No. 20-1008

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Respondent does not dispute the importance of the questions of class-action law presented by State Farm's Petition. The Eighth Circuit's opinion deepened two circuit conflicts: (1) whether class certification is proper when some members benefit from the same conduct that allegedly harms others; and (2) whether courts may certify a "fail-safe" class that defines membership by reference to success on the merits. Respondent's efforts to minimize both conflicts fail. As to the first, he insists that in all circuits an intraclass conflict must be "fundamental" to preclude certification, while ignoring disagreement about when such a conflict is fundamental. As to the second, he concedes the split over whether fail-safe classes may be certified and fails even to address the split over what constitutes a fail-safe class. Both questions are squarely presented on the undisputed facts of this case and warrant this Court's review.

I. THE CIRCUITS ARE SPLIT AS TO WHETHER AN INTRACLASS CONFLICT BARS CERTIFICATION

Respondent does not seriously contest the well-defined split on when an intraclass conflict bars certification. Although he insists there is no "split" on whether "speculative harm precludes class certification," Opp.1, that is not the question presented. Rather, the question is whether Rule 23 permits "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." Pet.i.

Nor is there anything speculative about the intraclass conflict here: It was undisputed that, at the

time of trial, Respondent's damages model systematically benefited certain members of the class (short-term policyholders and tobacco users), harmed others (long-term policyholders and non-tobacco users), and left hundreds or possibly thousands of members who suffered the same alleged breach without any damages at all. Indeed, Respondent himself asserts that Petitioner would be "retaliat[ing]" against current policyholders if it adopted his damages model prospectively. Opp.26-27.

This Court should grant review to resolve whether such an intraclass conflict precludes certification.

A. Respondent has no compelling answer to the split outlined by Petitioner

Respondent does not dispute that the Fifth, Seventh, Eleventh, and D.C. Circuits all hold that class certification is improper where some class members benefit from, and others are harmed by, the same alleged conduct. Pet.19-22 (collecting cases); Opp.22-23. Nor does Respondent dispute that the First Circuit has adopted the opposite legal rule. Pet.22. By affirming certification here, the Eighth Circuit joined the First Circuit on the short side of this recognized split.

Rather than addressing the question presented and the split described by Petitioner, Respondent posits a "universal rule ... that an intraclass conflict can defeat certification only when it is 'fundamental.'" Opp.21 (citation omitted). But the dispositive legal question is whether there *is* a fundamental intraclass conflict where "some [class] members claim to have been harmed by the same conduct that benefitted other members of the class." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189 (11th Cir.

2003). Four circuits hold that there is; two disagree; and the Third Circuit announced opposite views in two cases decided weeks apart. Pet.19-23. Those courts have reached incompatible results on the propriety of class certification under materially indistinguishable circumstances.

This is not a case where "there are slightly divergent interests regarding damages." Opp.21. Rather, the interests of some class members were fundamentally adverse to those of others, because some benefited from—and others were harmed by—the very damages model purporting to provide a remedy. In holding that there were "no class conflicts 'so substantial as to overbalance the common interests of the class members as a whole,'" the Eighth Circuit deepened an entrenched circuit split. App.18a (citation omitted).

Respondent also insists that "*no* circuit has held that speculative harm based on conjecture about future conduct requires a district court to deny certification." Opp.21. But Respondent does not dispute that, depending on the model the jury selected, up to 9% of the class (or 2,102 policies), *at the time of trial*, had no net damages. Pet.24. And, as of 2017, the model the jury selected generated *higher* cost of insurance rates for at least 20% of the class. Pet.10. Neither the district court nor the Eighth Circuit deemed this known, concrete harm "speculative."

Nor is it disputed that applying Respondent's model to current policyholders going forward would result in increasing harm over time. Pet.5. This does not render the fundamental intraclass conflict "speculative," as Respondent and the Eighth Circuit thought, but rather *confirms* the gravity of the

existing and undisputed intraclass conflict and the resulting prejudice to Petitioner.

B. The critical facts remain undisputed

Despite Respondent's attempt to confuse the record below, the essential facts remain undisputed: (1) Respondent's damages model resulted in *increased* cost of insurance rates over time for many class members; (2) as a result, a substantial number of class members suffered no net damages as of the time of trial; and (3) if Petitioner were to adopt Respondent's model going forward, it would harm some current policyholders—and (according to Respondent) would constitute "retaliat[ion]," Opp.26-27, against those policyholders, *see* Pet.11-12.

As to the first point, Respondent cannot dispute that his damages model, for some class members, produced higher rates than Petitioner actually charged. Pet.3-4, 10, 23-24. Instead, Respondent questions whether that crossover affected "at least '20% of all class members'" or merely 20% of "*occurrences* of monthly deductions in which the crossover is present." Opp.7. But as a matter of basic reasoning, unless those "occurrences" all affected the same class members, even *more* than 20% of class members holding policies as of 2017 were disadvantaged.

Respondent's point that many class members "no longer had their policies by 2017," Opp.7, sharpens the intraclass conflict, because it confirms that the Witt model harmed current policyholders relative to former policyholders, particularly short-term former policyholders. And Respondent admits that "Witt did not use tobacco-distinct mortality rates," so his model also harmed non-tobacco users relative to tobacco

users. Opp.25 n.13.[1] The consequence—and the important point here—is that the "occurrences of monthly deductions in which the cross-over is present," Opp.7 (emphasis omitted), increased over time, Pet.10.

Respondent's insistence that "[n]o class member had zero losses," Opp.6, ignores the 487 policies (identified by Respondent) and the additional 29 (revealed at trial) that Respondent's own model demonstrated had no net damages, *see* App.66a, 68a. And the percentage of policies with no net damages ranged as high as 9%, depending on which of Respondent's damages models the jury selected. Pet.24. Even in the models that yielded fewer policies with no net damages, Witt still created winners and losers by, for example, systematically favoring tobacco over non-tobacco users. This is because, contrary to common life insurance practice, Witt's models treat non-tobacco users and tobacco users alike, contrary to the expectations of both groups as to how they would be treated under the Policy.

Finally, Respondent offers the irrelevant point that Petitioner has not changed its underlying rates since trial. Opp.26. But there is no dispute that were Petitioner to calculate its cost of insurance rates according to the Witt pricing model going forward, as it may need to do in order to avoid future liability, that would harm some current policyholders and arguably contravene the terms of the existing Policy. Indeed, Respondent's contention that Petitioner would be

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[1] Respondent's observation that he "was a *non*-tobacco user," Opp.25 n.13, adds nothing beyond calling into question his adequacy as a class representative in offering a damages model that clearly disadvantaged a group of which he is a member.

"retaliat[ing]" against its customers if it did so only confirms that some class members are harmed by the model.

C. Respondent's preservation argument is meritless

Contrary to Respondent's assertion, Opp.20-21, the intraclass-conflict question was pressed and passed upon below. Petitioner argued that Respondent's theory "resulted in severe conflicts of interest among the class members" where the Witt "damages model[] result[ed] in a calculation that purportedly supported damages for [Respondent] but which would have adverse consequences for other class members." CA8 Opening Br.43-44. And Petitioner identified "an additional conflict" created by the application of Respondent's proposed rates to current policyholders. *Id.*

The Eighth Circuit addressed both points. It rejected Petitioner's first argument that some members "would have smaller or no damages and face larger [cost of insurance] charges," CA8 Opening Br.2, reasoning that there were "no class conflicts 'so substantial as to overbalance the common interests of the class,'" App.18a (citation omitted). And it dismissed Petitioner's second conflicts argument as "speculative." App.16a. Respondent focuses on the latter holding, but ignores Petitioner's first argument, which forms the crux of the split warranting this Court's review.

II. RESPONDENT CANNOT AVOID THE CIRCUIT SPLIT REGARDING FAIL-SAFE CLASSES

The Eighth Circuit affirmed a fail-safe class, deepening a split on the permissibility and characteristics of such classes. Pet.25-32. To the extent the court

thought it was not affirming a fail-safe class, its narrow view that fail-safe classes exist only where class members are excluded *after judgment*, itself splits from other circuits. Respondent's efforts to minimize that conflict and confuse the factual record are unavailing.

A. The circuits have adopted divergent rules regarding the permissibility and characteristics of fail-safe classes

Although the conflict over fail-safe classes has been recognized by courts and commentators, Pet.26, Respondent contends that the Fifth Circuit has merely declined to adopt "a per se 'rule against fail-safe classes,'" and merely "reject[s] challenges to class definitions that" employ "merits-related terminology" while leaving open "'the possibility that some [class members] may fail to prevail on their individual claims,'" Opp.17, 18 (citation omitted).

In fact, the Fifth Circuit has unequivocally "rejected a rule against fail-safe classes," thus breaking with other circuits. *In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). As the court has described its rule, where "'the class is similarly linked by a common complaint, the fact that the class is defined with reference to an ultimate issue … does not prevent certification.'" *Rodriguez*, 695 F.3d at 370 (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 n.1 (5th Cir. 1999)).

Now that the Eighth Circuit has deepened this conflict by actually permitting fail-safe classes, at least where, in its view, uninjured class members are excluded *before* trial, *see* Pet.30-32, this Court should grant review to ensure a consistent rule on this fundamental issue of class action procedure.

Respondent's focus on the Eighth Circuit's prior rule against fail-safe classes, Opp.13, ignores the fact that the court's narrow definition of when a fail-safe class is created generates another, separate split. Other courts take a broader view, focusing not on the timing of when members are defined out, as the Eighth Circuit did here, but rather on whether membership depends on success on the merits of the underlying claims. Pet.31-32. Here, even if the members holding the 487 policies had been defined out of the class before the jury's verdict (and they were not), because they could not establish damages under Respondent's model, the exclusion still creates, in the eyes of other circuits, a quintessential fail-safe class. Pet.31-32.

B. The undisputed facts show that the Eighth Circuit affirmed a fail-safe class

Equally unavailing is Respondent's effort to cast this recognized split as "factbound." Opp.14. The *undisputed* facts confirm the Eighth Circuit approved a fail-safe class.

It is undisputed that, when Respondent's original classwide damages model showed at least 487 members with no injury at the time of certification, the district court's solution was that uninjured members "may be excluded from the class." App.44a.

Petitioner argued at class certification that, if Respondent were to adjust his damages model to account for other flawed assumptions, even more class members would show no injury. Dkt.206 at 2. The district court nonetheless certified the class.

The district court then approved a class notice stating that the class "excludes policy owners who did

not suffer any harm." Pet.29. The notice neither identified specific class members, nor informed class members how to determine if they "did not suffer any harm."[2]

Finally, before trial, Respondent offered *four* alternative damages models developed by his expert to account for various contested factual assumptions. Pet.8-9, 15; App.24a-26a. Each showed a different number of uninjured class members. Not until *after* trial did the district court exclude the 487 uninjured members by *amending* the judgment. App.55a-56a. Until that occurred, these individuals were class members. And although Respondent misleadingly suggests otherwise, Opp.9 (citing App.68a), the district court confirmed in its order denying decertification, before amending the judgment, that the "487 policy owners were technically included in the class certification definition." App.68a. There was no "exclusion of 487 policyowners from the class at the outset." Opp.12.

None of Respondent's various other assertions, offered in a transparent effort to create fact issues, provides a reason not to grant certiorari.

Respondent first misrepresents *why* the 487 individuals were excluded. Contrary to his claim that "they 'did not share the claim' that [Petitioner's] charges were improper," Opp.14, his position below, as reflected in the district court's order, was that Petitioner's alleged breach "result[ed] from the uniform application of the Policy's terms," such that "[a]ll policy owners are subject to the same set of COI rates,

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[2] That Petitioner, having lost its class-certification challenge, proposed this language to protect against liability to uninjured class members, *see* Opp.5, does not defeat its fail-safe argument.

and all COI rates are calculated using the same undisclosed factors." App.39a. Under this theory, *every* policyholder subject to the Form 94030 COI provision shared the same claim.[3]

Unlike in other cases, the 487 excluded members were not different because they, for example, held a different policy. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012). In such a circumstance, there would be no risk that some could pursue the same claim using a different damages model. Rather, they were excluded because they had no damages *under Respondent's model*. App.43a ("[A]ccording to [Respondent's] expert, 487 [policyholders] were not injured by the COI rates that [Petitioner] charged."). That is the heart of the fail-safe problem: Because these individuals are not bound by the judgment, they may bring the same claim under a different damages model, thus subjecting Petitioner to multiple attempts at recovery.

Respondent suggests that other policyholders would *not* have been excluded from the class but rather from any damages award if the jury had found that they were uninjured. Opp.15-16. But the court-approved class notice simply stated that "policy owners who did not suffer any harm" would be excluded, Dkt.237-1, without specifying how anyone would know that they were excluded. This notice followed

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[3] Some members of this group indisputably paid the alleged charges and thus "share the claim[s]" of Respondent. Opp.14. Some cashed their policies out within a year but had monthly COI charges deducted while the policies were in effect; while others had their policies lapse for insufficient value in part *because* of the COI charges. Others, as Respondent acknowledged, were male infants who paid COI charges, Dkt.376 at 5 n.4.

the certification order, which stated that class members with no damages would "be excluded from the class." App.44a. And any uncertainty surrounding the timing and scope of exclusion only *compounds* the unfairness of permitting some class members to escape the binding effect of the judgment.[4]

Finally, Respondent is incorrect that Petitioner "misstate[d]" that "it was 'impossible' for the 487 policyowners to have been identified before trial." Opp.16. Petitioner correctly noted that the exact number of uninjured members who would be excluded under the district court's directive could not have been known until the jury selected from among Respondent's alternative damages models—each of which showed a different number. Pet.30. And although Respondent identified the 487 at class certification, that group was subject to change at any time up until the jury's verdict.

Despite Respondent's attempt to confuse the factual record, class members were excluded because they did not suffer damages under the model the jury selected. Up to 1,615 additional policies (beyond the 487 previously identified, for a sum of 2,102) could have been excluded from the class under at least one of Petitioner's models. Pet.24. And the final scope of the class was determined only *after* trial when the district court amended the judgment to change the class definition. This combination of linking class membership to a member's ability to prove the claim on the merits, and the unfairness of not determining class

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[4] The fact that 29 additional uninjured class members were not excluded from the judgment, Pet.30 n.3, does not solve the fail-safe problem as to the others.

membership until after judgment, squarely presents the certworthy issue of the permissibility of fail-safe classes.

III. ALTERNATIVELY, THIS COURT SHOULD HOLD THE PETITION FOR *TRANSUNION*

TransUnion LLC v. Ramirez, No. 20-297 bears directly on the question presented—whether Rule 23 allows class certification where the proposed class includes a substantial number of members who are either harmed by, or unable to prove their claims under, the class representative's damages models. Pet.i. If the Court concludes that Rule 23 does not permit classes to include uninjured members, that would make certification improper here, where the class included members who had no damages.

TransUnion argues that Rule 23 "demands that a class representative's *injuries*—not just her claims and legal theories—be typical of those of the rest of the class," and that "[a]llowing a class to be represented by someone 'whose substantial interests are not necessarily or even probably the same as those whom he is deemed to represent does not afford [the] protection to absent parties which due process requires." Petitioner's Br.44-45, *TransUnion* (No. 20-297) (alterations and citation omitted).

These mismatch arguments echo Petitioner's. And the mismatch is worse here, where Respondent's interests *conflict* with those of members who benefitted from the challenged conduct or are unable to prove damages under his model.

The Court should, at a minimum, hold this Petition pending *TransUnion*.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for *TransUnion*.

Respectfully submitted,

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