No. 20-50909

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROY C. SPEGELE, individually
and on behalf of all others similarly situated,
Plaintiff-Appellee

v.

USAA LIFE INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas
No. 5:17-cv-967

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

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

USAA Life Ins. Co. v. Spegele, No. 20-50909

Under Fifth Circuit Rule 29.2, I certify that the following listed persons and entities may have "an interest in the *amicus* brief":

- *Amicus Curiae*: Washington Legal Foundation (WLF).
- Counsel for *Amicus Curiae*: Cory L. Andrews and John M. Masslon II.

Under Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4) and Fifth Circuit Rule 28.2.1, I certify that WLF is a not-for-profit corporation created under § 501(c)(3) of the Internal Revenue Code. WLF has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

/s/ Cory L. Andrews
CORY L. ANDREWS

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Founded in 1977, Washington Legal Foundation is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an *amicus curiae* to urge the federal judiciary to confine itself to deciding only true "Cases or Controversies" under Article III of the Constitution. *See, e.g.*, *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615 (2020)*; Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). WLF has also long insisted that district courts act as gatekeepers to the admissibility of expert evidence. *See, e.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

As the Appellant's opening brief convincingly shows, the district court's class-certification order not only creates a glaring intra-class conflict by forcing injured and uninjured policyholders into a single class in violation of Rule 23, but it papers over crucial choice-of-law and

[*] All parties have consented to the filing of this brief. No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation or its counsel, helped pay for this brief's preparation or submission.

statute-of-limitations questions that are unavoidably individualized. Two other key failings of the district court's order, and the focus of this brief, are that it (1) allows class members who lack Article III standing to sue in federal court and (2) sidesteps the vital gatekeeping function for expert evidence that Rule 702 and *Daubert* demand.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal arises from a class action against USAA Life Insurance Company. A putative nationwide class of policyholders alleged that USAA breached the class's universal life policies by considering unlisted factors when setting cost of insurance (COI) rates during the class period. Neither the district court nor the named plaintiff dispute that many members of the proposed class would fare better under USAA's current policy construction and rate structure. As the district court conceded, "those [policyholders] who were 'undercharged' were not injured." (ROA 1503) Even so, and over USAA's objection, the district court certified a class that included many policyholders who suffered no injury from USAA's COI calculations. That error invites reversal.

To be justiciable under Article III of the Constitution, every claim 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 district court certifies a class containing many individuals who have suffered no injury, it violates Article III's standing requirement. *See Lewis v. Casey*, 518 U.S. 343, 358 & n.6 (1996). As Chief Justice Roberts has emphasized, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring).

The district court subverted these constitutional limits by certifying a class that includes 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 actual, concrete, and redressable harm caused by the defendant, the court far exceeded its jurisdictional reach under Article III.

Nor is that all. A district court may not certify a class without first resolving whether the plaintiff has introduced admissible evidence, including expert testimony, that the proposed class is susceptible to a classwide damages award. *Prantil v. Arkema Inc.*, ___ F.3d ___, 2021 WL 222722 (5th Cir. Jan. 22, 2021). Yet the district court held that it need not decide the admissibility of expert evidence of classwide damages at the class-certification stage. That holding contravenes both Rule 702 and this Court's case law, and offers an independent ground for reversal.

Left to stand, the district court's watered-down approach to the admissibility of contested expert evidence would dramatically lower the bar for class certification. That is no small matter. The very fact of certification gives a class-action plaintiff inordinate leverage in settlement negotiations. The district court's rule thus would not only transform the class action from a device that avoids the inefficiencies of trying the same claims repeatedly into a device that unfairly alters the parties' substantive rights, but it would unduly harm businesses and undermine the economy.

ARGUMENT

I. 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).

It follows that "unnamed class members" who have suffered no real-world harm "lack a cognizable injury under Article III." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 768 (5th Cir. 2020). Because the "constitutional requirement of standing is equally applicable to class actions," "each [class] member must have standing." *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 778-79 (8th Cir. 2013). A class cannot be certified if it contains members who would lack standing to sue individually. Put another way, "a named plaintiff cannot represent a class of persons who lack the ability to bring suit themselves." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). But that is precisely what happened here.

Over USAA's objection, the district court certified a nationwide class of all UL3 and UL4 policyholders. (ROA 1502-03) Yet many of those policyholders suffered no loss under the plaintiffs' damages

theory. In many cases, COI rates based on the plaintiff's construction of the policy would be *higher* than the rates USAA charged. (ROA 547, 565-75, 4286) As the district court conceded, "those [policyholders] who were 'undercharged' were not injured." (ROA 1503) A policyholder who is "not injured" has not suffered an "actual," "concrete," or "particularized" harm under Article III. *Spokeo*, 136 S. Ct. at 1547. Yet the district court included every UL3 and UL4 policyholder in the class anyway.

Sweeping aside USAA's objections as "premature" (ROA 1488), the district court then accused USAA of conflating the plaintiff's theory of liability with the merits, implying that it could sort out any defects later. (ROA 1502) But "merits question[s] cannot be given priority over an Article III question," and nothing justifies "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 supplant 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 many policyholders "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Rather than heed Article III's injury-in-fact requirement by ensuring that every member of the plaintiff's proposed class suffered some real-world harm, the district court committed reversible error.

II. CLASS CERTIFICATION MAY NOT REST ON INADMISSIBLE EXPERT EVIDENCE.

To satisfy Rule 23, a class-action plaintiff must "prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." to justify class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). The only way to "prove" these "facts," of course, is with admissible evidence. In other words, "the *Daubert* standard must be cleared when scientific evidence is relevant to the decision to certify." *Prantil.*, 2021 WL 222722, at *2.

The district court disagreed. Without deciding the admissibility of testimony proffered by the plaintiff's damages expert, the district court certified a class of all UL3 and UL4 policyholders on that expert's say-so. In denying USAA's motion to exclude that testimony, the court declined to "perform[] the gatekeeping function" required under "a full *Daubert* analysis." (ROA 1485) Instead, over USAA's objection, the court adopted a "limited *Daubert* approach." (*Id.* at 7) That decision to punt on admissibility at the class-certification stage lacks any legal or logical support and warrants reversal.

A. The district court erred when it applied a watered-down version of *Daubert*'s standard at the class-certification stage.

Mindful of "the important due process concerns of both plaintiffs and defendants inherent in the certification decision," this Court has insisted that "findings [at the class-certification stage] must be made based on adequate admissible evidence to justify class certification." *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319-20 (5th Cir. 2005).

To remove any doubt about a district court's gatekeeping role during class certification, this Court recently joined the Third, Seventh, and Eleventh Circuits to "insist that the metric of admissibility be the same for certification and trial." *Prantil.*, 2021 WL 222722, at *2; *see also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("We join our sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*."); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 817 (7th Cir. 2010) (vacating district court's class-certification order for "failing to clearly resolve the issue of * * *

admissibility before certifying the class"); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (holding that "the district court erred as a matter of law" by failing to perform a full *Daubert* analysis at the class-certification stage).

Prantil holds that a district court errs when it relies on "expert opinions in its certification decision without first ensuring those opinions would be admissible at trial under the *Daubert* standard." 2021 WL 222722, at *2. Here, as in *Prantil*, the district court "was not as searching in its assessment" of the expert's report "as it would have been outside the certification setting." *Id.* at *3. And here, as there, a full "assessment of the reliability" of the plaintiff's "scientific evidence for certification cannot be deferred." *Id.*

By deferring vexing questions about admissibility until a later stage of the case, the district court jettisoned the "rigorous analysis" this Court requires. *See Unger* 401 F.3d at 320-21 (citing *Gen'l Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). For when, as here, expert testimony is used to satisfy one or more of Rule 23's requirements, an analysis that fails to scrutinize that testimony under the minimum standard for admissibility under *Daubert* is anything but "rigorous."

After all, inadmissible evidence is no evidence at all. Indeed, the key lesson of *Daubert* is that inadmissible evidence is never helpful—it does not "assist the trier of fact to understand the evidence or to determine a fact in issue" as Rule 702 requires. *Daubert*, 509 U.S. at 591 (cleaned up); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 274-75 (5th Cir. 1998). Above all, if a plaintiff seeks to satisfy Rule 23's commonality requirement with inadmissible evidence at the class-certification stage, she has *not* shown that she will be able to resolve the class members' claims at trial "in one stroke." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547-48 (5th Cir. 2020).

According to the district court, however, class certification may rest on an expert's otherwise inadmissible testimony if that testimony can later be "adjust[ed]" or "reallocat[ed]." (ROA 1487-88) But Rule 23 "does not set forth a mere pleading standard." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012) (quoting *Dukes*, 564 U.S. at 351). Contrary to the district court's view, the elements of a claim are not capable of proof with common evidence if the only evidence proffered would later be inadmissible as proof of anything.

The district court's evidentiary shortcut was outcome dispositive to its certification decision. Had it conducted a full *Daubert* analysis, as this Court requires, the district court would have found the plaintiff's expert testimony inadmissible and could not have certified the class. Instead, the district court sidestepped the fact that Scott Witt, the plaintiff's damages expert, proffered a damages model that failed to "measure only those damages attributable to [the plaintiff's] theory." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). And it accepted Witt's model at face value even though he made no attempt to isolate any portion of COI charges attributable to expenses under Count II. (ROA 345:4-346:5; 347:13-348:7)

To certify a class under Rule 23(b)(3), a district court must "*find*" that common questions predominate over individual ones. Fed. R. Civ. P. 23(b)(3) (emphasis added). Just as it must "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law" to resolve class-certification issues, *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003) (cleaned up), a district court must resolve key evidentiary disputes—and the plaintiff

bears the burden of proving any disputed issue—at the certification stage.

B. Allowed to stand, the district court's "limited *Daubert* approach" would impermissibly lower the bar for class certification and burden the American economy.

Left to stand, the district court's "limited *Daubert* approach" would dramatically lower the threshold for class certification. If a district court may certify a class on nothing more than the say-so of a plaintiff's expert without subjecting that expert's opinion to scrutiny under *Daubert*—much less without resolving questions of admissibility—it will put a heavy thumb on the scale in favor of class certification. Such deference "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002).

This case proves the point. In class actions for monetary damages, class-action plaintiffs often seek to satisfy Rule 23(b)(3)'s predominance requirement by claiming that, although damages may vary from class member to class member, the issue of damages is "common" because it is susceptible to classwide proof at trial through an expert's damages

model. Under the district court's *Daubert*-lite approach, however, any plaintiff who can find an expert with a damages model in hand, even if ultimately inadmissible, can secure class certification.

Class certification is the most important decision a district court makes in a class action. As one commentator has aptly put it, it's "the whole shooting match." David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Prod. Liab. L. & Strategy 10 (Feb. 2009). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). Only an estimated two percent of certified class actions ever go to trial. *See 2019 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 34 (2019) <https://classactionsurvey.com>.

This hydraulic pressure to settle holds true even if the plaintiffs' claims lack merit. "[F]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011)

(emphasizing the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims.").

Deferring questions of admissibility until the merits stage may be convenient for the district courts, but it leaves defendants in a perilous bind. Once a class is certified, few companies are prepared to roll the dice on incurring a massive judgment. In the end, a class action in which the plaintiff can obtain certification based on unreliable or inadmissible expert testimony is a powerful cudgel for securing lucrative settlements.

Although this irresistible leverage to settle is calculated to extract windfalls from Fortune 500 companies like USAA, small businesses are even more susceptible to such *in terrorem* settlements. But a world in which any defendant feels obliged to settle even baseless claims would not only be bad for business, it would erode the American legal system. Justice is never served when the plaintiffs' payday does not reflect the likelihood that the plaintiff was harmed or that the defendant did anything wrong.

What's more, runaway litigation costs do not simply fall on individual defendants; they impose a drag on the entire U.S. economy. The costs of abusive class actions are "payable in the last analysis by innocent investors for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J. concurring)). Without a gatekeeper at the class-certification stage, the district court's "limited *Daubert* approach," if adopted, would raise the cost of doing business in a wide swath of industries that find themselves perennial targets of the plaintiffs' bar. And the ultimate price for those added costs is often passed along to consumers, employees, and shareholders.

* * *

The interests of fairness and the rule of law were both injured in this case. WLF joins with USAA in urging the Court to reverse the district court's certification order.

CONCLUSION

The Court should reverse the district court's certification order, dismiss all claims by uninjured policyholders for lack of Article III jurisdiction, remand with instructions to grant USAA's motion to exclude the testimony of the plaintiff's damages expert, and hold that no class may be certified on this record.

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 3,273 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface (Century Schoolbook) in 14-point font.

3. This brief includes any required privacy redactions under 5th Cir. R. 25.2.13, the electronic submission is an exact copy of the paper submission, and a virus-detection program (Webroot Antivirus Software 2021) scanned this document and detected no virus.

Dated: February 1, 2021

/s/ Cory L. Andrews
CORY L. ANDREWS

CERTIFICATE OF SERVICE

I certify under Fed. R. App. P. 25(c)(2) that on this First day of February, 2021, I filed a copy of the preceding document with the Clerk of Court for the Fifth Circuit through the Court's CM/ECF system, which will send notice of the filing to all participants in the case who are registered CM/ECF users.

/s/ Cory L. Andrews
CORY L. ANDREWS