No. _____

IN THE

Supreme Court of the United States

STATE FARM LIFE INSURANCE COMPANY,

Petitioner,

v.

MICHAEL G. VOGT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is one of a series of class actions against life insurance companies arising from "cost of insurance" provisions in Universal Life policies. Plaintiff here alleged that State Farm breached the relevant policy on a classwide basis by considering impermissible factors in developing its underlying "cost of insurance" rate structure. Building on this liability theory, Plaintiff's damages expert created alternative rate models using only "mortality" factors as inputs. But the models create winners and losers: Some class members benefit from, while others are harmed by, the alternative rates relative to the rates they were actually charged. Relatedly, some class members received no net damages at trial, even though they suffered the same alleged breach. To remedy the latter problem, the district court carved those members out from the class and thus from the judgment, a result that would allow them to sue State Farm again later using a different damages model.

The questions presented are:

1. Whether Rule 23 allows class certification where the damages models offered by the class representative would harm a substantial number of class members and leave many class members unable to prove damages as an element of their claims, thus creating an intraclass conflict.

2. Whether a district court faced with an inherent intraclass conflict may cure that conflict by defining out of the class—and thus excluding from the judgment—members with no net damages who cannot succeed on the merits of their claims, thereby creating a "fail-safe class" that leaves the defendant exposed to future litigation by excluded class members.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceedings below.

Pursuant to this Court's Rule 29.6, the undersigned counsel represent that Petitioner State Farm Life Insurance Company is not a publicly held corporation. It is wholly owned by State Farm Mutual Automobile Insurance Company, which is a mutual insurance company. Neither State Farm Life Insurance Company nor State Farm Mutual Automobile Insurance Company has issued any shares of stock to the public.

STATEMENT OF RELATED PROCEEDINGS

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

Vogt v. State Farm Life Ins. Co., W.D. Mo. No. 2:16-4170-CV-C-NKL (October 12, 2018) (judgment).

Vogt v. State Farm Life Ins. Co., 8th Cir. Nos. 18-3419, 18-3434 (June 26, 2020) (judgment).

Vogt v. State Farm Life Ins. Co., 8th Cir. Nos. 18-3419, 18-3434 (August 24, 2020) (order denying rehearing en banc).

Vogt v. State Farm Life Ins. Co., W.D. Mo. No. 2:16-4170-CV-C-NKL (November 17, 2020) (order granting prejudgment interest).

Vogt v. State Farm Life Ins. Co., 8th Cir. No. 20-3481 (November 30, 2020) (appeal from award of prejudgment interest).

Vogt v. State Farm Life Ins. Co., 8th Cir. Nos. 18-3419, 18-3434 (December 3, 2020) (order denying motion to recall mandate and stay the case).

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* Because this Petition does not rely on any redacted material, State Farm has not moved to file the unredacted version under seal with this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State Farm Life Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 963 F.3d 753. App. 1a-36a. The order denying rehearing and rehearing en banc is unreported but available at App. 74a-75a. The district court's order granting class certification is unreported but available at 2018 WL 1955425, and its order denying State Farm's motion for decertification is unreported but available at 2018 WL 4937069. App. 37a-54a, 64a-71a.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2020. App. 2a. A timely petition for rehearing was denied on August 24, 2020. App. 75a. On March 19, 2020, this Court issued a standing order extending the time for filing a petition for a writ of certiorari to and including January 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the Appendix. App. 76a-85a.

STATEMENT OF THE CASE

The Eighth Circuit affirmed class certification in this case, even though Plaintiff's classwide damages model created fundamental intraclass conflicts between members who claimed to be harmed by State Farm's alleged conduct and those who benefit from that conduct, and even though the district court's partial solution to that conflict—exempting members with no net damages from the binding effect of the judgment—created an impermissible "fail-safe" class. *See generally* App. 18a-19a. In so doing, it deepened several existing conflicts among the circuit courts.

Respondent Michael G. Vogt ("Plaintiff") sought to represent himself and other putative class members insured in Missouri under a form Universal Life Insurance policy that State Farm offered from 1994 to 2004. App. 5a, 37a. His claim rested on the policy's "Monthly Cost of Insurance Rates" provision, which states that "[t]hese rates for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class." App. 106a. "Rate class" is defined to mean "the underwriting class of the person insured." App. 94a.

Plaintiff did not allege that State Farm charged him or any class member a cost of insurance rate based on the wrong age, sex, or applicable rate class. Rather, he asserted that the phrase "based on the Insured's age on the policy anniversary, sex, and applicable rate class" referred, not to the attributes used to assign an individual Insured's cost of insurance rate from State Farm's underlying rate tables, but to the process by which State Farm developed those rate tables in the first instance. According to Plaintiff, the reference to "age," "sex," and "rate class" meant that the company's entire

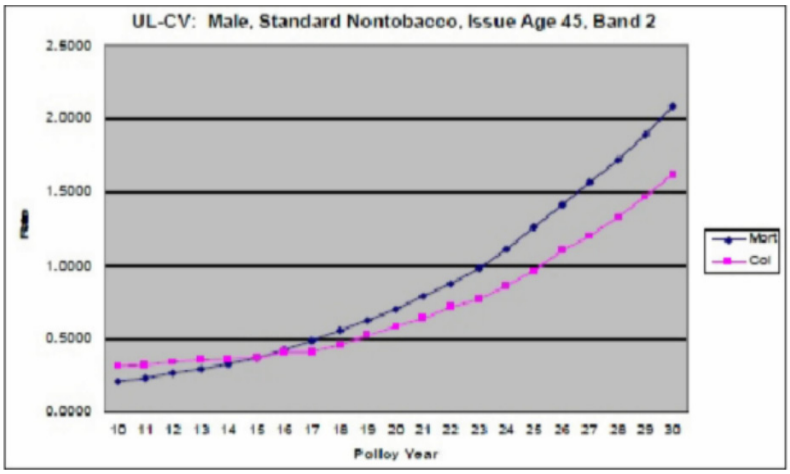
ratemaking process had to be performed using *only* those factors. Plaintiff alleged that State Farm breached the policy on a classwide basis by considering expenses, reserve requirements, and other actuarially required variables in developing its underlying rates.

To remedy this alleged breach, Plaintiff's expert, Scott Witt, proffered a series of damages models designed to create alternative rate structures, purportedly "based on" *only* the Insured's age, sex, and rate class. Dkt. 397 at 107-08. Because age, sex, and rate class do not translate into a dollar amount, much less an entire rate schedule, Plaintiff argued that the operative phrase—age, sex, and rate class—actually refers to "mortality factors." Dkt. 397 at 107-08, 121. From there, Plaintiff argued that State Farm was required to base its cost of insurance rate structure on the company's internal mortality table, which reflects the insureds' risk of dying in any given year, or, as Plaintiff's expert described them, "mortality factors." Dkt. 397 at 107-08, 121, 134-35. Relying on this table, Witt developed a set of substitute rates.

Witt used his models to calculate damages individually for each class member across a total of almost 24,000 policies, comparing the substitute rates against the rates actually charged under the policy. Dkt. 397 at 108. When applied, the models yield, for many class members, initial substitute rates *lower* than those actually charged by State Farm. But over the life of the policy, as the Insured ages, the model eventually reaches a "crossover" point for many class members where the model's substitute rates match and then *exceed* those actually charged. This effect appears most prominently for longer-term

policyholders who do not use tobacco, as the Witt model, unlike State Farm's actual rates, does not differentiate among policyholders for tobacco use but does differentiate for the length of time the policy was in effect.

A district court in a similar cost of insurance case illustrated this "crossover" phenomenon with the following graph. When mapped onto the facts here, the dark blue line would show rates under the Witt model and the pink line would show State Farm's actual rates. The intersection is the "crossover."



Thao v. Midland Nat'l Life Ins. Co., 2012 WL 1900114, at *9 (E.D. Wis. May 24, 2012), *aff'd on other grounds*, 549 F. App'x 534, 536 (7th Cir. 2013); *see also* Opening Brief of Appellant State Farm at 19 (citing *Thao*).

Plaintiff argued below that "every class member has suffered the same injury." Dkt. 190 at 8. But the undisputed mathematical reality of how the Witt models operate shows the opposite. Dkt. 398 at 302-05. For many class members, the Witt models

increase the monthly cost of insurance rates over time. And for some members, the benefit received in early years is eliminated by the increase in rates after the crossover. As a result, at trial, some ended up with no damages at all. App. 56a. And it was undisputed that, if State Farm were to adopt any of Witt's models in lieu of its actual rates to avoid a follow-on class action under the same theory, the result would be an even larger number of policyholders who, over time, would pay more under Witt's substitute rates. Dkt. 353 at 5-7.

The Witt models created an intraclass conflict by benefiting certain policyholders and disadvantaging others. Because damages are an element of a contract claim under Missouri law, those class members who could not show damages under Witt's model could not establish a claim. App. 43a-44a.

A. Legal and Factual Background

1. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), this Court held that the class action mechanism set forth in Federal Rule of Civil Procedure 23 requires that class members' claims be capable of "classwide resolution." In *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013), where plaintiffs attempted to satisfy Rule 23 through the use of an expert's damages model, the Court emphasized that courts addressing the propriety of class certification *must* undertake a "rigorous analysis" to ensure that Rule 23's requirements are satisfied.

Rule 23(a)(2) "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 564 U.S. at 349-50 (quotation marks omitted). The typicality and adequacy requirements of Rule 23(a)(3) and (4) require that a

class representative "possess the same interest and suffer the same injury as the class members," *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quotation marks omitted), a rule that protects against "conflicts of interest," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). These requirements work together to preclude class certification when conflicts among class members make class litigation inefficient and unfair—not only for the defendant, but also for class members. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-158, n.13 (1982); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940) (expressing as a due process limitation the rule precluding class actions involving "dual and potentially conflicting interests" within the class).

Another fairness concern presented by class treatment is that plaintiffs may want to "await developments in … trial or even final judgment on the merits" before deciding whether to be part of the class and thus bound by the resulting judgment. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). For this reason, most circuit courts prohibit what is called a "fail-safe class"—meaning "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012).

2. State Farm sold the at-issue policy between 1994 and 2004. App. 5a. It combines a death benefit (a feature of conventional term policies) with a value feature that earns interest. App. 3a. Payments to the policy and earned interest are credited to the value. App. 104a-105a. Certain monthly charges are deducted, including, as relevant here, the cost of insurance charge. App. 105a. This charge is akin to

a monthly premium payment in a conventional term policy.

The policy states that "[t]he cost of insurance is deductible while the policy is in force." App. 91a. It specifies that the monthly cost of insurance rates "for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class." App. 106a. The policy defines "rate class" as "[t]he underwriting class of the person insured." App. 94a. The rate class is determined through State Farm's underwriting process, during which the customer provides personal health information to State Farm, including height, weight, and medical history, and whether the Insured uses tobacco. Dkt. 397 at 133-34; Dkt. 398 at 250-51. Once underwriting is complete and the Insured's rate class has been determined, the individual Insured's cost of insurance rate is assigned from State Farm's cost of insurance rate tables. Dkt. 167 at 5.

When State Farm developed its underlying cost of insurance rate structure and rate tables, before the policy was offered to customers, Dkt. 167 at 4-5, accredited State Farm actuaries followed required actuarial principles and standards. Dkt. 398 at 258-60. Those standards, and the process of developing the rate structure, considered mortality factors for groups of potential insureds—some of which are reflected in the State Farm internal mortality table on which Witt based his models—as well as other factors related to, for example, the company's anticipated revenue needs, underwriting costs, salaries, agent commissions, and regulatory reserve and surplus requirements. Dkt. 398 at 258-60. State Farm organized the resulting cost of insurance rates into rate tables grouped according to the three factors

listed in the policy—age, sex, and rate class. Dkt. 398 at 263-66. As noted, at the time of purchase, the customer's monthly cost of insurance rate would be assigned from the rate tables based on the Insured's "age on the policy anniversary," "sex," and "applicable rate class." Dkt. 167 at 7-8.

3. In 1999, when he was 54, Plaintiff purchased a State Farm Universal Life Insurance policy on his own life. App. 90a. His policy identified his rate class as "Table 4 Rate Class-Male Non-Tobacco." App. 90a. This means that, in the underwriting process, he was given a sub-standard rate class due to health characteristics, with a "Non-Tobacco" designation, and was assigned a cost of insurance rate based on that rate class, his sex, and his age at each policy anniversary. Dkt. 397 at 116-17; Dkt. 167 at 5.

Plaintiff surrendered his policy in 2013, and in 2016 brought this diversity action against State Farm on behalf of Missouri policyholders on the same policy form. App. 4a-5a, 7a. He alleged claims for breach of contract, conversion, and declaratory relief. App. 39a-40a.

Two days before opening statements at trial, the district court granted an oral motion for summary judgment in favor of the class on liability for its contract-based claims. Dkt. 335. Applying Missouri law, the court agreed with Plaintiff that the cost of insurance provision must be read to mean that State Farm was obliged, in developing its underlying rate structure, to consider *only* "mortality factors," and not expenses, reserves, or other variables required by actuarial standards. Dkt. 335.

The case proceeded to trial solely on the issue of damages. The district court allowed Plaintiff to

submit, over State Farm's objection, several new, alternative damages models that Witt had developed. App. 6a. The new models all sought to address, in various ways, the crossover effect discussed above.

As Witt acknowledged, the crossover effect exists because the State Farm internal mortality table underlying his models does not align with the policy language or the way in which State Farm developed its rates for this policy.[1] Dkt. 397 at 174-75, 160-61, 187-98. Specifically, the mortality table does not differentiate between insureds who use tobacco and those who do not, but the "rate class" determination, defined in the policy as "the underwriting class of the person insured," does so differentiate. At the same time, the mortality table on which Witt relied *does* differentiate by how long the policy was in effect, whereas State Farm's rates do not. Dkt. 397 at 134-35. This is in contrast to some insurers that give more favorable rates for insureds who have undergone the underwriting process more recently.

It is undisputed that the substitutions and assumptions built into the Witt methodology systematically advantage some members of the class and disadvantage others. For many class members, the Witt methodology produces initial rates that are lower than what State Farm charged, but going forward in time over the life of the policy, the rates converge, and eventually "cross over." Dkt. 397 at

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[1] This mismatch between Plaintiff's theory of breach and the damages methodology has been noted in other similar cost of insurance litigation where class certification was denied. *See, e.g.*, *Thao*, 2012 WL 1900114, at *8 (holding in a virtually identical cost of insurance case that "[t]he problem for [plaintiff] is that her … remedy is not consistent with [her] interpretation of the policy language").

187-98. After that crossover point, the rates charged under the Witt model for many insureds are *higher* than the State Farm rates. As detailed by State Farm's expert at trial, and uncontested by Witt, by 2017, 20% of all class members would have been charged higher cost of insurance rates under Witt's methodology than they were charged by State Farm:

Policy Months Where Witt's Mortality Rate is Greater than the State Farm Base COI Rate

Year	Policy Months Where Witt's Mortality is Greater than COI	Policy Months Where Witt's Mortality is Less than the COI	Percent of Policy Months Where Witt's Mortality is Greater than COI
[1]	[2]	[3]	[4] = [2]/([2]+[3])
Pre 2010	24,521	2,621,552	0.9%
2010	7,077	194,266	3.5%
2011	10,675	181,746	5.5%
2012	14,800	169,294	8.0%
2013	18,050	158,706	10.2%
2014	21,043	148,543	12.4%
2015	23,636	138,616	14.6%
2016	26,570	129,150	17.1%
2017	28,822	115,212	20.0%
Total	**175,194**	**3,857,085**	**4.3%**

Notes and Sources: State Farm Dynamic Data; State Farm Static Data; Witt's Supplemental Exhibit C; Ex. 240 – Scott Witt – Crossover Damages Model.

Dkt. 398 at 302-19 (Ex. 244) (emphasis added).

Under the Witt methodology, for many class members, the higher rates charged after the crossover point eventually eliminate the benefit of the lower rates charged before the crossover point. For some, that reality manifested by trial, resulting in net negative damages (calculated as zero damages at trial). And although not all class members had net negative damages at trial, that is the inevitable result

of Witt's methodology as it projects forward in time for many policyholders who continue to hold their policies.

This crossover effect had three relevant consequences here:

First, it affects the *rates* for each class member. For many, it *raises* their cost of insurance rates, and the negative effect of the rate increase at some point swallows any benefit received from the lower rates earlier on. For this reason, a "snapshot" of the methodology's application at any given time shows some winners and some losers in the class.

Second, as of trial, the methodology resulted in zero or negative net damages for some class members, even though they suffered the same alleged contract breach as others. App. 56a; *see, e.g.*, Dkt. 397 at 177-79 (Ex. 242) (damages under one model ranged from zero to $79,315.57). And, as discussed below, because the district court eventually defined those members out of the class, they were left free to sue State Farm later under a different damages model that might show them suffering net positive damages. The untenable result for State Farm would be incongruent theories as to how cost of insurance charges should be calculated for policyholders insured on the same form who continue to hold their policies going forward.

Third, the methodology harms those *current* State Farm policyholders whose rates under the Witt model would be higher than those charged by State Farm. Although Plaintiff did not seek (and the district court did not award) injunctive relief in the form of an order directing State Farm to conform its rate structure to Witt's methodology, certainly State Farm would have a strong incentive to adopt something like Witt's

methodology in its going-forward rates to avoid a future class action under the same theory Plaintiff pursued.

B. Procedural History and Opinions Below

1. Plaintiff moved to certify a class of "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri." App. 37a.

State Farm opposed certification on the ground that there was an inherent conflict among class members because some benefited from the Witt methodology while others did not benefit, or would be injured by the model going forward. Dkt. 169 at 13-15. The district court acknowledged Plaintiff's concession that, at the time of his motion and under the version of Witt's model presented at class certification, class members holding at least 487 policies could claim no damages. App. 43a-44a. The court nevertheless found no conflict sufficient to preclude certification. App. 48a-49a. Rather, the court declared that individuals who could not prove damages under Plaintiff's own damages model "may be excluded" from the class. App. 44a.

The district court rejected State Farm's commonality argument, citing an inapposite observation from this Court that "'the question of whether uninjured class members [for purposes of Article III] may recover' was not 'yet fairly presented … because the damages award ha[d] not yet been disbursed.'" App. 44a (quoting *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016)).

State Farm also argued that the assumptions built into Witt's methodology resulted in an inherent

conflict, with some class members benefiting and others being harmed by the model projected forward in time. Dkt. 169 at 13-15. It also argued that Plaintiff was not an adequate class representative because his interests conflicted with those of other class members. Dkt. 169 at 13-15. The court did not address the first issue, and, as to the second, stated only that "[t]he issue is intertwined with the merits, and is not appropriately resolved upon a motion of class certification," App. 49a—a conclusion at odds with this Court's holding in *Comcast Corp.*, 569 U.S. at 33-34.

On April 20, 2018, the district court certified a Missouri class of policyholders insured on Form 94030. App. 3a, 54a. Six days later, the court approved dissemination of a class notice. Dkt. 238. After listing various exclusions from the class such as State Farm employees, the notice stated that the class "also excludes policy owners who did not suffer any harm." Dkt. 237-1 at 6.

2. As noted, the case then proceeded to a damages-only trial, during which the multiple, late-disclosed Witt models were introduced. On the last day of trial, before the jury's verdict and before the court entered judgment, State Farm moved to decertify the class, arguing that the intraclass conflict created by the Witt damages models made certification inappropriate and that the named Plaintiff was neither a typical nor an adequate class representative. Dkt. 353 at 7. State Farm focused, in particular, on the 20% of 2017 members whose rates would increase under Witt's methodology, and

another 29 members revealed at trial to have no damages. Dkt. 353 at 2, 6-7.

The district court denied the decertification motion, reasoning—for the first time, and contrary to the assumptions in the Witt models presented at trial—that "it would be speculation to assume that including only mortality factors in its [cost of insurance] rates would result in increased premiums for State Farm's long term customers." App. 64a, 69a.

While the decertification motion was pending, the jury returned a verdict for the class in the amount of $34,333,495.81. Dkt. 358. Plaintiff filed a motion to alter or amend the judgment to define out of the class—and thus exclude from the binding effect of the judgment—those members holding 487 policies identified as suffering no net damages by the model the jury followed in rendering its verdict. Dkt. 377. The district court granted the motion, adding the following to the class definition: "The Class also excludes the owners of 487 policies that were not subject to overcharges alleged by Plaintiffs (identified in Exhibit A)." App. 56a. The effect was that these class members were excluded for failure to establish an element of their claim under Missouri law—namely, damages. The court entered the revised judgment on October 12, 2018, and State Farm timely appealed. App. 72a-73a; Dkt. 408.

On the class certification issue, the Eighth Circuit rejected State Farm's argument that inherent conflicts within the class created by the Witt model precluded class treatment. App. 16a-18a. It reasoned that class members must share "typicality and adequacy of representation" but that "[b]ecause there are no class conflicts so substantial as to overbalance the common interests of the class members as a whole,

the district court did not err in certifying the class." App. 16a-18a (quotation marks omitted).

State Farm also argued that the remedy for intraclass conflict was *not* to define out of the class those members who could not succeed on the merits of their claims, as doing so would create an impermissible fail-safe class. App. 16a18a.

The Eighth Circuit disagreed that there was a fail-safe class, reasoning that the class members holding the 487 policies had been excluded by the district court before trial—even though the district court did not know, and could not have known, how many class members ultimately would be excluded because that number depended on which of the four different Witt models the jury would accept. App. 18a-19a. And the district court did not actually exclude any members with no damages until it amended the judgment at Plaintiff's request after trial. App. 56a.

Finally, the Eighth Circuit rejected State Farm's argument that Witt's methodology created a conflict between current and former policyholders because, if State Farm adopted that methodology for its rates to avoid future liability under the same theory, many class members who continued to hold their policies would be charged more, not less, over time. App. 16a-17a. The court deemed this argument "entirely speculative," because it would require "nothing more than conjecture about how this lawsuit will affect State Farm's future dealings with current policyholders." App. 16a-17a.[2] The court did not

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[2] State Farm also argued that the Witt rates disproportionately harmed longer-term policyholders because the Witt rates differentiated among policyholders by how long they held the policy, and State Farm's rates do not. Dkt. 353

address the point that the Witt methodology made this negative effect on many continuing policyholders a mathematical certainty, or the practical reality that a company would have to consider such a change to avoid future liability under the same classwide theory that produced the present verdict.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision deepens two splits among the federal appellate courts on issues warranting this Court's review: First, may a class be certified under Rule 23 where the damages models proffered by the class representative indisputably would harm a significant—and growing—number of class members and where, as of 2017 (the end date for Witt's data), the methodology yielded no net damages

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at 2. Put another way, State Farm "pools" its policyholders—meaning it charges them the same—regardless of how long they hold their policies. By contrast, some of Witt's models did *not* "pool"—meaning they did differentiate among policyholders based on how long the policy was in effect. Dkt. 398 at 274-75, 277, 283; Dkt. 397 at 134-35. Witt justified that assumption by referring to the State Farm mortality table, used early in the ratemaking process, that also does not "pool" for duration. Dkt. 397 at 133. The Eighth Circuit brushed State Farm's argument aside, incorrectly noting that "the jury concluded State Farm did not pool its mortality rates, and any argument premised on pooling must fail." App. 17a-18a. In fact, the jury was not asked to decide whether State Farm's underlying rates differentiate on this basis, Dkt. 358, (they indisputably do *not*), but rather was told to consider four different models—some of which assumed differentiation based on duration and some of which did not. Dkt. 397 at 140, 141, 144, 169-171, 173-176; Dkt. 398 at 326, 333. At most, the jury assumed that State Farm's internal *mortality table*, which formed the basis of Witt's models, differentiates based on duration. The jury made no such finding about the rates State Farm actually charges, as none of Witt's models addressed that point.

resulting from the alleged breach (an element of the claim) for hundreds or even thousands of them? Second, can such a conflict be solved by simply excluding those individuals with no net damages from the class, thereby relieving them of the binding effect of the judgment, precisely because of their inability to establish an element of their underlying claims?

The first question presented here is not new to this Court. It overlaps with one of the questions as to which this Court granted certiorari in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); Petition for Writ of Certiorari at i, *Tyson Foods*, 136 S. Ct. 1036, No. 14-1146 (granted June 8, 2015) ("Whether a class action may be certified or maintained under Rule 23(b)(3) … when the class contain[ed] hundreds of members who were not injured and have no legal right to any damages."). Yet the issue remains unresolved, because the petitioner in *Tyson Foods* reframed, and thus abandoned, that question at the merits stage. 136 S. Ct. at 1049.

Similarly, just this term, in *TransUnion LLC v. Ramirez*, No. 20-297 (granted Dec. 16, 2020), this Court granted certiorari on a question that overlaps significantly with the first question here. *See* Petition for Writ of Certiorari at i, *TransUnion* (No. 20-297) ("Whether … Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."). At the very least, the

Court should hold the petition pending resolution of *TransUnion*.

I. THE EIGHTH CIRCUIT'S DECISION DEEPENS A SPLIT AS TO WHETHER AN INTRACLASS CONFLICT BARS CERTIFICATION

Plaintiff's damages methodology, developed to remedy a claimed breach of State Farm's policy, systematically benefits shorter-term policyholders with certain personal health characteristics, including tobacco use, and disadvantages longer-term policyholders with other health characteristics, including no tobacco use. This is because, over time, the Witt methodology generates *higher* cost of insurance rates for some policyholders as compared to State Farm's actual rates. In fact, by 2017, 20% of policyholders insured on form 94030 would be paying *higher* cost of insurance rates under Witt's approach than under State Farm's rate tables. Dkt. 398 at 304-05 (Ex. 244).

Rather than address the problem of increased rates for some policyholders, Witt simply netted out each policyholder's gains and losses to see whether each suffered *net* damages as of 2017. Dkt. 397 at 204. As of that time, even for policyholders whose *rates* were higher under Witt's methodology, some still had damages because the alternative rate structure yielded lower rates in early years, but the crossover effect had not *yet* eliminated all of those gains. By contrast, other members had *no* net damages because the benefit of lower rates earlier on had been eliminated by the higher rates following the crossover. Witt identified and then excluded, from each of his models presented to the jury, those class members who, under each model, suffered no net damages. But Witt's various models presented at trial did not

calculate alternative rates beyond 2017, so they did not account for the continuing negative effect for policyholders who maintain their policies.

As a result, even though State Farm purportedly breached the policy held by all class members in the same way, Witt's damages models disadvantaged many of them through higher rates, and, for some, yielded no net damages at trial.

The Eighth Circuit's conclusion that the "intra-class conflicts" created by the Witt models were not "so substantial as to overbalance the common interests of the class members as a whole" and merely indicated that "different class members desir[e] different methods of calculating damages," App. 16a-18a (quotation marks omitted), not only constituted error, but deepened a circuit conflict regarding the circumstances in which a class containing members with competing interests may be certified.

In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003), an antitrust case involving a class of purchasers of a branded drug product, the Eleventh Circuit reversed class certification because defendant's evidence reflected that a significant number of class members experienced an economic benefit from the antitrust practices challenged in the suit. *Id.* at 1190-91. Citing circuit precedent, the court reasoned that certification is improper where there is a "fundamental conflict" between class members, meaning that "some … members claim to have been harmed by the same conduct that benefited other members of the class." *Id.* at 1189 (citing *Pickett v. Iowa Beef Processors*, 209 F.3d 1276 (11th Cir. 2000)). In such circumstances where "substantial conflicts of interest are determined to exist among a class, class

certification is inappropriate" because the named plaintiff cannot adequately represent the class. *Id.*; *see also Pickett*, 209 F.3d at 1280 (affirming denial of certification in antitrust case where class of cattle producers included producers who would benefit from the challenged practices).

The Eleventh Circuit further noted that, as of the time of its decision, "no circuit ha[d] approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Valley Drug*, 350 F.3d at 1190. The court concluded that, where the "injury suffered by some class members was arguably outweighed by the benefits they gained … , the actual economic interests of these members would substantially diverge from the objectives of the named representatives and other members," precluding class certification under Rule 23(a)(4). *Id.* at 1196.

The Fifth Circuit reached the same conclusion in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299 (5th Cir. 2007), a case involving a class of participants in a corporate 401(k) plan. The Fifth Circuit reversed a class certification order in light of evidence showing that a significant number of class members economically benefited from the challenged investment practices—that is, some class members' portfolios experienced gains under the challenged strategies and, even for those who experienced losses, different theories of liability would "have different consequences for class members' recovery." *Id.* at 315. The court observed that "[n]umerous courts have held that intraclass conflicts may negate adequacy under Rule 23(a)(4)." *Id.* And unlike the Eighth Circuit here, the Fifth Circuit considered the harm that some

class members may suffer *in the future*, "even if Appellees prevail without receiving an injunction." *Id.* at 315 n.27.

The Eighth Circuit's ruling also splits directly from the D.C. Circuit's decision in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019), which involved a closely analogous factual scenario. There, the court reviewed a decision declining to certify a "putative class of over 16,000 shippers allegedly harmed by a price-fixing conspiracy among the nation's largest freight railroads." *Id.* at 620. The shippers "maintain[ed] that the alleged conspiracy injured every one of them." *Id.* at 623. But their damages model showed something different—that 2,037 members of the proposed class "suffered only negative overcharges and thus *no* injury from any conspiracy." *Id.* (quotation marks omitted).

The D.C. Circuit reasoned that, because the shippers could not establish "common proof" of essential elements of liability—damages and causation—common questions did not predominate under Rule 23. 934 F.3d at 623-24 (noting that the court expects "common evidence to show all class members suffered *some* injury" (quotation marks omitted)).

The Seventh Circuit also prohibits certification where class members have competing interests. In *Bieneman v. City of Chicago*, a landowner contended that the city and airlines using the O'Hare airport reduced nearby property values due to the noise pollution and chemicals used by the aircraft. 864 F.2d 463 (7th Cir. 1988). The proposed class consisted of over 300,000 persons and "some of these undoubtedly derive great benefit from increased operations at O'Hare." *Id*. at 465. On this basis, the Seventh

Circuit affirmed the denial of class certification. *Id*. at 473.

In contrast to these cases, the First Circuit affirmed class certification in *Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012), even though the corporate policy challenged by the named plaintiffs benefited only some members of the class. There, a class of Starbucks baristas alleged that the company's policy of sharing pooled tips with shift supervisors violated a state law prohibiting policies requiring "wait staff" to share tips with managers. *Id.* at 132. Yet the class included hundreds of "former baristas who became shift supervisors at some point during the class period (and, thus, would be financially disadvantaged by a decision striking down Starbucks' current policy)." *Id.* at 138. Nonetheless, the court held that the class was properly certified even though it "embodie[d] a potential for conflict," reasoning that "an interest by certain putative class members in maintaining the allegedly unlawful policy is not a reason to deny class certification." *Id.* (quotation marks omitted).

For its part, the Third Circuit reached opposite conclusions on this issue within a matter of weeks. In *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184, 187-90 (3d Cir. 2012), the court cited *Valley Drug* to hold that an intraclass conflict precluded certification where the representative plaintiffs had an incentive to allocate benefits to themselves at the expense of other class members. By contrast, in *In re K-Dur Antitrust Litigation*, 686 F.3d 197, 223 (3d Cir. 2012), the court noted a "a split in authority" and expressly "reject[ed] the *Valley Drug* decision," holding that it made no difference whether unnamed

class members benefited from the conduct that allegedly harmed the named representative.

Although the Third, Fifth, Seventh, Eleventh, and seemingly the First and Eighth Circuits have all analyzed the class conflict issue as a function of the typicality and adequacy elements of Rule 23, the D.C. Circuit focused on commonality and predominance. These differences do not negate the circuit split presented by these cases, as the Rule 23 requirements all work to ensure that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co.*, 457 U.S. at 157 n.13. To the extent the characterization matters, it only exacerbates the split among the lower courts on the proper handling of conflicts within a proposed class.

Finally, the D.C. Circuit in *Rail Freight* assumed without deciding that a class containing members with no damages or negative damages might be certified where the percentage of members in conflict with the class is *de minimis*. 934 F.3d at 624-25. This point also does not negate the split. According to the D.C. Circuit, the "'few reported decisions' involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number.'" *Id.* at 625 (citation omitted). Applying this threshold, the court found that the 12.7% of class members in *Rail Freight* with "only negative overcharges" and no proof of causation was not *de minimis*. *Id.* at 623, 625.

Here, of the class members still insured on the policy as of 2017, 20% had *higher* cost of insurance rates under the Witt model, and with each passing year, more class members' rates will indisputably go up. Dkt. 398 at 188-90, 297-98, 302-19 (Ex. 244). At

trial, Plaintiff's counsel tried to paper over this problem by focusing only on the percentage of policies held by class members with no *net* damages as of 2017. Dkt. 397 at 204. This percentage varied under Witt's models, with one model identifying class members holding 2,102 such policies, or approximately 9% of the class, Dkt. 397 at 194-95 (the previously identified 487 members plus an additional 1,615 members), and another—the one that most resembled the jury's verdict—identifying members holding 487 policies (plus another 29 discovered at trial), or 2% of the class, Dkt. 397 at 194-95, 178; Dkt. 404-1. But this netting technique cannot obscure the fact that the percentage of policyholders harmed by the Witt model is much greater, because the crossover affects an increasing number of policyholders over time. That is particularly so given the practical reality that State Farm will need to consider conforming its Missouri rates for current policyholders to match the Witt model to avoid future liability under the same theory, thus also opening the door to exposure from policyholders who would be harmed by such a change. Contrary to the Eighth Circuit's analysis, App. 16a-17a, these forward-looking harms that the Witt model creates are not "speculative," but are mathematically demonstrable facts that both Plaintiff and Witt acknowledged. Dkt. 353 at 5-7.

Plaintiff cannot have it both ways. He cannot claim that State Farm must calculate its cost of insurance rates only by reference to age, sex, and rate class and then provide a damages model that purports to do just that (although it does not), only to turn around and argue that what State Farm does or does not do to remedy the "breach" is speculative. Plaintiff won a $34 million class award on the theory that

Witt's model provided the remedy for the breach, and it is not "speculative" to consider what effect that rate would have for continuing policyholders on a forward-looking basis.

* * *

This Court should grant certiorari on this question. The circuits have resolved the question in different ways, leading to different results in different jurisdictions. And further consideration by the lower courts seems unlikely to provide clarity. The question is crucial to both putative class members and defendants, and particularly to State Farm, which currently is facing eight additional cost of insurance class actions across the country, many with Witt as the expert and similar damages models to those used here.

II. THE EIGHTH CIRCUIT'S DECISION DEEPENS A CIRCUIT SPLIT REGARDING THE PERMISSIBILITY AND CHARACTERISTICS OF A FAIL-SAFE CLASS

As described above, the Witt damages models conceded an absence of net damages for class members holding as many as 2,102 policies. Dkt. 397 at 194-95 (the 487 previously identified members plus an additional 1,615 members). As a result, some percentage of class members could not establish the damages element of their claims. The district court nonetheless concluded that class certification was proper, reasoning that any class members who could not establish the damages element of their claims could simply be defined out of the class—a solution

that also would mean they would not be bound by the judgment. App. 37a, 44a.

By excluding class members because they could not establish an element of their claims, the district court created a fail-safe class—one in which class membership is defined by success on the merits of the underlying claims. In affirming certification, the Eighth Circuit recognized its own prior cases barring fail-safe classes, but concluded that what the district court created was *not* a fail-safe class because, as the court understood it, the exclusion of the uninjured members occurred before trial. App. 18a-19a.

In so holding, the Eighth Circuit contributed to a well-developed and recognized circuit split regarding the circumstances under which it is proper to certify a class defined by reference to whether its members can prevail on the merits of their claims. Erin L. Geller, Note, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2788-89 (2013) (recognizing circuit split on the permissibility of "fail-safe" classes). It also created a subsidiary conflict among circuits that prohibit fail-safe classes as to what constitutes a fail-safe class in the first instance.

A. The circuits are split on the permissibility of fail-safe classes

There is a clean circuit split on whether a district court may certify a "fail-safe" class—meaning a class defined by reference to whether class members can prevail on the merits of the underlying claim.

The First, Sixth, and Seventh Circuits, and a prior decision of the Eighth Circuit, all have held that fail-safe classes cannot be certified. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21-22 (1st Cir. 2015)

(noting the "inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury"); *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) (fail-safe class is "prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment"); *Messner*, 669 F.3d at 825 (fail-safe class is "improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment"); *Orduno v. Pietrzak*, 932 F.3d 710, 716-17 (8th Cir. 2019) (fail-safe class is "prohibited" when "defined to preclude membership unless a putative member would prevail on the merits" (quotation marks omitted)).

The Third, Ninth, and Eleventh Circuits have suggested that they would adopt the same rule. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 167 (3d Cir. 2015) (noting that requiring an overly specific class definition risks creating "a fail-safe class"); *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010) (recognizing that fail-safe classes are "unmanageable" and "palpably unfair to the defendant"); *Cordoba v. DirecTV, LLC*, 942 F.3d 1259, 1276-77 (11th Cir. 2019) (warning of the "risk of promoting so-called 'fail-safe' classes").

In contrast, the Fifth Circuit consistently has "rejected a rule against fail-safe classes." *In re Rodriguez*, 695 F.3d 360, 369-70 (5th Cir. 2012). Although the Fifth Circuit has acknowledged that "[a] fail-safe class is a class … defined in terms of the ultimate question of liability," it has expressly declined to adopt a rule against the certification of fail-safe classes. *Id.* It reasoned that a rule against fail-safe classes "would preclude certification of just about any class of persons alleging injury from a

particular action." *Id.* (quotation marks omitted). In the Fifth Circuit's view, as long as a class is "linked by a common complaint, the fact that the class is defined with reference to an ultimate issue of causation [for example] does not prevent certification." *Id.* (quotation marks omitted).

This circuit split is clear and well-recognized, including by district courts that have reached differing results following the divergent circuit court precedents. *Compare Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 624-26 (E.D. Pa. 2015) (noting circuit split and striking class allegations under Third Circuit precedent due to fail-safe definition), *and Fennell v. Navient Sols., LLC*, 2019 WL 3854815, at *3-4 & n.4 (M.D. Fla. June 14, 2019) (noting circuit split and following other Eleventh Circuit district courts in holding that a fail-safe definition is a "basis" on which to reject a proposed class), *with O'Donnell v. Harris Cty*, 2017 WL 1542457, at *3 (S.D. Tex. Apr. 28, 2017) (citing Fifth Circuit precedent allowing fail-safe classes as a basis for rejecting objection to class certification); *Doe v. Trinity Logistics, Inc.*, 2018 WL 1610514, at *10-12 (D. Del. Apr. 3, 2018) (noting split but declining to strike class allegations); *Reyes v. BCA Fin. Servs., Inc.*, 2018 WL 3145807, at *18-19 (S.D. Fla. June 26, 2018) (noting split and "hesitat[ing] to deny class certification" given uncertainty in the law but finding no fail-safe class).

The question whether Rule 23 permits the certification of a fail-safe class also has been discussed by academic commentators. Geller, *supra*, at 2788-2801 (describing circuit split); Geoffrey C. Shaw, Note, *Class Ascertainability*, 124 Yale L.J. 2354, 2386-88 (2015) (arguing that "a failsafe class sidesteps the

basic incentive structure of aggregate litigation—where plaintiffs assume the risk of preclusion in exchange for a potential payout").

B. The Eighth Circuit's decision creates a split on what constitutes a fail-safe class

At the class certification stage, the district court was advised that the then-extant Witt damages model yielded no damages for class members holding at least 487 policies and in fact would harm those and other members by charging them *higher* cost of insurance rates—an effect that would increase over time and affect more class members. App. 43a-44a, 48a. Rather than address whether this conflict precluded certification, the district court simply stated that members who suffered no damages could be "excluded from the class." App. 44a. This "solution" to the intraclass conflict was alluded to in the class notice, which stated that the class "excludes policy owners who did not suffer any harm." Dkt. 237-1 at 6. But neither the order nor the notice identified *which specific* policyholders would be excluded, nor did the notice provide class members with any way of discerning whether they were "unharmed" and thus subject to exclusion.

After a trial in which the jury, following one of Witt's damages models, awarded the class roughly $34 million, Plaintiff moved to alter or amend the judgment to exclude from the class definition the members holding 487 policies identified in that model as having suffered no net damages. App. 55a-56a. State Farm objected that the proposed exclusion would produce an impermissible fail-safe class and so was fundamentally unfair, as the excluded class members who could not prove their claims would not

be bound by the judgment. Dkt. 385 at 1. The court dismissed this concern, noting that the class definition, "although not technically changed" until after trial, "was functionally modified prior to the trial" because the parties knew that some class members might suffer no damages under Witt's various models. App. 56a. Accordingly, the court granted the motion and added the following sentence to the class definition: "The Class also excludes the owners of 487 policies that were not subject to overcharges…." App. 62a.[3]

On appeal, the Eighth Circuit affirmed on this point, declaring no fail-safe class "present here" because, on its reading of the record, and under its view of what constitutes a "fail-safe" class, the district court excluded these members *before* trial—a fact it viewed as dispositive. App. 18a-19a.

Even if it were true that class members holding the 487 policies that Witt deemed to have suffered no net damages were defined out of the class *before* the jury rendered its verdict, *see* App. 56a—an assertion that is impossible because the jury had not yet selected from among the divergent Witt models—the Eighth Circuit's holding that no fail-safe class was created unless the undamaged members were excluded *after* the verdict creates a separate split from

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[3] The fact that the jury agreed with State Farm that another 29 members suffered no net damages, yet those members somehow remained in the class, does not negate the fail-safe issue, which turns on qualitative issues of fairness and the nature of the class definition, not whether all members who failed on the merits were actually excluded. *See*, *e.g.*, *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 660-61 (7th Cir. 2015).

other circuits as to what constitutes an impermissible fail-safe class in the first place.

In *Randleman v. Fidelity National Title Insurance Co.*, 646 F.3d 347, 350, 352-53 (6th Cir. 2011), for example, the Sixth Circuit, presented with a fail-safe class definition well in advance of a merits judgment, affirmed decertification *before* trial, noting that decertification may be warranted before judgment where a class definition contains a fail-safe provision. The Sixth Circuit did not hold that the district court must wait and see which members would actually be defined out of the class through the judgment to conclude the class definition created a fail-safe class. *Id.* Rather, the court focused on the nature of the class definition itself, concluding that it was "flawed in that it only included those who are 'entitled to relief.'" *Id.*; *see also In re Nexium*, 777 F.3d at 22 (warning, at the certification stage, that a fail-safe class may be created by defining the class so as to "exclud[e] all uninjured class members").

And in contrast to the Eighth Circuit's narrow focus on the timing of the exclusion, other circuits have explained the mischief of a fail-safe class as the exclusion of class members who cannot succeed on their claims from the binding effect of the judgment, such that defendants are left exposed to later suits by the excluded members. That is precisely the concern articulated by the Seventh Circuit in *Messner*, 669 F.3d at 825 (problem arises where "losing" class members are "defined out of the class and [are] therefore not bound by the judgment"), and by the Third Circuit in *Byrd*, 784 F.3d at 167 (key attribute of fail-safe class is that it "is defined so that whether a person qualifies as a member depends on whether

the person has a valid claim" (quotation marks omitted)).

For this reason, multiple circuits reject proposed fail-safe classes regardless of timing. And for good reason: Waiting until after trial to make that determination would force the defendant to litigate an entire class action subject to the "heads I win, tails you lose" dilemma created by a fail-safe class.

* * *

Review is necessary to resolve this entrenched circuit split on the permissibility of fail-safe classes, and the additional circuit split on what constitutes a fail-safe class. These issues are critical, as they implicate fundamental questions of fairness in the application of Rule 23. If members are defined out of the class because they cannot prove the merits of their claim under one damages model, then they are not bound by the judgment and can try again under a different model, subjecting defendants to multiple attempts to recover on the same set of claims. That harm is particularly acute in cases like this one, where State Farm faces an intractable dilemma as to how it should calculate cost of insurance rates for current policyholders in the face of incongruent potential damages models. These same harms from a fail-safe class exist regardless of when class members were excluded, whether they could have been identified at the pre-verdict stage as a mere hypothetical group or a finite set of individuals, or the ultimate number of such members.

III. THIS COURT SHOULD HOLD THE PETITION PENDING RESOLUTION OF *TRANSUNION*

The Court recently granted certiorari in *TransUnion LLC v. Ramirez*, No. 20-297. In

TransUnion, the Court will decide "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." Petition For Writ of Certiorari at i, *TransUnion* (No. 20-297). A decision in *TransUnion* will bear directly on the propriety of class certification here. Accordingly, in the event the Court does not grant State Farm's petition, it should hold the petition pending resolution of *TransUnion*.

In *Ramirez v. TransUnion LLC*, a divided Ninth Circuit upheld a certified class even though the named plaintiff's injury failed to align with those of fellow class members. 951 F.3d 1008, 1033 (9th Cir. 2020); *id.* at 1038-39 (McKeown, J., concurring in part and dissenting in part) (observing that plaintiff's "faint allegations … strain[ed] Rule 23's typicality requirements"). The Ninth Circuit rejected TransUnion's argument that the inclusion of these class members was fatal to certification. *Compare id.*, *with* App. 16a.

In *TransUnion*, as here, the class included members whose injuries differed, and some who suffered no injuries at all. *Compare TransUnion*, 951 F.3d at 1027; *id*. at 1040 (McKeown, J. dissenting in part), *with* App. 18a. And there, as here, the Ninth Circuit rejected that distinction, concluding that Rule 23 certification turns on the nature of the claims in general—*i.e.*, whether the claims arose from the same event or conduct—rather than the nature and degree of the injuries suffered. *Compare TransUnion*, 951 F.3d at 1033 ("Even if Ramirez's injuries were slightly more severe than some class members' injuries, Ramirez's injuries still arose from the same event or practice or course of conduct that gave rise to the

claims of other class members and his claims were based on the same legal theory." (alterations and quotation marks omitted)), *with* App. 18a ("[E]ven if there are slightly divergent theories that maximize damages for certain members of the class, this slight divergence is greatly outweighed by shared interests in establishing defendant's liability." (alterations, and quotation marks omitted)).

Indeed, like the Ninth Circuit, the Eighth Circuit concluded here that class members without an actual, concrete injury satisfied Article III. *Compare TransUnion*, 951 F.3d at 1027, 1030, *with* App. 14a-16a. This Court's ruling on Article III also could bear upon the correctness of the Eighth Circuit's conclusion that Article III was not offended by the inclusion of class members who suffered no economic harm.

For these reasons, if the Court concludes that a named plaintiff fails to satisfy either Article III or the requirements of Rule 23 when some class members suffer no damages, or suffer damages unlike those suffered by the named plaintiff, the Eighth Circuit's decision upholding the certification would require reversal. Thus, the Court should, at minimum, hold this petition pending the disposition of *TransUnion*.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, this petition should be held pending the Court's decision in *TransUnion*.

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