C.A. No. 25-602

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Petitioner,

v.

PAULA GULICK AND SHARON SCHELHUBER,

Plaintiffs-Respondents.

On Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f)
United States District Court for the District of Kansas (Kansas City)
D. Ct. No. 2:21-cv-02573-TC-TJJ
The Honorable Toby Crouse, District Judge

MOTION 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 FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER'S RULE 23(f) PETITION

Jennifer B. Dickey
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Adam G. Unikowsky
Counsel of Record
Jonathan J. Marshall
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Proposed Amici Curiae

(Additional counsel on inside cover)

Andrew Pauley
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(304) 410-2964

Counsel for the National Association of Mutual Insurance Companies

Colleen Reppen Shiel
Stephen A. Skardon
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
8700 W. Bryn Mawr Avenue, Suite 1200S
Chicago, IL 60631
(847) 297-7800

Counsel for the American Property Casualty Insurance Association

DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a), 29(a)(4)(A), and 29(b)(4), undersigned counsel states:

- *Proposed amicus curiae* the Chamber of Commerce of the United States of America (the "Chamber") has no parent corporation and no publicly held company has 10% or greater ownership in the Chamber.
- *Proposed amicus curiae* the American Property Casualty Insurance Association ("APCIA") has no parent corporation and no publicly held company has 10% or greater ownership in APCIA.
- *Proposed amicus curiae* the National Association of Mutual Insurance Companies ("NAMIC") has no parent corporation and no publicly held company has 10% or greater ownership in NAMIC.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Proposed Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Proposed *amici curiae* the Chamber of Commerce of the United States of America (the "Chamber"), the American Property Casualty Insurance Association ("APCIA"), and the National Association of Mutual Insurance Companies ("NAMIC") respectfully move for leave to file a brief as *amici curiae* in support of State Farm's Rule 23(f) petition for permission to appeal. All parties consent to *amici*'s filing.

Under Federal Rule of Appellate Procedure 29, motions for leave to file *amicus* briefs must state "the movant's interest," Fed. R. App. P. 29(a)(3)(A), and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case," *id.* r. 29(a)(3)(B). *See id.* r. 29(a)(3) (setting forth requirements governing motion for leave to file *amicus* brief during consideration of case on merits); *id.* r. 29(b)(3) (applying these rules to motion for leave to file *amicus* brief during consideration of whether to grant rehearing).

Movants' interest. The 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 class-action-related briefs in this Court. *See, e.g.*, Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Appellants, *Cline v. Sunoco Partners Mktg. & Terminals*, Nos. 20-7064 etc. (10th Cir.), ECF No. 105 (Mar. 10, 2021).

APCIA is a national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 66% of the overall U.S. property-casualty insurance market and over 65% of Kansas's personal automobile insurance market. 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.

NAMIC consists of over 1,300 member companies, including six of the top ten property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $383 billion in annual premiums and represent 61% of homeowners, 48% of automobile, and 25% of the business insurance markets. 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.

Amici have a strong interest in this case, which follows a misguided trend of automobile-insurance customers seeking class certification (and district courts often granting it) based on alleged methodological errors by automobile insurers in calculating the value of totaled vehicles. Plaintiffs in these cases claim that classwide issues predominate, and thus class certification is proper under Federal Rule of Civil Procedure 23(b)(3), because the insurer made the *same* purported methodological error as to each class member's vehicle. In this case, for instance,

plaintiffs allege that the methodology State Farm used included a downward "typical negotiation adjustment" meant to reflect "the assumption that a used vehicle's selling price may be substantially less than the asking price." Order 5 (internal quotation marks omitted). Plaintiffs advance the dubious theory that they can prove State Farm's valuations were wrong on a classwide basis by showing that negotiation *never* occurs over used-vehicle prices.

But even if that were true, the class here should not have been certified. Even if State Farm's methodology was wrong to include a typical-negotiation adjustment, that would not show that every class member has a valid breach-of-contract claim. To establish such a claim, each member must show that State Farm *actually* paid less than the fair market value of his or her vehicle, not just that State Farm used an inaccurate methodology in valuing that vehicle. That must be done through individualized inquiries into the conditions and circumstances of each class member's vehicle, and those individualized inquiries plainly predominate over any common questions.

In nonetheless certifying the class, the district court relied on plaintiffs' expert's theory that the correct fair market value of each class

member's vehicle was exactly the value State Farm assigned minus the typical-negotiation adjustment. The district court erred, however, in accepting that theory at the class-certification stage without undertaking the necessary "rigorous analysis" to ensure that Rule 23's requirements were met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). And the district court also failed entirely to grapple with the problem that State Farm has the right to assert individualized defenses that will necessarily predominate over any common questions.

The district court's order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. *Amici* and their members have a strong interest in ensuring that federal district courts comply with those standards, and in encouraging the federal courts of appeals to correct district-court decisions that stray from the clear dictates of the Supreme Court. This Court should grant Rule 23(f) review.

Why an* amicus *brief is desirable and relevant. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J., in chambers). "Some friends of the court are entities

with particular expertise not possessed by any party to the case." *Id.* (internal quotation marks omitted). "Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Id.* (internal quotation marks omitted). "Still others explain the impact a potential holding might have on an industry or other group." *Id.* (internal quotation marks omitted).

In this case, *amici*'s proposed brief fulfills all three of these functions. First, *amici* have "particular expertise." *Neonatology Assocs.*, 293 F.3d at 132 (internal quotation marks omitted). The Chamber, for instance, has a broad and diverse membership with unparalleled ability to assess whether a particular judicial decision will have a significant effect on cases not before the Court. That insight may be particularly useful during consideration of a Rule 23(f) petition, where the Court must consider whether a decision is of sufficient practical importance to warrant immediate review. *Amici*'s brief elucidates how decisions like the district courts can avoid appellate review in the ordinary course and force defendants with meritorious cases to forgo their defenses and settle cases brought against them.

Second, *amici* argue "points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Neonatology Assocs.*, 293 F.3d at 132 (internal quotation marks omitted). Although the parties rightly focus on the facts of this case, *amici* are more generally focused on the problem of the broader pattern of district courts refusing to scrutinize plaintiffs' merits theories at the class-certification stage. Those arguments are relevant in deciding whether to exercise the discretionary authority to grant a Rule 23(f) petition.

Third, *amici* "explain the impact a potential holding might have on an industry or other group." *Neonatology Assocs.*, 293 F.3d at 132 (internal quotation marks omitted). As previously described, *amici* have a unique capability to describe how orders like the district court's below, which hurriedly accept plaintiffs' legal theories in concluding that common questions predominate, will affect other parties beyond the parties currently before the Court.

CONCLUSION

The motion for leave to file a brief as *amici curiae* should be granted.

Date: May 21, 2025

Respectfully submitted,

/s/ Adam G. Unikowsky

Jennifer B. Dickey
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Adam G. Unikowsky
Counsel of Record
Jonathan J. Marshall
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Proposed Amici Curiae

Andrew Pauley
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
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Indianapolis, IN 46268
(304) 410-2964

Counsel for the National Association of Mutual Insurance Companies

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Stephen A. Skardon
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
8700 W. Bryn Mawr Avenue, Suite 1200S
Chicago, IL 60631
(847) 297-7800

Counsel for the American Property Casualty Insurance Association

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the word limit set forth in Federal Rule of Appellate Procedure 27(d)(2) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this motion contains **1,320** words.

I further certify that this motion 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.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Proposed Amici Curiae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (a) all required privacy redactions have been made, pursuant to Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; (b) all required hard-copy submissions of this filing will be exact copies of this electronic filing; and (c) this electronic filing was scanned for viruses using CrowdStrike Falcon, a commercial virus-scanning program (version 7.24.19607.0, last updated on April 23, 2025), and, according to the virus-scanning program, this filing is free of viruses.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Proposed Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system, which will send notice to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Date: May 21, 2025

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Jennifer B. Dickey
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Adam G. Unikowsky
Counsel of Record
Jonathan J. Marshall
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amici Curiae

(Additional counsel on inside cover)

Andrew Pauley
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(304) 410-2964

Counsel for the National Association of Mutual Insurance Companies

Colleen Reppen Shiel
Stephen A. Skardon
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
8700 W. Bryn Mawr Avenue, Suite 1200S
Chicago, IL 60631
(847) 297-7800

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Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE* AND SUMMARY OF THE ARGUMENT[1]

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no counsel for any party authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no person or entity other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Mktg. & Terminals, Nos. 20-7064 etc. (10th Cir.), ECF No. 105 (Mar. 10, 2021).

Amicus curiae the American Property Casualty Insurance Association ("APCIA") is a national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 66% of the overall U.S. property-casualty insurance market and over 65% of Kansas's personal automobile insurance market. 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.

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Amici have a strong interest in this case, which follows a misguided trend of automobile-insurance customers seeking class certification (and district courts often granting it) based on alleged methodological errors by automobile insurers in calculating the value of totaled vehicles. Plaintiffs in these cases claim that classwide issues predominate, and thus class certification is proper under Federal Rule of Civil Procedure 23(b)(3), because the insurer made the *same* purported methodological error as to each class member's vehicle. In this case, for instance, plaintiffs allege that the methodology State Farm used included a downward "typical negotiation adjustment" meant to reflect "the assumption that a used vehicle's selling price may be substantially less than the asking price." Order 5 (internal quotation marks omitted). Plaintiffs advance the dubious theory that they can prove State Farm's valuations were

wrong on a classwide basis by showing that negotiation *never* occurs over used-vehicle prices.

But even if that were true, the class here should not have been certified. Even if State Farm's methodology was wrong to include a typical-negotiation adjustment, that would not show that every class member has a valid breach-of-contract claim. To establish such a claim, each member must show that State Farm *actually* paid less than the fair market value of his or her vehicle, not just that State Farm used an inaccurate methodology in valuing that vehicle. That must be done through individualized inquiries into the conditions and circumstances of each class member's vehicle, and those individualized inquiries plainly predominate over any common questions.

In nonetheless certifying the class, the district court relied on plaintiffs' expert's theory that the correct fair market value of each class member's vehicle was exactly the value State Farm assigned minus the typical-negotiation adjustment. The district court erred, however, in accepting that theory at the class-certification stage without undertaking the necessary "rigorous analysis" to ensure that Rule 23's requirements were met. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart*

Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)). And the district court also failed entirely to grapple with the problem that State Farm has the right to assert individualized defenses that will necessarily predominate over any common questions.

The district court's order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. *Amici* and their members have a strong interest in ensuring that federal district courts comply with those standards, and in encouraging the federal courts of appeals to correct district-court decisions that stray from the clear dictates of the Supreme Court. This Court should grant Rule 23(f) review.

ARGUMENT

I. This Court Should Grant Rule 23(f) Review to Correct the District Court's Manifestly Erroneous Application of Rule 23(b)(3)'s Predominance Requirement.

The claim plaintiffs assert is not amenable to class resolution. Each class member had an insurance contract obligating State Farm to pay the actual cash value—meaning fair market value—of a vehicle if it were totaled in an accident. Order 4. Plaintiffs claim that State Farm breached their contracts because the methodology it used to determine the value of plaintiffs' (and class members') vehicles, which included the typical-

negotiation adjustment, yielded values that were too low. Order 5-6. To succeed on that claim, plaintiffs and class members must show that they were *injured* by the application of State Farm's methodology, meaning that State Farm paid them *less* than their totaled vehicles' *actual* value. *See Stechschulte v. Jennings*, 298 P.3d 1083, 1098 (Kan. 2013). If State Farm's methodology generated a value equal to or higher than the value of a particular class member's vehicle, then that class member suffered no injury and has no viable claim.

A. Common Questions Do Not Predominate Because Plaintiffs Must Show That Each Class Member Received Less Than Fair Market Value.

Because plaintiffs must show a breach as to each class member, the class should not have been certified. Plaintiffs cannot show that a common question exists at all, and they certainly cannot show that common questions predominate. As the Supreme Court has explained, commonality requires not just "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 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, "whether the

typical-negotiation adjustment is sound methodology for valuing used vehicles" is not a common question under Rule 23 because no common answer to that question could drive the resolution of the litigation on a classwide basis.

Even if that were a common question, it would not predominate. The only way to determine whether a class member has a claim is to examine the specific conditions of that class member's vehicle and the nature of the market for similar used vehicles. Those individualized inquiries, which would be necessary for every member of the class, would overwhelm the purportedly common question of whether downward typical-negotiation adjustments reflect the realities of used-vehicle sales. That should have been the end of the class-certification issue in this case.

B. The District Court Erred in Concluding That Mere Admissible Evidence of Classwide Injury Is Sufficient.

To circumvent this problem, plaintiffs offered expert evidence purporting to show that "State Farm's calculation produces a sound estimate of a vehicle's actual cash value before the typical negotiation adjustment is applied." Order 27-28. That is, plaintiffs argued that no individualized inquiry is necessary because their expert's model "agree[s] with each step of [State Farm's] methodology *except* the typical negotiation adjustment."

Order 33. Therefore, in plaintiffs' view, "each class member was injured by the exact amount that [State Farm] downwardly adjusted their claim based on the allegedly impermissible deduction." *Id.* The district court accepted this theory in finding that common questions predominate. *See* Order 32-33. But for two reasons, the mere existence of this theory does not satisfy plaintiffs' burden to "prove that there are *in fact*" common questions that predominate. *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350).

First, plaintiffs' expert's claim—that the proper valuation of each class member's vehicle is State Farm's valuation, minus the typical-negotiation adjustment—is at most a *theory* under which the factfinder could find injury on a classwide basis. Whether that theory *actually* obviates the need for individualized inquiries as to the value of each class member's vehicle requires scrutiny of the expert's analysis, not just acknowledgement of its existence. Indeed, in *Comcast*, the Supreme Court expressly rejected the view that because plaintiffs had "provided a method to measure and quantify damages on a class-wide basis," it was "unnecessary to decide whether the methodology [was] a just and reasonable inference or speculative." 569 U.S. at 35 (alteration in original)

(internal quotation marks omitted). And though that scrutiny would doubtless "'overlap with the merits of the plaintiff[s'] underlying claim,'" the Court shrugged off that concern as "frequently" unavoidable at the class-certification stage. *Id.* at 33-34 (quoting *Dukes*, 564 U.S. at 351). Thus, the mere fact that plaintiffs' expert survived exclusion under *Daubert*, *see* Order 8-13, hardly gave the district court license to postpone the analysis the Supreme Court mandates.

Second, even if it were established that plaintiffs' expert offered a valid methodology for valuing vehicles, and thus that his testimony could establish injury for all class members through common proof, that would still not eliminate the need for individualized inquiries. As State Farm explains in its petition, Kansas law does not itself prohibit typical-negotiation adjustments or require insurers to value vehicles using any specific methodology, Pet. 15, 17, 19; all that State Farm was required to do was pay each class member the fair market value of his or her vehicle. State Farm would therefore have the right, as part of its defense in this case, to show that the amount it paid *each class member* was equal to (or greater than) the value of that class member's vehicle, regardless of plaintiffs' expert's valuation. The class-action mechanism cannot be used

to deprive State Farm of the right to assert this defense as to each class member. And given State Farm's asserted intent to put on such a defense, *see* Pet. 16-19, the trial here inevitably will involve individualized inquiries as to the circumstances of each class member's vehicle. This should have been a basis for denying class certification, but the district court never even addressed this issue.

C. This Court Should Grant Review Now.

Rule 23(f) review is appropriate. The district court's certification order is inconsistent with the opinions of courts in other circuits holding that individualized issues predominate in similar putative class actions because plaintiffs must show not just that the insurer used an improper methodology, but that each class member *actually* received less than fair market value for his or her vehicle. *See Bourque v. State Farm Mut. Auto. Ins. Co.*, 89 F.4th 525, 528-29 (5th Cir. 2023); *Sampson v. USAA*, 83 F.4th 414, 420 (5th Cir. 2023); *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1138-40 (9th Cir. 2022); *see also* Pet. 14-16. Indeed, *Sampson*'s logic is directly on point here: the Fifth Circuit emphasized that the existence of "an arbitrary choice of a liability model," like the one plaintiffs assert here (through their expert), cannot "serve as a determinant of injury and

liability as a matter of law" and thus obviate individualized inquiries into the fair market value of each class member's vehicle. 83 F.4th at 422-23 (emphasis omitted).

Moreover, conflicts of authority over class-certification issues like this one are unusually difficult for courts of appeals to resolve in the ordinary course. After a class is certified, cases usually settle, regardless of the merits of the plaintiff's claim. Indeed, "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). This is because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he 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). Thus, "[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." Nagareda, *supra*, at 99. Accordingly, denying State Farm review of the class-certification issue now might mean, as a practical matter, that State Farm

never gets review of the issue, leaving the district court's faulty analysis unchecked—and other insurers facing similar lawsuits bereft of this Court's guidance. This Court should grant the Rule 23(f) petition and reverse the district court's erroneous class-certification conclusion.

II. This Court Should Grant Rule 23(f) Review to Clarify That Classes May Not Include Members Who Have Not Suffered Any Injury.

Amici also agree with State Farm that Article III poses a bar to class certification here. *See* Pet. 19-24. For the reasons set forth above, it is likely that the certified class here includes members who received an amount equal to (or greater than) the actual fair market 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.

This Court should thus grant review because, even aside from questions about insurance class actions and the nature of the predominance inquiry, this case implicates important and recurring questions about the relationship between Article III and Rule 23. As State Farm explains, there is a circuit split "over whether a Rule 23(b)(3) class can be certified when some class members lack any Article III injury." Pet. 22. The

Supreme Court recently granted certiorari to resolve this disagreement. *See Lab'y Corp. of Am. Holdings v. Davis*, No. 24-304 (U.S. argued Apr. 29, 2025) ("*LabCorp*"). As the Chamber explained there, neither Rule 23 nor Article III permits certification of a damages class when some members of the proposed class have not suffered a cognizable injury. *See* Brief for the Chamber of Commerce of the United States of America et al. as *Amici Curiae* Supporting Petitioner at 5-28, *LabCorp.*, No. 24-304 (U.S. Mar. 12, 2025), 2025 WL 836748. Whatever happens in *LabCorp.*, this Court should guide district courts in this Circuit in applying the Supreme Court's instructions on Rule 23(b)(3). "[R]emain[ing] on the outskirts" of that circuit split only "le[aves] litigants and lower courts in the dark about the overlap between Rule 23 and Article III, which is a critical issue in practically every class action in the Circuit." Pet. 24.

CONCLUSION

For the foregoing reasons and those stated in State Farm's petition, the petition for permission to appeal should be granted.

Date: May 21, 2025

Respectfully submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky
Counsel of Record
Jonathan J. Marshall
JENNER & BLOCK LLP
1099 New York Avenue, NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

Counsel for Amici Curiae

Jennifer B. Dickey
Audrey Dos Santos
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

Andrew Pauley
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(304) 410-2964

Counsel for the National Association of Mutual Insurance Companies

Colleen Reppen Shiel
Stephen A. Skardon
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
8700 W. Bryn Mawr Avenue,
Suite 1200S
Chicago, IL 60631
(847) 297-7800

Counsel for the American Property Casualty Insurance Association

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 **2,599** 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.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Amici Curiae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (a) all required privacy redactions have been made, pursuant to Federal Rule of Appellate Procedure 25(a)(5) and Tenth Circuit Rule 25.5; (b) all required hard-copy submissions of this filing will be exact copies of this electronic filing; and (c) this electronic filing was scanned for viruses using CrowdStrike Falcon, a commercial virus-scanning program (version 7.24.19607.0, last updated on April 23, 2025), and, according to the virus-scanning program, this filing is free of viruses.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system, which will send notice to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Date: May 21, 2025

/s/ Adam G. Unikowsky
Adam G. Unikowsky
Counsel of Record for Amici Curiae