No. 23-01940

IN THE

United States Court of Appeals for the Sixth Circuit

DENNIS SPEERLY, ET AL.,

Plaintiffs-Appellees,

v.

GENERAL MOTORS LLC,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the Eastern District of Michigan
No. 2:19-cv-11044 (Hon. David M. Lawson)

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AND PUBLIC JUSTICE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae the American Association for Justice and Public Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock. Public Justice also certifies that it is a non-profit organization, has no parent corporation, and no publicly owned corporation owns 10% or more of its stock.

Respectfully submitted this 25th day of April 2024.

/s/ Jeffrey R. White

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions including class actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. Public Justice specializes in precedent-setting, socially significant civil litigation, one focus of which is fighting to preserve access to justice for victims of corporate and governmental misconduct. Class actions are an important tool that victims of corporate misconduct—including consumers harmed by unfair and deceptive practices—can use to join together to obtain justice. As such, Public Justice has

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from the amici curiae, no person, party, or party's counsel contributed money intended to fund the brief 's preparation and submission.

extensive experience representing consumers, employees, and others in cases seeking to preserve access to class actions.

SUMMARY OF ARGUMENT

1. Amici AAJ and Public Justice urge this Court to reject the radical proposal put forward by General Motors in this case. This Court has recognized that when a business overcharges its customers, or causes them to pay a premium price for its product, it has inflicted a concrete injury sufficient for standing to bring suit in federal court under Article III. To bring a consumer class action under this theory, plaintiffs need to plausibly allege that all class members purchased the allegedly defective product, that the defendant failed to disclose the defect, and that, as a result, they paid more than they would have paid for a non-defective product. Whether that harm gives rise to a cognizable legal cause of action is an entirely separate question that should be addressed at a merits proceeding, not on motion to certify the class. The district court in this case faithfully applied this Court's precedents, and its judgment should be affirmed.

The Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), is not to the contrary. There, the Court held that bare violations of statutory procedural requirements, even violations that pose a risk of future harm, do not constitute a present injury in fact. At the same time, the Court stated that a present

monetary loss is an obvious and traditional basis for Article III standing. The injury alleged by plaintiffs in this case is precisely that.

2. GM contends that the purchase of a defective product should not be enough, even where the plaintiffs can show that they were overcharged for the product because the defendant did not disclose the defect. Instead, GM argues that one who buys an allegedly defective product has suffered no concrete injury unless and until the defect becomes "manifest."

a. Defendant's radical proposal flies in the face of the longstanding recognition that economic loss is a concrete injury in fact, sufficient to establish Article III standing.

b. GM would call upon district courts to screen out class members who could not prevail on a products claim because the alleged defect has not manifested itself. That proposition runs counter to the longstanding principle that a valid cause of action is not a prerequisite to Rule 23 class certification. Although district courts may properly view merits-related evidence to ensure that the Rule 23 prerequisites are satisfied, Article III standing is not a Rule 23 prerequisite. Requiring plaintiffs to show at the certification stage that class members can prevail on the merits places the cart before the horse in this manner and is unfair to plaintiffs, who generally will not have had meaningful discovery. Defendants are able to defend against meritless cases well ahead of trial by moving to dismiss or for summary judgment.

c. For these reasons, every federal circuit to have addressed the issue has rejected the "manifestation" theory.

3. GM's proposed "manifestation" requirement would "drive a stake through the heart" of consumer class actions. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). Class actions exist because they are necessary to achieve vitally important goals that individual lawsuits simply cannot accomplish. First, and most importantly, consumer class actions provide access to legal redress for plaintiffs whose claims, while important, are not economically viable. For those whose claims are small, or even moderately valued, if they are unable to proceed by way of a representative class action, they will have no legal recourse at all.

Second, consumer class actions benefit consumers generally by promoting safer products. Class actions, like tort actions generally, have a deterrent effect on wrongdoing, including the concealment of product safety defects. Evidence indicates that concern with potential consumer class action litigation has a positive influence in product design decisions.

Third, consumer class actions supplement the efforts of governmental safety agencies which have limited resources and are subject to political priorities.

Fourth, consumer class actions benefit defendants as well. When a corporation's course of conduct gives rise to a multitude of individual claims, defendants benefit from litigating them in one proceeding. Because the trial outcome

or settlement is binding on all class members, defendants avoid inconsistent outcomes and the possibility that class members might seek to relitigate the same claims for a different result.

Finally, where many individual lawsuits would require repetition of the same pleadings, motions, discovery, and trial presentation, it is simply a far better use of the courts' limited resources to resolve the dispute in one class adjudication.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CERTIFIED THE CONSUMER CLASS IN THIS CASE.

A. This Court Has Recognized That a Classwide Overcharge or "Premium Price" Attributable to the Defendant Can Serve as the Basis for a Consumer Class Action Seeking Monetary Damages and Constitutes a Present, Concrete Injury.

This is not a "tale of two defects." GM Br. 7. This is a plea by GM, supported by amici representing businesses, for this Court to overturn its own settled, soundly reasoned precedent. This Court has recognized that a defendant's overcharging of customers is a concrete injury for purposes of Article III standing and certifying a consumer class action. The district court in this case faithfully applied this Court's precedents, and that decision should be affirmed.

This Court described the "overcharge" or "premium price" basis for certifying a Rule 23(b)(3) class action in *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013). Plaintiffs there had purchased Duet model

Whirlpool washing machines that, they contended, contained a design defect that promoted mold. The harm they alleged was not the risk that their machines would become petri dishes for mold sometime in the future. Rather, they asserted that every class member had already been harmed at the point of sale when they paid more for their washing machine due to defendant's failure to disclose the design defect. *Id.* at 857.

This Court upheld the district court's certification of the class and set out the essential features of the "'premium price' theory of recovery." *Id.* at 856. As this Court explained, "manifestation" of the alleged product defect is not essential—or even relevant to—a plaintiffs' action:

> Because *all* Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed, even those owners who have not experienced a mold problem are properly included within the certified class. . . . [P]laintiffs need not prove that mold manifested in every Duet owned by class members because the injury to all Duet owners occurred when Whirlpool failed to disclose the Duets' propensity to develop biofilm and mold growth.

Id. at 857 (emphasis in original).

Plaintiffs thus make out a cognizable cause of action for the class by plausibly alleging that all members of the class were overcharged due to some action attributable to Defendant. Although this Court was squarely addressing the substantive damage claims under Ohio law, this Court also recognized that by alleging such monetary loss the plaintiff class necessarily "sufficiently established

injury for standing purposes by showing that '[e]ach alleged class member was relieved of money in the transactions.'" *Id.* (quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011)). The Supreme Court declined further review. *Whirlpool Corp. v. Glazer*, 571 U.S. 1196 (2014).

Whirlpool was not the first time this Court recognized that payment of a premium price for a product with an undisclosed defect is sufficient to support a cause of action for monetary injury, regardless of whether the defect has manifested itself. In *Daffin v. Ford Motor Co.*, 458 F.3d 549, 554 (6th Cir. 2006), a class of owners of certain Ford vans alleged that defective throttles allowed the accelerators to stick in breach of Ford's express warranty. *Id.* at 550-51. This Court upheld class certification "regardless of manifestation during the warranty period." *Id.* at 554. Because plaintiffs alleged that the defect diminished their vehicles' value, their injury was not a future risk, but existed as "Ford delivered a good that did not conform to Ford's written warranty." *Id.* at 554. *See also Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 581 (6th Cir. 2013) (holding that the plaintiffs' allegation "that they suffered a monetary loss by paying more for a cold remedy because of the company's misrepresentation" establishes a concrete injury sufficient for Article III standing).

In re Ford Motor Co., 86 F.4th 723 (6th Cir. 2023), is not to the contrary, as GM suggests. *See* GM Br. 9. In that case, this Court did not reject standing based on

overcharging for products with undisclosed defects. Rather, this Court decertified the class of owners of vehicles alleged to have brake defects because the district court had refused to consider Ford's evidence of product improvements that may have eliminated the alleged defects entirely, thereby possibly negating the alleged classwide defect or Ford's knowledge of it. *Id.* at 728. In this case, by contrast, the district court gave full consideration of defendant's evidence. The district court noted that GM's improvements did not fully eliminate the alleged defect and others were "rejected due to the high cost." *Speerly v. Gen. Motors, LLC*, 343 F.R.D. 493, 514 (E.D. Mich. 2023).

The district court properly applied this Court's precedents to the allegations in this case. The court found that plaintiffs had plausibly alleged a classwide monetary injury. Their concrete injury was not the risk of future harm due to the transmission defects. Rather, because "the information about the alleged defects allegedly was not disclosed to any of them, . . . every class member suffered a loss due to overpaying for defective vehicles at the point of sale." *Id.* at 523.

B. The Supreme Court's Decision in *TransUnion* Does Not Overrule or Undermine the Rule That Paying a Premium Price for a Product Because It Contains an Undisclosed Defect Is Sufficient Concrete Injury for Article III Standing.

General Motors dismisses this Court's precedents as predating the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). GM Br. 25. But *TransUnion* does not speak to the central issue GM brings before this Court.

The plaintiff in *TransUnion* sought to certify a class of persons who were erroneously identified as potential terrorists on a list maintained by the defendant, a credit reporting agency that provides information to third parties. Justice Kavanaugh writing for the majority, explained that those whose names were actually provided to third parties had sufficient standing based on harm to their reputation, even without further allegation of financial harm. *Id.* at 432-33. However, "the mere existence of inaccurate information in a database is insufficient to confer Article III standing." *Id.* at 434.

TransUnion's analysis strongly supports Plaintiffs' standing to pursue their consumer class action in this case. The Supreme Court emphasized the crucial distinction between "an actual harm that has occurred," which is sufficient for Article III standing, even if "not readily quantifiable," and "a mere risk of future harm," which is not. *Id.* at 437. Importantly for the issue before this Court, *TransUnion* emphasized that monetary harms are among the "most obvious" and "traditional tangible harms" that "readily qualify as concrete injuries under Article III." *Id.* at 425. "If a defendant has caused physical *or monetary injury* to the plaintiff, the plaintiff has suffered a concrete injury in fact under Article III." *Id.* (emphasis added). The classwide injury in this case—that class members paid too much for their cars—is precisely that type of traditional, concrete injury.

II. DEFENDANT'S "MANIFESTATION" THEORY WOULD UPEND SETTLED PRINCIPLES OF STANDING AND SHOULD BE REJECTED.

GM only half-heartedly disputes the fact that the district court properly applied this Court's clear precedents in holding that Plaintiffs have Article III standing in this case.

Instead, GM urges this Court to break new ground and reject the principle that "proof of the manifestation of a defect is not a prerequisite to class certification." 343 F.R.D. at 523 (quoting *In re Whirlpool*, 722 F.3d at 857). In GM's view, this appeal "presents an opportunity to reset, . . . and to stem the influx of these no-injury, no-manifested defect class actions." GM Br. 6. To that end, GM urges this Court to require that plaintiffs at the certification stage demonstrate that every member of the proposed defective product class be able to show that the alleged defect has "manifested" itself in their particular product. GM Br. 25-28.

Such a radical barrier to certifying consumer class actions would upend basic principles of both Article III standing and Rule 23. GM's proposal rejects the traditional recognition that monetary loss is a concrete injury for standing purposes. In addition, Defendant's proposal requires the district court to assess the substantive merits of Plaintiffs' claims as the basis for a finding of injury in fact. Essentially, GM would have this Court require plaintiffs to show far more than a concrete injury in fact. GM would demand that plaintiffs demonstrate that their injury is legally

cognizable, that is, capable of surviving a motion to dismiss for failure to state a claim. Such a requirement would turn a certification proceeding into a dress rehearsal for trial on the merits. For these reasons, every federal court of appeals to have addressed this proposal has rejected the "manifestation" theory of class standing that GM proposes.

A. Monetary Loss Is a Concrete Injury in Fact.

The starting point for Article III standing is the familiar triad of requirements: that a plaintiff "must have suffered an 'injury in fact'—a concrete and imminent harm to a legally protected interest, *like property or money*—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023), (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis added).

GM repeatedly asserts that a defect that is only a potential cause of damage to persons or property cannot serve as a concrete harm. *See, e.g.*, GM Br. 26 (holding that purchasers of a product that "has not exhibited the alleged defect" have "necessarily received the benefit of their bargain" and lack "injury in fact"); *id.* at 27 ("The purchase of a vehicle with alleged defects posing a potential future risk of a problem is not a concrete injury-in-fact for every purchaser."). This is so, GM insists, even where plaintiffs do not allege that they were harmed by the defect itself, but by overpaying for a product with a defect that was not disclosed to them. In

GM's view, "plaintiffs' overpayment theory improperly seeks to transform an unmaterialized risk of some potential defect manifestation into a classwide point-of sale economic injury." GM Br. 28.

This is not so. A hypothetical based on the facts of this case is instructive. Suppose the vendor who sold the transmission friction material to GM had replaced "carbon fiber" material with a "paper-based" product that was not fully compatible with GM's chosen transmission fluid, all without disclosing the change to GM. Suppose further that GM could demonstrate that it paid about $2 more per unit over market value or, alternatively, that GM could demonstrate the cost of replacement. *See* 343 F.R.D. at 513. Surely GM would not dispute that it would have standing to recover its overcharge from the supplier based on misrepresentation or breach of warranty. Monetary loss is one of the "most obvious" forms of concrete injury for purposes of Article III standing. *TransUnion*, 594 U.S. at 425.

B. The Merits of Plaintiffs' Claims Are Not an Appropriate Basis for Determining Plaintiffs' Article III Standing.

GM's proposal, that only "manifest" defects constitute concrete injury, necessarily requires the district court to assess whether plaintiffs can prevail on the merits of their product defect claims. For example, GM would have the district court determine whether the complained-of "shudder or shift issues are even defects at all." GM Br. 13. Similarly, GM contends that claims in at least 12 states are governed by statutes that could deny recovery because they require manifestation of the claimed

defect. GM Br. 28-29. If they have no cognizable legal claim, GM reasons, they have no injury and therefore no standing. *Id.* 28.

The Supreme Court has declared it "firmly established" that "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," including constitutional standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). The Court underscored "the fundamental distinction between arguing no cause of action and arguing no Article III redressability," *id.* at 96, cautioning against any "attempt to convert the merits issue . . . into a jurisdictional one." *Id*. at 93. That is precisely what GM attempts to accomplish before this Court.

It its seminal decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), the Supreme Court emphasized that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen* remains good law "for the proposition that . . . the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action." *Gooch v. Life Invs. Ins. Co. of Am.*, 672 F.3d 402, 432 (6th Cir. 2012). Indeed, *TransUnion* emphasized this very point: "[U]nder Article III, an injury in law is not an injury in fact. 594 U.S. at 427.

GM nevertheless contends that the Supreme Court in *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 564

U.S. 338 (2011), gave a green light to district court evaluation of the merits of Plaintiffs' claims if "they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." GM Br. 30 (quoting *Amgen*, 568 U.S. at 466).

But the Supreme Court did not broadly throw open the door to consideration of substantive merits. At the outset, the Article III requirement of a concrete injury in fact is not a Rule 23 prerequisite. As this Court has explained, *Dukes* allows a district court to view the merits-related evidence for the narrow purpose of assuring that the common questions "matter to the merits." *Doster v. Kendall*, 54 F.4th 398, 430 (6th Cir. 2022) (quoting *Dukes*, 564 U.S. at 352). That is, will the class common question "resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. But the court's limited look must not "turn the class certification proceedings into a dress rehearsal for the trial on the merits." *Whirlpool*, 722 F.3d at 851-52.

Indeed, *Amgen* itself cautioned that a look to the merits to insure that the central question is an important one, must not become a "license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 568 U.S. at 466. As the Court instructed, "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case, but to select the best method of adjudicating the case." *Id.* at 460. To hold otherwise would "put the cart before the horse." *Id.*

GM's proposal here is neither narrow nor focused on Rule 23 prerequisites. GM would have the district court screen out plaintiffs who cannot show they can prevail on the merits as lacking concrete injury. The proposal is facially unfair to plaintiffs, who would be required to prevail on the merits prior to any meaningful discovery. Nor is it needed to protect defendants from the unnecessary expense and "incalculable risk of class trial" to defeat baseless claims. GM Br. 6. In most such cases, defendants raise their defenses against meritless suits pretrial. *See* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 109 (1996) (finding that two-thirds of class actions studied had rulings on motions to dismiss or for summary judgment); *id.* at 151 (under six percent went to trial).

GM does not argue that individual lawsuits are the best method to adjudicate the claims against it. Rather, GM suggests that this Court put the cart in front of the horse for no reason other than that GM would prefer that no action to hold it accountable move forward at all.

C. GM's "Manifestation" Theory Has Been Universally Rejected.

For these reasons, every federal appellate court to have examined the matter has adopted the "overcharge" or "premium price" basis for standing and has rejected defendants' attempts to require "manifestation" as an added barrier to consumer class actions.

The First Circuit, for example, approved certification of a class of consumers who alleged they were overcharged for vegetable oil that defendant had deceptively advertised as all-natural, but which contained GMOs. Observing that studies indicate that consumers are willing to pay a higher price for foods containing no GMOs, the court concluded that plaintiffs had pled, "a classic benefit-of-the-bargain injury," *Lee v. Conagra Brands, Inc.*, 958 F.3d 70, 80 (1st Cir. 2020), and that "[n]o more need be alleged at this stage of litigation." *Id.* at 81; *see also DiCroce v. McNeil Nutritionals, LLC*, 82 F.4th 35, 39 (1st Cir. 2023) (holding the plaintiff's allegation that the class members were overcharged for lactase supplements due to defendant's misleading statements met "the minimal plausibility standard for establishing Article III standing"); *In re Evenflo Co., Inc., Mktg., Sales Pracs. & Prods. Liab. Litig.*, 54 F.4th 28, 35 (1st Cir. 2022) ("This court has repeatedly recognized overpayment as a cognizable form of Article III injury.").

The Second Circuit stated, in an action where plaintiff plausibly alleged that defendant systematically misrepresented the weight of certain grocery items, "no one disputes that overpaying for a product results in a financial loss constituting a particularized and concrete injury in fact." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017).

In a Third Circuit suit where plaintiffs alleged that they were overcharged for medicines that were sold in bottles that tended to waste the medications, the court

rejected defendants' argument that plaintiffs were claiming only the possibility of future harm. "Plaintiffs' claimed financial harm has *already* occurred." *Cottrell v. Alcon Lab'ys*, 874 F.3d 154, 168 (3d Cir. 2017) (emphasis in original). Where plaintiffs "spent money that, absent defendants' actions, they would not have spent," the court stated, it is a "quintessential injury-in-fact." *Id.* (internal quotation omitted).

GM looks for support from *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278 (3d Cir. 2018). *See* GM Br. 26. But the court there did not deny class certification because the alleged danger in defendant's baby powder had not become "manifest" in physical injury. *Id.* at 281. Rather, the court found that the plaintiff had failed to make a nonspeculative showing of the economic loss she claimed for the purchase of a product that was consumed entirely. *Id.* at 281-82. Significantly, the court stated that a plaintiff who "alleged that her automobile was at risk of imminently malfunctioning because of a particular defect would present a much different question." *Id.* at 282 n.4.

Similarly, the Fifth Circuit, in an action by purchasers of certain GM cars whose air bags could deploy unexpectedly, rejected GM's contention that customers whose air bags had not actually deployed lacked Article III standing. *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007). It was sufficient for standing purposes, the court stated, that plaintiffs "seek recovery for their actual economic harm (e.g., overpayment, loss in value, or loss of usefulness) emanating from the loss of their

benefit of the bargain." *Id.* at 723. "Whether recovery for such a claim is permitted under governing law is a separate question." *Id.*

The Seventh Circuit has also rejected Defendant's theory. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 363 (7th Cir. 2012) (*Butler I*), raised factual allegations regarding mold-prone washing machines that were substantially identical to those presented to this Court in *Whirlpool.* Judge Posner, writing for the court, agreed with this Court's position. *Id.* at 363. Following the Supreme Court's remand for further consideration, the court reinstated its earlier judgment. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 802 (7th Cir. 2013) (*Butler II*); *see also In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750 (7th Cir. 2011) (holding that plaintiffs suffered injury where they paid for a toy with an undisclosed hazard, although no class member's child had suffered physical injury).

GM calls particular attention to the Eighth Circuit decisions in *O'Neil v. Simplicity, Inc.*, 574 F.3d 501 (8th Cir. 2009), and *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021). GM Br. 25-26. But that court's position offers GM no support.

In *O'Neil*, the plaintiff purchased a crib designed with a drop-down side to make it easier to lift a child into the crib. Thereafter, the Consumer Product Safety Commission announced a voluntary recall due to the danger that a child could get caught in a gap created by the drop-down side—a defect that had already caused

three infant deaths. *Id.* at 502. The trial court dismissed plaintiffs' class action complaint on the merits for failure to state a claim for breach of warranty because the O'Neils' crib had not exhibited the defect. Affirming, the court of appeals held that *no tort cause of action* lies for products that are merely at risk for manifesting a defect. *Id.* at 503 (emphasis added). The decision makes no reference to injury-in-fact or to Article III standing.

In fact, the Eighth Circuit has squarely held that allegations of overpayment or diminished value constitute "economic injury sufficient to establish Article III standing." *George v. Omega Flex, Inc.*, 874 F.3d 1031 (8th Cir. 2017). Plaintiffs there filed a class action alleging that the defendant misrepresented the capability of its steel tubing to withstand a lightning strike, depriving them of the benefit of the bargain. *Id.* at 1032. *George* held that the plaintiffs' assertions they had paid more than the steel tubing was worth constituted "economic injury sufficient to establish Article III standing" without regard to whether plaintiffs' claims had merit. *Id.*

Nor should *Johannessohn* guide this Court. *See* GM Br. 27. Purchasers of certain ATVs alleged that the design placed the exhaust manifold too close to the heat shield, posing a risk of melting components and serious burns to the rider. The plaintiffs alleged that the defendant's failure to disclose this hazard caused them to pay artificially inflated prices for their vehicles. 9 F.4th at 984. Upholding denial of certification, *Johannessohn* confuses "invasion of a legally protected interest" –

which constitutes injury in fact and which obviously includes out-of-pocket monetary loss – with "legally recognizable claim." The latter requires a plaintiff to plead a cause of action for damages sufficient on the merits to survive a motion to dismiss. The court relied chiefly on *Briehl v. Gen. Motors Corp*., 172 F.3d 623, 628 (8th Cir. 1999), which was a decision on the *merits* of a products claim, having nothing to do with Article III standing. *Johannessohn* is inconsistent with *George*, *supra*, which recognizes this distinction.

In the Ninth Circuit, "proof of the manifestation of a defect is not a prerequisite to class certification." *Heredia v. Sunrise Senior Living, LLC*, No. 22-55332, 2023 WL 4930840, at *2 (9th Cir. Aug. 2, 2023). That court has "consistently recognized that a plaintiff can satisfy the injury in fact requirement by showing that she paid more for a product than she otherwise would have due to a defendant's false representations about the product." *McGee v. S-L Snacks Nat'l*, 982 F.3d 700, 706 (9th Cir. 2020). *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012) (holding that, where Honda failed to disclose limitations of vehicles' braking systems, "[t]o the extent that class members were relieved of their money by Honda's deceptive conduct . . . they have suffered an 'injury in fact"); *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 822 (9th Cir. 2019) (holding that Nissan's "concealment of a defective clutch system injured class members at the time of sale [and] is consistent with his proposed recovery based on the benefit of the bargain");

Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1173 (9th Cir. 2010) (holding that "proof of the manifestation of a defect is not a prerequisite to class certification").

The Eleventh Circuit is in accord. For example, purchasers of dietary supplements that were banned by the FDA "experience[d] an economic injury [for purposes of Article III standing] when, as a result of a deceptive act or an unfair practice," their purchased items were worthless. *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1084 (11th Cir. 2019) (citing *Carriuolo v. Gen. Motors Co*., 823 F.3d 977, 986-87 (11th Cir. 2016)) (holding that, where class members alleged they purchased vehicles that were represented as having perfect three-star safety ratings, but actually had none, their injury "occurs at the point of sale because the false statement allows the seller to command a premium on the sales price").

III. GM'S PROPOSED "MANIFESTATION" REQUIREMENT IS A BARRIER TO CONSUMER CLASS ACTIONS AND OFFENDS PUBLIC POLICY.

Requiring plaintiffs to show that every member of a consumer class be able to show that the alleged defect had actually manifested itself in their product would, as Judge Posner has warned, "drive a stake through the heart of the class action device. *Butler II*, 727 F.3d at 801.

It is true that class litigation represents "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."

Canaday v. Anthem Cos., Inc., 9 F.4th 392, 403 (6th Cir. 2021) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). This class action exception exists "because it is necessary." Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 Akron L. Rev. 757, 767 (2015).

A. Consumer Class Actions Provide Access to Judicial Remedies for Those Whose Individual Claims Are Economically Infeasible.

The right of access to the courts for the redress of wrongs is a fundamental right, safeguarded by multiple guarantees of the Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). But that right rings hollow if major corporations can profit handsomely by inflicting relatively minor economic harm on many individuals. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amgen*, 568 U.S. at 478 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)). In this way, Rule 23 protects "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Id.*

As succinctly stated by Justice Scalia, where claims are relatively small, "most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

B. Consumer Class Actions Benefit All Consumers and the Public at Large by Deterring the Concealment of Safety Defects.

A "class action, like litigation in general, has a deterrent as well as a compensatory objective." *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013). Aggregating small claims "into a substantial class-wide recovery," can "make the suit a wake-up call for [the defendant] and so have a deterrent effect on future violations" by the defendant and others. *Id*. at 678.

This is nowhere more apparent than in the area of defective products. In one influential study, for example, corporate representatives reported that "concerns about potential class action suits sometimes have had a positive influence on product design decisions." Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 119 (RAND Inst. for Civ. Just. 2000), https://www.rand.org/pubs/monograph_reports/MR969.html. Moreover, in the consumer cases that were examined in depth, "the evidence strongly suggest[ed] that the litigation, directly or indirectly, produced [pro-consumer] change in practice." *Id.* at 431.

The incentive for safety that the threat of tort liability generates is greatly magnified when the vector of that incentive is the consumer class action. Even where individual actions may be economically feasible, such random and fragmentary enforcement undermines their impact on defendants because the cost of paying occasional judgments may be significantly outweighed by the benefits the defendant

expects to reap by staying the course of its misconduct. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67(1) Law & Contemp. Probs. 75, 90 (2004).

C. Consumer Class Actions Supplement and Enhance the Effectiveness of Governmental Safety Agencies.

Federal and state government agencies enforce regulations that protect public safety. But it is a large country with a dynamic economy, and public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations. They may lack statutory authority, they are subject to capture by the subjects of their regulation, or politically constrained by other influences. Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64(2) Law & Contemp. Probs. 137 (2001). One authority explains, "private litigation generally, and class actions specifically, . . . is not only an important complement to public enforcement but often a superior deterrent mechanism." 1 Newberg and Rubenstein on Class Actions § 1:8 (6th ed.). As Chief Justice Burger recognized, "the classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *see* Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1155 & 1163 (2012).

D. Consumer Class Actions Benefit Defendants by Providing Finality and Avoiding Inconsistent Verdicts.

When a corporation's course of conduct gives rise to a multitude of nearly identical claims, resolution of those claims by class action litigation yields tangible benefits for the defense. As this Court has noted, Rule 23 class actions are designed to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Pipefitters Loc. 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011) (first quoting *Amchem,* 521 U.S. at 615; and then quoting Fed. R. Civ. P. 23 Advisory Comm. Notes). Defendants benefit from those economies, compared to defending multiple individual lawsuits.

A class judgment also provides defendants with the information that a certain product design or course of conduct is or is not unacceptable, with a clarity that may not be found in studying the "inefficient signals" coming from the outcomes of multiple individual suits. *See* 1 Newberg and Rubenstein on Class Actions § 1:9 (6th ed.).

Because a class judgment is binding on all members of the class who do not opt out, a liable defendant can assess its outstanding liability with some certainty. A settling defendant can know that it has purchased resolution. And a prevailing defendant can be assured that another class member cannot attempt to relitigate the same claim to a different result.

E. Consumer Class Actions Promote Effective and Economical Use of Judicial Resources.

"[E]fficiency and economy of litigation" is also "a principal purpose of the [class action] procedure"). *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). By certifying a representative suit in place of a multiplicity of individual actions, the federal class action is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. In this way, "the class-action device saves the resources of both the courts and the parties." *Califano*, 442 U.S. at 701. Simply put, it is far more efficient for a court to resolve one representative suit once than to process a multitude of individual lawsuits.

The class action is not a disfavored device that must be contained and constrained at every turn. It is a necessary means of bringing actions presenting common questions into court. Making certification unduly difficult harms both individual plaintiffs with meritorious claims, the civil justice system, and the public at large. Where there is a classwide economic injury attributable to a defendant's course of conduct and capable of legal remedy, "class litigation is greatly preferred." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 758 (6th Cir. 2013).

CONCLUSION

For the foregoing reasons, AAJ and Public Justice urge this Court to affirm the judgment below.

Respectfully submitted,

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Dated: April 25, 2024

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,373 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

Date: April 25, 2024

/s/ Jeffrey R. White
JEFFREY R. WHITE

CERTIFICATE OF SERVICE

I, Jeffrey R. White, counsel for amici curiae and a member of the Bar of this Court, hereby certify that on April 25, 2024, electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users:

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