

No. 22A-_____

In the Supreme Court of the United States

*In re: Evenflo Company, Inc., Marketing, Sales Practices and
Products Liability Litigation*

EVENFLO COMPANY, INC.,

Applicant,

v.

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,

Respondents.

**UNOPPOSED APPLICATION TO THE HON. KETANJI BROWN JACKSON
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

Daniel B. Rogers
SHOOK, HARDY & BACON LLP
201 S. Biscayne Blvd., Ste. 3200
Miami, FL 33131

Tristan L. Duncan
Counsel of Record
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

*Counsel for Applicant, Evenflo Company, Inc.
(additional counsel listed on signature page)*

To the Honorable Ketanji Brown Jackson, Associate Justice of the Supreme Court of the United States and Circuit Justice for the First Circuit:

Pursuant to Supreme Court Rules 13.5 and 30.2, Applicant Evenflo Company, Inc. respectfully requests a 60-day extension of time, to and including June 5, 2023,¹ within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. The opinion of the court of appeals, App., *infra*, at 1a-28a, is reported at 54 F.4th 28. The order of the court of appeals denying rehearing is reproduced in the Appendix, *infra*, at 29a-31a. The memorandum and order of the United States District Court for the District of Massachusetts, App., *infra*, at 32a-44a, is available at 2022 WL 252331.

The court of appeals entered its judgment on November 23, 2022. A petition for rehearing or rehearing en banc was denied on January 4, 2023. Unless extended, the time within which to file a petition for a writ of certiorari will expire on April 4, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

In support of this unopposed request, Evenflo states as follows:

1. The decision below creates a split of authority among the courts of appeals on an important question of federal jurisdiction—specifically, whether plaintiffs allege a concrete economic injury sufficient to establish Article III standing by alleging they overpaid for a product due to misrepresentations about the product’s

¹ Because the sixtieth day falls on Saturday June 3, 2023, the 60-day period “extend[s] until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.” S. Ct. R. 30.1.

safety, but the alleged safety issues never manifested and the product never caused the plaintiffs harm.

2. Evenflo intends to petition this Court for a writ of certiorari to resolve the conflicting circuit authority on this threshold jurisdictional issue. Whether a plaintiff claiming such an economic loss has standing to sue in a federal court should not vary based on the circuit in which the plaintiff files the action. To ensure Evenflo has time to prepare a petition that will provide sufficient background on the circuit split, place that in context of this Court's prior standing jurisprudence, and be helpful to the Court in deciding why it should accept certiorari, Evenflo respectfully requests a 60-day extension of time to file its petition.

3. As background, this appeal emanates from multi-district litigation in which the plaintiffs allege claims on behalf of a putative class of consumers against the manufacturer of child booster seats. The plaintiffs do not assert typical products liability claims or allege that the booster seats caused their children personal injuries. Instead, they assert claims for only economic losses arising from the manufacturer's alleged misrepresentations about product safety and testing. The district court dismissed the entire action, including the claims for monetary and injunctive relief, for lack of Article III standing because the plaintiffs' consolidated class action complaint failed to plead specific facts establishing they sustained a concrete and particularized injury-in-fact.

4. The First Circuit reversed the dismissal of the claims for monetary relief, holding the consumers pled a cognizable injury-in-fact merely by alleging that

the product was worth less than they paid due to the manufacturer's alleged misrepresentations. The First Circuit disagreed with the district court that the complaint's conclusory allegations did not allow the court to factually quantify that theoretical economic harm and determine it was concrete and particularized. Instead, the First Circuit stressed that the underlying theory of liability pled here (*viz.*, affirmative misrepresentations about product safety) was sufficient by itself for Article III standing purposes notwithstanding the lack of facts plausibly demonstrating a concrete economic loss. If the decision is allowed to stand, plaintiffs in the First Circuit will have the novel ability to sue manufacturers for allegedly misrepresenting a product's safety even though (a) the product always operated safely and never caused harm and (b) no facts are pled to establish, in a concrete and non-speculative way, how the product was worth less than what the plaintiff paid due solely to alleged misrepresentations about safety that never manifested.

5. The First Circuit's decision creates a split of authority among several courts of appeals on this question of exceptional importance. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (discussing the importance of standing in class actions, as "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)). In contrast to the First Circuit's acceptance of conclusory allegations of theoretical overpayment, the Third and Eighth Circuits have held that consumers who use a product without incurring physical injury cannot plead a concrete and particularized economic injury with

conclusory allegations that they overpaid because the product posed a greater unrealized risk than they thought. *See, e.g., In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 287 (3d Cir. 2018); *In re Polaris Mktg., Sales Pracs., & Prods. Liab. Litig.*, 9 F.4th 793, 797 (8th Cir. 2021).

6. Evenflo will therefore petition this Court for a writ of certiorari to resolve a circuit split on an increasingly-recurring jurisdictional issue in class-action litigation—whether plaintiffs must plead actual *facts* showing that the particular product they purchased and used without injury was worth less than they paid, in some concrete and quantifiable way, due to alleged misrepresentations about product safety that never manifested.

7. Undersigned counsel respectfully request a 60-day extension of time, to and including June 5, 2023, within which to file that petition for a writ of certiorari. The foregoing background demonstrates that this case involves significant and complex issues of Constitutional standing and federal jurisdiction. A 60-day extension of time is necessary to allow undersigned counsel, some of whom were recently retained, to prepare a petition that fully addresses these important issues in context. More time is needed to ensure the petition adequately details the nature of the conflict among the courts of appeals and explains why the First Circuit erroneously departs from the other circuits that follow this Court's instructions, particularly in class actions, that consumers must incur concrete injuries and allege facts plausibly demonstrating them. This extension is also needed due to undersigned counsel's heavy caseload and because certain intervening matters may

have a material impact on Evenflo's forthcoming petition, including the possible narrowing of issues through resolutions or amended pleadings. Granting the requested extension of time will permit Evenflo's counsel to prepare a petition that fully addresses and frames the complex issues that exist in this case in a manner that will be most helpful to the Court in determining whether to accept review.

8. Evenflo has not previously requested an extension of time to file a petition for a writ of certiorari to review the judgment entered in this case.

9. Counsel for Respondents does not oppose the relief requested herein.

WHEREFORE, for the foregoing reasons, Evenflo respectfully requests a 60-day extension of time, to and including June 5, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

/s/ Tristan L. Duncan
Tristan L. Duncan
Counsel of Record
SHOOK, HARDY & BACON LLP
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
tlduncan@shb.com

Daniel B. Rogers
SHOOK, HARDY & BACON LLP
201 S. Biscayne Blvd., Ste. 3200
Miami, FL 33131

Dan H. Ball
Barbara A. Smith
Richard P. Cassetta
Timothy J. Hasken
BRYAN CAVE LEIGHTON PAISNER LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102

K. Lee Marshall
BRYAN CAVE LEIGHTON PAISNER LLP
Three Embarcadero Ctr. 7th Floor
San Francisco, CA 94111

March 10, 2023.