No. 16-8015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALLERGAN, INC.; ALLERGAN USA, INC.; ALLERGAN SALES, LLC; ALCON LABORATORIES, INC.; ALCON RESEARCH LTD.; FALCON PHARMACEUTICALS, LTD.; BAUSCH AND LOMB INCORPORATED; PFIZER INC.; MERCK & CO., INC.; MERCK, SHARP & DOHME CORP.; and PRASCO, LLC,

Defendants-Petitioners,

v.

CHARLENE EIKE, SHIRLEY FISHER, JORDAN PITLER, and ALAN RAYMOND, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION

Kathryn Comerford Todd
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street NW
Washington, D.C. 20062
Telephone: (202) 463-5685
Facsimile: (202) 463-5346
ktodd@uschamber.com

Jeffrey S. Bucholtz
Counsel of Record
Paul Alessio Mezzina
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
jbucholtz@kslaw.com
pmezzina@kslaw.com

Counsel for Amicus Curiae

August 9, 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:

   The Chamber of Commerce of the United States of America

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.

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/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

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/s/ Paul Alessio Mezzina
Paul Alessio Mezzina

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/s/ Kathryn Comerford Todd
Kathryn Comerford Todd

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INTEREST OF *AMICUS 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. Because businesses are frequent targets of class-action lawsuits, the Chamber has a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification.

ARGUMENT

The district court certified classes containing tens of thousands of members without meaningful analysis of whether class treatment was warranted. 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 refusing to consider defendants' evidence that the class members had not suffered any common injury (or any injury at all). The Court should grant the petition both to avoid coercing an

[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 the Chamber, its members, and its counsel contributed money that was intended to fund the preparation or submission of this brief.

unfair and harmful settlement and to reemphasize a district court's responsibilities when faced with a request for class certification. *See Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 497–98 (7th Cir. 2013) (discussing factors that support granting a Rule 23(f) petition).

I. 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 Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (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 Machines, 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* Doc. 282 at 5 ("[T]he core issue is whether the dispensers release unnecessarily large eye drops."); *id.* at 6 ("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* Pet. 4–6, 9–12. The 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.'" Doc. 282 at 11 (quoting Doc. 176, Ex. HH, ¶ 19). 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 [dis-

criminatory] 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." Doc. 282 at 11. To be sure, that *should* be the con-

sequence 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. Doc. 282 at 12. As explained more fully in the petition, *see* Pet. 15–20, plaintiffs' damages model is speculative. The district court did not point to 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. Plaintiffs did not show that any defendant's pricing was a function of volume rather than driven by other factors; nor did they account for the substantial costs of obtaining FDA approval to redesign the dispensers for 33 different products.

II. This Court's Intervention Is Needed To Discourage Abusive Class-Action Litigation.

The district court's decision invites abuse and exemplifies a troubling trend in class-action litigation that continues to harm both businesses and consumers. This Court should provide the necessary course correction.

The 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]," Doc. 282 at 5) 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 over-broad 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 disadvantageous terms, regardless of the merits of the suit." *Id.* (quoting Fed. R. Civ. P. 23 committee notes); *see McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 484 (7th Cir. 2012); *Szabo*, 249 F.3d at 675; *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 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.

While allowing classes to be certified based on sweeping, unrealistic issues framed by plaintiffs' lawyers is a boon to the class-action bar, it imposes severe costs on businesses and consumers. Businesses are forced to spend vast sums of

money on litigation defense costs, which regularly run into millions of dollars per year, per case. *See The 2016 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 15 (2016), http://classactionsurvey.com/pdf/2016-class-action-survey.pdf. Those costs, as well as the cost of settlement payouts, are ultimately borne by consumers, employees, and investors.

While defendants here are large companies, the ramifications of the district court's approach for vulnerable small businesses are particularly concerning. "Small businesses create most of the nation's new jobs, employ about half of the nation's private sector work force, and provide half the nation's nonfarm, private real gross domestic product (GDP), as well as a significant share of innovations." U.S. Small Bus. Admin., *The Small Business Economy: A Report to the President* 1 (2009). Small businesses struggling to grow can ill afford the threat of meritless class-action litigation. Yet under the decision below, each product sold by a small business has the potential to turn into bet-the-company litigation. *See, e.g.*, *Creative Montessori*, 662 F.3d at 916 (class certification turned a minor, $3,000 dispute into an $11 million suit against a home-furnishings wholesaler with three employees and annual sales of $500,000).

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 in Illinois and Missouri from accessing important, life-improving medications, while compelling defendants to incur

millions of dollars in costs to seek FDA approval for drastic product changes that will not benefit most patients. *See* Pet. 13–14. 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) (noting that if class actions are certified on an overbroad liability theory, a court could be forced to "award judgment to [defendants] and preclude class members with colorable claims from recovery because it defined the class too broadly in the first place"). Left undisturbed, the decision below will result in many more consumers being wrongly caught up as plaintiffs in litigation that runs counter to their interests.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

/s/ Jeffrey S. Bucholtz

Jeffrey S. Bucholtz
Counsel of Record
Paul Alessio Mezzina
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, D.C. 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
jbucholtz@kslaw.com
pmezzina@kslaw.com

Kathryn Comerford Todd
U.S. CHAMBER LITIGATION
CENTER, INC.
1615 H Street NW
Washington, D.C. 20062
Telephone: (202) 463-5685
Facsimile: (202) 463-5346

Counsel for Amicus Curiae

August 9, 2016

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 25, I certify that on August 9, 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