No. 20-1008

IN THE

Supreme Court of the United States

State Farm Life Insurance Co.,

Petitioner,

v.

Michael G. Vogt *on behalf of himself and others similarly situated*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. SCHIRGER
MILLER SCHIRGER, LLC
4520 Main Street,
Suite 1570
Kansas City, MO 64111
(816) 561-6500

NORMAN E. SIEGEL
BRADLEY T. WILDERS
Counsel of Record
LINDSAY TODD PERKINS
ETHAN M. LANGE
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
(816) 714-7100
wilders@stuevesiegel.com
Counsel for Respondent

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QUESTIONS PRESENTED

While other insurers obtain express permission to include non-mortality factors in the calculation of "cost of insurance" charges that are automatically deducted each month from universal-life-insurance policyowner accounts, State Farm indisputably did not. This lawsuit challenged State Farm's practice of using such factors to increase, or "load," those monthly deductions without the insured's permission. After a class was certified and elements of plaintiff's claims established by summary judgment under Missouri law, the case proceeded to trial on damages. Plaintiff's actuarial expert sought to prove the amount by which the charges were loaded by relying on the only set of rates without the impermissible factors produced by State Farm from its historical pricing files. Using those rates, he found and urged damages for each individual class member. State Farm's expert generated, for litigation, her own set of rates shortly before trial, using two assumptions plaintiff disputed. The jury rejected one assumption and adopted the other. The accepted assumption, which the courts below characterized as an offset defense, reduced damages by less than 3% and resulted in no net damages for a mere 29 (.13% of) class members. The district court entered a binding judgment on behalf of all class members, including those who took nothing from the verdict. It also reaffirmed its earlier order excluding 487 policyowners from the class, whose claims were not submitted to the jury, because their policy charges were refunded or they never experienced the alleged overcharge.

The Eighth Circuit affirmed, holding that State Farm's claimed intraclass conflicts rested on speculative assertions about future conduct and slightly divergent damages theories that did not outweigh the class's common interests. It further

held that State Farm mischaracterized the record in advancing its argument that this was a "fail-safe" class.

The questions presented are:

1. Whether the district court created a fail-safe class when it excluded 487 policyowners from the definition of the class prior to trial and with State Farm's acquiescence because they did not share the claim asserted by the plaintiff, while the 23,889 class members whose claims were tried were bound by the judgment "win or lose"?

2. Whether speculation and conjecture about future events, such as which rates State Farm will use in the future, or defendant-manufactured damages theories, are sufficient to create an intraclass conflict that defeats class certification when State Farm can conform its cost-of-insurance charges with the controlling policy interpretation under Missouri law by merely ensuring no charges exceed the amount permitted by the policy?

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INTRODUCTION

Michael G. Vogt acted as representative plaintiff on behalf of a class of 23,889 Missouri universal-life-insurance policyowners seeking damages for breach-of-contract and conversion under Missouri law. With interest, his efforts produced a trial judgment of over $39 million. Dkt. 460. After the district court interpreted the policy to prohibit State Farm from loading undisclosed costs into its monthly "cost of insurance" charges (a practice State Farm admitted to), a jury trial was held to determine damages. There, Vogt showed losses for every class member using State Farm's policy-level transactional data. The jury returned a verdict with a slightly reduced award corresponding to an offset defense asserted by State Farm, which resulted in no net damages for 29 class members. Nonetheless, over 99.8% of the class proved net losses and were awarded damages. As to the 29 members without a net loss, whose claims Vogt litigated vigorously, the district court ensured they took nothing from, but were bound by, the judgment.

Like a fox in the henhouse, State Farm now insists the class should be disassembled and the multi-million-dollar award extinguished because it claims Vogt did not adequately represent some class members. But vacating the judgment would not cure any harm to members of the class because there is no such harm. Instead, it would clearly inflict harm by depriving them of their share of the judgment. The Eighth Circuit rejected State Farm's speculative contention that some class members would be (or were) harmed by the litigation, finding that it rested on conjecture about uncertain future events.

Although State Farm claims a circuit split, *no* circuit has held or suggested, that speculative harm precludes class certification. To the contrary, all circuits relied upon by State Farm follow the rule applied below.

State Farm also argues that certiorari is warranted to review the propriety of a so-called "fail-safe" class—a class defined to include only plaintiffs who prevail on the merits. But the Eighth Circuit, which *has adopted a rule against such*

classes, found none here. State Farm invited the jury to award "no damages" to all 23,889 class members and those class members would have been bound by that result if the jury had accepted State Farm's invitation—just as the district court's judgment bound the 29 who failed to prove net losses at trial.

Finally, State Farm insists its petition should be held pending resolution of *Trans Union LLC v. Ramirez*. But, unlike allegations of non-monetary injuries arising from procedural violations, this case involves concrete injuries arising from breach of contract, conversion, and financial overcharges. Thus, whatever the outcome, *Trans Union* will have no impact here.

STATEMENT OF THE CASE

By holding State Farm to the meaning that an ordinary person would ascribe to its insurance contract, Vogt "lowered [the] ceiling" on what State Farm could deduct from policyowners' accounts each month. App. 69a. Because State Farm claimed the right to unilaterally set those charges, such a ceiling was obviously "to the benefit of all class members." *Id.* According to State Farm's own evidence, the prevailing policy interpretation produced overcharges in more than 95 percent of occurrences. And even though State Farm, for its own reasons, charged lower rates without the challenged additions in the remaining instances for which it claimed an offset to damages, the judgment still produced net damages for more than 99.8 percent of the class. There is no evidence some class members would be better off without their share of the judgment.

As to the class definition, a fail-safe class was not created when a handful of policyowners who were not subject to the challenged charges were excluded with State Farm's acquiescence at the class-certification stage and before any determination on the merits. The district court carefully ensured that all class members who sought a remedy from the jury were bound by the judgment, whether they won or lost.

A. The Policy.

Here, a universal-life-insurance contract, identical for all class members, was the glue that held together a class of 23,889 Missouri policyowners. A defining feature of such policies is that they provide both a death benefit and an "account value" that increases and decreases with premium payments and "separately identified interest credits … and mortality and expense charges[.]" Mo. Code Regs. Ann. tit. 20, § 400-1.100. Those charges are deducted automatically from the owner's policy account in which the balance earns interest. The policy is the sole source of State Farm's authorization for what it can deduct. Dkt. 1 at ¶ 22.

Each month State Farm takes a "monthly deduction" that includes a cost-of-insurance charge. The policy describes the formula for determining that charge with specificity. A determinative factor is the insured's cost-of-insurance rate. The rate is not disclosed to policyowners. Dkt. 191 at 16; Dkt. 218 at 4. In a section of the policy entitled "Guaranteed Values Provisions," State Farm promises that "[t]hese rates for each policy year are based on the Insured's age on the policy anniversary, sex, and applicable rate class ... [and] can be adjusted for projected changes in mortality[.]" Dkt. 218 at 2 (quoting App. 106a). These "mortality factors" permit State Farm to "determine [a] projected mortality estimate" for the policyowner. App. 4a.

"Expenses and profits are not mentioned" in the cost-of-insurance rate. Dkt. 218 at 2. In fact, the policy contains a separate monthly expense charge. Dkt. 218 at 2. And State Farm collects profits on the policy in several other ways. Dkt. 218 at 8; Dkt. 364 at 246 (Ex. P64).

Applying "general rules of contract construction" under Missouri law, the district court gave the policy's terms "the meaning that the average layperson would reasonably understand." Dkt. 218 at 5 (quoting *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997)). It followed other

courts that have construed "similar language" as "impos[ing] an obligation on the insurer to determine [cost-of-insurance] rates in accordance with the enumerated factors." Dkt. 218 at 6. A unanimous panel of the Eighth Circuit affirmed, concluding that the policy was

> at least ambiguous because a person of ordinary intelligence purchasing an insurance policy would not read the provision and understand that where the policy states that the [cost-of-insurance] fees will be calculated 'based on' listed mortality factors that the insurer would also be free to incorporate other, unlisted factors into the calculation.

App. 9a. If State Farm wanted the freedom it claimed, "it could have drafted the policy language to unambiguously achieve this aim." App. 10a (citing *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 211 (Mo. 1992)).[1]

B. Class Certification.

The district court certified a class by explicit reference to Missouri ownership of a particular policy form, all of whom had injury and damages according to the model prepared by Vogt's actuarial expert.

While the motion to certify was pending, State Farm produced policy-level transactional data that revealed 487 (out of 24,830) Missouri policyowners who did not share Vogt's claim. They either never paid an overcharge, or their charges were all reversed (because, for instance, they cancelled the policy during a free-look period). Acknowledging their unique

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[1] Amici's one-sided presentation that the claims here present recurring issues for life insurers tellingly ignores that (unlike State Farm) other insurers expressly include permission to use the non-mortality factors in determining the cost-of-insurance rates for their policies. *See, e.g.*, *In re Lincoln Nat'l COI Litig.*, 269 F. Supp. 3d 622, 628-29 (E.D. Pa. 2017) (policy disclosing rates "will be based on our expectation of future mortality, *interest, expenses, and lapses*") (emphasis added).

characteristics, Vogt agreed this small group should not be part of any certified class, and "State Farm [did] not deny that [they] may be identified and excluded from the class." App. 43a.

At the time, State Farm expressed no interest in seeking a binding judgment against this group. *See* Dkt. 215 at 5. In fact, after the district court acknowledged they could be identified and excluded, State Farm insisted language be added to the class notice making their exclusion from the class explicit.[2] Dkt. 235-1 at 6.[3] *See also* App. 68a.

C. Partial Summary Judgment.

At the pretrial conference, State Farm's counsel admitted that its cost-of-insurance rates included undisclosed profit and expenses. Dkt. 288 at 43. After allowing State Farm to submit a memorandum in opposition to plaintiff's oral motion for summary judgment, the court granted the motion in part, finding certain elements of liability and leaving only "the question of damages—the fourth element required to establish liability for breach of contract" for determination by the jury. Dkt. 335.[4]

D. The Trial.

1. Consistent with State Farm's own testimony, Vogt's actuary, Scott Witt, testified that when State Farm determined the policy's cost-of-insurance rates, it first generated mortality rates using the listed factors but then added a "load" for undisclosed profit and expenses to create the cost-of-insurance rates actually used. Dkt. 335; Dkt. 288 at 43; Dkt. 218 at 10. Internal actuarial memoranda from 1993 and 2002 described the

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[2] The only time State Farm asked for a binding judgment was after trial—when this group had long been out of the case. Dkt. 387; App. 68a.

[3] While the notice did not identify the 487 by name, it directed anyone with questions about class membership to the class website. Dkt. 235-1 at 6.

[4] Implying some defect in this procedure, State Farm neglects to mention the district court also granted *its* oral motion for partial summary judgment. Dkt. 320.

mortality-only rates as a percentage of State Farm's proprietary mortality experience. Witt determined each overcharge by substituting these rates for State Farm's actual cost-of-insurance rates. Using billions of data points from State Farm's historical, policy-level data, he removed the undisclosed "loads" and recalculated the resultant lost account values for each policy and totaled damages. Dkt. 363 at 128. His damages exhibit included "one row for every single policy" showing individual losses. Dkt. 363 at 132.

Total aggregated losses plus interest at the policy-compliant rate equaled $35,285,901.22 in "lost account value" for the class, an average of $1,462.14 per class member. Dkt. 363 at 132-133, 139. No class member had zero losses. Dkt. 363 at 200.

2. At trial, State Farm urged the jury to award "no damages[.]" Dkt. 365 at 415. Its expert, Anne Gron, claimed:

- Witt should have extended his rate substitutions to months in which the mortality-only rate was higher than the cost-of-insurance rate ("crossover"); and,
- Witt should have used "pooled" mortality rates—rates that did not vary by policy year—instead of the rates he took from State Farm's own records, even though the policy itself promised State Farm would generate rates "for each policy year."

App. 106a. None of Gron's criticisms, if assumed, eliminated damages. Although State Farm claimed these criticisms showed Witt's methodology unreliable, State Farm did not file a motion to exclude his testimony.

State Farm's claim that Witt offered "multiple, late-disclosed … models" at trial is misleading. Pet. 13. Witt calculated and urged at trial damages contained in his initial report (adjusted for those who opted out and State Farm employees). Dkt. 363 at 139. Before trial, however, he incorporated Gron's two assumptions into his model to show alternative damages if those assumptions were accepted. App. 25a-26a.

To incorporate Gron's first assumption, Witt applied straight substitutions, rather than merely removing State Farm's undisclosed loads from rates, which caused the monthly overcharges to be partially offset for some class members by the so-called crossover. According to the data State Farm itself cites, this occurred very infrequently—in only 4.3% of the millions of monthly transactions at issue. *See* Pet. 10 (quoting Dkt. 398 at 302-19 (Ex. 244)). As the verdict shows, even with the crossover, more than 99.8% of the class still had net losses.

Hence, State Farm grossly overstates the crossover as affecting at least "20% of all class members." Pet. 10. Its chart describes *occurrences* of monthly deductions in which the crossover is present, not amounts or number of class members. Additionally, the 20% calculation describes only occurrences in a single year (2017), Dkt. 364 at 305, but over half of the class no longer had their policies by 2017 and thus could not have been subject to one of those occurrences. *See, e.g.*, Dkt. 430 at 12.

Nevertheless, the evidence suggested the crossover was produced by State Farm's 2002 decision to lower its cost-of-insurance rates, which resulted in a small percentage of rates without a non-mortality load. This was done for competitive reasons—State Farm made plenty of profit on the policies through other charges and its rates in later policy years were not on par with its competitors. Dkt. 364 at 246 (Ex. P64). In State Farm's own words, this allowed it to "get[] more [cost-of-insurance] profits in the earlier years" before the policies were terminated. Dkt. 190 (cleaned up).[5]

At trial, State Farm argued that it should get a credit for these rare crossover occurrences against the overcharges occurring in the bulk of policy months. The district court

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[5] State Farm uses a line graph from another case involving a different policy, data, and defendant to demonstrate crossover. Pet. 4. Nothing in the record supports that this graph can be "mapped" onto the facts of this case.

"permitted this set-off argument even though State Farm had never raised set-off as an affirmative defense." App. 66a. State Farm presents the crossover as "inevitable" here, yet more than twenty-three years after the policies were first issued, the crossover reduced total damages by less than 3% (owing to the slight number of class members impacted by both the relatively rare occurrences and the amounts attributable to them). Dkt. 363 at 178:12-17. Only 29 class members had no net losses after application of the offset State Farm claims generated a debilitating intraclass conflict.

Second, Witt also calculated the impact of Gron's assumption that he should have used pooled mortality rates instead of the un-pooled-mortality-only rates State Farm admitted it used for pricing. Un-pooled rates are lower in earlier policy years and higher in later years, while pooled rates are "an averaging of" the rates so they do not differentiate by policy year. Dkt. 364 at 274. All class members necessarily benefit from the lower un-pooled rates in earlier policy years, while only some class members keep their policies into the later years when the un-pooled rates are higher. Overall, if the jury had accepted Gron's pooled rates (which were generated a few months before trial), it would have lowered total damages and increased the number of class members without net losses. *See* Dkt. 363 at 141-42; Dkt. 206 at 6; Dkt. 387 at 8. But, since pooled rates are a mere average of all rates, it is not inherent that even long-term policyowners would be better off using pooled-mortality-only rates. Most importantly, State Farm offered no analysis below to show the existence or size of any impact of using pooled, mortality-only rates for such members.

Witt's decision to use un-pooled rates was not incentive-driven, as State Farm suggests. Rather, he used the mortality rates found in State Farm's key actuarial memorandum, which were not pooled. In fact, pooled mortality rates did not exist in the "deposition transcripts, deposition exhibits, actuarial memoranda, [or] spreadsheets supplied by State Farm." Dkt. 363 at 142 ("one after the other did not use pooled mortality"). State

Farm's only contrary evidence came "from an employee who admitted that he did not personally participate" in pricing the policy. Dkt. 403 at 13. Thus, the alleged conflict depends on the supposition that Vogt could have chosen to advance an argument for which there was no credible, supporting evidence, as confirmed by the jury's rejection of it.

E. State Farm's Motion to Decertify.

1. During trial, State Farm moved to decertify the class, arguing for the first time that a judgment would "lead to greater [cost-of-insurance] charges for a substantial number" of class members who still held their policies. Dkt. 353 at 2-10. While the motion was pending, the jury returned a verdict, awarding $34,333,495.81. Dkt. 365 at 428. The verdict corresponded exactly to Witt's damages with the offset for Gron's proffered crossover assumption. The jury rejected State Farm's argument that it ever pooled its mortality-only rates. App. 21a.

After trial, the district court denied State Farm's motion. It clarified that "[a]s for the 487" policyowners "who never paid a [cost-of-insurance] charge that included a non-mortality" component or "had such charges immediately refunded, they were excluded from the class before trial and no claim on their behalf was ever tried or submitted to the jury." App. 68a. It went on to consider but reject State Farm's intraclass-conflict arguments. It held that the lawsuit "will not set rates going forward and, as State Farm acknowledges, what State Farm will do in the future is merely conjecture." Dkt. 69a. The court further noted that any suggestion class members were better off before the lawsuit was belied by the fact that "this lawsuit only lowered [the rate] ceiling." App. 69a. "[W]hat might occur after final judgment" was mere "[s]peculation" not "a basis for finding an intra-class conflict currently exists." App. 69a.

The district court entered a plan for allocating the judgment according to the individual damage calculations submitted at trial. Most importantly, that plan ensured all 29 class members

without net damages took nothing and were bound by the judgment. App. 72a-73a.

2. Contrary to State Farm's assertion, the litigation and resulting judgment did not systematically harm any portion of the class. The district court's policy interpretation benefitted all policyowners. Without it, State Farm claimed discretion to set the rates it desired. App. 69a.

Nor is it true, as State Farm contends, that "the inevitable result" is that "all class members [will eventually have] net negative damages" if State Farm substitutes its mortality-only rates for its cost-of-insurance rates. Pet. 10-11. For starters, nothing State Farm does in the future can inevitably harm all class members because more than half the class no longer have their policies. But more importantly, even as to those who do, State Farm submitted no going-forward analysis of such a substitution for current policyholders.[6] And more than twenty-three years after these policies went on the market, only 29 class members had no net damages, and overall damages were reduced by a mere 2.7%. State Farm further conspicuously ignores that the policy limits its ability to raise rates only when its projected mortality experience worsens. Moreover, State Farm admitted that its charges are loaded with expenses and profit, which is necessarily inconsistent with its assertions that all class members will inevitably have net negative damages if those loads are removed. *See* Dkt. 218 at 6; Dkt. 288 at 43.

State Farm also falsely claims Witt acknowledged "the crossover effect exists because the State Farm internal mortality table underlying his models does not align with the policy language or" development of the rates. Pet. 9. Witt acknowledged nothing of the kind and instead testified that he was

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[6] Gron's analysis that 4.3% of State Farm's rates are less than the mortality rates used by Witt is retrospective, not prospective. *See* Pet. 10; Dkt. 364 at 299. At trial, Gron claimed to have done some type of prospective analysis for in-force policies but that is not in the record nor was it submitted at class certification. Dkt. 364; *see also* Dkt. 352, 353, 387.

"following the guidance of the interpretation … the Court has ruled," Dkt. 363 at 176, and he used rates "State Farm repeatedly insisted" were its "pricing mortality rates." Dkt. 363 at 161, 153, 155.[7]

F. The Appeal.

State Farm appealed to the Eighth Circuit. It devoted a mere two pages of its 55-page brief to its intraclass conflict and fail-safe arguments. It cited *none* of the decisions it now argues the Eighth Circuit should have followed. And its fail-safe argument was *less than one, full sentence*. *See* Br. of Defendant-Appellant-Cross-Appellee State Farm Life Ins. Co. ("Op. Br. of State Farm") at 43-45.

A panel unanimously rejected State Farm's arguments. First, as to the alleged intraclass conflict, it held that a speculative conflict or one that "relies on nothing more than conjecture about how this lawsuit will affect State Farm's future dealings with current policyholders" did not render class certification inappropriate. App. 17a. There was no evidence that State Farm would or could raise cost-of-insurance rates, and State Farm's contentions "rest[ed] on 'uncertain predictions'" about the future. App. 17a.

Second, as to whether the use of un-pooled rates resulted in lower damages for class members of longer policy durations, the Eighth Circuit first acknowledged that the jury found State Farm did not use pooled rates. It then cited hornbook law, presented by Vogt, that "slightly divergent theories that maximize damages for certain members of the class" can, and here were, greatly outweighed by the shared interests in establishing liability. App. 18a (citing 1 Newberg on Class Actions § 3:62 (5th

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[7] State Farm claims *Thao v. Midland National Life Insurance Co.*, 2012 WL 1900114, at *9 (E.D. Wis. May 24, 2012), involved similar litigation, but certification failed there due to insufficient proof of "rates based exclusively on mortality expectations." Vogt presented sufficient proof here. App. 19a-23a.

ed. 2019)). Notably, State Farm had taken no issue with this legal rule in its reply brief. Defendant-Appellant-Cross-Appellee's Response and Reply Br. ("Reply Br. of State Farm") at 36.

Lastly, the Eighth Circuit addressed State Farm's cursory fail-safe argument, holding that this was not a fail-safe class. App. 18a. "[A]ll members of the class were bound by the judgment, regardless of whether they succeeded on their individual claims[.]" App. 19a. It further admonished State Farm for mischaracterizing the record. App. 19a.

State Farm's petition for rehearing en banc was denied without a single judge requesting a response. App. 75a. And its motion to recall the mandate based on this forthcoming petition was also unanimously denied. Dkt. 417.

REASONS FOR DENYING THE WRIT

At best, State Farm asks this Court to review application of legal rules that are not the subject of a circuit split (and which State Farm did not contest below) to the unique facts of this case. At worst, it seeks an impermissible advisory opinion that would not affect the outcome of this case. In either event, certiorari is inappropriate.

First, the Eighth Circuit did not affirm certification of a fail-safe class. The exclusion of 487 policyowners from the class at the outset followed by the trial of claims of 23,889 class members who were bound by the judgment—win or lose—did not create a fail-safe class under any circuit's precedent. Nor is the alleged split worthy of review. Only one circuit has declined to find it per se impermissible to certify a fail-safe class, and its decisions do not permit class members who lose on the merits to escape the binding effect of a judgment. Pet. 22; App. 18a.

Second, as to the alleged intraclass conflicts, the Eighth Circuit did not depart from established legal rules. State Farm does not point to any circuit that has barred certification based on a speculative conflict resting on conjecture about future

events—certainly not when certification ensures the class will share in a judgment now exceeding $39 million. In fact, the circuits State Farm relies upon all agree with the rule applied in this case.

Finally, there is absolutely no reason to hold this petition pending *Trans Union*. This is not a statutory-damages case in which there is a question regarding the concreteness of any class member's injury. Vogt alleged and proved actual overcharges for every class member and recovered net damages for over 99.8% of the class.

I. This Case Presents No Issue Concerning Fail-Safe Classes.

State Farm asks this Court to resolve a claimed intercircuit conflict over "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." Pet. 26. But this case offers no occasion to resolve that question. In a decision cited approvingly by the panel below, the Eighth Circuit recently adopted *State Farm's own view* on that issue. Citing the leading precedents on which State Farm relies, the court recognized in *Orduno v. Pietrzak*, 932 F.3d 710 (8th Cir. 2020), that a fail-safe class "is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." *Id.* at 716 (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012)).

The panel decision did not rest on the view that a fail-safe class is permissible—a position Vogt never advocated. It simply determined that no such class "is present here." App. 18a. Thus, State Farm does not complain that the Eighth Circuit adopted an incorrect rule of law, but that it did not apply the rule correctly to case-specific facts. That factbound objection does not merit review. S. Ct. R. 10.

A. The class passes any "fail-safe" test.

State Farm's factbound argument is meritless. As the panel stated below, it rests entirely on "an inaccurate characterization of the record." App. 19a. State Farm's central contention is that 487 policyowners were excluded from the class because they were not damaged. In fact, the parties recognized all along that there were 487 policyowners who could not sue because they either never paid the challenged cost-of-insurance charges or because the policy was cancelled and their charges refunded, as if the policies never existed. *See* App. 43a, 56a, 68a. The district court recognized in its initial certification order that those 487 policyowners were to be excluded from the class, App. 43a, and "none of their claims were submitted to the jury," App. 19a. They were excluded from the class not because their claim failed on the merits, but because they "did not share the claim" that State Farm's charges were improper. App. 19a.

Defining a class to include only those who share the claim advanced by the class representative does not create a fail-safe class. Rather, as State Farm's own authorities recognize, such a definition is required to meet the requirements of Rule 23(a) and to avoid a class that is overbroad because it "include[s] many members who could not bring a valid claim even under the best of circumstances." *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 825 (7th Cir. 2012); *see also Young*, 693 F.3d at 537–39 (holding that a class defined based on whether class members paid a challenged overcharge is not a fail-safe class).

The defining feature of a fail-safe class is that class members who share the named plaintiff's claim will not be bound by the judgment if their claim fails on the merits. *See id.* at 538; *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011). The class here had no such defect. It was defined as "Form 94030" policyowners in the state of Missouri, less certain categories of State Farm and judicial employees and the owners of 487 specifically identified policies. The only

claims submitted to the jury were the claims of the 23,889 policyowners who would be—and are—bound by the resulting judgment regardless of whether they won or lost. State Farm itself urged the jury to return a verdict of "no damages" that would have bound every class member. Dkt. 365 at 415. And the judgment ultimately rendered binds both class members who were awarded damages and the few who were not. App. 18a-19a.

Such a class is not a fail-safe one under any precedent cited by State Farm. *See* Pet. 26-27. The parties knew the identity of all 23,889 class members prior to trial; thus, this was not a class that "cannot be defined until the case is resolved on its merits[.]" *Young*, 693 F.3d at 538. The class was not defined in terms of its members' "entitle[ment] to relief," *see id.* at 538; *Randleman*, 646 F.3d at 352, but according to Missouri policy ownership and "objective criteria" that determined whether policyowners had been subject to the challenged charges. *See Young*, 693 F.3d at 539. Nor were any class members allowed to "seek a remedy but not be bound by an adverse judgment"—the potential unfairness inherent in true fail-safe classes. *Id.* In fact, when 0.13% of the class failed to prove net damages, they were not "defined out of the class" but were, quite properly, "bound by the judgment." *Messner*, 669 F.3d at 825.

In the face of these circumstances, State Farm doubles down on the "inaccurate characterization of the record" called out by the Eighth Circuit. App. 19a. But it remains patently false to claim the "district court … reason[ed] that any class members who could not establish the damages element of their claims could simply be defined out of the class." Pet. 25. Nor did the district court ever entertain excluding owners of "as many as 2,102 policies." *Id.* That characterization relies on adding together two unrelated groups: the 487 policyowners everyone agreed did not suffer an alleged overcharge who were excluded before trial and an additional 1,615 class members whose claims were, in fact, tried and would have been without net losses *only if* the jury had accepted both State Farm's

crossover and pooled-rates defenses. But, unlike a fail-safe class definition, the definition here would not have excluded the second group, whose claims were submitted to the jury, from the class if State Farm prevailed at trial. To the contrary, in its order certifying the class, the district court stated that if the jury accepted State Farm's defenses, class members who suffered no damages would be "identified and excluded *from any damages award*," not from the class. App. 45a (emphasis added).

That leaves the 487 policyowners who were not part of the class at trial. Contrary to State Farm's formulation of its question presented, they were not excluded to cure an intraclass conflict because Witt's damages model "would harm [them] by charging them *higher* cost of insurance rates[.]" Pet. 29. Rather, all 487 were *former* policyowners, Dkt. 376 at 5 n.4, who could not be harmed by any future rate-changes made by State Farm. Nor did they share the characteristics of the 1,615 class members for whom trial would decide whether they had net losses because it was undisputed the 487 never had an overcharge or had all charges refunded "as if the policy was never issued." *Id.* Vogt agreed such policyowners did not belong in the class because they did not share a single monthly overcharge with the rest of the class. App. 43a; App. 18a-19a.

State Farm's additional misstatements are even bolder. It claims it was "impossible" for the 487 policyowners to have been identified before trial "because the jury had not yet selected from among the divergent Witt models." Pet. 30. But State Farm knows better: At the class-certification stage, it submitted a supplemental brief identifying and arguing these same 487 policyowners lacked Article III standing, Dkt. 226, and the 487 policyowners were *repeatedly* referenced and identified *by policy number* as outside the class before and during trial. *See* Dkt. 235-1 at 6; Dkt. 267-1; Dkt. 362 at 25; Dkt. 363 at 200.

State Farm cannot point to a single circuit that would find an impermissible fail-safe class here. Once it was determined they did not share the allegedly improper overcharge with the other class members, Vogt did not ever "seek a remedy" on behalf these 487 policyowners without exposing them to "adverse judgment," *Young*, 693 F.3d at 538, because "none of their claims were submitted to the jury" or subject to a dispositive motion. App. 19a.

State Farm's contention that the decision below somehow conflicts with the Sixth Circuit's decision in *Randleman*, and decisions of other circuits, by holding that the "timing of the exclusion" of class members determines whether a class is a fail-safe one (Pet. 31) is meritless. *Randleman* and the other cited cases say that a class definition is improper if it "shields the putative class members from receiving an adverse judgment" by including only those "who are 'entitled to relief.'" 646 F.3d at 352. Here, the Eighth Circuit rightly recognized that the class definition never had that defect because the excluded members never sought relief. The Eighth Circuit did not suggest that a "district court must wait and see which members would actually be defined out of the class through the judgment[.]" Pet. 31. Rather, the class and the subsequent trial included only policyowners who shared the class claims—both those "entitled to relief and those not," *Young*, 693 F.3d at 538 (distinguishing *Randleman*)—which in any circuit would defeat the claim that this was a fail-safe class.

B. The claimed circuit conflict over fail-safe classes does not merit review.

Even if this case presented a vehicle to review the propriety of a fail-safe class, there is no circuit split requiring this Court's resolution on that issue. By State Farm's account, only the Fifth Circuit disagrees with the majority (including the Eighth) that fail-safe classes are improper. Pet. 27. But the Fifth Circuit's decisions, while stating that that court has not adopted a per se "rule against fail-safe classes," *In re Rodriguez*, 695 F.3d

360, 370 (5th Cir. 2012), do not permit class definitions that exclude class members whose claims fail on the merits from the binding effect of the judgment in a class action. Rather, they reject challenges to class definitions that, while employing some merits-related terminology, are properly understood as including "persons … linked by [a] common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership." *Id.* (quoting *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993)); *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 n.1 (5th Cir. 1999), *cert. denied*, 528 U.S. 1159 (2000). Courts that have staunchly adhered to the prohibition on fail-safe classes have similarly recognized that not every reference to merits considerations in a class definition results in an impermissible fail-safe class. *See Young*, 693 F.3d at 538; *see also Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010).

Moreover, the Fifth Circuit's three rulings touching on the point hardly reflect an entrenched view about fail-safe classes. Two (*Forbush* and *Mullen*) date back decades, predating the precedents of other circuits that have developed the fail-safe concept and do not even employ the term "fail-safe class." In the third (*Rodriguez*) the defendant did not cite any decisions of other circuits on the issue and did not seek rehearing en banc to allow the court to consider the consistency of its precedents with those of other courts. At minimum, this Court should give the Fifth Circuit an opportunity to consider the views of its sister circuits before considering review. If the Fifth Circuit were someday to reject the majority view and uphold a class definition that (unlike those at issue in *Rodriguez*, *Mullen*, and *Forbush*) genuinely excluded members if they failed to prevail on their claims, this Court's review would "benefit from [that] further attention[.]" *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting).

Meanwhile, there is no need for review. There are few examples, in the Fifth Circuit or elsewhere, of plaintiffs even

attempting to certify fail-safe classes, and such classes, even when attempted, generally fail other Rule 23 requirements. *See Ituah by McKay v. Austin State Hosp.*, No. A-18-CV-11-RP, 2020 WL 354949, at *7 & n.11 (W.D. Tex. Jan. 3, 2020), *report and recommendation adopted*, No. 1:18-CV-11-RP, 2020 WL 343973 (W.D. Tex. Jan. 21, 2020); *Barasich v. Shell Pipeline Co., LP*, No. CIV A 05-4180, 2008 WL 6468611, at *4 (E.D. La. June 19, 2008); *Hurt v. Shelby Cty. Bd. of Educ.*, No. 2:13-CV-230-VEH, 2014 WL 4269113, at *9 (N.D. Ala. Aug. 21, 2014); *Schydlower v. Pan Am. Life Ins. Co.*, No. EP-04-CA-441-DB, 2007 WL 9702858, at *9 (W.D. Tex. Jan. 18, 2007). It is unsurprising, then, that State Farm fails to cite even one modern case certifying an actual fail-safe class.[8]

II. State Farm's Claims of Intra-Class Conflict Do Not Warrant Review.

State Farm's argument that the Court should grant review to resolve a claimed circuit-split over whether intraclass conflicts bar class certification is fundamentally flawed. State Farm ignores that it did not dispute the legal standard applied by the Eighth Circuit, and thus it waived the right to urge a different legal rule. Moreover, there is no split of authority: The circuits agree that only fundamental conflicts bar certification and that claims of conflict that are speculative, or involve the details of damages theories, do not. State Farm's real disagreement with the courts below is over their application of settled legal principles to the unique facts here—a matter that would

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[8] State Farm gives one example (Pet. 28) that is actually not a fail-safe class notwithstanding the district court's reliance on *Rodriguez*; the class was limited to plaintiffs who met certain factual characteristics, but if defendant proved its conduct was constitutional, it would have had a binding judgment against those class members. *See ODonnell v. Harris Cty., Texas*, No. CV H-16-1414, 2017 WL 1542457, at *1 (S.D. Tex. Apr. 28, 2017). Examples offered outside the Fifth Circuit (Pet. 28) fare no better. *See Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV-GOODMAN, 2018 WL 3145807, *18-19 (S.D. Fla June 26, 2018) (concluding the class was not a fail-safe class).

be unworthy of this Court's consideration even if it did not rest on mischaracterization of the facts.

A. State Farm did not preserve a challenge to the law applied below.

This Court only reviews arguments raised below. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002). And at the certiorari stage, "[p]rudence … dictates awaiting a case in which [an] issue was fully litigated below, so that" when this Court reviews a legal question it "will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 538 (1992). As noted, State Farm barely argued the intraclass conflicts in the Eighth Circuit, and, critically, it did not dispute the legal rules applied below, which its petition skirts around.

In rejecting the intraclass-conflict arguments, the Eighth Circuit applied two legal rules—each highly fact dependent. The first is that speculative conflicts that depend on conjecture about future conduct do not preclude certification. App. 16a-17a. The second is that to preclude certification, a conflict regarding how to prove damages "must be so substantial as to overbalance the common interests of the class members as a whole." App. 16a (quoting *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012)). Applying these rules to the record here, the Eighth Circuit affirmed the district court's finding that harm to current policyowners was speculative and that common interests outweighed any potential interest among certain class members in calculating damages using different mortality rates. App. 16a-17a.

State Farm's cursory treatment below registered no disagreement with either legal principle. *See* Op. Br. of State Farm at 43-45; Reply Br. of State Farm at 36. Nor did it cite any of the decisions it now claims the Eighth Circuit should have followed. Pet. 19-23. Rather, State Farm's appeal centered on its factual assertion that the conflict "is not speculative." Reply Br.

of State Farm at 36. State Farm did not even respond to Vogt's citation of *Matamoros* in its reply. Having, thus, rested its appeal on the weight of the evidence (and failed), State Farm cannot now claim legal error and insist the Court review legal rules that it did not challenge below.

B. There is no split of authority, much less one on the issues decided.

Even if State Farm had preserved its argument, the two legal rules the Eighth Circuit relied upon do not present a split of authority. The Eighth Circuit did not hold that a class can contain members who will be harmed by the lawsuit. App. 16a-18a. It held that State Farm's assertions of harm are speculative. Importantly, *no* circuit has held that speculative harm based on conjecture about future conduct requires a district court to deny certification. Nor has any circuit adopted a per se rule that precludes certification when there are slightly divergent interests regarding damages calculation.

The universal rule is that an intraclass conflict can defeat certification only when it is "fundamental." 1 Newberg on Class Actions § 3:58 (5th ed. 2020); *see*, *e.g.*, *In re Suboxone Antitrust Litig.*, 967 F.3d 264, 272 (3d Cir. 2020); *In re Deepwater Horizon*, 739 F.3d 790, 813–14 (5th Cir. 2014); *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 989 (11th Cir. 2016). The Eighth Circuit also applies this consensus standard. *See In re Target Corp. Customer Data Sec. Breach Litig.*, 892 F.3d 968, 976 (8th Cir. 2018).

The other circuits cited by State Farm agree that hypothetical or speculative conflicts are not fundamental. *See, e.g.*, *Cobell v. Salazar*, 679 F.3d 909, 920 (D.C. Cir. 2012) (holding "hypothetical conflict is an inadequate basis" to upset class settlement); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) ("A conflict that is unduly speculative, however, is generally not fundamental."); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 680 (7th Cir. 2009) (affirming certification when "the existence of [alleged] conflicts is hypothetical");

Miles v. Metro. Dade Cty., 916 F.2d 1528, 1534 (11th Cir. 1990) (affirming certification over defendant's alleged intraclass conflict when defendant "has shown no evidence that some members of the class oppose the action, and we cannot see any realistic possibility that a conflict exists").[9]

Likewise, State Farm identifies no circuit disagreeing with the hornbook rule applied by the Eighth Circuit that "challenges to the class representatives' adequacy that were based on … different class members desiring different methods of calculating damages" are not fundamental if there are substantially overpowering common interests. App. 18a (quoting 1 *Newberg on Class Actions* § 3:62 (5th ed. 2019)); *accord In re Deepwater Horizon*, 739 F.3d at 814 (holding that "differently weighted interests" among class members do not necessarily preclude certification); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 813 (7th Cir. 2013) (rejecting that "the mere possibility that a trivial level of intra-class conflict may materialize as the litigation progresses forecloses class certification entirely"); *Dewey*, 681 F.3d at 186 (holding that "differently weighted interests" do not create a fundamental conflict because "each class member naturally derives different amounts of utility from any class-wide settlement").

None of the cases State Farm relies on even discussed the two legal rules applied here, let alone disagreed with them. In *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, the Eleventh Circuit remanded for further factual findings after "the defendants [had] presented evidence that the cognizable antitrust injury suffered by the national wholesalers may have been outweighed by the economic benefits these parties experienced in

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[9] Circuits not cited by State Farm also follow the rule. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) ("To defeat the adequacy requirement of Rule 23, a conflict 'must be more than merely speculative or hypothetical.'") (quoting 5 Moore's Fed. Prac. § 23.25[4][b][ii] (2002)).

the absence of generic competition." 350 F.3d 1181, 1193 (2003). In *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988), the plaintiff "conced[e]d" that some property owners "deriv[e]d great benefit from increased operations" of new airport terminals that the putative class sought to challenge. And, in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 315 (5th Cir. 2007), there was evidence that "thousands of … would-be class members … continued to direct money *into*" the challenged stock fund, which conflict was "exacerbated" by sought-after "injunctive relief" that would "shut down" the fund "for absent class members who desire this investment option." *See also Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("injunction would impose a significant restriction" on many class members).[10] The cases illustrate only that courts have found conflicts on a record and facts different from those here, not that there is disagreement over any legal principle.[11]

Nor has this Court ever held that "merely speculative or hypothetical" future harm that "rests on the uncertain prediction" about future events precludes certification. App. 17a. *See, e.g.*, *E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (noting as a "factor" in the adequacy analysis that plaintiffs were seeking merger of collective-bargaining

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[10] State Farm also cites *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019) (Pet. 21), but the D.C. Circuit did not even analyze that class for a conflict under Rule 23(a). It held individualized issues predominated under Rule 23(b)(3) in which there were 2,037 uninjured "members of the proposed class" with no way to "segregate the uninjured from the truly injured." *Id.* at 625. Obviously, that was not the case here.

[11] State Farm says "a split of authority" was recognized in *In re K-Dur Antitrust Litigation*, 686 F.3d 197, 223 (3d Cir. 2012). Pet. 22. But the disagreement there was how to apply, at class certification, the rule for calculating antitrust damages in *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *See In re K-Dur*, 686 F.3d at 223. This is not an antitrust case and provides no vehicle to resolve that disagreement.

units that *had already* failed by "vote [of] members of the class"); *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 331 (1980) (in dicta, hypothesizing that "the same plaintiff could not represent" a class of "employees and applicants who were denied employment and who *will*, if granted relief, compete with employees for fringe benefits or seniority") (emphasis added).

C. State Farm's factbound challenge to application of settled principles does not merit review.

The Eighth Circuit's application of established law to case-specific facts is inherently unworthy of review. S. Ct. R. 10. Moreover, the record below decisively refutes any suggestion that the Eighth Circuit certified an internally conflicted class of "winners and losers."

1. To begin with, the verdict benefited over 99.8% of the class and harmed none. While the verdict provides no damages to 29 class members, no alleged conflict produced that result. The jury accepted State Farm's offset defense, but it is undisputed that Vogt vigorously argued against it, and these 29 class members are no *worse* off for Vogt's having sought damages on their behalf.

The claim that some class members were "harmed" because they might have been awarded greater damages if Witt had used Gron's created-for-litigation "pooled" mortality rates similarly fails to establish a fundamental conflict. The mere possibility that some different rate calculation might have increased net damages for some class members does not establish a conflict in the absence of any basis for a claim that State Farm should have used that rate calculation. Here, the contract did not permit use of such rates—and thus the alleged conflict would have required Vogt to proffer a theory untethered to the evidence. *See* Dkt. 218 at 12 (holding the policy "incorporates the duration of the policy as a factor affecting" rates).

More fundamentally, State Farm cannot manufacture a conflict by creating pooled-mortality-only rates that did not exist until shortly before trial and then alleging that if Witt used those rates, instead of the un-pooled, mortality-only rates found in State Farm's pricing records, some class members would have greater damages. Indeed, as noted, State Farm never explained to the courts below why pooled rates—an *averaging* of all rates across policy durations—should create a *net* difference for policyowners over the life of the policy.[12] In urging decertification, it also never attempted to identify class members or quantify different damages related to the use of pooled-mortality-only rates. If the pooled-mortality-only rates State Farm created for trial generate a damages disparity, that only shows the inherent unreliability of its post-litigation averaging—it is not proof *Vogt's theory* produces an intraclass conflict.

Still, even if there were some difference, there is no evidence that any additional damages would be significant enough to outweigh the class's common interest in "overcom[ing] the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).[13]

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[12] Its evidence below was limited to the fact that un-pooled rates were higher than pooled rates in later years, which falls short of showing a net difference across all years.

[13] State Farm also repeatedly references the fact that Witt did not use tobacco-distinct mortality rates that would have been lower for non-tobacco users, suggesting a conflict between tobacco and non-tobacco users. Pet. 4, 7-9, 18. It did not raise this as an alleged conflict to the Eighth Circuit (Op. Br. of State Farm at 54-55); and, thus, the argument is waived.

In any event, Vogt himself was a *non*-tobacco user. App. 115a. So, he had the same incentives as other non-tobacco users in litigating the case. That he relied upon rates that were higher for non-tobacco users like himself is evidence that the damages-maximizing theory is not always the one best supported by the evidence.

2. As for State Farm's threat to increase cost-of-insurance rates for some current policyowners by adopting the rates relied upon by Witt to prove damages, State Farm ignores that this lawsuit "only lowered [the] ceiling" on its rates. App. 69a. Nothing in the judgment or policy interpretation compels State Farm to raise a single rate. And all class members are better off with a ceiling because, absent the judgment, State Farm claimed it had discretion to "set rates at any level" up to a separate maximum rate table. App. 69a. Acknowledging as much, State Farm argues merely that it will 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." Pet. 11-12. But that does not follow either: State Farm can avoid all future liability simply by removing the undisclosed, non-mortality loads from its rates. For the fraction of rates already below those relied upon by Witt for calculating damages here, State Farm has no potential liability by leaving those rates as is. *See* App. 106a (Policy: "We can charge rates lower than those shown[.]").

Moreover, State Farm's assertion that it will retaliate by increasing rates in the few instances when rates are below those used to prove damages at trial is speculative. It has been nearly three years since the verdict and over six months since the Eighth Circuit's mandate, but State Farm has produced no evidence it has changed rates, even though the Eighth Circuit's binding policy interpretation would survive any further review relating to class certification.[14] Nor has State Farm proved it can retaliate in such a manner without incurring new liability. The policy provides that "rates can be adjusted for projected changes in mortality," App. 106a-107a, but it nowhere permits

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[14] Indeed, even if certification was reversed, State Farm might still choose to substitute its cost-of-insurance rates with the rates used at trial in light of the Eighth Circuit's binding interpretation under Missouri law. No doubt, then, the class members—deprived of their share of the $39 million judgment—would be worse off.

State Farm to increase rates for other reasons, and State Farm does not contend that the threatened rate increases are justified by current mortality projections. Notably, when Vogt pointed this out below, State Farm did not dispute that the policy restricts its ability to retaliate in this manner by raising certain rates it voluntarily set below its mortality-only rates. *See* Plaintiffs-Appellees' Ans. Br. at 55; Reply Br. of State Farm at 46. And, of course, if State Farm increases charges, it risks policyowners cashing out their policies to avoid the increases.

Finally, even if it could, and planned to, retaliate, State Farm failed to adduce evidence that raising any cost-of-insurance rates would actually make any current policyholders worse off than they would be without their share of the verdict. It waited to raise this argument until its motion for decertification during trial and submitted no prospective analysis using any new rates.

III. THE COURT SHOULD NOT HOLD THE PETITION PENDING *TRANS UNION*.

State Farm's petition should not be held pending *Trans Union*. It does not seek review of the question presented there: can a damages class be certified "when the vast majority of the class suffered no actual injury[.]" Here, over 99.8% of the class proved a net financial loss at trial, and Vogt alleged at least one monthly overcharge for the mere 29 who were awarded no net losses by the jury. App. 66a, 67a. Their claims failed "on the merits," not for lack of standing, and they took nothing from the judgment. App. 14a-15a.

Moreover, unlike in *Trans Union*, the claims here were not for violations of statutory rights for which no monetary injury was shown. The jury awarded actual damages for State Farm's violation of a private, legal right "arising out of contract" (and common-law tort)—exactly the kind of violation long recognized as inflicting concrete injury, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) (Thomas, J., concurring).

Finally, briefing in *Trans Union* confirms that it will not affect the outcome here. Both parties focus on the fact-specific questions of whether the Fair Credit Reporting Act violations at issue inflicted concrete injuries on class members and whether injuries suffered by the class representative but not by other class members made his claims atypical. *See* Pet. Br., No. 20-297 (Feb. 1, 2021), Resp. Br., No 20-297 (Mar. 3, 2021). Those issues are not implicated or informative here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN J. SCHIRGER
MILLER SCHIRGER, LLC
4520 Main Street,
Suite 1570
Kansas City, MO 64111
(816) 561-6500

NORMAN E. SIEGEL
BRADLEY T. WILDERS
Counsel of Record
LINDSAY TODD PERKINS
ETHAN M. LANGE
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
(816) 714-7100
wilders@stuevesiegel.com