No. 12-322

In the Supreme Court of the United States

WHIRLPOOL CORPORATION,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

INTRODUCTION

Plaintiffs' brief in opposition never comes to grips with the central legal question presented by the petition: whether a class that is full of uninjured claimants and bristles with individual factual issues may be certified under the *Dukes* "same injury" standard and the *Amchem* "predominance" test.

Contrary to *Dukes*, the Sixth Circuit treated the lack of common injury—and lack of *any* injury to most of the class—as an irrelevance and reduced the "far more demanding" standard of predominance (*Amchem*, 521 U.S. at 624) to mere commonality. But even the product defect issue, discussed by plaintiffs in isolation from the other elements of their claims, is highly individualized due to changes in design and instructions and the vast differences in product use by 200,000 Washer purchasers.

Unable to justify the Sixth Circuit's glaring legal errors, plaintiffs offer a host of erroneous factual assertions that the courts below should have rigorously scrutinized, as *Dukes* requires. But plaintiffs' factual arguments do not alter the legal questions that urgently call for resolution.

Plaintiffs say (at 6) that 35-50% of the class suffered injury. Even if that were accurate, 50-65% of this enormous class would have no right to relief but could recover damages in any classwide judgment or settlement—including buyers who used their Washers for 10 years without any odor problem. Moreover, data compiled by *Consumer Reports*, Sears, and Whirlpool show that the actual percentage of Washer buyers who had no odor problem is 97-99%. See Pet. 7-8. The inclusion of so many uninjured Washer buyers did not matter to the

court of appeals, which avoided the *Dukes* "same injury" requirement by importing a "premium price" theory that Ohio law does not recognize—and that inaccurately reflects California law on which the Sixth Circuit improperly relied. Under Ohio law, buyers of odor-free Washers have received the benefit of the bargain they made at the price they paid.

Plaintiffs also say (at 5) that the multitude of Washer models had only insignificant differences. In fact, Whirlpool made many design changes to reduce mold risk and repeatedly revised Washer use and care instructions to describe how to prevent odors. D103-4 ¶ 35; D103-2 ¶¶ 18-35. Determining which buyers received particular instructions, and which of the few who had an odor problem complied with them, would require case-by-case resolution that could never be managed in a single class proceeding.

The *Wall Street Journal*, law and economics scholars, and five experienced amici have called for this Court's review given the extraordinary importance of this case. See *Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case*, Wall St. J., Oct. 9, 2012, at A18; J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, Wash. Times, Nov. 15, 2012, at B4. Judge Posner's recent *Butler* opinion compounds the Sixth Circuit's legal error by extending its harmful impact to an even broader swath of America's manufacturing base. These decisions open up new territory for massive class actions that now may be certified in two circuits whenever a few consumers assert that a mass-produced product did not meet their expectations—regardless of whether most buyers are satisfied with the product, whether the unsatisfied buyers used the product as instructed, and whether a

host of individual issues must be tried to resolve their claims. These actions will lead inevitably to coerced settlements unrelated to any actual common injury and impose enormous costs on manufacturers, retailers, and ultimately consumers. This "Frankenstein monster posing as a class action" (*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974)) should never have been certified.

A. A Class With So Many Uninjured Members Cannot Be Certified.

The court below failed to heed this Court's admonition in *Dukes* that all members of a class must "have suffered the same injury." 131 S. Ct. at 2551. Here, where most members of the class have not suffered *any* injury, much less the same injury, certification cannot be proper.

1. All empirical data in the record, including *Consumer Reports* annual surveys, show that only 1-3% of front-load washer buyers ever complained of any mold or odor. See Pet. 7-8. Although plaintiffs contend that the percentage of buyers who experienced Washer odors is 35-50%, they do so based solely on a small survey addressing a variety of appliances (not just front-load washers), and on a document discussing potential "concerns" of prospective buyers of *all* front-loader brands. See D122-1 ¶ 3; D103-32 ¶ 20. Even using those irrelevant percentages, 100,000-130,000 members of the certified class—and millions more in related cases—would not have experienced any odor problem.

2. Plaintiffs argue (at 16-17) that buyers of odor-free Washers are nonetheless injured at the time of purchase, just as buyers of cars with faulty brakes are injured even if the brakes have not caused a

crash. But there is a fundamental difference between a product that poses imminent risk of physical harm and a household appliance that works perfectly well where installed and used. The fact that *some* Washer buyers reported a musty odor does not place buyers of odor-free Washers in harm's way. The buyer of an odor-free Washer is *not* like someone "expos[ed] to toxic or harmful substances" (Opp. 14) or required to undergo medical monitoring (*id*. at 15).

Consider Phyllis Yates. She bought her Washer in 2009, never cleaned it, and never experienced an odor. D103-41. Under plaintiffs' theory, she is injured simply because other Washer owners reported an odor. But she got precisely the Washer she wanted at the price she agreed to pay. Or consider Chris Dow. He bought his Washer in 2007 and complied with the owner's manual recommendation that he keep the Washer door ajar between uses and run the Clean Washer cycle with bleach to prevent odor. D103-38. Under plaintiffs' theory, he is injured simply because he maintains his Washer according to instructions. But user care is not injury. All consumers must care for their products—whether by changing the oil in their cars or cleaning their drains, bathtubs, and refrigerators. Dow too got precisely the Washer he bargained for and has not been harmed.

As the record shows, the certified class is full of Washer buyers like Yates and Dow. *E.g.*, D103-37 to 41 (owner declarations). Not having been injured, they cannot claim "a constitutionally sufficient injury" (Opp. 13) that would allow them to sue in their own right. This is not simply an Article III standing issue. Plaintiffs' tort causes of action require proof of injury. As the Ohio jury instructions

show, plaintiffs' negligent design claim requires "injuries to the plaintiff" (1 OJI-CV 451.11.2(C)), and their negligent failure to warn and implied warranty claims each require "damages to the plaintiff" (1 OJI-CV 451.15.1, 451.17.1). These requirements cannot be circumvented by lumping uninjured Washer buyers into a gigantic class represented by two allegedly injured owners. Rule 23 requires the "same injury" across the class (*Dukes*, *supra*), a requirement that a class full of uninjured consumers cannot satisfy. See 1 Joseph M. McLaughlin, MCLAUGHLIN ON CLASS ACTIONS § 4.19, at 667 (8th ed. 2011) ("At the certification stage, plaintiffs must demonstrate their ability to prove *** that each member suffered injury").

3. Plaintiffs do not even try to defend the Sixth Circuit's reliance on California law to support its novel premium-price theory. Nor do they cite any Ohio case finding injury in circumstances like those here. Instead, plaintiffs cite (at 18) Ohio warranty cases that authorize "purely economic damages." But economic injury is not the issue. Governing Ohio law does not recognize the premium-price theory that was the sole ground for the Sixth Circuit's decision. See Pet. 17-18 (citing Ohio cases).

What is more, the Sixth Circuit was dead wrong about California law. In California, a latent defect will not support a warranty claim unless it is "*substantially certain* to result in malfunction during the useful life of the product." *Am. Honda Motor Co. v. Super. Ct.*, 132 Cal. Rptr. 3d 91, 98 (App. 2011) (emphasis added). "[I]f an alleged defect has not manifested itself during the product's useful life, the buyer has generally received what was bargained for." *Genovese v. Young Chang Am.*, 2012 WL 32070,

at *9-10 (Cal. App. Jan. 6, 2012). That is the general rule. See *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503-504 (8th Cir. 2009) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own") (citing cases).

4. Plaintiffs contend (at 10) that there is no circuit conflict over the propriety of certifying classes full of uninjured members. But both the Second and Eighth Circuits hold that "a class cannot be certified if it contains members who lack standing" due to lack of injury. *Avritt*, 615 F.3d at 1034; *Denney*, 443 F.3d at 263-264.

Plaintiffs say (at 11) that *Denney* allowed certification of a class containing unaudited taxpayers. But those class members all underpaid taxes due to "negligent or fraudulent tax advice" and incurred "costs in rectifying" tax returns. 443 F.3d at 265. Thus, unlike buyers of odor-free Washers, all the *Denney* class members suffered concrete injury.

Plaintiffs attempt (at 12) to distinguish *Avritt* as a case involving injury only to the named plaintiff. In fact, the Eighth Circuit explained that due to "the varying experiences of each of the members of the putative class," only individualized inquiries could determine which members were injured (615 F.3d at 1035)—precisely the situation here. Plaintiffs also cite (at 11) a later Eighth Circuit case, *Zurn Pex Plumbing*, 644 F.3d at 616. But *Zurn* reaffirmed that a court "may not certify a class *** if it contains members who lack standing," and that "it is not enough" to allege "that a product is at risk for manifesting [a] defect"; rather, the product must have "*actually exhibited* the alleged defect." *Ibid.*

(emphasis added). *Zurn* approved certification because all the class members' pipes had "exhibited a defect" upon exposure to water, and the evidence showed that "99% of homes would experience a leak." *Id*. at 610, 617. Here, the vast majority of Washer buyers have *not* experienced any odor problem, and never will.

These decisions conflict sharply with the Sixth Circuit's ruling that a class may be certified "[e]ven if some class members have not been injured by the challenged practice." Pet. App. 18a. That conflict has been broadened by the Seventh Circuit's ruling in *Butler v. Sears Roebuck & Co.*, 2012 WL 5476831, at *2 (7th Cir. Nov. 13, 2012), which authorized a class action involving similar front-load washers, even though "most members of the plaintiff class did not experience a mold problem." Judge Posner's *Butler* ruling underscores the growing confusion over this issue by diverging from his 2008 opinion *rejecting* certification of a class of clothes dryer purchasers because premium-price claims were "implausible." *Thorogood*, 547 F.3d at 748.

If a class is certified here, any judgment will be based only on the claims of the named plaintiffs. Under the Sixth Circuit's approach, plaintiffs' counsel could designate as class representative one of the minority of buyers who experienced odor, and a judgment in that representative's favor would apply to everyone, including the 97% of Washer buyers who never experienced any odor problem. Individual rights and responsibilities would be lost in this class-action shuffle.

B. A Class With So Many Individualized Questions Cannot Be Certified.

With so many fragmentary issues, this case does not come close to satisfying the demanding predominance standard laid down in *Amchem*. The failure of the courts below to grapple with predominance shows a compelling need for this Court's guidance.

1. Plaintiffs contend (at 25-26) that the district court's Rule 23 analysis was sufficient. But the court ruled that it could not resolve factual disputes that overlapped with the merits, refused to consider evidence showing a low incidence of odors, and rested its Rule 23 analysis entirely on "plaintiffs' theory" of the case. Pet. App. 25a, 29a-30a. The district court simply accepted "as true the allegations in the complaint." D93-1 at 18; Pet. App. 25a.

This Court's precedents reject such a lax approach. They require a "rigorous analysis" that "probe[s] behind the pleadings" and often will "overlap with the merits." *Dukes*, 131 S. Ct. at 2551. The Sixth Circuit's willingness to overlook that error and review the certification order deferentially (Pet. App. 9a-10a, 13a, 21a) heightens the need for this Court's intervention.

2. Plaintiffs contend (at 27) that "one or two central questions" supply the commonality required by Rule 23. But "[w]hat 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." *Dukes*, 131 S. Ct. at 2551. A class claim must be "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of *each one of the claims in one*

stroke." *Ibid*. (emphasis added). If common evidence cannot answer common questions for each class member, Rule 23 is not satisfied.

Whether each class member's Washer has a design defect cannot be answered "in one stroke." Whirlpool made over a dozen design changes to its 21 models between 2005 and 2009. D103-4 ¶¶ 5, 8, 35. Infrequent reports of moldy odors declined even more as Whirlpool added self-cleaning features and made changes to the Washers' tubs and structural supports. D103-29 ¶¶ 10, 14. Proof of a design defect in a 2001 Access-platform model thus would not prove any design defect in a 2006 Horizon-platform model or a 2009 Access-platform model.

The adequacy of Whirlpool's warnings about mold and odor also is not subject to classwide resolution. Whirlpool made important changes to its sales literature, care instructions, and website information between 2004 and 2007. D103-2 ¶¶ 18-37. From those materials—and from retailers, service representatives, and the Internet—buyers learned in varying ways and degrees about mold and how best to reduce any risk. *Id.* ¶¶ 18-39. Inadequate warnings to one buyer in 2002 cannot show inadequate warnings to a different buyer in 2007.

3. The Sixth Circuit failed to identify a single question that would produce the same answer "in one stroke." Worse still, it gutted the predominance test and flouted the core purpose of Rule 23(b)(3). There is no predominance where, as here, claims for "injuries to numerous persons" raise "significant questions, not only of damages but of liability and defenses of liability, *** affecting the individuals in different ways." Fed. R. Civ. P. 23(b)(3), 1966 advisory committee notes. "It is *only* where this

predominance exists that economies can be achieved by means of the class-action device." *Ibid.* (emphasis added); accord *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 612-613.

Although the predominance inquiry begins "with the elements of the underlying cause of action" (*Halliburton*, 131 S. Ct. at 2184), the Sixth Circuit never addressed the elements at issue here. Negligent design requires a defect that proximately caused injury. 1 OJI-CV 451.11. Tortious breach of warranty demands failure to provide a merchantable product fit for its intended use that proximately caused injury. 1 OJI-CV 451.17. And negligent failure to warn requires an unreasonable failure to warn of a known hazard that proximately caused injury. 1 OJI-CV 451.15. Only individual inquiries can address these elements, which depend on the model purchased, the date of purchase, and a buyer's actual experience with it. The same is true of fitness for intended use. Whether a buyer got "many years of clean clothes" (Opp. 29) is a buyer-specific question. Whether odor was caused by a defect in the Washer also requires buyer-specific inquiries. As plaintiffs' expert admitted, *all* washers can develop biofilm and odors, depending on the buyer's "use and habits" and the "environment that the machine sits in." D103-28 at 9, 22.

When was the Washer purchased? What self-cleaning features did it have? Was the buyer instructed to use low-suds, high-efficiency detergent and bleach or Affresh, or to keep the Washer door ajar between washings? Which instructions (if any) did the buyer follow? Was the Washer installed in a humid or dry area? Did the buyer contact Whirlpool or the retailer about any odor problem, and did those

providers fulfill their warranty service obligations? These questions, central to this litigation, would generate disparate answers. See D103-37 to 41, D104-25 to 30 (satisfied buyers' declarations).

"Following instructions" and "customer use" are critical issues that go to the heart of the predominance inquiry. If a buyer installs a product in a humid basement, fails to follow maintenance instructions, or fails to turn on her dehumidifier, she invites a mold problem—not just for washers but for every product in her basement. That is not the fault of the product manufacturer. Beyond this, "a class cannot be certified on the premise that [Whirlpool] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561. Whirlpool has potentially dispositive statute-of-limitations and product-misuse defenses that require individual examination.

Certification is even less warranted in this hotly-disputed case than in *Amchem*—a settled case—where the fact that class members used "different *** products, for different amounts of time, in different ways, and over different periods" precluded a finding of predominance. 521 U.S. at 624. The Sixth Circuit's decision reduces the predominance standard to a dead letter and conflicts directly with *Amchem*.

* * *

This case cries out for further review given the conflict with *Dukes* and *Amchem*, inter-circuit conflicts on the propriety of certifying classes full of uninjured members, the broad scope of this and similar class actions pending in several circuits, the injury to federalism resulting from refusal to apply

governing state law, and the green light now given to trial lawyers to sue on behalf of every purchaser of mass-produced products, even those who have never suffered harm. The resulting compulsion to settle will produce not rough justice, but rather mass injustice injurious to the Nation's economy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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