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

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

State Farm continues to hammer square pegs into round holes. Having failed to support its petition on the merits, its latest gambit is to insist that *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC,* No. 19-56514, --- F.3d ----, 2021 WL 1257845 (Apr. 6, 2021), deepened a circuit split that further supports granting certiorari in this case. But this latest "hail Mary"—citing a new case that does not even address the questions presented in State Farm's petition—falls woefully short of the mark.

Olean says absolutely nothing about the two questions on which State Farm petitioned for a writ of certiorari: (i) was the class here improper because of alleged intraclass conflicts, and (ii) was the class an improper "fail-safe" class. Indeed, neither the word "conflict" or words "fail-safe class," nor any synonyms of those words, even appear in the *Olean* opinion. Rather, "[t]he threshold consideration" in *Olean*, an antitrust case, was "whether Plaintiffs' representative evidence can be used to establish predominance" under Rule 23(b)(3). *Olean*, 2021 WL 1257845 at *7. The panel in *Olean* answered that question affirmatively, but a two-judge majority also held that when "[s]tatistical evidence" is used to show class-wide impact, it must be "rigorously analyze[d] … to test its reliability to see if the statistical modeling does *in fact* mask individualized differences." *Id.* As they put it, "[w]hen considering if predominance has been met, a key factual determination courts must make is whether the plaintiffs' statistical evidence sweeps in uninjured class members," because if it does, and "[i]f a substantial number of class members 'in fact suffered no injury', the need to identify those individuals will predominate.'" *Id.* at *10 (quoting *In re Asocol Antitrust Litig.*, 907 F.3d 42, 53 (1st Cir. 2018)). Those concerns are not presented by State Farm's petition for a variety of procedural and factual reasons.

A. State Farm does not even seek review of the district court's finding below that "questions of law or fact common to class members predominate over any questions affecting only

individual members." Fed. R. Civ. P. 23(b)(3). Nor does it seek review of the admissibility, or persuasiveness, of Vogt's expert evidence. Indeed, State Farm did not "raise any objections to Vogt's expert damages models prior to trial through a Daubert motion or through objections at trial." App.20a. And its appeal brief in the Eighth Circuit contained nary a reference to Rule 23(b) or its predominance requirement—the very rules applied in *Olean*. *See* State Farm's Op. Br. on Appeal.

State Farm's mischaracterizations of the record cannot conceal that all these concessions were for good reason. Unlike the plaintiffs in *Olean,* Vogt did not rely on statistical evidence to satisfy the predominance (or any other) requirement of Rule 23. The nature of the evidence here allowed Respondent's expert to show injury and calculate individual damages for each class member. This was not a case, like *Olean*, in which (at least according to the majority there) "Plaintiffs' experts' use of average assumptions *did* mask individual differences among the class members…." *Olean*, 2021 WL 1257845 at *11. Individualized differences in damages were inherently *unmasked* here by Witt's application of each side's proffered cost-of-insurance rates to State Farm's policy-level transactional data—which the trial, verdict, and plan for allocation of the judgment adopted by the district court showed. This ensured only injured class members receive damages, and it did so without any individualized proceedings that might defeat Rule 23(b)(3).

B. Next, State Farm fails to explain what "split" *Olean* deepens. The Ninth Circuit already permitted classes to contain a *de minimis* number of uninjured members without defeating Rule 23(b)(3)'s predominance requirement. *Id.* at *11 n.12 (citing *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016)). The *Olean* majority cited authority from several other circuits in support of its holding, *id.* at *10-11, and State Farm identifies no circuit that has held otherwise. Below, State Farm did not even frame the issue of supposedly uninjured class members as affecting predominance, but argued it only as a matter of standing, which is how the Eighth Circuit

addressed and rejected it. App.14a-15a. That was indisputably correct—all but 29 class members *proved* net damages at trial due to breach of contract and the tort of conversion, easily clearing Article III's injury-in-fact requirement. As to the 29 who suffered overcharges in some months, and thus suffered injury, but did not have net damages after State Farm's setoff defense was applied, the Eighth Circuit held that the jury's finding did not retroactively defeat Article III's injury requirement. Tellingly, State Farm neither seeks review of *that* holding nor shows that it is a subject meriting this Court's attention. It was in the context of standing that the Eighth Circuit remarked that State Farm's arguments "really go to the merits of plaintiffs' claims." Pet. Supp. Br. 4 (quoting App.15a). It is, therefore, disingenuous for State Farm to suggest the Eighth Circuit's comment related to satisfaction of Rule 23(b)(3)'s predominance requirement—something State Farm never asked the Eighth Circuit to review.

Further confirming the irrelevance of *Olean*, the panel majority there disclaims making a holding regarding standing at all. *Olean*, 2021 WL 1257845, at *10 n.7 ("we do not reach this issue because, as we lay out, class certification fails under Rule 23(b)(3), which is dispositive of the matter"). In contrast, the Eighth Circuit addressed State Farm's assertions about supposedly uninjured class members *only* as a matter of standing because State Farm did not raise any arguments about Rule 23(b)(3). App.15a.

C. State Farm continues to misrepresent the record. It argues that "one of Plaintiff's four damages models identified 9% of the class as having no net damages." Pet. Supp. Br. 3. Not so. That "model" was merely Witt's calculation of the impact on damages of *State Farm's* merits-related defenses. Plaintiffs did not seek to certify a class with any members who lacked injury under their legal theory. As explained in their opposition to the petition, State Farm reaches the 9% figure by assuming the cost-of-insurance rates should be "pooled" and that State Farm would prevail on its setoff defense. Cert. Opp. 15-16. At class

certification the district court properly held that the defense did not defeat predominance because the question "will have a common answer for all of the members of the proposed class" and once the jury made its factual findings "any class members who are found not to have been injured by State Farm's conduct can be identified and excluded from any damages award." App.45a. In other words, the court was confident that if there were ultimately uninjured class members, it could ensure they were not awarded any share of the damages. As noted, State Farm did not appeal this finding.

Ultimately, State Farm's argument that 9% of the class had no damages proved utterly meritless. The jury rejected its argument that the rates should have been pooled and rendered a verdict in which only 29 class members suffered no net damages due to the setoff (and ultimately were awarded *no* part of the judgment). All 29 were readily identifiable without any individualized proceedings, a fact that further distinguishes this case from *Olean* and *In re Rail Freight Ful Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019). *See* Cert. Opp. at 23 n.10. Even if the district court had been required to make its own finding at class certification regarding whether the rates should have been pooled, as State Farm now (wrongly) insists, *and* even if State Farm had preserved and appealed the absence of such a finding (which it did not), *and* even if State Farm had sought certiorari of this issue (which it did not), remand for the district court to decide if it should make such a finding now would not change the outcome given the jury's factual conclusions on the issue.

Unlike when the use of statistical averaging masks individualized differences, there was no threat here that the court would not be able to identify those, if any, without net damages depending on the verdict the jury returned. That fact distinguishes this case from the concern raised by the concurrence in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 464-66 (Roberts, C.J., concurring)—a case in which this Court *affirmed certification of a class* when it was "undisputed that hundreds of

class members suffered no injury[.]" *Id.* at 462. The judgment here resulted in only 29 members without net damages, which reflects just .13% of the class. Even if those members were "uninjured"—which they were not, as the lower courts explained—that number is far below the *de minimis* threshold adopted in *Olean*. *See Olean*, 2021 WL 1257845, at *11 n.12.

D. State Farm also continues to push its claim that "at the time of trial, at least 20% of current policyholders would have been charged *higher* cost of insurance rates … under Plaintiff's expert's model" in 2017 and each year going forward. Pet. Supp. Br. 3. That assertion played no role at trial and rests on evidence the district court excluded under Federal Rule of Evidence 403—a ruling State Farm did not appeal below. Dkt.364 at 306-07. In any event, as noted, State Farm's expert offered *no* forward-looking analysis at class certification or decertification to show that hypothetically higher monthly charges made by State Farm in the future would, in fact, actually harm any class member. Cert. Opp. 10. Notably, the actual number of class members who paid even *one* higher monthly cost-of-insurance charge in 2017—the year from which State Farm derives its 20% figure—or beyond due to the judgment in this case is undisputed: ***it was zero***. State Farm did not raise any cost-of-insurance rates in 2017 or any subsequent year. The 20% percent figure cited is thus not only hypothetical but disproved by actual events. The Eighth Circuit was, thus, both correct and prescient in concluding that State Farm's assertion that some class members will suffer future harm "relies on nothing more than conjecture about how this lawsuit will affect State Farm's future dealings with current policyholders." App.17a.

To paper over its own evidentiary deficiencies, State Farm misstates the Eighth Circuit's holding, claiming the panel noted "class certification should not be denied simply because 'divergent theories of liability would benefit different groups within the class.'" Pet. Supp. Br. 4 (quoting App.18 (quoting 1 Newberg on Class Actions § 3:62 (5th ed. 2019)). That statement by the panel, which was merely a parenthetical quotation

to a supporting citation, related to the amount of damages sought for each class member at trial, not to whether a class could be certified if the litigation actually resulted in net harm to some portion of the class. Indeed, the quoted portion of Newberg, which State Farm omits, went on: "Courts have thus rejected challenges to the class representatives' adequacy that were based … *on different class members desiring different methods of calculating damages*[.]" App.19 (emphasis added). And the panel's actual statement of law was merely that "slightly divergent theories that maximize damages for certain members of the class" do not defeat certification if "'this slight divergence is greatly outweighed by shared interests in establishing [defendant's] liability.'" App.18 (quoting *DiFelice v. U.S. Airways, Inc.*, 235 F.R.D. 70, 79 (E.D. Va. 2006)). State Farm did not challenge this rule of law below, shows no circuit split on this rule, and cannot claim that any class member, including the 29 without net damages, is worse off by Vogt having sought damages on their behalf. *See* Cert. Opp. 11, 20.

E. Finally, *Olean* does not confirm that it was error for the district court to exclude 487 policyowners from the class "who did not share the claim that State Farm's conduct deducted amounts for COI fees that included non-mortality factors[.]" App.19a. *Olean* says nothing about so-called fail-safe classes. And, while it holds a class *can* be certified when it contains a *de minimis* number of uninjured members, it nowhere suggests that it is an abuse of discretion to exclude such uninjured individuals from a class when they are identified during the certification proceedings. As noted, State Farm did not timely object to the exclusion of these policyowners, who were known at the time of certification and whose identification did not require any jury findings. Cert. Opp. 14.

State Farm continues to insist the Eighth Circuit approved "simply defining out of the class those members found at trial to have no damages." Pet. Supp. Br. 5. But the Eighth Circuit did not—and in fact could not—have made such a holding for the simple reason that the district court did not exclude any

uninjured members because they were found at trial to have no damages. As the panel said below, State Farm's contrary assertion is "an inaccurate characterization of the record. The district court excluded these class members prior to trial and none of their claims were submitted to the jury." App.19a.

As to the claims that were submitted to the jury, if State Farm had prevailed on its defenses at trial, it would not have "'weather[ed] years of litigation at untold costs, only to discover that the case never should have reached the merits at all,'" as the *Olean* majority described the concern presented in that case. Pet. Supp. Br. 5. Because Vogt did not rely on statistical averages to show injury, the presence of any class member without net damages according to the jury's verdict would not have required decertification; those class members were readily identifiable and could be excluded from sharing in the damages award while still being bound by the judgment that there claims failed on the merits—as actually happened for the 29 class members as to whom State Farm received a binding judgment of zero damages. If State Farm had prevailed on its other defense—that the cost-of-insurance rates should be pooled—the outcome likewise would not have been decertification, but a smaller monetary judgment and a greater number of class members against whom State Farm would have had a binding judgment of zero damages. That is a "harm" only to a defendant seeking to avoid any adjudication of a litigable dispute. It is not a reason to throw away the class-wide verdict obtained, after much effort on the part of the litigants and the courts, in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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