No. 13-138

IN THE

Supreme Court of the United States

BSH HOME APPLIANCES CORPORATION,

Petitioner,

v.

SHARON COBB, BEVERLY GIBSON, DIANA TAIT, AND NANCY WENTWORTH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Because the decisions below are contrary to this Court's holdings in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), respondents limit themselves to asserting that a grant of certiorari would be improper or unnecessary. Each of their assertions is incorrect. First, respondents claim the petition is "procedurally infirm" because it comes from a discretionary denial of permission to appeal. But just last term, this Court granted certiorari in just such a case. Next, respondents assert that no circuit split exists on the application of *Comcast*, but the Sixth, Seventh, and Ninth Circuits' interpretations of *Comcast* are irreconcilable with recent decisions from the Eighth, Tenth, and District of Columbia Circuits. Finally, respondents assert that the petition involves only issues of state substantive law, but the certification of classes containing hundreds of thousands of consumers based on allegations rather than evidence of common injury and classwide damages is a quintessential Rule 23 issue.

On the second issue presented, respondents argue that this case is not a good vehicle to resolve the circuit split as to the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). To the contrary, this case presents a prime example of the problems with the so-called "tailored approach."

I. THE COURT CAN AND SHOULD ADDRESS THE NINTH CIRCUIT'S DECISION.

Congress has drawn the outer bounds of this Court's certiorari jurisdiction to include all "[c]ases in

the courts of appeals." 28 U.S.C. § 1254; *see, e.g.*, *Hertz Corp. v. Friend*, 559 U.S. 77, 83 (2010). Accordingly, this Court has power to adjudicate any matter within those bounds, and "[t]he power thus given is not affected by the condition of the case as it exists in the court of appeals." *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897). The Court's jurisdiction over "[c]ases in the courts of appeals," 28 U.S.C. § 1254, "may be exercised before or after any decision by [the lower] court and irrespective of any ruling or determination therein." *Forsyth*, 166 U.S. at 513.

Respondents claim the petition is "procedurally infirm," Opp. 8, but cannot deny that this Court has repeatedly exercised jurisdiction in cases where circuit courts declined the opportunity to perform their own discretionary review. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013); *Hohn v. United States*, 524 U.S. 236, 241–42 (1998); *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 & n.23 (1982); *Ex Parte Quirin*, 317 U.S. 1, 24 (1942). Respondents accuse BSH of "hubris" for relying on *Hohn*, *Nixon*, and *Quirin* because they involved a former President and habeas petitioners, but the Court's jurisdiction does not wax and wane with respondents' perception of how important the underlying claims are. Tellingly, respondents do not so much as mention the statutory provision that defines this Court's certiorari jurisdiction or address *Forsyth*, which has served as a touchstone for the evolution and interpretation of that statutory provision over more than a century.

Most glaringly, respondents ignore this Court's decision just last term in *Standard Fire*, 133 S. Ct. 1345. As BSH does here, Standard Fire sought a writ

of certiorari from the court of appeals' denial of a request to engage in discretionary review of a district court order. *See id.* at 1348. The statute at issue in *Standard Fire* grants the court of appeals no less discretion than does Rule 23(f). *Compare* 28 U.S.C. § 1453(c)(1) ("[A] court of appeals *may accept an appeal* from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order" (emphasis added)) *with* Fed. R. Civ. P. 23(f) ("A court of appeals *may permit an appeal* from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered" (emphasis added)). And the standards that guide a court of appeals' discretion in deciding petitions under the two provisions are virtually identical. *Compare, e.g.*, *Coll. of Dental Surgeons v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 37–39 (1st Cir. 2009), *with Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293–94 (1st Cir. 2000).

Respondents offer no theory to reconcile this Court's exercise of jurisdiction in *Standard Fire* with their assertion that BSH's petition offers "no order properly presented for review." Opp. 11. To the extent respondents contend this case is not important enough to warrant the Court's attention because the underlying claims involve washing machines, this argument fails as well. The issue presented here is not washing machines, any more than the issue presented in *Standard Fire* was homeowner's insurance. The issue is whether a court may, consistent with Rule 23 and due process, certify

classes containing many thousands of persons who cannot have been injured and could not bring a claim on their own. By any measure, this is an important issue, whatever the nature of the underlying claims. *See Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (washing machines); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (same).

In their final procedural gambit, respondents argue that no basis exists for a GVR order because the Ninth Circuit denied BSH permission to appeal post-*Comcast*. Opp. 11–12. Yet BSH seeks a full grant of certiorari to decide the important questions presented in the petition. Unlike in the *Whirlpool* and *Sears* cases, where the lower courts have purported to certify classes on liability issues and to reserve damages issues for subsequent determination,[1] the district court below specifically held that the existence *and amount* of class members' damages was a predominating common question, Pet. App. 24a, despite the absence of *any evidence* that damages could be proved on a classwide basis.

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[1] *Butler v. Sears, Roebuck & Co.*, 11–8029, 2013 WL 4478200, at *4 (7th Cir. Aug. 22, 2013) (*Butler II*) ("Furthermore and fundamentally, the district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine damages on a class-wide basis."), *petition for cert. filed* (U.S. Oct. 7, 2013) (No. 13–430); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) (*Whirlpool II*) ("Here the district court certified only a liability class and reserved all issues concerning damages for individual determination . . . ."), *petition for cert. filed* (U.S. Oct. 7, 2013) (No. 13–431).

II. A DEEPENING CIRCUIT SPLIT EXISTS ON THE APPLICATION OF *COMCAST*.

A grant of certiorari is necessary to maintain the standards this Court has announced in recent class action decisions. In *Wal-Mart*, the Court emphasized that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered *the same injury*.'" 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982)). In *Comcast*, the Court held that predominance of common issues requires the plaintiff to demonstrate that damages can be calculated on a *classwide basis*, with a reliable methodology that limits damages to those attributable to the plaintiffs' legal theory. 133 S. Ct. at 1433. Rule 23 "imposes stringent requirements for certification that in practice *exclude most claims*." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (emphasis added).

Contrary to this precedent, the district court below did not perform a rigorous analysis of predominance. Despite the requirement that class members suffer "the same injury," the court aggregated into classes the few purchasers whose Washers have developed mold and odors with the many whose Washers have not, and the few consumers who were unaware that front-loading washers can develop moldy odors if not properly maintained with the many who were aware and thus cannot have been deceived. The court also did not require any showing that damages could be determined on a classwide basis, but simply declared that entitlement to damages and "the proper amount thereof" were predominating common questions. Pet. App. 24a. Despite the subsequent issuance of *Comcast*—and the GVR of the *Whirlpool* and *Sears*

decisions for reconsideration in light of *Comcast*—the Ninth Circuit denied BSH permission to appeal and then declined to reconsider its decision. Pet. App. 1a–2a; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013) (highly individualized damages determinations cannot defeat class certification).

The Ninth Circuit is not alone in ignoring and discounting *Comcast*. In its decision on remand in *Whirlpool II*, the Sixth Circuit (Stranch, J.) followed the *dissenting* opinion in *Comcast*, holding that "[w]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate." *Whirlpool II*, 722 F.3d at 860 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting)). The Seventh Circuit (Posner, J.) followed suit, holding that if common issues of liability exist and "the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses," the inability to prove damages on a classwide basis "should not preclude class certification." *Butler II*, 2013 WL 4478200, at *5.

Respondents assert that no circuit split exists. But whereas the Sixth, Seventh, and Ninth Circuits have ignored *Comcast* or interpreted it to be *sui generis*, the Eighth, Tenth, and District of Columbia Circuits apply *Comcast*'s holding. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (vacating the certification an antitrust class where the plaintiffs' damages model included persons who were not harmed: "No damages model,

no predominance, no class certification."); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1219–20 (10th Cir. 2013) (vacating certification of a class of natural gas royalty holders where the district court had not sufficiently considered individualized issues of injury and damages); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779-80 (8th Cir. 2013) (reversing class certification in light of *Comcast* where inquiries regarding individual class members' medical bills would predominate).

A situation therefore exists where three circuits interpret *Comcast* according to its holding whereas three others limit *Comcast* to its facts. According to these latter circuits, *Comcast* applies only where plaintiffs do not reserve damages issues for later determination *and* rely on a damages model that is broader than the asserted theories of legal harm. Of course, this means *Comcast* will rarely if ever apply. The Court's intervention is necessary to resolve this circuit split.

III. THE *COMCAST* QUESTION TURNS ON THE APPLICATION OF RULE 23, NOT STATE LAW.

The district court certified four statewide classes on consumer fraud claims without *any evidence* that absent class members experienced problems with their Washers, that these class members were unaware moldy odors could form if basic maintenance steps were not taken, or that damages could be determined on a classwide basis. In direct contravention of this Court's class action jurisprudence, the purportedly predominating common issues of "propensity," reliance, and damages were purely hypothetical.

Despite this, respondents assert that the only question raised by the petition is whether under state law a consumer can be harmed by paying too much for a defective product. Opp. 14. Apparently under respondents' interpretation of *Comcast*, any plaintiff may meet Rule 23(b)(3)'s predominance requirement simply by *alleging* that (1) a product has an undesirable propensity (without any admissible evidence as to causation); (2) all customers therefore paid too much for the product (without any evidence that they were unaware of the "propensity"); and (3) damages are a common issue (without any model to support this assertion and even though class members purchased the product over a seven-year period, from different retailers at different prices, and seek compensatory damages in addition to restitution).

Respondents focus on the question of whether the Washers are *defective*. Opp. 14–17. But this is not the legal theory upon which the district court certified the classes. The classes were certified on respondents' theory that BSH failed to disclose a "propensity." Pet. App. 27a (respondents need prove only a propensity), 70a (the cause of the propensity is "irrelevant"). The district court did not even identify defect as a common question. Pet. App. 13a, 24a. Respondents only cite implied warranty authorities, Opp. 14–17, even though seven of their nine claims sound in consumer fraud, and make no attempt to defend the district court's certification of classes on the consumer fraud claims.

Respondents avoid the actual basis of the class certification because a failure to disclose is material only if it would have *changed a consumer's buying*

decision. That is an inherently individual issue where, among other things, (i) some class members (including one named plaintiff) had previously owned front-loading washers and were aware that maintenance was necessary to prevent biofilm, mold, and odors; (ii) *Consumer Reports* had for years discussed mold complaints concerning front-loading washers; and (iii) many consumers will opt for a front-loading washer and undertake the steps necessary to keep them dry and odor-free.[2] A "premium price" theory does not eliminate individual issues because consumers who purchased a Washer knowing of its "propensity," or not caring about it, were not deceived and therefore did not overpay. *See* Pet. 12.

Indeed, in *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545 (5th Cir. 2003), upon which respondents rely, Opp. 15–17, the Fifth Circuit *reversed* certification of the plaintiffs' fraud-based claims regarding a towing hitch that could not perform as represented by the manufacturer, finding that individual issues of reliance predominated. 320 F.3d at 549–50. Only in the context of contract-based implied warranty claims did the court rely on a "benefit of the bargain" theory, and the evidence showed the towing hitch could not safely perform as advertised. *Id.* at 546–47, 551–52.

Moreover, the implied warranty decisions respondents cite are inapposite because they apply Texas

[2] *See In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 133–34 (2009) (on allegations that defendant failed to disclose health risks associated with Vioxx, denial of class certification was proper where the risks "*were not material* for all patients" since "[s]ome patients would still take Vioxx today if it were on the market" and "some physicians would still prescribe it regardless of risks").

law, which does not apply here. Under California law, which does apply here, an unmanifested defect can support a claim for breach of implied warranties only if the plaintiff proves that "that [the product] contains an inherent defect which is *substantially certain to result in malfunction during the useful life of the product*." *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th, 908, 918 (2001). Indeed, California courts have rejected the "premium price" theory upon which the district court relied. *See Am. Honda Motor Co. v. Super. Ct.*, 199 Cal. App. 4th 1367, 1375–76 (2011).

In the end, class members who knew of the Washers' "propensity" or who never experienced "foul odors" received exactly what they paid for. Respondents' reliance on dicta concerning the standing of cigarette purchasers to bring antitrust claims does not change this. *See* Opp. 17 (quoting *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999)).

IV. RESPONDENTS' EFFORTS TO AVOID THE *DAUBERT* QUESTION FAIL.

There is indisputably a circuit split on whether *Daubert* applies at the class certification stage, or whether district courts should examine the admissibility of expert evidence under a lower, "tailored" standard. The district court spent many pages discussing the split, characterizing this Court's observations in *Wal-Mart* as incorrect dicta, and adopting the approach followed by the Eighth Circuit. Pet. App. 53a–69a.

Respondents first attempt to deny the existence of a circuit split, but without discussing or trying to

explain the relevant decisions. Opp. 17–18. Whereas BSH cited seven decisions from four circuits to show the split, respondents cite just two. They then suggest that one of the two decisions, *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815–16 (7th Cir. 2010) (per curiam), has questionable vitality because it predates *Wal-Mart*. Opp. 18 n.5. What respondents fail to mention is that the Seventh Circuit reaffirmed *American Honda* after *Wal-Mart. See Messner v. Northshore Univ. Healthsys.*, 669 F.3d 802, 811–14 (7th Cir. 2012).

Next, Respondents assert that a grant of certiorari would not address the "claimed conflict." Opp. 18. To the contrary, this case highlights the problems with a "tailored" approach under which a court picks and chooses which parts of expert testimony seem "helpful." The district court admitted expert testimony that the Washers are defective, but ruled that the only relevant issue was whether they had common design. Pet. App. 70a–74a. Without admissible expert testimony as to the cause of the "propensity," however, nothing ties together class members other than that they bought a Washer and live in a particular state. This is insufficient after *Wal-Mart*, which clarified that more than a merely hypothetical common question must be identified; respondents must *adduce evidence* that the alleged injuries of all class members can be traced to the same source of injury. 131 S. Ct. at 2551. The alleged propensity to develop odors in any class member's Washer could be due various causes (*e.g.*, improper installation, misuse, malfunction, environment).

Finally, respondents argue that widespread confusion in district courts across the nation is no reason to grant certiorari. Opp. 18. Yet the confusion directly results from the circuit split described in the petition, and only this Court can resolve that split.

CONCLUSION

The petition for certiorari should be granted. At minimum, the petition should be held pending determination of two later-filed petitions that raise many of the same issues—*Sears, Roebuck & Co. v. Butler* (No. 13–430) and *Whirlpool Corp. v. Glazer* (No. 13–431).

Respectfully submitted,

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