

No. 16-2015

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

LEONARD COTTRELL, SANDRA HENON, WILLIAM REEVES, GEORGE HERMAN, SIMON NAZZAL, CAROL FREBURGER, JACK LIGGETT, PATRICIA BOUGH, MACK BROWN, DOLORES GILLESPIE, DEBORAH HARRINGTON, ROBERT INGINO, EDWARD ROGERS, JR., DEBORAH RUSIGNULOLO, DOROTHY STOKES, JOSEPHINE TROCCOLI, HURIE WHITFIELD, THOMAS LAYLOFF, CAROLYN TANNER, PATSY TATE, JOHN SUTTON, JESUS RENTERIA, GLENDELIA FRANCO, and NADINE LAMPKIN, *on behalf of themselves and all others similarly situated,*
Plaintiffs-Appellants,

v.

ALCON LABORATORIES, INC.; ALCON RESEARCH, LTD.; FALCON PHARMACEUTICALS, LTD.; SANDOZ, INC.; ALLERGAN, INC.; ALLERGAN USA, INC.; ALLERGAN SALES, LLC; PFIZER, INC.; VALEANT PHARMACEUTICALS, INTERNATIONAL, INC.; BAUSCH AND LOMB, INC.; ATON PHARMA, INC.; MERCK & CO., INC.; MERCK, SHARP & DOHME, CORP.; PRASCO, LLC; and AKORN, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Case No. 14-5859

**BRIEF FOR AARP AND AARP FOUNDATION AS AMICI CURIAE IN
SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL**

JULIE NEPVEU*
(DC Bar #458305)
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
Tel. (202) 434-2075
jnepveu@aarp.org

Counsel for AARP and AARP Foundation as Amici Curiae

CORPORATE DISCLOSURE STATEMENTS

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor have either issued shares or securities.

Dated: August 1, 2016

Respectfully Submitted

/s/Julie Nepveu

Julie Nepveu

AARP Foundation Litigation

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. PLAINTIFFS’ ALLEGATIONS THAT DEFENDANTS’ UNLAWFUL PRACTICES CAUSE THEM ECONOMIC HARM, BECAUSE IT UNAVOIDABLY WASTES MEDICINE THEY PURCHASE, ARE SUFFICIENT TO ESTABLISH STANDING	5
II. PEOPLE WITH CHRONIC AND SERIOUS HEALTH CONDITIONS, WHO ARE PARTICULARLY VULNERABLE TO UNAFFORDABLY HIGH PRESCRIPTION MEDICATION PRICES, NEED TO BE ABLE TO PROTECTION THEMSELVES FROM MYRIAD UNFAIR AND UNLAWFUL PRACTICES THAT INFLATE THE PRICE OF PRESCRIPTION MEDICATION	13
CONCLUSION	18
CERTIFICATE OF IDENTICAL COMPLIANCE AND VIRUS CHECK	20
CERTIFICATE OF BAR MEMBERSHIP	21
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	22
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

Cases

<i>Adams v. Watson</i> , 10 F.3d 915 (1st Cir. 1993)	4, 11
<i>Bell v. Hood</i> , 327 U.S. 678 (1946).....	10
<i>Bowman v. Wilson</i> , 672 F.2d 1145 (3d Cir. 1982).....	9
<i>Chaudhry v. City of Los Angeles</i> , 751 F.3d 1096 (9th Cir.), cert. denied, 135 S. Ct. 295 (2014).....	10
<i>Cohens v. Virginia</i> , 19 U.S. 264, 6 Wheat. 264 (1821).....	5
<i>Cole’s Wexford Hotel, Inc. v. UPMC</i> , 127 F. Supp. 3d 387 (W.D. Pa. 2015)	11
<i>Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.</i> , 165 F.3d 221 (3d Cir. 1998)	8
<i>Danvers Motor Co. v. Ford Motor Co.</i> , 432 F.3d 286 (3d Cir. 2005)	4, 8, 9, 11, 17
<i>D.R. Ward Constr. Co. v. Rohm and Haas Co.</i> , 470 F. Supp.2d 485 (E.D. Pa. 2006).....	11
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988)	6
<i>Eike v. Allergan</i> , No. 12-cv-1141-SMY-DGW, Doc. No. 282, Mem. and Order, at *12 (N.D. Il., July 25, 2016)	10, 11
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982).....	9
<i>Hochendoner v. Genzyme Corp.</i> , 2016 U.S. App. LEXIS 9438 (1st Cir. Mass.).....	8, 9

<i>In re Nickelodeon Consumer Privacy Litig.</i> , __ F.3d __, 2016 U.S. App. LEXIS 11700, 2016 WL 3513782 (3d Cir. June 27, 2016).....	8
<i>In re Processed Egg Prods. Antitrust Litig.</i> , 851 F. Supp.2d 867 (E.D. Pa. 2012).....	11
<i>In re Wernly</i> , 91 B.R. 702 (Bankr. E.D. Pa. 1988).....	12
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 134 S. Ct. 1377 (2014).....	5
<i>Monetary Funding Group, Inc. v. Pluchino</i> , 867 A.2d 841 (Conn. App. Ct. 2005).....	12
<i>Murphy v. McNamara</i> , 416 A.2d 170 (Conn. Super. Ct. 1979).....	12
<i>Nesbit v. Gears Unlimited, Inc.</i> , 347 F.3d 72 (3d Cir. 2003).....	4
<i>People ex rel. Hartigan v. Knecht Servs.</i> , 575 N.E.2d 1378 (Ill. App. Ct. 1991).....	12
<i>Sprint Communs., Inc. v. Jacobs</i> , 134 S. Ct. 584 (2013).....	5
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	10
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998).....	10
<i>Thomas v. FTS USA, LLC</i> , No. 3:13-cv-825, 2016 U.S., Dist. LEXIS 85545 (E.D. Va. June 30, 2016).....	8
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	9
<i>Williams v. Red Bank Bd. of Ed.</i> , 662 F. 2d 1008 (1981).....	6

Rules

F. R. A. P. 29(c)(5).....	1
---------------------------	---

Other Authorities

- Carolyn Carter, *Consumer Protection In The States, A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, Nat'l Consumer Law Ctr., (Feb. 2009).....6, 7, 8, 18
- Consumers Union, *Rx Costs: A Primer For Health Care Advocates* (2015), http://www.healthcarevaluehub.org/files/2214/3508/0516/Research_Report_No._5_-_Drug_Cost_Primer.pdf14
- Bianca Dijulio et al., *Kaiser Health Tracking Poll (2015)*, <http://kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-june-2015/>15, 16
- Facts About Glaucoma*, https://nei.nih.gov/health/glaucoma/glaucoma_facts (last visited July 27, 2016)2, 3
- Glaucoma Facts and Stats*, <http://www.glaucoma.org/glaucoma/glaucoma-facts-and-stats.php> (last visited July 27, 2016)2
- HHS Office of Minority Health, *HHS Action Plan To Reduce Racial and Ethnic Health Disparities* (2015), http://minorityhealth.hhs.gov/assets/pdf/Final_HHS_Action_Plan_Progress_Report_11_2_2015.pdf15
- Sean P. Keehan et al., *National Health Expenditure Projections, 2014–24: Spending Growth Faster Than Recent Trends*, Health Affairs (2015).....13
- Robert Langreth & Rebecca Spalding, *Shkreli Was Right: Everyone's Hiking Drug Prices*, BLOOMBERGBUSINESS, Feb. 2, 2016, <http://www.bloomberg.com/news/articles/2016-02-02/shkreli-not-alone-in-drug-price-spikes-as-skin-gel-soars-1-860>.....13

Nat'l Ctr. for Health Stats., *Health, United States, 2014: With Special Feature on Adults Aged 55–64*, U.S. Dep't of Health and Human Srv's (2015), <http://www.cdc.gov/nchs/data/hus/hus14.pdf>14

Stephen Schondelmeyer & Leigh Purvis, *Trends in Retail Prices of Brand Name Prescription Drugs Widely Used by Older Americans 2006 to 2013*, AARP Pub. Pol'y Inst. (2014), <http://www.aarp.org/content/dam/aarp/ppi/2014-11/rxprice-watch-report-AARP-ppi-health.pdf>14

Topher Spiro et al., *Enough Is Enough, The Time Has Come to Address Sky-High Drug Prices*, Ctr. for American Progress (Sept. 2015).....13, 17

Jo Ellen Stryker et al., *An Exploratory Study of Factors Influencing Glaucoma Treatment Adherence*, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2808197/> (last visited July 27, 2016)16, 17

Ana Swanson, *How new drugs helping millions of Americans live longer are also making them go broke*, Wonkblog, (June 30, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/06/30/how-new-drugs-helping-millionsof-americans-live-longer-are-also-making-them-gobroke/>.....16

Zobair M. Younossi et al., *Disparate Access to Treatment Regimens in Chronic Hepatitis C Patients*, *J. Viral Hepatitis* (2016)15

STATEMENT OF INTEREST¹

Since its founding in 1958, AARP has advocated for access to affordable health care, including affordable prescription medications, and for controlling costs without compromising quality. Access to affordable drugs is particularly important to older adults because they have the highest rates of prescription drug use due to higher incidences of chronic and serious health conditions, including glaucoma. AARP and AARP Foundation have a strong interest in protecting AARP members and the public from unfair practices that increase the cost of prescription medication.

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials, including participation as amicus curiae in state and federal courts. An important purpose of AARP Foundation's advocacy is to ensure that consumers injured by unfair practices have

¹ Pursuant to F. R. A. P. 29(c)(5), Amici Curiae AARP and AARP Foundation state that this brief was not authored in whole or in part by any party or its counsel, and that no person other than AARP, its members, AARP Foundation, or their counsel contributed any money that was intended to fund the preparation and submission of this brief. All Parties have consented to Amici filing this brief.

access to courts to obtain a remedy for violations of state and federal laws that protect consumers, and to deter marketplace practices that injure older people.

Amici's participation in this case will assist this Court to understand the heavy toll levied on older people by high prescription drug costs, which have a significant impact on their financial security, health care decisions, and overall health and well-being. Amici urge this Court to reverse the district court's holding that consumers of prescription eye drops who allege that Defendants' practices cause them economic injury by forcing them to waste medication they purchased do not have standing to maintain their lawsuit.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Glaucoma—a treatable, chronic condition affecting nearly 3 million Americans—is a leading cause of preventable blindness and vision impairment in the United States. *Glaucoma Facts and Stats*, <http://www.glaucoma.org/glaucoma/glaucoma-facts-and-stats.php> (last visited July 27, 2016). Anyone may develop glaucoma at any age, but the risk of developing it is substantially higher for older people, and particularly older people of African American or Mexican decent. *Facts About Glaucoma*, https://nei.nih.gov/health/glaucoma/glaucoma_facts (last visited July 27, 2016). Glaucoma cannot be cured, but many people who develop glaucoma can avoid vision loss. The treatment most often

prescribed requires regular daily use of prescription eye drops for the remainder of a glaucoma patient's life. *Id.*

The issue on appeal is whether Plaintiffs have standing to challenge Defendants' sales practices, which they allege injure them by causing economic loss in violation of state laws that prohibit unfair practices. Specifically, Plaintiffs are glaucoma patients who use prescription eye drops to treat their glaucoma. They allege that Defendant manufacturers sell prescription glaucoma medication in packaging that delivers eye drops that are too large and overflow when the patient instills the drops in their eye. That medicine that overflows due to the drop being too large is unavoidably wasted. Although the manufacturers allegedly have the means to deliver smaller drops that would not cause medication to be wasted, they continue to use droppers that dispense too much medication and charge glaucoma patients for medication that is unavoidably wasted. Plaintiffs' allege that they have suffered monetary injury that is caused by Defendants' unfair practice, in violation of state law.

The district court twice dismissed Plaintiffs' claims, finding that Plaintiffs' alleged injuries are too conjectural or speculative to establish the injury in fact necessary to establish standing. In particular, the court held that Plaintiffs could never allege facts adequate to establish an injury in fact because Defendants' have discretion over the prices they charge for the medication, irrespective of the size of

the drop. As Plaintiffs correctly argue in their opening brief, however, the district court misconstrued Plaintiffs' allegations of injury and erred in finding that Plaintiffs lack standing.

The district court holding essentially immunizes pharmaceutical manufacturers from private enforcement of laws that prohibit unfair practices, even where the consumer alleges an unfair practice that causes them monetary injury. This result is contrary to well-established law. "Monetary harm is a classic form of injury-in-fact[, and] is often assumed without discussion." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005). Having discretion to set the price of the medication should not immunize defendants from compliance with laws designed to protect consumers against such harm, even where such discretion may make the injury more difficult to monetize. *Id.* at 293 (citing *Adams v. Watson*, 10 F.3d 915, 920-25 n.13 (1st Cir. 1993)).

Amici write to underscore that both an individual's right to seek remedies and the public's interest in robust private enforcement of laws designed to protect consumers from unfair or deceptive practices in the marketplace are severely undermined when courts improperly and/or erroneously refuse to exercise jurisdiction over such cases. *See Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 80 (3d Cir. 2003) (noting "[t]he [Supreme] Court also criticized the implications of treating the validity of a cause of action as jurisdictional."). Respectfully, amici

urge this Court to reverse the district court decision dismissing Plaintiffs' claims for lack of standing and remand for consideration on the merits.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS THAT DEFENDANTS' UNLAWFUL PRACTICES CAUSE THEM ECONOMIC HARM, BECAUSE IT UNAVOIDABLY WASTES MEDICINE THEY PURCHASE, ARE SUFFICIENT TO ESTABLISH STANDING.

Plaintiffs correctly argue that the district court erred in holding, at the motion to dismiss stage, that Plaintiffs' allegations are inadequate to establish standing. Federal courts must fulfill their obligation to exercise jurisdiction over cases that adequately allege constitutionally minimal requirements to establish standing. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (emphasizing that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging" once the three-part test of (1) injury, (2) causation, and (3) redressability is satisfied (citation and internal quotation marks omitted)). Billions of dollars' worth of consumers' hard-earned resources and the utility of private enforcement as means to enforce of consumer protections laws, redress injuries caused by unlawful practices, and police the marketplace are undermined unless courts fulfill their constitutional role to adjudicate consumer's claims on the merits. *See id.*; *Sprint Communs., Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013) (citing *Cohens v. Virginia*, 19 U.S. 264, 6

Wheat. 264, 404 (1821)); *Deakins v. Monaghan*, 484 U.S. 193, 202-03 (1988) (citing with approval Third Circuit rule that enforces federal court's duty "to assume jurisdiction where jurisdiction properly exists." (quoting *Williams v. Red Bank Bd. of Ed.*, 662 F. 2d 1008, 1024 (1981))).

Laws that prohibit unfair and/or deceptive acts and practices in consumer transactions have been enacted in every state. See Carolyn Carter, *Consumer Protection In The States, A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, Nat'l Consumer Law Ctr. 3 (Feb. 2009). Lawmakers have long recognized that taxpayer-funded public agencies, acting alone, do not have the resources necessary to deter unfair and deceptive practices, provide remedies to consumers injured by such practices, and level the playing field so that honorable businesses can compete without resort to such unfair practices. *Id.* at 6, 18 ("Fundamentally, there are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement cannot do the job no matter how well-funded.").

To ensure the robust level of enforcement necessary to achieve these benefits, most state consumer protection laws provide a private right of action to challenge allegedly unlawful practices. *Id.* at 12 (finding only 4 states do not provide a private right of action). Consumers injured by unlawful practices have an incentive to enforce the laws in order to seek remedies. Such private

enforcement also benefits the public, because it efficiently and economically ensures more robust law enforcement without burdening either taxpayers or public enforcement agencies. *Id.* at 18 (“consumers[’] ability to enforce their state UDAP statute is crucial for consumer justice. Limited state consumer protection enforcement budgets are not able to police the marketplace fully.”). Holding lawbreakers accountable ensures they will not benefit from their ill-gotten gain, and subjects them to statutory and other remedies that help deter unlawful practices. Robust enforcement also protects other consumers who are less likely to be subject to unlawful and injurious practices as a result. *Id.* at 6.

In addition to private enforcement, lawmakers enhance consumer protection by providing broad substantive protection. They recognize the futility of trying to anticipate and enumerate every potential practice that could harm consumers, particularly considering the wealth of human inventiveness. As a result, statutes prohibiting unfair and deceptive practices are often drafted very broadly and are intended to encompass a wide variety of harmful practices. *See Carter, supra*, at 11. Courts, in turn, generally construe such statutes broadly in order to further their remedial purpose. *Id.* at 13. Where courts have construed such statutes narrowly, the utility of the statute to police the marketplace or redress injuries is limited. For example, courts in Michigan and Rhode Island “have interpreted an

exception for ‘authorized’ or ‘permitted’ transactions so broadly that the statute now covers few if any consumer transactions.” Carter, *supra*, at 13.

A similar concern arises where courts fail to exercise jurisdiction over claims for injuries they interpret too narrowly. Plaintiffs injured by new and emerging unfair or deceptive practices must often advance novel legal theories and seek innovative remedies to make them whole. In all cases, but particularly where a novel consumer protection claim is raised, it is essential that “[w]hen reviewing an order of dismissal for lack of standing, [this Court] accept as true all material allegations of the complaint and construe them in favor of the plaintiff.” *Danvers*, 432 F.3d at 288 (quoting *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 224 (3d Cir. 1998)). Moreover, it is essential that courts not lose sight of the fact that “[w]hile it is difficult to reduce injury-in-fact to a simple formula, economic injury is one of its paradigmatic forms.” *Danvers*, 432 F.3d at 291.²

² There are many examples of cases recognizing standing where, at the time the claims were advanced, the legal theories were considered novel, but they are now well settled. See e.g., *In re Nickelodeon Consumer Privacy Litig.*, ___ F.3d ___, 2016 U.S. App. LEXIS 11700, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (finding standing to assert concrete injury of invasion of privacy caused by “defendant fail[ure] to comply with statutory prerequisites protecting the plaintiff’s privacy . . . regardless of actual damages.”); accord *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2016 U.S. Dist. LEXIS 85545, at *31 (E.D. Va. June 30, 2016);

As Justice Alito wrote when he was sitting on this Court, Article III “[i]njury-in-fact is not Mount Everest.” *Danvers*, 432 F.3d at 294 (holding “the obvious fact that [a plaintiff is] forced to pay money it otherwise would have kept for itself [is] sufficient to confer Article III standing.” *Id.* at 293). Moreover, “‘the contours of the injury-in-fact requirement, while not precisely defined, are very generous;’ requiring only that claimant allege ‘some specific, ‘identifiable trifle’ of injury. . . .” *Id.* (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982)).

Thus, despite the district court finding that Plaintiffs’ asserted personal injury is speculative, Plaintiffs have adequately pled an economic injury—in the form of drops of medication that they purchased being unavoidably wasted because it overflows their eye and runs down their cheek—that is sufficiently “distinct and palpable” for purposes of standing. *See Danvers*, 432 F.3d at 291 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Hochendoner v. Genzyme Corp., 2016 U.S. App. LEXIS 9438 (1st Cir. Mass.) (reversing dismissal for lack of standing in part, finding standing where plaintiff adequately alleged that defendants’ unlawful practices caused allergy and an anaphylactic reaction to medicine); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding “concrete and demonstrable injury” when a realty company’s unlawful practices “perceptibly impaired [its] ability to provide counseling and referral services for low-and moderate-income homeseekers,” resulting in a “drain on the organization’s resources.”).

While a plaintiff’s allegations of an economic injury may ultimately be difficult to prove or hinge on the interpretation of the law upon which the claim is based, this does not defeat standing so long as the injury alleged is sufficiently “concrete and particularized.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (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.” *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1109 (9th Cir.), cert. denied, 135 S. Ct. 295 (2014); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89-90 (1998) (“jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.”) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)).

The district court further found that Plaintiffs could not allege an adequate injury in fact because Defendants have discretion regarding the prices they charge. Contrary to the district court’s finding, such discretion does not make Plaintiffs’ alleged injury speculative; the unavoidably wasted medicine clearly has intrinsic economic value. Indeed, in a case raising nearly identical claims of injury, the court in *Eike v. Allergan*, No. 12-cv-1141-SMY-DGW, Doc. No. 282, Mem. and Order, at *12 (N.D. Ill., July 25, 2016), recently granted class certification of nearly identical claims. The court specifically approved of plaintiffs’ theory for calculating class-wide damages caused by Defendants’ allegedly unlawful practice

of making the eye drops too large, based on the monetized cost of the medicine that is unavoidably wasted. *Id.* (raising claims under Illinois and Missouri law).

Tellingly, neither the *Eike* defendants nor the court addressed the question of Eike’s standing to seek a remedy for the alleged injuries. This approach is not only correct, it is also consistent with long settled jurisprudence that “[m]onetary harm is a classic form of injury-in-fact. . . . [and] is often assumed without discussion.” *Danvers*, 432 F.3d at 293 (citing *Adams v. Watson*, 10 F.3d 915, 920-25 & n.13 (1st Cir. 1993) (collecting cases)).

In fact, courts routinely find that plaintiffs have standing to seek remedies for unlawful practices even where sellers of consumer goods and services have discretion to set prices in the marketplace—as they typically do. *See e.g., Cole’s Wexford Hotel, Inc. v. UPMC*, 127 F. Supp. 3d 387, 398 (W.D. Pa. 2015) (holding plaintiff sufficiently “alleges’ it suffered monetary harm, *i.e.*, injury in fact, in the form of overcharges it paid for health insurance”); *In re Processed Egg Prods. Antitrust Litig.*, 851 F. Supp.2d 867, 887 (E.D. Pa. 2012) (holding plaintiffs’ allegations that they personally “paid artificially inflated prices for eggs because of the Defendants’ conspiracy” sufficient to establish injury in fact); *D.R. Ward Constr. Co. v. Rohm and Haas Co.*, 470 F. Supp.2d 485, 492-93 (E.D. Pa. 2006) (allegations that plaintiffs “paid inflated prices for products with plastics additives due to an overcharge on plastics additives” sufficient to establish injury in fact).

Likewise, courts have found violation of laws prohibiting unfair practices where defendants have charged unconscionably high prices. *See, e.g., In re Wernly*, 91 B.R. 702 (Bankr. E.D. Pa. 1988) (\$1156 fee to cash \$11,171 Social Security check); *Monetary Funding Group, Inc. v. Pluchino*, 867 A.2d 841 (Conn. App. Ct. 2005); *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979) (lease of a TV set with option to buy at more than double retail value); *People ex rel. Hartigan v. Knecht Servs.*, 575 N.E.2d 1378 (Ill. App. Ct. 1991) (charging unconscionably high prices for little or no services where consumer has no real alternatives, and after advertising “minimum charge”). The injury at the heart of these claims is monetary loss caused by a defendants’ allegedly unfair practice. Plaintiffs’ *injury* here is analogous to one caused by price gouging in an emergency situation, but it arises under a more broadly-applicable statutory provision.

The importance of private enforcement of statutes that prohibit unfair and deceptive practices in protecting consumers and ensuring a properly functioning marketplace is patent. That protection is severely compromised by the district court’s holding that Plaintiffs economic injury is too speculative where the Defendants’ have discretion over pricing. To make this finding, the district court improperly conflated Plaintiffs’ allegations to establish standing with the merits of their claim. This is error; even if Plaintiffs ultimately cannot prove their claims, they nevertheless have standing to try.

II. PEOPLE WITH CHRONIC AND SERIOUS HEALTH CONDITIONS, WHO ARE PARTICULARLY VULNERABLE TO UNAFFORDABLY HIGH PRESCRIPTION MEDICATION PRICES, NEED TO BE ABLE TO PROTECTION THEMSELVES FROM MYRIAD UNFAIR AND UNLAWFUL PRACTICES THAT INFLATE THE PRICE OF PRESCRIPTION MEDICATION.

The district court's holding, if affirmed, will significantly impair the ability of consumers to challenge a host of allegedly unfair and unlawful practices, even in the majority of states that have broadly drafted consumer protection laws. Of particular relevance to this case, the holding will have severe adverse impacts on vulnerable people who need access to affordable, often life-sustaining medications.

Unfair practices of pharmaceutical manufacturers are a significant factor driving up the cost of prescription medication. *See* Topher Spiro et al., *Enough Is Enough, The Time Has Come to Address Sky-High Drug Prices*, Ctr. for American Progress (Sept. 2015). Medication prices consistently outpace rising health care costs, and often by alarming margins. *Id.* at 9; Sean P. Keehan et al., *National Health Expenditure Projections, 2014–24: Spending Growth Faster Than Recent Trends*, *Health Affairs* 34 (8) (2015): 1407–1417; Robert Langreth & Rebecca Spalding, *Shkreli Was Right: Everyone's Hiking Drug Prices*, BLOOMBERGBUSINESS (Feb. 2, 2016), <http://www.bloomberg.com/news/articles/2016-02-02/shkreli-not-alone-in-drug-price-spikes-as-skin-gel-soars-1-860> (reporting that drug prices for 60 of the most common drugs doubled in 2015, and

prices quadrupled for 20 of those drugs). Retail prices for prescription medication rose at more than eight times the overall rate of inflation in 2013. See Stephen Schondelmeyer and Leigh Purvis, *Trends in Retail Prices of Brand Name Prescription Drugs Widely Used by Older Americans 2006 to 2013*, AARP Pub. Pol’y Inst. (2014), <http://www.aarp.org/content/dam/aarp/ppi/2014-11/rxprice-watch-report-AARP-ppi-health.pdf>. A significant portion of the increase is pure profit. See, e.g., Consumers Union, *Rx Costs: A Primer For Health Care Advocates* 5 (2015) (“Average profits for brand-name pharmaceutical companies is 18.4 percent compared to 5.6 percent for generics.”) (citations omitted), http://www.healthcarevaluehub.org/files/2214/3508/0516/Research_Report_No._5_-_Drug_Cost_Primer.pdf.

Older people as a group will bear a disproportionate share of those costs, given that they tend to use a larger share of medications to treat their higher incidence of chronic medical conditions, including glaucoma, diabetes, cancer, heart disease, high blood pressure, chronic obstructive pulmonary disease, and others that become increasingly prevalent as people advance in age. See Nat’l Ctr for Health Stats., *Health, United States, 2014: With Special Feature on Adults Aged 55–64*, U.S. Dep’t of Health and Human Srv’s, (2015), <http://www.cdc.gov/nchs/data/hus/hus14.pdf>.

On top of the obvious economic impact that rapidly rising prescription medication prices has on consumers with chronic medical conditions, additional injuries have been identified. The practices that inflate medication prices may make medical treatment unaffordable and out of reach for vulnerable consumers, with both personal and public health and economic consequences. Such practices may delay effective treatment, potentially allowing communicable disease to spread, or exacerbating serious existing health conditions. *See, e.g.* Zobair M. Younossi et al., *Disparate Access to Treatment Regimens in Chronic Hepatitis C Patients*, 10 *J. Viral Hepatitis* 12506 (2016). Such practices may also exacerbate the already significant health disparities based on race and ethnicity. *See* HHS Office of Minority Health, *HHS Action Plan To Reduce Racial And Ethnic Health Disparities* (2015), http://minorityhealth.hhs.gov/assets/pdf/Final_HHS_Action_Plan_Progress_Report_11_2_2015.pdf.

Many older people have low incomes and cannot afford to pay the rising costs of prescription medications. This is particularly true for those whose chronic health conditions make it difficult or impossible for them to work. Older people whose expenses for necessities outpace their income are known to skip doses of medicine, delay or discontinue treatment, or conversely, skip meals and other necessities, such as heating and cooling, so they can pay for (what is often) life-sustaining medication. *See* Bianca Dijulio et al., *Kaiser Health Tracking Poll*, at

fig. 5 (2015), <http://kff.org/health-costs/poll-finding/kaiser-health-tracking-poll-june-2015/> (finding in June 2015 that 25% of those surveyed had declined to fill a prescription due to costs, and 18% of those surveyed had skipped doses or cut pills in half).

Additionally, the most vulnerable consumers—those who need prescription medications to stay alive, work, care for others, and maintain their mobility and independence—are the ones most likely to be injured by allegedly unlawful practices that increase the cost of prescription medication. People with glaucoma, cancer, heart disease, diabetes, and other serious chronic conditions cannot avoid the injury caused by such unfair practices without seriously jeopardizing their health. See Ana Swanson, *How new drugs helping millions of Americans live longer are also making them go broke,*” Wonkblog (June 30, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/06/30/how-new-drugs-helping-millionsof-americans-live-longer-are-also-making-them-gobroke/>.

Even higher income older people may be deterred from protecting their health and well-being due to the cost of prescription medication. For example, although “blindness ranked third (after cancer and heart disease) as people’s major fear,” the cost of prescription glaucoma medication nevertheless can be a barrier to patients using it consistently over the long term in order to avoid vision loss. Jo Ellen Stryker et al., *An Exploratory Study of Factors Influencing Glaucoma*

Treatment Adherence, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2808197/> (last visited July 27, 2016) (finding “[t]he cost of glaucoma medications has been cited as a medication adherence barrier in most but not all available studies.”) (footnotes omitted).

The district court’s erroneous standing analysis prevents consumers from asserting even “paradigmatic claims of injury” caused by unfair practices that allegedly violate the law, such as those presented in this case. *Danvers*, 432 F.3d at 291. This is a significant setback for private enforcement of laws that are essential to protect the public and especially for the most vulnerable health care consumers whose lives and independence may depend on having access to affordable medication. Ultimately, it is they who are injured the most, through increased out of pocket costs, higher insurance premiums and taxes, deferred or denied medical treatment, and exacerbation or progression of chronic and acute health conditions.

Numerous pharmaceutical manufacturer schemes have boosted medication prices and profits unlawfully. For example, unfair practices include increasing costs by limiting the availability of less expensive generic medication using various schemes. *See Spiro, supra*, at 8 (describing various practices the limit entry of generic drugs into the marketplace, including “pay-for-delay” “product hoping” or “ever-greening”). Particularly in light of the complexity and ingenuity

demonstrated through such schemes, it is essential that standing to bring private enforcement actions to challenge such practices not be unduly impaired. It is as important now as it ever has been to police the prescription medication marketplace effectively.

If, as the district court held, consumers of particular medications do not have standing to seek a remedy for allegedly unlawful practices that raise the price of drugs they actually use, and unavoidably waste due to Defendant's allegedly unlawful practices, then the pharmaceutical industry will be all but exempt from laws enacted to further the "basic premise [] that unfair and deceptive tactics in the marketplace are inappropriate." Carter, *supra*, at 5. This result would seriously undercut "the basic legal underpinning for fair treatment of consumers in the marketplace," with predictably devastating consequences. *Id.*

CONCLUSION

Amici respectfully urge this Court to reverse the district court order dismissing Plaintiffs' claims for lack of standing and remand the case for further proceedings on the merits.

Dated: August 1, 2016

Respectfully Submitted,

/s/Julie Nepveu

Julie Nepveu*

(DC Bar #458305)

**Counsel of Record*

AARP Foundation Litigation

601 E Street, NW

Washington, DC 20049

Tel. (202) 434-2060

jnepveu@arp.org

Attorney for AARP and AARP Foundation as Amici Curiae

CERTIFICATE OF IDENTICAL COMPLIANCE AND VIRUS CHECK

I, Jacqueline Crawford, hereby certify that the foregoing Brief of AARP and AARP Foundation as Amici Curiae electronically filed in PDF with this Court is identical to the brief amici curiae served with this Court in paper format, and has been virus checked, last scanned on July 28, 2016, with the program Symantec Anti-Virus Endpoint Protection, ed. 2011.

Dated: August 1, 2016

/s/Jacqueline Crawford
Jacqueline Crawford

CERTIFICATE OF BAR MEMBERSHIP

I, Julie Nepveu, hereby certify that I am admitted to practice before the United States Court of Appeals for the Third Circuit and that I am currently a member in good standing.

Dated: August 1, 2016

/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3988 of words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements to Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman using Microsoft Word 2010 in font size 14.

Dated: August 1, 2016

/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August, 2016, I served through the ECF system the Brief for AARP and AARP Foundation as Amici Curiae In Support of Plaintiffs-Appellants Urging Reversal. Seven hard copies of this brief will be delivered to the Court's office within five days of electronically filing.

Dated: August 1, 2016

/s/Julie Nepveu

Julie Nepveu*

(DC Bar #458305)

**Counsel of Record*

AARP Foundation Litigation

601 E Street, NW

Washington, DC 20049

Tel. (202) 434-2075

jnepveu@arp.org

Attorney for AARP and AARP Foundation as Amici Curiae