s more demanding predominance requirement. Indeed, it has been 15 years since this Court last addressed the predominance requirement. See *Amchem*, 521 U.S. at 623-624.

In *Amchem*, the Court insisted that a class be "sufficiently cohesive." *Id.* at 623. It did not elaborate on criteria that judges could use in implementing the "cohesi[on]" standard. *Ibid.*; see Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1060 (2005) (*Amchem* did not fully articulate

standards "to evaluate the relative significance of unity and disunity (or similarity and dissimilarity) among claims and defenses"). Because of this, the predominance requirement has resulted in courts' applying "a myriad of vague and distinct formulations." *Id*. at 1058-1060 (citing cases).

Given the critical importance of the predominance inquiry to any Rule 23(b)(3) class, this Court's review is necessary to address the role of factual dissimilarities in conducting the predominance evaluation. See Fed. R. Civ. P. 23(b)(3), 1966 Advisory Committee Note (if a tort action would "degenerate" into "multiple lawsuits" on "liability," "damages," and "defenses," "affecting the individuals in different ways," economies cannot be achieved and the predominance test is not satisfied).

IV. The Questions Presented Have Exceptional Practical Importance To The Administration Of Civil Justice In Federal Courts.

This class action does not exist in a vacuum. It is but one of many lawsuits filed against Whirlpool and other appliance manufacturers and sellers alleging nearly identical moldy odor problems in front-loading washing machines. See *supra* pp. 2 & n.1, 4 & n.2.

These proposed class actions include millions of additional front-loading washer purchasers. As here, those lawsuits involve only a small minority of class members who have experienced any alleged moldy odor problem. See, *e.g.,* Def.'s Opp'n to Pls.' Renewed Mot. for Class Certification, D164 at 1, *Terrill v. Electrolux Home Prods., Inc.*, 1:08-cv-00030 (S.D. Ga. filed Aug. 24, 2011) (submitting evidence showing that "less than *two-tenths of one percent* of the likely putative class members" required a visit by a service

technician to address alleged problems relating to odor, mold or mildew during the warranty period). Without this Court's intervention, the Sixth Circuit's decision will have a substantial impact on the certification decisions in those pending cases. See, *e.g.*, Ltr. from Pls.' Counsel to Judge Hochberg, D274, *Harper v. LG Elecs. USA, Inc.*, No. 2:08-cv-00051 (D.N.J. filed May 3, 2012) (submitting the Sixth Circuit's decision in this case as supplemental authority and asserting that "the facts in *Whirlpool* are substantially identical to the facts here").

But these moldy odor cases are only a small part of a wider class-action crisis in the lower courts. Class action filings, particularly in the consumer arena, are increasing at a dramatic pace. Since CAFA was enacted just over seven years ago, tens of thousands of class actions have been filed in or removed to federal court. A Federal Judicial Center study analyzing data through June 2007 put the annual number of new class actions in federal courts at between 4,000 and 5,000. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, App. B fig. 1 (Federal Judicial Center, Apr. 2008).[6] More than two-thirds of these new filings and removals were consumer and employment class actions, which have continued to proliferate. See *id.* at 1, 4 & App. B. fig. 7.

Without this Court's review, the Sixth Circuit's decision will influence the certification of innumerable other cases alleging problems with products or services that affect only a small fraction of

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[6] Available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf.

purchasers. As this Court long has recognized, the decision to certify can put tremendous pressure to settle on a defendant, even where the plaintiffs' likelihood of success on the merits is slight. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification 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"); Fed. R. Civ. P. 23(f), 1998 Advisory Committee Note ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

Given the importance of the certification decision to class litigation, as well as the number and size of similar class actions pending across the country, this Court's review is warranted to address the critical issues raised here which repeatedly confront class litigants and the lower federal courts.[7]

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[7] This Court recently granted certiorari to consider a narrower issue—the significance of expert testimony in the class certification inquiry. *Comcast Corp. v. Behrend*, No. 11-864 (U.S. June 25, 2012). This case presents three different issues—whether a class may be certified (i) where it is composed primarily of uninjured tort claimants, (ii) without evaluating undisputed evidence showing lack of commonality and predominance, and (iii) without rigorously scrutinizing the predominance issue. Plenary review or summary reversal of the Sixth Circuit's decision is appropriate to resolve the broad conflict with *Dukes* and the intercircuit conflicts described in this petition in a case of extraordinary scope and practical importance. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (summarily reversing).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MALCOLM E. WHEELER
MICHAEL T. WILLIAMS
GALEN D. BELLAMY
ALLISON R. COHN
Wheeler Trigg O'Donnell LLP
370 Seventeenth Street
Denver, CO 80202
(303) 244-1800

STEPHEN M. SHAPIRO
Counsel of Record
JEFFREY W. SARLES
TIMOTHY S. BISHOP
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
sshapiro@mayerbrown.com

Counsel for Petitioner Whirlpool Corporation

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