No. 16-3334

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLENE EIKE, et al.,

Plaintiffs-Appellees,

v.

ALLERGAN, INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Illinois, No. 3:12-cv-1141-SMY-DGW

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

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October 18, 2016

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel provides the following statement in compliance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

   Amici curiae Chamber of Commerce of the United States of America and American Tort Reform Association

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   King & Spalding LLP
   U.S. Chamber Litigation Center, Inc.
   American Tort Reform Association

3. If the party is a corporation:

   i) Identify all its parent corporations, if any:

   Amici have no parent corporations.

   ii) List any publicly held company that owns 10% or more of the party's stock:

   No publicly held company owns ten percent or more of any *amicus*'s stock.

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

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   No publicly held company owns ten percent or more of any *amicus*'s stock.

/s/ Paul Alessio Mezzina
Paul Alessio Mezzina

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   King & Spalding LLP
   U.S. Chamber Litigation Center, Inc.

3. If the party is a corporation:

   i) Identify all its parent corporations, if any:

   The Chamber has no parent corporations.

   ii) List any publicly held company that owns 10% or more of the party's stock:

   No publicly held company owns ten percent or more of the Chamber's stock.

/s/ Kathryn Comerford Todd
Kathryn Comerford Todd

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   King & Spalding LLP
   U.S. Chamber Litigation Center, Inc.

3. If the party is a corporation:

   i) Identify all its parent corporations, if any:

   The Chamber has no parent corporations.

   ii) List any publicly held company that owns 10% or more of the party's stock:

   No publicly held company owns ten percent or more of the Chamber's stock.

/s/ Warren Postman
Warren Postman

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel provides the following statement in compliance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case:

   Amicus curiae American Tort Reform Association ("ATRA")

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   King & Spalding LLP
   American Tort Reform Association

3. If the party is a corporation:

   i) Identify all its parent corporations, if any:

   ATRA has no parent corporations.

   ii) List any publicly held company that owns 10% or more of the party's stock:

   No publicly held company owns ten percent or more of ATRA's stock.

/s/ H. Sherman Joyce
H. Sherman Joyce

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   King & Spalding LLP
   American Tort Reform Association

3. If the party is a corporation:

   i) Identify all its parent corporations, if any:

      ATRA has no parent corporations.

   ii) List any publicly held company that owns 10% or more of the party's stock:

      No publicly held company owns ten percent or more of ATRA's stock.

/s/ Lauren Sheets Jarrell
Lauren Sheets Jarrell

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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.

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.

The Chamber and ATRA regularly file *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. Because businesses are frequent targets of class-action lawsuits, including abusive suits based on ever-more-exotic theories of "injury," *amici* have a keen interest in ensuring that courts rigorously analyze whether class-action plaintiffs have satisfied the requirements for Article III standing and class certification.

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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.

INTRODUCTION & SUMMARY OF ARGUMENT

Imagine you order an ice cream sundae and it arrives with a larger portion of ice cream than you can eat. You might think it was too bad that some ice cream would go to waste. But you probably would not think the ice-cream parlor had caused you a concrete and particularized injury that could be redressed by a court. After all, the ice-cream parlor delivered what it promised; you did not suffer any physical or emotional harm; and you were not deceived into buying (or overpaying for) the sundae. While you might wish the ice-cream parlor had given you the option of buying less ice cream for less money, it had no obligation to offer such an option. Nor do you have any reason to believe it would have charged less for a smaller sundae—just as likely, it would have charged the market price for a sundae regardless. In short, the ice-cream parlor's sundae design, even if inefficient, did not make you worse off in any legally cognizable way. And even if for some reason you felt the ice-cream parlor had injured you, you certainly would not conclude that it had caused the same injury to all of its other customers, regardless of their individual tastes and appetites.

The novel theories of standing and classwide injury advanced by plaintiffs in this case are no less absurd than the above hypothetical.

First, plaintiffs lack standing because they 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 cogniza-

ble injury, let alone one that is fairly traceable to the conduct plaintiffs challenge as unlawful. In fact, plaintiffs' standing theory is even more indefensible than the customer's hypothetical claim that the ice-cream parlor should have served him less ice cream: the ice-cream parlor is presumably free to adjust its portion size as it wishes, but federal law bars defendants here from changing their packaging unless they devote significant resources to conducting new clinical trials to prove that the proposed new packaging is safe and effective and then obtain approval from FDA to make the change.

Second, even assuming plaintiffs sufficiently pleaded the elements of Article III standing, they did not satisfy the requirements for class certification. The district court abused its discretion in certifying classes containing tens of thousands of individual consumers without meaningful analysis of whether class treatment was warranted. The court certified those classes because it accepted plaintiffs' lawyers' implausibly broad framing of a supposed "common issue"—whether 33 different FDA-approved glaucoma medications release eye drops that are too large for *all* consumers under *all* circumstances—while improperly refusing to consider defendants' evidence that the class members had not suffered any common injury.

Affirming the decision below would trigger a new wave of abusive, no-injury class-action litigation, with potentially devastating effects on businesses and consumers. If plaintiffs' novel standing theory were accepted, it would encourage lawyers to bring class-action suits over any business practice that could be portrayed as inefficient, based on conjecture that greater efficiency might have translated into

savings for customers. And if the district court's cursory class-certification analysis were upheld, it would encourage those same lawyers to frame supposedly common issues at an unrealistically high level of generality in order to win certification of large classes and thereby coerce defendants into paying huge settlements. Those consequences of affirmance would benefit no one but the lawyers—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 this case were allowed to proceed.

ARGUMENT

I. This Case Should Be Dismissed For Lack Of Standing.

"[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 to sue in federal court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). The Court can and should resolve this appeal on the threshold ground that plaintiffs lack standing under Article III of the Constitution, as at least one district court has held in a nearly identical case brought by the same plaintiffs' lawyers. *See Cottrell v. Alcon Labs., Inc.*, No. 14-5859, 2016 WL 1163163, at *4–8 (D.N.J. Mar. 24, 2016), *appeal pending*, No. 16-2015 (3d Cir.).[2]

[2] In a Rule 23(f) appeal, it is ordinarily necessary to consider whether the named plaintiffs have standing before reaching the merits of the class-certification decision. *See, e.g.*, *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002); *see also McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 222–23 & n.10 (3d Cir. 2012) (collecting cases). In opposing defendants' Rule 23(f) petition, plaintiffs argued that "under certain circumstances, a court should consider class certification *before* reach-

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). Put simply, the question is whether defendants' challenged conduct actually made plaintiffs "worse off." *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." *Id.* at 174 (quoting *McNamara v. City of Chi.*, 138 F.3d 1219, 1221 (7th Cir. 1998)).

A. Plaintiffs Cannot Show Injury.

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 packaging 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

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ing standing." Pet. Resp. 16. But they did not argue that this case presents such special circumstances, and it does not. Courts can consider certification before standing only when "the class certification issues are 'logically antecedent to the existence of any Article III issues.'" *Rivera*, 283 F.3d at 319 n.6 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612 (1997)). But here, as in *Rivera*, "the standing question would exist whether [plaintiffs] filed [their] claim[s] alone or as part of a class; class certification did not create the jurisdictional issue." *Id.* It is therefore necessary to consider at the outset whether the individual named plaintiffs have standing.

painkiller, and she received just that—the benefit of her bargain"). Their factual allegations do not "allow[] the court to draw the reasonable inference" that defendants' product design made them worse off. *Silha*, 807 F.3d at 173–74 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

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.

Instead, plaintiffs rely on a theory of standing that even their own *amici* in the pending Third Circuit case consider "novel" and "innovative." AARP Br. 8, *Cottrell v. Alcon Labs.*, No. 16-2015 (3d Cir. Aug. 1, 2016). 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. In other words, plaintiffs believe they would have saved money if defendants had designed their products to be more efficient. *See* Pet. Resp. 6, 17; *see also* A.018 (noting plaintiffs' allegation that defendants' conduct "forc[ed] the plaintiffs to spend more money on medication").

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. 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 Cottrell*, 2016 WL 1163163, at *6 (refusing to "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"). "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 conceivable," 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 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 asso-

ciated with getting the medication to market. *See* Def. Br. 17–18, 29–30. 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.

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. *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."). Patients demand treatment, not fluid volume; so demand for defendants' products is properly measured in doses, not in milliliters, and logical pricing decisions will reflect that basic economic reality. 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 would not reduce demand for them—because consumers demand pain relief, not powder volume—and the manufacturer would therefore have no reason to reduce the price of each pill. The packaging changes urged by plaintiffs likewise would not have put any downward pressure on the prices of defendants' products.

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 unexplained statements, such as those in various "scientific studies," that supposedly support their pricing theory. Pet. Resp. 17. As the district court in New Jersey correctly held, those studies do not show that plaintiffs suffered any injury in fact. *See Cottrell*, 2016 WL 1163163, at *5. 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.

B. Plaintiffs Cannot Show Causation.

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, 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* Def. Br. 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. *Cottrell*, 2016 WL 1163163, at *6 n.4; *accord Kuehn*, 563 F.3d at 292. 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).

C. Accepting Plaintiffs' Novel Standing Theory Would Trigger A Flood Of Meritless Class Actions.

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 Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497 (7th Cir. 2012) ("[C]ommonality requires the plaintiffs to demonstrate that the class members 'have suffered the same injury'" (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011)). 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. 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 unlimited." Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation*, 80 BROOK. L. REV. 599, 601 (2015).

Plaintiffs' novel standing theory would provide countless opportunities for such 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. 24. 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*, BUS. 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 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*. 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).

II. In The Alternative, The Class Should Be Decertified.

Even assuming *arguendo* that the allegations in the complaint give rise to an inference that some class members suffered an Article III injury caused by defendants' challenged conduct, the Court should still reverse the district court's class-certification decision. Although a district court is required to conduct a rigorous analysis of the requirements of Rule 23 before certifying a class, the district court in this case based its decision on a perfunctory analysis that failed to grapple with the serious problems posed by plaintiffs' broad class definition.

A. The District Court Failed To Conduct The Requisite Class-Certification Inquiry.

Before certifying a class, a district court must conduct a "rigorous analysis" of whether Rule 23's requirements have been satisfied. *Wal-Mart*, 564 U.S. at 351 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). It is not enough

for plaintiffs simply to articulate a theory that sounds "common." Rather, they must "prove that there are *in fact* . . . common questions of law or fact" that will "'generate common *answers* apt to drive the resolution of the litigation,'" *id.* at 350, and they "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)," *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). As this Court has put it: "Mere *assertion* by class counsel that common issues predominate is not enough." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014). "[W]hen factual disputes bear on issues vital to certification," the court "must receive evidence . . . and resolve the disputes *before* deciding whether to certify the case." *Id.* (quoting *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)) (emphasis added, internal quotation marks omitted).

Here, the district court did not rigorously analyze whether plaintiffs' claims presented genuinely common questions that truly predominated over more individualized ones. Instead, it found commonality and typicality based on nothing more than an uncritical recitation of plaintiffs' theory. *See* A.022 ("[T]he core issue is whether the dispensers release unnecessarily large eye drops."); A.023 ("Plaintiffs allege that they were all exposed to the same course of conduct by Defendants: selling prescription eye medication in a bottle that delivers unnecessarily large eye drops."). It did not consider whether plaintiffs had carried their burden of *proving* that the ideal eye-drop size can be determined for all medications, all patients, and all circumstances "in one stroke." *Wal-Mart*, 564 U.S. at 350. Nor did it address defendants' extensive evidence that it cannot. *See* Def. Br. 8–11, 36–37.

To be sure, the district court offered a perfunctory acknowledgment that defendants had presented an expert report explaining that "whether class members would receive a safe and effective dose of medication with a [smaller] drop is an individualized issue" because "redesigning the droppers on all 33 products 'would impact each of these medications differently, and would also affect individual patients differently.'" A.028 (quoting ECF No. 176-33, at 6). But it did not discuss defendants' evidence in any detail. It simply observed that "[o]f course" plaintiffs had their own expert and then threw up its hands and declared that it was "not the role of the Court to determine which expert is more believable." *Id.*

The district court's refusal even to consider the parties' evidence is antithetical to the rigorous analysis that Rule 23 requires. As *Wal-Mart* makes clear, simply articulating a claim at a high level of generality is not a free pass to class certification. The plaintiffs there posed a superficially common question concerning "whether Wal-Mart's female employees nationwide were subjected to a single set of [discriminatory] corporate policies." 564 U.S. at 347. But the Court did not uncritically accept the plaintiffs' framing of the case. Rather, the Court explained that "[f]requently th[e] 'rigorous analysis' [required at the class-certification stage] will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* at 351. The Court then weighed the evidence and concluded that because the plaintiffs had "provide[d] no *convincing proof* of a companywide discriminatory pay and promotion policy," they had not "established the existence of any common question." *Id.* at 359 (emphasis added).

The district court also erred in assuming that plaintiffs could satisfy Rule 23 "just by hiring a competent expert." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010). On the contrary, when a district court is faced with conflicting evidence or testimony bearing on Rule 23's requirements, it "may not duck hard questions by observing that each side has some support." *Id.* (quoting *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)). In such circumstances, "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *Id.* (quoting *West*, 282 F.3d at 938); *see also Parko*, 739 F.3d at 1086 (vacating class certification and observing that "[i]f [plaintiffs'] expert's evidence is rejected, there will be no basis for" finding a common injury). Here the district court abdicated that responsibility.

The court's abdication is not excused by its statement that "if it is [later] determined that some, but not all, [class members] would benefit from the status quo, then the entire class would fail." A.028. To be sure, that *should* be the consequence of plaintiffs' strategic decision to paper over meaningful differences in order to win class certification. But as recognized by the above authorities, district courts have an obligation to assess the likelihood of such a result at the class-certification stage. Where the evidence shows that the plaintiffs' purported method of common proof is illusory, certification of a class action is improper. And as explained below, certification in this situation severely prejudices defendants, and potentially absent class members as well.

The district court likewise erred in accepting an implausible damages model that was "based on the common issue" framed by plaintiffs' counsel. A.029. "In determining whether to certify a consumer fraud class," a district court must conduct "a 'rigorous analysis' into whether the plaintiffs' 'damages are susceptible of measurement across the entire class.'" *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014). Plaintiffs' "method of determining damages must match the plaintiff's theory of liability and be sufficiently reliable." *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015). The court must "investigate[] the realism of the plaintiffs' . . . damage model in light of the defendants' counterarguments," and it may not refuse to do so "simply because those arguments would also be pertinent to the merits." *Parko*, 739 F.3d at 1086.

If the district court here had conducted such an inquiry, it would have had to acknowledge that plaintiffs' damages model is entirely unrealistic. For one thing, the model relies on plaintiffs' speculative volume-based-pricing theory despite the lack of evidence suggesting that *any* class member, let alone *all* class members, would have paid a lower price for glaucoma medication if defendants' products had dispensed smaller eye drops. *See* Part I.A, *supra*. In addition, the model implausibly assumes that class members suffered damages equal to the entire difference between the average size of defendants' eye drops and plaintiffs' preferred drop size, ignoring both the many differences between patients that affect their ideal drop size and the many ways in which patients waste medication that have nothing to do with drop size. *See* Def. Br. 8–10, 45–47.

Plaintiffs thus have not identified any plausible means of calculating "only those damages attributable to" defendants' alleged wrongdoing. *Comcast*, 133 S. Ct. at 1433. If their model were used as a basis for calculating damages, either in the aggregate for the class as a whole or for each individual class member, it would rob defendants' of "the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members," which would violate due process. *Mullins*, 795 F.3d at 671.

B. Affirming The District Court's Decision Would Invite Abuse Of The Class-Action Mechanism, Harming Businesses And Consumers.

The district court's decision is especially problematic because it suggests that to get a class certified, a plaintiff need only articulate an issue that is theoretically capable of classwide resolution if taken at face value. That would make Rule 23 an extremely low, if not illusory, bar. After all, "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Love v. Johanns*, 439 F.3d 723, 729–30 (D.C. Cir. 2006) (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998)). Alleging that a product is defective for everyone all the time everywhere is not hard. Nor is it difficult to find a supportive "expert." If that were all it took to get a class certified, then "certification would be virtually automatic." *Parko*, 739 F.3d at 1085.

Class-action plaintiffs' framing of implausibly broad issues to win class certification is not all that different from § 1983 plaintiffs' use of the same tactic to evade qualified immunity. The Supreme Court "ha[s] repeatedly told courts . . . not

to define clearly established law at a high level of generality," but to focus on "whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Just as describing a constitutional question broadly and omitting relevant factual details (*e.g.*, whether a police officer may "'use deadly force against a fleeing felon who does not pose a sufficient threat of harm,'" *id.* at 308–09) skews a court's analysis of whether a particular officer violated clearly established law, so describing a product-liability issue broadly (*e.g.*, "whether the dispensers [for each of 33 different medications] release unnecessarily large eye drops [for all consumers under all circumstances]," A.022) skews the class-certification analysis.

If plaintiffs' lawyers believed they would have to prove at trial the theory they used to get a class certified, that might deter reliance on unrealistic and overbroad theories to get classes certified. But as the Court knows, that is not how it works. The overgeneralizing gambit that succeeded here is attractive to plaintiffs' lawyers because of a "basic truth about class action litigation: the fight over class certification is often the whole ball game." *Hartford Acc. & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006).

It is no secret that "[c]lass actions, unless dismissed at an early stage, are typically settled rather than litigated to judgment." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011). The reason is simple: aggregating tens of thousands of claims into a single case raises the stakes so dramatically that it tends to "coerce the defendant into settling on highly disadvanta-

geous terms, regardless of the merits of the suit." *Id.* (quoting Fed. R. Civ. P. 23 committee notes); *see also, e.g.*, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 484 (7th Cir. 2012); *Szabo*, 249 F.3d at 675.

Businesses subjected to these kinds of suits can either fight on, bearing the significant costs of litigation and opening themselves up to ruinous liability, or they can acquiesce to what amounts to a "blackmail settlement[]." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). Not surprisingly, many defendants, "[f]aced with even a small chance of a devastating loss," are "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). 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.").

Because class certification gives a case "settlement value to the plaintiff out of any proportion to the prospect of success at trial," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975), plaintiffs' lawyers have every incentive to frame issues at an unrealistically high level of generality, without pausing to worry about whether they would have any chance of prevailing on those issues at trial. That incentive is exacerbated when district courts let plaintiffs write their own

ticket to class certification by making sweeping, unprovable assertions and fail to subject those assertions to any meaningful scrutiny, as the district court did here. If the decision below is allowed to stand, it will become a roadmap for plaintiffs' lawyers to pursue meritless and abusive class lawsuits.

As the Chamber's and ATRA's members know all too well, the tactic used here is already frequently employed, with varying levels of success, by lawyers who see class certification not as an opportunity to frame realistic issues sensibly for trial, but as a chance to obtain leverage to coerce a settlement. *See, e.g.*, *Robinson v. Gen. Elec. Co.*, No. 09-cv-11912, 2016 WL 1464983, at *6 (E.D. Mich. Apr. 14, 2016) (refusing to certify class of microwave purchasers where plaintiffs framed product-defect allegations "at the highest level of generality"); *Corvello v. Wells Fargo Bank N.A.*, No. 10-cv-5072, 2016 WL 3995909, at *6 (N.D. Cal. Jan. 29, 2016) (refusing to certify class of mortgagors alleging breach of contract where "plaintiffs, in an attempt to identify a common question, ha[d] posed the question at an exceedingly high level of generality"); *see also Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 529 (6th Cir. 2015) (Cook, J., dissenting) (criticizing panel majority for "allow[ing] Plaintiffs to define the question at an impossibly high level of abstraction"), *cert. denied*, 136 S. Ct. 1493 (2016). The district court's decision encourages such gamesmanship.

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 and allowing classes to be certified based on sweeping, unrealistic issues framed by plaintiffs' lawyers. 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. And while those costs are high enough to impact the bottom line of even large companies like defendants here, the ramifications of meritless 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 (2005) (statement of Sen. Grassley).

The costs of defending against meritless, no-injury class actions, as well as the costs of settlement payouts, are ultimately borne by businesses' customers, em-

ployees, 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 more than 100,000 glaucoma patients from accessing important medications while compelling defendants to incur tens of millions of dollars in costs to seek FDA approval for drastic product changes that will not benefit most, if any, patients. *See* Def. Br. 12–13. Certifying a class based on issues framed at too high a level of generality can also harm absent class members, whose possibly legitimate but narrower claims are extinguished. *See Thomas v. UBS AG*, 706 F.3d 846, 850 (7th Cir. 2013); *Rikos*, 799 F.3d at 529 (Cook, J., dissenting). Left undisturbed, the decision below will result in many more consumers, who doubtless do not consider themselves injured, being wrongly caught up as plaintiffs in litigation that runs counter to their interests.

CONCLUSION

The Court should order the district court to dismiss this case in light of plaintiffs' lack of standing. In the alternative, it should reverse the district court's class-certification decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6,582 words, as counted by Microsoft Word, excluding the items that may be excluded.

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CERTIFICATE OF SERVICE

On October 18, 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
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