No. 17-1337

IN THE
Supreme Court of the United States

ALCON LABORATORIES, INC., *et al.*,
Petitioners,
v.

LEONARD COTTRELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, for purposes of establishing standing under Article III of the United States Constitution, a plaintiff's speculation that he might have paid less for treatment if a pharmaceutical product were packaged differently is sufficient to establish an economic injury in fact.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared in this and other federal courts to urge the judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. In particular, WLF regularly appears as *amicus curiae* to support adherence to rules barring federal-court adjudication of claims filed by those lacking Article III standing. *See, e.g., Spokeo v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 586 U. S. 398 (2013); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

WLF is concerned that the decision below, by conferring Article III standing on plaintiffs who speculate that they might have paid less for medical products if the products had been packaged differently, dramatically expands the judicial power by assigning to federal courts the power to enforce state statutes in contexts far removed from what has traditionally been understood to constitute an adversarial judicial proceeding.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, WLF notified counsel for Respondents of its intent to file. All parties have consented to the filing.

The threat to Article III constraints on federal-court jurisdiction is a cause for particular concern when, as here, it arises in the context of claims that businesses have acted "unfairly." The inherent ambiguity of the term "unfair" grants courts very broad discretion in determining which business practices to proscribe. WLF believes that review is warranted to ensure that use of that judicial discretion is limited to those instances in which the plaintiffs have adequately pleaded facts demonstrating that the defendant's alleged misconduct has caused them to suffer actual injuries.

The Petition amply demonstrates that the decision below has created a sharp inter-circuit split. WLF writes separately to urge that review is also warranted because the decision below conflicts sharply with this Court's standing case law and because the danger of judicial overreach is particularly acute in the context of broadly worded unfair-practices statutes.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Petitioners are manufacturers and distributors of prescription eye drop medications that are approved by the Food and Drug Administration (FDA) to treat a variety of medical conditions. The medications are dispensed from FDA-approved plastic bottles directly into patients' eyes. Respondents (hereinafter, "Cottrell") contend that the bottles' tips are too large,

so that a single drop dispenses much more medicine than any patient needs—thereby wasting considerable product. Cottrell claims that the use of too-large bottle dropper tips is an unfair business practice and resulted in his having paid more per dose than if the bottles had been redesigned to dispense smaller drops.

Cottrell filed a putative class action on behalf of himself and all similarly situated consumers in six States: California, Florida, Illinois, New Jersey, North Carolina, and Texas. He alleged that Petitioners' product packaging violated the unfair-trade-practices statutes of each of those States. Importantly, he does not contend that Petitioners deceived him in any way or that labeling on the plastic bottles made any representations regarding the number of doses contained in each bottle. Rather, the complaint alleges that he had no choice but to pay Petitioners' high prices because no alternative treatments existed for his (or other class members') eye conditions.

After providing Cottrell an opportunity to amend the complaint to buttress his claims that the allegedly unfair practices had injured him, the district court dismissed the amended complaint for lack of standing. Pet. App. 46a-63a. The court stated that Cottrell failed to allege facts sufficient to demonstrate that he had suffered any injury. In particular, he alleged no facts purporting to demonstrate that Petitioners' pricing was determined by the volume of medication in each bottle. Thus, the court held, there was no basis for concluding that the price of each bottle would have remained the same—thereby reducing Cottrell's per-dosage costs—had the bottle dropper tip been redesigned to dispense smaller drops. *Id.* at 59a.

A divided court of appeals reversed. Pet. App. 10a-45a. The court focused its Article III standing analysis on whether the complaint had adequately alleged injury in fact. Cottrell claimed that his injury consisted of "the cost of 'wasted' medication that Plaintiffs allege they were compelled to purchase but could not use." *Id.* at 30a. The appeals court held that Cottrell's claim adequately alleged an "actual" injury. *Ibid* ("Plaintiffs' claimed financial harm has *already* occurred, it is not merely possible or even probable.") (emphasis in original). It concluded that although a theory of damages may be "too speculative" if it is based on comparisons with an alternative reality in which numerous variables are altered, Cottrell's alleged damages were not "conjectural or hypothetical" because "the reduced size of the bottle dropper tip is the *only* change from the status quo" that was "essential to [Cottrell's] allegations of financial harm." *Id.* at 32a (emphasis in original).

The majority stated that a Rule 12(b)(1) motion to dismiss a complaint for lack of Article III standing "is not the occasion for evaluating the empirical accuracy of an economic theory." Pet. App. 34a n.11 (citation omitted). While conceding that Cottrell's injury theory might be insufficient to withstand a motion to dismiss for failure to state a claim or a summary judgment motion, the court stated that the factual allegations were sufficient to "pass muster" for standing purposes at the pleadings stage. *Ibid.*

Judge Roth dissented and would have affirmed the district court's no-standing finding. Pet. App. 36a-45a. She concluded, "[For] purposes of analyzing economic injuries in the context of marketwide effects,

we cannot do precisely what the plaintiffs here ask of us: isolate and change one variable [*i.e.* the size of the bottle dropper tip] while assuming that no downstream changes would also occur." *Id.* at 41a. She argued that Cottrell's no-downstream-changes-by-other-actors assumption is "exactly the sort of assumption that cannot be proven at trial" and thus renders Cottrell's injury-in-fact claim too speculative to establish Article III standing. *Id.* at 42a.

Judge Roth added that Cottrell's injury theory "is a particularly bad fit for the market for pharmaceuticals," in which manufacturers only rarely price their products based on the volume of the medicine being sold. *Ibid.* Under those circumstances, she concluded, it was "unreasonable" for Cottrell to speculate that manufacturers would have offered their bottles of medication at the same price even if the bottles came equipped with reduced-size dropper tips—a change that would have substantially increased the number of doses available in each bottle. *Id.* at 45a.

An equally divided Third Circuit denied a petition for rehearing *en banc* by a 3-3 vote. Pet. App. 1a-10a. Dissenting from denial of the petition, Chief Judge Smith (joined by Judges Ambro and Jordan) agreed with Judge Roth that Cottrell had inadequately alleged injury in fact. He stated:

> By allowing plaintiffs to establish standing simply by speculating about the additional efficiencies they might have captured had a defendant acted in accordance with the rules of a plaintiff's

> hypothetical marketplace, I fear that everyday business decisions may be subject to litigation by creative plaintiffs capable of theorizing a way that those business decisions could have been made to serve plaintiffs more efficiently. ... I would hold that Article III limits the Court's ability to engage in the type of speculation that Plaintiffs' theory calls for regardless of whether a plaintiff roots its claim in unfairness, deception, or any other cause of action.

Id. at 8a.

SUMMARY OF ARGUMENT

The petition raises issues of exceptional importance. Article III of the Constitution strictly confines the judicial power of federal courts to matters filed by those who can demonstrate standing to invoke the courts' jurisdiction. To make that demonstration, a litigant must prove (among other things) that he has suffered an injury fairly traceable to the allegedly wrongful conduct. Merely alleging that one has been injured is insufficient to establish standing at the pleadings stage; the complaint must "clearly allege facts" which, if established at trial, would demonstrate an injury that is "actual or imminent, not conjectural or hypothetical." *Spokeo,* 136 S. Ct. at 1547-48. An injury is "conjectural and hypothetical"—and thus insufficient to establish Article III standing—if its existence is dependent on speculation about how independent actors are likely to respond to changed circumstances. *Daimler-Chrysler Corp. v. Cuno*, 547

U.S. 332, 344 (2006).

Review is warranted because the decision below directly conflicts with this Court's standing jurisprudence. Cottrell's injury claim hinges on demonstrating that Petitioners would charge the same price for their products if they were re-designed to reduce the size of the bottle dropper tip—thereby substantially increasing the number of doses in each bottle. The Third Circuit held that Cottrell's same-price assertion should not be deemed speculative for Article III standing purposes, because (it contended) there is nothing speculative about assuming that an independent actor will maintain "the status quo" in the face of changed circumstances. Pet. App. 31a, 32a. But nothing in this Court's case law supports the Third Circuit's contention that whether a complaint's assertions about the responses of independent actors are overly speculative (and thus insufficient to establish Article III standing) is dependent on whether the independent actor's projected response entails a change from the status quo.

As Judge Roth explained, allegations that a plaintiff has suffered injury in fact suffice at the pleading stage only if they are based on facts that are "susceptible to proof at trial." Pet. App. 42a. Cottrell has not suggested any plausible method by which he could prove that Petitioners would charge current prices for a re-designed product that would supply substantially more doses than bottles as currently designed—a pricing structure that would substantially reduce Petitioners' revenue. Review is warranted to resolve the conflict between the decision below and this Court's standing decisions, which make clear that

speculation regarding how independent actors would respond to changed circumstances cannot be used to establish the plaintiffs' injury in fact.

The Third Circuit stated that "[t]ypically, a plaintiff's allegations of financial harm will easily satisfy each of [the] components" of Article III standing. Pet. App. 19a. While that statement is undoubtedly true, it says nothing about the nature of the factual assertions that are required to support such allegations. When a consumer alleges that a seller fraudulently induced him to purchase a product that he would not have purchased but for the fraud, the consumer's financial harm is readily apparent: the consumer's financial harm is measured by the amount of the purchase price attributable to the fraudulent conduct. But Cottrell makes no fraud allegation; he simply alleges that Petitioners acted unfairly by allegedly forcing him to purchase a larger quantity of medication than he required. Under those circumstances, Cottrell can demonstrate an "actual" injury only by demonstrating that he paid more for his medications than he would have paid had they been packaged to his liking. Because Cottrell's "I paid more" claim is based on speculation about pricing that would not be susceptible of proof at trial, the Third Circuit's decision to uphold Cottrell's standing cannot be squared with this Court's disapproval of speculative, unprovable injury claims.

Review is particularly warranted in light of the dramatic increase in the number of "unfair practices" claims being asserted in federal courts. Over the past half century, all 50 States have adopted statutes—modeled on the Federal Trade Commission

Act (FTC Act), 15 U.S.C. § 41 *et seq.*—that prohibit "unfair" trade practices or acts. In general, those statutes have declined to specify what acts are deemed "unfair"; rather, the definition is intentionally left open-ended to permit courts to address newly developed practices that are arguably unfair to consumers. Moreover, unlike the FTC Act (which is not privately enforceable), state unfair-practices statutes authorize causes of action by any individual who claims to have been injured by an "unfair" trade practice—and they provide large financial incentives (*e.g.*, punitive damages, statutory damages, attorney fees) to file such claims. As a result, judges possess extraordinarily wide discretion to decide whether a business practice should be deemed "unfair," and the plaintiffs' bar repeatedly requests the judiciary to expand the list of actionable practices.

The law of Article III standing places a damper on such requests. It "is built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 at 408. Because the inherent ambiguity of the term "unfair" may tempt some judges to aggrandize their power by labeling as "unfair" (and thereby proscribing) trade practices that had not previously been condemned, Article III standing doctrine serves as an important check on such power. It limits the authority of federal judges to pass on the fairness of trade practices to those businesses that demonstrably have injured the plaintiff. Review of the Third Circuit's decision is especially warranted given that it arises in the context of statutes that are regularly invoked by plaintiffs with doubtful injury claims.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDING CASE LAW BY CREDITING DAMAGES CLAIMS RESTING ON MERE SPECULATION ABOUT THE DECISIONS OF INDEPENDENT ACTORS

Cottrell alleges that Petitioners' packaging of their prescription medications injured him because it allegedly caused him to pay more for the medications than he would have paid had they been packaged in the manner he preferred. But he can do no more than speculate how much Petitioners would have charged had the medications been packaged differently. Under this Court's case law, Cottrell lacks Article III standing to sue in federal court because such speculation is insufficient to demonstrate an "actual" injury—any injury claim is conjectural or hypothetical. The Third Circuit nonetheless held that Cottrell's complaint adequately alleged Article III standing because no "speculation" is required to conclude that Petitioners would have charged the same per-ounce price for their medications if sold in packaging re-designed in Cottrell's preferred manner. Review is warranted to resolve the sharp conflict between the decision below and this Court's Article III standing decisions.

The Constitution confers limited authority on each branch of the federal government. It grants to the federal courts "[t]he judicial Power of the United States." U.S. Const., Art. III, § 1. The judicial power is expressly limited; it extends only to "Cases" and "Controversies." Art. III, § 2. That limitation ensures that federal courts do not seek to aggrandize their

power at the expense of the Legislative and Executive branches. Indeed, "[n]o principal is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). The case-or-controversy requirement "plays a critical role" in constraining the authority of federal courts. *Cuno*, 547 U.S. at 342.

As this Court recently explained:

> Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. ... The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.

Spokeo, 136 S. Ct. at 1547.

"Any person" seeking to invoke the power of a federal court "must demonstrate standing to do so." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). The "irreducible constitutional minimum" of standing consists of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must have: (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.* at 560-61. His complaint must

allege facts demonstrating that his injury is "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Importantly, in determining whether a claimed injury is "actual or imminent," the Court has refused "to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. Injury-in-fact claims may not rest on "unjustifiable economic and political speculation"—for example, that independent actors such as elected officials will raise taxes "to make up a budget deficit." *Arizona Christian School Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011).

The Third Circuit's holding that Cottrell adequately alleged injury in fact was based on legal conclusions that directly conflict with the case law cited above. Cottrell's injury claim is dependent on a demonstration that Petitioners would charge the same price for their products if they were re-designed to reduce the size of the bottle dropper tip—thereby substantially increasing the number of doses in each bottle. The appeals court insisted that Cottrell's allegations that Petitioners would maintain the same per-ounce price were not mere "speculation," but it did so on the basis of legal standards that cannot be squared with *Clapper, Winn*, *Cuno* and other decisions of this Court that have disapproved of basing Article III standing on speculation about the actions of independent actors.

A. An Assumption that Independent Actors Will *Maintain* Their Price Structure in the Face of Changing Conditions Is No Less Speculative Than that Those Actors Will *Change* Their Prices

The appeals court premised its no-mere-speculation finding on its legal conclusion that there is a material difference—when evaluating a plaintiff's injury-in-fact claims—between an assumption that an independent actor would maintain the status quo and an assumption that the actor would alter its policies in response to changed conditions. The court distinguished one of its prior decisions on that basis. Pet. App. 32a (citing *Finkelman v. Nat'l Football League*, 810 F.3d 187 (3d Cir. 2016)). In *Finkelman*, the court held that the plaintiffs lacked standing, rejecting their injury-in-fact claim as overly speculative because it was based on an unsupported assumption that increased numbers of NFL ticket purchasers would offer their tickets on the resale market (thereby decreasing resale-ticket prices) if the NFL changed its ticket distribution policies. 810 F.3d at 200-02. The appeals court distinguished *Finkelman* on the ground that it is far less speculative to assume that an independent actor will maintain the status quo in response to changed conditions:

> Plaintiffs' pricing theory does not depend on a comparable presumption essential to their allegations of financial harm. As explained, the reduced size of the bottle dropper tip is the *only* change from the status quo. Accordingly, we find the

> pricing theory sufficient to satisfy the injury-in-fact requirement.

Pet. App. 32a.[2]

The Third Circuit's status-quo theory conflicts sharply with this Court's case law. The Court has repeatedly held that injury-in-fact claims may not "rest on speculation about the decisions of independent actors," *Clapper*, 568 U.S. at 414, without indicating that an independent actor's decision to maintain the status quo in the face of changed circumstances is exempt from that edict. Thus, *Cuno* stated unequivocally that "alleged injury is ... 'conjectural and hypothetical'" when it "depends on how legislators respond to a reduction in revenue," without ever suggesting that the rule would be otherwise if the alleged injury would arise if legislators responded to the reduction in revenue by taking no action. 547 U.S. at 344. Review is warranted to resolve the conflict between the decision below and this Court's case law regarding the requirements for establishing injury in fact.

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[2] The appeals court had previously explained its "status-quo theory" as follows:

> Plaintiffs would have paid less for their course of medication if they were able to extract more doses of medication—at least twice as many doses, according to the allegations—out of the same bottle, *without any changes from the status quo in bottle pricing, physicians' prescribing practices, or the volume of medication in each bottle.*

Id. at 31a (emphasis added).

Indeed, the evidence suggests that the Third Circuit's assumption—that Petitioners would charge the same price for a redesigned product that included a smaller bottle dropper tip—is not only speculative but also very likely incorrect. First, as Petitioners have explained, they could not redesign their product without first applying for and obtaining FDA approval of the change. Pet. 18. That application process can be very expensive and time consuming. Petitioners could reasonably be expected to incorporate the costs of the application process into the price charged for their medications.

More importantly, there is every reason to believe that Petitioners would charge a higher price for medications packaged in a re-designed bottle that delivered considerably more doses than currently available products. As Judge Roth pointed out in her dissent, pharmaceutical companies routinely establish their prices based on the value conveyed to consumers, rather than on the volume of goods provided or the cost of goods sold. Pet. App. 42a-44a.[3] If patients and their prescribing physicians ascribe a "value" of x dollars to

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[3] There are multiple reasons for this pricing structure. Among them are that patients (and their prescribing physicians) are much more concerned about effective treatment than they are about prices—particularly because a significant portion of drug costs is routinely borne by health insurers. Cost of goods sold is a negligible pricing factor; indeed, the vast majority of production costs are fixed costs (*e.g.*, the hundreds of millions of dollars required to gain FDA marketing approval), and the marginal cost of producing additional medication is quite small in comparison. Moreover, the exclusive marketing authority often afforded to manufacturers of brand-name drugs provides them with considerable flexibility in determining prices.

a medical product that provides y doses (as reflected by their willingness to pay that price), then it stands to reason that they would ascribe a value of 2x dollars to a package of the same medication that provides 2y doses.

The most reasonable assumption is that drug manufacturers would raise their prices to reflect the increased "value" created by a product re-design that substantially increases the number of doses provided by the package. Cottrell's contrary assumption—that Petitioners would charge the same price for a bottle whose re-designed dropper tip delivered twice as many doses—is pure speculation unaccompanied by any factual allegation and thus cannot support his injury-in-fact claim. Review is warranted because the Third Circuit's contrary legal conclusion conflicts with this Court's case law.

B. Respondents' Injury-in-Fact Claim Is No Less "Conjectural or Hypothetical" Simply Because They Assert the Injury Has Already Been Incurred

In ruling that Cottrell adequately pleaded injury in fact, the Third Circuit took pains to distinguish Cottrell's injury claims from those of plaintiffs who have not been injured yet but who assert standing on the basis of a claim that their injury is imminent. The appeals court stated that, under Cottrell's damages theories, "Plaintiffs' claimed financial harm has *already* occurred, it is not merely possible, or even probable." Pet. App. 30a (emphasis in original). *See id.* at 19a ("[W]here a plaintiff alleges [past] financial

harm, standing is often assumed without discussion.") (citations omitted). The court then cited this Court's case law for the proposition that "the plaintiff 'of course' had standing to seek damages for alleged *past* economic injury, as opposed to alleged risks of future injury." *Ibid* (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995)) (emphasis in original).

The Third Circuit's statement that an injury-in-fact claim is *ipso facto* less speculative if the injury is alleged to have already been incurred is in considerable tension with this Court's case law. *Spokeo* holds that a plaintiff claiming standing "bears the burden of establishing" that his injury is actual *or* imminent;[4] and regardless whether he claims that his injury has already been inflicted or will imminently be so, his claimed injury must be neither "conjectural" nor "hypothetical." 136 S. Ct. at 1547-48.

Nothing in the Court's case law suggests that an injury is rendered any less conjectural or hypothetical simply because it is alleged already to have been incurred. The Court has routinely rejected injury-in-fact claims as too speculative even for past alleged injuries. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 10 (1972) (rejecting plaintiffs' claim that they had been injured by a government surveillance program, where they were unaware of whether they had been surveillance targets but nonetheless alleged injury consisting of "an impermissible burden on respondents

[4] At the pleadings stage, "the plaintiff must clearly allege facts demonstrating" an actual or imminent injury. 136 S. Ct. at 1547 (citation omitted).

and others similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights."). Nor does *Adarand* provide any support for the Third Circuit's position. *Adarand* stated that a plaintiff "of course" has standing if he adequately alleges that the defendant's activities have caused him economic injury; but the Court never suggested that a bare claim of past economic injury, if unsupported by factual allegations, is sufficient at the pleadings stage.

C. Respondents' Allegations Regarding Prices Petitioners Would Have Charged for Medications Sold in Re-Designed Packaging Is Incapable of Proof at Trial

The Third Circuit characterized Petitioners' (and Judge Roth's) contentions that the injury-in-fact claims were "overly speculative" as a challenge to the viability of Respondents' economic theory, and held that any such challenge is premature at the pleadings stage. Pet. App. 33a-34a n.11. The appeals court stated, "A Rule 12(b)(1) motion ... is not the occasion for evaluating the empirical accuracy of an economic theory." *Id.* at 34a n.11 (quoting *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015), *cert. dism'd as improvidently granted*, 137 S. Ct. 289 (2016)).

That holding directly conflicts with *Spokeo*, which expressly requires plaintiffs, at the pleadings stage, to "clearly allege facts demonstrating each element" of Article III standing, including injury in fact. 136 S. Ct. at 1547. Cottrell has alleged *no* facts to support his claim that Petitioners would have

charged the same price for its medication sold in the re-designed bottle imagined by Cottrell.[5] The absence of such allegations is particularly damaging to Cottrell in light of his failure to contest that: (1) pharmaceutical companies routinely establish pricing based on value conferred, not quantity sold; and (2) the re-designed bottle imagined by Cottrell would provide significantly more value (*i.e.*, significantly more doses) than the current, FDA-approved design. Review is warranted to resolve the conflict between *Spokeo* and the decision below regarding a plaintiff's burden at the pleadings stage.

Moreover, the Third Circuit's reliance on the D.C. Circuit's *Osborn* decision is misplaced; that decision actually supports Petitioners' position. *Osborn* explained that the Article III standing requirements do not compel the plaintiff to append a report from an economic expert to the complaint, and that pleadings regarding basic economic assumptions will be accepted as true, provided that they "are provable at trial." 797 F.3d at 1065. The D.C. Circuit added, "[A]llegations founded on economic principles, while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation." *Ibid* (citation

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[5] The appeals court noted that Cottrell cited several medical-journal articles stating that consumers would incur reduced costs for prescription eye-drop medications *if* the manufacturers re-designed their packaging *and* the per-ounce price of the medications remained constant. Pet. App. 31a-32a. But those articles did not purport to undertake an economic analysis or to consider whether prices would, in fact, remain constant.

omitted). But Cottrell does not invoke any economic principles in support of his no-price-change assertion, nor has he attempted to explain how he could possibly "prove" that assertion at trial by resort to such principles. *Osborn* thus supports Petitioner's contention that the no-price-change assertion—because it relies on the actions of an independent actor—is a mere "prediction[ ] based only on speculation." *Ibid.*

The Third Circuit lost sight of the important distinction between Cottrell's injury-in-fact claim and the injury-in-fact claims asserted in garden-variety product-purchase cases, in which the consumer typically alleges fraud. When a consumer alleges that a seller fraudulently induced him to purchase a product that he would not have purchased but for the fraud, the consumer's financial harm is readily apparent: it is measured by the amount of the purchase price attributable to the fraudulent conduct. But Cottrell makes no fraud allegation; he simply alleges that Petitioners acted unfairly by allegedly forcing him to purchase a larger quantity of medication than he required. Under those circumstances, Cottrell can demonstrate an "actual" injury only by demonstrating that he paid more for his medications than he would have paid had they been packaged to his liking. Yet despite Cottrell's failure to provide any explanation of how he could demonstrate that Petitioners would *not* have charged more for medication dispensed in a re-designed bottle (and thus that Petitioners' failure to undertake a re-design caused him to pay more for his medications), the Third Circuit held that he adequately pleaded injury in fact. That holding cannot be reconciled with *Spokeo*.

II. ENFORCING STANDING CONSTRAINTS IS PARTICULARLY IMPORTANT IN "UNFAIR PRACTICES" ACTIONS, WHICH GRANT COURTS CONSIDERABLE DISCRETION IN DEFINING THE CAUSE OF ACTION

Review is particularly warranted in light of the dramatic increase in the number of "unfair practices" claims being asserted in federal courts. Over the past half century, all 50 States have adopted statutes—modeled on the FTC Act—that prohibit "unfair" trade practices or acts. Moreover, while many of those state laws initially mimicked the FTC Act by providing that only designated government officials could file suit to enforce the prohibition against "unfair" practices, *see* 15 U.S.C. § 45, all but one of the laws were amended in subsequent decades to provide for private enforcement. Widely adopted features of these amended statutes include authorization for class actions, statutory damages, punitive damages, and attorney fees for prevailing plaintiffs. *See* James Cooper and Joanna Shepherd, *State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis*, 81 Antitrust L.J. 947, 957-60 (2017) (hereinafter, "Cooper").

Embedded in most state unfair-practices legislation is the legislature's conscious decision *not* to compile a definitive list of "unfair" trade practices. Instead, the statutes delegate to judges the authority to determine whether challenged business practices are unfair to consumers. As a result, judges possess extraordinarily wide discretion to decide whether a business practice should be deemed "unfair."

Each of the six States whose unfair-practices statutes Cottrell invokes—California, Florida, Illinois, New Jersey, North Carolina, and Texas—is among those that grant broad discretion to judges. For example, California's Unfair Competition Law prohibits business practices that constitute "unfair competition," which is defined as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof. Code § 17200. The California Supreme Court has recognized that the legislature "framed the UCL's substantive provisions in broad, sweeping language" and "provided courts with broad equitable powers to remedy violations." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011). The legislature adopted this sweeping language "for a reason"—it did so

> precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive. ... When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one.

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 181 (1999).

North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA), N.C.G.S. §§ 75-1.1 to 75-42, is similar in its grant of broad discretion to judges to determine what business practices are "unfair." The

Fourth Circuit has explained that "unfair" conduct under the UDTPA is:

> [C]onduct which a court of equity would consider unfair. Thus viewed, the fairness or unfairness of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others.

Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, 80 F.3d 895, 902 (4th Cir. 1996) (quoting *Harrington Mfg. Co. v. Powell Mfr. Co.*, 38 N.C.App. 393, 400 (1978)).

Because state unfair-practices statutes grant so much authority to determine what business practices should and should not be permitted, the danger of judicial overreach is particularly acute in cases raising claims under one of those statutes. It is therefore particularly important for this Court to ensure that federal courts confine their exercise of that broad discretion to those instances in which the plaintiffs have demonstrated Article III standing; that is, instances in which the plaintiffs have adequately pleaded facts demonstrating that the defendant's alleged misconduct has caused them to suffer actual injuries. The law of Article III standing "is built on separation-of-powers principles" and "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 408.

The plaintiffs's bar has deluged the courts with

a wide array of multi-state putative class actions alleging violations of the unfair-practices statutes. Indeed, many state courts have expanded the definition of "unfair" practices to include alleged violation of FDA labeling regulations, thereby permitting consumers to file product-labeling challenges for which the Federal Food, Drug, and Cosmetic Act (FDCA) does not provide a private right of action. *See, e.g., Debernardis v. IQ Formulations, LLC*, ___ F. Supp. 3d ___, 2018 WL 1536608 (S.D. Fla., March 29, 2018) (suit under Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*, alleging that a dietary supplement was "misbranded" under FDCA). In many instances, there is reason to question whether members of the putative classes have actually been injured by the "unfair" business practices of which they complain. *See, e.g.,* Cooper, *supra*, 81 Antitrust L.J. at 972-73, 976 n.123.

In sum, the Petition is a particularly good vehicle for deciding the Article III standing issue raised herein—an issue that has sharply divided the federal appeals courts.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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