No. 12-1067

In the
Supreme Court of the United States

SEARS, ROEBUCK AND COMPANY,

Petitioner,

v.

LARRY BUTLER, et al.,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Plaintiffs sought certification of a six-state breach-of-warranty class, claiming that front-loading washing machines they bought from Sears, Roebuck and Co. have a design defect that causes musty odors and a manufacturing defect that interrupts operation with false error codes. Holding that two classes (one for each alleged defect) should be certified under Rule 23(b)(3), the Seventh Circuit ruled that a class action is "the more efficient procedure" based on a single purportedly common question—whether there is a defect. The court did not address any of the many individual questions that would need to be tried, much less determine whether the purportedly common question predominates over individual questions. The questions presented are:

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

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

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.[1] PLF was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project seeks, among other things, to uphold the constitutional due process limitations on class action litigation, including identifying the adverse consequences of permitting class actions to include a majority of noninjured class members. *See*, *e.g.*, *Whirlpool v. Glazer*, S. Ct. docket no. 12-322; *First American Financial Corp. v. Edwards*, 132 S. Ct. 2536 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Bennett v. Spear*, 520 U.S. 154 (1997); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

In addition, PLF staff have published extensively on the effects of overly expansive tort liability on the business community. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006). PLF believes its public policy experience will assist this Court in considering the merits of this case.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The purpose of the Due Process Clause is to protect individual rights. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."). It requires that all persons "have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). Thus, a defendant's "aggregate liability . . . does not depend on whether the suit proceeds as a class action," because "[e]ach of the . . . members of the putative class could . . . bring a freestanding suit asserting his individual claim." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality op.).

The decision below, *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), improperly elevates systemic efficiency above constitutional protection for individual rights. *See* Edward Brunet, *The Triumph of*

Efficiency and Discretion Over Competing Complex Litigation Policies, 10 Rev. Litig. 273, 278 (1991) (comparing individual efficiency—the "just, speedy, and inexpensive" adjudication of a claim—with systemic efficiency, or, benefits to the judicial system as a whole). That which makes the administration of courts efficient does not necessarily inure to the benefit of an individual litigant.[2] The decision below therefore conflicts with ample precedent of this Court establishing the primacy of individual due process rights over efficiency. Moreover, the class certified below contains an undisputed minority of actually injured claimants, a fact that in itself creates significant due process concerns worthy of this Court's resolution.

ARGUMENT

I

THE SEVENTH CIRCUIT'S EQUATING OF EFFICIENCY TO DUE PROCESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

By equating the predominance question in class action certification to efficiency, *Butler*, 702 F.3d at 362, the decision below fails to place the accepted value of efficiency within its proper constitutional context. There is no question that when confronted with two equally constitutional actions, considerations of

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[2] As Justice Marshall pointedly noted, "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *United States v. Ross*, 456 U.S. 798, 842 n.13 (1982) (Marshall, J., dissenting).

efficiency can be a sound reason to tip the balance as a government actor or court chooses one over the other. *See Peretz v. United States*, 501 U.S. 923, 933 (1991) ("absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments [in improving the efficiency of the judicial process] that are acceptable to all participants in the trial process and consistent with the basic purpose of the statute"). But efficiency alone cannot transform an unconstitutional action into a constitutional one. *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991) ("[W]hile cost to the government is a factor to be weighed . . . , it is doubtful that cost alone can ever excuse the failure to provide adequate process."); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 866 (5th Cir. 1985) (The cost of duplicative and perhaps conflicting adjudications is "the price of due process."); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness.").

Whenever this Court has explicitly considered the intersection of efficiency and constitutional due process guarantees, efficiency yields to due process:[3]

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[3] Efficiency must yield to other constitutional protections of individual rights as well. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 639 (1980) (invalidating anti-solicitation ordinance upon finding that state's interest in convenience and efficiency was insufficiently compelling to justify interference with protected speech); *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (federal courts may not settle disputes "for the sake of convenience and efficiency" if the plaintiff lacks Article III standing).

Competency hearings. Because a criminal defendant has a constitutional "right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel," a state may not truncate or eliminate competency hearings because "the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." *Cooper v. Okla.*, 517 U.S. 348, 366-67 (1996).

Custody proceedings. An unwed father cannot be deprived of custody of his children upon the death of the mother without a hearing showing him to be an unfit parent. This Court rejected the state's argument that most unmarried fathers are unsuitable and neglectful parents and it would therefore be more efficient to assume the unfitness of all unmarried fathers:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Ill., 405 U.S. 645, 656 (1972).

Job termination for pregnancy. Similar to the state's assumptions about unwed fathers, the school board in *Cleveland Board. of Education v. LaFleur*

assumed that teachers in their fourth or fifth month of pregnancy are unfit for their jobs. This Court acknowledged that the school board's presumption was "easier," but held that "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." 414 U.S. 632, 647 (1974). *See also Vlandis v. Kline*, 412 U.S. 441, 451 (1973) ("The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.").

Search warrants. This Court invalidated Arizona's "murder scene exception" to the Fourth Amendment's search warrant requirement, rejecting the state's argument that "law enforcement may be made more efficient" by skipping the step of obtaining a search warrant. "[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citations omitted).

Prejudgment replevin procedures. A consumer is entitled to notice and a hearing prior to repossession of goods on which a debt is owed. Allowing a creditor to repossess property by the simple expedient of filing papers in small claims court was an efficient use of state resources, but saving the costs of a hearing "cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the

person whose possessions [or property] are about to be taken." *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972).

These fundamental principles must also apply in the context of class action litigation. The efficiencies created by class action litigation cannot be employed at the cost of denying individual litigants justice in the courts. *Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"), *cert. denied*, 464 U.S. 1040 (1984); *see also* James A. Henderson, Jr., *Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.").

Procedural fairness is required for individual justice for two reasons. First, fair process is often celebrated as an end in itself. *See*, *e.g.*, Judith Resnik, *et al.*, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 306 (1996). Underlying this view is the notion that every American has a right to his "own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4449 (1981)). Second, procedural fairness can affect the fairness of the outcomes it produces. *See*, *e.g.*, Robert G. Bone, *Rethinking the "Day in Court" Ideal*

and Nonparty Preclusion, 67 N.Y.U. L. Rev. 193, 201-02 (1992).

With its single-minded focus on the efficiency of aggregating the claims below in a class action, the Seventh Circuit essentially allowed the plaintiffs to presume the essential element of having suffered an actual injury. This procedure unfairly benefits the plaintiffs at the expense of the defendant. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove causation through individual affidavits submitted to special master rejected as "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Even when there is a common question as to the wrongfulness of the defendant's conduct, "this is only half the question;" courts may not combine claims in a class action where there are individualized facts as to whether each class member suffered actual damages. *Yeger v. E*Trade Sec. LLC*, 65 A.D.3d 410, 884 N.Y.S.2d 21, 24 (N.Y. App. Div. 2009) (footnote omitted). As the Second Circuit emphasized, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's —and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). By removing individual considerations from the adversarial process, the judicial system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000). Class certification hides the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

The contrary approach adopted by the court below is also counterproductive as a matter of public policy: For example, in the asbestos litigation, trial judges swept into single enormous classes both plaintiffs who were ill and plaintiffs who were completely asymptomatic but who had been exposed to asbestos. In the name of "efficiency," these judges ushered in a tidal wave of claims that threatened to swamp the judiciaries of their states. *See Georgine v. Amchem Prods, Inc.,* 83 F.3d 610, 626 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer

from lung cancer, disabling asbestosis, or from mesothelioma . . . ").

This Court should grant the petition to ensure that the predominance necessary for class certification is assessed based on the individual claims and rights of both plaintiffs and defendants, protected by the Due Process Clause.

II

THE SEVENTH CIRCUIT'S CERTIFICATION OF A CLASS OF MOSTLY UNINJURED MEMBERS CONFLICTS WITH OTHER COURT DECISIONS AND VIOLATES DUE PROCESS

The court below acknowledged Sears' allegation that most of the consumers suffered no harm, but without analysis or citation simply dismissed the significance of the allegation at the certification stage, stating that it can be resolved on the merits. *Butler*, 702 F.3d at 362. This holding stands in stark conflict with decisions of other courts that consider the composition of the purported class at the certification stage, as well as a decision of a different panel of the Seventh Circuit.

A. Unnamed Class Members Must Suffer the Same Injury as the Representative Plaintiffs

A properly defined class is necessary to realize both the protections and benefits for which the class action device was created. As the Ninth Circuit explained in *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973), class actions are subject

to the same essential principles as other cases, and therefore "courts [should] not be available to those who have suffered no harm at the hands of them against whom they complain. They have no standing to sue." For this reason, a "class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008) (rejecting class certification where court found that 80% of the putative class suffered no injury). *See also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (plaintiffs seeking certification of all state residents active in the "peace movement" was unworkably overbroad to challenge a city ordinance restricting leafletting activities); *Tietsworth v. Sears, Roebuck and Co.*, 720 F. Supp. 2d 1123, 1146 (N.D. Cal. 2010) (Purported class action of consumers alleging problems with the electronic control panel of their washing machines could not be certified because the putative class "include[s] members who have not experienced any problems with their Machines' Electronic Control Boards—or for that matter with any other part of the Machine. 'Such members have no injury and no standing to sue.' "); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 2008) (rejecting putative class action of Bronco II SUV owners who alleged their vehicle's propensity to roll-over, and claiming they had been damaged by being induced to purchase vehicles that they say were worth less than they would have been worth if they had been what Ford had represented them to be because, in part, the "overwhelmingly vast majority of Bronco II[] have never manifested the alleged defect").

In *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), *cert. denied*, 551 U.S. 1115 (2007), a

plaintiff invoked the Illinois consumer protection act to pursue a class action against Coca-Cola on a claim that the company deceptively marketed fountain Diet Coke and bottled Diet Coke. The difference between the two beverages was that fountain Diet Coke was sweetened with a combination of aspartame and saccharin, while bottled Diet Coke was sweetened only with aspartame. *Id.* at 509. Oshana sought certification of a class comprised of all consumers who purchased a fountain Diet Coke on or after March 12, 1999. *Id.* at 514. The Seventh Circuit noted the obvious problems with such an overinclusive class:

> Such a class could include millions who were not deceived and thus have no grievance under the [Illinois consumer protection act]. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.

Id. Because Oshana claimed she was deceived and injured, as opposed to every other possible member of the class, the court held that her claims were not "typical," and upheld the trial court's denial of certification. Even for her "per se" misrepresentation claim that did not require proof of deceit, the court rejected her proposed class because the consumer protection act still requires proximate causation, which she could not allege on behalf of such a broad,

indefinite class. *Id.* at 515.[4] *See also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (3d Cir. 2000) ("[A] plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class.").

The requirement that all members of the class have Article III standing—including "concrete, particularized, and actual or imminent" injury—reflects the constitutional limitations on federal courts. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). If that were not the rule, a class could include members who could not themselves bring suit to recover, thus permitting a windfall to those class members and allowing Federal Rule of Civil Procedure 23—a procedural rule—to enlarge substantive rights. *See*, *e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (a class must be defined in such a way that all members have Article III standing); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) (same); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) (A class cannot be defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct.").

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[4] *See also Yost v. General Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (purported class action dismissed where plaintiff only alleged that a "potential" oil leak in certain Cadillac models was "likely" to cause damage and "may" create safety hazards); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 601-02 (S.D.N.Y. 1982) (class certification denied in case alleging breach of implied warranty and merchantability for tires, where the "considerable majority" of tires covered by the litigation functioned "without incident, during their predicted lives of service").

This Court has addressed—and soundly rejected—the situation where representative plaintiff seeks to use the procedural requirements of Rule 23 to create Article III standing by bootstrapping his own standing from the alleged injuries of unnamed class plaintiffs. *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974). And just as representative plaintiffs may not bootstrap their own standing from the alleged injuries to unnamed class members, this case presents the flip-side question: Can the vast majority of the unnamed plaintiffs (not just some small fraction) bootstrap their own standing from a representative plaintiff? This Court's previous decisions suggest, contrary to the Seventh Circuit decision in this case, that the answer would be no: that class certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. That result would violate the Rules Enabling Act because "no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right,"'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (quoting *Amchem Prods.*, 521 U.S. at 612-13 ("Rule 23's requirements must be interpreted in keeping with Article III constraints."). *See also Shady Grove*, 130 S. Ct. at 1443 ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

B. The Decision Below Violates Defendants' Due Process Rights

Because defendants as well as plaintiffs enjoy full protection of the Constitution's Due Process Clause, this Court in *Wal-Mart Stores Inc. v. Dukes* demanded that courts investigate seriously whether class certification is warranted under the federal Rule. In that case, this Court emphasized that "the class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual name parties only,'" *Dukes*, 131 S. Ct. at 2550, and asserted that "to justify a departure from that rule" all the requirements of Rule 23 must be met. *Id*. 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." *Id*. at 2551. When considering the type and quantity of evidence required for a plaintiff to meet these standards, the Court compared the evidence in *Dukes* with a prior case, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which the plaintiff provided 40 accounts of discrimination for a class of 334 alleging discrimination. *Dukes*, 131 S. Ct at 2556. While the *Teamsters* plaintiffs provided an anecdote for one out of every eight members of that class, the *Dukes* plaintiffs offered one for every 12,500 members. *Id*. This suggests that the larger the proposed class is, the more evidence will be required to adequately show that commonality and typicality exist among the class members. Julie Slater, Comment, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-Dukes?*, 2011

B.Y.U. L. Rev. 1259, 1269. A different panel of the Seventh Circuit also differs from the decision below, opining that simple judicial acceptance of the plaintiff's proffered evidence when there is conflicting counter-evidence offered by the defendant, "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

The importance of developing clear rules for lower courts to approach the factual issues raised by class certification cannot be overstated. Our legal system depends on discovery and evidentiary rules to allow each side to uncover the specific facts necessary to develop its case. With the facts revealed through discovery, each side can test the other side's assertions and develop appropriate lines of argumentation. "Aggregate litigation does not in any way diminish plaintiffs' ability to do these things. But it can threaten the ability of defendants to do so." John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 677 (2011). The class action device should not "turn into a mechanism for putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." *Id.*

C. "Noninjury" Class Actions Are Ripe for Abuse

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have

never entered into contractual representation—or even met—the vast majority of the class members whom they purport to represent. The "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of protection because they are not there to defend themselves. *Hansberry v. Lee*, 311 U.S. 32, 42 (1940). Their only chance to avoid unfair practices by the "representative" named plaintiff—whose interests may not clearly reflect those of all purported class members—is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who happens to have the least information." Jeremy Gaston, Note, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Actions*, 77 Tex. L. Rev. 215, 244 (1999). Because the class action binds these absent and informationally impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *Id.*

Essentially, this requires that the representative's stake in the case, whatever that may be, rises or falls on the claims of the other class members. Individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See*, *e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Moreover, the aggregation of claims detracts from the acknowledgment of each plaintiff's particular injuries, a value recognized as a legitimate end in itself, apart from the end of compensation for injuries. *See Martin v. Wilks*, 490 U.S. 755, 762 (1989). For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." Gaston, 77 Tex L. Rev. at 238. These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18). "The plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated." *Rodriguez v. Family Publications Service, Inc.*, 57 F.R.D. 189, 195 (C.D. Cal. 1972) (citation omitted).

"Noninjury" standing, combined with the class action procedure, also tends to result in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.") (internal citations omitted); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85, 789 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a

settlement far in excess of the individual claims' actual worth.").

The decision below, which cavalierly declares that Sears can present its claims during the merits stage, expresses willful blindness to the practicalities of class certification, namely, that few class actions actually proceed to judgment—the vast majority settle. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). This Court and "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail." *Id*. (citations omitted). For this reason, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation: "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." *Coopers v. Lybrand*, 437 U.S. 463, 476 (1978). *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic pressure" to settle.).[5]

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[5] This pressure to settle was a key factor for courts denying certification in several jurisdictions. *See*, *e.g.*, *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) ("Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a (continued...)

Such litigation is used not primarily to redress injury (especially where a significant portion of the class can demonstrate no injury); it therefore exists as a sham to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Class members "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.* Thus, noninjury class actions to recover compensation

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[5] (...continued)
catastrophic judgment as much as, if not more than, the actual merit of the claims."); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000) ("[E]ven ordinary class certification decisions by their very nature may radically reshape a lawsuit and significantly alter the risk-benefit calculation of the parties . . . ."); *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part) ("Class actions often place immense pressure on defendants to settle, considering the 'all or nothing' nature of class action verdicts."); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 217 (Md. 2000) ("[G]ranting class certification significantly increases the pressure on a risk-adverse defendant to settle pending class claims rather than face the threat of an exceptional award of damages.").

simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id.* The decision below, by combining any legitimate claims with tens of thousands of uninjured plaintiffs, bloats any properly joined or representative legal action and opens the door to the federal courts wide for gross misuse of the justice system.

CONCLUSION

The Seventh Circuit decision equating "efficiency" with predominance, without consideration of other factors, conflicts with the most basic due process principles, as reflected in this Court's and other courts' decisions. It is particularly offensive to constitutional doctrine as applied in this case, involving a purported class consisting largely of uninjured members.

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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