No. 16-2015

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEONARD COTTRELL, et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ALCON LABORATORIES, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of New Jersey, Case No. 14-5859

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND PHARMACEUTICAL RESEARCH & MANUFACTURERS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit LAR 26.1, *amici curiae* make the following disclosures:

Amici have no parent corporations. No publicly held company owns 10% or more of any *amicus*'s stock. *Amici* are not aware of any publicly held corporation that is not a party to the proceeding before this Court but that has a financial interest in the outcome of the proceeding.

/s/ Jeffrey S. Bucholtz
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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases involving important issues of class-action practice and procedure. Businesses are frequent targets of class-action lawsuits, including abusive suits based on ever-more-exotic theories of "injury." The Chamber thus has a keen interest in ensuring that courts rigorously analyze whether class plaintiffs have satisfied the requirements for Article III standing.

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[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than *amici*, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus* briefs in cases that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association comprising the leading

pharmaceutical research and technology companies. PhRMA members are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives. In 2015 alone, PhRMA members invested $58.8 billion in discovering and developing new medicines. *See About PhRMA*, Pharm. Research & Mfrs. of Am., http://phrma.org/sites/default/files/pdf/biopharmaceutical-industry-profile.pdf.

ARGUMENT

Imagine you order a burger and fries and your meal arrives with a larger portion of fries than you can eat. You might think it was too bad that some fries would go to waste. But you probably would not think the restaurant had caused you a concrete and particularized injury that could be redressed by a court. After all, the restaurant delivered what it promised; you did not suffer any physical or emotional harm; and you were not deceived into buying (or overpaying for) the meal. While you might wish the restaurant had given you the option of buying less food for less money, it had no obligation to offer such an option. Nor do you have any reason to believe the restaurant would have charged less for a meal with fewer fries—just as likely, it would have charged the market

price regardless. In short, the restaurant's meal design, even if inefficient, did not make you worse off in any legally cognizable way.

The novel theory of standing advanced by plaintiffs in this case is no less absurd than the above hypothetical. Plaintiffs received what they were promised: effective, FDA-approved prescription glaucoma medications. Their speculative claim that they might have paid less for those medications if defendants had packaged them more efficiently—a claim that is not supported by concrete factual allegations and that runs contrary to basic economic logic—does not describe a cognizable injury in fact, let alone one that is fairly traceable to the conduct plaintiffs challenge as unlawful. In fact, plaintiffs' theory is even more indefensible than the diner's hypothetical claim that the restaurant should have served him fewer fries: the restaurant is presumably free to adjust its portion sizes as it wishes, but federal law bars defendants here from changing their packaging unless they devote significant resources to conduct new clinical trials to prove that the proposed new packaging is safe and effective and then obtain approval from FDA to make the change.

That plaintiffs' theory is baseless, however, does not mean it is innocuous. If that theory were accepted, it would trigger a new wave of abusive, no-injury class-action litigation, with potentially devastating effects on businesses and consumers. It would encourage plaintiffs' lawyers to bring large class actions challenging any business practice that could be portrayed as inefficient, based on conjecture that greater efficiency might have translated into savings for customers. No one but the lawyers would benefit from such suits—not the businesses that would pay millions in litigation and nuisance settlement costs; not the employees, investors, and consumers who would ultimately bear those costs; and certainly not the glaucoma patients who take the medications at issue in this case and who could be denied those critical medications if plaintiffs' theory were accepted.

The Court should hold that plaintiffs lack Article III standing and affirm the district court's judgment.

I. Plaintiffs' Novel Standing Theory Fails To Establish Either Injury Or Causation.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government" than the requirement that a plaintiff demonstrate standing under Article III of the Constitution to sue in federal court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). For a plaintiff to have standing, she must have suffered, or be imminently likely to suffer, a "concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated." *Doe v. Nat'l Board of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999); *see also Doe v. Chao*, 540 U.S. 614, 624–25 (2004) (only a plaintiff "subjected to an adverse effect has injury enough to open the courthouse door").

1. While plaintiffs allege that defendants' products could have been designed to work more efficiently by dispensing smaller eye drops, they cannot show that defendants' use of supposedly less-efficient pack-

aging caused them to suffer any concrete and particularized injury. Plaintiffs got what they paid for—FDA-approved medications that worked as promised—and "[m]erely asking for money does not establish an injury in fact." *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319–20 (5th Cir. 2002) (finding no Article III standing where plaintiff "paid for an effective painkiller, and she received just that—the benefit of her bargain"). They have not pleaded any concrete factual allegations, as opposed to "mere conclusory statements," that would "allow[] the court to draw the reasonable inference" that defendants' product design made them worse off. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see Silha v. ACT, Inc.*, 807 F.3d 169, 175 (7th Cir. 2015) ("[A] plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution." (internal quotation marks omitted)).[2]

[2] One of plaintiffs' *amici* suggests that the ordinary *Iqbal* pleading standard should not apply to standing. *See* NACA Br. 4–5. That is wrong. The elements of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. So a plaintiff must plead her own standing with as much specificity and plausibility as she must plead the defendant's liability. Indeed, the Supreme Court recently emphasized that when "a case is at the pleading stage, the

Plaintiffs do not assert any traditional theory of injury. For instance, they do not allege that the medications they purchased were ineffective or failed to work as intended or that they suffered any physical or emotional harm from using the medications. Nor do they allege that they were misled into purchasing products they would not otherwise have purchased or into paying more for those products than they otherwise would have paid. *See* Pl. Br. 26 (conceding that plaintiffs "do not allege that defendants' conduct was deceptive").

Instead, plaintiffs rely on a theory of standing that even their own *amici* consider "novel" and "innovative." AARP Br. 8. They claim that defendants—who sold them effective, FDA-approved medications that worked as promised—injured them financially by not using an alternative, supposedly more efficient form of product packaging that they claim would have enabled them to get more doses from the same volume of medicine. They contend that their injury can be quantified as either the value of the medication they were "forced" to waste or the amount by which their medication "would have cost less" if defendants had

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plaintiff must clearly allege facts demonstrating each element" necessary to establish the plaintiff's standing. *Spokeo*, 136 S. Ct. at 1547 (ellipsis and internal quotation marks omitted).

packaged it more efficiently. Pl. Br. 19. Although plaintiffs describe those as two different theories, *see id.*, they are really just two ways of saying the same thing: that plaintiffs believe they would have saved money if defendants had designed their products to be more efficient.

Plaintiffs may believe that defendants' use of an allegedly less-efficient packaging made them worse off financially, but they have not pleaded any facts that would allow a court reasonably to draw that inference. *See Spokeo*, 136 S. Ct. at 1547. It is at least equally plausible that defendants would have priced their products based on how many therapeutic doses (not how many milliliters of fluid) they contained, so that improvements in the products' efficiency would not have saved the plaintiffs any money. *See* JA21 ("The Court cannot credit Plaintiffs' bald assertions that Defendants would base the prices of their products on the volume of fluids as the determinative factor, or a factor at all."); *see also* Def. Br. 24–26. "Article III requires more than this kind of conjecture." *Finkelman v. Nat'l Football League*, 810 F.3d 187, 202 (3d Cir. 2016); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (injury in fact "is not an ingenious academic exercise in the conceiva-

ble," but requires "a factual showing of perceptible harm" (internal quotation marks omitted)).

Indeed, the scenario in which defendants would price their products by dose is much more plausible than plaintiffs' "hypothetical world," JA19, in which defendants would price those products by volume. Defendants are not somehow required to base their prices on a "cost-of-service" model, charging only enough to recover their expenses plus a fixed margin of profit. *Cf. Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008) (describing traditional cost-of-service method for setting electric utilities' rates). They are businesses operating in a market where prices reflect supply and demand. Moreover, that market is heavily regulated such that the overwhelming majority of the cost of delivering an FDA-approved medication lies not in the cost of manufacturing the liquid in the bottle, but in the research, trials, regulatory approvals, and numerous other costs associated with getting the medication to market. Even assuming that defendants could have delivered the same number of therapeutic doses to patients using less fluid—and even assuming that using less fluid would have reduced defendants' manufacturing costs—

there is no reason to assume they would have passed any such marginal cost savings on to consumers. *See In re Kuehn*, 563 F.3d 289, 292 (7th Cir. 2009) ("A provider of goods and services usually is free to charge whatever the market will bear.").

Plaintiffs and their *amici* are thus wrong to assert that "common sense" and "basic economic logic" support their novel theory of injury. Pl. Br. 28–29; NACA Br. 9. Just the opposite: common sense and economic logic suggest that if the same volume of medicine could be packaged to yield twice as many therapeutic doses, defendants would still charge the same amount per dose, regardless of the volume. NACA's reliance on the principle that "reduced demand for a product tends to lower, not increase, its price," *id.* at 10, ignores that patients demand treatment, not fluid volume, so demand for defendants' products is properly measured in doses, not in milliliters. By analogy, if a pharmaceutical manufacturer discovered a way to make its pain-relieving pills equally effective with half as much ibuprofen powder, that might or might not make the pills less costly to manufacture, but it certainly would not reduce demand for them—because consumers demand pain relief, not powder volume. The packaging changes urged by plaintiffs

likewise would not have reduced demand for defendants' products in any meaningful sense.

Plaintiffs cannot overcome the fact that their claim of standing is based on conjecture and conclusory statements by pointing to similar conclusory statements made by others. *Cf. Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1255–56 (9th Cir. 2008) (affirming dismissal for lack of standing where plaintiff relied on "academic articles" that "did not establish that [he] personally paid a higher price for a book" as a result of the challenged conduct). Yet that is what plaintiffs try to do when they tout the "*eleven* scientific publications" that supposedly support their pricing theory. Pl. Br. 29–31. As the district court recognized, those publications do not show that plaintiffs suffered any injury in fact. The authors were not economists, did not claim any expertise in product pricing, and did not explain their offhand suggestions that smaller drops might save patients money. They plainly were not focused on that issue. That they appear to have made the same unsupported assumption as plaintiffs does not make that assumption any more reasonable as a basis for standing. It would eviscerate Article III's limitations on federal jurisdiction if plaintiffs could establish standing merely by

showing that they were not the first to indulge in a particular bit of speculation.

2. Because plaintiffs cannot plead "facts plausibly showing" that, in the hypothetical world they envision, defendants would have charged less for the same number of doses, they cannot show that they have suffered any injury in fact. *Iqbal*, 556 U.S. at 682. But even if they could, they would still be unable to satisfy the second element of standing: that their injuries are fairly traceable to the conduct challenged in their complaint. *See, e.g.*, *Lujan*, 504 U.S. at 560 (requiring "a causal connection between the injury and the conduct complained of"); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 247 (3d Cir. 2012) (dismissing complaint for failure to "allege facts showing a causal relationship between the alleged injury . . . and [defendant]'s alleged wrongful conduct").

As an initial matter, as explained by appellees Sandoz, Inc., Falcon Pharmaceuticals, Ltd., and Akorn, Inc., FDA has approved the packaging of defendants' medications based on clinical trials and expected future use, and federal law thus prohibits defendants from changing that packaging in the way plaintiffs demand. *See* Sandoz et al.

Br. 6–12. Thus, even if plaintiffs could be said to be "injured" as a result of defendants' failure to change their packaging, that injury would be traceable to federal law, not to any conduct by defendants that plaintiffs can challenge.

Moreover, plaintiffs cannot show that their supposed injuries were caused by defendants' allegedly unlawful conduct because they cannot dispute that defendants had "discretion" to set prices for their products. JA22; *accord* AARP Br. 4 (agreeing that defendants have "discretion to set the price of the medication"). While plaintiffs claim that various state laws required defendants to package their products more efficiently, they do not contend that defendants would have been compelled to price those more-efficiently-packaged products in a way that would have saved plaintiffs money—only that defendants might have done so in their discretion. So any additional cost that plaintiffs paid for defendants' actual products—as compared to what they might have paid for hypothetical, more-efficient products—resulted not from defendants' allegedly unlawful conduct, but from their lawful and separate price-setting decisions.

Plaintiffs cannot rely on cases affording standing to consumers who claim they paid higher prices because of a business's unlawful conduct. When courts find standing in such cases, they require plausible allegations that the defendant *could not have charged the same price* if it had complied with the law—not merely that the defendant might have chosen, in its discretion, to charge a lower price. In antitrust cases, for example, consumers' standing typically rests on the claim that the defendant's anticompetitive conduct enabled it to charge above-market prices. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 264 (3d Cir. 2009) (plaintiffs had standing because "they paid supra-competitive prices for their insurance policies as a result of [defendants'] anticompetitive conduct"). Similarly, consumer standing in cases involving false advertising or undisclosed product defects is sometimes premised on the notion that the defendant's alleged dishonesty enabled it to charge a higher price than it otherwise could have. *See, e.g.*, *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750–51 (7th Cir. 2011) (plaintiffs had standing because "they paid more for the toys than they would have, had they known of the risks").

Unlike the plaintiffs in those cases, plaintiffs here cannot plausibly claim that defendants would have *had* to charge a lower per-dose price if they had packaged their medications more efficiently, only that they might have *chosen* to do so. But they cannot base their standing on the possibility that defendants might have made a completely discretionary choice that would have saved plaintiffs money. *Cf. DH2, Inc. v. SEC*, 422 F.3d 591, 597 (7th Cir. 2005) (plaintiff lacked standing to challenge rules requiring "fair value pricing" for certain securities where mutual funds would "have the discretion to use fair value pricing" regardless).

II. Accepting Plaintiffs' Theory Would Invite Abusive Class-Action Litigation.

If plaintiffs' novel theory of standing were accepted, it would open up a wide new frontier for abusive, "no-injury" class actions. *Rivera*, 283 F.3d at 320. That would be disastrous for everyone but the lawyers.

It is no secret that class actions are a "powerful tool [that] can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 21 (2005) (Class Action Fairness Act). One of the most important limitations on that tool is the need to show that the class members suffered a common injury. *See Reyes v. Netdeposit, LLC*, 802 F.3d 469, 481 n.12 (3d Cir.

2015) (certifying a class under Rule 23(b)(3) "requires that plaintiffs show that their individual injuries are capable of proof at trial through common evidence and that their damages are measurable on a class-wide basis" (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430, 1432–33 (2013))). Courts are not supposed to certify large classes of consumers claiming to have suffered physical or emotional injuries, because such injuries generally require individualized proof. *See, e.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) (noting the need for "individual hearings to determine the particular amount of damages to which each plaintiff is entitled").

As a result, enterprising class-action lawyers are always on the lookout for expansive theories of injury that can be applied to thousands of consumers at once and that make it possible to bypass the need to prove that each class member was truly injured. As one "prominent plaintiffs' lawyer" reportedly said: "If there were liability for every physical injury or actual economic harm that occurs in America, I would still be limited in my practice. . . . But if I were allowed to recover damages and attorneys' fees when there is no injury, my potential return is un-

limited." Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation*, 80 BROOKLYN L. REV. 599, 601 (2015).

Plaintiffs' novel standing theory would provide countless opportunities for adventurous class actions. As defendants point out, there are numerous everyday products, from toothpaste to ketchup to hairspray, that could be said to involve "forced" wastage. *See* Def. Br. 20. It would only take a creative lawyer to argue that those products should be packaged more efficiently and that the failure to do so "injures" consumers. Consider, for example, the recent introduction of peanut butter jars that unscrew at both ends so that less of the product goes to waste. *See, e.g.*, Adam Fusfeld, *Today's Million-Dollar Idea: A Double-Sided Peanut Butter Jar So You Can Get Every Last Bit*, BUSINESS INSIDER, Oct. 5, 2010, https://goo.gl/RzxTXs. A clever idea, but it hardly follows that every company selling peanut butter in traditional jars is injuring consumers.

Nor would the adventures end there. Nothing about plaintiffs' novel theory of injury-by-inefficiency is logically limited to inefficiency at the point of use. If that theory is valid, it is easy to imagine plaintiffs' lawyers arguing that companies are "injuring" their customers through

any number of allegedly uneconomical practices, from using suboptimal manufacturing techniques to employing too many workers to spending money on ineffective advertising. After all, if plaintiffs here can create standing by speculating that defendants might have charged less for their products if they had used fewer microliters of fluid per drop, why not suppose that a defendant that eliminated inefficiencies in its manufacturing facilities or its work force might have passed the resulting savings on to consumers? In short, if plaintiffs' theory were accepted, it would encourage a new wave of nonsensical class actions claiming that companies could have produced their products more efficiently and sold them more cheaply (even where, as here, a regulatory scheme precludes the proposed change).

Class actions already take an enormous toll on U.S. businesses, and ultimately on the public at large, even without opening up a new frontier of no-injury claims. Class actions often drag on for years. *See, e.g.*, U.S. Chamber Inst. for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1 (Dec. 2013), https://goo.gl/um3toQ ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution

or even a determination of whether the case could go forward on a class-wide basis."). And the costs of defending against them continue to rise, ranging from "$5 million to $100 million." Adeola Adele, Dukes v. Wal-Mart*: Implications for Employment Practices Liability Insurance* 1 (July 2011), https://goo.gl/zrS2Qf; *see also* Carlton Fields Jorden Burt, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 14 (2015), https://goo.gl/L5idv2 ("In 25 percent of bet-the-company class actions, companies spend more than $13 million per year per case on outside counsel. In 75 percent of such actions, the cost of outside counsel exceeds $5 million per year per case."). In 2015 alone, companies spent a total of $2.1 *billion* on legal services related to class actions. *See* Carlton Fields, *Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 4 (2016), https://goo.gl/iBVuxq.

Although those costs are high enough to impact the bottom line of even large companies like defendants here, the ramifications of merit-less and overreaching class actions for small businesses are particularly concerning "because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664

(Feb. 8, 2005) (statement of Sen. Grassley). *See, e.g.*, *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir. 2011) (class certification turned a minor, $3,000 dispute into an $11 million suit against a home-furnishings retailer with three employees and annual sales of $500,000); *see also* U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010), https://goo.gl/ov3fJK (small businesses took in only 22% of total revenue but bore 81% of business tort-liability costs); Nat'l Fed'n of Indep. Bus., *National Small Business Survey* vol. 5, issue 2 (2005) (on average, the cost of settling a legal dispute consumes 10% of a small business owner's salary); Matthew Grimsley, *What Effect Will Wal-Mart v. Dukes Have on Small Businesses?*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 99, 116–17 (2013) (discussing how small businesses, with fewer resources, are particularly ill-equipped to fight frivolous class actions).

Given these factors, it is not surprising that, as this Court has repeatedly recognized, certification of a large class can "create unwarranted pressure to settle nonmeritorious claims on the part of defendants." *In re Modafinil Antitrust Litig.*, No. 15-3475, 2016 WL 4757793, at *6 (3d Cir. Sept. 13, 2016) (quoting *Newton v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001)). The reason is simple: "[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*, 563 U.S. 333, 350 (2011); *see also 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."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975) (recognizing that class certification gives a case "settlement value to the plaintiff out of any proportion to the prospect of success at trial").

In the end, businesses subjected to these kinds of suits can either fight on, bearing the significant costs of litigation and opening themselves up to potentially ruinous liability, or they can acquiesce to what amounts to a "blackmail settlement[]." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). For companies facing that decision, class certification is "often the whole ballgame." *Marcus v. BMW of*

N. Am., LLC, 687 F.3d 583, 591 n.2 (3d Cir. 2012). In fact, a "study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (citing Emery G. Lee III, et al., *Impact of the Class Action Fairness Act on Federal Courts* 2, 11 (Fed. Judicial Ctr. 2008)); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (2010) ("[V]irtually all cases certified as class actions and not dismissed before trial end in settlement.").

The costs of defending against meritless, no-injury class actions, as well as the costs of settlement payouts, are ultimately borne by businesses' customers, employees, and investors. Consumers are further harmed when products they like and depend on are changed or removed from the market entirely. This suit, for example, threatens to prevent glaucoma patients from accessing important medications while compelling defendants to incur millions of dollars in costs to seek FDA approval for product changes that will not benefit most, if any, patients. *See* JA151 (seeking not only damages, but also an injunction commanding defendants to redesign their products to dispense smaller eye drops).

Overturning the district court's decision would result in many more consumers, who doubtless do not consider themselves injured, being wrongly caught up in litigation that runs counter to their interests.

Class actions will probably always "present opportunities for abuse." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989). But the likelihood of abuse is particularly great in cases like this one, where plaintiffs cannot plausibly allege that defendants' challenged conduct has injured *anyone*. These sorts of baseless class actions can and should be resolved quickly through challenges to standing. Well-reasoned decisions like the one the district court issued in this case help to deter such meritless suits and spare defendants the costs and settlement pressures that accompany such litigation. In this "era of frequent litigation [and] class actions . . . , courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

CONCLUSION

The Court should affirm the judgment below.

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September 28, 2016

COMBINED CERTIFICATE OF COMPLIANCE

Word Count: This brief complies with the length limitations set forth in that rule because it contains 4,781 words, as counted by Microsoft Word, excluding the items that may be excluded.

Bar Membership: Jeffrey S. Bucholtz and Paul Alessio Mezzina are members in good standing of the Bar of this Court.

Identical Briefs: I caused the electronic version of this brief to be prepared in Adobe PDF, and it is identical to the paper version of this brief filed with the Court.

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/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

CERTIFICATE OF SERVICE

On September 28, 2016, I caused a copy of the foregoing document to be served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz