Nos. 13-430 and 13-431

IN THE

Supreme Court of the United States

SEARS, ROEBUCK AND COMPANY,

Petitioner,

v.

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

Respondents.

WHIRLPOOL CORPORATION,

Petitioner,

v.

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

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit And To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a class may be certified under Rule 23 when the majority of the class members have suffered no injury without running afoul of Article III's standing requirement.

2. Whether a class in which the class members have not suffered the same injury meets the commonality requirement of Rule 23(a)(2).

3. Whether a court's judgment that class proceedings would be efficient is sufficient to satisfy the predominance requirement of Rule 23(b)(3), without considering the individualized questions bearing on liability and damages and without considering whether those individualized questions predominate over any common questions of law or fact.

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BRIEF OF *AMICUS CURIAE* RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

If the Seventh Circuit's decision in *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*") stands, the expansive class-certification standards announced in that opinion pose significant risk to RLC's members, as well as all retailers nationwide. The Rule 23 motion in that case "turns on the straightforward application of class-certification principles," *Comcast Corp.* v. *Behrend*, 133 S. Ct.

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* timely notified all parties of its intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

1426, 1433 (2013)—and, under those principles, should have been denied.

Although RLC's *amicus* brief focuses on the myriad concerns warranting certiorari in *Butler II*, those concerns are equally applicable to the Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838 (6th Cir. 2013) ("*Glazer II*"). *Glazer II*, like *Butler II*, permits class certification under gauzy standards irreconcilable with this Court's settled precedents. Either decision, or both of them, merits review.

The Seventh and Sixth Circuits have eviscerated this Court's Rule 23 jurisprudence to place expedience before the rigorous analysis that this Court has deemed essential to any motion for class certification. *See*, *e.g.*, *Behrend*, 133 S. Ct. at 1432. The Court should grant the petition for a writ of certiorari in *Butler II* and hold *Glazer II*, or vice versa, or grant review in both cases, so that its class-action jurisprudence is not rendered a nullity.

SUMMARY OF ARGUMENT

"[T]he Rule 23 class-action device was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamaski*, 442 U.S. 682, 700–01 (1979). This bedrock principle of class-action litigation is so fundamental that this Court has repeatedly emphasized it in recent decisions. *See Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011).

Although "[a] class action . . . enables a federal court to adjudicate claims of multiple parties at once,

instead of in separate suits," "it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). A class action is "a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980). It may not be used to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

To ensure that classwide adjudication retains its proper role as a limited procedural exception, Rule 23 institutes a series of procedural safeguards designed to protect defendants and absent class members alike. *See Taylor* v. *Sturgell*, 553 U.S. 880, 900–01 (2008). The requirements of Rule 23(a) and (b), which the party seeking certification must "satisfy through evidentiary proof," *Behrend*, 133 S. Ct. at 1432, are "stringent requirements for certification that in practice exclude most claims." *Italian Colors*, 133 S. Ct. at 2310.

The principles attending these requirements are not unique to employment claims (*Dukes*) or antitrust claims (*Behrend*); they apply universally to all class actions, no matter the underlying claim's substance. *See*, *e.g.*, *Behrend*, 133 S. Ct. at 1433 (stating that the analysis "turns on the straightforward application of class-certification principles"); *see also generally Italian Colors*, 133 S. Ct. 2304. Under *Butler II*, however, the opposite is true: The Seventh Circuit (following the Sixth Circuit) interpreted Rule 23 to impose only lax requirements in the product-liability context.

The Seventh and Sixth Circuits' reasoning is inconsistent with this Court's precedents: Either the

courts erred in creating a unique set of rules applicable only to product-liability cases, or they erred in announcing a lower standard for class certification that (because this Court has made clear that class-certification principles are of universal application) could extend beyond the product-liability context to *any* class action. The petition for certiorari in *Butler II*—or, alternatively or additionally, *Glazer II*—should be granted.

ARGUMENT

I. THE PANEL DECISIONS ELIMINATE ARTICLE III STANDING REQUIREMENTS IN CLASS ACTIONS TO FIND COMMONALITY UNDER RULE 23(A).

In the face of a putative class comprised largely of individuals who suffered *no injury*, the panels' decisions wish that fundamental requirement away—and Article III standing with it. In *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation* ("*Glazer II*"), the Sixth Circuit did so on the thin reed of a purported "premium-price theory." 722 F.3d 838, 857 (6th Cir. 2013). The Seventh Circuit in turn offered no rationale at all. *See generally Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 799, 801 (7th Cir. 2013) ("*Butler II*"). Regardless, evading substantive rights to facilitate the class-action device is error, and one that risks opening the courtroom doors to wide-sweeping and burdensome litigation—and violating the Constitution, at that.

A. Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Therefore, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 611, 613 (1997). A fundamental requirement of Article III standing is

injury-in-fact. *See*, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Because an individual must allege a colorable injury to have Article III standing, it necessarily follows that the certification of any class that includes members who have not suffered such a colorable injury "creates a substantive right" for those members—standing to bring suit—"where none existed before." *In re Deepwater Horizon*, — F.3d —, 2013 WL 5473330, at *12 (5th Cir. 2013) (opinion of Clement, J.) (citing cases).

The opinions below ignore this fatal defect, even though the following evidence is uncontroverted. Only a fraction of the absent class members experienced the harm alleged in these actions: mold or odor in their washers (*Butler II* and *Glazer II*), or a computer error in their washers' control unit (*Butler II*). *See*, *e.g.*, *Butler II*, D.E. 231-13 ¶¶ 10–11, 13 & Tbls. 1–3; *id.*, D.E. 231-15 ¶¶ 17–20; *Glazer II*, D.E. 103-29 ¶¶ 9, 13 & Tbl. 2. Worse still, certain of the *class representatives* themselves did not suffer the complained-of injuries. *See Butler II*, D.E. 230-1 § IV. Allowing the Seventh and Sixth Circuits' sweeping opinions permitting those classes to stand would create, in effect, two sets of Article III standing rules: a strict rule for the usual single-party litigation, and a relaxed rule for class-action litigation. But the class-action vehicle cannot modify such substantive rights.

This dual-track approach to standing poses particularly acute risks to the retail industry. In that sector, and particularly for those companies that operate statewide or nationwide, thousands of individuals may purchase identical items and enjoy them with no complaint, while an isolated few complain of a defect. Ignoring the injury requirement makes every consumer grievance a possible class action.

And for many retailers, that risk is exponential across an array of product offerings.

B. This problem is compounded by the panel decisions' approach to Rule 23(a) commonality. Even if the speculative threat of future injury sufficed to establish standing—it does not, *see*, *e.g.*, *Clapper*, 133 S. Ct. at 1147—"[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered *the same injury*.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 157 (1982)) (emphasis added). Absent a common injury, class-wide proceedings cannot "'drive the resolution of the litigation'"; they merely necessitate future litigation to answer those individualized questions that remain. *Ibid.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Where only select absent members have suffered any injury, the class has not suffered "the same injury." But in *Butler II*, the Seventh Circuit refused even to discuss this defect, instead blithely stating that "the damages of individual class members"—presumably zero for those who suffered no injury—"can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses." 727 F.3d at 801. And in *Glazer II*, the Sixth Circuit crafted a purported "premium-price theory" according to which all customers were injured by paying a premium price. *See* 722 F.3d at 856–57. Ohio law, however, does not recognize such a theory, *see* Whirlpool Pet. 18–19 (collecting cases); thus the Sixth Circuit impermissibly altered the parties' substantive rights to facilitate class certification.

In such cases, classwide proceedings *cannot* drive the litigation's resolution, for individualized proceedings will still follow to determine the outstanding issues: injury, causation, defenses, and damages—to name but a few. *Butler II* and *Glazer II* thus directly conflict with *Dukes*—and, in doing so, result in foreign Rule 23 principles unique to the Seventh and Sixth Circuits. In these Circuits, any individual product-liability claim asserted by a consumer against a retailer—no matter if the vast majority of consumers have not suffered "the same injury" with the same product or service, and indeed have experienced *no* problem whatsoever—could perhaps be transformed into a class-action claim. That cannot be the correct approach to commonality under Rule 23.

II. THE PANEL DECISIONS ELEVATE EXPEDIENCY OVER RULE 23(B)(3)'S REQUIREMENTS.

The Seventh and Sixth Circuit opinions collapse the predominance inquiry into one about efficiency. *See Butler II*, 727 F.3d at 800–01. But "the court's gestalt judgment" (*Amchem*, 521 U.S. at 621)—a case-by-case approach that provides no guidance or predictability to litigants—ignores over fifteen years of this Court's jurisprudence.

Parties seeking Rule 23(b)(3) certification must demonstrate predominance and superiority. *Amchem*, 521 U.S. at 615. These procedural safeguards are a "vital prescription" (*id.* at 623) protecting against abuse of the (b)(3) class action, "an adventuresome innovation . . . designed for situations in which class-action treatment is not as clearly called for." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted).

The predominance requirement calls for the district court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). This requirement is "far more demanding" than Rule 23(a) commonality. *Amchem*, 521 U.S. at 623–24. Before *Behrend*, however, courts far too often paid lip service to predominance, and failed to give consideration to those individualized questions bearing on the elements of the class claims. *See*, *e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) ("Before *Behrend*, the case law was far more accommodating to class certification under Rule 23(b)(3)"). In *Behrend*, this Court made clear that plaintiffs seeking certification under Rule 23(b)(3) must demonstrate, by evidentiary proof, that common questions predominate over individual ones. *See* 133 S. Ct. at 1432.

Both *Butler II* (727 F.3d at 800) and *Glazer II* (722 F.3d at 860–61) attempt to cabin *Behrend* as applying only to liability-*and-damages* classes, and thus having minimal jurisprudential effect on cases involving liability-only classes. This approach—decide classwide "liability" now and figure out the rest later—effectively endorses issue-class certification whenever a court believes that classwide proceedings on that issue (and nothing else) would be "efficient." But "the court's duty" under Rule 23(b)(3) is "to take a close look at whether common questions predominate over individual ones." *Behrend*, 133 S. Ct. at 1432 (internal quotation marks omitted). Even before *Behrend*, this Court had explained that the predominance inquiry begins "with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184

(2011). *Behrend* establishes that the predominance inquiry can be failed even where the *sole* individual issue is damages. *See* 133 S. Ct. at 1432–35. That decision does not suggest that the problem can be avoided by pretending, in effect, that the only elements of the relevant cause of action involve liability. This error notwithstanding, the Seventh Circuit's de facto approval of issue-class certification in this manner further exacerbates a circuit split in this area of class-action law, which is sufficient by itself to warrant this Court's review. *Compare*, *e.g.*, *Castano* v. *Am. Tobacco Co.*, 83 F.3d 734, 745 n.21 (5th Cir. 1996) ("A district court cannot manufacture predominance through the nimble use of subdivision (c)(4)"), *with In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) ("[A] court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement"), *and Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (same).

In any event, the panel opinions rest wholly on tunnel vision. Their focus on the narrow question of damages gives no consideration to the "likelihood that significant questions, not only of damages *but of liability and defenses of liability*, would be present, affecting the individuals in different ways." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966) (emphasis added). These issues are not hypothetical in the present cases, or in the types of consumer cases faced by the retail industry. The most simple question in these cases—*did the consumer experience any problem with the washer*—alone defeats predominance. Simply put, "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Rail*

Freight, 725 F.3d at 252–53 (citing *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039, 1056–57 (8th Cir. 2000)). And other individualized determinations tie directly to a liability finding: the washer model purchased, purchase date, product maintenance, and installation location all vary consumer-to-consumer in this action, as does the answer to the most fundamental gatekeeping question. *See*, *e.g.*, *Marcus* v. *BMW of N. Am., LLC*, 687 F.3d 583, 604 (3d Cir. 2012) (explaining that "an individual examination of that class member's tire" is required to determine liability on a warranty claim); *see also Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (explaining that factual variations "account for the fact that few warranty cases ever have been certified as class actions").

For the panels below, these questions are of no moment. *Butler II* casts aside these individualized questions in favor of the supposed economic efficiencies produced by classwide adjudication. 727 F.3d at 800–01; *see also Glazer II*, 722 F.3d at 861 ("Use of the class method is warranted particularly because class members are not likely to file individual actions—the cost of litigation would dwarf any potential recovery"). But policy concerns cannot trump the clear requirements of Rule 23. *See*, *e.g.*, *Amchem*, 521 U.S. at 628 (settlement class cannot be certified if it fails the Rule 23 requirements, even if it "would provide the most secure, fair, and efficient means of compensating victims"); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (rejecting a cost-of-litigation exception to the Federal Arbitration Act).

Rule 23(b)(3) requires that the class proponent make a showing, supported by evidentiary proof, that

common issues predominate over any individualized issues. *See Behrend*, 133 S. Ct. at 1432. The panel decisions improperly relieve plaintiffs of that burden.

III. IF LEFT UNTOUCHED, THE PANEL DECISIONS WILL SIGNIFICANTLY HARM THE NATION'S RETAILERS AND CONSUMERS ALIKE.

The influence of the Seventh and Sixth Circuits' opinions is already felt in class-action litigation against retailers *outside* of those Circuits. *See*, *e.g.*, *Gomez* v. *Tyson Foods, Inc.*, — F.R.D. —, 2013 WL 5516189, at *3 (D. Neb. 2013) (citing *Butler II*); *Jacob* v. *Duane Reade, Inc.*, — F.R.D. —, 2013 WL 4028147, at *8–11 (S.D.N.Y. 2013) (citing *Glazer II*).

Annually, corporations spend $2.1 billion defending class actions. Carlton Fields, P.A., *The 2013 Carlton Fields Class Action Survey* 6 (2013), *available at* http://www.carltonfields.com/files/uploads/Carlton-Fields-Class-Action-Report-2013-electronic.pdf. Even before these decisions, that amount was expected to increase. *Id.* at 7. Retailers routinely face a cornucopia of putative class actions: false marketing, product liability, and deficient pre- and post-sale services—just to name a few.[2] Indeed, over one-third

[2] *See*, *e.g.*, *Fernandez* v. *Obesity Research Inst., LLC*, No. 2:13-cv-00975-MCE-KJN, 2013 WL 4587005 (E.D. Cal. Aug. 28, 2013) (allegedly false claim); *Reibstein* v. *Rite Aid Corp.*, 761 F. Supp. 2d 241 (E.D. Penn. 2011) (receipt allegedly printed too much credit-card information); *Alfi* v. *Nordstrom, Inc.*, No. 09CV1249 BEN(CAB), 2010 WL 5093434 (S.D. Cal. Dec. 8, 2010) (expiration date allegedly printed in too-small font size on gift certificates); *In re Sony VAIO Computer Notebook Trackpad Litig.*, No. 09-CV-2109-BEN-RBB, 2010 WL 2127264 (S.D. Cal. Mar. 22, 2010) (allegedly defective laptop trackpads); *Verzani* v. *Costco Wholesale Corp.*, 641 F. Supp. 2d 291 (S.D.N.Y. 2009) (allegedly mislabeled weight of product), *aff'd*, 387 F. App'x 50

of class actions against corporations involve consumer-fraud or product-liability claims. *Id.* at 12.

To be sure, retailers earnestly endeavor to follow the law. But ultimately, like any other citizen, they rely on its uniform and predictable application. Class-action law requires "crisp rules with sharp corners" applied in a consistent manner. *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008) (internal quotation marks omitted). If the panel decisions are permitted to ignore the plain requirements of Rule 23—and effectively nullify this Court's decisions interpreting them—retailers (and other class-action defendants) will be caught in a web of unpredictable standards that vary at a lower court's whims. That lack of predictability will in turn create barriers to the effective resolution of cases, compounding the costs of discovery and changing the incentive-versus-risk assessment that encourages settlement.

Moreover, RLC's members—and many retailers generally—do business nationwide and thus are subject to suit nationwide. Lenient class-certification standards in certain courts will mean retailers must budget ever-increasing sums of money to defend against improper class actions. Faced with rising litigation costs, retailers will be forced to increase prices.

Finally, the Rule 23 principles approved in these class actions risk ending one of the retail industry's strongest and most utilized *pro-consumer* practices:

[Footnote continued from previous page]

(2d Cir. 2010); *Goldstein* v. *Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340 (N.D. Ga. 2009) (alleged failure to follow installation specifications).

warranty programs. Retailers routinely offer warranties—usually included in the purchase, sometimes extended at a price—for higher-priced items to promote consumer satisfaction. Thus, through warranty programs, retailers provide consumers with quick and fair resolution of problems that may arise, at little or no additional cost to the consumer. These consumer-centric programs are intentionally designed as an inexpensive, efficient alternative to litigation. And they are designed to be a voluntary, opt-in system: An individual consumer contacts the retailer when he or she has experienced a problem, and the retailer strives to fix the problem quickly in order to keep the consumer happy and to encourage repeat business.

By contrast, *Butler II* and *Glazer II*—through their erroneous vision of commonality and predominance (injury need not be considered)—automatically transport consumers from the cheap, efficient realm of informal dispute resolution into the judicial arena of class-action litigation, which can be expensive and cumbersome. *All* consumers of a product or service, even when the majority have experienced no problem, involuntarily become Rule 23(b)(3) class members unless they opt out—which occurs extraordinarily rarely. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 Vand. L. Rev. 1529, 1549 tbl. 2 (2004) (on average, 0.2 percent of class members opt out of a consumer class action).

This erroneous expansion of class actions thus risks causing a contraction of warranties: As class-wide litigation by wholly uninjured consumers increases due to courts' wrongful acceptance of pro-

gressively lax Rule 23 standards, retailers will be pressured to decrease aspects of the warranty programs that they offer, such as scope, duration, or degree. In turn, consumers could find themselves having lost some measure of the timely retailer assistance with product or service issues that they have come to expect over decades of experience for class-action litigation, which can take years to resolve. Surely this is not the "efficiency" the *Butler II* court envisioned.[3]

[3] Even when a consumer class action results in recovery to absent class members, years of litigation typically have passed. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 820 tbl. 2 (2010) (average length of 963 days from complaint to settlement). Most classes recover a fraction of the amount claimed—and still less after attorneys' fees are diverted to class counsel. *See id.* at 835. The prevailing lodestar approach encourages drawn-out litigation tactics by class counsel. These class actions are the antithesis of efficiency—and far less efficient than the warranty system.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari in *Butler II* and hold *Glazer II*, or vice versa, or alternatively grant review in both cases.

Respectfully submitted.

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