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April 24, 2015

Honorable Trent Franks
Chair, Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Honorable Steve Cohen
Ranking Member, Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 1927, the Fairness in Class Action Litigation Act of 2015

Dear Chairman Franks and Ranking Member Cohen:

Having studied H.R. 1927, the Fairness in Class Action Litigation Act of 2015, I respectfully provide my considered view that it is poorly conceived and would cause vast harm were it enacted.[1] While the bill would, as a practical matter, do away with many if not most cases brought under Federal Rule of Civil Procedure 23, I leave it to others to describe how and why that is the case. I focus my comments here on how the bill would have the improper effect of

[1] I am the Reiss Professor of Constitutional Law at New York University School of Law. I served as Reporter for *Principles of the Law of Aggregate Litigation*, published by the American Law Institute in 2010. I am the author or co-author of books on American civil procedure and voting rights.

curtailing or eliminating substantive rights long enjoyed by Americans. It is clear, for instance, that this bill would foreclose civil rights, privacy, and other statutory cases, as well as traditional state-law remedies for universally condemned marketplace violations.

An obvious disqualifying flaw is that the bill is framed as applying to all class actions, yet it narrowly defines injury as being limited to harm to "body or property." Under this language, *Brown v. Board of Education* never could have been brought as a class action. The class representative in that case could not have shown injury to the body or property of each child affected by the separate but equal policy. Rather, the injury there—as in so many civil rights cases—consists of the denial of a fundamental right. Given the history of the civil rights movement as a defining inspiration for modern Rule 23 of the Federal Rules of Civil Procedure, such careless reversal is quite disturbing.

The same disregard would also undermine much federal civil rights legislation enacted since 1966, when modern Rule 23 came into being. The modern device is a staple feature of many efforts to achieve the objectives of congressional civil rights enactments. For example, disabled individuals sue to gain equal access to polling places and voting machines.[2] Or white male applicants to a police academy seek to change hiring and promotional practices that allegedly discriminate against them.[3] Or, women at an auto plant pursue injunctive relief against company culture rampant with harassment.[4] None of these real-life cases could have proceeded under this legislation.

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[2] *National Org. of Disability v. Tartaglione*, 2001 WL 1258089 (E.D. Pa. 2001).
[3] *Bishop v. Gainer*, 272 F.3d 1009 (7th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002).
[4] *Warnell v. Ford Motor Co.*, 189 F.R.D. 383 (N.D. Ill. 1999).

It is important to pause here and remember that Rule 23(b)(2) authorizes certification of classes even in the *absence* of concrete injury to each and every class member, if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[5] The framers of this Rule intended this mechanism to be particularly effective in cases arising from violations of civil and other fundamental rights, such as religious liberty, because these cases often involve classes "incapable of specific enumeration"[6] together with the claim that a defendant's conduct similarly affects all class members. Hence, the Rule 23(b)(2) action "would not only fill the void where individual joinder failed but it would also help conquer problems of mootness and injunction enforcement caused by the fact that school children often graduated long before school desegregation cases ended."[7] This is the heartland of class action practice—and it is squarely compromised by the amendment.

Important privacy cases in our era of instant electronic communications would also be compromised were this amendment enacted into law. The injury in these cases is not to "body or property," but rather to the right to be free from intrusive privacy invasions. For example, an Internet search company surreptitiously collects emails, passwords, videos, and documents from local networks when its vehicles drive by to gather information for its latest web application.[8] Or a company that rents out a laptop computer takes a screen shot of a website that a consumer visited, without his consent, and when repossessing the laptop a company representative shows the consumer this screen shot and a picture of him taken without his knowledge with the laptop's

[5] Fed. R. Civ. P. 23(b)(2).
[6] Advisory Committee Note to Fed. R. Civ. P. 23(b)(2) (1966).
[7] W. Rubenstein, et al., *Newberg on Class Actions* § 4:39 (5th ed. 2012).
[8] *Joffe v. Google, Inc.*, 746 F.3d 920 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2877 (2014).

camera.[9] Under the bill, this consumer could sue only in his own capacity, not to put a stop to the illegal surveillance on behalf of other laptop renters.

In fact, a host of federal statutes protect intangible rights—e.g., under the Truth in Lending Act, the right to be notified of changes in loan terms—that go completely unrecognized under the bill's narrow definition of injury. H.R. 1927 would thereby eliminate consumers' ability to band together to vindicate such rights as defined by Congress. These are exactly the kinds of legal claims that need to be grouped together in order to be viable for private enforcement. Without a mechanism to group together such claims, more violations would inevitably follow.

Perhaps worse, H.R. 1927 also threatens to undermine historic state remedies at common law. Our system of dual sovereignty contemplates that citizens will turn first to these customary remedies if they experience legal injuries. For example, most states have consumer fraud statutes that protect their citizens against unfair and deceptive business practices, like false advertising. The viability of these small value consumer claims depends on being able to group these together as well. Otherwise, fully meritorious legal actions would be overwhelmed by the cost of enforcement. No such lawsuit could survive if each and every purchaser of a defective product had to prove that he or she had relied to a misrepresentation as to the efficacy of the product, and even if such a misrepresentation had been central to the marketing of the product. For almost a century the Uniform Commercial Code has sought to protect just this sort of "benefit of the bargain," allowing the common sense intuition that consumers who buy a toaster would expect it to be able successfully to toast bread. This is why many states recognize a presumption of

[9] *Byrd v. Aaron's Inc.*, -- F.3d --, 2015 WL 1727613 (3d Cir. Apr. 16, 2015).

reliance from a misrepresentation found to be likely to deceive a reasonable consumer.[10] But, by requiring a showing of actual injury to each and every proposed class member—and at a relatively early stage in the life of a case—the bill would compromise this crucial and well-settled set of laws. Defrauded bank customers, for instance, could not join forces to recover from a large financial institution that swindled them out of costly overdraft fees.[11] This, despite the Advisory Committee's statement that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action."[12]

H.R. 1927 would likewise do away with decades-old remedies for breaches under the Uniform Commercial Code—enacted in every state—where purchasers are similarly situated and their individual damages are too small to justify the expense of individual actions. As the Supreme Court recognized, these breaches constitute the very "essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain,"[13] and such traditional state claims for point-of-purchase damages can be well suited for class treatment when the underlying contracts and goods are the same or similar.[14] This bill, however, would return us to the long-discarded *caveat emptor* world by requiring a showing, before the evidentiary record

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[10] *E.g.*, *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 655 A.2d 417, 430 (N.J. 1995); *Davis v. McGuigan*, 325 S.W.3d 149, 162 (Tenn. 2010); *Chrysler Corp. v. Schiffer*, 736 So.2d 538, 543-44 (Ala. 1999); *Johnson v. Collins Entm't Co.*, 564 S.E.2d 653, 665 (S.C. 2002).

[11] *Gutierrez v. Wells Fargo Bank*, 704 F.3d 712 (9th Cir. 2012), *subsequent proceedings at* 589 F. App'x 824 (9th Cir. 2014).

[12] Advisory Committee Note to Fed. R. Civ. P. 23(b)(3) (1966).

[13] *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986). For additional background on how products liability claims for breach of warranty fall within long-established principles of state substantive law, see Exhibit A to this letter, the Brief in Opposition in *Whirlpool v. Glazer Corp.*, No. 13-431, and *Sears Roebuck & Co. v. Butler*, No. 13-430, *cert. denied as to both*, 134 S. Ct. 1277 (2014).

[14] *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449 (5th Cir. 2001); *McManus v. Fleetwood Enters.*, 320 F.3d 545 (5th Cir. 2003); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014).

is even complete, that each of hundreds or thousands of purchasers was denied the benefit of the bargain.

For these reasons and many others, the bill before the Committee is ill considered.

Sincerely,

Samuel Issacharoff

EXHIBIT A

Nos. 13-430 & 13-431

IN THE

Supreme Court of the United States

WHIRLPOOL CORPORATION,
Petitioner,
v.
GINA GLAZER AND TRINA ALISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

SEARS, ROEBUCK & CO.
Petitioner,
v.
LARRY BUTLER, ET AL., 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 Sixth and Seventh Circuits

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners and their amici totemically repeat that these are "no injury" class actions seeking to use the class action device to impose "novel" theories of liability on manufacturers for the sale of defective washing machines. The questions presented turn on the assertion that "most members have never experienced the alleged defect," and that, accordingly, painstaking individual inquiries would doom any class resolution of these cases. The questions presented turn on a fundamental mischaracterization of the claims in the two certified class actions. The cases are not injury actions at tort, but instead assert time-tested state law breach of warranty claims against manufacturers whose products were designed and delivered to purchasers in a form unsuitable for their ordinary and intended use.

The classes certified in the Sixth and Seventh Circuits allege that certain front-load washing machines manufactured by Whirlpool Corporation ("Whirlpool") were delivered with a uniform design defect that causes them to accumulate mold. The evidence before the courts below establishes that the defect was present across all machines at the time of sale, and rendered them all incapable of performing as warranted. As a consequence, *all* purchasers were forced to absorb the time and expense of undisclosed efforts at remediation. The complaints allege that as a result, *no* consumers got the benefit of their

bargain. Such claims are not "no-injury" claims; they are "neither novel nor exotic."[1]

Instead, these claims are the very "essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 868 (1986). Such black-letter breach of warranty claims are easily recognizable at common law for the past century, and have been well-settled in state law for decades through the Uniform Commercial Code ("U.C.C."). The remedies for these claims are designed to put the aggrieved party "in as good a position as if the other party had fully performed." U.C.C. § 1-305; *see also* Restatement (Second) of Contracts § 344 cmt. a (1981) (same); U.C.C. § 2-714(2) ("The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted[.]").

Petitioners also argue certiorari is appropriate because the Courts of Appeals on remand from this Court misapplied *Comcast Corporation v. Behrend*, 133 S. Ct. 1426 (2013). The critical inquiry on remand in light of *Comcast* was to ensure that "a model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory." *Id.* at 1433. Unlike *Comcast*, these cases allege only a single, uniform defect causing a uniform harm, in which a seller

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[1] *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 & 454 n.4 (5th Cir. 2001).

delivered a substandard product that does not perform as warranted and is not fit for its ordinary purpose, and thereby does not satisfy the terms of the bargain. That is the only liability theory presented, and it applies to all class members.

Respondents assert that a design defect compromised the value of the washing machines before they reached any purchaser. Because the alleged harm is realized for all consumers at the point of sale, the courts below held that damages flow directly from the harm alleged. SP at 7a; WP at 28a.[2] Unlike *Comcast,* these claims will be established through common proof. *See* WP at 33a ("[T]he certified liability class 'will prevail or fail in unison[.]'" (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013)).

Nor are there any disagreements among the three Circuits that have now considered class certification in the washing machine cases following *Comcast.*[3] Not a single judge on these courts has agreed with Petitioners' arguments. There is no Circuit split to be found. Not about *Comcast,* not

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[2] "WP" refers to the petition for certiorari to the Sixth Circuit, "SP" refers to the petition for certiorari to the Seventh Circuit. "WD" refers to the docket in the Northern District of Ohio, and "SD" refers to the docket in the Northern District of Illinois.

[3] A separate certiorari petition is pending on a case raising similar claims against another manufacturer. *Tait, et al. v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *23(f) denied,* No. 13-80000, 2013 U.S. App. LEXIS 7023 (9th Cir. Apr. 1, 2013), *cert. filed,* No. 13-138.

about certification of warranty claims, not about standing. None.

At bottom, Respondents assert well-established state warranty law claims. Respondents may not carry the day: summary judgment or trial could prove fatal to their claims. But these cases present no unsettled legal issues, and Respondents have shown all that Rule 23 requires: within each state, all purchasers will win or lose together. Respondents respectfully ask that the petitions be denied.

STATEMENT OF THE CASE

This case involves certain front-load washing machines manufactured by Whirlpool in Mexico and Germany between 2001 and 2008, and sold by Whirlpool and Sears, Roebuck & Co. ("Sears") ("Washers"). *See* WD263 at 10-11. Broadly speaking, Respondents allege that Petitioners sold Washers that accumulate mold and require unexpected, time-consuming, and costly maintenance, none of which Petitioners disclosed until *after* the sale. *See* WD80 at ¶¶ 39, 59-61; SD162 at ¶¶ 2, 34, 45-48. Respondents allege that Petitioners were legally obligated to provide Washers with neither of these characteristics. *See* WD80 at ¶ 30; SD162 at ¶ 129.

To support their contention that the Washers are uniformly defective, Respondents relied primarily upon internal Whirlpool engineering documents. *See, e.g.*, WD93-3/SD212-6 (6/24/04 Hardaway Memo) at 1 (explaining that these Washers are the "ideal environment" for developing mold). The expert engineering testimony of Whirlpool's own former Director of Laundry

Technology and all of Whirlpool's pre-litigation documents confirmed that the "mold problem" was uniform. *See, e.g.*, WD 93-19/SD213-5 (10/26/04 Minutes) at 1 ("Biofilm is an issue we see globally on multiple washer platforms. It is not only an issue which we have in one region and it is not linked to one platform only!"); WD93-8/SD212-1 at 2 (Hardaway Aff.) (explaining that all Washers are materially identical).

Respondents also relied on the fact that Whirlpool directed *all* purchasers of the Washers to undertake costly and time-consuming maintenance to try to ameliorate the mold problem. Tellingly, Whirlpool did so in its "use and care guidelines," a document it provided to purchasers only *after* they bought and installed the Washers. WD93-25 (Hilsee Rep.) at 4-15 (analyzing use and care guidelines). In those post-sale instructions, Whirlpool directed *all* purchasers that they must: clean the exterior, interior, door seal, and dispenser drawer; wipe the machine down after each use; leave the door open between uses; run monthly maintenance cycles; and run cycles with Affresh cleaning tablets. *Id.*

Petitioners respond that there is no defect, that they breached no warranty. WD100; SD230. Petitioners and their amici focus exclusively on one *symptom* of the alleged defect, arguing that the harm is limited to a small subset of purchasers. According to Petitioners, the only legally cognizable harm occurs when the Washers emit a noxious odor that is a sometime symptom of mold buildup.[4] And

[4] In other words, what Petitioners contend insulates them from liability (post-purchase instructions that may help

Footnote continued on next page

Petitioners argue that there are few consumer complaints about this odor through their warranty process, *see, e.g.*, SP at 8, a point echoed by their amici. Citing the warranty process as the measure of harm is an odd argument given that the gravamen of the underlying complaints is that Petitioners refused to provide warranty coverage for the defect.

But even using Petitioners' constricted account of harm, the record shows that this is far from a "no-injury" class. Whirlpool's own internal analyses concluded that 35-50% of purchasers had already complained of problems with odor (again, a symptom of mold) within just a few years. *See, e.g.*, WD93-5/SD213-12 (BioFilm Quickfix Presentation) at 10.

Whirlpool certainly acted as if every purchaser faced a significant product defect, not just the tiny percentage Petitioners now posit. Indeed, in addition to instructing all purchasers (post-purchase) of the need to undertake extraordinary and expensive steps not associated with other washing machines, Whirlpool directed all purchasers (again, post-purchase) that they needed to buy another product sold by Whirlpool, Affresh, to "effectively combat" the buildup of "mold and mildew." WD93-11/SD213-11 (9/20/07 Affresh Memo) at 1-2. A September 2008 presentation Whirlpool

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Footnote continued from previous page
avoid *odor*) is precisely the reason Respondents contend Petitioners *are* liable (because the maintenance is costly, time-consuming, disclosed only after purchase, and never actually eliminates the mold).

prepared and used to market Affresh[5] to retail stores states that "7 million potential consumer[s] in NEED of solution to odor causing residue in their [front-load] washer;" that the stores should "assume 50% [of front-load washers] may have odor concerns;" and that Whirlpool's new Affresh cleaning product could generate between "$50 million—$195 million [in] revenue . . . ." WD93-6/SD213-16 at 2.

Before developing and marketing Affresh, Whirlpool discussed developing a washer cleaner with Procter & Gamble ("P&G"). A 2005 P&G memorandum summarizing those discussions reflects that, according to Whirlpool: "Biofilm is a serious problem will for all [front-load] machines . . . .35% of current [Whirlpool] duet owners have already called" to register odor complaints. WD130-1/SD213-17 at 1. Recognizing the extent of the mold problem in the Washers, P&G and other companies began marketing competing washer cleaning products (e.g. Tide Washing Machine Cleaner).[6]

Finally, the record reflects that warranty complaint data is, by definition, not an accurate or relevant measure of product-related failures generally, and particularly not for one for which a

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[5] The documents use the shorthand "HE," for "high-efficiency," another term for the Washers.

[6] *See, e.g., http://www.tide.com/en-US/product/tide-washing-machine-cleaner.jspx; http://www.clorox.com/products/clorox-washing-machine-cleaner/?gclid=CISy-J3FlLsCFUpnOgodV28Aag.*

company denies coverage within the warranty period. WD93-32 (Oliver Rep.) at 3-4.

A. The Relationship Between the Sixth and Seventh Circuit Cases.

Whirlpool designed and manufactured all of the Washers at issue in both cases. Some were sold under the "Whirlpool" brand name, while others were marketed under the "Sears/Kenmore" label; they are otherwise identical. *See* SP at 11a.

While Sears is the nominal defendant in the litigation over the Sears-branded machines, Whirlpool is indemnifying Sears and both cases involve substantially the same factual record and attorneys. *See* SP at 19a.

The "Whirlpool" class certified in the Sixth Circuit involves only Ohio consumers; the "Sears" classes certified in the Seventh Circuit involve consumers in six states: California, Minnesota, Illinois, Indiana, Kentucky, and Texas.

B. The Facts Relating to the Mold Design Defect.

The record establishes that:

- "Whirlpool knew the designs of its [front-load washer] platforms contributed to residue buildup resulting in rapid fungal and bacterial growth." WP at 8a; *see also* WD93-3/SD212-6 at 1.

- Whirlpool's engineers concluded that its front-load "wash platforms are the ideal

environment for molds and bacteria to flourish." *Id.* at 9a (referencing WD130-4/ SD212-6 at 1).

- Whirlpool submitted a sworn declaration that its wash platforms "shar[e] nearly identical engineering . . . and most model differences are aesthetic." *Id.* at 7a; *see also* D93-8/ SD212-1 at 2.

- Prior to litigation, Whirlpool's engineers concluded that "the mold problem was not restricted to certain models or certain markets." *Id.* at 9a; *see also* D93-14/ SD212-4 at 1.

- "Whirlpool's team . . . discovered that mold growth could occur before the [Washers] were two to four years old, that traditional household cleaners were not effective treatments, and that consumer laundry habits . . . might exacerbate mold growth but did not cause it." *Id.* at 9a; *see also* WD93-14/SD 212-4 at 1; WD93-16/SD212-7 at 5; WD93-23/SD213-9 at 1.

- "Internal Whirlpool documents acknowledged . . . that the available data indicated 35% of [Washer] customers had complained about odor . . . and that complaints continued to increase in all markets." *Id.* at 11a; *see also* WD93-5/SD213-12 at 10.

- "Although Whirlpool contemplated issuing a warning to consumers about the mold problem, [Respondent's] expert evidence

indicates Whirlpool failed to warn the public adequately . . ." *Id.* at 10a; *see also* WD93-25 at 4-15.

- While Whirlpool created a product called Affresh to sell to all consumers to fight odor in its Washers, "even using Affresh in the [Washer's] special cleaning cycle [does] not cure the mold problem." *Id.* at 12a; *see also* WD93-4/SD214-4 at 6.

C. The Facts Relating to the CCU Manufacturing Defect.

In the Seventh Circuit, there is an additional, unrelated claim. *See* SP at 11a. Respondents allege that a small subgroup of readily identifiable Washers were manufactured using a uniformly defective process that damaged the central control unit ("CCU"), which ultimately causes many of those Washers to stop functioning. *See* SP at 33a-34a ("[L]imited to an identified production period during which control units from a single supplier were installed by a unique process. . . . readily identifiable by serial number."). Respondents contend that Petitioners' warranty obligates them to fix Washers that stop functioning because of the CCU defect. *See* SD162 at ¶ 32.

The Seventh Circuit found that "[t]he only individual issues concern the amount of harm to particular class members . . . as with the mold class action, the district court [will] want to consider whether to create different subclasses of the control unit class for the different states because of different state laws." SP at 5a.

D. The Courts of Appeals' Opinions After *Comcast*.

The facts above underlay the decisions by both Courts of Appeals approximately one year ago. *See* WP 41a-47a; SP at 16a-17a.[7] The Courts of Appeals' initial opinions were vacated and remanded for further consideration following *Comcast*, 133 S. Ct. at 1433.

On remand, the Sixth Circuit again affirmed the class certification order. WP at 3a. Based on the nature of the claim at issue (warranty), and the evidence of classwide exposure to the alleged design defect, the Sixth Circuit expressly rejected the argument that the class contained even a single member who did not assert a cognizable legal claim. *See id.* at 28a ("*[A]ll* Duet owners were injured at the point of sale."). The Sixth Circuit also explained that what Whirlpool presented as "individual defenses" were not "'fatal dissimilarit[ies]'" among class members, but were instead "'a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action.'" *Id.* at 33a (quoting *Amgen*, 133 S. Ct. at 1197). The Sixth Circuit next discussed *Comcast*, and explained that "liability issues relating to injury must be susceptible of proof

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[7] Petitioners sought rehearing en banc from the original opinions. Indeed, in the Sixth Circuit, Whirlpool took the unusual step of writing Chief Judge Alice M. Batchelder directly as part of its petition, and Sears implored any Seventh Circuit judge to issue a written dissent even if rehearing was denied in that court. No judge on either Circuit requested rehearing. *See* WP at 73a; SP at 43a. Petitioners did not seek rehearing en banc this time.

on a classwide basis to meet the predominance standard." *Id.* at 36a (citing *Comcast,* 133 S. Ct. at 1433). It concluded that *Comcast's* requirements were "met in this case." *Id.*

The Seventh Circuit unanimously concurred in the Sixth Circuit's reasoning: "[u]nlike the situation in *Comcast*, there is no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis[.]" *Id.* at 7a. It concluded: "[t]he concordance in reasoning and result of our decision and the Sixth Circuit's decision averts an intercircuit conflict." *Id.* at 12a.

REASONS TO DENY THE PETITIONS

I. All Respondents Have Alleged an Injury Recognized Under Relevant State Law, and All Have Constitutional Standing.

A. "Getting an Inferior Product for the Same Money" Is a Well-Recognized, Legally-Actionable Injury.

Despite acknowledging that the underlying class actions "allege that [Petitioners] breached written and implied warranties," SP at 2, Petitioners and their amici return time and again to the assertion that the underlying classes are comprised largely of uninjured persons who have no legal claim under state law. At no point do Petitioners or their amici actually engage the requirements of state warranty law in the states at issue. Nor do Petitioners explain how their claim that harm, if any, is limited to a handful of purchasers aligns with

the largely undisputed facts of record that buttress the conclusions below that the mold problem is widespread, that the claims seek well-established remedies under common warranties, and that the cases are properly brought as class actions.

Petitioners instead would have this Court reach out to unsettle a century of hornbook state warranty law, and fundamentally refashion the commercial law of seven states. Petitioners' contention that consumers who got less than they bargained for are legally "unharmed" cannot be reconciled with this well-settled state law that consumers are entitled to receive a product suitable for its ordinary and intended use. Nor can it be reconciled with this Court's unanimous recognition that claims to recover the benefit of the bargain are the very "essence of a warranty action . . . ." *E. River S.S.*, 476 U.S. at 868.

Petitioners argue that many class members are "uninjured" because costly and time-consuming maintenance may prevent the mold in their Washers from emitting a noxious odor. But the certified classes assert warranty claims that *all* purchasers were harmed at the point of sale because they got less than that for which they paid. As explained above, Respondents allege that *every* Washer is defective because each accumulates mold, and Whirlpool directed *all* purchasers to undertake unexpected, extraordinary, and costly measures to try to ameliorate that mold. As a result, the class actions assert that the Washers are "[un]fit for the ordinary purposes for which [washing machines] are used" for each and every purchaser. U.C.C. § 2-314(2); *see also* James J. White & Robert S.

Summers, Uniform Commercial Code § 12:8 (6th ed. 2010) ("We define [direct economic] loss as damage flowing directly from insufficient product quality. Direct economic loss includes ordinary loss of bargain damages: under 2-714(2), the difference between the actual value of the goods accepted and the value that they would have had if they had been as warranted.").[8]

Under well-established U.C.C. law, the remedies for such claims flow directly from the proof of harm—the very question that concerned this Court in *Comcast*. The remedy in a breach of warranty claim is defined by the economic loss that establishes the claimed harm. As set forth by the U.C.C., warranty remedies must restore the purchaser to being "in as good a position as if the other party had fully performed." U.C.C. § 1-305; *see also* Restatement (Second) of Contracts § 344 cmt. a (1981) (same); U.C.C. § 2-714(2) ("The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted[.]").

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[8] As Professor White explains, "Breach of warranty occurs and the cause of action arises upon the sale of an unmerchantable product.... If the buyer discovers the defect before four years have passed, he may recover damages. That is so whether his damages are a grave injury to life, limb, or property or whether the injury is but a small diminution in value (because of the defect) from what was promised." James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. Rev. 1067, 1076 (2002).

The logic is clear. If a car dealer sells a consumer a putative Cadillac, but in reality slaps an upmarket decal on a Chevrolet, the consumer is harmed. A cause of action does not await a collision in which the consumer is physically injured. Nor is the warranty claim averted because the car can still get from Point A to Point B. The seller, moreover, cannot defend against the action by pointing out that many people very much like Chevrolets. And most certainly, the seller does not avoid the warranty action by advising the purchaser not to accelerate or brake too suddenly (or by offering to sell the purchaser a costly fuel additive to try to boost performance). If a seller contracts to deliver a Cadillac, the seller must deliver a Cadillac.

This is precisely how the courts below understood these cases. As with the Chevy passed off as a Cadillac, the issue was whether these Washers were or were not merchantable at the point of sale. *See* SP at 11a ("There is a single, central, common issue of liability: whether the [Washers were] defective."); WP at 26a ("plaintiffs alleged on behalf of all [Washer] owners that Whirlpool impliedly warranted that the [Washers] were of good and merchantable quality, both fit and safe for their ordinary intended use."). These claims are recognized by settled warranty law in every state at issue here.

B. These are Quintessential State Law Breach of Warranty Claims.

The Courts of Appeals found that Respondents properly allege breach of warranty claims, and properly seek benefit of the bargain remedies under the relevant state laws. *See, e.g.*, WP at 28a.

Petitioners and their amici argue that this was error, a misapprehension of the critical state law distinctions between warranty claims and product liability claims. *See, e.g.*, WP at 18-20; SP at 31-32.

The seven state laws here distinguish tort claims for personal injury or property damage from breach of contract claims under warranty. A plaintiff bringing a product liability claim must establish that a product has caused personal injury or property damage. *See E. River S.S.*, 476 U.S. at 868. In such an action, the plaintiff may not recover for purely economic harm. *See id.*; Restatement of Torts (Second) § 402A (setting forth conditions for strict products liability for tort injury). Thus, if Respondents argued that the Washers caught fire and injured them or damaged property, then product liability law would come into play. *See, e.g., Hale v. Enerco Group, Inc.*, No. 1:10-cv-867, 2011 U.S. Dist. LEXIS 781, at *21-22 (N.D. Ohio Jan. 5, 2011) (explaining this distinction under Ohio law); *see also* Ohio Product Liability Act ("OPLA"), Ohio Rev. Code §§ 2307.71(A)(7).[9]

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[9] For simplicity, Respondents discuss only California, Ohio, and Texas state-law here; Appendix A shows that the law of the other four states at issue (Illinois, Indiana, Kentucky, and Minnesota) is in accord. The leading Eighth Circuit case applying Minnesota warranty law, *Zurn*, is discussed *infra*.

Although Petitioners acknowledge in *Butler* that the class claims sound in warranty, SP at 2, they elide that critical fact in *Glazer*. *See* WP at 18-19 (citing only Ohio tort cases seeking physical or economic injury

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However, when a plaintiff asserts that the product delivered differed from the product promised (i.e., Respondents' claims here), a plaintiff may recover *only* the lost economic benefit of the bargain. The law of California, one of the states in the Sears class, well identifies the distinction. As then-Justice Janice Rogers Brown explained, "[w]hen no safety concerns are implicated because the damage is limited to the product itself, the consumer's recourse is in contract law to enforce the benefit of the bargain." *Jimenez v. Superior Court*, 58 P.3d 450, 461 (Cal. 2002) (Brown, J., concurring and dissenting); *see also Seely v. White Motor Co.*, 403 P.2d 145, 150 (Cal. 1965) (Traynor, J.) ("[T]he rules of warranty . . . . determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver.").

Two putative class actions decided by the Fifth Circuit, under Texas law also at issue in *Butler*, are instructive. *See McManus v. Fleetwood Enters.*, 320 F.3d 545, 552 (5th Cir. 2003) (Clement, Garza, Hudspeth, JJ.); *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 (5th Cir. 2001) (Jones, Jolly, Smith, JJ.).

In *McManus*, the defendant sold a motor home represented as capable of towing a family's passenger car. 320 F.3d at 552. Undisclosed (like here, until post-sale) was that in order to tow a car, and to be able to stop safely as well, an additional

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damages). This persistent mischaracterization was made in the Petition in *Glazer* last year, and was addressed by Respondents then.

purchase of supplemental brakes was necessary. *Id.* Class certification was challenged on the grounds that some purchasers had not been injured while attempting to tow a vehicle, and that others had not even tried to tow a vehicle. *See id.* Judge Edith Brown Clement explained that neither argument applied to a breach of warranty claim:

> [W]hether or not any member of the class actually suffered any *physical* injury is immaterial. Likewise, it is immaterial whether or not the class members even intended to use their motor homes for towing because all a jury need determine is that the motor homes were defective with respect to a motor home's "*ordinary* purpose."

Id. (citation omitted). She continued:

> Fleetwood emphasizes that the McManuses have not shown *any* class members were actually injured. These arguments misapprehend the nature of the implied warranty of merchantability cause of action. . . . Here, the damages sought by the McManuses are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain.

Id. (internal citations omitted).

Similarly, in *Coghlan*, plaintiffs contended that they had been promised a fiberglass boat made entirely of fiberglass, but were sold a boat

constructed of 1.5 inches of plywood encased by fiberglass. *Id.* The district court dismissed, holding that the plaintiffs did not assert "any real damages." *Id.* Judge Edith Jones reversed:

> The only damage sought by the Coghlans is the benefit of their bargain with Wellcraft, or the difference in value between what they were promised, an all fiberglass boat, and what they received, a hybrid wood-fiberglass boat. Along with the "out of pocket" damages formula, which measures the difference between what the plaintiff paid in consideration and what he actually received, "benefit of the bargain' is a standard method for measuring damages in fraudulent representation and certain contract cases. The benefit of the bargain measure of damages is neither novel nor exotic.

Id. at 452. Judge Jones added, in the same terms as the Chevy versus Cadillac hypothetical:

> A simple example ... makes the common-sense nature of benefit of the bargain damages clear: if a man buys what is represented to him as an 18k gold ring, but later discovers that the ring is merely 10k gold, he is entitled to the difference in value between the 18k ring that he bargained for and the 10k ring that he received.

Id. The court explained the distinction between such hornbook warranty claims like those Respondents assert here and "no-injury" product liability claims:

> The key distinction between this case and a "no-injury" product liability suit is that the Coghlans' claims are rooted in basic contract law. . . . the plaintiffs in a no-injury products liability case have not suffered any physical harm or out-of-pocket economic loss. Here, the damages sought by the Coghlans are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain.

Id. at 455 n.4.

As Judge Frank Easterbrook has well put it: "[p]aying too much, or *getting an inferior product for the same money*, or getting a product that causes deferred injury and medical expenses, causes a loss of one's money, which is 'property.'" *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris*, 196 F.3d 818, 823 (7th Cir. 1999) (emphasis edited); *see also United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 749 (7th Cir. 2013) ("Basing damages on net loss is the norm in civil litigation. If goods delivered under a contract are not as promised, damages are the difference between the contract price and the value of what arrives.").

As these cases demonstrate, Respondents' warranty claims are neither novel nor are they "no-injury" claims.

C. All Purchasers Have Standing as Design Defect (Mold) Class Members.

Petitioners argue that whatever state law holds, constitutional standing is limited to those whose Washers have developed a noxious odor. WP at 32-33; SP at 31-33 ("[B]uyers whose products function perfectly lack standing to sue . . . ."). In other words, Petitioners argue a defect must not merely be latent, but must "manifest" for there to be constitutional standing. *See id.* As demonstrated, this argument misapprehends the underlying state warranty law claims; it also misapprehends the law of standing.

Even if this were a latent defect case, the Circuits agree that every class member would have constitutional standing, regardless of manifestation. *See, e.g., Cole v. GMC*, 484 F.3d 717, 722-23 (5th Cir. 2007) (explaining that an unmanifested defect establishes injury-in-fact for constitutional purposes when plaintiffs sue for economic injury); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006) (explaining that a claim for diminution in value is the same whether or not a defect has manifested); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264-65 (2d Cir. 2006) (explaining that a person exposed to a toxic substance has injury-in-fact if potential future health consequences cause him to worry); *cf. Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) ("[P]roof of the manifestation of a defect is not a prerequisite to class certification. . . . What [Defendant] argues is whether class members can win on the merits." (citations omitted)).

But to be clear: this is not a case about a latent defect that may never harm the purchasers. It is a case about delivery of a product with a design defect that both compromises its value for all purchasers at point of sale and requires all purchasers to undertake time-consuming and costly remedial steps to try to avoid the result (mold).[10] This Court's opinion in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), makes clear that the Courts of Appeals are correct with respect to standing in such circumstances.

In *Monsanto*, this Court held that one who is forced to take remedial action to avoid potential harm from a product has standing. *See id.* at 2754-55. There, alfalfa farmers feared *potential* contamination of their crops if genetically-altered seeds were allowed to come to market. The Court explained that, if the seeds were allowed on the market, the farmers would have to "conduct testing to find out whether and to what extent their crops have been contaminated," and concluded that this "reasonable probability" of future harm was sufficient to confer standing under Article III. *See id*

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[10] The prevalence of mold and the notice Whirlpool directed post-sale to all owners regarding costly corrective measures sets these cases apart from those involving no claim of actual defect, diminished functionality, failed consumer expectations, or remediation. *See, e.g., Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 747-48 (7th Cir. 2008) (decertifying class in case alleging stainless steel drums in Sears dryers were not made *entirely* of stainless steel; finding no evidence consumers relied on this representation, that anyone cared, or that anyone's clothes had actually been affected by rust).

("Respondents also allege that the risk of gene flow will cause them to take certain measures to minimize the likelihood of potential contamination.").

Here, too, all purchasers of the Washers must undertake costly and time-consuming remedial measures (at Whirlpool's direction, no less) to minimize the likelihood of mold contamination. As the Court explained in *Monsanto*, "[s]uch harms, which respondents will suffer *even if their crops are not actually infected* . . . are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." *Id.* at 2755 (emphasis added); *cf. Reed Elsevier, Inc., v. Muchnick,* 559 U.S. 154, 161 (2010) (summarizing limits on "drive-by" jurisdictional rulings in favor of "claim-processing rules" based on the substantive merits of the cause of action).

Clapper v. Amnesty International USA, 133 S. Ct. 1138 (2013) is not to the contrary. In *Clapper*, plaintiffs asserted that a new federal law might cause them some inchoate harm in the future. There was no claim (let alone evidence) of present harm at the time suit was filed, nor even of "hypothetical future harm that is . . . certainly impending." 133 S. Ct. at 1141. The complaining organizations in *Clapper* asserted primarily "an objectively reasonable likelihood that their communications will be acquired . . . at some point in the future," a necessarily speculative claim of harm. *Id.* Because there had been no prohibited targeting of any of the plaintiffs, nor any identified government policy to target them, there was no standing. *Id.* at 1148-49. The Court explained, however, that while "mere

conjecture" or "speculation" supported only by "an attenuated chain of inferences" about future harm is not enough to create standing, there is no requirement "that it is literally certain that the harms . . .will come about." *Clapper*, 133 S. Ct. at 1150 n.5 & 1154.

Clapper is thus unlike *Monsanto*, where ameliorative steps had to be taken by all purchasers. It is unlike the design defect cases, in which the diminished value of acquired goods is alleged as an already realized harm that occurred at the time of purchase. And it is unlike *this* case, in which there is *both* the point-of-sale diminished value and necessity of remedial measures to avoid mold contamination.

Finally, the Court in *Clapper* reaffirmed that in order to satisfy standing, "an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Id.* at 1147 (quoting *Monsanto,* 130 S. Ct. at 2752). In *Clapper,* no member of the class could satisfy this requirement.

Here, the entire class alleges a concrete injury, delivery of a substandard product and the cost of remedial measures, a direct link between the design defect and the warranty claim, and the ability to obtain legal redress under well-settled warranty law. This satisfies the constitutional standing requirement.

D. All Manufacturing Defect (CCU) Class Members Have Standing.

As explained above, in a design defect case, it is the allegedly defective design that establishes the breach of warranty and injury-in-fact at the point of sale, which is the reason that the class is properly defined to include all purchasers. Unlike the mold claims, the CCU class alleges that a set of readily identifiable washing machines were manufactured with a substandard process and part (Petitioners concedes this much), and that Petitioners are obligated to fix that problem after it occurs under the terms of the warranty. Accordingly, the CCU class is defined not as all purchasers of the washers, but only those purchasers who own the machines manufactured with the substandard process and part (identifiable by serial numbers on the machines). SP at 20a, 33a-34a. The CCU class seeks to have Petitioners cover the costs or repair or replacement for those units that have failed.

In the CCU case, the procedural form follows the substantive claim as the class definition tracks the alleged harm. The mold class is comprised of all purchasers facing a design defect that compromises the benefit of the bargain to the consumer, where the harm arises under state warranty law at the point of purchase. By contrast the CCU class comprised of only those purchasers whose product was not properly manufactured, where the harm is the actual product failure. Again, consistent with *Comcast,* the CCU class seeks the classwide remedy of warranty enforcement to provide repairs/replacement as the CCUs in the Washers fail in operation. Any other definition would allow the procedural device of a class action to alter the

substantive law, which all parties agree is impermissible.[11]

II. There is No Circuit Split on Certification of Consumer Warranty Claims.

There is no Circuit split on certification of a class of consumers who did not receive the benefit of their bargain upon purchase of a defective product. Put succinctly: all Circuits mandate that every class member assert a constitutionally cognizable injury; no circuit requires proof that every class member ultimately recover damages. *See, e.g., In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011); *Cole*, 484 F.3d at 717; *Denney*, 443 F.3d at 253.

Petitioners offer a curious cocktail of splits in authority (and their amici offer yet more), made particularly unusual because Whirlpool argued a

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[11] Petitioners' hypothetical case involving iPhones fails to capture this critical distinction. SP at 27-28. If 1% of iPhones suffered from a manufacturing defect and Apple refused to fix those iPhones under warranty when they ceased functioning, a class action might well be appropriate, assuming (as is true in the CCU case): (1) the mis-manufactured iPhones could be identified objectively by serial number; (2) every mis-manufactured iPhone was mis-manufactured in the same way; (3) the affected iPhones had materially identical written warranties. *See, e.g.*, SP at 20a, 34a (certifying the CCU class action). Owners of the 99% of iPhones that were *not* mis-manufactured would not be in the class. Further, Apple would at most be liable under its warranty to repair only those iPhones that actually broke.

different split to this Court only last Term. Then, Whirlpool told this Court that there was "a deep and mature circuit conflict" because the Third, Sixth, and Ninth Circuits permitted certification of claims including uninjured class members, whereas the Second, Seventh, and Eighth did not. *See* Brief for Petitioner at 20-22, *Whirlpool Corporation v. Glazer, et al.* (US 2013) (No. 13-322). Petitioners now conjure a completely different circuit split over this same issue, pitting the Sixth, Seventh, and Ninth Circuit "against" the Fifth, Eighth, and Eleventh. *See* WP at 29-32; SP at 28-30. This split is no more genuine than the last one.

For example, Petitioners contend that under Fifth Circuit law, "a class containing persons who did not experience the alleged problem cannot be certified." SP at 28. Petitioners do not specify what the "alleged problem" is in a warranty action, and the case they cite does not support the argument that the Fifth Circuit found there can be no predominance in cases involving warranty claims for unmanifested defects. *See id.* at 29 (*citing Cole v. Gen. Motors Corp.*, 484 F.3d at 730.) The holding in *Cole* turned on the failure of plaintiffs to establish that the underlying claims in a nationwide class were uniformly cognizable, given "variations in the substantive laws of express and implied warranty among the fifty-one jurisdictions." *Id.* at 726. There is no conflict between that holding and the holdings below, which implicate only the law of seven states that recognize the particular warranty claim asserted by Respondents (and do so under the law of each, not in a single class). *See* Appx. A (setting forth the relevant state laws). Indeed, as discussed above, the Fifth Circuit specifically *approves* of class

certification of warranty claims like these under Texas law. *See McManus*, 320 F.3d at 552.

Petitioners also claim a conflict with Eighth Circuit law. Yet in *Zurn*, the leading Eighth Circuit case on point, the court upheld certification of a warranty class against a company selling allegedly defective pipes. 644 F.3d at 617.[12] *Zurn* applied Minnesota warranty law in a manner identical to the warranty claims presented here (Minnesota is one of the six states in *Butler*.) Defendants in *Zurn* argued class certification was improper because many consumers' plumbing had not yet actually leaked, and that these "dry plaintiffs" had suffered no legally cognizable injury. *See id.* The Eighth Circuit rejected this contention, explaining that the burden on the plaintiffs at certification was to show that there was a uniform defect, not uniform damages: "the claims of the dry plaintiffs are cognizable under Minnesota warranty law and . . . they may seek damages if they succeed in proving their claim of a universal inherent defect in breach of warranty." *Id.* at 617. In other words, the Eighth Circuit reached exactly the same conclusion in *Zurn* as the ones reached by the Sixth and Seventh Circuits here.

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[12] Instead of citing *Zurn*, Petitioners cite an inapposite case in which an accounting firm error harmed some class members while benefiting others, and the Eighth Circuit explained that the class could not include people who did not assert a legal harm. *See Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010). *Zurn* is the apposite case here.

Petitioners' two final purported "splits" would not warrant certiorari even if Petitioners were correct about them.

First, Petitioners cite two California district court opinions that they assert are inconsistent. *See* WP at 30. Setting aside that these opinions are not in fact inconsistent, a split in district court authority is not a matter warranting this Court's attention. *See, e.g., Supreme Court Practice* at 256 ("It is the duty of the Courts of Appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts.").

Second, Petitioners cite an unpublished memorandum opinion from the Eleventh Circuit, *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857 (11th Cir. 2012), ostensibly inconsistent with the opinions below. WP at 31. Again, such an unpublished order lacks "the precedential significance that [this Court] generally look[s] for in deciding whether to exercise [its] discretion to grant plenary review." *Lawrence v. Chater*, 516 U.S. 163, 170 (1996). And there is no conflict with the Eleventh Circuit in any event.[13]

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[13] In *Walewski*, the plaintiffs sued over a malfunctioning video game on behalf of a putative class included non-consumer buyers, buyers who had bought from someone other than the defendant, and buyers with no cause of action. *Id.* at 861.

III. Class Members Assert Claims Established by Common Proof.

Three circuits have now reviewed the application of *Comcast* to these claims (including the Ninth Circuit's denial of Rule 23(f) review in *Tait*, *supra* n. 3), and each found class certification proper. Both Circuits below here, moreover, were correct in holding that, on the facts of this case, common issues of liability and injury predominate over possibly individual damage issues. *See* SP at 10a ("[D]amages of individual class members can be *readily determined* in individual hearings[.]" (emphasis added)); WP at 37a ("[L]iability questions common to the class predominate over damages questions unique to class members[.]" (citation omitted).).

A. The Damages Flow Directly From the Alleged Liability.

In *Comcast*, this Court explained that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [the] theory [of liability certified for class treatment]." 133 S. Ct. at 1433. The Court held, moreover, that class certification was impermissible when the method for establishing proof of injury to all class members did not, in fact, establish the harm suffered by those class members. *See id.* ("There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised."). *Comcast* was an antitrust case in which the same econometric models that defined damages as a result of anticompetitive activity were also the basis for liability. Accordingly, when the *Comcast* plaintiffs submitted a model for determining injury

that could not address damages for many of the proposed class members, there was a failure of proof of classwide harm. *See id.*

Here, there are *no* individual issues of injury if Respondents prove that a common design defect rendered the Washers unfit for their ordinary and intended use. As the Sixth Circuit put it: "[i]f a defective design is ultimately proved, all class members have experienced injury as a result of the decreased value of the product purchased." WP at 27a; *see also* SP at 7a. ("[A]ny buyer of a [Sears/Kenmore] washing machine who experienced a mold problem was harmed by a breach of warranty alleged in the complaint."). And unlike in *Comcast*, "there is *no* possibility . . . that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis. . . . [d]amages follow from the alleged harm directly." SP at 7a (emphasis added).[14]

Petitioners simply contend that *Comcast* means *"a fortiori"* that no class may be certified if there are any individual damages calculations. *See, e.g.*, WP 17a. Latin aside, this is wrong. Neither this Court nor any court below has held that individual calculation of damages necessarily bars class certification on a common liability theory. Indeed, this Court has explained that the need to prove one

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[14] In the ongoing litigation below, Respondents have produced expert reports demonstrating that the precise quantum of damages for each class member can be calculated based on a simple formula, as in cases such as *Leyva v. Medline Industries*, 716 F.3d 510, 514 (9th Cir. 2013).

or more elements of a claim individually does *not* automatically defeat predominance. *See Amgen*, 133 S. Ct. at 1195 (reaffirming that common issues need only predominate); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) (rejecting requirement of proof of loss causation at class certification stage because loss causation addresses "subsequent economic loss"). Requiring plaintiffs to prove that all class members will recover damages as a condition of class certification is "putting the cart before the horse." *Amgen*, 131 S. Ct. at 1191.

At bottom, Petitioners appear to contend that this Court should grant certiorari to hold that class certification is *always* inappropriate if damages cannot be resolved in classwide proceedings. *See* WP at 2, 15-16, 25; SP at 17. Petitioners have no citation for this proposition, and no appellate decision in the wake of *Comcast* case even implies it. Indeed, the Circuits uniformly hold to the contrary. *See, e.g., Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) ("[T]here are ways to preserve the class action model in the face of individualized damages."); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("The predominance inquiry requires an analysis of whether a prima facie showing of *liability* can be proved by common evidence . . . ." (emphasis added)); *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification . . . ."); *In re Rail Freight Fuel Surcharge Antitrust Litig*, 725 F.3d 244, 252 (D.C. Cir. 2013) (finding that plaintiffs need not be "prepared at the certification stage to demonstrate through common

evidence the precise amount of damages incurred by each class member").

B. There is No Confusion or Circuit Split on the Application of *Comcast*.

In one petition for certiorari (but not both), Petitioners argue that the Ninth Circuit and the D.C. Circuit have reached differing conclusions about the meaning of *Comcast*. *See* WP at 28.[15] Not so. Their holdings address and resolve different issues; they do not conflict, they are unrelated.

In *Leyva v. Medline Industries*, the Ninth Circuit considered a wage and hour claim that employees were undercompensated under governing labor laws. 716 F.3d at 513. It explained that common issues predominate in such a claim when a liability determination rests entirely on common evidence and the only individual issues are mechanical damage calculations. *See id.* at 514 (explaining that defendant's "computerized payroll and time-keeping database would enable the court to

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[15] Petitioners also address a district court opinion, *Jacob v. Duane Reade, Inc.*, No. 11-civ-160, 2013 U.S. Dist. LEXIS 111989 (S.D.N.Y. Aug. 8, 2013). *See* WP Pet. at 27-28. Leaving aside that *Jacob* is a district court opinion, Petitioners mischaracterize what it shows, which is that the Courts of Appeals have only just begun to address the meaning of *Comcast* at all. *Jacob* discerns three *factual* groups of cases, each requiring a different result under *Comcast*. Factual differences leading to some cases granting class certification and others denying it do not create a Circuit conflict.

accurately calculate damages for each claim"). In so holding, the Ninth Circuit explained that individual "damage calculations alone cannot defeat certification." *Id.* at 513.

In *In re Rail Freight Fuel Surcharge Antitrust Litig.*, the D.C. Circuit considered whether antitrust liability could be established based on an econometric model that "detect[ed] injury where none could exist." 725 F.3d at 252. Unsurprisingly, the D.C. Circuit answered this question in the negative—antitrust injury is an element of the cause of action (distinct from damages)—"[c]ommon questions of fact cannot predominate where there exists no reliable means of proving classwide injury in fact." *Id.* at 252-53. Injury-in-fact is not the same as damages, and the D.C. Circuit stated expressly that Plaintiffs need not be "prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member." *Id.* at 252 (citations omitted).

Rail Freight held that no class can be certified when the threshold question of *liability* (including injury-in-fact) requires a detailed individual inquiry, while *Leyva* held that the need to calculate individual *damages* cannot, by itself, render class certification inappropriate. There is no inconsistency between these cases, and both faithfully apply *Comcast*. Moreover, *these* cases—arising out of the Sixth and Seventh Circuits—present poor vehicles for resolving a supposed disagreement between the Ninth and D.C. Circuits.

IV. Efficiency Is a Textually-Mandated Policy of Rule 23.

Petitioners and their amici feign to be shocked, shocked by the lower courts' consideration of efficiency as a desideratum in class certification. The text of Rule 23 should assuage their concern: "a class action [must be] superior to other available methods for fairly and *efficiently* adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *see also* Fed. R. Civ. P. 1 (explaining that the Federal Rules must "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

Efficiency alone may not be enough for class certification, and the courts below did not suggest (much less hold) that it is. But it remains a textually-based, central consideration when applying Rule 23(b)(3). Indeed, as this Court explained just last Term, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'method' best suited to adjudication of the controversy 'fairly and efficiently.'" *Amgen,* 133 S. Ct. 1191.

The same efficiency concerns that buttress class certification here led Whirlpool to treat all purchasers as a class for these very harms. When faced with internal engineering conclusions that the design defect was present in all of the Washers, Whirlpool directed its own "notice" to all purchasers, instructing them to keep their washing machines open between use (a disturbing recommendation for those who purchased these machines because of space constraints at home, or those with young children), to wipe down the machine, and to run

extra cleaning cycles with Affresh tablets. The record establishes that Whirlpool directed these instructions to *all* purchasers of these Washers: it did not differentiate between the purported 21 different models, nor between those who had complained of odor and those who had not.

Affresh, too, demonstrates that Whirlpool treated all purchasers of the Washers the same, and thereby effectively defined the contours of the class. Aware of the scope of the mold problem in its Washers, Whirlpool developed, marketed, and sold Affresh (at substantial profit) to *all* purchasers as "THE solution" to their mold problems. WD93-6/SD213-16 at 2.

The common treatment of purchasers as a class in litigation followed Whirlpool's own common treatment of these same purchasers in the market for its products.

The objectives of the Rules were well-served below. In a design-defect warranty class action, the allegation is that all class members suffered (uniform) injury at the point of purchase when they were (uniformly) provided a product that was not what they were (uniformly) promised. If purchasers in such a class action ultimately prove that the design was defective and resulted in an inferior product being delivered, then every member of that class is entitled to benefit of the bargain damages; i.e., the difference in value between what was promised and what was provided. *See, e.g.*,

McManus, 320 F.3d at 552.[16] In other words, the class certification here follows directly from the proofs submitted. Rule 23 did not create a cause of action for any purchaser; it serves only as the efficient means to adjudicate (identical) breach of warranty claims.

CONCLUSION

It has been almost a century since Justice Cardozo explained that a manufacturer is "responsible for the finished product. It [is] not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests." *MacPherson v. Buick Motor Co.*, 394 111 N.E. 1050, 1055 (N.Y. 1916). Contrary to the doomsday rhetoric of Petitioners and their amici, that simple warranty standard has well served American manufacturers, American consumers and the American economy. The sky has not fallen.

For the aforementioned reasons, the Petitions for Writs of Certiorari should be denied.

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[16] And in a manufacturing defect class action (e.g., the CCU class or Petitioners' hypothetical iPhone class), the class is defined as all of those who received the allegedly defective part. In such a case, the injury occurs upon failure and damages are the cost of repair: a defendant's financial liability is necessarily limited to providing warranty service when the manufacturing defect causes the product to stop functioning.

RESPECTFULLY SUBMITTED,

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EXHIBIT A

CALIFORNIA	
Case	*Seely v. White Motor Co.*, 403 P.2d 145, 150 (Cal. 1965): "[T]he rules of warranty . . . . determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver."). *See also Jimenez v. Superior Court*, 29 Cal. 4th 473, 490 (Cal. 2002) (Brown, J., concurring and dissenting): > When no safety concerns are implicated because the damage is limited to the product itself, the consumer's recourse is in contract law to enforce the benefit of the bargain. This principle underlies the economic loss rule, a rule that distinguishes between damages from physical injuries caused by a defective product and economic losses resulting from the failure of the product to meet the consumer's expectations (for example, losses in a business or the diminished value of the product).
Statute	Cal. Com. Code § 2714(2): Buyer's damages for breach in regard to accepted

	goods (a) Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable. (b) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (c) In a proper case any incidental and consequential damages under the next section may also be recovered.

ILLINOIS	
Case	*Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 76 (Ill. 2002) (citations omitted): "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property" . . . as well as "the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." . . . These definitions are consistent with the policy of warranty law to protect expectations of suitability and quality.
Statute	§ 810 Ill. Comp. Stat. 5/2-714: Buyer's damages for breach in regard to accepted goods (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607 [810 ILCS 5/2-607]) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary

	course of events from the seller's breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

INDIANA	
Case	*Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 959 (Ind. 2005) (internal quotation marks and citations omitted): The remedy for breach of implied warranty of merchantability is in most cases, including this one, the difference between the value of the goods accepted and the value they would have had if they had been as warranted.
Statute	Ind. Code Ann. § 26-1-2-714: Buyer's damages for breach in regard to accepted goods (1) Where the buyer has accepted goods and given notification (IC 26-1-2-607(3)), he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the

	value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under IC 26-1-2-715 may also be recovered.

KENTUCKY	
Case	*Giddings & Lewis, Inc. v. Indus. Risk Insurers*, 348 S.W.3d 729, 738 (Ky. 2011): Faced squarely with a classic case for application of the economic loss rule, we hold that the rule applies in Kentucky. We adopt the *East River Steamship* Court's holding that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." 476 U.S. at 871. This rule recognizes that economic losses, in essence, deprive the purchaser of the benefit of his bargain and that such losses are best addressed by the parties' contract and relevant provisions of Article 2 of the Uniform Commercial Code.
Statute	KY. Rev. Stat. Ann. § 355.2-714: Buyer's damages for breach in regard to accepted goods (1) Where the buyer has accepted goods and given notification (subsection (3) of KRS 355.2-607) he may recover

	as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under KRS 355.2-715 may also be recovered.

MINNESOTA	
Case	*S.J. Groves & Sons Co. v. Aerospatiale Helicopter Corp.*, 374 N.W.2d 431, 434 (Minn. 1985): > What [plaintiff] seeks is recovery for the product's failure to live up to [plaintiff's] expectations as to its suitability, quality, and performance -- even if a tort injury arose out of the same occurrence, [plaintiff] did not suffer it, but lost only what it purchased. This type of damage -- to the defective product itself -- is not ordinarily recoverable in tort because a product's unsatisfactory performance is the type of problem that warranty law and the U.C.C. were designed to remedy. *See also In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617 (8th Cir. 2011) (finding "under Minnesota warranty law and that [plaintiffs] may seek damages if they succeed in proving their claim of a universal inherent defect in breach of warranty").
Statute	Minn. Stat. § 336.2-714: Buyer's damages for breach in regard to accepted goods (1) Where the buyer has

	accepted goods and given notification (subsection (3) of section 336.2-607) the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

OHIO	
Case	*Chemtrol Adhesives, Inc. v. American Manuf. Mut, Ins. Co.*, 537 N.E.2d 624 (Ohio 1989): Generally speaking, a defective product can cause three types of injury: personal injury, property damage, and economic loss. "Personal injury" is, of course, self-explanatory. "Property damage" generally connotes either damage to the defective product itself or damage to other property. "Economic loss" is described as either direct or indirect. "Direct" economic loss includes the loss attributable to the decreased value of the product itself. Generally, this type of damages encompasses "the difference between the actual value of the defective product and the value it would have had had it not been defective." It may also be described as "the loss of the benefit of the bargain . . . ." *Id.* at 629 (citing *Mead Corp. v. Allendale Mut. Ins. Co.*, 465 F. Supp. 355, 363 (N.D. Ohio 1979)).
Statute	1302.88 Buyer's damages for breach in

	regard to accepted goods - UCC 2-714. (A) Where the buyer has accepted goods and given notification as provided in division (C) of section 1302.65 of the Revised Code, he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable. (B) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (C) In a proper case any incidental and consequential damages under section 1302.89 of the Revised Code may also be recovered.

TEXAS	
Case	*Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77, 78 n. 1 (Tex. 1977): Direct economic loss may be said to encompass damage based on insufficient product value; thus, direct economic loss may be "out of pocket" the difference in value between what is given and received or "loss of bargain" the difference between the value of what is received and its value as represented. Direct economic loss also may be measured by costs of replacement and repair. Consequential economic loss includes all indirect loss, such as loss of profits resulting from inability to make use of the defective product.
Statute	Tx Bus. & Com. Sec. 2.714: Buyer's Damages For Breach In Regard To Accepted Goods (a) Where the buyer has accepted goods and given notification (Subsection (c) of Section 2.607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events

	from the seller's breach as determined in any manner which is reasonable. (b) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. (c) In a proper case any incidental and consequential damages under the next section may also be recovered.