No. 18-3419 & 18-3434

IN THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MICHAEL VOGT, on behalf of himself and all others similarly situated,
Plaintiffs-Appellees,

v.

STATE FARM LIFE INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Missouri
(Case No. 2:16-cv-04170-NKL)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT, URGING REVERSAL

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IDENTITY & INTEREST OF *AMICUS CURIAE*[1]

Founded in 1977, Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states, including Missouri. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law.

The proliferation of abusive class actions in federal courts greatly stifles our nation's free-market economy. To combat that trend, WLF has appeared as an *amicus curiae* before this and other federal courts to oppose the certification of inappropriate and unwieldy class actions under Federal Rule of Civil Procedure 23. *See, e.g.*, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). WLF has also repeatedly urged the federal judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

[1] All parties have consented to the filing of this brief. WLF states, under Fed. R. App. P. 29(a)(4)(E), that no party's counsel authored any part of its brief; no person or entity, other than WLF or its counsel, helped pay for the brief's preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal arises from a class action against State Farm Life Insurance Company. A putative class of Missouri policyholders alleged that State Farm breached their universal life policies by including unlisted factors in their cost of insurance (COI) rates during the class period. Over State Farm's objection, the district court certified a class that included at least 516 individuals who suffered no harm or loss from State Farm's COI calculations. Though State Farm never charged any policyholder more than the maximum rates disclosed in the policy, the district court found—as a matter of law—that State Farm breached every policy by considering non-mortality factors (including expenses) in setting non-guaranteed COI rates. Following a three-day damages trial, the jury returned a verdict of more than $34 million. Months later, the district court modified the judgment to exclude from the class some 487 policyholders who, the parties had stipulated, suffered no damages as a result of State Farm's COI rates. It also kept in the class 29 policyholders who, while they received no recovery because they suffered no damages, are bound by the class-wide judgment.

The district court's certification decision radically transforms the class action from a device designed to avoid the inefficiencies of trying (and deciding) the same claims repeatedly into a device that unfairly alters the parties' substantive rights. The result here is an impermissible "fail-safe" class, one that requires the court to resolve the merits of the class claims before it can determine who is a member of the proposed class. *See* Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 Fordham L. Rev. 2769, 2782-84 (2013). While many federal appeals courts prohibit fail-safe classes, this Court has not yet considered them. This appeal offers the Court an excellent vehicle for doing so.

"It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (quotation and citation omitted). It follows that vague class definitions tied to the ultimate merits of the case are neither adequately defined nor clearly ascertainable. If class members are later found to have suffered no injury, they are retroactively dropped out of the class and not bound by the judgment. That happened

here, when the court eventually excluded 487 uninjured policyholders from the class—all of whom are now perfectly free to try their claims again. But that sort of "heads-I-win, tails-you-lose" approach to class-action litigation is deeply unfair to State Farm.

At the same time, the Due Process Clause requires that absent class members receive meaningful notice of the suit and an opportunity to opt out of the litigation. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 805 (1985). Yet potential class members who must wait for adjudication on the merits before learning whether they are in the class cannot intelligibly exercise their opt-out rights. That was the case here for at least 29 policyholders, who remain bound by the judgment even though the jury found that, under the plaintiffs' proposed damages model, they have no right to recovery because they suffered no loss. Reversal of the judgment below is warranted to preserve the due-process rights of all litigants.

In all events, to be justiciable under Article III, § 2 of the Constitution, every suit brought in federal court must seek to redress an "injury in fact" caused by the defendant. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). But when, as here, a class is certified containing

hundreds of class members who have suffered no injury caused by the defendant, Article III's standing requirement is not satisfied. *See Lewis v. Casey*, 518 U.S. 343, 358 & n.6 (1996). As this Court has held, Rule 23 cannot excuse the constitutional requirement that *every* litigant seeking relief from an Article III court must suffer a cognizable injury. *See*, e.g., *Halvorson v. Auto-Owners Ins.*, 718 F.3d 773, 778-79 (8th Cir. 2013).

The district court subverted these constitutional limits by allowing the named plaintiff to sue on behalf of a class that included many uninjured policyholders. That decision strips Article III of its vital gatekeeping function, so critical to the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). By permitting the expediency of the class-action device to substitute for an actual, concrete, and redressable harm caused by the defendant, the court exceeded its jurisdiction under Article III.

Nor is that all. Rule 23's requirements also must be interpreted in keeping "with the Rules Enabling Act, which insists that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,

612-13 (1997). Here, both Rule 23 and due process required all class members to prove every element of their claim "in one stroke" to prevail on the merits. But the district court entered final judgment for more than two dozen policyholders who lacked any such proof.

Indeed, the district court entered final judgment in favor of at least 29 plaintiffs who, the district judge conceded, suffered *no* damages at all. Because damages are an essential element of the plaintiffs' claim, the district court wrongly absolved those 29 plaintiffs of their burden to prove every element of their claim. By granting judgment for uninjured plaintiffs against State Farm for an unproven claim, the district court allowed Rule 23 to enlarge those plaintiffs' substantive rights while unfairly abridging State Farm's substantive rights.

What's more, the district court certified the plaintiffs' class despite State Farm's showing that the named plaintiff's own experience differed markedly from the experience of many of the class members he sought to represent. For example, as State Farm warned repeatedly in the district court, requiring policyholders' COI rates to vary by duration among policyholders of the same age, sex, and rating class (as plaintiffs insisted) would inevitably help policyholders of shorter duration at the

expense of policyholders of longer duration. So by certifying a class that includes some plaintiffs who were better off under State Farm's COI calculation, the district court created a glaring intra-class conflict. Ratifying that conflict not only flouts Rule 23's commonality, typicality, and cohesiveness requirements, but it is an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT CREATED AN IMPERMISSIBLE FAIL-SAFE CLASS.

The district court's certification order defined the class as "[a]ll persons who own or owned a universal life insurance policy issued by State Farm on Form 94030 in the State of Missouri," excluding anyone related to State Farm, plaintiff's counsel, or the judge. (Dkt. 234 at 1) Yet even at that time, no party disputed that at least 487 policyholders suffered no loss under State Farm's COI calculation. (Dkt. 234 at 7) And that number grew to 516 policyholders after the jury's damages verdict. (JA5347) Though State Farm calculated those 516 policyholders' COI based on the same factors it used to determine COI for the rest of the class, all class members did not suffer "the same injury." Many were never injured.

In refusing to decertify the class, the district court papered over these defects, explaining that "[i]f it turns out that some members of the class are not entitled to relief, that represents a failure on the merits." (JA5347) The district court's solution to the problem of an unworkable class definition was to certify a class of all policyholders but later redefine the class by excluding 487 uninjured class members—after verdict and entry of judgment. (JA5381) Compounding that error, the district court also granted final judgment to 29 policyholders who the jury found suffered no loss and had no right to recovery. (JA5347)

The district court's ruling epitomizes the problem of the "fail-safe" class. A court creates a fail-safe class when, as here, "the class definition bases membership in the class on the validity of the plaintiff's claims." Geller, supra, at 2782. Though it has not yet considered the propriety of fail-safe classes, this Court requires that every class "must be adequately defined and clearly ascertainable." *Sandusky*, 821 F.3d at 996. But a fail-safe class, by its very nature, is neither of those things. That is why other federal appeals courts flatly prohibit the certification of a fail-safe class. The Court should follow their lead.

The Ninth Circuit, for example, holds that it is error for a district court to define a class in any way that pegs class membership to whether "the liability of the defendant is established." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (quoting *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. 2010)). "When the class is so defined, once it is determined that a person who is a possible class member cannot prevail against the defendant, that member drops out of the class. That is palpably unfair to the defendant." *Kamar*, 375 F. App'x at 736.

Likewise, the Seventh Circuit has addressed "the problem of the 'fail-safe' class: one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). Because "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment," the Seventh Circuit precludes certification of any class whose definition hinges on resolution of the merits. *Id.*; *see McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794, 799 (7th Cir. 2017) ("A case can't

proceed as a class action if the plaintiff seeks to represent a so-called fail-safe class.").

The Sixth Circuit, too, refuses to certify a class that by definition includes only "those who are 'entitled to relief.'" *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011). Such an "improper fail-safe class" "shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment." *Id.*; *see Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012) ("All parties concede that a class definition is impermissible where it is a 'fail-safe' class, that is, a class that cannot be defined until the case is resolved on its merits.").

These courts recognize two chief defects of a fail-safe class; both arise from due-process concerns. First, "certifying a fail-safe class allows the class to escape the bar of res judicata because class members are bound only by a favorable judgment." Geller, supra, at 2787. Second, "fail-safe classes prevent absent class members from receiving the requisite notice and ability to opt out of the class prior to final

judgment." *Id.* at 2788. As we shall see, both of these due-process deficiencies are present here.

A. The District Court's Decision Allows Class Members to Evade Res Judicata.

Due process entitles a class-action defendant to assurance that the entire plaintiffs' class will be bound by res judicata. "Whether it wins or loses on the merits, [a defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [the defendant] is bound." *Shutts*, 472 U.S. at 805. The decision below flouts State Farm's due-process rights.

Required to defend thousands of individual policy-related claims on a class-wide basis, State Farm faces a no-win situation. If a plaintiff prevails on the merits, State Farm incurs monetary liability to that plaintiff. But if a plaintiff cannot prevail on the merits, that plaintiff is magically defined out of the class and free to re-litigate its claims against State Farm. Such a class does not allow for the "final resolution of the claims of *all* class members that is envisioned in class action litigation." *Young*, 693 F.3d at 538.

That problem is especially acute here because the district court acknowledged in its class-certification order that the class included at

least 487 uninjured class members. (Dkt. 234 at 7) Though State Farm fully litigated and prevailed against those class members, the district court later decided that they were never part of the class to begin with. Over State Farm's objection, the court allowed those uninjured class members to remain in the class through verdict and judgment—but then excluded them from the class more than four months later. (JA5381)

But "Rule 23 was never meant to be an exception to the rules of res judicata or to provide a risk-free method of litigation." *Dafforn v. Rousseau Associates, Inc.*, No. F 75-74, 1976 WL 1358, at *1 (N.D. Ind. July 27, 1976). Ordinarily, a finding of no-injury is a finding *on the merits* of the plaintiff's claim. Yet because the district judge dropped them from the class only after reaching the merits of their claims, 487 policyholders are not bound by the judgment and so are free to try their claims again. Such class definition by subtraction after trial on the merits is impermissible. It allows class members to re-litigate claims that the defendant has tried fully and that the court adjudicated

against them in a way that does not insulate the defendant against liability in the future.[2]

At the very least, due process requires that if State Farm must face the possibility of a class-wide loss, it must also be assured the possibility of a class-wide win. But no such assurance exists when the class is unfairly defined based on whether its members can prevail on the merits. The district court's class-certification decision violates due process and must be reversed.

B. The District Court's Decision Deprives Absent Class Members of Adequate Notice and the Ability to Opt Out.

The class notice "exclude[d] policy owners who did not suffer any harm," without specifying which policyholders were harmed, or how the existence of harm could be determined. (Dkt. 235-1 at 6) But to satisfy due process, notice of binding court proceedings must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present

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[2] Put differently, a fail-safe class revives the impermissible "one-way intervention" of baseless class actions that the 1966 amendment to Rule 23 explicitly sought to eliminate. *See* Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. Mich. J.L. Reform 347, 348 (1988).

their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). When no means exists to provide constitutionally adequate notice in a class action, *Shutts* bars class certification. 472 U.S. at 812.

In moving to decertify the class, State Farm warned the district court that "there is no way for any policyholder to know whether Plaintiff was conceding that he or she lacks injury." (JA5262) As a result, policyholders could not intelligibly know whether they were a member of the class. Despite State Farm's objection, the district court's order denying decertification failed even to address the adequacy of class notice. (JA5345-JA5351) Even so, the lack of adequate notice to absent class members is yet another flaw in a fail-safe class.

Because the district court equated class membership with a policyholder's ability to prevail under the damages model the jury ultimately adopted at trial, class members could be identified only after final judgment. But that virtually ensured that some absent class members would not receive adequate notice of the class or a fair opportunity to opt out. And even those absent class members who received notice had no way of knowing whether they were among the

487 uninjured policyholders who would later drop out of the class and are thus free to sue again.

Nor, for that matter, could they know whether they were among the 29 uninjured policyholders who remain bound by the jury's finding that they suffered no damages. Having suffered no damages under State Farm's COI, those 29 policyholders were essentially duped into litigating against their own interests. And in another late-disclosed damages model, plaintiffs identified another 1,615 policyholders as uninjured. (Dkt. 397 at 156-57) Like many others who received notice, these policyholders had no way of knowing whether they were injured or not, given the interplay between the class-certification order, the late-disclosed damages models, the jury's damages award, and the post-verdict modification of the class.

This lack of notice is even worse given the intractable intra-class conflict present here. As State Farm warned repeatedly in the district court, requiring policyholders' COI rates to vary by duration among policyholders of the same age, sex, and rating class would inevitably help policyholders of shorter duration at the expense of policyholders of longer duration. In unrebutted testimony, State Farm's expert, Dr. Ann

Gron, identified at least 175,194 "policy months" when the plaintiffs' proposed mortality-only rates were greater than the COI rate State Farm charged. (JA5254)

The number of such months would "increase over time" so that, by 2017, "fully 20 percent" of the monthly COI deductions "were *higher* under the plaintiff's damages model than they were using State Farm's actual COI rates." (JA5254) Depending on policy duration, a policy-holder who is "overcharged" this month may be "undercharged" next month and all future months. If so, she would not benefit from the plaintiffs' class action; in the long run, she would be harmed.

But if the stakes of litigation are not fully known, absent class members cannot make an informed decision about whether to opt out. When, as here, the class consists of "legions so unselfconscious and amorphous," grave doubt exists about "whether class action notice sufficient under the Constitution and Rule 23 could ever be given." *Amchem*, 521 U.S. at 628. The district court's certification order should be reversed.

* * *

The contemplation of a fail-safe class is "an independent ground for denying class certification." *Randleman*, 646 F.3d at 352. Here, the district court's class-certification decision was an abuse of discretion that cries out for reversal. The Court should seize this opportunity to join the Sixth, Seventh, and Ninth Circuits in barring *all* fail-safe classes. The issue is fully preserved and squarely presented. The due process interests at stake, for both defendants and absent class members, could not be greater. Yet without this Court's swift and decisive correction, those due-process deprivations will only continue for litigants in this Circuit.

II. ARTICLE III PRECLUDES CLASS CERTIFICATION WHEN MANY CLASS MEMBERS LACK STANDING.

"The Constitution confers limited authority on each branch of the Federal Government." *Spokeo*, 136 S. Ct. at 1546. Article III "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper*, 568 U.S. at 408. Under this "case-or-controversy requirement," all plaintiffs "must establish that they have standing to sue." *Raines v, Byrd*, 521 U.S. 811, 818 (1997).

The "irreducible constitutional minimum" of standing consists of three elements: "the plaintiff must have (1) suffered an injury in fact,

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. As the party invoking the court's jurisdiction, the plaintiff "bears the burden of establishing these elements." *Id.* The harm suffered by the plaintiff must be "concrete and particularized" and "actual and imminent"—*not* "conjectural or hypothetical." *Id.* at 1548 (citations omitted).

Rule 23 changes nothing. Standing "is not dispensed in gross." *Lewis*, 518 U.S. at 358 n.6. That is, federal courts can "provide relief to claimants, in individual or class actions," but only if those claimants "have suffered, or will imminently suffer, actual harm." *Id.* at 349. "That a suit may be a class action," in other words, "adds nothing to the question of standing" under Article III. *Spokeo,* 136 S. Ct. at 1547 n.6 (citations omitted).

Since the "constitutional requirement of standing is equally applicable to class actions," this Court holds that "each [class] member must have standing." *Halvorson*, 718 F.3d at 778-79. As a result, "a class cannot be certified if it contains members who lack standing." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010). Put

another way, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves." *Id.* (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). Yet that is precisely what happened here.

Over State Farm's objection, the district court certified a class comprising all current and former Missouri owners of universal life insurance policies issued on Form 94030. (Dkt. 234 at 1) Yet at the time of certification, the parties agreed that at least 487 policyholders suffered no loss under the plaintiffs' damages theory. And the jury later concluded that another 29 policyholders had suffered no damages. None of those 516 absent class members suffered an "actual," "concrete," or "particularized" harm under Article III. *Spokeo*, 136 S. Ct. at 1547.

A plaintiff's burden to show that she suffered an "injury in fact" increases as the case progresses, until "at the final stage" a plaintiff's standing "must be supported by the evidence adduced at trial." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted). But the plaintiffs did not make that showing here. True, the district court reassured State Farm that "a discrete group of class members" who "were not injured" by State Farm's conduct "may be

excluded from the class." (Dkt. 234 at 6-7) But Article III standing is measured at the time "when the suit is filed." *Davis v.* FEC, 554 U.S. 724, 734 (2008). Besides, 29 of the 516 uninjured class members remain a part of the class to this day.

Even so, the district court's decision to winnow out some 487 uninjured class members on the merits, through post-certification (and post-verdict) proceedings, does not excuse Article III's standing requirement. Because "merits question[s] cannot be given priority over an Article III question," no basis exists for "allowing merits questions to be decided before Article III questions." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). Indeed, "the proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances' that the Constitution leaves for resolution through the political process." *Id.* (citation omitted).

And while rigorous, Rule 23's requirements are no substitute for scrutinizing the standing of unnamed class members under Article III. After all, Rule 23 and Article III "spring from different sources and serve different functions." 1 William B. Rubenstein, *Newberg on Class*

Actions § 2:6 (5th ed. 2012 & Supp. 2018). Given the fundamental distinction between the two, it was improper for the district court to replace Article III's demanding standing requirement with its perfunctory (and erroneous) analysis of whether class treatment was proper under Rule 23.

"In an era of frequent litigation [and] class actions … courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). Here, the district court certified a class that included hundreds of policyholders "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Rather than heed this Court's exacting standing precedents by verifying that every member of the plaintiff's proposed class satisfied Article III standing, the district court committed reversible error.

III. THE DISTRICT COURT'S CERTIFICATION OF A CLASS CONTAINING UNINJURED POLICYHOLDERS VIOLATES RULE 23, DUE PROCESS, AND THE RULES ENABLING ACT.

The district court compounded its error by certifying a class that contained at least 516 individuals who suffered no harm or loss. Beyond considerations of Article III, core principles of due process underlying

Rule 23 and the Rules Enabling Act require that *all* class members suffer the same injury and have the same right to relief.

A. The District Court's Judgment Permits Rule 23 to Enlarge Uninjured Plaintiffs' Substantive Rights at the Expense of State Farm's.

Rule 23 is merely a procedural device, "ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Because Rule 23's "procedural protections" are "grounded in due process," *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008), a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). Under the Rules Enabling Act, therefore, the "use of the class device cannot 'abridge, enlarge, or modify any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (quoting 28 U.S.C. § 2072(b)).

Above all, a class "cannot be certified on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims." *Dukes*, 564 U.S. at 367. That is why the class-certification inquiry "frequently entail[s] overlap with the merits of the plaintiff's underlying claim" because "the class determination generally involves

considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 569 U.S. at 33-34 (quotation omitted).

So regardless of standing to sue, if damages are "an indispensable part of the plaintiff's case," *Lujan*, 504 U.S. at 561, a plaintiff who has suffered no damages has no right to relief. Indeed, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* But that did not happen here.

Although the district court ultimately amended the judgment to exclude from the class 487 policyholders who the parties agreed suffered no injury (JA5381), it never excluded some 29 policyholders the jury found had suffered *no* damages. As the court conceded, these policyholders suffered no damages because "their mortality-only rate was higher than the COI charge State Farm levied." (JA5347)

And yet damages are an essential element of a breach-of-contract claim. To prevail on a claim for breach of contract under Missouri law, each plaintiff must show (1) "the existence of a valid contract"; (2) "the rights of plaintiff and obligations of defendant under the contract"; (3) "a breach by defendant"; and (4) "damages resulting from the

breach." *Clayborne v. Enter. Leasing Co. of St. Louis, LLC*, 524 S.W.3d 101, 106 (Mo. Ct. App. 2017). Even when the parties to a contract have agreed to liquidated damages, the plaintiff "must show at least some actual harm or damage caused by the breach." *Arcese v. Daniel Schmitt & Co.*, 504 S.W.3d 772, 781 (Mo. Ct. App. 2016); *see Valentine's, Inc. v. Ngo*, 251 S.W.3d 352, 355 (Mo. App. 2008) ("[I]t nevertheless must be shown that some harm or damage, in fact, occurred."). As the jury's damages schedule confirms, at least 29 members of the class failed to prove damages. (JA5347)

All the same, by leaving them in the class, the district court entered final judgment *in their favor*. In an individual action, a failure to prove damages is a failure to prove the claim. Yet the district court entered final judgment *against* State Farm for 29 class members who the court acknowledged suffered *no* damages. (JA5347) Because a judgment for these policyholders would have been impossible if pursued individually, the district court wrongly absolved them of their burden to prove every element of their claim. In doing so, the district court used Rule 23 to enlarge those class members' substantive rights while unfairly abridging State Farm's substantive rights. This it cannot do.

B. The District Court's Certification Decision Does Violence to Rule 23's Commonality, Typicality, and Cohesiveness Requirements.

Rule 23 does not permit claims to be tried on a class-wide basis unless liability can be established "in one stroke" by common evidence. *See Dukes*, 564 U.S. at 350; Fed. R. Civ. P. 23(a). "What matters to class certification … is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotation marks and citation omitted).

Along with the commonality requirement, Rule 23's predominance requirement ensures that all class members are similarly situated. *See* Fed. R. Civ. P. 23(b)(3). In a breach-of-contract action over an insurance policy, the "predominance inquiry requires rigorous analysis of whether the same evidence will suffice for each member to make a prima facie showing that the insurance contract was breached, *causing injury*." *In re State Farm Fire & Cas. Co.*, 872 F.3d 567, 572 (8th Cir. 2017), *reh'g denied* (Oct. 31, 2017) (quotation omitted) (emphasis added). This requirement helps ensure that the "proposed classes are sufficiently

cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623-24.

But the requisite cohesion exists only when all class members "possess the same interest and *suffer the same injury*." *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (emphasis added) (quotation omitted); *Dukes*, 564 U.S. at 349-50 (Rule 23 "requires the plaintiff to demonstrate that the class members 'have suffered the same injury'") (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rule 23's insistence on a common, class-wide injury protects both defendants and class members by ensuring "sufficient unity so that absent class members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 620-21.

Yet if, as here, significant numbers of class members are uninjured, the class cannot satisfy Rule 23's typicality requirement, which ensures that "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 156; *Amchem*, 521 U.S. at 626 n.20 (noting that the adequacy-of-representation requirement, which arises from due process concerns,

tends to merge with the typicality and commonality requirements of Rule 23).

Because some policyholders suffered no injury at all, the named plaintiff did not suffer the "same" injury as all class members. Simply put, the class members' disparate claims are not sufficiently "interrelated" to satisfy Rule 23's typicality requirement. And because predominance is lacking when no means exist to prove a class-wide injury, the gap here between the claims of uninjured class members and those of the rest of the class precludes class certification.

"That is not to say the plaintiffs must be prepared at the class certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000). But this Court fully "expect[s] the common evidence to show that *all* class members suffered some injury." *Id.* (emphasis in original). The plaintiffs did not make—nor did the district court insist on—that basic showing in this case.

As shown above, by certifying a class that includes some plaintiffs who were better off under State Farm's COI calculation, the district

court ratified a glaring intra-class conflict. That the jury ultimately accepted the plaintiff's damages theory does not absolve the inherent harm of an intra-class conflict. It simply allows some class members to benefit at the expense of others. And it prejudices the interests of those class members who stood to benefit now and in the future from State Farm's COI calculation. As a result, the plaintiff's theory of damages in this lawsuit disadvantaged many class members. Rule 23 exists to prevent that result.

* * * * *

Whether framed as a problem with Rule 23, due process, or the Rules Enabling Act, class certification is improper if it permits some plaintiffs to assert legal claims they otherwise could not advance on their own. That is certainly true for those absent class members here who have suffered no injury, no damages, and thus are entitled to no relief.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 5,500 words under Fed. R. App. P. 32(a)(7)(B), excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: February 5, 2019

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I certify under Fed. R. App. P. 25(c)(2) that on this Fifth day of February, 2019, I filed a copy of the above with the Clerk of the Eighth Circuit through the Court's CM/ECF system, which will send notice of the filing to all registered CM/ECF users.

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