

Nos. 13-430, 13-431

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**In the Supreme Court of the United States**

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SEARS, ROEBUCK AND COMPANY,  
*Petitioner,*

v.

LARRY BUTLER, ET AL., INDIVIDUALLY AND ON BEHALF  
OF ALL OTHERS SIMILARLY SITUATED,  
*Respondents.*

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WHIRLPOOL CORPORATION,  
*Petitioner,*

v.

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

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*On Petitions for Writs of Certiorari to the United States  
Court of Appeals for the Seventh Circuit and the United  
States Court of Appeals for the Sixth Circuit*

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**BRIEF OF THE TECHNOLOGY ASSOCIATION OF  
AMERICA AND TECHNET AS *AMICI CURIAE* IN  
SUPPORT OF PETITIONERS**

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Lawrence B. Friedman	Lewis J. Liman
Jennifer Kennedy Park	<i>Counsel of Record</i>
Sheryl B. Shapiro	CLEARY GOTTlieb STEEN
Stewart C. Dearing	& HAMILTON LLP
David E. Wagner	One Liberty Plaza
CLEARY GOTTlieb STEEN	New York, NY 10006
& HAMILTON LLP	(212) 225-2000
	lliman@cgsh.com

*Counsel for Amici Curiae*

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## QUESTIONS PRESENTED

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**

	<b>Page</b>
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
INTERESTS OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
REASONS FOR GRANTING THE PETITION .....	5
I. THE TECHNOLOGY INDUSTRY PLAYS A CRITICAL ROLE IN THE UNITED STATES ECONOMY.....	5
II. INNOVATION IS A KEY DRIVER OF THE TECHNOLOGY INDUSTRY'S SUCCESS .....	6
III. CERTIFICATION OF NO-INJURY CLASS ACTIONS WILL CHILL INNOVATION IN THE TECHNOLOGY INDUSTRY WITHOUT PROVIDING A COMMENSURATE PUBLIC BENEFIT.....	8
A. The Characteristics Of The Technology Industry Make It Particularly Vulnerable To Strike Suits Brought As No-Injury Class Actions.....	10

**TABLE OF CONTENTS (cont'd)**

	<b>Page</b>
B. The Practical Difficulties Of Defending Against No-Injury Class Actions Will Induce <i>In</i> <i>Terrorem</i> Settlements .....	14
IV. THERE IS NO DEMONSTRATED NEED IN THE TECHNOLOGY INDUSTRY FOR NO-INJURY CLASS ACTIONS TO PROTECT CONSUMER INTERESTS.....	21
CONCLUSION.....	26

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Am. Express Co. v. Italian Colors Rest.</i> , 133 S. Ct. 2304 (2013).....	22, 25
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	17
<i>AT&amp;T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011).....	20
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	15
<i>Butler v. Sears, Roebuck and Co.</i> , 702 F.3d 359 (7th Cir. 2012).....	4, 18, 21
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<i>Dura Pharm., Inc. v. Broudo</i> , 544 U.S. 336 (2005).....	15
<i>In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.</i> , No. 1:00-1898, MDL 1358(SAS), M21-88, 2007 WL 1791258 (S.D.N.Y. June 15, 2007) .....	25-26
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	Page(s)
<i>Lindsey v. Normet</i> , 405 U.S. 56 (1971).....	18
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<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	25
<i>Winzler v. Toyota Motor Sales U.S.A., Inc.</i> , 681 F.3d 1208 (10th Cir. 2012) .....	23
<b>STATUTES AND RULES</b>	
28 U.S.C. § 2072(b).....	16-17
Fed. R. Civ. P. 12(b)(6).....	3
Fed. R. Civ. P. 23.....	20, 23, 25
Sup. Ct. R. 37.6 .....	1
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Amended Consolidated Class Action Complaint, <i>In re Sony Vaio Computer Notebook Trackpad Litig.</i> , No. 3:09-cv-2109-AJB-MDD, 2011 WL 1057840 (S.D. Cal. Jan. 24, 2011) .....	10
Barry Jaruzelski et al., Booz & Co., <i>The Global Innovation 1000: Navigating the Digital Future</i> , Strategy+Business, forthcoming Winter 2013, available at <a href="http://www.booz.com/global/home/what-we-think/reports-white-papers/article-display/2013-global-innovation-1000-study">http://www.booz.com/global/home/what-we-think/reports-white-papers/article-display/2013-global-innovation-1000-study</a> .....	7
Bay Area Council Econ. Inst., <i>Technology Works: High-Tech Employment and Wages in the United States</i> (2012), available at <a href="http://www.bayareaeconomy.org/media/file/s/pdf/TechReport.pdf">http://www.bayareaeconomy.org/media/file/s/pdf/TechReport.pdf</a> .....	5
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	Page(s)
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Complaint, <i>Ferranti v. Hewlett-Packard Co.</i> , No. 5:13-cv-03847-LHK (N.D. Cal. Aug. 20, 2013).....	9
Complaint, <i>Hilton v. Apple Inc.</i> , No. 3:13-cv-02167-EMC, 2013 WL 1952125 (N.D. Cal. May 10, 2013) .....	9
Complaint, <i>Jarrett v. Panasonic Corp. of N. Am.</i> , No. 4:12-cv-00739-SWW, 2012 WL 6643924 (E.D. Ark. Nov. 21, 2012).....	9
Complaint, <i>Meyers v. Garmin Int'l, Inc.</i> , No. 2:13-cv-02416-CM-GLR (D. Kan. Aug. 13, 2013).....	9
<i>Cybersecurity Insurance</i> , Dep't of Homeland Sec., <a href="http://www.dhs.gov/publication/cybersecurity-insurance">http://www.dhs.gov/publication/cybersecurity-insurance</a> (last visited Oct. 31, 2013).....	23



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Elana Zak, <i>Twitter’s IPO: Meet the #Godfather of the Social Hashtag</i> , Wall St. J., Oct. 4, 2013 .....	12
Elizabeth MacDonald, <i>Bugs and Breaches</i> , 13 Int’l J.L. & Info. Tech. 118 (2005) .....	11
F.T.C., <i>To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy</i> (2003), available at <a href="http://www.ftc.gov/os/2003/10/innovationrpt.pdf">http://www.ftc.gov/os/2003/10/innovationrpt.pdf</a> .....	7
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U.C.C. § 2-314 (2011) . . . . .	17

**BRIEF OF THE TECHNOLOGY ASSOCIATION  
OF AMERICA AND TECHNET AS *AMICI  
CURIAE* IN SUPPORT OF PETITIONERS**

The Technology Association of America, Inc. (“TechAmerica”) and TechNet respectfully submit this brief as *Amici Curiae* in support of Petitioners Sears, Roebuck and Co. and Whirlpool Corporation (collectively, “Petitioners”).

**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici* together represent the interests of the leading companies in the technology industry, including the consumer electronics sector, and their senior executives across the United States.

TechAmerica is the leading association for the United States technology industry—the driving force behind productivity growth and job creation in the United States and the foundation of the global innovation economy. Representing premiere technology companies of all sizes, TechAmerica advocates for the Information and Communication

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *Amici Curiae* hereby state that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. On October 25, 2013, *Amici* notified counsel of record for Petitioners and Respondents of their intent to file this brief. All parties consented in writing to the filing of this brief.

Technology sector before decision makers at the state, federal, and international levels of government. Many of TechAmerica's members are leading innovators in their fields. TechAmerica's members sell products directly to consumers as well as to other manufacturers who incorporate that technology into products that they sell to consumers. TechAmerica's primary objectives include fostering an environment that will allow its members to continue developing new products and services to benefit American consumers and expanding market opportunities for the United States technology industry around the world.<sup>2</sup>

TechNet is a national network of chief executive officers and senior executives in the technology industry that has as its objective the promotion of growth in the technology industry and the economy. TechNet's members represent more than one million employees in the fields of information technology, biotechnology, e-commerce, and finance.<sup>3</sup>

*Amici* are deeply interested in this Court's review of the rulings below. The question presented—whether a class may be certified when most members have never experienced the alleged defect and questions of both injury and damages would have to be litigated on a member-by-member

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<sup>2</sup> More information about TechAmerica is available at <http://www.techamerica.org>.

<sup>3</sup> More information about TechNet is available at <http://www.technet.org>.

basis—is of extraordinary importance to *Amici* and their members. *Amici* and their members are critical constituents of the fastest growing sector of the United States economy and are committed to ensuring its continued future viability.

### INTRODUCTION AND SUMMARY OF ARGUMENT

The technology sector is characterized by a high degree of innovation, rapid and varied product launches and re-launches, and extensive experimentation. Its success depends on the ability of firms to get products to the market quickly, to observe the performance of those products outside the laboratory, and to expeditiously and effectively release product improvements and enhancements when needed.

The decisions of the courts below, if allowed to stand, would interfere with those activities and chill the innovation that fuels the technology sector's growth and continued success. Under those rulings, a consumer of technology products who could allege, in a form barely satisfying the requirements of Federal Rule of Civil Procedure 12(b)(6), that those products “share a common design defect,” would be able to litigate a massive class action suit against the company that manufactures and/or distributes those products on behalf of all purchasers of those products, regardless of whether a significant percentage of the absent class members or any at all experienced the alleged defect or suffered any damages. *See*

*Butler v. Sears, Roebuck and Co. (Butler II)*, Pet. App. 3a-5a, 11a; *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer II)*, Pet. App. 6a, 28a-30a, 36a-37a. Technology products are particularly at risk of being victimized by class action lawsuits launched merely for settlement value, if, as the Sixth and Seventh Circuits have held, neither classwide injury nor classwide damages is required for class certification. Technology products are subject to manifold uses, which frequently cannot be anticipated or are barely contemplated at the time of product launch. And the risk of occasional minor “bugs” is common in technological development and enhancements as new uses and new ways to address those uses are identified.

The rulings below will also effectively impose a tax on all product innovation. Such a tax will operate by discouraging companies both from releasing products before every conceivable application is tested for fear that any possible use of a product would lead to a no-injury class action on behalf of all purchasers, and from issuing product enhancements for fear that any design improvement made shortly after a product launch could be mischaracterized as evidence that the previous design was defective. The resulting tax is not necessary to redress any injury suffered by customers and would impose harmful consequences on the technology sector and the economy in general.



## REASONS FOR GRANTING THE PETITION

### I. THE TECHNOLOGY INDUSTRY PLAYS A CRITICAL ROLE IN THE UNITED STATES ECONOMY

The significance of the technology industry to the United States economy cannot be overstated. Over the last several decades, technological innovations have revolutionized the ways we travel, communicate, learn, work, and, as shown in these cases, clean our laundry. From the cell phones in our pockets to the high definition televisions and digital appliances in our homes, technology permeates our daily lives.

A vibrant technology industry is essential to the country's continued prosperity. In 2012 alone, technology companies employed more workers than the finance and insurance or construction industries;<sup>4</sup> for each high-tech job created in a local economy, approximately 4.3 jobs are created in other industries.<sup>5</sup> Small businesses and entrepreneurs rely heavily on technology for communication, data processing, and networking, and without the development and sale of new

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<sup>4</sup> TechAmerica Foundation, *Cyberstates 2013: The Definitive State-by-State Analysis of the U.S. Tech Industry* 10, 12 (2013), available at <http://www.techamericafoundation.org/cyberstates>.

<sup>5</sup> Bay Area Council Econ. Inst., *Technology Works: High-Tech Employment and Wages in the United States* 25 (2012), available at <http://www.bayareaeconomy.org/media/files/pdf/TechReport.pdf>.

technologies, they will face more challenges to their survival. *See* Nat'l Small Bus. Ass'n, *2013 Small Business Technology Survey* 4, 6 (2013)<sup>6</sup> (finding that 74% of more than 800 small-business owners use smartphones, 84% use laptops, 82% maintain a website, and 70% believe that technology is critical to the success of their business).

## II. INNOVATION IS A KEY DRIVER OF THE TECHNOLOGY INDUSTRY'S SUCCESS

The ability to innovate is of paramount importance to the technology industry's continued success. Almost by definition, the technology industry depends on innovation. New products and new versions of existing products cycle into the market at dizzying speeds. As just one example, "[a]bout 63% of the [mobile] apps used daily now differ from those used daily a year ago." Jessica A. Lessin & Spencer E. Ante, *The Business of Apps: Apps Explode into Industry Ready to Hit \$25 Billion*, Wall St. J., Mar. 4, 2013, at B1. It is thus no surprise that technology companies feature prominently among the world's most innovative enterprises. *See* Jeff Dyer & Hal Gregersen, *The Top 100: The Most Innovative Companies 2013*, Forbes, Sept. 2, 2013, at 96 (technology companies represented more than half of Forbes' top 100 for innovation).

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<sup>6</sup> Available at <http://www.nsba.biz/wp-content/uploads/2013/09/Technology-Survey-2013.pdf>.

Innovation, the end goal of research and development efforts, is important to all sectors of the economy, but its impact is even more pronounced in the technology industry. The computing and electronics industry accounts for 27 percent of all research and development spending by the 1,000 most innovative businesses worldwide, more than any other sector of the economy. Barry Jaruzelski et al., Booz & Co., *The Global Innovation 1000: Navigating the Digital Future*, Strategy+Business, forthcoming Winter 2013, at 33, 37.<sup>7</sup> And the social benefits from innovative new technology products far exceed the private gains to the companies that develop them. Innovation leads to the invention of new products that make people more efficient, more productive, safer, and healthier. See F.T.C., *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* 1 (2003).<sup>8</sup>

For this reason, current government policy wisely fosters an environment that promotes technological innovation, invention, and creativity. See *Technology*, whitehouse.gov, <http://www.whitehouse.gov/issues/technology> (last visited Oct. 31, 2013) (setting forth the government's initiatives to promote technology and innovation); *A Strategy for American Innovation: Securing Our Economic*

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<sup>7</sup> Available at <http://www.booz.com/global/home/what-we-think/reports-white-papers/article-display/2013-global-innovation-1000-study>.

<sup>8</sup> Available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

*Growth and Prosperity*, whitehouse.gov, <http://www.whitehouse.gov/innovation/strategy> (last visited Oct. 31, 2013). Policy makers have explained that “[i]nnovation-based economic growth will bring greater income, higher quality jobs, and improved health and quality of life to all U.S. citizens.” *Strategy for American Innovation: Executive Summary*, whitehouse.gov, <http://www.whitehouse.gov/innovation/strategy/executive-summary> (last visited Oct. 31, 2013). It is in this environment, where promoting innovation is highly prioritized, that the technology industry has thrived.

### III. CERTIFICATION OF NO-INJURY CLASS ACTIONS WILL CHILL INNOVATION IN THE TECHNOLOGY INDUSTRY WITHOUT PROVIDING A COMMENSURATE PUBLIC BENEFIT

The decisions of the Sixth and Seventh Circuits in *Butler II* and *Glazer II* are just two examples of a troubling and pervasive recent trend in class action litigation: federal courts are certifying overbroad classes of plaintiffs in which only a small fraction of the class has actually experienced the alleged product defect that provides the basis for the lawsuit, and in which both injury and damages will need to be litigated on an individualized basis. These decisions gloss over class members’ divergent reasons for buying the products and the diverse ways in which they use them. Moreover, the very fact of class certification makes it particularly difficult for the defendant to present individualized

defenses, thereby forcing *in terrorem* settlements. This trend has resulted in an increasing number of class action strike suits against technology companies<sup>9</sup> and poses a threat to the technology

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<sup>9</sup> For a few examples of cases filed or litigated *in 2013 alone* that illustrate the technology industry’s particular susceptibility to overbroad class actions, see, e.g., Complaint at 22, *Ferranti v. Hewlett-Packard Co.*, No. 5:13-cv-03847-LHK (N.D. Cal. Aug. 20, 2013) (proposed class of “[a]ll persons and entities in the United States . . . who currently own . . . an HP Officejet Pro 8500 or 8600 Wireless All-in-one-printer”); Complaint at 2, *Meyers v. Garmin Int’l, Inc.*, No. 2:13-cv-02416-CM-GLR (D. Kan. Aug. 13, 2013) (proposed class of “[a]ll persons or entities in the United States who purchased a Garmin NÜVI brand portable Navigation device”); Complaint, *Hilton v. Apple Inc.*, No. 3:13-cv-02167-EMC, 2013 WL 1952125 (N.D. Cal. May 10, 2013) (proposed class of “all consumers who purchased an iPhone 4 for their own use . . . from either Apple or AT&T in the United States”); Class Action Complaint at 9, *Hardy v. Toshiba Am. Info. Sys., Inc.*, No. 8:13-cv-00516-CJC-JPR (C.D. Cal. Apr. 1, 2013) (proposed class of “[a]ll persons and entities in the United States . . . who have purchased or leased a Toshiba Portege model . . . laptop computer”); Complaint, *Jarrett v. Panasonic Corp. of N. Am.*, No. 4:12-cv-00739-SWW, 2012 WL 6643924 (E.D. Ark. Nov. 21, 2012) (proposed class of “[a]ll persons and entities residing in the United States who purchased a 42” and 46” Sanyo plasma television”); Class Action Complaint at 10, *Koertge v. LG Elecs. USA, Inc.*, No. 2:12-cv-06204-JLL-MAH (D.N.J. Oct. 3, 2012) (proposed class of “[a]ll residents of the United States of America who . . . purchased an LHB975 Home Theater System manufactured by LG”); Class Action Complaint, *Wolph v. Acer Am. Corp.*, No. 3:09-cv-01314-JSW, 2009 WL 908383 (N.D. Cal. Mar. 25, 2009) (proposed class of “[a]ll persons and entities who reside in the United States who have purchased a new Acer notebook computer . . . that came bundled and pre-installed with a Microsoft(R) Windows Vista . . . operating system and

industry's continued ability to innovate, thrive, and contribute to the United States economy. These class actions—and the burdens they create—will increase if the decisions in *Butler II* and *Glazer II* are allowed to stand.

**A. The Characteristics Of The Technology Industry Make It Particularly Vulnerable To Strike Suits Brought As No-Injury Class Actions**

The nature of the technology industry makes companies within it vulnerable to strike suits brought as “no-injury” class actions and highlights the analytical and practical deficiencies of the Sixth and Seventh Circuits’ application of Federal Rule of Civil Procedure 23. The technology industry is characterized by the rapid and widespread distribution of new products, as technology evolves and better designs are developed to address identified needs and risks. High-tech products transform over time and are often put to uses that were unanticipated or barely anticipated at the time they were first developed. *See* Daniel A. Levinthal, *The Slow Pace of Rapid Technological Change: Gradualism and Punctuation in*

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containing” a certain amount of memory); Amended Consolidated Class Action Complaint, *In re Sony Vaio Computer Notebook Trackpad Litig.*, No. 3:09-cv-2109-AJB-MDD, 2011 WL 1057840 (S.D. Cal. Jan. 24, 2011) (proposed class of “[a]ll persons in the United States, or such states as the Court may determine is appropriate, who purchased a Sony VAIO notebook containing a defective touchpad since January 1, 2007”).

*Technological Change*, 7 Indus. & Corp. Change 217, 226-33, 244 (1998) (explaining that technology products may develop unanticipated “new domains of application”). In such circumstances, minor “bugs” or glitches might occasionally appear. See Elizabeth MacDonald, *Bugs and Breaches*, 13 Int’l J.L. & Info. Tech. 118, 118 (2005) (“It is impossible to test even the simplest [software] program in an exhaustive fashion. . . . [E]very piece of software will contain errors which may not materiali[z]e until a particular and perhaps unrepeatable set of circumstances occurs.”) (citation omitted). Those bugs or glitches are addressed by new product designs, updates, and enhancements, as science and engineering evolve. Thus, it has been said that because technology rapidly improves in an iterative fashion and new products are continually emerging, it is simply “impossible for developers to anticipate and design against all risks.” Seldon J. Childers, *Don’t Stop the Music: No Strict Products Liability for Embedded Software*, 19 U. Fla. J.L. & Pub. Pol’y 125, 172 (2008).

The type of no-injury class action lawsuit recognized by the Sixth and Seventh Circuits presents a particular threat to innovation in the technology industry. Where, as in the high-tech sector, products are put to different uses depending on the needs and ingenuity of the consumer, and where it is impossible or prohibitively expensive or time-consuming for the launching company to predict every use in advance, it would be the rare product launch that was not accompanied by at

least the threat of a potentially ruinous class action lawsuit if the rulings below are permitted to stand. The more advanced and innovative the product is, the greater the risk of an unknown defect. The wider the product launch, the more likely a consumer will experience a product not functioning properly for some use, and the more attractive a class action lawsuit will be to an enterprising lawyer, regardless of whether the injury suffered by the named plaintiff was idiosyncratic and isolated, common and widespread, or simply nonexistent.

Moreover, technology companies frequently respond to unanticipated uses by altering their products to accommodate these uses—sometimes quite quickly. *See, e.g.,* Elana Zak, *Twitter’s IPO: Meet the #Godfather of the Social Hashtag*, Wall St. J., Oct. 4, 2013, at B4 (explaining that the “hashtags” that are now almost synonymous with Twitter were the result of the company changing its approach to accommodate them as they became popular among users). Plaintiffs’ lawyers may plausibly allege (whether true or not) that a measure or update adopted after a product was launched was a “reasonable alternative design” available at the time of product launch, thus rendering the prior design “defective.” *See* Restatement (Third) of Torts: Prods. Liab. § 2 (1998).<sup>10</sup> The pace of change in the industry is such

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<sup>10</sup> The test for a design defect under the Restatement (Third) of Torts: Products Liability is whether the “foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable



that this result is not only possible, but probable. The very release of a product update or improvement can provide plaintiffs' lawyers with fuel to drive a lawsuit alleging that the original product was defective.

The social value of many high-tech products lies in their open-ended potential for creative and unpredictable uses. Yet it is these same characteristics that make them vulnerable to class action lawsuits. A legal environment in which plaintiffs' lawyers can assemble massive classes to sue every time a product is alleged to have even a minor defect as used by at least one consumer will impair innovation, discouraging manufacturers from introducing new and updated products into the market on a timely basis or even at all. *See, e.g.,* Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 287-88 (2013) (noting that "expanding the scope of products

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alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe." *Id.* The test for a defect under the Restatement (Second) of Torts is whether "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." § 402A cmt. g (1965). Under this "consumer expectations test," consumers disappointed by their high-tech product will be incentivized to allege a defect and to bring an overbroad class action based on that allegation.

liability should decrease economic activity such as production, employment, innovation, and business openings”). “If the production of a consumer product creates a substantial risk that product liability settlements and jury verdict losses might be so high that they wipe out profit on the product, the product will not be produced, no matter how beneficial the product may be to millions of consumers.” Jürgen O. Skoppek, *Litigation and the Market: Restoring the Balance Between Individual and Employer Rights*, Mackinac Ctr. (July 1, 1989), <http://www.mackinac.org/6266>.

**B. The Practical Difficulties Of Defending Against No-Injury Class Actions Will Induce *In Terrorem* Settlements**

Just as the nature of the technology industry illustrates how easy and attractive it would be under *Butler II* and *Glazer II* for plaintiffs’ lawyers to institute no-injury class actions, regardless of the magnitude of the individual or aggregate harm, it also illustrates how such lawsuits would compromise the defendant technology companies’ rights to a fair verdict and legal process. The result of these overbroad class actions will be to permit plaintiffs to extract a disproportionate rent on innovation and to achieve efficiencies only through the sacrifice of due process rights.

The purchase of a technology product, or any consumer product for that matter, is unlike the purchase or sale of a security in a well-developed market. In the latter circumstance, “millions of

shares chang[e] hands daily” and this Court has held that a presumption exists that “where materially misleading statements have been disseminated into an impersonal, well-developed market for securities,” every person who purchased shares did so on the basis of the same reliance on the “integrity of the market price” alone and not on the basis of any individualized review of company information. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242-43, 247 (1988) (holding that “[r]equiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented . . . a class action, since individual issues then would have overwhelmed the common ones”). Every person who purchased shares in reliance on the integrity of the market price and holds those shares through a corrective disclosure suffers damages in the same manner calculable by a formula. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 344-46 (2005) (discussing damages for Rule 10b-5 violations); *Basic*, 485 U.S. at 242-43, 248-49.

In contrast, people purchase technology products for different reasons at different times. *See* Moin A. Yahya, *Can I Sue Without Being Injured?: Why the Benefit of the Bargain Theory for Product Liability Is Bad Law and Bad Economics*, 3 *Geo. J.L. & Pub. Pol’y* 83, 131 (2005) (“Consumers are concerned about a number of characteristics in any one product . . . . Some buy with an eye to value, and others buy with an eye to efficacy.”). They then put those products to

different uses in different contexts. For example, most consumers buy smart phones to make and receive calls or send e-mails, but some have applied them to other uses such as managing home security or thermostat systems. Some consumers use their personal computers for simple word processing and data storage, others for running complex scientific functions. While some consumers of the smart phone or personal computer may experience a malfunction, many others may never encounter a defect. And, in the event that a product—such as a smart phone or personal computer—malfunctions, it may cause vastly different types of damages, even if it malfunctions in the same way. The damages suffered by a financial services company from a software malfunction may be dramatically different in form and amount than those suffered by an individual consumer. The typical harm from a malfunctioning smart phone is the simple annoyance of a dropped call, but a consumer using the phone to regulate a home thermostat could experience harm as extensive as flooding from frozen and bursting pipes.

Thus, recognition of a no-injury class action lawsuit will modify the substantive rights of litigants by impermissibly affording a person who purchased an allegedly defective product different burdens of proof, depending on whether that person is suing as an individual or is instead the named plaintiff or absent class member in a class action. *See* 28 U.S.C. § 2072(b) (procedural rules like Rule 23 cannot be used to “abridge, enlarge or modify

any substantive right”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (holding that Rule 23 must be interpreted in accordance with the Rules Enabling Act). Defendants, too, will have different defenses available depending on whether the plaintiff is pursuing an individual claim, is a named plaintiff in a class action, or is an absent class member.

A brief review of the causes of action for breach of warranty and strict product liability demonstrates the point. Generally, a plaintiff bringing a claim on his own behalf for breach of implied warranty needs to show that the product was not “merchantable,” *i.e.*, not “fit for the ordinary purposes for which such goods are used.” U.C.C. § 2-314 (2011). The defendant can defend against such a claim by showing that the breach of warranty was not the proximate cause of the buyer’s loss because “the loss resulted from some action or event following [the seller’s] own delivery of the goods.” *Id.* cmt. 13. A plaintiff bringing an individual claim for strict product liability must typically show that the defendant distributed a defective product that caused harm. Restatement (Third) of Torts: Prods. Liab. § 1. A defendant can defend against a product liability claim by showing that the plaintiff misused, altered, or modified the product in an unforeseeable way. *Id.* § 2 cmt. p. But under the approach adopted by the Sixth and Seventh Circuits, the sole issue in a class case asserting these causes of action becomes “whether the

[product] was defective.” *See Butler II*, Pet. App. at 11a; *see also Glazer II*, Pet. App. at 6a, 30a.

If the “single, common question of liability” certified for class-wide resolution is “whether the [product] was defective,” *see Butler II*, Pet. App. at 11a, the defendants’ potential defenses will be eviscerated and their due process rights (and with them the fairness and accuracy of the proceeding) will be compromised. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1971) (“Due process requires that there be an opportunity to present every available defense”) (citation omitted); Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1045 (2005) (arguing that “the procedural device of certification should not circumvent resolution of individual issues that would be salient under applicable substantive law if each class member’s claim were tried separately”). As a practical matter, the focus will be narrowed to the defendant’s conduct (was there a defect) to the exclusion of the equally critical issue of the plaintiff’s conduct (did the plaintiff use the product as intended and did it cause harm—questions particularly important for high-tech products).<sup>11</sup>

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<sup>11</sup> Such narrow focus would also exclude the question of whether, under the Sixth Circuit’s test, a “premium price” can truly be said to exist due to a single latent defect that may not even matter to or be experienced by the majority of the class. *See Glazer II*, Pet. App. at 28a.

Moreover, where plaintiffs have opted not to sue individually and subject themselves to the jurisdiction of the court, but rather to remain “absent members” of a no-injury class action, it becomes virtually impossible for the defendant to establish (except from his own evidence) the uses and damages of others in the putative class. A person who is a member of an uncertified class is not a party before the court, *see Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-81 (2011), and even after a class has been certified, courts are understandably reluctant to permit discovery of absent class members. *See Manual for Complex Litigation (Fourth)* § 21.41, at 302-03 (2004). Thus, defendants’ opportunity to explore potential defenses against persons who—if a class judgment is rendered will be the beneficiary of such judgment—is impaired.

Allowing no-injury class actions like *Butler II* and *Glazer II* will permit plaintiffs’ lawyers to extract what amounts to a rent from the technology sector in an amount far disproportionate to any actual damages suffered by the class members as a whole. The ability of a plaintiff to bring a class action on behalf of a virtually limitless class of purchasers—without any limitation in the class definition to those persons who actually suffered a common injury or common damages—will give plaintiffs’ lawyers the ability to extract compensation and fees that far exceed the sum of their clients’ individual damages (assuming they are entitled to relief). This Court and the Judicial

Conference Committee on Rules of Practice and Procedure have long recognized that the decision to certify any class has drastic ramifications and can be used to essentially bludgeon a defendant into settling. *See* Fed. R. Civ. P. 23(f) advisory committee’s note (1998) (“An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting the *in terrorem* effect of class actions that “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”). This pressure to settle is felt acutely in no-injury product defect class actions against technology companies, where class members are numerous and litigating the cases is prohibitively expensive, even when companies have potentially meritorious defenses. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (“Certification 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.”).

Finally, contrary to the assumption of the opinions below, the no-injury class action does not promote—but rather defeats—the efficiency that is one of the ostensible values served by Rule 23. Enormous societal and judicial resources are spent (and the defendant incurs substantial legal costs) to answer a hypothetical question that may have little



bearing on whether there is actually any entitlement to relief for members of a nationwide class. Some of the costs of answering that question are borne by society at large; other portions of the costs are borne by consumers of the products at issue who are forced to pay—in the form of higher prices—for the insurance paid to the few. And the only beneficiary, aside from the named plaintiff, is the legal profession, which siphons in the form of legal and administrative expenses as much as 60 percent of the class action settlement. *See* A. Mitchell Polinsky and Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1469-70 & n.137 (2010) (estimating that plaintiffs in product liability litigations receive less than half of every dollar paid by defendants).

#### **IV. THERE IS NO DEMONSTRATED NEED IN THE TECHNOLOGY INDUSTRY FOR NO-INJURY CLASS ACTIONS TO PROTECT CONSUMER INTERESTS**

The economic and legal costs of overbroad no-injury class action lawsuits cannot be justified—as the courts below sought to do—on the theory that absent such lawsuits, injured consumers would not be able to obtain redress and “defendants would be able to escape liability for tortious harms of enormous aggregate magnitude.” *Butler II*, Pet. App. at 10a; *see also Glazer II*, Pet. App. at 37a (asserting that “[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits’ because of litigation costs”) (citation omitted). This Court has explicitly

rejected the notion that the Rule 23 requirements for class certification “must be dispensed with because the ‘prohibitively high cost’ of compliance would ‘frustrate [plaintiffs] attempt to vindicate the policies underlying the . . .’ laws.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166-68, 175-76 (1974)). Moreover, there is no demonstrated need for a no-injury class action to redress complaints by a minority of consumers.

The technology industry has proven remarkably effective in redressing consumer harm without court intervention. The examples are legion where a technology company, discovering a bug in its product, distributes a product update or patch, frequently for free. Where the high-tech product does not function effectively for a particular use to which it is put by certain consumers, the market frequently redresses any harm that would be too small for an individual lawsuit.<sup>12</sup> Moreover, where hardware has been found to be defective, the individual and combined impact of reputational injury, the specter of individual lawsuits, and regulatory enforcement have proven sufficient to cause product recalls or replacements. Massive class action lawsuits on behalf of those who are not

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<sup>12</sup> Indeed, several technology companies have even launched programs to obtain customer feedback on a regular basis so that they are more quickly alerted to defects and can respond to them immediately. *See, e.g., Microsoft Customer Experience Improvement Program*, Microsoft.com (Feb. 1, 2009), <http://www.microsoft.com/products/ceip>.

injured and have not experienced damages are not necessary where there is harm of “enormous aggregate magnitude” because other mechanisms exist to effectively and expeditiously address those concerns.<sup>13</sup>

Furthermore, where individual customers fear catastrophic loss from their use of technology products, they can buy insurance. They need not squeeze compensation from a product liability mechanism (the Rule 23 class action) funded (in the form of resulting higher prices) by those consumers who do not want such insurance. *See* Polinsky & Shavell, *supra* at 1460, 1468. The market offers a number of insurance products, including policies covering personal electronic devices and cybersecurity, without requiring all to pay in the form of higher product costs. *See* Polinsky & Shavell, *supra* at 1462 (noting that “[a] substantial majority of Americans have some private or public insurance coverage . . . [covering harm] that might result from accidents, including product-related ones”); *Cybersecurity Insurance*, Dep’t of Homeland Sec., <http://www.dhs.gov/publication/cybersecurity-insurance> (last visited Oct. 31, 2013) (describing the purposes and benefits of cybersecurity insurance).

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<sup>13</sup> *See, e.g., Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1211-12 (10th Cir. 2012) (instructing the district court to dismiss as moot a proposed class action based on defective Toyota Corollas due to the government supervised nationwide recall, which provided the plaintiff “precisely the relief she seeks”).

To the extent that a function of the product liability system is to signal risks to consumers and induce firms to focus on product quality, *see* Polinsky & Shavell, *supra* at 1440, if a technology product causes “tortious harms of enormous aggregate magnitude,” the market—in addition to regulators—already conveys that information. In a world where individuals constantly and instantly communicate with each other, consumers have become “information omnivores’ who demand a say in everything from product design to after-market support.” Robert Weisman, *The Challenge of the Tougher Customer*, *The Boston Globe*, May 25, 2008, at G1. And given the rapid spread of information on the Internet and the ways in which negative reviews are put to use in the highly competitive technology industry, the sector already has ample reputational and economic incentives to address defects that impact many but none to a great degree. *See, e.g.*, David Douthit et al., Accenture, *A “Returning Problem”: Reducing the Quantity and Cost of Product Returns in Consumer Electronics* 3 (2011)<sup>14</sup> (noting that “customer experience’ is a key differentiator” in the consumer electronics industry); Richard Florida and Jim Goodnight, *Managing for Creativity*, *Harv. Bus. Rev.* at 7-8 (July-Aug. 2005) (describing the key roles that excellent customer relationships and expedient handling of customer complaints play in

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<sup>14</sup> Available at <http://www.accenture.com/SiteCollection/Documents/PDF/Accenture-Reducing-the-Quantity-and-Cost-of-CustomerReturns.pdf>.

the success of SAS Institute, the world's largest privately held software company).

Finally, this Court has repeatedly stressed that a class action lawsuit is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)) (internal quotation marks omitted); *Am. Express Co.*, 133 S. Ct. at 2309 (same). Where an individual purchaser or user has been damaged as a result of a design defect or warranty breach by a technology manufacturer, that “usual” form of litigation remains available: the injured consumer can sue. And where a number of consumers have been injured by the same product defect in the same way (but the predominance and numerosity requirements of Rule 23 are not satisfied), the consumers can sue jointly, perhaps using test or bellwether cases, where information on the value of the cases can be developed by individual verdicts without compromising the need for each plaintiff to prove entitlement to relief based on his individual circumstances or the right of the defendant to present defenses to those individual circumstances. *See, e.g., In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, No. 1:00-1898, MDL 1358(SAS), M21-88, 2007 WL 1791258, at \*1 (S.D.N.Y. June 15, 2007) (“[T]he results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts.

Common issues or even general liability may also be resolved in a bellwether context in appropriate cases.”) (citation omitted); Manual for Complex Litigation (Fourth) § 22.36, at 374 (2004) (“[A]dvantages of using test cases might include litigating and trying all of the claims in the test cases, which would allow the litigation to mature through trials.”). There is no need to sacrifice those principles, upon which the American justice system rests, in the name of “efficiency.”

### CONCLUSION

For the foregoing reasons, *Amici* respectfully support Petitioners’ request that a writ of certiorari be granted in this case.

Respectfully submitted,

Lawrence B. Friedman	Lewis J. Liman
Jennifer Kennedy Park	<i>Counsel of Record</i>
Sheryl B. Shapiro	CLEARY GOTTLIEB STEEN
Stewart C. Dearing	& HAMILTON LLP
David E. Wagner	One Liberty Plaza
CLEARY GOTTLIEB STEEN	New York, NY 10006
& HAMILTON LLP	(212) 225-2000
	lliman@cgsh.com

*Counsel for Amici Curiae*

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