No. 22-

IN THE

Supreme Court of the United States

EVENFLO COMPANY, INC.,

Petitioner,

v.

MIKE XAVIER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court long ago articulated the constitutional minimum a complaint must plead to demonstrate standing. But even after reiterating that plausibility standard in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the courts of appeals have conflicting rulings on what constitutes "clearly ... allege[d] facts demonstrating" a concrete and particularized injury-in-fact, *Spokeo*, 578 U.S. at 338 (cleaned up), when applying these precedents to consumer class action pleadings that contain only conclusory allegations of injury to each plaintiff.

When a complaint does not include factual allegations of injury, some circuits, including the Third and Ninth Circuits, have required dismissal. Here, the First Circuit took an entirely different tack, reversing a dismissal on those grounds, and holding plaintiffs did not need to plead any facts of actual economic harm because conclusory allegations of alleged "overpayment" were sufficient for the court to infer injury-in-fact for Article III standing. The question of what constitutes plausible facts versus speculative "inferences" for economic injury is a recurring issue in class actions in federal court.

The question presented is:

Whether a plaintiff alleging economic injury must plead facts to support his theory of harm, as several circuits require, or whether a court may supplement conclusory allegations of economic harm (*i.e.*, but for alleged misrepresentations about a product's safety, consumers would not have bought a product, would have paid less for it, or would have bought a cheaper

alternative) by supplanting the lack of facts with its own "common sense" and "experience," as the First Circuit here held?

PARTIES TO THE PROCEEDING

Petitioner, Defendant-Appellee below, is Evenflo Company, Inc.

Respondents, Plaintiffs-Appellants below, are Mike Xavier; Lindsey Brown; Marcella Reynolds; Mona-Alicia Sanchez; Keith Epperson; Casey Hash; Jessica Greenschner; Lauren Mahler; Edith Brodeur; David A. Schnitzer; Ashley Miller; Danielle Sarratori; Hailey Lechner; Desinae Williams; Elise Howland; Theresa Holliday; Joseph Wilder; Amy Sapeika; Najah Rose; Sudhakar Ramasamy; Tarnisha Alston; Emily Naughton; Talise Alexie; Heather Hampton; Lindsey Reed; Karen Sanchez; Becky Brown; Debora De Souza; Correa Talutto; Karyn Aly; Janette Smarr; Kari Forhan; Joshua Kukowski; Anna Gathings; Kristin Atwell; Penny Biegeleisen; Carla Matthews; Jilli Hiriams; Natalie Davis; Cathy Malone; Jeffrey Lindsey; Linda Mitchell; Rachel Huber; Cassandra Honaker.

Additional plaintiffs who were not Appellants below: Janelle Woodson; Dana Berkley; Jessica Bloswick; Colleen Coderre; Greta Anderson; Kristen Brinkerhoff; Linda Feinfeld; Andrew Gladstone; Georgette Gladstone; Elizabeth Granillo; Janet Juanich; Teresa Muga; Ashley Perry; Angelica Ruby.

RULE 29.6 STATEMENT

Evenflo Company, Inc. is a wholly owned subsidiary of its parent corporation Goodbaby U.S. Holdings. Neither is a publicly traded corporation. An indirect parent company, Goodbaby International Holdings Limited, is publicly traded on the Hong

Kong Stock Exchange. No other public company or affiliate owns stock in Evenflo Company, Inc.

RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are related to this case:

- *In re: Evenflo Company, Inc., Marketing, Sales Practices & Products Liability Litigation*, No. 22-1133 (1st Cir. Nov. 23, 2022), reported at 54 F.4th 28.
- *In re: Evenflo Company, Inc., Marketing, Sales Practices & Products Liability Litigation,* No. 20-md-02938-DJC (D. Mass. Jan. 27, 2022), available at 2022 WL 252331.

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Evenflo Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. This Petition presents an important, recurring question on which courts of appeals have split, namely whether plaintiffs in a putative class action allege a concrete economic injury sufficient to establish Article III standing when a complaint contains conclusory allegations of economic harm absent concrete facts to support any theory of economic injury.

Here, plaintiffs bought and used a product without issue. Now, they allege economic injury due to the lack of certain disclosures at the time of sale, asserting they (1) would not have bought the product, (2) would have paid less for it, or (3) would have purchased a cheaper alternative. But they alleged no facts establishing that any of these mutually exclusive theories of economic harm were plausible. They have provided no facts that they received no value for their purchase, that supported any alleged price-premium, or that demonstrated a cheaper alternative product actually exists.

Other courts of appeals have dismissed such conclusory claims of economic harm. The Third Circuit has repeatedly applied this Court's Article III standing jurisprudence to require plaintiffs to allege specific facts that can lead a court to an inference of economic harm, including under the benefit of the bargain theories of economic loss invoked here. *See, e.g., In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278 (3d Cir. 2018); *Thorne v. Pep Boys Manny Moe & Jack,*

Inc., 980 F.3d 879, 889 (3d Cir. 2020). These courts have properly conformed this Court's standing jurisprudence at the pleadings stage with this Court's plausibility standards for all cases and claims.

The First Circuit came out the other way by reasoning it could *infer* facts sufficient to allege economic injury, notwithstanding that no such facts were pleaded. It is true that courts may draw inferences from *facts alleged*, but no other circuit has held that federal courts can engage in free-floating inferences untethered from the facts in the complaint. Thus, while the First Circuit held it could draw inferences without factual foundation by taking the complaint "as a whole," App.19a, other circuits have applied this Court's standing jurisprudence to allow claims only after plaintiffs have alleged facts that could support such judicial inferences. *See Debernadis v. IQ Formulations, LLC*, 942 F.3d 1076, 1086-87 (11th Cir. 2019) (facts showing a banned product was "worthless" to the consumers was sufficient to plausibly plead economic harm for the full cost of the product); *John v. Whole Foods Market Grp., Inc.*, 858 F.3d 732 (2nd Cir. 2017) (stating that inclusion of a news report in the complaint was sufficient to plausibly show overpayment). These circuits would undoubtedly join the Third Circuit in holding that bare allegations do not establish Article III standing.

The First Circuit's ruling also implicates a split with the Eighth Circuit, which requires a greater showing of harm to establish damages when, as similar to here, a consumer alleges a safety issue that has not manifested for the plaintiff bringing the suit. The First Circuit held that economic harm based on the risk of such future injury—from a side-impact

collision or to a child less than 40 pounds in weight—is a viable injury-in-fact for Article III standing so long as presented as a misrepresentation claim for economic loss at the time of sale. The Eighth Circuit has repeatedly held that economic harms are not sufficiently concrete for Article III standing when based on risk of future injury, regardless of how presented. *See, e.g.*, *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021). The First Circuit decision conflicts with this Eighth Circuit precedent by establishing a double standard for misrepresentation claims.

This question of what constitutes injury-in-fact is an important question at the heart of federal jurisdiction and this case is an ideal vehicle for resolving it. The issue is a pure question of law and the case involves economic loss theories commonly pleaded in federal courts. By granting the Petition, the Court can provide needed guidance on this recurring, important Article III standing issue in the context of satisfying the plausibility standard for economic injury in consumer fraud class actions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming in part, reversing in part, and remanding the matter for further proceedings is published at 54 F.4th 28 (1st Cir. 2022) and attached as Appendix A at 1a-26a.

The order of the District Court of Massachusetts granting Defendant's motion to dismiss is available at 2022 WL 252331 and attached as Appendix B at 27a-43a.

The order of the United States Court of Appeals for the First Circuit denying the petition for rehearing is attached as Appendix C at 44a-46a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on November 23, 2022. App., *infra*, 1a. A petition for rehearing was denied on Jan. 4, 2023. App., *infra*, 44a. On March 14, 2023, Justice Jackson granted Evenflo Company, Inc.'s application to extend time to file a petition for a writ of certiorari until June 5, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

A. Respondents Allege Evenflo's Truthful Marketing Statements Misled Them.

Petitioner Evenflo manufactures and sells child car restraints. This litigation involves its Big Kid booster seat. A booster seat, as the name implies, elevates a child so the vehicle's shoulder-to-hip seatbelt, which is designed to secure adults, fits the child's smaller body. Because a booster uses a vehicle's seatbelt, it is distinct from other child car seats that contain their own internal restraints. Children typically start in rear- and front-facing seats with internal harnesses and, as they grow, progress to belt-positioning booster seats until they graduate to using a vehicle's seatbelt.

Respondents allege that Evenflo made two misrepresentations about its Big Kid booster, namely that (1) it could be used safely by children weighing 30 pounds, and (2) the seat was "side-impact tested." App.6a. The complaint expressly *disclaims any physical* injury; no Respondent alleges injury to any child who was harmed because they were too small for a booster or because they were involved in a side-impact crash. App.7a. Instead, Respondents bought and used their Big Kid boosters for months or years without incident, and no Respondent alleges they stopped using their Big Kid for these reasons.

The statements at issue in this case were truthful. As with many products, the federal government closely regulates both safety and safety statements related to child seats. Specifically, the National Highway Traffic Safety Administration (NHTSA)

regulates child car restraints, including belt-positioning boosters. *See* 49 U.S.C. §§ 30101-3013. During the time Evenflo manufactured the Big Kid, NHTSA allowed for the use of boosters by children weighing at least 30 pounds. 49 C.F.R. § 571.213 at S5.5.2(f) ("booster seats shall not be recommended for children whose masses are less than 13.6kg" (*i.e.*, 30 pounds)).

In the early days of belt-positioning boosters like the Big Kid, many front-facing child seats with internal restraints could not accommodate tall children who outgrew the height limitations of their front-facing car seats before weighing 40 pounds. For them, a belt positioning booster seat was the best option. NHTSA regulations allowed manufacturers to recommend booster seats for children who weighed 30 pounds or more. *See* 49 C.F.R. § 571.213 at S5.5.2(f). This weight limit has been raised to 40 pounds. Manufacturers (including Evenflo) have developed front-facing seats that could accommodate tall children weighing less than 40 pounds.

With respect to side-impact testing, NHTSA did not require any side-impact testing of booster seats during the class period. Nevertheless, Evenflo performed side impact tests on its Big Kid booster seats, and those tests were modeled after government side-impact tests for automobiles. Consequently, Evenflo included a "side-impact tested" statement on the box of all Big Kid models from 2008 to 2019.

As the complaint acknowledges, the Big Kid booster seat generally sold at a price that was roughly $10 less than its primary competitor. App.22a.

B. The District Court Dismissed the Complaint Because Respondents Did Not Plausibly Plead Any Concrete Economic Harm.

Purchasers of the Big Kid brought putative class actions against Evenflo in multiple district courts in 2020. The Judicial Panel on Multidistrict Litigation centralized the actions and transferred the claims to the United States District Court for the District of Massachusetts before Judge Denise Casper. On October 20, 2020, Plaintiffs filed a consolidated amended class-action complaint.

The complaint seeks economic damages under a benefit-of-the-bargain theory. App.10a. Rather than put forth a single theory of harm, Respondents pleaded their harm in the alternative: had they understood the context for these two statements, they would "not have purchased [the] seat, would have paid less for it, or instead would have purchased one of the many safer available alternatives." App.20a. The complaint, though, does not include facts supporting any of these economic harm theories: that the Big Kid booster seat was worthless, that it would have cost less if Evenflo had not made these statements, or that a less expensive alternative existed.

The district court dismissed the action, including the claims for monetary and injunctive relief, on the basis that Plaintiffs lacked Article III standing because the complaint did not plead specific facts establishing that Respondents sustained a concrete, particularized injury-in-fact, namely that Respondents' purchase of the booster seats caused them any of the economic harms they alleged. The district court also

noted the complaint did not allege the seats failed to perform. App.39a. Respondents used their booster seats seemingly without incident, as they have not asserted any issues, safety or otherwise, related to their use of the seat, including for a child under 40 pounds or from a side-impact collision. Thus, Respondents received the benefit of the bargain in purchasing the Big Kid booster seats.

Specifically, the court stated that "Plaintiffs have alleged no estimate (aside from a bare claim that the seats were 'worthless' to them) of how much the Big Kid would diminish in value, or any facts giving rise to the same." App.39a. Thus, "[e]ven taking Plainiffs' allegations about the forty-pound seat minimum and side-impact testing as true, they do not offer a plausible explanation of Plaintiffs' economic injury—all Plaintiffs claim is that the Big Kid, because of these alleged problems, were of no value to them. Accordingly, Plaintiffs have not shown they have standing to redress their economic injuries." App.40a.

C. The First Circuit Reversed, Creating a Circuit Split That a Court Can "Infer" Injury Based on Conclusory Allegations, Not Facts, in the Complaint.

The First Circuit reversed the dismissal of the claims for monetary relief, holding Respondents pleaded a cognizable injury-in-fact merely by alleging that the product was worth less than they paid due to the manufacturer's alleged misrepresentations. App.3a. The First Circuit held that when a plaintiff alleges affirmative misrepresentations about product safety, merely stating the conclusion that he would not have bought the product, would have paid less for

it, or would have bought a cheaper alternative is sufficient by itself for Article III standing. App.19a. It then used the court's ability to make inferences to conclude that each alternative theory of economic harm was plausible, notwithstanding the lack of facts supporting any of these economic losses. App.19a-24a. It inferred injury without tying that inference to any fact alleged in the complaint.

The court reasoned the various claims—when "consider[ed]…together"—established harm because they sounded in fraudulent inducement and misrepresentation and sought forms of overpayment. App.10a. The court first validated that an alleged overpayment, including based on a benefit-of-the-bargain theory, can be "a cognizable form of Article III injury." App.11a. "[O]verpayment for a product—even one that performs adequately and does not cause any physical or emotional injury—may be a sufficient injury to support standing." *Id.*

The court then concluded that, when "read as a whole, the complaint's allegations satisfy the plausibility standard." App.19a. It addressed the plausibility of the purported injury of overpayment under each alternative economic loss alleged. In response to the assertion Respondents would not have bought any booster seat, it stated it was "reasonable to infer that parents could have continued using other models [harnesses or convertible seats] rather than choosing to buy a new [booster] seat." App.21a. It cited no facts in the complaint supporting this conclusion because none had been alleged.

Next, it held that "it is a reasonable inference that, if Evenflo had not marketed the Big Kid as safe

for children as small as thirty pounds and as side impact tested, the product would have commanded a lower price, allowing plaintiffs to pay less for it. At this stage of the litigation, that inference suffices to support the plaintiffs' standing even without quantification of the change in market value." App.21a. Here again, the court inferred this conclusion without citation to any fact in the complaint.

Finally, the court addressed the complaint's lack of facts establishing that any cheaper alternative booster seat existed on the market. To the contrary, the complaint alleged the Big Kid *was* the cheaper alternative to higher-priced competitors. The court stated Petitioner's argument on this point had "some force, but we conclude that, at the pleading stage, it does not defeat the plaintiffs' standing. ... Given that purchasing a different seat is only one of the three alternative courses of action described in the complaint and the possibility that a cheaper alternative exists, the complaint, taken as a whole, plausibly supports the plaintiffs' argument that Evenflo's misrepresentations caused them to overpay." App.22a.

The First Circuit also held because Respondents' briefs did not address their standing to pursue injunctive relief, "they have waived any argument on that point. Nothing in the plaintiffs' complaint suggest any possibility of future harm; for example, the complaint does not allege that any plaintiff intends to purchase a Big Kid in the future." App.24a. Thus, it affirmed dismissal of the injunctive relief claims.

REASONS FOR GRANTING THE PETITION

The Petition raises a critical question related to federal jurisdiction on which there is a circuit split and which increasingly arises in class actions in federal courts. The Court has held that "[e]very class member must have Article III standing in order to recover individual damages," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021), and standing requires an "injury in fact" that is "concrete and particularized," *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61 (1992). The alleged harm must be "'real,' and not 'abstract.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). And, most importantly here, the allegations of injury must be properly pleaded. *See id.* at 338. Although these bedrock principles remain entrenched, the courts of appeals disagree about how to apply them in the class-action context. The Court should grant the Petition to resolve this split and clarify that allegations of economic harm require support from specific facts. Conclusory allegations of economic harm do not establish standing.

This case presents a common way class litigation is pleaded. Respondents allege marketing statements Petitioner made about its product's safety were misleading. App.7a. They disclaim any physical or property harm from their alleged safety concerns. *Id.* Rather, they claim only economic injuries and plead those injuries in the alternative, offering three mutually exclusive theories of harm: (1) they would not have bought the product; (2) they would have paid less for it; or (3) they would have bought an alternative product. *Id.* However, Respondents provided no *facts* that they sustained any plausible concrete or particularized harm under any of these theories.

The circuits are split on whether such threadbare assertions of economic harm can be sufficient to survive a motion to dismiss on Article III grounds. The First Circuit here held that monetary harm can be "properly pleaded" even when entirely conclusory: a court can draw "reasonable inferences" based on its own experiences and common sense from those conclusory allegations by taking the complaint "as a whole." App.8a,19a. It then held, without factual foundation, that "[i]t is a reasonable inference that, if Evenflo had not marketed the Big Kid as safe for children as small as thirty pounds and as side impact tested, the product would have commanded a lower price. ... At this stage of the litigation, that inference suffices to support the plaintiffs' standing *even without quantification of the change in market value*." App.21a-22a (emphasis added). The complaint, though, provided no factual basis to plausibly make this inference. To the contrary, booster seat market dynamics, discussed *infra*, demonstrate that this inference is actually *unreasonable*, which highlights the hazards of drawing inferences that are not based on the facts of the case. By not requiring factual bases for their inferences, judges can impose their idiosyncratic views and values on a case, putting their thumbs on the judicial scale in favor of a party.

Other circuits have rejected this approach—requiring facts to support allegations of harm—and for good reason. The Third Circuit has addressed this question repeatedly and has required plaintiffs to allege specific facts that can lead a court to an inference of economic harm, including when invoking a benefit of the bargain economic loss theory. *See, e.g., In re Johnson & Johnson Talcum Powder Prods.*

Mktg., Sales Pracs. & Liab. Litig., 903 F.3d 278 (3d Cir. 2018). In *In re Talcum Powder*, the Third Circuit squarely held that a "plaintiff must do more than offer conclusory assertions of economic injury to establish standing. She must allege facts that would permit a factfinder to value the purported injury at something more than zero dollars without resorting to mere conjecture." *Id.* at 285. A plaintiff "must allege facts that would permit a factfinder to determine that the economic benefit she received in purchasing the [product] was worth less than the economic benefits which she bargained." *Id.*

The Third Circuit reiterated this requirement in *Thorne v. Pep Boys Manny Moe & Jack, Inc.*, holding a plaintiff did not allege "a tangible economic injury that is sufficient for standing purposes" because she "supported her benefit-of-the-bargain theory of injury with only speculative allegations that the [products] ... were worth less than she paid for them." 980 F.3d 879, 889 (3d Cir. 2020). Other circuits have issued similar rulings. *See, e.g.*, *Cahen v. Toyota Motor Corp.,* 717 Fed Appx. 720 (9th Cir. 2017) (unpublished) (stating an "economic loss theory is not credible" when the allegations of harm "are conclusory and unsupported by any facts"). And others have required plaintiffs to provide facts supporting economic loss under the theories alleged here, indicating they too would agree with the Third Circuit on the larger question. *See Debernadis v. IQ Formulations, LLC*, 942 F.3d 1076, 1086-87 (11th Cir. 2019) (facts showing a product was "worthless" to the consumers was sufficient to plausibly plead economic harm for the full cost of product); *John v. Whole Foods Market Grp., Inc.*, 858 F.3d 732 (2nd Cir. 2017) (stating that

inclusion of a news report in the complaint was sufficient to plausibly show overpayment).

Further, in reversing the district court's dismissal of this case, the First Circuit decision implicates a split with the Eighth Circuit, which requires a greater showing of harm to establish damages when, as similar to here, a consumer alleges a safety issue that has not manifested for the plaintiff bringing the suit. The Eighth Circuit has repeatedly held that economic harms are not sufficiently concrete for Article III standing when based on risk of future injury, regardless of how presented. *See, e.g.*, *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021); *Penrod v. K&N Eng'g, Inc.*, 14 F.4th 671 (8th Cir. 2021). The First Circuit stated "reliance on misrepresentation distinguishes this case from the products liability actions in which the Eighth Circuit has found standing lacking for want of injury." App.16a. But, there is no principled reason for changing pleading standards for the *same* economic harm—here, a lost benefit of the bargain—based on whether that harm was allegedly caused by a misrepresentation or product claim. The pleading standards for a type of harm should be uniform across types of cases.

The Court should grant the Petition to resolve this circuit split and provide guidance that when a plaintiff alleges economic injury, he must allege facts to support that injury. Allegations that he did not receive the benefit of his bargain cannot rest on solely conclusory allegations, and Article III standing cannot be established merely through artful pleading. Plaintiffs must offer some facts about the products or the marketplace from which courts can draw inferences that the harm alleged is plausible, and they

should not be allowed to use Rule 23 to circumvent this requirement and sneak these complaints past motions to dismiss and into discovery.

Here, had the Third or Ninth Circuits, as well as the other circuits, heard this appeal, they would have affirmed the trial court's dismissal of the claims on standing grounds. Article III standing must not vary based on the circuit where the action is being heard, particularly when claims are consolidated before a single district court in a multi-district litigation.

A. The Court Should Grant the Petition To Resolve a Circuit Split on Whether Conclusory Allegations of Economic Injury Can Satisfy Article III Standing Requirements.

The Court should grant the Petition to resolve the question of whether concrete facts must support allegations of economic harm, as the Third Circuit has held, including when asserted under a benefit-of-the-bargain theory based on alleged misrepresentations. The constitutional limits of federal courts prohibit them from inferring injury based solely on conclusory allegations. Courts can determine whether an injury-in-fact is plausible based only on actual facts.

Here, the First Circuit split from other circuits in holding that a complaint which pleads no facts to support economic injury can survive dismissal on the basis that a court may infer such injury on its own. It did so here by effectively rewriting the complaint. It merged Respondents' three independent theories of harm—a consumer would not have bought the Big Kid booster seat at all, would have paid less for it, or would have bought a cheaper, "safer" alternative—

into a single theory of damages called "overpayment." App.3a. It then stated courts have "recognized overpayment as a cognizable form of Article III injury," App.11a, and, based on its "judicial experience and common sense," App.19a, found it is "a reasonable inference" for it to make that the Big Kid, without these statements, "would have commanded a lower price." App.21a.

The First Circuit's approach of glossing over the economic harms alleged and lack of facts supporting them, and then inferring injury, conflicts with the fundamental constitutional minimum standing requires, as articulated in *Ashcroft v. Iqbal*: "[a] claim has facial plausibility when the *plaintiff pleads factual content that allows the court to draw the reasonable inference*." 556 U.S. 662, 678 (2009) (emphasis added). It also directly conflicts with other circuits—both as a general premise for constitutional standing and when applied to the specific types of economic injuries Respondents allege. The First Circuit turned this jurisprudence on its head.

1. The First Circuit's Decision, Which Holds That a Plaintiff Has Standing If He Pleads Only Conclusory Allegations of Harm, Squarely Splits with the Third Circuit.

As indicated above, the Third Circuit in *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices and Liab. Litig.* directly conflicts with this ruling and shows how courts should respond to these types of bare pleadings. The plaintiffs there, as here, presented state law consumer-fraud-related theories regarding the company's advertisements of

its products—there, baby powder. The district court rejected the plaintiffs' price premium and benefit of the bargain theories as not being sufficiently pleaded to establish injury-in-fact in ways that directly conflict with the First Circuit's ruling here.

> A plaintiff alleging an economic injury as a result of a purchasing decision must do more than simply characterize that purchasing decision as an economic injury. The plaintiff must instead allege facts that would permit a factfinder to determine, without relying on mere conjecture, that the plaintiff failed to receive the economic benefit of her bargain. Because the plaintiff here has failed to plead facts sufficient to establish economic harm, the District Court's judgment will be affirmed.

903 F.3d at 281. The Third Circuit also disagreed with the First Circuit's notion that plaintiffs can satisfy their *pleading* requirements through promises of future evidence. As here, the plaintiffs there contended they were "not required to offer any economic theory of injury at the pleading stage," and "at the appropriate time after discovery" would "put forth models for calculating damages." *Id.* at 287. The court reiterated that the plaintiffs' "request to indefinitely defer what is a pleading obligation is not one we may grant and still fulfill our constitutional obligations." *Id.* (cleaned up). "While the evidentiary burdens placed on a plaintiff at the pleading stage are minimal, our precedent requires the plaintiff to do more than simply pair a conclusory assertion of money lost with a request that a defendant pay up." *Id.* Yet that is what the First Circuit did below.

Other circuits have issued rulings consistent with the Third Circuit's jurisprudence. The Ninth Circuit, in an unpublished opinion, made this same point. *See Cahen v. Toyota Motor Corp.,* 717 Fed Appx. 720 (9th Cir. 2017) (unpublished). In *Cahen*, as here, plaintiffs alleged economic injury based on alternative theories of harm: but for the alleged misconduct, "they either would not have purchased their vehicles or would have paid less for them." *Id.* at 723. The court held this "economic loss theory is not credible, as the allegations that the vehicles are worth less are conclusory and unsupported by any facts." *Id*. Accordingly, plaintiffs "have not alleged sufficient facts to establish Article III standing." *Id.* at 724.

The district court's ruling dismissing the case at bar is a proper application of this jurisprudence. The court found that "Plaintiffs have alleged no estimate (aside from a bare claim that the seats were 'worthless' to them) of how much the Big Kid would diminish in value, or any facts giving rise to the same." App. 39a. "Even taking Plaintiffs' allegations about the forty-pound seat minimum and side-impact testing as true, they do not offer a plausible explanation of Plaintiffs' economic injury—all Plaintiffs claim is that the Big Kid, because of these alleged problems, were of no value to them. Accordingly, Plaintiffs have not shown they have standing to redress their economic injuries." App. 40a. The Third Circuit would clearly have affirmed this dismissal on appeal.

Before *Spokeo* and *TransUnion*, the Fifth and Sixth Circuit issued rulings that could be consistent with the First Circuit allowing bare conclusory allegations. *See Cole v. General Motors Corp.,* 484 F.3d 717, 723 (5th Cir. 2007) (noting at class certification

stage, "[i]t is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered"); *Loreto v. Procter & Gamble Co.*, 515 Fed. Appx. 576 (6th Cir. 2013) (unpublished) ("Plaintiffs' allegation that they suffered a monetary loss by paying more for a cold remedy because of the company's misrepresentation establishes cognizable injury."). The Court should clarify that the Third Circuit's jurisprudence is the proper application of *Spokeo* and *TransUnion* to the pleadings, or other circuits may rely on the First Circuit's decision when this issue comes before them in the future.

2. The First Circuit's Decision Also Conflicts with the Eleventh, Ninth, and Second Circuits, Which Require Plaintiffs To Plead Facts Supporting Their Alleged Economic Harms, Including Under the Theories at Issue Here.

The First Circuit ruling also splits from other circuits that have required plaintiffs to provide facts supporting their assertions of economic harm, including under the very same benefit-of-the-bargain theories presented here. These rulings provide a strong indication that these circuits agree with the Third Circuit that conclusory allegations alone do not plausibly state any of the economic harms alleged here.

First, Respondents allege one of the economic harms they may have sustained is the full value of the Big Kid booster seats. The Eleventh Circuit has held that, for the economic loss to be the full cost of the product, the plaintiffs must allege facts showing their purchase was "worthless" to them. *Debernadis*, 942 F.3d at 1086-87. The court held "plaintiffs have

standing because they allegedly experienced economic loss when they purchased a product that the FDCA banned from sale because it was presumptively unsafe," making the product worthless. They received no value for their purchase. Here, Respondents provided no facts that they did not receive value for their purchase. They used their Big Kid booster seats for months or years (and may presumably continue to do so) without incident, and none allege they stopped using their Big Kid booster seat because of the concerns they allege. Thus, there can be no reasonable inference that Respondents would be entitled to the full price they paid for their Big Kid booster.

The First Circuit stated this theory of harm was plausible by inferring on its own that Respondents would not have bought any booster seat at all. App.21a. Without factual support, it posited that parents "could have continued using other models [they already owned] rather than choosing to buy a new seat." *Id.*[1] However, no Respondent alleged the car seat model they previously owned would (or could) have accommodated a child up to the age, height and weight of a booster seat. It also was not reasonable to infer parents would forego buying a car seat given that its use is required by law in each state where Respondents reside.[2] Thus, this infer-

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[1] This is not necessarily the case. If a plaintiff's child was tall, and had outgrown the seat without reaching 40 pounds in weight, then the previously-owned seat would not be available.

[2] *See, e.g.*, Fla. Stat. § 316.613 (under five years); Colo. Rev. Stat. § 42-4-236 (under eight years); N.Y. Veh. & Traf. Law § 1229-c (same); 75 Pa. Cons. Stat. § 4581 (same); Cal. Veh. Code § 27360 (under eight years and under fifty-

ence by the court is *unreasonable*. This situation demonstrates the danger of replacing facts with judicial "common sense." Respondents did not plausibly plead their economic loss can be the entire cost of the Big Kid, and the First Circuit should not have rewritten the complaint to infer otherwise.

Second, Respondents allege their economic harm was a portion of a product's cost. Other circuits have required plaintiffs to allege *facts* leading to a reasonable inference they would have or could have paid less for the product given their allegations. *See John*, 858 F.3d at 732. In *John*, a plaintiff included in the pleadings a study showing the defendant's pattern of overcharging for pre-packaged goods, which the court held sufficiently demonstrated injury-in-fact because the plaintiff could show he regularly purchased such goods. *Id*. at 737 ("For present purposes, [Plaintiff] has plausibly alleged a nontrivial economic injury sufficient to support standing"). The court explained that at the pleading stage the plaintiff "need not prove the accuracy of the [findings] or the rigor of its methodology" because "targeted discovery" could determine whether obstacles of applying the study to his claims could be surmounted. *Id.* Alleging facts regarding economic studies created a factual foundation from which an inference could be drawn. Whether the facts were true were subject to discovery.

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seven inches in height); Ohio Rev. Code Ann. § 4511.81 (same); Okla. Stat. tit. 47, § 11-1112 (same); S.C. Code Ann. § 56-5-6410 (same); Tenn. Code Ann. § 55-9-602 (same); Tex. Transp. Code Ann. § 545.412 (same); W. Va. Code § 17C-15-46 (same).

The opposite situation exists here. Respondents provided no facts as to any diminished value or how it would be assessed, or what the market value of the Big Kid would have been had Evenflo not made the statements in question. They did not provide facts that weight minimums or side-impact testing would impact the retail price of a booster seat (including one priced well below its competitors), scientific literature on price premiums, studies on overpayments, or even a range of what each Respondent believed to be his or her overpayment. The First Circuit excused this factual void by stating "at the pleading stage, to demonstrate Article III standing, plaintiffs need not quantify or offer a formula for quantifying their injury." App.22a. "[I]t is a reasonable inference that, if Evenflo had not marketed the Big Kid as safe for children as small as thirty pounds and as side impact tested, the product would have commanded a lower price." App.21a. But the facts in the complaint contradict this inference: the Big Kid was priced to sell for $10 less than its primary competitor and other seats sell for well more than the Big Kid. App.22a. Thus, this ruling conflicts with the Second Circuit.

Third, Respondents allege economic loss by not purchasing a cheaper alternative. The Ninth Circuit, in *Reid v. Johnson & Johnson*, held the plaintiff had standing only because he showed the product at issue "costs more than similar products" in addition to contending "he would not have been willing to pay as much as he did" but for the alleged misrepresentations. 780 F.3d 952, 957 (2015). Again, the facts here are inapposite: Respondents never alleged a cheaper alternative actually existed and acknowledge the Big Kid was $10 less than its chief competitor. App.22a.

The First Circuit acknowledged that "[t]his argument has some force, but we conclude that, at the pleading stage, it does not defeat the plaintiffs' standing." *Id.* "Given that purchasing a different seat is only one of the three alternative courses of action described in the complaint and the *possibility* that a cheaper alternative exists, the complaint, taken as a whole, plausibly supports the plaintiffs' argument that Evenflo's misrepresentations caused them to overpay." *Id.* (emphasis added). Possibility is not plausibility.

Thus, these rulings in the Eleventh, Second, and Ninth Circuits conflict with the First Circuit's ruling with respect to the specific economic hams alleged. If presented with this case, all of these circuits would undoubtedly enforce Respondents' obligation to provide facts establishing a plausible injury-in-fact. The Court should grant the Petition to resolve this split among the circuits and make clear that, when plaintiffs have not alleged facts establishing their alleged injury-in-fact is sufficiently plausible for Article III standing, courts should not satisfy this burden for them. Otherwise, "inferences" the courts purport to make are nothing more than mere speculation and could open the door for groundless litigation.

B. The First Circuit's Decision Also Implicates a Split with the Eighth Circuit, Which Requires an Additional Showing of Harm To Establish Economic Damages in Latent Defect Cases.

The Eighth Circuit has also weighed in on the scope of economic injury in the context of latent defect class actions, in which, similar to here, a con-

sumer alleges a safety issue that has not manifested for the plaintiff bringing suit. That court squarely holds that plaintiffs do *not* have standing (at the class certification and summary judgment stages) to seek economic harm for unmanifested safety issues. Thus, the Eighth Circuit has repeatedly held that economic harms are not sufficiently concrete for Article III standing when based on the risk of future injury. This statement on the scope of what economic harm claims require conflicts with the First Circuit's decision. In the Eighth Circuit, economic harm is *precluded* in these cases because the plaintiff bought and safely used the product without suffering any physical injury, and thus received the benefit of his bargain as a matter of economics. This definition of what economic harm requires would never pass muster under the First Circuit's reasoning in this case.

Principles of Article III standing turn on the scope of the constitution, not the nature of the claim pleaded. Whether brought as a products or misrepresentation claim—which, incidentally, may actually be subject to the higher pleading standards for fraud under Rule 9(b)—a plaintiff cannot proceed past a motion to dismiss unless he pleads facts to support *all* elements of standing: injury, causation, and redressability. When a plaintiff seeks economic damages, he must allege facts that (if developed in discovery and proven at trial) establish economic harm. This is not a question of mathematical precision for establishing damages at the pleading stage. A complaint must simply put forth a plausible theory of economic harm. Conclusory statements that the plaintiff was harmed, without more, do not do the work that plausibility pleading requires.

The First Circuit acknowledged this tension with the Eighth Circuit. App.15a ("Eighth Circuit precedent less clearly favors the plaintiffs."). It argued that there is a difference between *product* claims over the risk of future injury and *misrepresentation* claims over such future risks: the "reliance on misrepresentation distinguishes this case from the products liability actions in which the Eighth Circuit has found standing lacking for want of injury." App.16a. But, the Eighth Circuit has been resolute in rejecting standing in cases that allege current economic harms over the risk a product may cause physical injury in the future regardless of the way in which they are packaged. *See, e.g.*, *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981 (8th Cir. 2021) ("It is not enough to allege ... a product is *at risk* for manifesting this defect; rather, the plaintiff must allege that their product actually exhibited the alleged defect."); *Penrod v. K&N Eng'g, Inc.*, 14 F.4th 671 (8th Cir. 2021) (same).

In these cases, the Eighth Circuit has rejected "attempt(s) to sidestep the manifest defect rule" by reframing their claims as an economic harm. *Id.* at 988 In *Polaris*, plaintiffs alleged "economic injury by the mere fact that they paid an inflated purchase price" and that "the average [product] buyer would not pay the sticker price if they knew" of the potential safety concerns. *Id.* But that court rejected this characterization of the case: "At its core, [this] argument is that purchasers without manifest defects should be able to piggyback on the injury caused to those with manifest defects. That theory is in direct conflict with the manifest defect rule and does not create an Article III injury." *Id.*

In *Penrod*, the Eighth Circuit pointed out that plaintiffs relied on "various contract cases and theories to argue that the uninjured class members do, in fact, have cognizable injuries." 14 F.4th at 674.[3] It reiterated that plaintiffs "cannot now recast their product liability claim into a non-existent breach of contract claim." *Id.* Also, plaintiffs "refer to an alleged economic injury that was suffered based on the difference in the price between the defective oil filter and a non-defective one." *Id.* But "until the product fails or causes injury, the purchasers of the [product] have received the benefit of their bargain." *Id.* "Lastly, we reject plaintiffs' argument that separately analyzing their claims under state consumer protection law impacts the analysis. Plaintiffs' complaint still fails to plausibly allege damages to satisfy the jurisdictional threshold." *Id.* at 675. Thus, the Eighth Circuit would be inhospitable to the case at bar.

Allowing the First Circuit's distinction to stand will encourage class counsel to simply re-cast claims over the risk of future injury as misrepresentation claims, both because it would increase their chance of courts accepting their speculative economic harm allegations as viable Article III injuries and, when coupled with the court's allowance of conclusory allegations of harm, reduce their burden to plead facts showing this speculative harm.[4] Indeed, the ease of

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[3] The court assessed plaintiffs' ability to plausibility plead damages under the Class Action Fairness Act, but stated that the analysis under Article III standing would be the same. *See Penrod v. K&N Eng'g, Inc.*, 14 F.4th 671, 674 (8th Cir. 2021).

[4] This scenario also would undermine the Court's caution in *TransUnion* against claims based on the risk of future harm.

doing so can be seen from the complaint here, which is replete with product liability-related jargon. App.20a (observing the complaint refers to the "*defective nature* of Evenflo's Big Kid booster seat" and other product defect language). Ironically, the risk of future harm found too speculative for standing in the Eighth Circuit is even less certain here. Petitioner's statements about the Big Kid were true; they just did not contain information Respondents allege they now would have preferred. Further, it should be axiomatic that pleading standards for claims based on a changed *perception* of risk should be higher, not lower, than an *actual* increase in risk.

Indeed, such a result would be entirely inconsistent with the heightened pleading standards that apply to misrepresentation and fraud-based claims *because* of the potential for these claims to be too speculative. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see* also JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE & PROCEDURE § 9.11(2)(b)(i), at 9–36 (2007) (Rule 9(b) "usually requires the claimant to allege at a minimum the time, place, and content of the misrepresentation, *the resulting injury*, and the method by which the misrepresentation was communicated") (emphasis added); *New London Tobacco Market, Inc. v. Kentucky Fuel Corp.*, 44 F.4th 393,

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141 S. Ct. at 2211-12 ("If the risk of future harm materializes and the individual suffers a concrete harm, then the harm itself, and not the pre-existing risk, will constitute a basis for the person's injury and for damages.").

411 (6th Cir. 2022) (plaintiff failed to meet Rule 9(b) by not describing the injury alleged).

Constitutional standards for injury-in-fact cannot be so flimsy as the First Circuit suggests, and the distinctions the First Circuit raises with the Eighth Circuit's jurisprudence do not justify different outcomes. Whether claims arising from this alleged wrong sounds in product liability, consumer warranty, or fraud should make no difference to the Article III requirement that the complaint facially pleads plausible harm with facts. Also, the viability of such claims should not depend on whether they are filed in the First or Eighth Circuits.

C. This Petition Is an Excellent Vehicle for the Court to Clarify the Scope of Article III's Injury and Plausibility Requirements for Class Actions Involving Speculative Economic Harms.

This case presents an ideal vehicle for resolving this circuit split and reinforcing the Court's jurisprudence that the obligation on each plaintiff to allege a concrete injury that is real and not abstract is to be enforced "at the pleading stage," where the plaintiff "must 'clearly ... allege facts demonstrating'" such an injury-in-fact. *Spokeo*, 578 U.S. at 338. Class action rules, pleading in the alternative, and judicial inferences cannot be used to circumvent this requirement. *TransUnion*, 141 S. Ct. at 2208 ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not") (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J. concurring)). And, when speculative class injuries are pleaded, particularly in

MDLs where cases are consolidated from around the country, it is critical for the judiciary to speak with a single voice on Article III standing.

In addition, as the First Circuit articulated, this case involves the typical economic injury allegations made in consumer class actions in federal courts today: that consumers did not receive the benefit of their bargain because they would not have bought the product, would have paid less for it, or would have bought a cheaper alternative if only they were aware of certain information. App.7a.[5] Thus, granting the Petition will allow this Court to clarify Article III standing for claims commonly brought in federal courts. Indeed, most circuits that have addressed pleadings under these various economic harm theories have either held that claims that do not provide factual support for their theories of harm have not met their Article III standing burden, or have allowed such claims only after plaintiffs have substantiated their alleged economic injuries with facts.

The Petition also provides the Court the opportunity to address the First Circuit's worry-about-it-later approach to factual allegations that must be in the pleadings. Here, the district court found it disqualifying that the pleadings did not include any "estimate … of how much the Big Kid would diminish in value, or any facts giving rise to the same." App.39a. The First Circuit's response—"At this stage of the

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[5] *See also* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK at 126–27 (2023 ed.) (discussing strategic pressures for vague pleading); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 702 (2016).

litigation, [its] inference suffices to support the plaintiffs' standing even without quantification of the change in market value," App.22a.—reflects a misunderstanding of the injury requirement for standing that this Court should correct.

Respondents need not provide expert analyses of "but for" pricing, but they must specify in the pleadings the value of the bargain they believed they would receive versus the value of the bargain they contend they actually received. These facts, to the extent they exist, are in each plaintiff's possession: a plaintiff knows how much they would have paid for a product, and the economic tools plaintiffs typically rely on later in these cases are merely aggregations of survey responses where individuals estimate how much they would each pay for a product with certain attributes. Discovery is not needed to establish these measures. *Accord Twombly*, 556 U.S. at 560 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process."). Conversely, not granting the Petition will encourage plaintiffs in a variety of cases to resist offering any specific facts in pleadings, arguing they can provide that information later, which, frankly, often never happens.[6]

Finally, the Court can use this case to reinforce its jurisprudence that individuals cannot use class action filings to enter the courthouse doors, engage

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[6] *Cf. Tyler v. Hennepin County, Minnesota*, 598 U.S _ (2023) (affirming standing in a takings case because plaintiff plausibly alleged financial harm by stating how much money a county kept that she argues belongs to her).

in expensive discovery, and leverage the inefficiencies and inequities of class action litigation based on speculative assertions of harm that would clearly not be viable if filed in an individual's case. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (cautioning against "the risk of 'in terrorem' settlements that class actions entail."). If plaintiffs could plead conclusory allegations without factual support, any group of consumers could allege that different marketing statements would have led them to not buy the product, to pay less for it, or to purchase an alternative—and a class action would be born.

This problem is particularly acute in a non-disclosure case such as this, where the information that was provided was itself truthful, but Plaintiffs simply complain more information should have been disclosed. A plaintiff can always say more information should be disclosed and then couple that allegation with speculative injury for lack of that information. Circumvention of the pleading and plausibility standards is a sure-fire way to employ the very *in terrorem* effect *Concepcion* eschewed. Requiring concrete injury to be pleaded in the complaint, in addition to being mandated by Article III, safeguards the federal judiciary from the most speculative of claims and class action abuse.

In this "era of frequent litigation [and] class actions ... courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). Merely having to litigate a putative class action, regardless of the merits, "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and

to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Because of these dynamics, allowing a putative class action to survive a motion to dismiss can enable plaintiffs to leverage the inefficiencies and inequities of the judicial system "to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148, 149 (2008).

The risk of this injustice is heightened, as Justice Ginsburg observed, when "a class action poses a risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n. 3 (2010) (Ginsburg, J., dissenting). This Petition provides the Court with an ideal opportunity to consider and resolve the question presented. This question is undeniably important and exposes potential fissures in the Court's jurisprudence. Failure to grant the Petition would significantly undermine the protections the Court has assiduously developed against conclusory assertions of harm. The Court should grant *certiorari* in this case and reverse or vacate the judgment below.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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June 5, 2023

APPENDIX

TABLE OF APPENDICES

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APPENDIX A — Opinion of the United States Court of Appeals for the First Circuit, Dated November 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1133

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION,

MIKE XAVIER; LINDSEY BROWN; MARCELLA REYNOLDS; MONA-ALICIA SANCHEZ; KEITH EPPERSON; CASEY HASH; JESSICA GREENSCHNER; LAUREN MAHLER; EDITH BRODEUR; DAVID A. SCHNITZER; ASHLEY MILLER; DANIELLE SARRATORI; HAILEY LECHNER; DESINAE WILLIAMS; ELISE HOWLAND; THERESA HOLLIDAY; JOSEPH WILDER; AMY SAPEIKA; NAJAH ROSE; SUDHAKAR RAMASAMY; TARNISHA ALSTON; EMILY NAUGHTON; TALISE ALEXIE; HEATHER HAMPTON; LINDSEY REED; KAREN SANCHEZ; BECKY BROWN; DEBORA DE SOUZA CORREA TALUTTO; KARYN ALY; JANETTE SMARR; KARI FORHAN; JOSHUA KUKOWSKI; ANNA GATHINGS; KRISTIN ATWELL; PENNY BIEGELEISEN; CARLA MATTHEWS; JILLI HIRIAMS; NATALIE DAVIS; CATHY MALONE; JEFFREY LINDSEY; LINDA MITCHELL; RACHEL HUBER; CASSANDRA HONAKER,

Plaintiffs, Appellants,

Appendix A

JANELLE WOODSON; DANA BERKLEY; JESSICA BLOSWICK; COLLEEN CODERRE; GRETA ANDERSON; KRISTEN BRINKERHOFF; LINDA FEINFELD; ANDREW GLADSTONE; GEORGETTE GLADSTONE; ELIZABETH GRANILLO; JANET JUANICH; TERESA MUGA; ASHLEY PERRY; ANGELICA RUBY,

Plaintiffs,

v.

EVENFLO COMPANY, INC.,

Defendant, Appellee,

GOODBABY INTERNATIONAL HOLDINGS LIMITED,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Hon. Denise J. Casper, *U.S. District Judge.*

Before

Lynch and Selya, *Circuit Judges*, and McElroy,* *District Judge*.

November 23, 2022, Decided

* Of the District of Rhode Island, sitting by designation.

Appendix A

LYNCH, ***Circuit Judge***. The district court dismissed the plaintiffs/appellants' operative complaint ("complaint") in this putative class action for lack of Article III standing. *See In re Evenflo Co. Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 20-md-02938, 2022 WL 252331, at *1, *5-6 (D. Mass. Jan. 27, 2022). The complaint alleges that the defendant, Evenflo Company, Inc. ("Evenflo"), made several misrepresentations about the safety and testing of its children's Big Kid car booster seat and that the plaintiffs bought the seat relying on those misrepresentations for use by their children and grandchildren (collectively, "children"). The complaint alleges that, but for Evenflo's misrepresentations, the plaintiffs would not have purchased the seat, would have paid less for it, and/or would have bought a safer alternative. We refer to these three harms as "overpayment." The complaint alleges that Evenflo's misrepresentations caused the plaintiffs to spend money that they otherwise would not have spent. It does not allege that the plaintiffs' children were hurt while using the seat or that the product otherwise failed to perform. The complaint raises a variety of state law claims and requests monetary, declaratory, and injunctive relief.

We hold that the plaintiffs' pleadings plausibly demonstrate their standing to seek monetary relief. We also hold that the plaintiffs lack standing to seek declaratory and injunctive relief. We affirm in part, reverse in part, and remand for further proceedings.

Appendix A

I.

A.

We describe the facts as they appear in the plaintiffs' complaint. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 728 (1st Cir. 2016).

The complaint asserts fifty-eight state law counts, including claims for fraudulent concealment, unjust enrichment, negligent misrepresentation, violations of various state consumer protection statutes, and breaches of implied warranties of merchantability under several other state statutes. The plaintiffs seek to certify a nationwide class of "[a]ll persons in the United States . . . who purchased an Evenflo 'Big Kid' booster seat between 2008 and the [complaint's filing]," as well as subclasses for each state, the District of Columbia, and Puerto Rico, and request monetary, injunctive, and declaratory relief.

The complaint alleges that "the market for children's car safety seats is generally grouped around . . . three basic designs that track, sequentially, with children's growing weights and heights: rear-facing seats, forward-facing seats with harnesses, and belt-positioning booster seats." Evenflo manufactures and sells all three types of seats. The plaintiffs' allegations concern the Big Kid booster seat, a model introduced in the early 2000s and said to offer similar features to a booster seat sold by one of Evenflo's leading competitors but intended to sell for approximately $ 10 less.

Appendix A

The complaint focuses on two misrepresentations Evenflo allegedly made about the Big Kid on its website and packaging, in marketing materials, and in its product descriptions at major retailers between 2008 and 2020.

First, Evenflo represented the Big Kid as safe for children as small as thirty pounds. The complaint alleges that Evenflo was aware "[a]s early as 1992 . . . that booster seats were not safe for children under 40 pounds," based on a National Highway Traffic Safety Administration ("NHTSA") "flyer that was [then] pending approval." That flyer stated that a "toddler over one year of age, weighing 20 to 40 pounds, is not big enough for a booster." Further, "since the early 2000s, the [American Academy of Pediatrics ("AAP")] has advised that children who weigh 40 pounds or less . . . are best protected in a seat with its own internal harness." In 2011, both NHTSA and the AAP updated their guidances to reflect "that parents should keep their children in rear-facing child safety seats for as long as possible before transitioning them to forward-facing harnessed seats, and that switching children to booster seats [from forward-facing harnessed seats] at 40 pounds was no longer recommended." In 2012, "Evenflo's top booster seat engineer" delivered an internal presentation that Evenflo should "modify[] the [Big Kid's] weight rating to 40 [pounds]" in order to "discourage early transitions to booster seats," which place younger children at an "increased risk of injury." A senior marketing director "vetoed" this weight recommendation; the same marketing executive also rejected another proposal to modify the weight limit later that year.

Second, the complaint alleges that Evenflo misrepresented that the Big Kid had been "side impact tested." Evenflo also stitched a "side impact tested" label onto the seats. Evenflo described its side impact testing on its website as meeting or exceeding federal standards and "simulat[ing] the government side impact tests conducted for automobiles."

The plaintiffs describe this side impact testing claim as "misleading at best." Between 2008 and 2020, NHTSA did not require or set a standard for side impact testing of booster seats. *See* 49 C.F.R. § 571.213 (setting requirements for child seats). The complaint alleges that NHTSA's side impact testing for vehicles incorporates two different tests, assessing the damage done to crash test dummies after (1) crashing "a 3,015 pound moving barrier . . . at 38.5 miles per hour into a standing vehicle" and (2) pulling "a vehicle angled at 75 degrees . . . sideways at 20 miles per hour into a 25 cm diameter pole at the driver's seating location." Evenflo's test was "performed by placing a product on a bench (resembling a car seat), moving that bench at 20 miles per hour, then suddenly decelerating it." Evenflo considered a booster seat to have failed this test only if "(1) . . . a child-sized dummy escape[d] its restraint entirely, . . . or (2) the booster seat itself [broke] into pieces." An Evenflo technician "has stated that, in 13 years, he did not once perform a 'failed' side-impact test," and an Evenflo engineer "admitted under oath that, when real children move in [ways displayed by crash test dummies in tests considered successful by Evenflo], they are at risk for injurious head contact."

B.

The plaintiff Evenflo customers brought a number of suits against the company related to the Big Kid's marketing and safety in various federal district courts in early 2020. The Judicial Panel on Multidistrict Litigation centralized the actions and then transferred them to the District of Massachusetts in June 2020.

On October 20, 2020, the plaintiffs filed a consolidated amended class action complaint. This operative complaint names forty-three plaintiffs from twenty-eight states who purchased Big Kids for their children between 2010 and 2020. The complaint alleges that Evenflo's representations that the Big Kid was side impact tested and safe for children as small as thirty pounds were false or misleading. Three of the plaintiffs allegedly were involved in car accidents after purchasing the Big Kid, but none seek recovery for any physical injuries, if there were any, to their children. Although the exact language varies over the course of the complaint, the complaint typically alleges that "[h]ad [the plaintiffs] known about the defective nature of Evenflo's Big Kid booster seat[], [they] would not have purchased the seat, would have paid less for it, or instead would have purchased one of many safer available alternatives."

On November 20, 2020, Evenflo moved to dismiss the complaint with prejudice. Evenflo argued that the plaintiffs lacked standing because they had not been injured by Evenflo's conduct, that the complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)

(6), and that the plaintiffs had not pleaded their fraud claims with the particularity required by Rule 9(b).

The district court concluded that the plaintiffs lacked standing and granted Evenflo's motion on January 27, 2022. *See In re Evenflo*, 2022 WL 252331, at *1, *5-6. The court reasoned that the plaintiffs had failed to establish any economic injury sufficient to pursue monetary relief because (1) the complaint did not allege that the seats failed to perform -- such that the plaintiffs had necessarily received the benefit of the bargain in purchasing them -- and (2) the plaintiffs had not plausibly shown that the seats were worth less than what they had paid for them or estimated their true value. *See id.* at *3-5. The court also concluded that the complaint did not allege any likelihood of future injury sufficient to create standing to pursue injunctive relief. *See id.* at *5-6. The court did not address Evenflo's other arguments for dismissal, and it did not specify whether the dismissal was to operate with or without prejudice. *See id.* at *1, *6.

The plaintiffs timely appealed.

II.

Article III of the Constitution limits "[t]he judicial Power" to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *see Kerin v. Titeflex Corp.*, 770 F.3d 978, 981 (1st Cir. 2014). "The existence of standing is a legal question, which we review de novo." *Kerin*, 770 F.3d at 981. "When reviewing a pre-discovery grant of a motion to dismiss for lack of standing, 'we accept as true all well-pleaded fact[s] . . . and indulge all reasonable inferences'

in the plaintiff[s'] favor." *Id.* (first alteration and omission in original) (quoting *Katz v. Pershing, LLC*, 672 F.3d 64, 70 (1st Cir. 2012)). "Because no class was certified below, our review is limited to whether [the named plaintiffs have] standing." *Id.*

"To satisfy th[e] standing requirement, a plaintiff must sufficiently plead three elements: injury in fact, traceability, and redressability." *Id.; see, e.g., TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "An 'injury in fact' is 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not conjectural or hypothetical."'" *Kerin*, 770 F.3d at 981 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted)); *see, e.g., TransUnion*, 141 S. Ct. at 2203. Traceability "requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm." *Katz*, 672 F.3d at 71; *see, e.g., Lujan*, 504 U.S. at 560. And redressability requires the plaintiff to "show that a favorable resolution of her claim would likely redress the professed injury." Katz, 672 F.3d at 72; *see, e.g., Lujan*, 504 U.S. at 561, 568-71.

Importantly, "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion*, 141 S. Ct. at 2208.

We stress that the standing inquiry is distinct from the determination of whether the plaintiffs' claims have merit; "standing in no way depends on the merits of the plaintiff[s'] contention that particular conduct is illegal."

Hochendoner, 823 F.3d at 734 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

III.

We first consider the plaintiffs' standing to pursue monetary relief. The complaint alleges only economic injury in the form of overpayment. In addition to statutory and common law claims explicitly based on misrepresentations, the complaint includes several claims pursuant to state statutes creating implied warranties of merchantability. These statutes are modeled on Uniform Commercial Code ("UCC") section 2-314, which provides, inter alia, that "[g]oods to be merchantable must . . . conform to the promise or affirmations of fact made on the container or label if any." U.C.C. § 2-314(2) (Am. L. Inst. & Unif. L. Comm'n 1977); *see, e.g.*, Alaska Stat. § 45.02.314 (adopting similar language). The plaintiffs' counsel explained during oral argument that they view their claims under these statutes as "essentially . . . fraudulent inducement claim[s] under the UCC," and Evenflo's counsel agreed that these counts are "wrapped up in the same economic harm analysis" as the plaintiffs' other claims. We consider these claims together with the plaintiffs' other claims sounding in misrepresentation. In keeping with the plaintiffs' characterization of their claims, our ultimate holding that the plaintiffs have standing to pursue monetary relief on these counts is limited to the degree to which the plaintiffs seek redress for economic injuries resulting from Evenflo's misrepresentations, rather than any other potential breach of warranty.

Evenflo attacks both the cognizability of overpayment as an injury in the absence of physical or emotional harm and the plausibility of the plaintiffs' pleading of that injury in this case. We consider both arguments in turn.

A.

We first address Evenflo's more sweeping argument: that "where a plaintiff is not actually injured by an allegedly unsafe product, she does not have standing to pursue a claim for damages." We disagree. This court has repeatedly recognized overpayment as a cognizable form of Article III injury. *See Gustavsen v. Alcon Lab'ys, Inc.*, 903 F.3d 1, 7-9 (1st Cir. 2018); *In re Asacol Antitrust Litig.*, 907 F.3d 42, 47 (1st Cir. 2018) (recognizing "injury in the form of lost money fairly traceable to an allegedly unlawful supra-competitive price"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 190 (1st Cir. 2009) (recognizing "overpayment [as] a cognizable form of injury").

Gustavsen illustrates that overpayment for a product -- even one that performs adequately and does not cause any physical or emotional injury -- may be a sufficient injury to support standing. There, this court concluded that a group of consumers had plausibly pleaded a concrete injury by alleging that they had overpaid for eyedrops as a result of bottles that dispensed larger than necessary drops. 903 F.3d at 7-9. The consumers did not claim, for standing purposes, that the eyedrops failed to perform or caused them any physical or emotional harm; they relied entirely on the allegation that, were the bottle more

efficiently designed, they would have spent less money on the product. *See id.*

Evenflo seeks to distinguish *Gustavsen* by characterizing it as involving "the loss of a product that a company forced [the plaintiffs] to waste." But *Gustavsen* did not turn on the fact that the plaintiffs were wasting portions of a consumable product; the court recognized that the plaintiffs had sufficiently pleaded an injury in the form of "an out-of-pocket loss" of money. *Id.* at 7. The plaintiffs assert the same type of injury here. That the mechanics underlying that injury are somewhat different in this case -- a one-time overpayment for a durable product, rather than repeated overpayments for a consumable good -- does not undercut the concreteness of the alleged economic harm.

Kerin also does not undercut the plaintiffs' standing here. The plaintiff there did advance an argument that he had been injured by overpaying for a product, but did not argue that the source of the injury was a misrepresentation. *See* 770 F.3d at 983-84, 984 n.3. The plaintiff's purported injury instead rested entirely on allegations that the product -- which had been approved as to safety against the alleged risk by state regulators -- was defective, or at least unsafe, as a result of vulnerability to lightning strikes, without any argument that the product's manufacturer had misrepresented its quality. *See id.* at 983-84. This court held that, because the purported harm rested entirely on a purported risk of future injury ruled out by regulatory authorities, the plaintiff's failure to allege "facts sufficient to assess the likelihood of future injury" or establish that the product would be the cause

of any damage rendered "the alleged risk of harm . . . too speculative to give rise to a case or controversy." *Id.* at 985; *see id.* at 983-85; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (explaining that plaintiffs asserting injury based on risk of future harm bear burden of showing "injury is not too speculative for Article III purposes" (quoting *Lujan*, 504 U.S. at 565 n.2)). In contrast, the plaintiffs here do not rely on a risk of future injury as grounds for economic loss; instead, they argue that they overpaid (or purchased the product at all) because of Evenflo's past misrepresentations.

Our conclusion that the plaintiffs have standing as to these claims is consistent with precedent from other circuits addressing similar allegations.

Multiple Second Circuit decisions have determined that plaintiffs had standing based on overpayment due to a defendant's false or misleading statements. *See Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 92 (2d Cir. 2018) (finding standing where plaintiff alleged she paid more for product based on purported misrepresentation); *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (finding standing on an overpayment theory where the plaintiff purchased prepackaged groceries labeled and priced as being heavier than they really were); *Axon v. Fla.'s Nat. Growers, Inc.*, 813 F. App'x 701, 703-04 (2d Cir. 2020) (finding standing where the plaintiff "suffered an injury-in-fact because she purchased products bearing allegedly misleading labels and sustained financial injury -- paying a premium -- as a result").

Although the Third Circuit has, in several decisions cited by Evenflo, rejected plaintiffs' efforts to invoke overpayment injuries in cases involving allegedly misleading marketing where the plaintiffs did not suffer any physical injury, its decisions have emphasized the plaintiffs' failure to plausibly plead such an injury. *See, e.g., In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 282-83, 285-90 (3d Cir. 2018). We conclude that the plaintiffs in this case have adequately pleaded the injury.

The Fifth Circuit, in *Cole v. General Motors Corp.*, 484 F.3d 717 (5th Cir. 2007), held that purchasers of vehicles with allegedly defective airbag systems that could inadvertently deploy had standing to sue even though their airbags had never actually inadvertently deployed. *See id.* at 721-23. The court concluded that each plaintiff had suffered an economic injury based on the "difference between what they contracted for and what they actually received" -- an economic injury that manifested "at the moment [each plaintiff] purchased a [vehicle] because each [vehicle] was defective." *Id.* at 722-23. The complaint here alleges analogous economic injuries that manifested at the moment of purchase because each purchase was allegedly the product of misrepresentations, regardless of whether any physical injury ultimately resulted.[1]

1. Evenflo relies on the Fifth Circuit's decision in *Rivera v. Wyeth-Ayerst Laboratories*, 283 F.3d 315 (5th Cir. 2002), which concluded that a group of patients lacked standing to sue over alleged defects -- and the defendant's failure to warn of the alleged defects -- in a medication where the plaintiffs did not claim that the medicine had "caused them physical or emotional injury, was ineffective as a pain killer, or ha[d] any future health consequences." *Id.* at 319. As

The Sixth Circuit, too, recognizes that a "[p]laintiff['s] allegation that [she] suffered a monetary loss by paying more for [a product] because of the [defendant's] misrepresentation establishes a cognizable injury." *Loreto v. Procter & Gamble Co.*, 515 F. App'x 576, 581 (6th Cir. 2013).

The Seventh Circuit has also concluded that an overpayment injury is cognizable for standing purposes. *See In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750-51 (7th Cir. 2011). *Aqua Dots* held that a group of parents who had bought, but whose children had not been injured by, a defective toy had standing to sue based on a "financial [injury]: they paid more for the toys than they would have, had they known of the risks the [toys] posed to children." *Id.* at 751. While the plaintiffs in this case pursue misrepresentation claims, rather than the products liability claims raised in *Aqua Dots, see id.* at 750-51, the injury is analogous, as the complaint here alleges that the plaintiffs paid more than they would have if Evenflo had not misrepresented its products.

Eighth Circuit precedent less clearly favors the plaintiffs but is ultimately consistent with their theory of standing. That circuit has held that "plaintiffs claiming

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the Fifth Circuit explained in *Cole*, however, the *Rivera* plaintiffs "did not assert economic harm emanating from anything other than potential physical harm," *Cole*, 484 F.3d at 722-23; *see Rivera*, 283 F.3d at 319-21; *cf. Kerin*, 770 F.3d at 983, unlike the plaintiffs here, whose complaint alleges that they were injured by Evenflo's misrepresentations. As a result, *Cole* presents the better analogy for this case.

economic injury do not have Article III standing in product defect cases unless they show a manifest defect." *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 988 (8th Cir. 2021) (finding no standing where plaintiffs sought to rely on overpayment theory of injury but did not plead that every product demonstrated the alleged defect). The plaintiffs' case sounds in misrepresentation rather than products liability, however. And the Eighth Circuit has also held that, even if the defect must manifest to support standing, it need not necessarily cause any physical injury; for this reason, consumers who had purchased pipes susceptible to cracking could claim standing based on that defect when the pipes cracked but did not actually leak. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 608-09, 616-17 (8th Cir. 2011). While the plaintiffs here do not assert that every Big Kid they purchased exhibited a defect, the complaint does allege that Evenflo's misrepresentations applied to and influenced each purchase.[2] This reliance on misrepresentation distinguishes this case from the products liability actions in which the Eighth Circuit has found standing lacking for want of injury.

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2. This reliance on an alleged misrepresentation distinguishes this case from *O'Neil v. Simplicity, Inc.*, 574 F.3d 501 (8th Cir. 2009), on which Evenflo relies. There, the plaintiffs, who had purchased an allegedly defective crib from the defendant, did not allege that the defendant had misrepresented its product -- only that some cribs had exhibited a defect, although theirs had not. *See id.* at 503-04. Because the crib had not failed to perform, the court held that the plaintiffs had not been injured. *See id.* Here, the plaintiffs' injury stems from the misrepresentations, not a defect in the Big Kid.

A line of Ninth Circuit decisions holds that "[i]n a false advertising case, plaintiffs [have standing] if they show that, by relying on a misrepresentation on a product label, they 'paid more for a product than they otherwise would have paid, or bought it when they otherwise would not have done so.'" *Reid v. Johnson & Johnson*, 780 F.3d 952, 958 (9th Cir. 2015) (quoting *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1104 n.3 (9th Cir. 2013)); *accord, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 595 (9th Cir. 2012), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022).[3]

Finally, the Eleventh Circuit has held that a "person experiences an economic injury" that "qualifies as a concrete injury" for standing purposes "when, as a result of a deceptive act or an unfair practice, he is deprived of the benefit of his bargain." *Debernardis v. IQ Formulations, LLC*, 942 F.3d 1076, 1084 (11th Cir. 2019). The *Debernardis* plaintiffs sought damages related to their purchase of allegedly adulterated dietary supplements; they did not allege that "the supplements failed to perform as advertised" or inflicted physical harm, but instead

3. Evenflo cites the Ninth Circuit's decisions in *McGee v. S-L Snacks National*, 982 F.3d 700 (9th Cir. 2020), and *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), in support of its argument that "where a plaintiff is not actually injured by an allegedly unsafe product, she does not have standing to pursue a claim for damages." But the court in both cases noted that overpayment as a result of misrepresentations by a defendant *could* create a cognizable Article III injury before determining that the plaintiffs had not alleged any such misrepresentations. *See McGee*, 982 F.3d at 706-07; *Birdsong*, 590 F.3d at 961-62. The plaintiffs here have done so.

asserted that "[b]ecause the supplements had no economic value, each plaintiff paid an 'unwarranted amount' to purchase the supplements." *Id.* at 1082, 1085-86. Evenflo seeks to distinguish *Debernardis* on the grounds that the supplement purchasers alleged that the adulterated products were worthless, *see id.* at 1084-86, but this distinction makes no difference in the standing inquiry. While the Eleventh Circuit did discuss the supplements' alleged worthlessness, it did not state, or even imply, that a diminution -- rather than a complete loss -- in value would not constitute a concrete injury. *See id.* On the contrary, it observed that when a "product retains some value," a plaintiff's "damages are less than the entire purchase price" -- but that plaintiff is nonetheless injured. *Id.* at 1084. And, in any event, a requirement that plaintiffs allege that a product is *worthless* in order to invoke an overpayment injury is irreconcilable with the rule that "a relatively small economic loss -- even an 'identifiable trifle' -- is enough to confer standing." *Katz*, 672 F.3d at 76 (quoting *Adams v. Watson*, 10 F.3d 915, 924 (1st Cir. 1993)).

Evenflo, supported by its amici, argues that this body of precedent recognizing overpayment injuries is in tension with the Supreme Court's recent decisions in *Spokeo v. Robins*, 578 U.S. 330 (2016), and *TransUnion*. Those decisions examined the concreteness requirement for injury in fact, reaffirming that the injury must be "real, and not abstract." *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 340); *see id.* at 2204-07; *Spokeo*, 578 U.S. at 340-43. Contrary to Evenflo's argument, the decisions made clear that monetary harms such as those alleged here fall firmly on the real, concrete side of the

divide. *TransUnion* in fact described "monetary harms" as "traditional tangible harms" that "readily qualify as concrete injuries under Article III," and contrasted such harms with more abstract -- although still concrete -- forms of injury, such as "reputational harms, disclosure of private information, and intrusion upon seclusion." 141 S. Ct. at 2204. Nothing in *TransUnion* indicated that some monetary harms are concrete while others are not; the Court there held that properly pleaded monetary harms -- like those asserted by the plaintiffs here -- *are* sufficiently concrete, as compared to other, nonmonetary forms of injury, which may or may not be concrete. *See id.; see also Gustavsen*, 903 F.3d at 8 (explaining that overpayment injuries involve "actual economic loss, which is the prototypical concrete harm," even after *Spokeo*). *TransUnion* and *Spokeo* support the plaintiffs' standing.

B.

We turn to Evenflo's argument that the complaint does not allege sufficient facts to plausibly demonstrate that, as a result of Evenflo's misrepresentations, the plaintiffs spent more money than they otherwise would have. *See Hochendoner*, 823 F.3d at 731. In conducting this "context-specific" plausibility inquiry, we "'[must] draw on [our] judicial experience and common sense' . . . [and] read [the complaint] as a whole." *García-Catalán v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (first alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). We conclude that, read as a whole, the complaint's allegations satisfy the plausibility standard.

The complaint typically alleges that "[h]ad [the plaintiffs] known about the defective nature of Evenflo's Big Kid booster seat[], [they] would not have purchased the seat, would have paid less for it, or instead would have purchased one of many safer available alternatives."[4] The references to "know[ing] about the defective nature" of the Big Kid are fairly read in the context of the complaint to refer to how the plaintiffs would have acted were it not for Evenflo's misrepresentations, and Evenflo does not argue otherwise. Instead, it contends that these allegations fall short of plausibly demonstrating any financial injury.

Evenflo raises doubts about the plausibility of the purported injury under each of the plaintiffs' proposed alternative courses of action. First, it argues that the plaintiffs could not plausibly "forgo buying [any] car seat, given that the use of a car seat is *required by law* in each state where the [p]laintiffs reside." But the complaint alleges that booster seats are meant to be used only when children outgrow other models of car seat (some of which can "fit children up to 90 pounds") and that Evenflo's

4. For a small number of plaintiffs, the complaint omits the reference to a safer alternative, stating only that the plaintiffs would not have purchased the Big Kid or would have paid less for it were it not for the misrepresentations. We consider these plaintiffs' standing alongside that of the other plaintiffs for two reasons. First, purchasing an alternative seat is an obvious step these plaintiffs might have taken if they chose not to purchase the Big Kid, and so the cost of doing so might still bear on their standing. Second, as discussed below, we see the reference to a safer alternative as the weakest point in the plaintiffs' claim to standing. Considering these plaintiffs alongside the others works to Evenflo's benefit -- though we ultimately conclude that the plaintiffs have plausibly pleaded their standing.

marketing the seat as appropriate for smaller children over thirty pounds presented the product as safe for use (and purchase) sooner than it actually was, making it reasonable to infer that parents could have continued using other models rather than choosing to buy a new seat.

Next, Evenflo attacks the plaintiffs' claim that they might have paid less for the Big Kid for offering no "measure" or "basis" for the decreased price. But it is a reasonable inference that, if Evenflo had not marketed the Big Kid as safe for children as small as thirty pounds and as side impact tested, the product would have commanded a lower price, allowing the plaintiffs to pay less for it.[5]

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5. In *Gustavsen*, this court noted that the plaintiffs had cited "scientific studies and the admission of a marketing executive" in arguing that, were eyedrop bottles more efficiently designed, the plaintiffs' costs would decrease. 903 F.3d at 8. But *Gustavsen* did not establish a bright-line rule that such supporting materials are necessary for pleading this type of injury, and it emphasized their existence because of the "unusual" economic theory advanced by the plaintiffs, "in which a large number of companies independently for[went] what seem[ed] like a profit maximizing opportunity of lowering marginal costs." *Id.* The inference in this case -- that a loss of favorable marketing claims would make a product less marketable -- is much more straightforward.

Lee v. Conagra Brands, Inc., 958 F.3d 70 (1st Cir. 2020), on which Evenflo also relies in support of its argument that the complaint must quantify the plaintiffs' injury, noted that the plaintiff, who alleged overpayment based on a misleading product label, had cited "several studies" in her pleadings to support her theory of harm. *Id.* at 80. *Lee*, however, concerned the requirements for pleading injury under a Massachusetts state statute, not Article III, and, in any event, did not indicate that such studies are always required. *See id.* at 80-81. The

At this stage of the litigation, that inference suffices to support the plaintiffs' standing even without quantification of the change in market value.

Finally, Evenflo highlights the plaintiffs' allegation that, were it not for Evenflo's misrepresentations, they may have purchased a safer alternative seat. It points out that the complaint does not allege that such alternatives would have been cheaper -- and in fact alleges that the Big Kid was roughly $10 cheaper than its chief competitor. This argument has some force, but we conclude that, at the pleading stage, it does not defeat the plaintiffs' standing. *Cf. Axon*, 813 F. App'x at 704 (recognizing injury even where the plaintiff "fail[ed] to identify the prices of competing products to establish the premium that she paid"). Given that purchasing a different seat is only one of the three alternative courses of action described in the complaint and the possibility that a cheaper alternative exists, the complaint, taken as a whole, plausibly supports the plaintiffs' argument that Evenflo's misrepresentations caused them to overpay.

Evenflo also faults the plaintiffs for "offer[ing] no theories of how damages could be measured"; although it concedes that "[a] precise amount of damages need not be pleaded," it asserts that the plaintiffs must at least offer "the formula" for measuring damages. But at the pleading stage, to demonstrate Article III standing, plaintiffs need not quantify or offer a formula for

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relevant question under Article III remains whether the complaint alleges sufficient facts to "plausibly demonstrate [the plaintiffs'] standing." *Gustavsen*, 903 F.3d at 7 (quoting *Hochendoner*, 823 F.3d at 731).

quantifying their injury. *See, e.g.*, *TransUnion*, 141 S. Ct. at 2211 (recognizing possibility of "an actual harm that . . . is not readily quantifiable"); *García-Catalán*, 734 F.3d at 103 (emphasizing that the plausibility standard "does not demand 'a high degree of factual specificity'" in the context of a motion to dismiss under Rule 12(b)(6) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 47 (1st Cir. 2012))).

We note that the plaintiffs' allegations readily satisfy the remaining requirements of traceability and redressability. Indeed, Evenflo makes no argument to the contrary. The complaint alleges that the plaintiffs overpaid because of Evenflo's misrepresentations, making their injury traceable to the challenged conduct. *See, e.g., Katz*, 672 F.3d at 76-77. And monetary relief would compensate them for their injury, rendering the injury redressable. *See, e.g., Gustavsen*, 903 F.3d at 9.

As to arguments going to whether a claim is stated -- for instance, Evenflo's assertions that its statements were not false, misleading, or inconsistent with regulatory requirements -- they are not properly before us on appeal. *See Hochendoner*, 823 F.3d at 734 (distinguishing between inquiries under Rules 12(b)(1) and 12(b)(6)).

As the case proceeds, the plaintiffs will bear the burden of substantiating their alleged injuries, and Evenflo may challenge their success in doing so. *See, e.g., Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 362-64 (1st Cir. 2001) (discussing different forms of jurisdictional challenges). Evenflo raised a variety of other arguments for dismissal before the district court which that court did not reach. We

leave it for the district court to consider those arguments in the first instance. *See, e.g., Hochendoner*, 823 F.3d at 735 (remanding case for district court to consider alternative bases for dismissal).

IV.

The plaintiffs' briefs do not address their standing to pursue declaratory relief, and so they have waived any argument on that point. *See, e.g., FinSight I LP v. Seaver*, 50 F.4th 226, 236 (1st Cir. 2022) (argument "presented in conclusory fashion" is waived).

"Standing for injunctive relief depends on 'whether [the plaintiff is] likely to suffer future injury . . . .'" *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 276 (1st Cir. 2022) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). Nothing in the plaintiffs' complaint suggests any possibility of future harm; for example, the complaint does not allege that any plaintiff intends to purchase a Big Kid in the future. The plaintiffs' assertions about their past behavior do not plausibly allege any likelihood of relying on Evenflo's advertising or purchasing Big Kids in the future, and so there is no impending future injury that an injunction might redress. The plaintiffs argue that this reasoning would allow Evenflo to "continue falsely marketing its Big Kid seats to parents and grandparents . . . who will continue to purchase them because of Evenflo's false statements." But a hypothetical future injury to other unnamed "parents and grandparents" does not give these plaintiffs standing.

V.

Finally, the plaintiffs request that we "amend, or direct the district court to amend, the judgment to provide for dismissal without prejudice."[6] Although Evenflo's motion to dismiss requested that the district court "dismiss[] the [complaint] . . . with prejudice," the district court's decision and order granting the motion did not state whether it was to operate with or without prejudice. The accompanying "Judgment in a Civil Case" form signed by the court's deputy clerk entered "[j]udgment for the defendant" "[i]n accordance with" the court's decision and order.

The plaintiffs correctly point out that "a dismissal for lack of Article III standing *must* operate without prejudice." *Hochendoner*, 823 F.3d at 736 (emphasis added). Given the ambiguity in the district court's order, we "direct the district court, on remand, to clarify its judgment to reflect that the judgment is to operate without prejudice" to the extent we affirm the dismissal for lack of standing.[7] *Id.*

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6. Evenflo argues that the plaintiffs should not be granted leave to amend their complaint, but the plaintiffs do not appear to request that form of relief on appeal.

7. Evenflo argues that the plaintiffs waived, or at least forfeited, any argument in favor of dismissal without prejudice by not raising it before the district court. But it is far from clear that the district court *did* dismiss with prejudice. And, in any event, the rule that dismissal for lack of standing must be without prejudice reflects the fact that a court lacks Article III jurisdiction "to enter a judgment on the merits," *Hochendoner*, 823 F.3d at 736, and accordingly implicates "a constitutional requirement that can never be waived," *Unión Internacional UAW, Local 2415 v. Bacardí Corp.*, 8 F.4th 44,

VI.

We *affirm* in part, *reverse* in part, and *remand* the matter for further proceedings consistent with this opinion. All parties shall bear their own costs on appeal.

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52 n.5 (1st Cir. 2021) (citing *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 35 (1st Cir. 2020)).

APPENDIX B — Memorandum and Order of the United States District Court for the District of Massachusetts, Dated Jan. 27, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MDL No. 20-md-02938-DJC

IN RE EVENFLO CO., INC. MARKETING, SALES PRACTICES & PRODUCTS LIABILITY LITIGATION

This Document Relates To:

All Actions

MEMORANDUM AND ORDER

CASPER, J. January 27, 2022

I. Introduction

A putative class of consumers that purchased the Big Kid booster seat ("Plaintiffs") have filed this lawsuit against Defendant Evenflo Company, Inc. ("Evenflo") alleging fraudulent concealment (Count I), unjust enrichment (Count II), negligent misrepresentation (Count III) and violation of the consumer protection and implied warranty laws of twenty-eight states (Counts IV—LVIII). D. 67. Evenflo has moved to dismiss. D. 79. For the reasons stated below, the Court ALLOWS the motion.

II. Standard of Review

Pursuant to Fed. R. Civ. P. 12(b)(1), a defendant may move to dismiss an action for lack of subject matter jurisdiction. "[T]he party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995) (quoting *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (1st Cir. 1993)). To determine if the burden has been met, the Court "take[s] as true all well-pleaded facts in the plaintiffs' complaints, scrutinize[s] them in the light most hospitable to the plaintiffs' theory of liability, and draw[s] all reasonable inferences therefrom in the plaintiffs' favor." *Fothergill v. United States*, 566 F.3d 248, 251 (1st Cir. 2009).

A defendant may also move to dismiss for a plaintiff's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Although detailed factual allegations are not necessary to survive a motion to dismiss, the standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "The relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 13 (1st Cir. 2011).

III. Factual Background

Unless otherwise noted, the following facts are drawn from Plaintiffs' consolidated amended complaint, D. 67, and are taken as true for the purpose of resolving the motion to dismiss.

A. Evenflo's Big Kid Booster Seat

Evenflo manufactures and sells children's car seats. D. 67 ¶¶ 224-25. There are three basic designs of these seats that correspond to children's weights and heights: rear-facing seats, forward-facing seats with harnesses and belt-positioned booster seats. *Id.* ¶ 215. In the early 2000s, Evenflo introduced a belt-positioned booster seat, the Big Kid, which it marketed as safe for children as young as one with a minimum weight of thirty pounds and no minimum height. *Id.* ¶¶ 224-25. The Big Kid was designed with similar features to a booster seat from one of Evenflo's competitors, Graco, but was priced lower. *Id.* In 2008, Evenflo added side wings to the Big Kid to align with Graco's design and increase customers' perception of the Big Kid's safety. *Id.* ¶¶ 226-27.

The National Highway Traffic Safety Administration ("NHTSA") promulgates the federal safety regulation, 49 C.F.R. § 571.213 ("FMVSS 213"), with which booster seats must comply before they are sold in the United States. *See id.*; 49 C.F.R. § 1.95 (delegating authority to NHTSA for promulgating regulations including safety standards); D.

67 ¶ 211.[1] The American Academy of Pediatrics ("AAP") also develops and publishes its own guidance for safety standards for these seats. *Id.* NHTSA and AAP have recommended a harnessed seat for children who weigh forty pounds or less because adult seat belts may not adequately hold a child in place. *Id.* ¶¶ 212, 216-19, 245. In 2011, NHTSA and AAP both updated their guidance to recommend that parents keep children in a specific seat type for as long as possible (i.e., until they max out the manufacturer's height and weight limits) before moving them up to the next type of seat. *Id.* ¶¶ 265, 265 n. 26.

1. Side Impact Testing

Evenflo advertises the Big Kid as "side impact tested" on its own website and packaging, in its marketing, and in product descriptions at major retailers. *Id.* ¶¶ 247-49, 271-72. Evenflo also stitches a "side impact tested" label onto the seats. *Id.* ¶ 249.

Because NHTSA has not regulated side impact testing for booster seats, Evenflo developed its own side impact test. *Id.* ¶¶ 229-30; *see* 49 C.F.R. § 571.213 S5.1, S6.1 (specifying required tests). Evenflo did not publicly disclose its testing protocol, but states that its "rigorous test simulates the government side impact tests conducted for automobiles" and "simulates the energy in the severe 5-star government side impact tests conducted for

1. The Court takes judicial notice of applicable NHTSA regulations (i.e., FMVSS 213), which Plaintiffs incorporate by reference into their complaint. *See Schuster v. Harbor*, 471 F. Supp. 3d 411, 416 (D. Mass. 2020) (taking judicial notice of agency rules referenced in complaint on motion to dismiss).

automobiles." *Id.* ¶¶ 230, 234, 272. Evenflo further states that it "continue[s] to go above and beyond government standards to provide car seats that are tested at 2X the Federal Crash Test Standard" and all of its car seats "meet or exceed all applicable federal safety standards and Evenflo's side impact standards." *Id.* ¶¶ 233-34, 272.

Although NHTSA does not perform or require side impact testing for booster seats, NHTSA's crash testing protocol for vehicles rates them based on the extent of injuries observed in crash dummies during two simulated side impact crash scenarios: an intersection-type collision with a 3,015-pound moving barrier at 38.5 miles per hour and a telephone pole crash where a vehicle is pulled into the pole at 30 miles per hour. *Id.* ¶ 232. Evenflo performs its side impact test by placing the Big Kid seat on a bench, moving the bench at 20 miles per hour, then suddenly decelerating it. *Id.* ¶ 231. A booster seat only fails this test if the child crash dummy escapes its restraint entirely and ends up on the floor or if the booster seat itself breaks apart into pieces. *Id.* ¶ 238. As a result, the Big Kid rarely fails Evenflo's side impact test. *Id.* ¶ 239. In its testing, Evenflo has observed the seat belt slipping off the dummy's shoulders and tightening around the abdomen and ribs, which puts children at risk of head injury. *Id.* ¶¶ 240-41.

2. Weight and age minimum

When Evenflo first introduced the Big Kid in the early 2000s, it marketed the seat as safe for children as young as one-year-old so long as they weighed thirty pounds, with no minimum height. *Id.* ¶ 260. Engineers at the company

have since concluded that one- and two-year-olds should not be placed in a booster seat, and, in 2007, Evenflo raised the minimum age for the Big Kid to three and added a minimum height of thirty-eight inches. *Id.* ¶¶ 261-62. Evenflo then warned consumers that placing a child under the new age and height minimum in the Big Kid could "result in your child striking the vehicle's interior during a sudden stop or crash, potentially resulting in serious injury or death." *Id.* ¶ 262. Around 2012, a senior booster seat engineer at Evenflo circulated research reports suggesting that three- and four-year-olds were at an increased risk of injury in booster seats because they often do not sit in them properly. *Id.* ¶¶ 266-67. The engineer concluded that having the weight minimum at thirty pounds encourages parents to transition children to a booster seat early, but that Evenflo should discourage such a change in favor of keeping children in harnessed seats longer. *Id.* The engineer further suggested that Evenflo raise the weight minimum to forty pounds and to follow NHTSA's 2011 guidelines, which recommend a four-year age minimum for booster seats. *Id.*[2] In late 2012, Evenflo raised the Big Kid's age minimum to four years old. *Id.* ¶ 268. The engineer's suggestion to increase the weight minimum was rejected. *Id.* Even after Evenflo increased the Big Kid's age minimum, it continued selling old models with manuals from 2008, which stated that the seat was safe for three-year-olds. *Id.* ¶ 269. Evenflo increased the Big Kid's weight minimum to forty pounds in 2020 following an investigative news article reporting on the facts alleged above. *Id.* ¶ 253.

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2. The 2011 NHTSA guidelines are recommendations, not regulations. *See id.* ¶ 265, 265 n.26.

B. Big Kid Purchases

Plaintiffs come from twenty-eight states. *Id.* at 16-43. Each named plaintiff purchased a Big Kid booster seat between 2008 and the present. *Id.; id.* ¶ 293 (defining putative class). Although four plaintiffs allege that they were involved in a car accident, one of which was prior to purchasing a Big Kid, and one plaintiff alleging an injury during a car accident while using the Big Kid seat, *see id.* ¶¶ 24, 139-40, 160, 185, Plaintiffs allege economic injury. That is, each plaintiff alleges that that had she "known of the significant safety risks posed by the Big Kid booster seat, and the low threshold for Defendant giving its own booster seat a passing grade regarding side impact testing, she would not have purchased this seat, would have paid less for it, or instead would have purchased one of many safer available alternatives." *See, e.g., id.* ¶ 188.

IV. Procedural History

In February 2020, purchasers of the Big Kid brought the first lawsuit against Evenflo in the Southern District of Ohio. *Xavier v. Evenflo Co. Inc.*, No. 3:20-cv-00053 (S.D. Ohio Feb. 12, 2020). Various other purchasers then filed suit in multiple district courts. The Judicial Panel on Multidistrict Litigation subsequently ordered all Evenflo booster seat actions centralized and transferred the actions to this Court. D. 2, 5. Plaintiffs later filed their consolidated amended complaint. D. 67. Evenflo has now moved to dismiss. D. 79. The Court heard the parties on the pending motion and took this matter under advisement. D. 91.

V. Discussion

A. Standing

As an initial matter, Evenflo challenges Plaintiffs' standing to bring this suit. D. 80 at 26. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy" within Article III of the U.S. Constitution, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), and serves to "identify those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). To establish Article III standing, Plaintiffs must demonstrate that they "(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." *Spokeo*, 578 U.S. at 338 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs bear the burden of establishing standing, but "the same pleading standards apply both to standing determinations and Rule 12(b)(6) determinations." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 734 (1st Cir. 2016). "An individual's plausible allegations of a personal injury will generally suffice to plead an injury in fact, even if the claim is ultimately lacking on the merits." *Id.*

1. Injury-in-fact

"The '[f]irst and foremost' concern in standing analysis is the requirement that the plaintiff establish an injury in fact." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Spokeo*, 578 U.S. at 338) (alteration in

original)). To do so, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560).

Plaintiffs allege only past economic injury—that they would not have purchased the Big Kid or would have paid less for it—had they known that the seat was "not safe for children weighing between 30 and 40 pounds and that Evenflo's statements about side-impact testing were false and misleading." D. 83 at 16-19; *see, e.g.*, D. 67 ¶¶ 188, 282.

Evenflo contends that the Plaintiffs received the benefit of their bargain, thus they have not alleged a cognizable injury. "Under the benefit of the bargain theory, a plaintiff might successfully plead an economic injury by alleging that she bargained for a product worth a given value but received a product worth less than that value." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 283 (3d Cir. 2018). "The economic injury is calculated as the difference in value between what was bargained for and what was received." *id.*

Evenflo relies upon *In re Fruit Juice Prods. Mktg. & Sales Pracs. Litig.*, 831 F. Supp. 2d 507, 510-13 (D. Mass. 2011), where the district court concluded that a group of consumers lacked standing based in part on insufficient allegations of economic harm. The consumers purchased juice advertised as safe for consumption, but the juice contained lead, and the consumers argued that

the juice posed a health risk to them and their children rendering the juice "valueless." *Id.* at 512. The court rejected Plaintiffs' allegations under this theory of injury, concluding that, "Plaintiffs received the benefit of the bargain, as a matter of law, when they purchased these products," reasoning that, "Plaintiffs paid for fruit juice, and they received fruit juice, which they consumed without suffering harm." *Id.* (citing *Rivera v. Wyeth—Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002) (concluding that plaintiffs lacked standing because they did not show they were harmed by using an anti-inflammatory drug that was later withdrawn from the market because of its potential to cause liver damage)). Plaintiffs' theory of injury further failed, for "[t]he products have not been recalled, have not caused any reported injuries . . . do not fail to comply with any federal standards . . . [and] had no diminished value due to the presence of the lead." *Id.; see Kerin v. Titeflex Corp.*, 770 F.3d 978, 983 (1st Cir. 2014) (affirming dismissal for no standing where plaintiff's "purported present injury, 'overpayment' for a defective product and the cost of replacement, is thus entirely dependent on an unsupported conclusion that the [product] is defective, coupled with a speculative risk of future injury").

Plaintiffs attempt to distinguish *Fruit Juice* by arguing that their allegations are not merely that the Big Kid was unsatisfactory to them, but rather that the seat was unsafe for children under forty pounds. D. 83 at 19.[3] But that is precisely what the *Fruit Juice* plaintiffs

3. Plaintiffs do not allege that the Big Kid was recalled. *See* D. 67. Moreover, Plaintiffs do not allege that the Big Kid fails to

alleged—that the juice was unsafe to consume based on the presence of lead, like the plaintiffs here who have alleged that the Big Kid was unsafe for their children because of Evenflo's marketing of it. *See Fruit Juice*, 831 F. Supp. 2d at 513 (characterizing injury as plaintiffs' dissatisfaction with product where complaint failed to allege that "products had any diminished value because of the presence of lead or that they would have purchased different or cheaper fruit juice products had they known about the lead").

Cases from outside the First Circuit considering similar theories of economic injury warrant the same result here. In *Johnson & Johnson*, 903 F.3d at 281, plaintiffs claimed economic injury in purchasing baby powder they said was unsafe because of studies linking it to cancer. *Id.* The Third Circuit held the plaintiff failed to allege that the baby powder "provided her with an economic benefit worth one penny less than what she paid" because she offered no analysis of the diminished value, but rather generic information about the undisclosed link to cancer. *Id.* at 288. Similarly, in *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009), the Eighth Circuit held that plaintiffs did not allege an economic injury when claiming, "they paid for a drop-side crib and now they do not use the crib because the drop-side is not safe," because the allegedly defective crib, "has not exhibited the alleged defect, [so] they have necessarily received the benefit of their bargain. [Plaintiffs] purchased a crib with

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comply with NHTSA regulations related to required testing and age/weight minimums, but rather informal NHTSA guidance of same. *See id.* ¶¶ 265-67.

a functioning drop-side and that crib continues to have a functioning drop-side." *Id.* The Court finds this line of cases, in line with *Kerin* and *Fruit Juice*, more persuasive than the recent case of *Carder v. Graco Children's Prods.*, 2:20-cv-00137-LMM, 2021 WL 3909953, at *3-5 (N.D.Ga. Aug. 31, 2021) (following Circuit precedent and concluding that Plaintiffs had standing for side-impact claims regarding booster seats, but concluding that Plaintiffs lacked standing to seek injunctive relief), D. 111; D. 114 (distinguishing *Carder*), particularly in light of *TransUnion LLC v. Ramirez*, __ U.S. __, 141 S.Ct. 2190, 2210 (2021) (concluding that class members whose credit files were not disseminated to third-parties did not suffer "a concrete harm" required for Article III standing); D. 105 at 1; *cf. Carder*, 2021 WL 3909953, at *3 n.5 (concluding that *TransUnion* did not warrant a different outcome).

Plaintiffs further contend that they have alleged actual economic loss because they overpaid for the Big Kid. *See* D. 83 at 17-19 (citing *Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1, 8 (1st Cir. 2018)). In *Gustavsen*, plaintiffs alleged they were deceived into overpaying for eye drops. The allegations of economic injury in *Gustavsen*, however, exceed those made here. First, the plaintiffs put a number on their overpayment, "an out-of-pocket loss of $ 500 to $ 1000 per year." *Gustavsen*, 903 F.3d at 7. Second, plaintiffs alleged facts to explain that number. Plaintiffs "expressly allege[d] that scientific studies and the admission of a marketing executive for one of the major defendants" showed "consumer cost would fall to some degree" if the alleged deceptive practice—unnecessarily enlarging the size of eye drops—was not used. *Id.* at 8.

Plaintiffs "compar[ed] the number of bottles a patient would use if the bottles dispensed 15 microliter doses against the number of bottles each patient is now required to purchase [to] calculate that a patient, on a yearly basis, could save upwards of $500, depending on the brand and type of solution used." *Id.* at 5. Here, Plaintiffs have alleged no estimate (aside from a bare claim that the seats were "worthless" to them) of how much the Big Kid would diminish in value, or any facts giving rise to same. *See, e.g.,* D. 67 ¶ 814.

Plaintiffs rely upon *Ortiz v. Sig Sauer, Inc.*, 448 F. Supp. 3d 89, 97-98 (D.N.H. 2020) for the proposition that a plaintiff establishes economic injury by alleging "that he would not have purchased a [product] or would not have paid as much for it" had he known about a defect. *See* D. 83 at 19. There, the plaintiff sufficiently pled economic injury at the motion to dismiss stage by alleging both an actual defect in the product and that the manufacturer's recall program for same would not adequately compensate him for lost resale value, including the defect's impact on the product's market value. *Ortiz*, 448 F. Supp. 3d at 97-98 (citing *Gustavsen*, 903 F.3d at 7). Here, by contrast, Plaintiffs have not alleged an actual defect in the product, nor are they suggesting any resale value of the Big Kid or diminution in value of the current Big Kid, as discussed above.

Additionally, only some of the named plaintiffs allege the approximate weight of their child at the time of purchase, whereas others offer no allegations about the age, height or weight of their child, as to plausibly suggest

that their child was below the respective age, height and weight minimums of the Big Kid. *See, e.g.*, D. 67 ¶¶ 19, 24, 36, 40, 63. With respect to testing, Plaintiffs also do not account for other safety tests that Evenflo is required to conduct based on other potential crash scenarios (i.e., front impact), *see* 49 C.F.R. § 571.213 S5.1, S6.1 (specifying required tests), meaning that the seat may indeed provide some value in those instances but, as alleged, not in side impact collisions. Considering Plaintiffs have not alleged they exclusively purchased the seat because of its ability to protect against side impact collisions, their claim that the seats were "worthless" is not plausible, yet they do not allege anything to explain what the diminished value to them may be, or what the market value of the seat would be, given these allegations about testing.

Even taking Plaintiffs' allegations about the forty-pound seat minimum and side-impact testing as true, they do not offer a plausible explanation of Plaintiffs' economic injury—all Plaintiffs claim is that the Big Kid, because of these alleged problems, were of no value to them. Accordingly, Plaintiffs have not shown they have standing to redress their economic injuries.[4]

4. Given that Plaintiffs have not alleged an economic injury sufficient for Article III standing, the Court does not reach Evenflo's argument that NHTSA has primary jurisdiction over the claims here and the Court should defer ruling on it.

2. Injunctive relief

Plaintiffs seek a permanent injunction requiring Evenflo to recall the Big Kid, stop selling the Big Kid and add a warning label to all future Big Kid models. D. 67 at 240. Evenflo asserts that Plaintiffs lack standing to seek injunctive relief. D. 80 at 36. Where, as here, Plaintiffs seek injunctive relief from future injury, they must plausibly allege that "the threatened injury is 'certainly impending' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal citation omitted). "Either a certainly impending harm *or* substantial risk of harm suffices." *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 923 F.3d 209, 222-23 (1st Cir. 2019) (emphasis in original).

The Court concludes that Plaintiffs lack standing to seek injunctive relief. Plaintiffs' complaint is devoid of allegations that they personally are susceptible to future harm, either physical or economic, and a court-mandated recall would confer economic benefit on Plaintiffs who have not shown economic injury. Further, the putative class consists entirely of individuals who have already "purchased an Evenflo 'Big Kid' booster seat between 2008 and the present." D. 67 ¶ 293. An injunction requiring Evenflo to stop selling the Big Kid or place a warning label on future models would not redress any alleged injury as to Plaintiffs, who do not claim they are likely to buy another Big Kid—to the contrary, Plaintiffs allege only that they would not have bought the Big Kid had they known about the weight and testing issues prior to purchase. *See Johnson & Johnson*, 903 F.3d at 292-

93 (concluding that plaintiff had no standing to seek injunctive relief requiring warning label when plaintiff now was aware of alleged risks because she likely "will not act in such a way that she will again suffer the same alleged 'injury'").[5]

Plaintiffs counter that such a determination is premature, particularly in a consumer class action, because standing to seek an injunction may be determined at the class certification stage. D. 83 at 26. Plaintiffs rely upon *Winfield v. Citibank, N.A.*, 842 F. Supp. 2d 560, 574 (S.D.N.Y. 2012) for that proposition, but as *Winfield* made clear, such a deferral is appropriate only when certification is "logically antecedent to Article III concerns" and where "named plaintiffs in a class action . . . have standing to sue the defendant on at least some claims." *Id.* (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999)). This is not the case here. First, certifying the class is not logically antecedent to standing for injunctive relief because, as explained above, the putative class has already purchased a Big Kid and cannot show imminent future injury. Second, the Court has determined that Plaintiffs have not alleged

5. Plaintiffs rely upon a Ninth Circuit decision to distinguish the proposition, held by several circuits, that a previously deceived consumer does not have standing to seek injunctive relief for the same product, but the Ninth Circuit specifically noted that there, unlike the case here and before the other circuits, the plaintiff "sufficiently allege[d] that she would purchase [the products] manufactured by [defendants]" again, if they did not contain the allegedly deceptive labels. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 n.5 (9th Cir. 2018) (citing and distinguishing *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213 (3d Cir. 2012)).

economic injury and have no standing to bring claims for damages, the only other relief sought. "[T]hat a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal citation and quotation marks omitted); *see Modell v. Eliot Sav. Bank*, 139 F.R.D. 17, 20 (D. Mass. 1991) (stating that "[w]hen the issue of standing is raised by a party, this Court must resolve that issue before considering the class certification requirements of Rule 23") (emphasis omitted).

For all these reasons, Plaintiffs do not have standing here. In light of this ruling, the Court need not turn to Evenflo's challenges to the specific claims that Plaintiffs assert.

VI. Conclusion

For the foregoing reasons, the Court ALLOWS Defendants' motion to dismiss, D. 79.

So Ordered.

/s/ Denise J. Casper
United States District Judge

APPENDIX C — Denial of Rehearing of the United States Court of Appeals for the First Circuit, Dated Jan. 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1133

IN RE: EVENFLO COMPANY, INC., MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION,

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MIKE XAVIER; LINDSEY BROWN; MARCELLA REYNOLDS; MONA-ALICIA SANCHEZ; KEITH EPPERSON; CASEY HASH; JESSICA GREENSCHNER; LAUREN MAHLER; EDITH BRODEUR; DAVID A. SCHNITZER; ASHLEY MILLER; DANIELLE SARRATORI; HAILEY LECHNER; DESINAE WILLIAMS; ELISE HOWLAND; THERESA HOLLIDAY; JOSEPH WILDER; AMY SAPEIKA; NAJAH ROSE; SUDHAKAR RAMASAMY; TARNISHA ALSTON; EMILY NAUGHTON; TALISE ALEXIE; HEATHER HAMPTON; LINDSEY REED; KAREN SANCHEZ; BECKY BROWN; DEBORA DE SOUZA CORREA TALUTTO; KARYN ALY; JANETTE SMARR; KARI FORHAN; JOSHUA KUKOWSKI; ANNA GATHINGS; KRISTIN ATWELL; PENNY BIEGELEISEN; CARLA MATTHEWS; JILLI HIRIAMS; NATALIE DAVIS; CATHY MALONE; JEFFREY LINDSEY; LINDA MITCHELL;

Appendix C

RACHEL HUBER; CASSANDRA HONAKER,

Plaintiffs-Appellants,

JANELLE WOODSON; DANA BERKLEY; JESSICA BLOSWICK; COLLEEN CODERRE; GRETA ANDERSON; KRISTEN BRINKERHOFF; LINDA FEINFELD; ANDREW GLADSTONE; GEORGETTE GLADSTONE; ELIZABETH GRANILLO; JANET JUANICH; TERESA MUGA; ASHLEY PERRY; ANGELICA RUBY,

Plaintiffs,

v.

EVENFLO COMPANY, INC.,

Defendant-Appellee,

GOODBABY INTERNATIONAL HOLDINGS LIMITED,

Defendant.

Before

Barron, *Chief Judge*, Selya, Lynch, Kayatta, Gelpí, and Montecalvo *Circuit Judges*, and McElroy,* *District Judge.*

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* Of the District of Rhode Island, sitting by designation.

Appendix C

ORDER OF COURT

Entered: January 4, 2023

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

Maria R. Hamilton, Clerk