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

SUPPLEMENTAL 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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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner respectfully submits, for the Court's consideration, the Ninth Circuit's recent decision in *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, No. 19-56514, — F.3d —, 2021 WL 1257845 (April 6, 2021).

Olean deepens the circuit split described in the Petition as to whether Rule 23 permits certification of a class containing a significant number of members who have no damages—because they either were unharmed by, or benefited from, the complained-of conduct. The Ninth Circuit in *Olean* joined the Fifth, Seventh, Eleventh, and D.C. Circuits (as well as possibly the Third Circuit) on one side of the split, with the First Circuit and the Eighth Circuit, in this case, on the other side. Pet. 18–23. The Ninth Circuit held that district courts must address and resolve, at the class certification stage, any factual disputes over the existence of uninjured class members, and that if more than a *de minimis* percentage of the class has no damages, a class cannot be certified under Rule 23. *Olean*, 2021 WL 1257845, at *10–12.

Olean confirms the importance of the questions presented in the Petition. Absent further guidance from this Court, lower courts will continue to reach different results under substantially similar factual circumstances, unfairly prejudicing parties forced to litigate under an incorrect reading of Rule 23.

I. THE NINTH CIRCUIT'S DECISION IN *OLEAN* DEEPENS THE SPLIT OVER WHEN AN INTRACLASS CONFLICT BARS CERTIFICATION

In *Olean*, Plaintiff tuna purchasers brought antitrust claims against three producers of packaged

tuna, alleging a price-fixing conspiracy. *Olean*, 2021 WL 1257845, at *1–2. The district court certified three classes of purchasers after concluding that the requirements of Rule 23 were satisfied by "'plausibly reliable'" "expert statistical evidence finding classwide impact based on averaging assumptions and pooled transaction data." *Id.* at *1, 10 (quoting *In re Packaged Seafood Prods. Antitrust Litig.*, 332 F.R.D. 308, 325 (S.D. Cal. 2019)). The plaintiffs' statistical evidence suggested that 5.5% of class members had not been overcharged and thus had no damages. *Id.* at *2, 10. The defendants' expert identified flaws in the plaintiffs' expert's methodology, and, after correcting for those flaws, opined that 28% of the class had not been overcharged and thus had no damages. *Id.* The district court concluded that, although criticisms of the plaintiffs' expert's model were "'serious,'" "'could be persuasive to a finder of fact,'" and were "'ripe for use at trial,'" the court was not required to make a factual determination at the class certification stage as to what percentage of the class in fact had no damages, because any conclusions as to which expert was "'correct'" would be "'beyond the scope'" of its obligations at certification. *Id.* at *3 (quoting *In re Packaged Seafood*, 332 F.R.D. at 325).

The Ninth Circuit reversed, holding that the district court had "abused its discretion in declining to resolve the competing expert claims on the reliability of Plaintiffs' statistical model." *Olean*, 2021 WL 1257845, at *10. It relied on *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013), the subsequent iteration of which was discussed extensively in the Petition, Pet. 21, and held that "if injury cannot be proved or disproved through common evidence, then … class treatment

under Rule 23 is accordingly inappropriate." *Id.* (citing *In re Rail Freight*, 725 F.3d at 252). The Ninth Circuit further held that, "[i]f Plaintiffs' model indeed shows that more than one-fourth of the class may have suffered no injury at all, the district court cannot find … that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Id.* at *11 (quoting Fed. R. Civ. P. 23(b)(3)).

Like the D.C. Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619, 624–25 (D.C. Cir. 2019), the Ninth Circuit noted that, although there is no established "threshold for how great a percentage of uninjured class members would be enough to defeat predominance … the few reported decisions involving uninjured class members 'suggest that 5% to 6% constitutes the outer limits of a *de minimis* number,'" and, even without setting a numerical upper limit, "it's easy enough to tell that 28% would be out-of-bounds." *Id.* at *11 (quoting *In re Rail Freight*, 934 F.3d at 624–25 (affirming denial of certification after remand)).

As State Farm explained in the Petition, as of 2017, one of Plaintiff's four damages models identified 9% of the class as having no net damages—well beyond this *de minimis* threshold. Pet. 24. And, as State Farm's expert showed, that percentage only increases over time when the model is applied to current policyholders and projected forward in time. Pet. 4–5, 29. This effect is confirmed by the fact that, as of the time of trial, at least 20% of current policyholders would have been charged *higher* cost of insurance rates in 2017 under Plaintiff's expert's model. Pet. 23.

Without question, if *Vogt* had been brought in the Ninth Circuit (or the Fifth, Seventh, Eleventh, or D.C. Circuits (and possibly the Third Circuit)), the district court would have been bound to address these issues at the class certification stage before finding certification appropriate under Rule 23—and to deny certification if more than a *de minimis* percentage of class members were uninjured after making that determination.

The Eighth Circuit brushed aside these concerns, relying on its prior precedent saying that such disputes over the existence of uninjured class members "'really go to the merits of plaintiffs' claims,'" App. 15a (quoting *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371, 377 (8th Cir. 2018)), and further noting that class certification should not be denied simply because "'divergent theories of liability would benefit different groups within the class,'" App. 18a (quoting 1 Newberg on Class Actions § 3:62 (5th ed. 2019)). This Court should grant review and restore consistency to the application of Rule 23.

II. *OLEAN* CONFIRMS THE ERROR IN THE EIGHTH CIRCUIT'S "SOLUTION" OF DEFINING UNINJURED MEMBERS OUT OF THE CLASS

Rather than contend with the class conflict generated by Plaintiff's damages model at the class certification stage, the district court in *Vogt* (affirmed by the Eighth Circuit) concluded that it could resolve any issue of uninjured class members by simply defining them out of the class after the verdict, App. 56a—an approach that is particularly problematic from the standpoint of predominance and commonality, as both the Ninth Circuit and D.C. Circuit have recognized.

The Ninth Circuit in *Olean* expressly warned against delaying resolution of the intraclass conflict, reasoning that "[c]ourts cannot relocate the predominance inquiry to the merits stage of the trial." 2021 WL 1257845, at *10 n.8. Rather, courts must "resolve the factual disputes" and hold plaintiffs to their burden of proof "at the pre-trial stage." *Id.* at *10 n.8, 12. *Contra* App. 17a (rejecting one argument for intraclass conflict based on "the jury's finding[s]"). As the Ninth Circuit recognized, even if the jury agrees with the defendant and concludes that a substantial percentage of the class has no damages, relief comes "[t]oo late: the damage has been done." *Olean*, 2021 WL 1257845, at *10 n.8. This is because the defendant was forced to "weather[] years of litigation at untold costs, only to discover that the case never should have reached the merits at all." *Id.*

This harm is not avoided by the "solution" the Eighth Circuit approved here—simply defining out of the class those members found at trial to have no damages. Apart from the fail-safe problem this creates, as discussed in the Petition, Pet. 25–32, merely removing the members with no damages does not alleviate the harm of having been forced to litigate, sometimes for years, a class action that never should have existed to begin with.

CONCLUSION

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

Respectfully submitted,

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