Nos. 13-430 & 13-431

In The Supreme Court of the United States

SEARS, ROEBUCK AND CO.,
Petitioner,
v.
LARRY BUTLER, Individually and on Behalf of All Others Similarly Situated,
Respondents.

WHIRLPOOL CORPORATION,
Petitioner,
v.
GINA GLAZER and TRINA ALLISON, Individually and on Behalf of All Others Similarly Situated,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici address only the first of the two Questions Presented in the Petitions:

Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported "efficiency" of a class trial on one abstract issue, without consideration of the host of individual issues that would need to be tried in order to resolve liability and damages, and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to express its view that federal courts should not certify cases as class actions unless the plaintiffs can demonstrate that they have satisfied each of the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Amgen, Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of *amici*'s intent to file.

the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs.

Amici fully support Petitioners' efforts to obtain review of both of the Questions Presented in their petitions. This brief focuses on the "predominance" issue raised by the first Question Presented. *Amici* are concerned that if the appeals courts' decisions are allowed to stand, Fed.R.Civ.P. 23(b)(3) will no longer serve as an effective check on the certification of plaintiff classes whose members have widely divergent interests, and that consumer class actions will be routinely certified whenever a mass-produced product fails to meet the expectations of even a single consumer.

Amici are concerned by the proliferation of class action lawsuits being filed in federal court and the inhibiting effect that such suits can have on the development and expansion of business. A decision to certify an unviable class creates enormous pressure on defendants to settle the suit without regard to the underlying merits. Such settlements are primarily of benefit to a small group of lawyers, and their costs are borne by the consuming public in the form of higher prices. *Amici* believe that class certification can be deemed "efficient" only if the case can be tried efficiently, and not simply because certification is likely to force a quick settlement.

STATEMENT OF THE CASE

Respondents are purchasers of front-loading washing machines manufactured by Whirlpool Corp., the petitioner in No. 13-431. Those Washers are sold by Sears, Roebuck and Co., the petitioner in No. 13-430. Respondents contend that all of Whirlpool's front-loading Washers have a design "defect" that may cause them to emit moldy odors. The uncontested evidence demonstrates, however, that the great majority of purchasers have not experienced the problem.

The Respondents in No. 13-430 are six individuals who purchased Washers from Sears. Two of those six contend that they experienced moldy odors. Their lawsuit, filed in Illinois, asserts claims against Sears for breach of written and implied warranties under the laws of six States: California, Illinois, Indiana, Kentucky, Minnesota, and Texas.[2] They filed a motion to represent a class of all individuals who purchased the front-loading Washers in any of the six States since 2001 (with respect to the odor claims) and a class of all purchasers of 2004-2007 model-year Washers (with respect to the control unit claims).

The district court denied class certification with respect to the odor claims. No. 13-430 Pet. App. ("Pet. App. 7th") 29a-33a. The court concluded that the plaintiffs failed to meet Rule 23(b)(3)'s predominance requirement, finding that common questions of fact

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[2] The lawsuit also alleges a second defect (one not at issue in 13-431): it alleges that a manufacturing defect in the central control unit of some Washers can cause false error messages and temporarily interrupt operations.

and law did not predominate over questions affecting only individual members of the proposed class. *Id.* at 32a-33a. The court focused on the numerous design changes undergone by the Washers throughout the class period and concluded that the analysis of whether the Washers were defective under the laws of the six States at issue would vary considerably from model to model. *Id.* The district court certified the control unit class, although it conceded that the evidence before the court made it unclear how many of the class members actually experienced control unit malfunctions. *Id.* at 33a-35a.

The Respondents in No. 13-431 are two individuals who purchased Washers in Ohio. They allege that their Washers were defectively designed and that as a result of that defect, they experienced moldy odors. They assert claims under Ohio law for negligent design, negligent failure to warn, and tortious breach of warranty. The district court granted their motion to certify a plaintiff class with respect to liability issues on those three claims; the class consists of all Ohio residents who purchased Washers in Ohio since 2001. No. 13-431 Pet. App. ("Pet. App. 6th") 63a-72a. While recognizing that damages issues would need to be resolved on an individualized basis, the court concluded that class certification on liability issues alone was appropriate because it would "significantly advance the litigation." *Id.* at 68a. The court concluded that virtually all liability issues—including the existence of a design defect, causation, and the adequacy of Whirlpool's disclosures of potential odor problems and how to address them—raised common questions of law and fact and thus that the plaintiffs met both the commonality and predominance requirements of Rule

23. *Id.* at 67a-69a.[3]

On appeal, the Seventh Circuit reversed the denial of certification of the moldy odor claim and affirmed certification of the defective control unit claim, while the Sixth Circuit affirmed class certification in the Ohio action. This Court granted writs of certiorari in both cases, vacated the appeals courts' decisions, and remanded for reconsideration in light of its *Comcast* decision. *Comcast* held, *inter alia*, that the "rigorous analysis" required when a court examines Rule 23(a) issues is also required when examining Rule 23(b)(3) issues and that "[i]f anything, Rule 23(b)(3)'s predominance requirement is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Both appeals courts deemed *Comcast* of minimal relevance and affirmed their initial decisions.

The Seventh Circuit concluded that because the numerous design changes during the class period did not entirely "eliminat[e] the odor problem," the "basic question" of defectiveness "is common to the entire mold class." Pet. App. 7th 4a. It added that if the trial court determines that there are large differences in the frequency of mold among the various Washer designs or that there are differences among the laws of the six

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[3] The court recognized that, under Ohio law, proof that the plaintiff suffered damages is a necessary element of liability under both a failure-to-warn claim and a tortious breach of warranty claim. While recognizing that such proof would require individual-by-individual evidence, the court nonetheless concluded, without explanation, that "these common issues predominate over the individualized issue of damages." *Id.* at 70a.

States, "the district judge might decide to create subclasses." *Id.* While conceding Sears's evidence that "most members of the plaintiff class had not experienced any mold problem," the Seventh Circuit said that such evidence was not a reason to deny class certification but rather would justify entry of "a judgment that would largely exonerate Sears." *Id.* at 5a. The court distinguished *Comcast* and concluded that causation could be demonstrated on a class-wide basis because "[u]nlike the situation in *Comcast*, . . . all members of the mold class attribute their damages to mold" and that "any buyer of a [Washer] who experienced a mold problem was harmed by a breach of warranty alleged in the complaint." *Id.* at 7a. The court did not acknowledge, however, that Sears intends to dispute causation on a plaintiff-by-plaintiff basis; *e.g.*, Sears alleges that mold problems experienced by some purchasers were likely caused by failure to follow directions for product use.

The appeals court held that certification was appropriate as a matter of "efficiency":

> A class action is the efficient procedure for litigation of a case such as this, a case involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit.

Id. at 4a. The court reasoned that the need for post-liability individual damage assessments would not undermine that efficiency because "[t]he parties probably would agree on a schedule of damages" and "indeed the case would probably quickly settle." *Id.*

The Sixth Circuit, following the remand from this Court, similarly affirmed its class certification decision while giving *Comcast* short shrift. Pet. App. 6th 1a-38a. In response to Whirlpool's evidence that the great majority of Ohio purchasers experienced no odor problem, the court determined that even those who experienced no odor problem could legitimately assert injury because, "If defective design is ultimately proved, all class members have experienced injury as a result of the decreased value of the product purchased." *Id.* at 27a. The court concluded that common issues that could be proven class-wide included whether the Washers were defectively designed, whether that alleged defect proximately caused mold to develop in the Washers, and whether Whirlpool adequately warned class members about the propensity for mold growth. *Id.* at 20a. The court determined that the proposed class met Rule 23(b)(3)'s predominance and superiority requirements and added that "two recent Supreme Court cases on predominance and superiority [*Amgen* and *Comcast*] seal our conviction that this is so." *Id.* at 31a.

SUMMARY OF ARGUMENT

These cases present issues of exceptional importance to the business community. The decisions of the Seventh and Sixth Circuits condone—indeed, appear to mandate—class certification as a means of "efficiently" processing a large number of smaller claims, without first requiring a careful analysis of whether all the claims and defenses likely to be raised by the parties could realistically be adjudicated in a single proceeding. The appeals courts suggested that

such an analysis is largely superfluous given the likelihood that the parties would reach a settlement following certification rather than continuing to litigate through final judgment. *See, e.g.,* Pet. App. 7th 4a. If upheld, the appeals courts' interpretation of Rule 23 is likely to lead to a considerable expansion in the number of class actions filed against the manufacturers of consumer products. Indeed, certifying class actions in the name of "efficiency" when predominance is not shown to exist ultimately is likely to undermine efficiency by encouraging attorneys to file questionable claims in the hopes that a certification order will force a settlement.

Review is warranted to determine whether the Seventh and Sixth Circuits' expansive interpretation of class action rules is consistent with this Court's case law, particularly *Comcast*'s characterization of Rule 23(b)(3)'s predominance criterion as "demanding" and its mandate that a class not be certified until after a court is satisfied, after a "rigorous analysis," that the plaintiff has demonstrated the predominance of common issues over issues affecting only individual class members. As other federal courts have recognized, a "rigorous analysis" requires at an absolute minimum that a court identify *all* of the issues of fact and law likely to be raised by the parties. Only then is a court in a position to engage in the qualitative and quantitative evaluation necessary to determine whether it is common issues or individual issues that are likely to predominate in subsequent class proceedings.

Yet, neither appeals court took cognizance of the vast majority of the numerous issues cited by Sears

and Whirlpool as examples of issues that will need to be addressed on a plaintiff-by-plaintiff basis. Instead, the courts' predominance findings rested largely on the conclusion that defectiveness could be determined on a class-wide basis and that "there need be only one common question to certify a class." Pet. App. 6th at 20a. The Petitions have explained in detail why the Washers' alleged defectiveness cannot be determined on a class-wide basis. But even if a class-wide means of making that determination actually existed, the appeals court cannot be said to have engaged in the "rigorous" predominance analysis required by *Comcast* without at least acknowledging each of the individual issues identified by Sears and Whirlpool and then explaining why those issues do not foreclose a finding that common issues predominate.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO DETERMINE WHETHER A RULE 23(b)(3) INQUIRY REQUIRES COURTS TO IDENTIFY AND ANALYZE ALL RELEVANT ISSUES IN DECIDING WHETHER COMMON QUESTIONS PREDOMINATE

Respondents seek to represent not only their own interests in this litigation but also the interests of hundreds of thousands of individuals not before the court. Rule 23 imposes strict requirements on those seeking to represent others in a federal court proceeding. The requirements of Rule 23(a) ensure that "the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Wal-Mart*, 131 S. Ct. at 2550. The plaintiffs

must also demonstrate that their proposed class action qualifies as one of the three types of class actions set forth in Rule 23(b). Respondents are relying on Rule 23(b)(3), which provides for class certification if the court finds "that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Importantly, Rule 23 imposes a significant evidentiary burden on those seeking to proceed as representatives of a class of absent parties. As this Court has explained:

> Rule 23 does not set forth a mere pleading standard. 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.

Wal-Mart, 131 S. Ct. at 2551 (emphasis in original).

Courts are directed to undertake a "rigorous analysis" of the moving party's proffered evidence when determining whether that party has satisfied Rule 23(b)(3)'s predominance standard, *i.e.*, whether the party has demonstrated that "questions of law or fact common to class members predominate over any questions affecting only individual members." *Comcast*, 133 S. Ct. at 1432. Indeed, the Court has stated that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Id.*

Yet despite having characterized the predominance requirement as "demanding," the Court has not had occasion to explain in any detail what is meant by "predominance" and how courts should go about comparing the common questions of fact and law to those that affect only individual members of the class. Review is warranted to provide badly needed guidance to the lower federal courts.

A. The Petitions Supply the Court with Excellent Vehicles for Providing Guidance Regarding How Courts Should Determine Whether Common or Individual Questions Predominate

Both the Seventh and Sixth Circuits began their Rule 23 analyses by identifying "common" questions of fact that, the courts asserted, could be tried on a class-wide basis; *i.e.*, the trier-of-fact's answers to those common questions would be applicable to all class members. The Seventh Circuit held, "The basic question presented by the mold claim—are the machines defective in permitting mold to accumulate and generate noxious odors—is common to the entire mold class." Pet. App. 7th at 4a.[4] The Sixth Circuit identified two common questions "that will produce in one stroke answers that are central to the validity of the plaintiffs' legal claims": (1) whether the alleged design defect in the Washers proximately cause mold or mildew to develop in the machines; and (2) whether Whirlpool adequately warned purchasers about the

[4] The Seventh Circuit said that in the control-unit class, "the principal issue—common to all class members," is "whether the control unit is indeed defective." *Id.* at 5a.

propensity for mold growth in the machines. Pet. App. 6th at 20a. The appeals courts then each concluded that those common questions predominated over questions applicable only to individual members of the class. Pet. App. 7th at 9a-11a; Pet. App. 6th at 30a-37a.

However, the appeals courts never addressed the great majority of individual questions raised by Sears and Whirlpool. The only individual question that both appeals courts addressed in a more-than-cursory fashion was damages. The Seventh Circuit acknowledged that damages were an individual issue but stated categorically that "[i]f the issues of liability are genuinely common issues . . . the fact that damages are not identical across all class members should not preclude class certification." Pet App. 7th at 10a. The Sixth Circuit also acknowledged that any damages awarded in connection with the negligent design claim would need to be computed on a plaintiff-by-plaintiff basis, but it deemed the issue largely irrelevant to the Rule 23(b)(3) predominance determination because "the district court certified only a liability class." Pet. App. 6th at 35a. Although the district court had recognized that, under Ohio law, proof of injury is a necessary element of liability under both a failure-to-warn claim and a tortious breach of warranty claim, *see supra* at 5 n.3, the Sixth Circuit did not address whether those individual damages questions predominated over other liability issues.

Because the appeals courts addressed predominance in such a cursory fashion, these petitions provide the Court with an excellent vehicle for determining what constitutes a "rigorous analysis" of

the sort mandated by *Comcast*.

The Petitions set forth at length the numerous factual questions that will need to be addressed on a plaintiff-by-plaintiff basis but that the appeals courts did not consider at all or considered only in a cursory manner. Accordingly, *amici* will not discuss those questions in detail. Among the many "individual" factual questions raised by Sears and Whirlpool are the following: (1) did the plaintiff's Washer emit a moldy odor (or did the Washer's control panel malfunction)?; (2) if so, did the odor/malfunction occur during the warranty period?; (3) did the plaintiff file a warranty claim with Sears before filing suit?; (4) did the plaintiff receive warranty service, and if so, did that correct the odor problem (or the control panel problem)?; (5) which version of the repeatedly-revised product-care instructions were included with the plaintiff's Washer?; (6) did the plaintiff adhere to the product-care instructions (written for the explicit purpose of ensuring that a purchaser would not be among the minority of owners who experienced odor problems)?; (7) which Washer model did the plaintiff purchase (the Washer design was altered five times during the class period to address odor issues)?; (8) does the state law applicable to each plaintiff's claims (the Seventh Circuit suit combines the claims of purchasers from six different states) recognize that plaintiff's claims?; and (9) did the limitations period on the plaintiff's claim expire before suit was filed? The appeals courts did not grapple with any of those issues in arriving at their "predominance" determinations, or did so in a cursory manner. Review is warranted to determine whether that approach to Rule 23(b)(3)'s requirements constitutes the "rigorous analysis" mandated by

Comcast.[5]

The Seventh Circuit recognized that the existence of six separate product designs and six sets of state laws might destroy the district court's ability to provide a common answer to the question of whether the Washers are "defective." Yet despite that recognition, it reversed the district court's denial of the class certification motion. It reasoned that although the district court might at some later time "decide to create subclasses" to address those differences in design and state laws, "this possibility was not an obstacle to certification of a single mold class at the outset." Pet. App. 7th at 4a.[6] In other words, according to the Seventh Circuit, district courts should conclude that a proposed class meets the requirements of Rule 23(b)(3) without first satisfying themselves that questions affecting only individual class members would not predominate, because district courts might be able to address problems that arise later by creating subclasses. The Seventh Circuit's failure to address

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[5] Sears also identified significant "individual" issues with respect to the control-unit class. In particular, Sears asserts that a large percentage of the class members never experienced a control-unit malfunction that generated false error messages. The trial court certified the class despite admitting that it had very little idea of how many purchasers of Washers containing the potentially-defective Bitron control unit actually experienced a malfunction. Pet. App. 7th at 34a.

[6] The Seventh Circuit neglected to note that the subclass approach it endorsed entailed creation of at least 36 subclasses: one subclass for each product design for plaintiffs from each of the six states. The appeals court's decision included no discussion regarding whether a class action with that many subclasses would be manageable.

the other "individual" questions raised by Sears (and listed above) indicates that it adopted a similar "certify now, worry later" approach to those questions as well.

The Sixth Circuit's response to the "individual" questions raised by Whirlpool was to "resolve" the merits of at least some of those questions in connection with its ruling on class certification. For example, to support its contention that individual issues predominated (and thus that certification under Rule 23(b)(3) was inappropriate), Whirlpool noted the numerous changes in Washer design and the product-care instructions that accompanied each new Washer, changes that occurred during the class period and that were intended to reduce the incidence of odor problems. The Sixth Circuit determined that those changes did not raise questions affecting individual class members because it determined (based on its reading of several documents) that "the mold problem occurred despite variations in consumer laundry habits and despite remedial efforts undertaken by consumers and service technicians to ameliorate the mold problem." Pet. App. 6th at 23a.

Review is warranted to determine whether merits-based factual determinations of the sort undertaken by the Sixth Circuit are what this Court had in mind when it mandated a "rigorous analysis" of Rule 23(b)(3) predominance issues. Whirlpool has made clear its intent to defend against the Ohio claims by pointing to changes in design and product-care instructions that (it contends) have caused the already-low percentage of Washers experiencing odor issues to become even lower. For Rule 23(b)(3) purposes, the issue is whether Whirlpool's introduction of its

substantial quantity of evidence on design and instruction changes will cause "individual" questions to overwhelm "common" questions, not whether the Sixth Circuit—after a cursory review of the record—has opined that Whirlpool is unlikely to prevail at trial on this issue with respect to any individual class members. Indeed, any suggestion by the Sixth Circuit that Whirlpool will be barred at trial from defending against defect claims on a plaintiff-by-plaintiff basis by introducing evidence of design and instruction changes conflicts sharply with *Wal-Mart*'s determination that Rule 23 procedures may not be employed to abridge the rights of class action defendants to defend themselves against all claims. *Wal-Mart*, 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.").

As the Petitions note, numerous federal courts undertake the "rigorous analysis" of Rule 23(b)(3) predominance issues in a manner that sharply conflicts with the approach adopted by the Seventh and Sixth Circuits. *See, e.g. Cole v. General Motors Corp.*, 484 F.3d 717, 729-30 (5th Cir. 2007). Review is warranted to resolve that conflict and to provide the lower federal courts with badly-needed guidance on this frequently recurring issue.

B. The Court Should Consider Requiring Certification Orders to Indicate How the Claims Will Likely Be Tried

Courts are more likely to resolve predominance issues in a sensible manner if (as the Seventh and

Sixth Circuits failed to do) they issue certification orders that directly address each of the "common" and "individual" questions likely to be addressed at trial. Nonetheless, as the Seventh Circuit noted, the predominance issue is not simply a matter of "bean counting" but also requires the trial judge to undertake a "qualitative assessment" of whether the case can manageably be tried as a class action. Pet. App. 7th at 9a. The danger, of course, is that allowing district courts to employ open-ended "qualitative assessments" of predominance will lead to widely disparate standards regarding when common questions predominate over individual questions.

Amici respectfully suggest that the Court grant review in order to consider adopting guidelines that have succeeded in a number of States—particularly Texas—in increasing the uniformity of predominance decisions. Those guidelines require that an order certifying a class be accompanied by a trial plan that explains how the court intends to try the case. Experience has shown that if trial judges are required to consider precisely how a class action will be tried, they will be less likely to certify classes whose claims are so unwieldy that they could never realistically be tried.[7]

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[7] The business community has long complained that judges routinely certify such unwieldy classes in the expectation that the defendant will be forced to settle—thereby eliminating the case from the court's docket. Such settlements can in many instances legitimately be deemed "blackmail settlements." H. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also Castano v. American Tobacco Co.,* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of unwieldy classes amounts to "judicial blackmail," creating "insurmountable

The Texas Supreme Court first announced its "trial plan" class action guidelines in *Southwestern Refining Co. v. Bernal*, 22 S.W. 2d 425 (Tex. 2000).[8] The court explained that "[t]he predominance requirement is intended to prevent class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses." *Id.* at 434. It noted, however, that some Texas courts had failed to enforce the requirement rigorously: "When presented with significant individual issues, some courts have simply remarked that creative means may be designed to deal with them, without identifying those means." *Id.* The court concluded, "We reject this approach of certify now and worry later." *Id*. at 435.

The Court concluded that strict adherence to the predominance requirement could best be maintained if trial courts, after certifying a class, are required to devise a trial plan that provides a tentative explanation of how the class claims are to be tried:

> [I]t is improper to certify a class without knowing how the claims can and will likely be tried. A trial court's certification order must indicate how the claims will likely be tried so

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pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

[8] Texas's class action rule, Tex.R.Civ.P. 42, is modeled on Fed.R.Civ.P. 23 and its language is virtually identical to the language of Rule 23.

> that conformance with Rule 42 may be meaningfully evaluated. . . . If it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate.

Id. at 435-36.

Bernal's "trial plan" requirement has been well-received in Texas. It has not unduly restricted the ability of trial judges to make "qualitative assessments" of the predominance issue yet at the same time has increased uniformity in class certification decisions and has reduced the prevalence of unwieldy class actions being certified under the "certify now and worry later" philosophy typified by the Seventh Circuit's decision in this case. Review is warranted in order to determine whether a "trial plan" requirement along the lines adopted by Texas would provide additional assurance that classes will be certified under Rule 23(b)(3) only when certification advances the Rule's goal of "fairly and efficiently adjudicating the controversy."

C. Damage Issues Are Not Exempt from the Predominance Requirement

Review is also warranted because the appeals courts' treatment of damage issues is in considerable tension both with the text of Rule 23 and this Court's decisions.

The Sixth Circuit recognized that questions relating to damages are not "common" questions but

rather raise questions affecting only individual class members. Pet. App. 6th at 35a-36a. The court nonetheless deemed this "individual" question irrelevant to the predominance determination (and thus deemed *Comcast* distinguishable) because "the district court certified only a liability class and reserved all issues concerning damages for individual determination." *Id.* at 35a. The court noted that Rule 23(c)(4) explicitly authorizes an action to be maintained as a class action with respect to particular issues and not with respect to other issues. *Id.*

The Sixth Circuit has badly misinterpreted Rule 23 and this Court's case law with respect to damages issues. The court is correct that Rule 23(c)(4) contemplates the existence of class actions that encompass less than all issues in a case, but nothing in the rule suggests that those portions of the case not encompassed within the class action are exempt from the predominance requirement. To the contrary, Rule 23(c)(4) states explicitly that class actions "with respect to particular issues" may be maintained only "when appropriate." One explicit limitation on "appropriate[ness]" is that the class action must be authorized under Rule 23(b). If (as will always be the case in an action for damages) the plaintiffs seek certification under Rule 23(b)(3), they must satisfy Rule 23(b)(3)'s predominance requirement. That requirement requires a showing that common questions predominate over individual questions, even when (as in 13-431) the plaintiffs have "reserved all issues concerning damages for individual determination." Pet App. 6th at 35a.

The need to calculate damages on an

individualized basis does not, of course, categorically preclude class certification under Rule 23(b)(3). In many instances, individual damage awards can be ascertained based on a simple formula and thus are unlikely to predominate over common issues.[9] But *Comcast*—which overturned a lower court's predominance determination because the plaintiffs failed to demonstrate that damages could be calculated on a class-wide basis—is *prima facie* evidence that the predominance of individual damages questions can, in at least some instances, be sufficient by itself to defeat certification under Rule 23(b)(3).

Significantly, Sears and Whirlpool base their respective challenges to the predominance findings on a plethora of "individual" questions in addition to damages. The point here is that the Sixth Circuit's decision conflicts both with *Comcast* and with the plain language of Rule 23(b)(3) in refusing to consider damage issues when determining whether all "individual" questions, considered in combination, predominate over "common" questions. Review is warranted to resolve that conflict.

Moreover, as the district court acknowledged in No. 13-341, Ohio law requires plaintiffs asserting claims for negligent failure to warn and tortious breach of warranty to establish, as an element of liability, that they suffered damages as a result of the defendant's

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[9] For example, in a securities-fraud class action filed under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the damages calculation often entails nothing more than verifying that a class member purchased x shares of stock on a specified date at a specified price.

tortious conduct. Pet. App. 6th at 68a. Yet the Sixth Circuit, while asserting baldly that all liability issues could be established through class-wide evidence, failed to explain how that assertion could be squared with the indisputably individualized nature of damage claims. The Sixth Circuit asserted, without citation to Ohio case law, that all class members—even those who did not experience odor problems—arguably suffered damages because the "premium price" they paid for their Washers exceeded the actual value of a machine that had the potential to develop moldy odors. *Id.* at 26a. Even accepting the validity of this dubious legal theory, it does nothing to change the individual nature of damage claims; each plaintiff would still need to prove on a Washer-by-Washer basis the difference in value (if any) between the machine bargained for and the one actually delivered. In sum, the failure of the Sixth Circuit's predominance determination to take into account the individualized nature of damage issues renders that determination all the more problematic.

II. REVIEW IS WARRANTED TO ADDRESS WHETHER "EFFICIENCY" IS A SUFFICIENT GROUND FOR CERTIFYING A CLASS

Review is also warranted to address the Seventh Circuit's rationale for certifying the mold class: a class action is the most "efficient" method of resolving the claims. Review is warranted because the appeals court's efficiency rationale conflicts with the requirements of Rule 23(b)(3) and the decisions of this Court.

The Seventh Circuit explained its efficiency rationale as follows:

> A class action is the efficient procedure for litigation of a case such as this, a case involving a defect that may have imposed costs on tens of thousands of consumers, yet not a cost to any one of them large enough to justify the expense of an individual suit.

Pet. App. 7th at 4a.

The conflict with Rule 23(b)(3) arises because Rule 23 and the Seventh Circuit are focusing on entirely different variables when determining the appropriateness of class certification. Rule 23 balances the complexity of class litigation against the complexity of individual litigation. The drafters of Rule 23 authorized class actions as a means of achieving "economies of time, effort, and expense," but they determined that such economies were achievable only when the prerequisites of Rule 23 have been established:

> The court is required to find, as a condition of holding that a class action may be maintained under [Rule 23(b)(3)], that the questions common to the class predominate over the questions affecting individual members. *It is only where this predominance exists that economies can be achieved by means of the class-action device.*

Advisory Committee's Notes, Rule 23, 1966 Amendments (emphasis added). In contrast, the

Seventh Circuit measures efficiency in terms of the procedure most likely to provide a vehicle by which those alleging wrongdoing can seek compensation from the alleged wrongdoer. Viewed through that prism, a class action involving thousands of individuals alleging a slight injury will *always* be more efficient than thousands of separately filed suits, because (as the Seventh Circuit noted) "the expense of an individual suit" is rarely justified by the prospect of a small recovery. Pet. App. 7th at 4a. But Rule 23 does not authorize the certification of class actions simply because Judge Posner views certification as the "efficient procedure." Rather, Rule 23 deems class certification to be the efficient and authorized procedure "only where . . . predominance exists." *Comcast* and numerous other decisions of this Court have stressed the importance of the predominance requirement. Indeed, certifying class actions in the name of "efficiency" when predominance is not shown to exist ultimately is likely to undermine efficiency by encouraging attorneys to file questionable claims in the hopes that a certification order will force a settlement. Review is warranted to resolve the conflict between the Seventh Circuit's efficiency rationale for certifying classes and this Court's adherence to Rule 23(b)(3)'s predominance requirement.

CONCLUSION

The Washington Legal Foundation and the International Association of Defense Counsel respectfully request that the Court grant the Petitions.

Respectfully submitted,

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