C.A. No. 24-5421

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JESSICA CLIPPINGER,
on behalf of herself and all others similarly situated,

Plaintiff-Appellee,

v.

STATE FARM AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee (Memphis)
D. Ct. No. 2:20-cv-02482-TLP-cgc
The Honorable Thomas L. Parker, District Judge

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 24-5421

Case Name: *Clippinger v. State Farm Automobile Insurance Co.*

Name of counsel: Adam G. Unikowsky

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Not applicable.

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I certify that on December 1, 2025, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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Name of counsel: Adam G. Unikowsky

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Not applicable.

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Not applicable.

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STATEMENT REGARDING CONSENT

All parties have consented to the filing of this brief.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the Nation's business community, including in cases involving class actions.

The American Property Casualty Insurance Association (APCIA) is a national trade association for home, auto, and business insurers.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and that no person or entity other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. On issues of importance to the insurance industry and marketplace, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the federal and state levels, and submits *amicus* briefs in significant cases before federal and state courts.

The National Association of Mutual Insurance Companies (NAMIC) consists of over 1,300 member companies, including six of the top ten property/casualty insurers in the United States. NAMIC supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. Through its advocacy programs NAMIC promotes public policy solutions that benefit member companies and the policyholders they serve, and fosters greater understanding and recognition of the unique alignment of interests between management and policyholders of mutual companies.

Class actions like the one at issue here are becoming ubiquitous. In these cases, individuals seek to represent massive classes pursuing enormous recoveries because of an alleged methodological error in automotive

insurers' calculation of totaled vehicles' value. To this point, the federal courts of appeals have unanimously held that such cases are improper for class resolution due to the predominance of individualized questions. But in many cases, district courts have certified such classes and the court of appeals has denied interlocutory review, placing tremendous pressure on the insurer to settle. *Amici* fear that the panel decision approving class certification here will not only attract class actions to this Circuit but also embolden district courts in circuits where the law remains unsettled to certify unwieldy classes asserting meritless claims unsuitable for classwide resolution. *Amici* therefore have a deep interest in rehearing here, which they hope will lead to maintaining uniformity among the circuits, stemming the tide of these meritless class actions, and promoting the proper application of Rule 23.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The panel decision is an outlier: five circuits have held, in reviewing certification of materially equivalent classes, that Rule 23(b)(3)'s predominance requirement is unsatisfied due to the inevitability of individualized questions. This Circuit now stands alone among the courts of

appeals on this important and recurring question. That alone warrants the full Court's review.

The panel decision is also wrong. As explained in Judge Murphy's dissent, common questions cannot be said to predominate for purposes of Rule 23(b)(3) because State Farm's liability as to *each and every absent class member* turns on the *actual* value of that class member's vehicle before it was totaled. The panel majority shrugged off this concern as a mere "*damages* issue." Panel Op. 17. Not so: it is impossible to know whether a class member has a breach-of-contract claim on the *merits* without knowing the pre-accident value of her vehicle. In addition, the panel majority erred by crediting plaintiff's unsubstantiated theory that State Farm's valuation of each class member's vehicle was exactly accurate *except* for the challenged adjustment. Class certification is also suspect given the presence in the class of members who have suffered no Article III injury.

The upshot is that it is now far easier to obtain class certification in the Sixth Circuit than elsewhere. The panel decision will make this Circuit a magnet for would-be class-action plaintiffs and increase risks for defendants. In the insurance industry specifically, these suits are a

serious threat—even when a class claim is meritless, the potentially staggering liability is used to extract settlements from defendants once a class is certified.

This Court should grant rehearing.

ARGUMENT

I. The Panel Decision Creates a Lopsided Circuit Split on Rule 23(b)(3)'s Predominance Requirement as Applied to Class Actions Like This One.

The panel decision makes the Sixth Circuit an outlier in its interpretation of Rule 23(b)(3). As noted above, putative class actions like this one have appeared throughout the country. Before the panel decision in this case, every federal court of appeals to address such cases had agreed that common questions do not predominate because there is no way around determining the true value of each absent class member's automobile. *See Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1139 (9th Cir. 2022) (no predominance because insurer "only owed each putative class member the actual cash value of his or her car," so "figuring out whether each individual putative class member was harmed would involve an inquiry specific to that person"); *Sampson v. USAA*, 83 F.4th 414, 422 (5th Cir. 2023) (agreeing with *Lara*); *Drummond v. Progressive*

Specialty Ins. Co., 142 F.4th 149, 157-58 (3d Cir. 2025) (same); *Schroeder v. Progressive Paloverde Ins. Co.*, 146 F.4th 567, 577-78 (7th Cir. 2025) (same); *Freeman v. Progressive Direct Ins. Co.*, 149 F.4th 461, 470-71 (4th Cir. 2025) (same); *see also Ambrosio v. Progressive Preferred Ins. Co.*, 154 F.4th 1107, 1110-13 (9th Cir. 2025); *Bourque v. State Farm Mut. Auto. Ins. Co.*, 89 F.4th 525, 528-29 (5th Cir. 2023).[2]

As the rehearing petition explains, the panel majority's approach is irreconcilable with the approach of these five circuits. Reh'g Pet. 8-14; *accord* Panel Op. 37-41 (Murphy, J., dissenting). In each of these courts, the need to determine whether each class member has suffered an actual breach as a result of the allegedly improper procedure used to value her vehicle predominates over the common question—whether that procedure is, in fact, improper. Only in this Circuit is the predominance

[2] The panel decision also conflicts with *In re State Farm Fire & Casualty Co. (LaBrier)*, 872 F.3d 567 (8th Cir. 2017). The class action in *LaBrier* concerned home insurance, not automotive insurance, but involved a similar theory of predominance. *See id.* at 577. Like here, it was possible that State Farm's use of the challenged "estimating methodology would produce an unreasonable estimate," but that issue could "only be determined based on all the facts surrounding a particular insured's partial loss," and there were therefore "no predominant common facts at issue." *Id.*

requirement relaxed. The panel majority's departure from the consensus view in itself warrants this full Court's attention.

II. The Panel Decision Is Wrong.

As *amici* argued in their brief at the merits stage, it is doubtful that plaintiff has even shown the existence of a *common* question sufficient to satisfy Rule 23(a)(2). *See* ECF No. 18, at 5-7. At any rate, the panel majority's conclusion as to predominance is erroneous as well.

A. "[T]he predominance requirement demands more than the commonality requirement." *Fox v. Saginaw County*, 67 F.4th 284, 301 (6th Cir. 2023). To determine whether the predominance requirement is satisfied, the court must "add up all the suit's common issues (those that the court can resolve in a yes-or-no fashion for the class) and all of its individual issues (those that the court must resolve on an individual-by-individual basis)." *Id.* at 300. The court then "qualitatively evaluate[s] which side 'predominates' over the other." *Id.*

Here, that balancing is straightforward, as it is inevitable that there will be individual liability trials with respect to every single class member. As Judge Murphy explained, "[a] jury would have to identify th[e] fair market value *for each class member*['s vehicle] before it could

resolve the primary two elements of that class member's breach-of-contract claim at issue in this litigation: whether State Farm *breached* the policy and what the class member's *damages* were from that alleged breach." Panel Op. 36 (dissenting opinion). And because "[t]his valuation inquiry will require a fact-intensive review of each class member's car," it is plain that these unavoidable individualized questions "'likely will dominate' all others." *Id.* (quoting *Tarrify Props. v. Cuyahoga County*, 37 F.4th 1101, 1106 (6th Cir. 2022)).

Judge Murphy's dissenting view aligns with that of the majority of circuits. Those courts recognize that, in a contract case, a class member has a valid cause of action only if she has suffered both a breach and damages—*both* of which, in a total-loss automotive-insurance case, require an individualized determination as to whether the class member received the actual cash value of her car, totally apart from whether the methodology used by the insurer to arrive at its *estimated* value was sound.

The panel majority's explanation on this score is unpersuasive. In the majority's view, "a common answer on whether the [negotiation adjustment] is a breach of contract can be generated through common proof

and takes center stage." Panel Op. 17. And the panel majority viewed the question whether class members were actually harmed by application of the adjustment—*i.e.*, whether they received less than what they were contractually owed—as a "*damages* issue" that had little bearing on predominance "even if damages will have to be tried separately." *Id.* (some emphasis omitted).

This is simply incorrect as a matter of law, as most courts have recognized. Whether a class member received too little money as a result of the challenged adjustment is the *sine qua non* of her breach-of-contract claim. *See Whitworth v. City of Memphis*, 689 S.W.3d 579, 584 (Tenn. Ct. App. 2023). Thus, for instance, the Ninth Circuit in *Ambrosio* explained that "the existence of the [challenged adjustment] does not necessarily indicate measurable damages, which is required to prove a breach of contract." 154 F.4th at 1111. And perhaps more fundamentally, if the insured received the fair value of her vehicle, *there was no breach of the contract at all*. *See, e.g.*, *Sampson*, 83 F.4th at 422-23.

The panel majority also credited the District Court's approval of plaintiff's theory of classwide damages: simply assume that State Farm's model calculated the value of each class member's vehicle correctly *except*

for the negotiation adjustment. Panel Op. 15. But plaintiff has only asserted, not properly defended, this means of calculating damages. And the proposition is indefensible. A factfinder could not possibly assume that, in every single case, the appraised value of a car will be *exactly* State Farm's valuation *minus* the negotiation adjustment. Neither the District Court nor the panel held otherwise; instead, they simply accepted plaintiff's assertion that this damages model, if correct, could be used to determine each class member's damages—without addressing whether the model is *actually* correct. Permitting that shortcut was erroneous in light of the need for a "rigorous analysis" to ensure Rule 23's requirements are met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). And it makes it far too easy to manufacture class certification in this Circuit going forward.

B. *Amici* also agree with State Farm that Article III poses a bar to class certification here. *See* Reh'g Pet. 17. For the reasons given, it is likely that the class here includes members who received an amount equal to (or greater than) the actual value of their vehicles—in which case they would lack not only a breach-of-contract claim against State Farm, but the injury necessary for Article III standing.

Even aside from predominance issues, this case thus implicates important and recurring questions about the relationship between Article III and Rule 23 that went unaddressed by the panel majority. Last Term, the Supreme Court heard argument in a case presenting just this question: "[w]hether a federal court may certify a damages class pursuant to [Rule] 23 when the class includes both injured and uninjured class members." *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 328 (2025) (Kavanaugh, J., dissenting) (*LabCorp*). Though the Supreme Court ended up dismissing the writ of certiorari in *LabCorp*, *see id.* at 328 (mem.), the question is undoubtedly important, and without this full Court's attention, the panel opinion may be construed as having staked out a side in that significant debate. *See Speerly v. GM, LLC*, 143 F.4th 306, 336-46 (6th Cir. 2025) (en banc) (Thapar, J., concurring); *id.* at 346-55 (Nalbandian, J., concurring).

III. Left in Place, the Panel Decision Will Invite Meritless Class Actions to the Sixth Circuit.

The loosening of the predominance requirement will not just affect class actions against automotive insurers. The panel decision subjects every business holding contracts with large numbers of customers to improper class actions, so long as one plaintiff can find some isolated error

in the business's ordinary mode of calculating fees or costs. Under proper Rule 23 principles, determining whether each class member suffered a breach as a result of the mistake would require a host of individualized mini-trials predominating over any common question. But under the panel majority's approach, that cumbersome necessity is a mere "*damages* issue" posing no obstacle to class certification. Panel Op. 17. Left in place, this novel approach to Rule 23(b)(3) will make district courts in the Sixth Circuit a magnet for meritless class actions.

This state of affairs is inconsistent with the letter and spirit of Rule 23. "Certification as a class action can 'coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit.'" *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (quoting Fed. R. Civ. P. 23(f) advisory committee note to 1998 amendment). And "[w]ith 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)).

In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). This risk is magnified in class actions: "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded in other part by* Fed. R. Civ. P. 23(f); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010).

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: December 1, 2025

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit set forth in Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains **2,600** words.

I further certify that this brief complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5)(A) and with the type-style requirements set forth in Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using 14-point Century Schoolbook font in Microsoft Office Word 365.

Dated: December 1, 2025

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I hereby certify that on this day, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be effected through the CM/ECF system.

Dated: December 1, 2025

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