No. 23-1666

In the

United States Court of Appeals
For the Sixth Circuit

JODI TAPPLY, JEANNETTE BUSCHMAN, MICHAEL PARTIPILO,
BARBARA LESTER, and VICKI MEYERHOLZ,
on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

WHIRLPOOL CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court for the
Western District of Michigan, No. 1:22-cv-758
Hon. Jane M. Beckering

**BRIEF OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND THE
ASSOCIATION OF HOME APPLIANCE MANUFACTURERS
AS AMICI CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 23-1666 Case Name: Jodi Tapply, et al. v. Whirlpool Corporation

Name of counsel: Brian D. Schmalzbach

Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. The Chamber does not have a parent company and has not issued stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

CERTIFICATE OF SERVICE

I certify that on April 16, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brian D. Schmalzbach

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1666 Case Name: Jodi Tapply, et al. v. Whirlpool Corporation

Name of counsel: Brian D. Schmalzbach

Pursuant to 6th Cir. R. 26.1, Association of Home Appliance Manufacturers
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Association of Home Appliance Manufacturers is a nonprofit corporation organized under the laws of the state of Illinois. AHAM does not have a parent company and has not issued stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None known.

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s/Brian D. Schmalzbach

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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and 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. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Association of Home Appliance Manufacturers ("AHAM") is a not-for-profit trade association, incorporated in the State of Illinois and headquartered in Washington, D.C. Appellee Whirlpool Corporation ("Whirlpool") is a member of AHAM. AHAM represents more than 150 member companies that manufacture 90% of the major, portable and floor care appliances shipped for sale in the U.S. Home appliances are the heart of the home, and AHAM members provide safe, innovative, sustainable, and efficient products that enhance consumers' lives. The home appliance

industry is a significant segment of the economy, measured by the contributions of home appliance manufacturers, wholesalers, and retailers to the U.S. economy. In all, the industry drives nearly $200 billion in economic output throughout the U.S. and manufactures products with a factory shipment value of more than $50 billion.

Amici's members and their subsidiaries are often targeted as defendants in litigation, including class actions, claiming millions or billions in damages related to consumer products but asserting no cognizable injury. Amici thus are familiar with no-injury consumer litigation, both from the perspective of individual defendants and from a more global perspective. Amici have a significant interest in this case because the proper application of Article III raises issues of immense significance not only for their members, but also for the customers, employees, and other businesses that depend on them.

STATEMENT OF CONSENT, AUTHORSHIP, AND CONTRIBUTION

Counsel for all parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary

contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

This appeal requires this Court to defend the limits of federal jurisdiction in the face of a spurious, yet oft-advanced argument claiming Article III standing for uninjured product purchasers who wish they had paid less for their purchases. The Plaintiffs invoking that theory here bought gas ranges that have worked without complaint for themselves. Yet they claim that because of a so-called defect in the ranges, *other* buyers have inadvertently activated the ranges' control knobs, resulting (according to their own account) in easily detected and corrected gas flows that never injured anyone. Plaintiffs now insist that had they known about this purported defect, they would not have bought their ranges or would have paid less. Their theory thus seeks to parlay an asserted defect that has caused no injury in Plaintiffs' ranges—and is not alleged to have caused injury when it allegedly manifested in others'—into a massive class action to monetize their alleged buyer's remorse.

The district court should have dismissed this putative class action for lack of standing, because that attempted Article III alchemy cannot survive

fundamental limitations on federal jurisdiction.[1] The upshot of Plaintiffs' complaint is that because their ranges *may* malfunction at some future point, they should be compensated now. But as the Supreme Court has confirmed, if a claimed "risk of future harm does *not* materialize, then [the plaintiff] cannot establish a concrete harm sufficient for standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 436 (2021). Consistent with *TransUnion*'s ban on such speculative standing, other circuits have recognized "that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own." *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009). Those principles apply with even more force here, where the supposed defect has not caused any harm even when Plaintiffs allege that it has manifested.

Those Article III guardrails are all the more important in this class-action context: "In an era of frequent litigation"—and especially in "class actions"—"courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S.

[1] Amici agree with Whirlpool that if the district court had Article III jurisdiction, it would be proper to dismiss these claims on the merits. *See* Whirlpool Br., Section II.

125, 146 (2011). Indeed, the "buyer's remorse" standing endorsed by the district court is tailor-made to circumvent limits on class actions by fabricating speculative classwide injuries that skirt the need for individualized proof. That theory thus threatens to convert nearly any alleged product defect into a massive class action divorced from any harm or risk attributable to the product. And that result would exacerbate the dangers that prolific class actions pose to the American economy. To avoid that result and protect the case-or-controversy requirement, this Court should therefore affirm the dismissal of this Complaint on the grounds that Plaintiffs lack Article III standing.

ARGUMENT

I. Plaintiffs lack any Article III injury from a purported defect that has caused no harm.

"Every class member must have Article III standing in order to recover individual damages. Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *TransUnion*, 594 U.S. at 431. Plaintiffs bear the burden of establishing that standing. *Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 581 (6th Cir. 2016). Plaintiffs themselves must establish (among other elements) that they have sustained

an "injury in fact" that is "concrete and particularized," i.e. "it must affect the plaintiff[s] in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). "Requiring a plaintiff to demonstrate a concrete and particularized injury … ensures that federal courts decide only 'the rights of individuals.'" *TransUnion*, 594 U.S. at 423 (citing *Marbury v. Madison*, 5 U.S. 137, 170 (1803)). The injury-in-fact requirement thus guarantees "that federal courts exercise 'their proper function in a limited and separated government.'" *TransUnion*, 594 U.S. at 423 (quoting John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L. J. 1219, 1224 (1993)).

The district court erred in holding that Plaintiffs have Article III standing to pursue overpayment claims for products that work just fine for them. Opinion and Order, R. 40, Page ID #714–717. First, that holding cannot be reconciled with *TransUnion*, which rejected the notion that an unmaterialized risk of future harm is an injury-in-fact. Second, the district court ignored the well-established principle, reflected in decisions before and after *TransUnion*, that a plaintiff lacks standing to sue for an alleged product defect that has not manifested any harm. Third, the district court

ignored that manifestations of this particular alleged defect would not deprive purchasers of the benefit of their bargain.

1. *TransUnion LLC v. Ramirez* establishes that an unmanifested harm does not provide Plaintiffs with the necessary Article III injury-in-fact. The *TransUnion* plaintiffs sued a credit reporting agency, alleging that their credit reports contained erroneous and defamatory information. 594 U.S. at 430. Many plaintiffs, however, failed to show that the defendant had published the erroneous reports to third parties, and thus, that there was any harm from the erroneous reports. *Id.* at 433. Instead, the damages claims of those no-publication plaintiffs hinged on the as-yet unmaterialized risk of that potential harm. *Id.*

The Supreme Court reversed the Ninth Circuit's ruling that plaintiffs had Article III standing, agreeing with TransUnion that "if the risk of future harm does *not* materialize, then the individual cannot establish a concrete harm sufficient for standing." *Id.* at 436. In other words, "the risk of future harm on its own does not support Article III standing for [a] damages claim." *Id.* at 441. Because "plaintiffs did not demonstrate that the risk of future harm materialized" or "that the class members were independently harmed by their exposure to the risk itself … such as [by] an emotional injury," the

Court held that their "argument for standing for their damages claims based on an asserted risk of future harm is unavailing." *Id.* at 437.

The Supreme Court illustrated *when* a risk of harm creates standing using the example of a woman driving ahead of "a reckless driver who is dangerously swerving across lanes." *Id.* at 436. That "reckless driver has exposed the woman to a risk of future harm, but the risk does not materialize and the woman makes it home safely. . . . [T]hat would ordinarily be cause for celebration, not a lawsuit." *Id.* at 436–37. If, however, "the reckless driver crashes into the woman's car, the situation would be different, and (assuming a cause of action) the woman could sue the driver for damages." *Id.* at 437.

TransUnion thus forecloses Plaintiffs' theory. These Plaintiffs are like the no-publication plaintiffs in *TransUnion* or the woman who made it home safely. At best, Plaintiffs have alleged a risk of future harm. And their overpayment theory seeks to smuggle that unmaterialized risk of future harm into a point-of-sale economic injury. But under *TransUnion*, their "argument for standing for their damages claims based on an asserted risk of future harm is unavailing." *Id.* at 437. "No concrete harm, no standing." *Id.* at 442.

2. Decisions both before and after *TransUnion* reject attempts (like Plaintiffs') to use the "overcharge" label to fabricate injury from the purchase of a product that works properly for its purchaser. Those decisions flow from the "well established" principle "that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own." *O'Neil*, 574 F.3d at 503; *see also In re Polaris Mktg., Sales Pracs., & Prods. Liab. Litig.*, 9 F.4th 793, 797 (8th Cir. 2021) (assertion that a defect "*can* cause" damage does not create standing); *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 938 (7th Cir. 2022) ("[A] plaintiff seeking money damages has standing to sue in federal court only for harms that have in fact materialized.").

That principle defeats standing for claims like Plaintiffs'. It "is not enough to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that *their product* actually exhibited the alleged defect." *O'Neil*, 574 F.3d at 503 (emphasis added). Plaintiffs thus cannot satisfy Article III by trying "to piggyback on the injury caused to those with manifest defect." *Johannessohn*

v. Polaris Indus. Inc., 9 F.4th 981, 988 (8th Cir. 2021) (rejecting standing based on "inflated purchase price" or "economic injury").[2]

The district court thought that Plaintiffs' characterization of their own economic injury sufficed for standing. Opinion and Order, R. 40, Page ID #715 ("accepting Plaintiffs' allegations as true" that "had they known [of the Defect], they would not have purchased the [Ranges], or least would not have paid as much"). But plaintiffs cannot meet the injury-in-fact requirement by "simply characteriz[ing] that purchasing decision as an economic injury." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 281 (3d Cir. 2018) ("*J&J*"); *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319 (5th Cir. 2002) ("Merely asking for money does not establish an injury in fact."). If "the purchase provided her with an economic benefit" that was not "worth less than the economic benefit for which she bargained," she has no economic injury. *J&J*, 903 F.3d at 290 & n.15 (citation omitted). Thus, plaintiffs cannot plead around Article III by alleging that the manufacturer gave false assurances that the product she

[2] That tactic of laying claim to *others'* alleged injuries is especially fruitless here, where Plaintiffs cannot even allege that third parties who experienced a manifestation of the alleged defect suffered any injury or damage from it.

bought was safe (suggesting that some people would pay more for a safe product), if the product she received "was, in fact, safe as to her." *Id.* at 288–89; *Rivera*, 283 F.3d at 319–20 (a plaintiff cannot satisfy Article III by alleging that a product posed undisclosed risks—and was therefore worth less than he bargained for—if those risks never materialized as to the plaintiff). Because none of these Plaintiffs can allege that their ranges are not safe as to them, none have standing to pursue overpayments for products that provided them with the benefit of their bargain. *See J&J*, 903 F.3d at 281 ("buyer's remorse, without more, is not a cognizable injury under Article III").

3. Although the foregoing principles suffice to dispose of this case, it nonetheless bears emphasis that this is a particularly easy case compared to other actions advancing no-manifest-defect claims. Not only do Plaintiffs fail to plead that the purported defect in *their* ranges manifested any harm, but there is no allegation that such a defect has made *anyone's* range unfit for use.

To the contrary, Plaintiffs' own allegations confirm that the alleged defect does not render the range unusable. Plaintiffs themselves fail to allege that they had firsthand experience with the supposed defect, but do allege

that they continue to use their ranges today. Amended Compl., R. 13, Page ID #104–105, 109, 111–116 (¶¶ 1, 27, 38–39, 47, 56, 65). According to the complaint, even the non-plaintiff owners who reported inadvertent knob actuation claimed no personal injury or property damage. Amended Compl., R. 13, Page ID # 126–134 (¶¶ 81–100). Instead, those owners simply reported noticing the smell of gas and so turned the flow of gas off without incident. *Id.* In other words, the ranges' knobs and the odorant in the gas worked effectively to ensure that there was no personal injury or property damage from any inadvertent gas discharge. "[T]hat would ordinarily be cause for celebration, not a lawsuit." *TransUnion*, 594 U.S. at 437.[3]

Because the defect asserted here does not render the products unusable, it is distinguishable from defects that plaintiffs in other cases have claimed would inevitably defeat the point of the product if manifested. For example, the district court (at Opinion and Order, R. 40, Page ID #715) cited this Court's decision in *In re Whirlpool Corp. Front-Loading Washer Product Liability Litigation*, which concluded "*under Ohio law* that not all class members must demonstrate manifestation of biofilm and mold growth in

[3] In any event, as Whirlpool's brief explains, the ranges conformed to the specifications that Whirlpool promised. *See* Whirlpool Br. 18–19.

their Duets before those individuals may be included in the certified class." 722 F.3d 838, 857 (6th Cir. 2013) (emphasis added). That decision, rendered at class certification, concerned the scope of state law and did not address the Article III standing question. In any event, the defect alleged there went to the heart of the product: a washing machine that makes "laundry . . . smell musty" would be decidedly counterproductive. *Id.* at 848. Plaintiffs do not and cannot make any such allegation here.

The district court also relied on decisions finding standing related to various alleged automobile safety defects. Opinion and Order, R. 40, Page ID #715–716 (citing *In re FCA US LLC Monostable Elec. Gearshift Litig.*, 2017 WL 1382297 (E.D. Mich. 2019) (unintended rollaway of parked vehicles); *In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152 (C.D. Cal. 2011) (sudden unintended acceleration)). Even if those courts correctly found standing for alleged defects that would render a vehicle unsafe if they manifested, that is a far cry from a defect that presents no such safety risk if it ever manifests. *Compare Cahen v. Toyota Motor Corp.*, 717 F. App'x 720, 723 (9th Cir. 2017) (no standing based on alleged vulnerability to hacking); *Lassan v. Nissan N.A., Inc.*, 211 F Supp. 3d 1267, 1283–84 (C.D. Cal. 2016) (no standing based on alleged defect in keyless ignition fob). So even if a plaintiff alleging a defect

whose manifestation would render the product useless could have standing, these Plaintiffs do not.

II. Plaintiffs' theory threatens to convert all alleged defects into unnecessary no-injury class actions.

Considered just with respect to an individual claim, buyer's remorse standing is an affront to the case or controversy requirement of Article III, but it is even worse in the class-action context, where "courts must be more careful to insist on the formal rules of standing, not less so." *Winn*, 563 U.S. at 146. The purpose and effect of Plaintiffs' theory is to fabricate a common injury-in-fact to evade the limits of both federal jurisdiction and Rule 23. Plaintiffs' theory invites courts to skip past two critical questions: whether the purchase of a product actually injured any purchaser, and whether such injury can be established for members of the class without individualized inquiries of fact and law. Instead, Plaintiffs ask this Court to endorse a shortcut around those inquiries by presuming injury from defects that have caused none. That invitation is unjustifiable as a matter of Article III, Rule 23, or tort theory.

1. *TransUnion* held that "[e]very class member must have Article III standing in order to recover individual damages." 594 U.S. at 431. Thus,

every class member must show a bona fide injury in common with the class. Properly understood, Rule 23 and Article III require proof *at the class-certification stage* that every class member is injured.[4]

At a minimum, the injury-in-fact analysis requires that before certifying a damages class, a court must engage in "rigorous analysis"—based on evidentiary proof—to determine that common issues will predominate over individualized questions. *Fox v. Saginaw Cnty., Michigan*, 67 F.4th 284, 300 (6th Cir. 2023). "If many or most of the putative class members could not show that they suffered an injury fairly traceable to the defendant's misconduct, then they would not be able to recover, and that is assuredly a relevant factor that a district court must consider when deciding whether and how to certify a class." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (11th Cir. 2019). Standing for unnamed class members thus presents a

[4] *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."); *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1785.1 (3d ed.) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention.").

"powerful problem under Rule 23(b)(3)'s predominance factor." *Id.*[5] "[I]f fact-specific damage trials will inevitably overwhelm common liability questions, individual issues may predominate." *Fox*, 67 F.4th at 301; *see also Tarrify Props, LLC v. Cuyahoga Cnty.*, 37 F.4th 1101, 1106–08 (6th Cir. 2022).

Plaintiffs' theory of standing would circumvent all that. Their theory would invite courts to certify classes based on the notion that all class members were overcharged for a product—whether or not each buyer's product has ever malfunctioned or will ever malfunction, and whether or not each buyer is completely satisfied with the product for the price paid. Yet a proper injury analysis must ask each of those questions, which would inevitably require individualized inquiries to determine whether each putative class member can satisfy Article III. Validating "buyer's remorse" standing thus opens the floodgates to no-injury class actions.[6]

[5] *See also In re Asacol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018) (if a substantial number of class members "in fact suffered no injury," the "need to identify those individuals will predominate"); *Van v. LLR, Inc.*, 61 F.4th 1053, 1069 (9th Cir. 2023) (vacating class certification for failure to consider effect of individualized injury inquiries on predominance).

[6] The plaintiffs' bar has already sought to leverage this theory of standing in increasingly absurd applications. *See, e.g.*, *In re Marriott Int'l, Inc.*, 78 F.4th 677, 681 (4th Cir. 2023) (vacating certification of classes alleging that "they had paid more for their hotel rooms than they would have had they known of Marriott's allegedly lax data-security practices").

2. Transmuting buyer's remorse into Article III standing would generate legions of consumer class actions that are not only improper, but unnecessary as well. Judge Easterbrook showed how allowing claims like Plaintiffs' would cause overcompensation: !

> Consider an example. Defendant sells 1,000 widgets for $10,000 apiece. If 1% of the widgets fail as the result of an avoidable defect, and each injury creates a loss of $50,000, then the group will experience 10 failures, and the injured buyers will be entitled to $500,000 in tort damages. That is full compensation for the entire loss; a manufacturer should not spend more than $500,000 to make the widgets safer.

In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1017 n.1 (7th Cir. 2002) (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). The tort system thus provides appropriate compensation to deter buyers who are actually injured.

Adding tort compensation based on Plaintiffs' theory of injury, however, systematically overcompensates:

> Suppose, however, that uninjured buyers could collect damages on the theory that the risk of failure made each widget less valuable; had they known of the risk of injury, these buyers contend, they would have paid only $9,500 per widget—for the expected per-widget cost of injury is $500 …. On this theory the 990 uninjured buyers would collect a total of $495,000. The manufacturer's full outlay of $995,000 ($500,000 to the 10 injured

> buyers + $495,000 to the 990 uninjured buyers) would be nearly double the total loss created by the product's defect.

Id. at 1017 n.1. The result of that theory of injury is both to "overcompensate buyers as a class and induce manufacturers to spend inefficiently much to reduce the risks of defects." *Id.*[7] Tort theory thus aligns with *TransUnion*: when a "risk of future harm does not materialize," that is "cause for celebration, not a lawsuit." 594 U.S. at 436–37.

III. No-injury class actions hurt American businesses and the economy as a whole.

The district court's lax approach to standing magnifies the burdens that class-action litigation imposes on the business community and the public. That approach thus exacerbates "the procedural unfairness to which class actions are uniquely susceptible." *In re Ford Motor Co.*, 86 F.4th 723, 729 (6th Cir. 2023).

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[7] Making matters worse, the additional costs of compensating a class with only "buyer's remorse" standing naturally will be reflected in higher product prices. Those higher prices would not "spread[] a concentrated loss over a large group," but would merely create a circular flow of money from consumers to manufacturers (in the form of higher prices) and back to consumers (in the form of purported overpayment damages), "with a substantial portion of the higher price skimmed off for attorneys' fees." *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

Class-action litigation costs in the United States are oppressive and getting worse. In 2023, those costs surged to $3.9 billion, continuing a long-running trend of rising costs. *See* 2024 Carlton Fields Class Action Survey, at 6–7 (2024), available at https://ClassActionSurvey.com. Defending *even one* class action can cost a business over $100 million. *See, e.g.*, Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011). And those class actions routinely drag on for years, accruing legal fees without resolution of class certification—let alone the dispute as a whole. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), available at http://bit.ly/3rrHd29 ("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.").

The extraordinary exposure created by certifying a class also coerces defendants to settle even cases that ought to be resolved in their favor on the merits. Judge Friendly aptly termed these "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973), *quoted in Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023). As the Supreme Court explained,

"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." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017) (class certification may create a "reverse death knell" that "'force[s] a defendant to settle rather than . . . run the risk of potentially ruinous liability'" (quoting Advisory Committee's 1998 Note on subd. (f) of Fed. R. Civ. P. 23)). Over the last five years, a significant percentage of class actions have resulted in settlements—including over 73% of class actions in 2021. *See* 2024 Carlton Fields Class Action Survey 26.

Rigorous enforcement of Article III in the class-action context would be a much-needed step in the right direction. But if the district court's lax standing analysis goes uncorrected, the already immense pressure on businesses to settle no-injury class actions will continue to balloon no matter whether plaintiffs have suffered any actual harm. That coercion hurts the entire economy, because the attorney's fees and costs accrued in defending and settling those class actions are ultimately absorbed by consumers and employees through higher prices and lower wages. *See* U.S. Chamber Institute for Legal Reform, *Unfair, Inefficient, Unpredictable: Class Action Flaws*

and the Road to Reform, at 40 (Aug. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/08/ILR-Class-Action-Flaws-FINAL.pdf (explaining why "overbroad class actions are nothing more than a mechanism for expanding the size of a given class to justify a windfall for attorneys who claim to represent the interests of uninjured class members").

CONCLUSION

It makes little sense to allow uninjured claimants to maintain lawsuits based on a constitutionally deficient "buyer's remorse" theory of injury. It makes even less sense to do so here, where the price of allowing class litigation on behalf of the unharmed and uninjured is to impose unwarranted costs on both manufacturers and the consumers who buy their products. For these reasons, this Court should affirm the dismissal of the Complaint on the ground that Plaintiffs lack Article III standing.

Dated: April 16, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced, 14-point Book Antiqua font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2024, the foregoing was filed with the Clerk of the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, which will also serve counsel of record.

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