No. 12-322

In the Supreme Court of the United States

WHIRLPOOL CORPORATION,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf.
2. Whether a class may be certified without resolving factual disputes that bear directly on the requirements of Rule 23.
3. Whether a class may be certified without determining whether factual dissimilarities among putative class members give rise to individualized issues that predominate over any common issues.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber"), Business Roundtable ("BRT"), and the National Association of Manufacturers ("NAM") respectfully submit this brief as *Amici Curiae* in support of Petitioner Whirlpool Corporation.

INTERESTS OF *AMICI CURIAE*[1]

These three *Amici* together are leaders in representing vast and varied businesses interests across the United States.

The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* hereby state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On September 24, 2012, *Amici* notified counsel of record for Petitioner and Respondent of their intent to file this brief, and Petitioner and Respondent both consented that same day.

industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. The Chamber has contributed as *Amicus Curiae* to this Court's consideration of several recent class-action appeals, none involving product liability or a class of consumers. *See* http://www.chamberlitigation.com/ cases/issue/ class-actions.

BRT is an association of chief executive officers of leading U.S. companies that collectively take in over $7.3 trillion in annual revenues and employ nearly 16 million individuals. BRT member companies comprise nearly a third of the total value of the U.S. stock market and invest more than $150 billion annually in research and development, comprising some 61 percent of U.S. private R&D spending. Member companies pay $182 billion in dividends to shareholders and generate nearly $500 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions.

NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment that supports economic growth. It also promotes increased understanding among policymakers, the media, and the general public about the vital contributions manufacturing makes to America's economic future and living standards.

Amici have two interests in the Court's review of the ruling below. *First*, the Sixth Circuit's lack of rigor in certifying a class under Federal Rule of Civil Procedure 23 contravenes this Court's recent ruling in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). The Sixth Circuit has certified the 200,000-member class at issue notwithstanding the absence of any common question of law or fact that predominates over questions peculiar to individual claimants. The Sixth Circuit's ruling considerably relaxes standards for class certification and, if allowed to stand, will dramatically increase the class-action exposure faced by *Amici*'s members.

Second, many of *Amici*'s members manufacture products that are sold in interstate commerce, thereby subjecting them to potential product-liability litigation across the 50 States. The opinion below exposes all such members to the risk of class-action litigation brought by classes of plaintiffs who either suffered no injury from the products at issue or allegedly suffered injury from a range of different products, under a spectrum of different circumstances. Not only does this ruling sharpen an existing circuit split, but it opens the door to uncabined class-action liability throughout the Sixth Circuit—liability that bears little relation to any specified harm that any particular group of consumers has suffered from any particular product.

STATEMENT

In *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), this Court vacated a class certification in the absence of meaningful demonstration "that the class members have suffered the same injury." *Id.* at 2551 (internal

citation and quotation omitted). Its vacatur reaffirmed Federal Rule of Civil Procedure 23(a)(2)'s threshold insistence upon "questions of law or fact common to the class." In the decision below, the Sixth Circuit nonetheless affirmed certification of a class of some 200,000 Ohio consumers who allege defects in a variety of washing machines they purchased, notwithstanding that most of those consumers ostensibly suffered *no injury whatsoever* and that their relevant experiences (*e.g.*, what model washing machine they purchased, how they operated it, and whether they experienced any problem) vary wildly. What is more, the Sixth Circuit characterized this class as satisfying not only Rule 23(a)(2)'s basic commonality requirement, but *also* Rule 23(b)(3)'s *more demanding* requirement that the common question further "predominate over any questions affecting only individual members."

The Sixth Circuit's approach reflects a misconception of law whereby the substantive claims advanced by a plaintiff class can be far greater than the sum of the class's individual parts, thereby transforming Rule 23 from a procedural device to a novel (and worrisome) substantive charter. Its holding poses special threat to *Dukes* in the product-liability arena by subjecting manufacturers to product-liability class actions enlisting wide swathes of consumers who have suffered no injury that might occasion individual suit. Such sprawling consumer class actions, aggregating legions of "plaintiffs" who have suffered no injury, would expose manufacturers to litigation and liability based on mere dissatisfaction in a small fraction of the product's buyers. This specter is especially troubling given the frequency of consumer

class-action filings and the relative inability of any manufacturer, no matter where it is located, to curtail its exposure to them.

To the extent lower courts like the court below appear to be neglecting or discounting this Court's holding in *Dukes*, *Amici* respectfully submit that this Court's review is necessary. A grant of review here would allow the Court to elucidate the implications of the decision for consumer class actions in particular. *Amici* therefore join Petitioner in respectfully urging this Court to grant certiorari and decide, *inter alia*, whether class members who have not been harmed and cannot themselves sue may nonetheless be the primary constituents of a class properly certified under Rule 23(b)(3). This question not only divides the circuits (*see* Cert. Pet. 19-22) but is freighted with constitutional and statutory significance as well as great practical importance to the business community.

REASONS FOR GRANTING THE PETITION

The decision below undermines this Court's holding in *Dukes* in ways that merit this Court's attention and review.

I. *DUKES* FORECLOSED CERTIFICATION OF A CLASS ABSENT SOME SHARED INJURY, UNITED BY A COMMON QUESTION

Rule 23 is a procedural device for aggregating claims, not a substantive font for claims that would not otherwise exist. As powerful as this procedural device is, it is subject to essential limits that are specified by rule and courts are "bound to enforce." *Amchem*

Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997). No aspect of Rule 23 has further tested those limits or inspired more "adventuresome" certifications than has Rule 23(b)(3), providing for certification of a class as to which a common question of fact or law predominates. *Id.* at 614 (internal quotation and citation omitted). This Court and lower courts do critical work in subjecting class certifications to principled outer limits.

True to the design of Rule 23, this Court in *Dukes* limited any and all class certifications—not just those under 23(b)(3)—to cases posing a common question whereby "all . . . claims can productively be litigated at once." 131 S. Ct. at 2551. In doing so, the Court emphasized that a putative class of plaintiffs can obtain certification only if those plaintiffs have been subjected to "the same injury." *Id.* (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982)). Mere recitation of "a violation of the same provision of law" does not satisfy this requirement; instead, the ultimate validity of a plaintiff's claim (*i.e.*, the plea for redress of a specified injury) must rise or fall on a common question, susceptible to resolution "in one stroke." *Id.*

This focus on plaintiffs' injury and some shared question on which their plea for relief depends is faithful to Article III of the U.S. Constitution. This Court has stated time and again that a plaintiff must plead and prove a "distinct and palpable" injury, as opposed to an "abstract injury" or a "generalized grievance[]," as a prerequisite to calling upon a federal court for adjudication. *Valley Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464, 475, 482-83 (1982) (internal quotations and citations omitted). Expenditure of federal judicial

resources is thus confined to those cases in which "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

While adding efficiency to the exercise of Article III powers, Rule 23 does not substantively expand those powers or furnish a path around the prerequisites to their exercise. To the contrary, Rule 23 would be invalid and unenforceable if it attempted to do so. *See Shady Grove Orthopedic Assoc., P.A. v. Allstate v. Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). Accordingly, *Dukes*' insistence that class members suffer the "same injury" grows out of Article III itself. Rule 23 does not open the courthouse doors to suits by plaintiffs who have suffered no injury and could not sue individually.

Dukes also adhered to the Rules Enabling Act by preserving a class-action defendant's right to defend against individual claims. *See* 28 U.S.C. § 2072(b) (prohibiting construction of the Federal Rules of Civil Procedure to "abridge, enlarge or modify any substantive right"); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process requires affording a defendant "'an opportunity to present every available defense'") (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). Although a procedural rule may "incidentally affect litigants' substantive rights" by changing the procedure for litigating claims, *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987), it must always be interpreted consistent with constitutional requirements. *See, e.g.*, *Dukes*, 131 S. Ct. at 2561; *Amchem Prods.*, 521 U.S. at

612-13; *see also Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (explaining that Rule 23's "procedural protections" are "grounded in due process"). In a similar vein, the Rules Enabling Act itself foreclosed the Ninth Circuit's attempt in *Dukes* to use statistical sampling of individual claims for backpay as an aggregate formula whereby Wal-Mart would lose its ability "to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561.

Finally, *Dukes* highlighted Rule 23's concern that class-wide adjudication provide a fair and efficient means of resolving numerous claims on their merits, according to a common question. According to *Dukes*, the mere fact that a putative class challenges the same practice is an inadequate basis for certification if that practice has harmed different plaintiffs in different ways, implicating different legal theories and arguments—or, short of that, created a mere potential for injury. The Court in *Dukes* so held specifically in reference to Wal-Mart's challenged practice of committing promotion decisions to local discretion, observing that "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." *Id.* at 2554. Again, the touchstone for certification came down to whether a class of plaintiffs had suffered "the same injury" implicating a common question, the "truth or falsity [of which] will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551.

II. THE OPINION BELOW UNDERMINES *DUKES* BY AUTHORIZING CERTIFICATION OF A CLASS LACKING ANY COMMON UNDERLYING INJURY OR COMMON QUESTION

The opinion below does not square with *Dukes*; to the contrary, it would render its teachings hollow. The lower court in *Dukes* had certified a class of female plaintiffs who worked in different stores across the country, under the supervision of different managers, and offered reports of gender discrimination that varied from region to region. *See Dukes*, 131 S. Ct. at 2554-57. All that united those plaintiffs was a Wal-Mart policy that afforded local managers wide discretion over promotion decisions. *Id.* at 2554.

Similarly here, all that unites the members of the certified class in this case is that they live in Ohio, and sometime in the last eleven years, somewhere bought for their own use one of various Whirlpool front-loading washing machines. Pet. App. 9a. These 200,000 Ohio consumers purchased different washing-machine models, constructed on different platforms, built from different designs. Pet. App. 8a. They maintained their machines differently and placed their machines in different environments, which plaintiffs' expert admitted would affect whether any mold grew on the washing machine, and, if so, how much. *See* Pet. App. 16a. They may or may not still own the washers, and they may or may not ever have experienced the alleged odor problem.

Most fundamentally, whereas this Court in *Dukes* insisted that class members have suffered "the same

injury," 131 S. Ct. at 2551, most of the class members here have suffered *no* injury. The opinion below itself acknowledges that the class encompasses Ohio consumers who purchased Whirlpool front-loading washing machines without encountering a single mold spore. Pet. App. 18a. What is more, only a tiny fraction of the class, some three percent, have reported the appearance of mold or mildew in their washing machines. *See* Pet. at 7.

Thus, the Sixth Circuit has read Rule 23(b)(3) as authorizing certification of a class of 200,000 plaintiffs even though, according to its own findings, many of them lack standing to be in federal court; in fact, by all indications, only a small minority of them have such standing or ever will. *See* Pet. App. 18a. A procedural device for aggregating and streamlining litigation should not be transformed into a substantive device for inventing litigation where there should be none. The court of appeals here disregarded this Court's insistence upon "rigorous analysis," *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 161) into, *e.g.*, whether the class presents a common question the answer to which "will resolve an issue that is central to the validity of each one of the claims in one stroke," *id.* at 2551.

The decision below compounded its error by crediting (in passing) a "premium price" theory that was not even urged by any party. According to speculation by the court below, "the class plaintiffs *may* be able to show that each class member was injured at the point of sale upon paying a premium price." Pet. App. 18a (emphasis added)). Such offhand theorizing about potential merits theories—at odds

with the merits theories actually advanced by the putative class and scrutinized by the court—departs from the rigor that must define inquiry into whether the class has suffered a shared injury in fact, gathering around a common merits question clearly posed.

The Sixth Circuit's lack of adherence to *Dukes* is all the more problematic because the decision below reached Rule 23(b)(3)'s requirement of predominance. Whereas *Dukes* addressed only the threshold commonality requirement of Rule 23(a)(2), the predominance requirement of Rule 23(b)(3) is "far more demanding." *Amchem Prods.*, 521 U.S. at 624. In particular, predominance within the meaning of Rule 23(b)(3) requires that plaintiffs' claims not only stem from "shared experience" but also "are sufficiently cohesive to warrant adjudication by representation," and "call[s] for caution when . . . disparities among class members are great." *Id.* at 623-25. If this demanding inquiry is as easily satisfied as the court of appeals indicated here, then nothing appreciable will remain of it, much less of the more basic commonality requirement that this Court took care to spell out in *Dukes*. In each and all of these respects, the Sixth Circuit's adventurous application of Rule 23 threatens to rewrite the legal holding of *Dukes* and undermine its practical application.

III. REVIEW SHOULD BE GRANTED TO VINDICATE PROPER LIMITATIONS ON THE SCOPE OF RULE 23

Because this Court's teachings in *Dukes* are clear, the decision below is clearly at odds with them, and circuit courts have been dividing, *Amici* support grant

of the petition for certiorari in order to resolve the conflict and prevent an end-run around the holding in *Dukes*. Left uncorrected, the decision below will have grave practical consequences, exposing defendants in the Sixth and like-minded Circuits to sprawling, unwieldy class actions that this Court has held have no business being litigated as such.

A. Improper Class Certification Imposes Large Practical Costs On Businesses

By expanding both the availability of class certification and the size of the classes certified, the Sixth Circuit's rule will alter the landscape on which class-action litigation is decided. That landscape is already treacherous for corporate defendants. Although class certification may technically be a threshold step on the way towards merits resolution, this Court has long recognized that the costs and stakes posed by class certification magnify its relative importance. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (describing the prospect of wide-ranging discovery as "a social cost rather than a benefit . . . to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people"). Class-action discovery tends to be particularly far-ranging, as judges are reluctant to restrain class counsel from using discovery mechanisms to "delv[e] into ten issues when one will be dispositive." Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989).

Moreover, class-certification decisions typically obviate further proceedings on the merits. In light of

the literal and figurative price of proceeding through discovery and trial, certification unleashes "hydraulic" pressure to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001). Indeed, a recent study demonstrated that nine out of ten class actions settle after certification. *See* Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). That pressure is generally less rooted in the merits of the plaintiffs' claims than in the economic rationality of defendants, meaning that class certification—particularly certification based on a loose application of Rule 23—dramatically increases the chances that plaintiffs with individual claims of little worth, or their attorneys, will earn an unwarranted payout. Substantial economic distortion results, with the cost of "litigation" and "litigation avoidance" incorporated into the product's cost that is paid by the consumer. Joseph A. Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995).

B. Such Practical Costs Warrant Clarifying the Proper Scope of Rule 23

If the Sixth Circuit's approach to consumer class actions alleging product liability is allowed to stand, then manufacturers may face massive class-action complaints alleging injuries from a product (or, as here, range of products) that has not in fact harmed (or as here, caused dissatisfaction in) more than a fraction of those on the plaintiffs' side of the caption. The powers of federal courts should not be enlisted under the guise of Rule 23 to serve such armies of plaintiffs who themselves have no basis for complaint.

Such sweeping, uncabined liability is out of all proportion to any actual harm and irreconcilable with *Dukes*.

This Court has previously seen fit to grant review in order to clarify the import and scope of the Federal Rules, especially where the day-to-day work of the federal courts and the interests of litigants are greatly affected by any remaining ambiguity. For instance, in *Bell Atlantic Corporation v. Twombly*, this Court held that Rule 8(a)'s pleading standard requires plaintiffs to plead "enough facts to state a claim to relief that is plausible on its face." 550 U.S. 544, 570 (2007). While many courts applied *Twombly*'s pleading standard to all claims, *see, e.g.*, *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008), other circuits initially read *Twombly* as confined to the antitrust and conspiracy claims specifically at issue there, *see, e.g.*, *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008). This Court granted review and provided essential clarity, in *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009), where it took the opportunity to reaffirm *Twombly* and to hold that the requirements of Rule 8(a) extend across the board beyond antitrust cases to whatever type of claim might be brought in federal court.

In the wake of *Dukes*, the Court has already recognized the importance of questions related to those posed here by granting certiorari in *Behrend v. Comcast Corporation*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864), and in *Connecticut Retirement Plans and Trust Funds v. Amgen Inc.*, 660 F.3d 1170 (9th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3519 (U.S. June 11,

2012) (No. 11-1085). In the former, the Court will be confronting, specifically in the antitrust context, whether a class may be certified without deciding whether the expert testimony on which class-wide damages would be premised is in fact admissible. In the latter, it will be confronting, specifically in the securities context, whether a class may be certified without addressing proof of materiality and evidence rebutting a particular fraud-on-the-market theory.

Because antitrust and securities cases may pose challenges and concerns distinct from those in product-liability cases, granting certiorari in this case as well would yield enormous and distinct benefits by clarifying the scope of class certification in an area of repeated and expensive business litigation. *Consumer* class actions pose a threat all their own to *Amici*'s members, particularly given some courts' expansive views of personal jurisdiction. Any manufacturer that does business anywhere in the nation may, according to many plaintiffs' lawyers and certain courts, face exposure to suit almost everywhere in the nation, including the Sixth Circuit. And any product that a manufacturer may sell on any substantial scale may give rise to one or another allegation by one or another consumer, who may then purport to enlist all other purchasers of that same product, without distinction, as fellow members of a theoretical class.

Such consequences are profoundly concerning to *Amici* and their membership, and *Amici* respectfully submit that the questions presented have national significance warranting the Court's review.

CONCLUSION

Accordingly, *Amici* respectfully support Petitioner's request that a writ of certiorari be granted in this case.

Respectfully Submitted,

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