Nos. 13-430, 13-431

In the
Supreme Court of the United States

SEARS, ROEBUCK AND COMPANY,

Petitioner,

v.

LARRY BUTLER, et al., 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 Writ of Certiorari to the United States Courts of Appeal for the Sixth and Seventh Circuits

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

Sears, Roebuck & Company v. Butler

Plaintiffs filed class action breach of warranty claims on behalf of buyers of front-loading washing machines sold by Sears, Roebuck in six states. They allege a design defect that causes musty odors and a manufacturing defect that produces false error codes, even though it is undisputed that most washers never developed either problem. The Seventh Circuit initially ordered classes certified under Rule 23(b)(3) based on a single abstract question: whether there is a defect. This Court granted certiorari, vacated, and remanded in light of *Comcast*. The Seventh Circuit now has "reinstated" its prior decision, holding that a class trial on the purportedly common "defect" issue is the "efficient procedure." The court of appeals swept aside a multitude of individual liability and damages issues as irrelevant to Rule 23's predominance requirement. The questions presented are:

1. Whether the predominance requirement of Rule 23(b)(3) is satisfied by the purported "efficiency" of a class trial on one abstract issue, without considering the host of individual issues that would need to be tried to resolve liability and damages and without determining whether the aggregate of common issues predominates over the aggregate of individual issues.

2. Whether a product liability class may be certified where it is undisputed that most members did not experience the alleged defect or harm.

Whirlpool Corp. v. Glazer

Plaintiffs claim that all Whirlpool high-efficiency front-loading clothes washers sold since 2001 have a latent defect that potentially can cause moldy odors to develop. It is undisputed that most of the washers never developed any odor problem. The Sixth Circuit initially affirmed certification of a Rule 23(b)(3) class of some 200,000 Ohio residents. This Court granted certiorari, vacated, and remanded that decision in light of *Comcast*. On remand a two-judge panel of the Sixth Circuit, describing *Comcast* as having "limited application," reaffirmed its prior decision. The panel held certification proper based on two purportedly common questions: whether there is a defect that proximately causes odor, and whether Whirlpool adequately warned of that defect. The court swept aside a multitude of individualized factual inquiries needed to answer those questions. And it ignored the fact that neither injury nor damages can be determined on a classwide basis. The questions presented are:

1. Whether the Rule 23(b)(3) predominance requirement can be satisfied when the court has not found that the aggregate of common liability issues predominates over the aggregate of individualized issues at trial and when neither injury nor damages can be proven on a classwide basis.

2. Whether a class may be certified when most members have never experienced the alleged defect and both fact of injury and damages would have to be litigated on a member-by-member basis.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Rules

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this consolidated brief amicus curiae in support of Petitioners Sears Roebuck and Company and Whirlpool Corporation.[1] PLF was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project seeks, among other things, to uphold the constitutional due process limitations on class action litigation, including identifying the adverse consequences of permitting class actions to include a majority of noninjured class members. PLF filed amicus briefs supporting the original petitions for writ of certiorari in these cases. *Sears, Roebuck and Co. v. Butler*, 133 S. Ct. 2768 (2013) (granting certiorari and remanding in light of *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013)); *Whirlpool Corp. v. Glazer*, 133 S. Ct. 1722 (2013) (same). *See also First*

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

American Financial Corp. v. Edwards, 132 S. Ct. 2536 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Bennett v. Spear*, 520 U.S. 154 (1997).

SUMMARY OF REASONS FOR GRANTING THE PETITIONS

These cases address two key components of class certification that require resolution by this Court. First, they raise the question of whether efficiency – valuable though it can be – should be permitted to trump due process principles. Second, they present the recurring problem of massive classes that contain a vast majority of uninjured plaintiffs. Circuits are split as to what the Constitution requires with regard to both these issues.

The purpose of the Due Process Clause is to protect individual rights. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011) ("The Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power."). It requires that all persons "have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs[.]" *Barbier v. Connolly*, 113 U.S. 27, 31 (1885). Thus, a defendant's "aggregate liability . . . does not depend on whether the suit proceeds as a class action[,]" because "[e]ach of the . . . members of the putative class could . . . bring a freestanding suit asserting his individual claim." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.).

The Seventh Circuit's decision in *Sears, Roebuck & Company v. Butler*, improperly elevates systemic

efficiency above constitutional protection for individual rights. *Butler,* Pet. App. at 4a (holding that a class action is the "efficient procedure for litigation" of liability and that the parties would be expected to "quickly settle[]" the question of damages). *See* Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 Rev. Litig. 273, 278 (1991) (comparing individual efficiency—the "just, speedy, and inexpensive" adjudication of a claim—with systemic efficiency, or, benefits to the judicial system as a whole). That which makes the administration of courts efficient does not necessarily inure to the benefit of an individual litigant.[2] The decision below therefore conflicts with ample precedent of this Court establishing the primacy of individual due process rights over efficiency.

The difficulties presented by classes comprised largely of uninjured plaintiffs (difficulties present in both the *Sears* and *Whirlpool* cases) also raise significant constitutional issues. Article III, Section 2, of the Constitution limits the jurisdiction of the federal courts to the resolution of cases and controversies. This limitation reflects "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant . . . is the threshold question in every federal case, determining the power of the court to entertain the suit." *Id.* This is no less

---

[2] As Justice Marshall pointedly noted, "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *United States v. Ross*, 456 U.S. 798, 842 n.13 (1982) (Marshall, J., dissenting).

true in the context of class action litigation because a federal rule cannot alter a constitutional requirement. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))).

The judicial economy that justifies the use of class actions in appropriate circumstances does not mean that class actions are appropriate in all circumstances. The Constitution mandates a strong standing requirement. And while this Court has addressed the question of named plaintiffs' standing, there is confusion in the lower courts as to the constitutional standing requirements applied to unnamed, uninjured class members, particularly when those uninjured class members significantly outnumber those who actually suffered some injury. As with any case that involves uninjured plaintiffs, the potential for litigation abuse, and waste of judicial resources, is compounded when the issues arise in class actions. The decisions below adopted an open-ended theory, permitting people who are not harmed and who do not claim to be harmed to sue in the name of those who may be able to allege such harm, and thus warrant grants of certiorari.

ARGUMENT

I

EQUATING EFFICIENCY TO DUE PROCESS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

A. Constitutional Due Process Protection Trumps Prudential Concerns of Judicial Economy

By equating the predominance question in class action certification to efficiency, *Butler*, Pet. App. at 4a, 7a, the decision below fails to place the accepted value of efficiency within its proper constitutional context. There is no question that when confronted with two equally constitutional actions, considerations of efficiency can be a sound reason to tip the balance as a government actor or court chooses one over the other. *See Peretz v. United States*, 501 U.S. 923, 933 (1991) ("absent concerns about raising a constitutional issue or depriving a defendant of an important right, we should not foreclose constructive experiments [in improving the efficiency of the judicial process] that are acceptable to all participants in the trial process and consistent with the basic purpose of the statute"). But efficiency alone cannot transform an unconstitutional action into a constitutional one. *Propert v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991) ("[W]hile cost to the government is a factor to be weighed . . . , it is doubtful that cost alone can ever excuse the failure to provide adequate process."). The *Butler* decision breezily dismisses "complications [that] arise from the design changes and separate state warranty laws," *Butler,* Pet. App. at 11a,

but these "complications" are actually critical to the assessment of whether common issues truly predominate such as to warrant class certification. Disregarding the import of these complications conflicts with other circuits that defer to due process. *See Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 866 (5th Cir. 1985) (The cost of duplicative and perhaps conflicting adjudications is "the price of due process."); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness.").

Whenever this Court has explicitly considered the intersection of efficiency and constitutional due process guarantees, efficiency yields to due process:[3]

Competency hearings. Because a criminal defendant has a constitutional "right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel," a state may not truncate or eliminate competency hearings because "the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system." *Cooper v. Okla.*, 517 U.S. 348, 367-68 (1996).

---

[3] Efficiency must yield to other constitutional protections of individual rights as well. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988); *Village of Schaumburg v. Citizens for a Better Env't of N.C., Inc.*, 444 U.S. 620, 639 (1980) (invalidating anti-solicitation ordinance upon finding that state's interest in convenience and efficiency was insufficiently compelling to justify interference with protected speech); *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (federal courts may not settle disputes "for the sake of convenience and efficiency" if the plaintiff lacks Article III standing).

Custody proceedings. An unwed father cannot be deprived of custody of his children upon the death of the mother without a hearing showing him to be an unfit parent. This Court rejected the state's argument that most unmarried fathers are unsuitable and neglectful parents and it would therefore be more efficient to assume the unfitness of all unmarried fathers:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Ill., 405 U.S. 645, 656 (1972).

Job termination for pregnancy. Similar to the state's assumptions about unwed fathers, the school board in *Cleveland Board of Education v. LaFleur* assumed that teachers in their fourth or fifth month of pregnancy are unfit for their jobs. This Court acknowledged that the school board's presumption was "easier," but held that "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." 414 U.S. 632, 647 (1974). *See also Vlandis v. Kline*, 412 U.S. 441, 451 (1973) ("The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and

practicable means of establishing the pertinent facts on which the State's objective is premised.").

Search warrants. This Court invalidated Arizona's "murder scene exception" to the Fourth Amendment's search warrant requirement, rejecting the state's argument that "law enforcement may be made more efficient" by skipping the step of obtaining a search warrant. "[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citations omitted).

Prejudgment replevin procedures. A consumer is entitled to notice and a hearing prior to repossession of goods on which a debt is owed. Allowing a creditor to repossess property by the simple expedient of filing papers in small claims court was an efficient use of state resources, but saving the costs of a hearing "cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions [or property] are about to be taken." *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972).

B. A Defendant's Due Process Right To Mount a Defense Is Equal to a Plaintiff's Right To Pursue a Claim

The efficiencies created by class action litigation cannot be employed at the cost of denying individual litigants justice in the courts. *Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make

an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"), *cert. denied*, 464 U.S. 1040 (1984); *see also* James A. Henderson, Jr., *Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.").

Procedural fairness is required for individual justice for two reasons. First, fair process is often celebrated as an end in itself. *See*, *e.g.*, Judith Resnik, *et al.*, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 306 (1996). Underlying this view is the notion that every American has a right to his "own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4449 (1981)). Second, procedural fairness can affect the fairness of the outcomes it produces. *See*, *e.g.*, Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 201-02 (1992).

With its single-minded focus on the efficiency of aggregating the claims below in a class action, the Seventh Circuit essentially allowed the plaintiffs to presume the essential element of having suffered an actual injury. This procedure unfairly benefits the plaintiffs at the expense of the defendant. *See In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove

causation through individual affidavits submitted to special master rejected as "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Even when there is a common question as to the wrongfulness of the defendant's conduct, "this is only half the question;" courts may not combine claims in a class action where there are individualized facts as to whether each class member suffered actual damages. *Yeger v. E*Trade Sec. LLC*, 65 A.D.3d 410, 884 N.Y.S.2d 21, 24 (N.Y. App. Div. 2009) (footnote omitted). As the Second Circuit emphasized, "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's —and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). By removing individual considerations from the adversarial process, the judicial system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Sw. Ref. Co. v. Bernal*, 22

S.W.3d 425, 438 (Tex. 2000). Class certification hides the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

A properly defined class is necessary to realize both the protections and benefits for which the class action device was created. As the Ninth Circuit explained in *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973):

> Class actions, we believe, must be structured so as to conform in the essential respects to the judicial process. This is the principle by which we are guided. It dictates, inter alia, that the courts not be available to those who have suffered no harm at the hands of them against whom they complain. They have no standing to sue.

For this reason, a "class definition that encompasses more than a relatively small number of uninjured putative members is overly broad and improper." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. 2008) (rejecting class certification where court found that 80% of the putative class suffered no injury). *See also DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (plaintiffs seeking certification of all state residents active in the "peace movement" was unworkably overbroad to challenge a city ordinance restricting leafleting activities); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 2008) (rejecting putative class action of Bronco II SUV owners who alleged their vehicles' propensity to roll-over, and claiming they had

been damaged by being induced to purchase vehicles that they say were worth less than they would have been worth if they had been what Ford had represented them to be because, in part, the "overwhelmingly vast majority of Bronco II[] have never manifested the alleged defect").

II

WHETHER FEDERAL COURTS MAY HEAR CLASS ACTIONS COMPRISED PRIMARILY OF UNINJURED PARTIES IS AN ISSUE OF NATIONAL IMPORTANCE

A. Unnamed Class Members Must Suffer the Same Injury as the Representative Plaintiffs

The requirement that all members of the class have Article III standing reflects the constitutional limitations on federal courts. *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 360-61 (3d Cir. 2013). If that were not the rule, a class could include members who could not themselves bring suit to recover, thus permitting a windfall to those class members and allowing Federal Rule of Civil Procedure 23—a procedural rule—to enlarge substantive rights. *See, e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (a class must be defined in such a way that all members have Article III standing); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006) (same); *Kohen v. Pac. Inv. Mgmt. Co. LLC, & Pimco Funds*, 571 F.3d 672, 677 (7th Cir. 2009) (A class cannot be defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct.").

The *Whirlpool* decision below, however, offers little analysis of this critical issue. The Sixth Circuit noted Whirlpool's argument that "[s]atisfied consumers lack anything in common with consumers who may have misused their machines and complain of a mold problem," but found no problem with a class including uninjured plaintiffs, on the basis of a single precedent from that circuit. *Whirlpool* Pet. App. at 25a-26a. The court was concerned only about the elements of Rule 23, and ignored entirely the Article III standing implications.

This Court has addressed—and soundly rejected—the situation where a representative plaintiff seeks to use the procedural requirements of Rule 23 to create Article III standing by bootstrapping his own standing from the alleged injuries of unnamed class plaintiffs. *See Allee v. Medrano*, 416 U.S. 802, 828-29 (1974):

> [A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

(Burger, C.J., concurring in the result in part and dissenting in part). Just as representative plaintiffs may not bootstrap their own standing from the alleged injuries to unnamed class members, this case cleanly presents the question as to whether the converse is true: Can the vast majority of the unnamed plaintiffs (not just some small fraction) bootstrap their own standing from a representative plaintiff?

This Court's previous decisions suggest, contrary to the Sixth Circuit decision in this case, that the answer would be no; that class certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. That result would violate the Rules Enabling Act because "no reading of the Rule can ignore the Act's mandate that 'rules of procedure "shall not abridge, enlarge or modify any substantive right,'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints.")). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) ("A class action, no less than traditional joinder . . . , merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.).

B. Class Certification Proceedings Should Not Operate To Prevent Defendants From Presenting Evidence Related to Individual Plaintiffs

Because defendants as well as plaintiffs enjoy full protection of the Constitution's Due Process Clause, this Court in *Wal-Mart Stores Inc. v. Dukes* demanded that courts investigate seriously whether class certification is warranted under the federal rule. *Dukes*, 131 S. Ct. at 2550 ("the class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'", and "to justify a departure from that rule" all

the requirements of Rule 23 must be met) (internal citation omitted); *Comcast*, 133 S. Ct. at 1432 (same). A party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are, in fact sufficiently numerous parties, common questions of law or fact, etc." *Id.* at 2551. When considering the type and quantity of evidence required for a plaintiff to meet these standards, the Court compared the evidence in *Dukes* with a prior case, *Teamsters v. United States*, 431 U.S. 324 (1977), in which the plaintiff provided 40 accounts of discrimination for a class of 334 alleging discrimination. *Dukes*, 131 S. Ct. at 2556. While the *Teamsters* plaintiffs provided an anecdote for one out of every eight members of that class, the *Dukes* plaintiffs offered one for every 12,500 members. *Id.* This suggests that the larger the proposed class is, the more evidence will be required to adequately show that commonality and typicality exist among the class members. Julie Slater, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-*Dukes*?*, 2011 B.Y.U. L. Rev. 1259, 1269. This Court, however, did not discuss the nature and extent of Wal-Mart's counter-evidence, an important issue presented by the petitions in these cases.

The importance of developing rules for lower courts to approach the factual issues raised by class certification cannot be overstated. Our legal system depends on discovery and evidentiary rules to allow each side to uncover the specific facts necessary to develop its case. With the facts revealed through discovery, each side can test the other sides' assertions and develop appropriate lines of argumentation.

"Aggregate litigation does not in any way diminish plaintiffs' ability to do these things. But it can threaten the ability of defendants to do so." John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 676 (2011). Without judicial constraint, the procedural class action device can "turn into a mechanism for putting a defendant under a microscope and then putting that defendant on trial, rather than testing whether a particular plaintiff meets the elements of a cause of action and whether defenses to that cause of action exist in the context of a particular occurrence." *Id.* at 677. *Dukes* rejected one particular type of trial by formula because it presented unacceptable risks to both plaintiffs' and defendants' participatory rights. The logic of that decision should be applied to these cases, in which the lower courts deemed hundreds of thousands of plaintiffs to have standing to sue, while disallowing Sears and Whirlpool from presenting individualized proof.

C. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting noninjury claims to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom they purport to represent. The "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the

litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a "representative" who is not a member of the class is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who happens to have the least information." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Actions*, 77 Tex. L. Rev. 215, 244 (1998). Because the class action binds these absent and informationally impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *Id.*

Essentially, this requires that the representative's stake in the case, whatever that may be, rises or falls on the claims of the other class members. Commonality among plaintiff class members is important because individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Class members with stronger than average claims may not be proportionately compensated, and the weaknesses in

other class members' claims may work to the disadvantage of the class as a whole. *See, e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Moreover, the aggregation of claims detracts from the acknowledgment of each plaintiff's particular injuries, a value recognized as a legitimate end in itself, apart from the end of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812-13 (2000); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." Gaston, 77 Tex L. Rev. at 238.

Permitting class members without Article III standing to proceed will flood the federal courts with "lawyers' lawsuits." The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For "[i]f passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984). These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18). This is certainly the situation in this case, in which the present litigation is serving as the "bellwether" for identical suits filed nationwide.

"Noninjury" standing, combined with the class action procedure, also tends to result in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Judge Posner for the majority, quoting Judge Henry J. Friendly's use of the term, while noting that Judge Friendly was "not given to hyperbole" and that judicial concern about settlement pressure is "legitimate"); *West v. Prudential Securities, Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) ("The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure

on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.") (internal citations omitted); *In re GMC Pickup Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) ("[C]lass actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

Although, in *Butler*, Judge Posner appears to have changed his mind with regard to the implications of strong settlement pressure, blithely offering it as a solution to countless differences among plaintiffs as to damages, *Butler,* Pet. App. at 4a, those "legitimate concerns" remain. Meanwhile, the Sixth Circuit also opines that Whirlpool should "welcome class certification" because, should Whirlpool prevail, all class members who do not opt out will be bound. *Whirlpool,* Pet. App. at 29a. This completely ignores the fact that the "blackmail" charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. "[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). This Court and "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail." *Id.* (citations omitted). For this reason,

counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under "hydraulic pressure" to settle.) "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Nagareda, 103 Colum. L. Rev. at 151.

Such litigation is used not primarily to redress injury (especially where a significant portion of the class can demonstrate no injury); it therefore exists as a sham to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Class members "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on

corporate behavior." *Id.* Thus, noninjury class actions to recover compensation simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id.* The decisions below, by combining any legitimate claims with tens of thousands of uninjured plaintiffs, bloat any properly joined or representative legal action and open the door to the federal courts wide for gross misuse of the justice system.

CONCLUSION

The petitions for writs of certiorari should be granted.

DATED: November, 2013.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: dlafetra@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation