No. 12-1067

In the Supreme Court of the United States

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

After granting Rule 23(f) review "to clarify the concept of 'predominance,'" the Seventh Circuit reduced that key requirement for class certification to an inquiry whether *any* issue may efficiently be litigated on a class-wide basis. Pet. App. 2a. Here, just one supposedly common issue—"were the machines defective?"—was held to be enough to satisfy this unprecedented "efficiency" test. *Id.* at 4a. Our petition showed that by holding "[p]redominance" to be solely a "question of efficiency" (*ibid.*), the Seventh Circuit effectively rewrote Rule 23. It reversed the denial of certification of plaintiffs' sprawling odor class and affirmed certification of the disparate CCU class without conducting a proper predominance inquiry. And it glossed over admitted differences in six States' laws (Pet. App. 5a), as well as a host of differences in Washer design and purchaser conduct. Yet those divergent circumstances mean that core issues of law and fact—including the most basic question whether a purchaser suffered any injury at all—are *not* "applicable in the same manner to each member of the class" but are highly individualized. *Falcon*, 457 U.S. at 155.

The Seventh Circuit's decision makes a mockery of the constraints on class actions imposed by Rule 23's drafters and this Court. See *Dukes*, 131 S. Ct. at 2550. It turns the "demanding" predominance requirement (*Amchem*, 521 U.S. at 624) into an empty cipher that can be satisfied by manipulating the level of generality at which issues are stated. And it replaces the rigorous condition of class "cohesive[ness]" with a "chancellor's foot" judgment

about efficiency, without considering what issues will be tried or what evidence will be presented. *Id.* at 621, 623.

Plaintiffs' only response is to assert that there is no judgment for this Court to review. That is incorrect. There plainly is a reviewable judgment, and the erroneous standards articulated by the court of appeals in reaching that judgment ensure that the Seventh Circuit will become a haven for massive, fragmentary, multi-state classes full of uninjured claimants, designed to extract blackmail settlements. This Court's GVR following *Comcast Corp. v. Behrend* (No. 11-864) in *Whirlpool Corp. v. Glazer* (No. 12-322)—the Sixth Circuit decision on which the Seventh Circuit principally relied—means that *at least* a GVR is required here. But as four *amicus* briefs filed by leading business and legal organizations attest, the questions presented are of immense practical importance to consumers and businesses and warrant immediate plenary review.

I. The Seventh Circuit's Decision Falls Within This Court's Certiorari Jurisdiction.

Plaintiffs make a single argument against granting certiorari. They claim (at 11) that there is "no operative order or judgment on the question of class certification" for this Court to review under Rule 23(f). Their argument has two components. First, plaintiffs assert that, by reversing and remanding the district court's denial of certification of the odor class, the Seventh Circuit eliminated any reviewable class certification order. Second, they say that the Questions Presented do not encompass the affirmed CCU class certification order. Plaintiffs are wrong on both counts.

A. Plaintiffs mischaracterize the Seventh Circuit's ruling on the odor class. Neither the Seventh Circuit's opinion nor its judgment uses the word "remand." Neither "requires" or even recommends that the district court engage in "further examination" based on "the full factual record under new legal authority," as plaintiffs contend (at 11). Both say only that "the denial of class certification regarding the mold claim is reversed." Pet. App. 8a; CA7 Dkt. 14. And the Seventh Circuit expressly agreed with the Sixth Circuit's decision in *Glazer* upholding a "single mold class" supposedly "identical to" the one here. Pet. App. 6a-7a.

Regardless of how the Seventh Circuit's judgment is characterized, Rule 23(f) does not stand as a barrier to review because it does not control this Court's certiorari jurisdiction. Rule 23(f) addresses only the ability of a "court of appeals" to "permit an appeal from an order granting or denying class-action certification." Certiorari decisions are made under 28 U.S.C. § 1254, which allows review of "[c]ases in the courts of appeals," no matter how they got there or were decided.

As plaintiffs concede (at 11), this Court has never suggested that it cannot review Rule 23(f) decisions that vacate or reverse class certification orders. To the contrary, this Court has previously granted certiorari to review decisions that vacated or reversed class certification rulings. See *Amchem*, 521 U.S. at 597 (reviewing decision that vacated and remanded class certification order); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 394 (1980) (reviewing decision that reversed order denying class certification and granting summary judgment); *Eisen*

v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) (reviewing decision that reversed class certification order).

These cases reflect the Court's long-standing practice of reviewing important interlocutory appellate decisions reversing or vacating pre-trial rulings and remanding for further proceedings. See, *e.g.*, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012) (reviewing decision that vacated preliminary injunction); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 21-22 (2004) (reviewing decision that reversed and remanded partial summary judgment order under 28 U.S.C. § 1292(b)); *Edwards v. Balisok*, 520 U.S. 641, 644 (1997) (reviewing decision under § 1292(b) that reversed stay order); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing decision that reversed dismissal order).

A court of appeals decision reversing the district court order that triggered a Rule 23(f) appeal does not prevent this Court from granting certiorari. Nor does it mean that review will be advisory and unconnected to any judgment, as plaintiffs claim (at 12). This Court reviews the judgment of the *court of appeals*, which here reversed in part and affirmed in part. That judgment, which erroneously replaced predominance with supposed efficiency and endorsed certification of classes filled with uninjured persons, is binding on the district court in this case and controlling precedent throughout the circuit.

B. The introductory paragraph to our Questions Presented expressly refers to the erroneous certification of a CCU class covering an alleged "manufacturing defect that interrupts [Washer] operation with false error codes." Pet. i. In affirming certification of that CCU class, the Seventh Circuit

invoked the "efficiency" test for predominance that we challenge in the first Question Presented. Pet. App. 7a-8a. And most members of the CCU class never experienced the alleged manufacturing defect, which brings that class within the scope of our second Question Presented—whether a class filled with uninjured members may be certified. Pet. 11-12. Accordingly, the Seventh Circuit's errors in upholding certification of the CCU class fall squarely within the Questions Presented.[1]

In sum, plaintiffs' only argument against review of the Seventh Circuit's ruling is meritless.

II. This Court Should Grant Certiorari.

A. At a minimum, the Court should grant certiorari, vacate the Seventh Circuit's ruling, and remand in light of *Comcast*. The class certification ruling by the court of appeals—which predates *Comcast*—squarely conflicts with *Comcast*'s holdings.

Comcast requires courts "to take a close look at whether common questions predominate over individual ones." 133 S. Ct. at 1432. And *Comcast* rejects the dissenting view that "economies of time and expense" override rigorous compliance with the predominance requirement. *Id.* at 1437. Yet, in this case, the Seventh Circuit asked only whether it would be more "efficient" to litigate a single common

[1] Notwithstanding plaintiffs' false assertions to the contrary (at 7-9), the certified CCU class includes "all persons or entities who purchased" a "front-load washing machine manufactured from 2004 to 2007 with a Bitron CCU" in six States (Pet. App. 22a; D206), regardless of whether they are among the small percentage of buyers who experienced the alleged defect. See Pet. 11-12.

question. Pet. App. 4a, 7a-8a. And in addressing that abstract question, it failed to consider what issues would be tried, what evidence presented, and whether a class trial would be efficient overall.

Comcast ruled that "nearly endless" "permutations" in class member claims due to different causes of alleged injury, across numerous class members in varied locations, precluded class certification. 133 S. Ct. at 1434-1435. Here, the Seventh Circuit disregarded far greater permutations, across hundreds of thousands of purchasers of more than 20 different models in six different States, concerning the existence of odors or CCU malfunctions, their causes, amounts of any resulting damages, customers' care of Washers, timely requests for warranty service, and Sears' adherence to its warranty obligations. See Pet. 17-21.

Comcast also held that allowing "arbitrary" methods of resolving factual disputes to support a predominance finding would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." 133 S. Ct. at 1433. The Seventh Circuit allowed class certification based on arbitrary theories regarding the significance of Washer design changes, the incidence of odors and CCU malfunctions, and injuries to purchasers who never experienced those problems. Pet. App. 4a-7a; see Pet. 7-12, 24-30.

Comcast concluded that the plaintiffs could not "show Rule 23(b)(3) predominance" because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. Here, the Seventh Circuit acknowledged that the odor and CCU claims raised individual damages issues, but nonetheless approved

class certification based on the presence of a single supposedly common issue. Pet. App. 4a, 7a.

Furthermore, the Seventh Circuit expressly relied on the Sixth Circuit's *Glazer* decision, 678 F.3d 409 (6th Cir. 2012), which this Court has already vacated in light of *Comcast*. No. 12-322 (Apr. 1, 2013). Indeed, plaintiffs themselves assert (at 10) that "[t]he central legal issues in this case are identical to those presented in *Glazer*."

In short, the Seventh Circuit's decision cannot stand after *Comcast*.

B. We and the *amici* have shown that this case urgently calls for plenary review. It is obvious now, and without need for a remand, that neither class was properly certified. The Seventh Circuit's contrary ruling conflicts with a host of this Court's precedents. It speaks volumes that plaintiffs offer not a word in defense of this indefensible ruling.

The one supposedly common issue identified by the Seventh Circuit—whether the product was defective—is an abstraction, *not* a common issue. See *Dukes*, 131 S. Ct. at 2551. For the odor class, the Seventh Circuit acknowledged that the answer to the defect question "may vary with the differences in design." Pet. App. 4a. Only Washer-specific analysis can determine whether a CCU class member experienced the sporadic deviation from CCU manufacturing standards. Pet. 18. The trial will not be about any common "defect" issue, but about each separate model's design, performance, and instructions, and each individual purchaser's usage.

Purchaser-specific evidence regarding fact of injury, causation, amount of damages, Washer care, and warranty requests and service raises additional

individual issues that must be resolved to adjudicate plaintiffs' claims and Sears' defenses. Pet. 19-21. As *Comcast* and *Amchem* make clear, those individual issues cannot be swept aside in the name of "efficiency." *Comcast*, 133 S. Ct. at 1432; *Amchem*, 521 U.S. at 615, 622-624. They must be rigorously analyzed to determine whether they predominate over any common issues. Here, they plainly do—but the Seventh Circuit never undertook that inquiry.

Beyond this, constitutional standing and Rule 23 precedents preclude broad classes filled with customers who experienced no harm. As this Court recently held, "allegations of *possible* future injury are not sufficient" to create standing because "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013) (emphasis original). No class action may be certified under Rule 23 unless the class representatives show that they and the class members "have suffered the same injury." *Dukes*, 131 S. Ct. at 2551. Here the class members' experiences are vastly different.

The Seventh Circuit supported its ruling by overriding the warranty laws of six different States to fabricate classwide injuries. Pet. App. 5a-6a; Pet. 25-26. That step—which makes its decision even more erroneous than the Sixth Circuit's decision in *Glazer*—glossed over the serious problems created by multi-state class actions (see, *e.g.*, *Casa Orlando Apartments, Ltd. v. FNMA*, 624 F.3d 185, 194-195 (5th Cir. 2010)) and disregarded the court's duty to respect the particulars of applicable state law (see *Phillips Petrol.*, 472 U.S. at 821). There is no reason to ask the Seventh Circuit again whether this

"Frankenstein monster posing as a class action" (*Eisen*, 417 U.S. at 169) should lumber forward.

The Seventh Circuit's ruling cries out for immediate correction. It effectively rewrites Rule 23's predominance requirement to permit class certification whenever a judge can speculate that some "efficiency" would be served—which could be said in every case. But procedural fairness, no less than efficiency, is the aim of the predominance requirement. Fed. R. Civ. P. 23(b)(3), 1966 advisory committee note ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, * * * without sacrificing procedural fairness"). Neither fair nor efficient adjudication is possible if, in the aggregate, individual issues predominate over common issues. *Ibid.* ("*It is only where this predominance exists that economies can be achieved* by means of the class-action device" (emphasis added)).

As this Court recognized in *Amchem*, "[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria" are "not impractical impediments," but "serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment." 521 U.S. at 621. *Comcast* likewise emphasized that the safeguards provided by the predominance requirement obligate courts to take an especially "close look at whether common questions predominate over individual ones." 133 S. Ct. at 1432. Yet the Seventh Circuit's "efficiency" test brazenly substitutes "gestalt judgment" for the required predominance analysis.[2]

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[2] Judge Posner, who authored the Seventh Circuit's opinion, recently stated that, under his "pragmatic" approach to judicial

Left uncorrected, Judge Posner's opinion reducing Rule 23 to a blank slate will become an influential precedent nationwide, paving the way for disparate classes in any "defect" suit where only a small fraction of class members suffered harm. The Chief Judge of the Northern District of Illinois already has relied on *Butler* to certify a product-defect class action beset by individual damages issues, after brushing aside the contrary holding in *Comcast* as "merely dicta." *Harris v. comScore*, 2013 WL 1339262, at *10 & n.9 (N.D. Ill. Apr. 2, 2013). This is a dangerous development that undermines just resolutions because class certification almost always terminates the case due to the immense pressure to settle. *Concepcion*, 131 S. Ct. at 1752. Indeed, a coerced settlement is the only "efficiency" identified by Judge Posner here. Pet. App. 4a-5a. This Court should correct the Seventh Circuit's serious misreading of Rule 23.

III. Plaintiffs Mischaracterize The Factual Record.

Plaintiffs' recitation of facts is irrelevant to the legal questions we have presented. For example, whether 0.37%, or 35%, or 50% of Washer owners experienced odors at some point, half or more *concededly* did not, and so the proposed class

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decision-making, when "orthodox materials do not yield an answer to the legal question presented," or "*the answer they yield is unsatisfactory*, the judge's role is legislative: *to create new law* that decides this case and governs similar future ones." Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. 519, 540 (2012) (emphasis added); see Richard A. Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 242 (1999) (precedent is merely a "sourc[e] of information" and a "limited constrain[t]").

contains hundreds of thousands of uninjured members who can be identified only through individual inquiry. Of course, to the extent there were genuinely disputed facts relevant to the class certification inquiry, they should have been resolved and then tested against the correct Rule 23 standards. *Dukes*, 131 S. Ct. at 2551-2552. But here none are legally relevant.

Most of plaintiffs' factual assertions are not the subject of genuine dispute because they have no support in the record. Plaintiffs' mischaracterization of the record should not be permitted to muddy the Seventh Circuit's dispositive legal errors on recurring issues of immense practical importance. For example:

- All empirical evidence, including surveys from the independent *Consumer Reports*, show a less than 5% occurrence of odor (see Pet. 9);
- Cleaning instructions given to owners changed materially throughout the class period (see Pet. 8 & D231-2); and far from being "extraordinary," they resemble those provided by other manufacturers (D231-13 at 19-24);
- A dozen or more material changes in *relevant* designs and features of the Washers occurred during the class period (D231-8 ¶¶ 41-42);
- Plaintiffs' engineering expert admitted that biofilm accumulation in any machine "depends on the use and habits" of "the consumer" and "the environment the machine sits in" (D231-12 at 11);

- The alleged CCU problem resulted from sporadic errors by individual assemblers, not any uniform manufacturing process, and did not affect the vast majority of Washers (D231-15 ¶¶ 17-20); whether the flaw exists in any particular Washer and caused a malfunction requires machine-specific analysis (*id*. at ¶¶ 18-19).

* * *

Guidance from this Court is sorely needed now. Front-loading washer defect suits like this one are pending across the country, and soon will be ready for trial. See Pet. 5 n.1. The *amicus* briefs attest to the "mounting horde of purported 'class' litigation premised on alleged defects that affect but a handful of consumers." Br. of Prod. Liab. Advisory Council at 5; see Br. of Chamber of Commerce *et al.* at 21 ("class actions alleging product defects have become an increasingly common and expensive area of business litigation"). And the Seventh Circuit's ruling is subject to the same intense criticism leveled against the Sixth Circuit's ruling in *Glazer*—and the same calls for immediate review. See Editorial, *Classy Action at the High Court*, Wall St. J., Mar. 28, 2013, at A14 (the Court "should keep taking cases and overturning heedless junior courts until they get the message"); Editorial, *Reining in Class Action*, Wash. Times, Mar. 28, 2013, at B2; Pet. 5 n.2. The Court should grant certiorari and decide this case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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