No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case suffers from precisely the same errors as those in two Court of Appeals opinions that this Court recently vacated and remanded. *See Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) and *Sears, Roebuck & Co. v. Butler*, -- S. Ct. --, No. 12–1067, 2013 WL 775366 (U.S. June 3, 2013). The district court certified four statewide classes of washing machine purchasers on plaintiffs' allegations that the machines had a "propensity" to develop odors that the manufacturer failed to disclose, concluding that it was irrelevant whether class members' washers *did* develop odors or whether any odors were due to product misuse. The questions presented are:

1. Whether after *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the absence of a showing that injury can be proved on a classwide basis precludes class certification under Federal Rule of Civil Procedure 23(b)(3).

2. Whether at the class certification stage of litigation a district court must analyze the admissibility of expert testimony under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

PARTIES TO THE PROCEEDING

Petitioner BSH Home Appliances Corporation is a wholly owned subsidiary of BSH Bosch und Siemens Hausgeräte GmbH, a German company.

Plaintiffs-Respondents are Sharon Cobb, Beverly Gibson, Diana Tait, and Nancy Wentworth.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

BSH Home Appliances Corporation ("BSH") petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Ninth Circuit denying BSH permission to appeal class action certification, an order of the Ninth Circuit denying reconsideration of that denial in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013), and the underlying class certification order of the United States District Court for the Central District of California.

ORDERS BELOW

The order of the court of appeals denying permission to appeal (Pet. App. 1a) is unpublished. The court of appeals' order denying reconsideration of its decision (Pet. App. 2a) is unpublished. The order of the district court granting in part plaintiffs' motion for class certification (Pet. App. 3a–75a) is reported at 289 F.R.D. 466.

JURISDICTION

BSH seeks review of an order of the court of appeals entered on April 1, 2013 denying BSH's petition for permission to appeal class action certification. Pet. App. 1a; *see* Fed. R. Civ. P. 23(f). The court of appeals denied BSH's timely motion for reconsideration on May 23, 2013. Pet. App. 2a. On June 20, 2013, Justice Kennedy granted BSH's application for an extension of time to file a petition for writ of certiorari to and including July 30, 2013. Pet. App. 164a–165a. The Court's jurisdiction rests on 28 U.S.C. § 1254(1). *Cf., e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1348 (2013) (review

of a discretionary decision not to hear an appeal of an order remanding a class action removed to federal court under the Class Action Fairness Act); *Hohn v. United States*, 524 U.S. 236, 241–42 (1998) (an application for a certificate of appealability is a "case" in the Court of Appeals and 28 U.S.C. § 1254(1) affords jurisdiction to review its denial).

RULE INVOLVED

Federal Rule of Civil Procedure 23 provides in relevant part:

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> > (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> >
> > (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> >
> > (D) the likely difficulties in managing a class action.

* * *

(f) APPEALS. 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. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

STATEMENT OF THE CASE

Plaintiffs are purchasers of Bosch and Siemens 27" front-loading clothes washing machines ("Washers"). Plaintiffs allege that the Washers are defective because they have a propensity to develop biofilm, mold, mildew, and odors, resulting in property damage. *See* Pet. App. 4a–5a. They seek relief under the consumer protection laws of California, Illinois, Maryland, and New York, as well as the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, for BSH's alleged failure to disclose this "propensity." *See* Pet. App. 4a–5a. The district court had jurisdiction under 28 U.S.C. § 1332(d).

After the completion of class discovery, Plaintiffs moved to certify four statewide classes of Washer purchasers under Federal Rule of Civil Procedure 23(b)(3). *See* Pet. App. 4a. The class definitions include *any* purchaser of a Washer, regardless whether the purchaser experienced odors, or was aware of the alleged "propensity" at the time of purchase. *See* Pet. App. 5a–9a Under Plaintiffs' theory, all purchasers of Washers were harmed at the time of purchase by paying a premium price for a defective product.

BSH opposed the motion, arguing that the putative class members lacked commonality, and that in any event, common questions did not predominate. Fed.

R. Civ. P. 23(a), (b)(3). BSH offered evidence that, among other things: (1) 99 percent of Washer purchasers never complained of odors and therefore have not been harmed; (2) many purchasers who did complain of odors improperly installed or misused the Washers; (3) all washing machines—front-loaders and top-loaders—can develop odors; and (4) some class members were aware of the potential for odors prior to purchase and bought Washers anyway. *See* Pet. App. 87a. In these circumstances, BSH argued, it is not possible to determine on a classwide basis whether purchasers paid a premium price (as Plaintiffs alleged) or, instead, received the benefit of their bargains. *See* Pet. App. 91a–92a.

The district court disagreed, and certified four statewide classes of purchasers.[1] Pet. App. 75a. In concluding that common issues of fact and law predominated over individual issues, the district court relied on the Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 678 F.3d 409 (6th Cir. 2012), which this Court later vacated, *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013).[2] Pet. App. 26a–27a.

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[1] The district court certified classes of California, New York, and Maryland purchasers and an Illinois subclass of purchasers subject to a statute of limitations defense. The district court granted plaintiffs leave to substitute a new named plaintiff for an Illinois class not subject to this defense. Pet. App. 75a.

[2] This Court GVR'd *Whirlpool* in light of *Comcast.* Notwithstanding this Court's clear guidance in *Comcast*, which points to denial of class certification in these cases, a two-judge panel of the Sixth Circuit recently reinstated the class action order in *Whirlpool*. *See* -- F.3d --, No. 10-4188, 2013 WL 3746205 (6th Cir. July 18, 2013) (Martin and Stranch, JJ.). The Sixth Circuit does not discuss *Comcast* until the final pages of its decision, and then concludes *Comcast* is irrelevant because

The district court stated, as the *Whirlpool* court had, that "Plaintiffs need only prove that Defendant's products had a common design and the design created a *propensity* for the products to develop an undesirable condition; Plaintiffs need not prove that every product actually developed this undesirable condition." Pet. App. 27a. In the district court's view, whether any odors that formed in a Washer were due to product misuse was a "red herring" "because the harm for which Plaintiffs sue is not the *actual manifestation* of BMFO,[3] but . . . Defendant's *failure to disclose* the Washers' *propensity* to develop BMFO." Pet. App. 27a.

(continued…)

the district court "certified only a liability class and reserved all issues concerning damages for individual determination." *Id.* at *17. Quoting the dissent in *Comcast*, the Sixth Circuit holds that when "'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.'" *Id.* at *18 (quoting *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J., dissenting)). The Sixth Circuit also reaffirmed its "premium price" theory of injury, twice citing the district court decision in this very case. *Id.* at *13-14 (citing *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 479 (C.D. Cal. 2012)). Nowhere does the Sixth Circuit address the fact that, even if this theory were valid, putative class members who never experience odors in their washers would have a materially different injury than putative class members whose washers develop "mold and mildew . . . leading to ruined laundry and malodorous homes." *Id.* at *1; *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (class members must "suffer[] the same injury").

[3] "BMFO" is an acronym Plaintiffs coined for "biofilm, mold, mildew, and foul odors."

Accordingly, the district court ruled that whether the Washers have a propensity to develop odors, whether BSH knew of this propensity, whether a reasonable consumer would have been deceived by a failure to disclose this propensity, and whether class members were entitled to damages were predominating common issues. Pet. App. 24a. The district court was unconcerned by the myriad individualized issues that would suffuse a proper adjudication of Plaintiffs' claims, such as whether class members' Washers formed odors during their useful lives; whether any odors that did form in a class member's Washer were due to misuse; or whether class members knew of the alleged propensity at the time of purchase. Pet. App. 25a–29a. Nor did the district court require Plaintiffs to show that damages or restitution could be proved on a classwide basis, even though class members bought their Washers from third-party retailers at various times and prices and had different experiences with their Washers.

The court also admitted the testimony of Plaintiffs' two experts, over BSH's objection, without requiring either to meet the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet. App. 69a–75a. Instead, the district court applied what it called a "tailored" analysis for class certification, under which "robust gatekeeping of expert evidence is not required" and relevance and reliability serve only as "guideposts." Pet. App. 67a–68a; *see also* Pet. App. 53a–66a. Based on its conclusion that "merits" issues were irrelevant to class certification, the district court overruled BSH's objections to the experts' testimony regarding the Washers' alleged common defect. Pet. App. 69a–75a. The district court did so despite the fact that

Plaintiffs' engineering expert was unfamiliar with one of BSH's two product lines and based his theory that *all* its Washers share a common defect on *viewing*, not testing, five non-randomly selected Washers owned by Plaintiffs. Pet. App. 69a-70a. Nor did Plaintiffs' experts control for the effect of misuse, improper installation, or environment, without which no conclusion as to the "commonality" of any alleged defect is reliable. *See* Pet. App. 95a.

BSH timely petitioned the Ninth Circuit under Federal Rule of Civil Procedure 23(f) for permission to appeal the class certification order. Pet. App. 76a–106a. BSH raised three issues:

> 1. After *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), is it improper for a district court to certify a class action upon *allegations* that a product is defective without conducting a rigorous analysis of evidence bearing on whether the alleged defect in fact raises common issues as to the class members?
>
> 2. After *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011), must a district court perform a full *Daubert* analysis of expert testimony proffered at the class certification stage?
>
> 3. Did the district court commit manifest error in concluding that issues of reliance do not raise predominantly individual issues that preclude class certification under Rule 23(b)(3)?

Pet. App. 86a. Plaintiffs opposed the petition, relying heavily on the Sixth Circuit's since-vacated decision in *Whirlpool* and the Seventh Circuit's since-vacated decision in *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *vacated*, 133 S. Ct. 2768 (2013).

Pet. App. 107a–129a. BSH filed a reply. Pet. App. 130a–147a.

On April 1, 2013, five days after this Court issued its opinion in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and on the very same day this Court vacated the Sixth Circuit's decision in *Whirlpool*, *see* 133 S. Ct. 1722, a two-judge motions panel of the Ninth Circuit summarily denied BSH's petition for permission to appeal. Pet. App. 1a (Graber & Bea, JJ.).

BSH timely moved for reconsideration under Ninth Circuit Rule 27-10(a), highlighting this Court's remand of *Whirlpool* to the Sixth Circuit for further consideration in light of *Comcast*. Pet. App. 157a–63a.[4] BSH argued that, like the Sixth Circuit, the Ninth Circuit had an obligation to consider "how *Comcast* applies in the context of consumer class actions where plaintiffs have not shown that injury or damages can be proved on a classwide basis." Pet. App. 159a. BSH also noted that, because this Court in *Comcast* did not reach the issues of how *Daubert* applies on a class certification motion, it remained an open issue that the Ninth Circuit should address. Pet. App. 160a. The Ninth Circuit denied BSH's motion for reconsideration on May 23, 2013. Pet. App. 2a.

[4] BSH had advised the Ninth Circuit of this Court's decisions in *Comcast* and *Whirlpool* on the dates those GVR orders were issued. Pet. App. 148a–56a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S REFUSAL TO CONSIDER THE EFFECT OF THIS COURT'S DECISIONS IN *COMCAST* AND *WHIRLPOOL* CALLS FOR AN EXERCISE OF SUPERVISORY JURISDICTION.

The Court may grant certiorari if it is convinced that a ruling of a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a). This is such a case.

1. In *Comcast*, this Court reaffirmed that plaintiffs "'must affirmatively demonstrate [their] compliance' with Rule 23" because Rule 23 "'does not set forth a mere pleading standard.'" *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart*, 131 S. Ct. at 2551). Plaintiffs must "show (1) that the existence of individual injury" resulting from the alleged violation is "'capable of proof at trial through evidence that was common to the class rather than individual to its members'; and (2) that the damages resulting from that injury [are] measurable 'on a class-wide basis' through use of a 'common methodology.'" *Id.* at 1430 (quoting 264 F.R.D. 150, 154 (E.D. Pa. 2010)).

Plaintiffs' burden to satisfy "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)" and requires "evidentiary proof" that Rule 23(b)(3) has been satisfied. *Id.* at 1432. Accordingly, courts have a "duty to take a 'close look' at whether common questions predominate over individual ones," and must address merits issues necessary to the resolution of the Rule 23 inquiry. *Id.* (quoting

Wal-Mart, 131 S. Ct. at 2558 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997))).

Comcast also requires that "any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged . . . effect of the violation." *Id.* at 1433. And for purposes of Rule 23, "courts must conduct a rigorous analysis to determine whether that is so." *Id.* The Court explained that applying an "arbitrary" measure of damages simply because it can be applied classwide "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* Thus, a "methodology that identifies damages that are not the result of the wrong" cannot support certification of a class. *Id.* at 1434.

2. Shortly after deciding *Comcast*, the Court granted certiorari, vacated, and remanded two class actions whose facts and theories are, for all relevant purposes here, indistinguishable from this action.

Five days after *Comcast*, the Court vacated and remanded the Sixth Circuit's judgment in *Whirlpool* for further consideration in light of *Comcast*. *Whirlpool*, 133 S. Ct. at 1722. In *Whirlpool*, as here, the district court certified a statewide class of washing machine purchasers on allegations that the machines had a propensity to develop biofilm and odors. *See* 2010 WL 2756947 (N.D. Ohio July 12, 2010). As here, the district court in *Whirlpool* certified the statewide class despite evidence that most class members never experienced odors and those who did may have misused their washers. *Id.* at *3–4 & n.4. The Sixth Circuit adopted a "premium price" theory to affirm the class certification decision,

see Whirlpool, 678 F.3d at 420–21, which the district court here followed, Pet. App. 26a–27a.

The following month, this Court likewise vacated and remanded the Seventh Circuit's decision in *Butler* for further consideration in light of *Comcast*. *Butler*, 133 S. Ct. 2768. As in *Whirlpool*, and as in this case, the plaintiffs in *Butler* alleged that the washing machines at issue (Kenmore brand) had a defective design that caused them to develop biofilm and odors. *See* 702 F.3d at 361. The Seventh Circuit reached the same result as in *Whirlpool* and in this action, certifying a class of washer purchasers despite evidence that most class members never experienced odors and despite acknowledging that the calculation of damages would raise individual issues. *Id.* at 362–63.

3. As in *Comcast*, *Whirlpool*, and *Butler*, the courts below did not require Plaintiffs to show that resolving the question whether each Washer buyer suffered injury and damages could be resolved with common evidence. Instead of rigorously analyzing predominance, the district court disregarded the fact that as many as 99 percent of class members never experienced any odor problem with their Washers. Nor, with two minor exceptions, did the district court cite evidence or resolve factual disputes bearing on satisfaction of the predominance requirement, and instead relied exclusively on Plaintiffs' allegations and theories. *See* Pet. App. 23a–44a.

The district court also did not determine whether individual issues regarding liability, injury, and damages would overwhelm the purportedly common issue of "propensity." Instead, the district court relied on a "premium-price" theory under which all

buyers are deemed uniformly injured, regardless of whether they ever experienced an odor. Pet. App. 26a–27a. This theory is more arbitrary than the theory found insufficient to support class certification in *Comcast*. Whereas an expert opinion supported plaintiffs' theory in *Comcast*, here the Plaintiffs offered no evidence of any kind to show how "premium price" damages could be calculated on a classwide basis.

Indeed, as a matter of common sense, a "premium price" theory does not eliminate individual issues. If a class member paid $800 for a Washer that never developed odors during its useful life, the buyer did not overpay. This is true regardless whether any other owner did experience odors. *See, e.g.*, *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001) ("If the defect has not manifested itself [during the product's useful life], the buyer has received what he bargained for."); *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 122-27 (N.Y. App. Div. 2002) (discussing and rejecting "tendency to fail" claims). Likewise, class members who bought Washers with knowledge of potential odors did not overpay. And class members who *would* have bought their Washers had they known—for example, to take advantage of the significant energy and water savings the Washers create—did not overpay. All these class members received precisely what they bargained for. Determining which members did or did not overpay therefore requires an inherently individualized inquiry.

Because some class members' Washers developed odors and others did not, some class members knew of the potential for odors and others did not, some

class members misused their washers and others did not, and all class members bought their Washers from third-party retailers for various prices and receiving various rebates, the four certified statewide classes cannot meet the requirements of Rule 23(b)(3). Whether class members were injured at all—and, if so, why and to what extent—will inevitably overwhelm any questions common to the classes.

4. Notwithstanding this Court's issuance of its *Comcast* decision while BSH's Rule 23(f) petition was pending, and despite the vacatur and remand of the legally indistinguishable *Whirlpool* judgment for further consideration in light of *Comcast*, the Ninth Circuit denied BSH's petition and then denied reconsideration of its decision. Pet. App. 1a–2a. This Court's vacatur and remand of the Seventh Circuit's equally indistinguishable *Butler* decision 11 days after the Ninth Circuit's denial of reconsideration highlights and confirms the Ninth Circuit's abuse of its discretion.[5]

Indeed, how *Comcast* applies in the context of a consumer class action where, as here, plaintiffs have

[5] If anything, the class certification decisions in *Whirlpool* and *Butler* are less far afield than the one here, as BSH explained in its reply brief to the Ninth Circuit. Pet. App. 143a–145a. Accordingly, the widespread criticism those decisions received applies equally, if not more so, here. *See, e.g.*, Theodore H. Frank, *The Supreme Court Must Stop the Trial Lawyers' War on Innovation*, Forbes.com, May 24, 2013; Michael Hoenig, *Supreme Court Review Sought on Crucial Class Action Issues*, N.Y.L.J. (online), Dec. 12, 2012; J. Gregory Sidak, *Supreme Court Must Clean Up Washer Mess*, Wash. Times, Nov. 16, 2012, at B28; *Supreme Laundry List: The Justices Should Hear a Misguided Class-Action Case*, Wall St. J., Oct. 10, 2012, at A18.

not shown that injury or damages can be proved on a classwide basis is a question of nationwide importance and, as a practical matter, can only be decided by means of a petition for permission to appeal. *See* Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005) (90 percent of class actions settle after certification). Rule 23(f) was designed for just this kind of situation. *See, e.g.*, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (permission to appeal under Rule 23(f) is appropriate "when an appeal implicates novel or unsettled questions of law" because "early resolution through interlocutory appeal may facilitate the orderly development of the law"); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) ("[T]he more fundamental the question and the greater the likelihood that it will escape effective disposition at the end of the case, the more appropriate is an appeal under Rule 23(f).").

By refusing to hear BSH's appeal, either to decide the issues or to vacate and remand the certification order for further consideration in light of *Comcast*, the Ninth Circuit also countenanced a district court decision that is wildly inconsistent with this Court's precedent. The district court summarily concluded that *Wal-Mart* has no application to consumer class actions. Pet. App. 14a n.2. So, the district court failed to heed this Court's admonition that a common question of fact or law "must be of such a nature 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." *Wal-Mart*, 131 S. Ct. at 2551. The "common questions" identified by the

district court do not remotely meet this test. For example, whether Washers have a "propensity" to develop odors, Pet. App. 24a, does not resolve *any* issue "central to the validity of [Plaintiffs'] claims," because a particular Washer may develop a "propensity" for odors as a result of misuse, neglect, environment, or a whole host of factors other than design.

Nor, contrary to the district court's reasoning, can it be a common question whether "as a result of Defendant's conduct, Plaintiffs have suffered damages *and, if so, the proper amount thereof*." Pet. App. 24a (emphasis added). As this Court noted in *Comcast*, even if the plaintiffs' damages model had properly tied the damages analysis to the theory of liability, it still would be insufficient to establish the "requisite commonality of damages unless it plausibly showed" that the impact of the wrongful conduct was the same for all class members. 133 S. Ct. at 1435 n.6. Here, class members purchased their Washers from different retailers at different prices and received different rebates. Determining how much any particular class member overpaid would necessitate individual inquiries that would overwhelm any common ones.

5. That a court of appeals has broad discretion to grant or deny a petition for permission to appeal, *see* Fed. R. Civ. P. 23(f), does not reduce the need for this Court's review because the Ninth Circuit's abuse of its discretion is manifest for the reasons discussed above.[6]

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[6] Although the Advisory Committee's Note to Rule 23 describes a court of appeals' discretion under subdivision (f) as "unfettered," the Court is not bound by interpretations of rules

Moreover, quite aside from the scope of the Ninth Circuit's discretion, the pendency of BSH's petition in the court of appeals allows this Court to directly review the district court's class certification order. *See* 28 U.S.C. § 1254(1). Shortly after Congress determined that this Court should have discretion over at least part of its docket and provided for the writ of certiorari, *see* Act of Mar. 3, 1891, 26 Stat. 826, 828, this Court recognized that, as a prerequisite to its jurisdiction, "[a]ll that is essential is that there be a case pending in the Circuit Court of Appeals . . . ." *Forsyth v. Hammond*, 166 U.S. 506, 513 (1897). As statutory provisions defining this Court's jurisdiction have been amended over the intervening years, *see* Pub. L. No. 475, 36 Stat. 1087, 1157 (Mar. 3, 1911); Pub. L. No. 415, 43 Stat. 936, 938–39 (Feb. 13, 1925); Pub. L. No. 773, 62 Stat. 869, 928 (June 25, 1948); Pub. L. No. 100-352, 102 Stat. 662 (June 27, 1988), this basic idea has not changed.

In *Hohn v. United States*, this Court concluded that a lower court's denial of a petition for discretionary review itself constitutes "a case" from which an appeal can be taken. *Hohn*, 524 U.S. at 252. *Hohn* was a habeas case, in which the petitioner

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(continued…)

or statutes reflected in the Advisory Committee Notes. *See, e.g.*, *Hohn*, 524 U.S. at 245 ("We must reject the suggestion contained in the Advisory Committee's Notes on Federal Rule of Appellate Procedure 22(b) that '28 U.S.C. § 2253 does not authorize the court of appeals as a court to grant a certificate of probable cause.'"); *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1152 (2002) (noting that the Court "consistently refuses to accord the [Advisory Committee] Notes binding authority").

sought review of the circuit court's denial of a certificate of appealability. *Id.* at 239. The Court appointed an *amicus curiae* to contest the question of jurisdiction but ultimately decided that Hohn's petition for a writ of certiorari was properly before the Court and vacated the circuit court decision. *Id.* at 239, 241. In reaching that outcome, the Court reviewed its prior decisions. In particular, it focused on two cases where a lower court declined a petition for review and the Court held that appeal was proper. *See id.* at 246–47 (discussing *Ex Parte Quirin*, 317 U.S. 1 (1942), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)).

Ex Parte Quirin involved seven German-born saboteurs captured in the United States and charged in a military commission. They filed petitions with the United States District Court for the District of Columbia seeking leave to file petitions for a writ of habeas corpus. When the district court denied them leave, the petitioners sought Supreme Court review and this Court held that it had jurisdiction to consider their petitions: "Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari." 317 U.S. at 24.

Nixon v. Fitzgerald was a civil suit seeking damages from the former President based on an employment decision made in his official capacity during his tenure in office. *See* 457 U.S. at 738–40. When the district court denied Nixon's motion to dismiss the suit on the theory of absolute immunity,

he filed an interlocutory appeal in the United States Court of Appeals for the District of Columbia Circuit. *See id.* at 741. That court dismissed his appeal, holding that the district court's decision "failed to present a 'serious and unsettled question' of law sufficient to bring the case within the collateral order doctrine." *Hohn*, 524 U.S. at 246. Nixon sought Supreme Court review, and Fitzgerald argued that, because the circuit court had dismissed the case for want of jurisdiction, "the District Court's order was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of § 1254." *Nixon*, 457 U.S. at 742. The Court rejected this position, holding that the order met the criteria for interlocutory review and that, regardless, "[t]here can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction." *Id.* at 742–43 & n.23.

Hohn, *Quirin*, and *Nixon* illustrate that a lower court's consideration of a request for adjudication creates a "[c]ase[] in" that lower court. All three therefore support the proposition that a Rule 23(f) petition is a "case[] in the court[] of appeals," 28 U.S.C. § 1254, whether it is granted or denied. Rule 23(f) was adopted pursuant to 28 U.S.C. § 1292(e), which "authoriz[es] this Court to promulgate rules designating certain kinds of orders as immediately appealable." *Johnson v. Jones*, 515 U.S. 304, 310 (1995). By allowing parties to bring class certification rulings before courts of appeals, Rule 23(f) brings those rulings within this Court's jurisdiction. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 79 (9th ed. 2007) ("[T]he Court has given a broad interpretation to the word 'cases' so as to include not

only a fullblown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals or a judge thereof."). As the Court explained in *Hohn*, a request to proceed before a court of appeals should not be "regarded as a threshold inquiry separate from the merits which, if denied, prevents the case from ever being *in the court of appeals*." 524 U.S. at 246 (emphasis added).

Whether review is of the Ninth Circuit's denial of permission to appeal or of the district court's class certification order itself, a grant of certiorari is necessary to maintain the standards this Court announced in *Wal-Mart* and reaffirmed in *Comcast*, whose relevance to the determination of the appropriateness of this action for class treatment is indisputable after the Court's GVR orders in *Whirlpool* and *Butler.*

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER *DAUBERT* APPLIES AT CLASS CERTIFICATION.

A second reason to grant certiorari is to resolve a circuit split on an important, oft-recurring issue in federal class actions nationwide. The courts of appeals are divided on whether *Daubert*, 509 U.S. 579 fully applies at the class certification stage or whether district courts should instead examine the admissibility of expert evidence under a lower, "tailored" standard.

The Seventh and Eleventh Circuits have held that *Daubert* fully applies at class certification. *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam) (holding that "when an

expert's report or testimony is critical to class certification. . ., a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."); *accord Messner v. Northshore Univ. Healthsys.*, 669 F.3d 802, 811–14 (7th Cir. 2012); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890–91 (11th Cir. 2011) (unpublished).

The Fifth and Ninth Circuits have indicated agreement with this approach. *See Ellis*, 657 F.3d at 982 (at the class certification stage, "the trial court must act as a 'gatekeeper' to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable."); *Unger v. Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005) ("In many cases, it makes sense to consider the admissibility" of expert testimony at the Rule 23 certification stage, because "[i]n order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable.").

The Eighth Circuit, by contrast, has held that district courts should perform a "tailored" *Daubert* analysis under which the court examines only "the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 614 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 1752 (2013). The Third Circuit has indicated agreement with the Eighth Circuit's approach. *Behrend v. Comcast Corp.*, 655 F.3d 182,

204 n.13 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013).[7]

This circuit split has resulted in widespread uncertainty among district courts in the Ninth Circuit, *see* Pet. App. 97a–98a & nn. 4–5, and well beyond, *see, e.g.*, *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 208 (M.D. Pa. 2012) ("Despite the paucity of relevant precedent in the Third Circuit and the discordant views percolating in the circuits, the court finds that a thorough *Daubert* analysis is appropriate at the class certification stage of this MDL in light of the court's responsibility to apply a 'rigorous analysis' to determine if the putative class has satisfied the requirements of Rule 23."); *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090 ADM/AJB, 2012 WL 3031085, at *6 (D. Minn. July 25, 2012) ("[a]t the class certification stage, the Court, not a jury, is the decision maker, and therefore a less stringent analysis is required."); *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 24 (D.D.C. 2012) ("it is unclear whether a full analysis of [a class certification expert's] report and testimony is even appropriate at this stage" in light of the conflict between *Zurn Pex* and *American Honda*).

Indeed, this Court granted certiorari in *Comcast* to resolve the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class had introduced *admissible*

[7] But one district court in the Third Circuit recently performed a full *Daubert* analysis, including holding a *Daubert* hearing, with regard to the same issues (and one of the same experts) as in this action. *See In re Front Loading Washing Machine Class Action Litig.*, No. 08-51 FSH, 2013 WL 3466821, at *1-8 (D.N.J. July 10, 2013).

evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *See* 133 S. Ct. at 1431 n.4 (emphasis added). The Court ultimately decided *Comcast* on a different ground given the petitioner's failure to object to the admission of the expert testimony at issue. *Id.* The extent to which *Daubert* applies at the class certification stage of litigation therefore remains an open question, the answer to which will bring much-needed clarity to putative class actions in federal courts across the nation.

This case presents an excellent vehicle to decide this issue. The district court denied BSH's *Daubert* motions to strike the testimony of Plaintiffs' engineering expert Brian Clark and microbiologist Chin Yang, who opined that the Washers are defective and share a common design even though neither expert examined a random sample of Washers or controlled for the effects of misuse, improper installation, or environment. *See* Pet. App. 69a–70a, 95a. Even on the limited issue of common design, Clark only examined Washer models owned by plaintiffs, all of which were from the same line, and Clark was unfamiliar with a separate model line; "understood" from visiting websites and reading deposition testimony that Bosch models used similar components; but admitted that the models did not share all the same components. *See* Pet. App. 95a n.3.

The district court interpreted the Ninth Circuit's decision in *Ellis* as being consistent with the notion that "robust gatekeeping of expert evidence is not required" on a motion for class certification and "the court should ask only if expert evidence is 'useful in

evaluating whether class certification requirements have been met.'" Pet. App. 60a–62a (quoting *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 635–36 (N.D. Cal. 2007), *rev'd on other grounds*, 657 F.3d 970 (9th Cir. 2011)). The district court also rejected this Court's suggestion to the contrary in *Wal-Mart*, *see* 131 S. Ct. at 2553-54, as "dicta" that "mischaracterize[d]" the record in that case, Pet. App. 58a–59a.

According to the district court, *Daubert*'s requirements of relevance and reliability serve only as "guideposts." Pet. App. 67a. Concluding that the existence or nonexistence of a common defect in the Washers was a "merits" issue irrelevant to the class certification determination, and the only relevant matters were Plaintiffs' allegations and the existence of a common design, the district court ruled that the expert opinions were reliable enough to admit for class certification purposes. Pet. App. 70a–71a, 74a–75a.

In sum, the district court evaluated Plaintiffs' expert evidence under a "tailored" standard that bears no resemblance to *Daubert*. This error, like the court's error in finding predominance of common issues based upon Plaintiffs' allegations and theories without evidence of common injury, arises from a severe underestimation of the rigor required in a Rule 23 analysis. Having ruled that the incidence and causes of any biolfilm, mold, mildew, or odors in class members' Washers are irrelevant to the predominance analysis, Pet. App. 26a–27a, the court admitted the testimony of Plaintiffs' two experts that the Washers' are defective without requiring either expert to demonstrate a reliable methodology, Pet.

App. 69a–74a. The class certification order thereby contravenes both Rule 23 and *Daubert*, rendering them nugatory.

This case therefore presents the Court with an excellent opportunity to clarify that *Daubert* applies with full force at the class certification stage of litigation. This Court in *Wal-Mart* and again in *Comcast* held that district courts must rigorously analyze the evidence in support of class certification—including expert testimony—in deciding whether to certify a class. The question that continues to divide the lower courts is the proper analysis to apply when examining expert evidence offered in support of class certification, specifically, whether it is the full *Daubert* standard or some less stringent version. Given the importance of this question to class certification proceedings in federal courts across the nation, this issue independently warrants this Court's review. In concert with the first question presented, the need for certiorari is compelling.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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