No. 21-11769

In the

United States Court of Appeals

For the Eleventh Circuit

ANTHONY SOS,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Judge Paul G. Byron
No. 6:17-CV-00890-PGB-LRH

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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August 12, 2021

Anthony Sos v. State Farm Mutual Automobile Insurance Company, No. 21-11769

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, and 11th Cir. R. 26.1, *amici curiae* the Chamber of Commerce of the United States of America, American Hospital Association, American Medical Association, and Florida Medical Association states that, in addition to the persons listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellants on June 7, 2021, the following persons and entities have an interest in the outcome of this case:

Andrew R. Varcoe, Counsel for *Amicus Curiae*

Chamber of Commerce of the United States of America, *Amicus Curiae*

Jennifer B. Dickey, Counsel for *Amicus Curiae*

McGuire Woods LLP, Counsel for *Amicus Curiae*

Michael Francisco, Counsel for *Amicus Curiae*

Amicus curiae the Chamber of Commerce of the United States of America further states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent

corporation, and no publicly held company has 10% or greater ownership in the Chamber.

Dated: August 12, 2021

Respectfully submitted,

/s/ Michael Francisco
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STATEMENT OF IDENTITY AND INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three 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 curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They are particularly likely to be defendants in putative class actions. The Chamber's members thus have a strong interest in ensuring that courts comply with the Supreme Court's class action precedents, including undertaking the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber

[1] Both parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

has filed *amicus curiae* briefs in several recent Rule 23 class action cases, including *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013); and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

STATEMENT OF THE ISSUES

Amicus curiae agrees with Appellant State Farm's statement of the issues.

SUMMARY OF THE ARGUMENT

The court below violated Article III principles and Rule 23 when it failed to dismiss the case after the named plaintiff's claims were mooted before class certification. Class actions are not an exception to the Constitution's requirement that a federal court proceed only when presented with an actual case or controversy. Here, no such case or controversy existed after the defendant voluntarily chose to remediate both the named plaintiff's injury and the injuries of any putative class members. Keeping the case alive after that point for the purposes of awarding attorney's fees was beyond the Article III power of the court and ultimately harmful to the legal system.

The court's decision to certify a class action in the case also ran afoul of Rule 23's basic requirements of numerosity and typicality. Because of the defendant's laudable act of remediating the error for both the named plaintiff and the putative class, plaintiff has been able to identify no more than four individuals who would potentially fall within the class, far below any conceivable threshold for numerosity under Rule 23. And the named plaintiff—whose claim arose from the omission of all state tax due to a programming error—is hardly a typical (or adequate) representative of a "class" of four individuals whose claims arise from the omission of only some state tax due to a different error. Under a properly rigorous application of Rule 23, this class could never have been certified.

Finally, the Court should be mindful of the increasing drain on the economy caused by inappropriate uses of the class action procedure in deciding this case. Class actions are incredibly costly for businesses and the judicial system. And this case presents a cautionary tale of how litigation that could have been averted, or at least swiftly resolved due to the voluntary remediation by the defendant, may be used to drive attorney's fees rather than resolve live claims. That is neither appropriate nor permissible under our law.

ARGUMENT AND CITATIONS OF AUTHORITY

I. A class action cannot proceed if the named plaintiff lacks a live claim at class certification.

All federal litigation, including class actions, must comport with the Constitution's limits on judicial power. Article III of the Constitution limits the jurisdiction of federal courts to "case[s]" or "controvers[ies]." Thus, courts may decide only "the legal rights of litigants in actual controversies." *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (internal quotation marks omitted). And a plaintiff may invoke federal court jurisdiction only if he possesses a legally cognizable interest, or "personal stake," in the outcome of the action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (internal quotation marks omitted). This personal stake must "be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). Therefore, when a named plaintiff's stake in a suit is extinguished, so too is the court's jurisdiction over the case. *Id.*

Rule 23 is not an end-run around Article III. "Rule 23's requirements must be interpreted in keeping with Article III constraints,

and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("The constitutional requirement of standing is equally applicable to class actions."). Allowing cases to be litigated by a person without any stake in the outcome of the case would yield precisely the advisory opinions that the case or controversy requirement protects against.

The named plaintiff plays a uniquely important jurisdictional role in putative class actions. When a class is merely putative, there is no other plaintiff to maintain a case or controversy against the defendant. And Article III prohibits the continuation of litigation based solely on speculation that the attorney will be able to locate a new plaintiff, not presently before the court, who might have a live dispute with the defendant. *See Genesis Healthcare Corp.*, 133 S. Ct. at 1528 (2013) ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed.") (internal quotation marks omitted). Put simply, "[f]ederal jurisdiction cannot be based on

contingent future events." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013).

Thus, just as in individual actions, a named plaintiff whose claim becomes moot before class certification loses his live claim and his standing to proceed with the action. *See United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) ("Normally a class action would be moot if no named class representative with an unexpired claim remained at the time of class certification."); *J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019) ("For every claim, at least one named plaintiff must keep her individual dispute live until certification, or else the class action based on that claim generally becomes moot."). He no longer has an injury in need of redress by the court, nor interests adverse to the plaintiff. And because, in the absence of a certified class, there is no longer any "necessity" to "expound and interpret" the law, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), the federal courts lack authority to hear the entire case. If it were otherwise, and named plaintiffs could maintain a lawsuit even after their personal stake had been fully satisfied, it would turn the rules governing class actions on their head, effectively exempting them from Article III's stringent requirements and denying unnamed class

members Rule 23's procedural protections of a typical and adequate class representative.

Class actions are for the benefit of claimants, not attorneys with an interest in obtaining fees. The Supreme Court has repeatedly held that claims for attorneys' fees are inadequate, standing alone, to support a live claim. See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("A request for attorney's fees or costs cannot establish standing because those awards are merely a 'byproduct' of a suit that already succeeded, not a form of redressability."). In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court explained that, "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself." 523 U.S. 83, 107 (1998); see also *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 480 (1990) (citing *Diamond v. Charles,* 476 U.S. 54, 70–71 (1986)).

Nor can there be any argument that defendant's conduct here somehow justifies allowing the suit to proceed in the absence of a named plaintiff with a live claim. Some authorities have speculated that paying

a claim before class certification could allow defendants to "pick off" the lead plaintiff, and continue to do so, until the statute of limitations had run on the putative class. E.g. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011). But first, there is no "bad conduct" exception to Article III's requirements. Second, plaintiff has shown no such conduct here. Indeed, once the business defendant became aware of the problem, described as a programming error by State Farm in this case, it worked diligently to address it. State Farm paid out more than $4 million dollars: no trivial amount. There can be no "pick off" when State Farm identified the putative class and paid their full potential loss.

Nor is there any basis for holding that this matter is capable of repetition but evading review. *See Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 705 (11th Cir. 2014) (recognizing this exception to the traditional mootness rule). State Farm fixed the programming error it identified and then fully paid those individuals affected by it, with no strings attached. That makes this an easy case. There can be no repetition of the named plaintiff's claim here—State Farm both eliminated the programming error and fully paid the potential loss for everyone affected by the programming issue.

From the perspective of the individuals who suffered from the mistake, this was full restoration, without any judicial process tax being imposed on the recovery. It is hard to see how this remediation is anything other than a best-case scenario for those individuals who are the potential unnamed class members. This is precisely the sort of claimant-benefiting conduct that proponents of Rule 23 class procedures have long encouraged.

II. Any contrary ruling would conflict with bedrock mootness law and risk creating circuit conflict.

In addition to allowing a moot case to proceed "in violation of 'the oldest and most consistent thread in the federal law of justiciability,'" *Uzuegbunam*, 141 S. Ct. at 803 (Roberts, J., dissenting) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)), the lower court's actions deviated from the approach taken by this Court's sister circuits. This Court should not create a circuit split by endorsing those actions.

The Tenth Circuit's decision in *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009) (Tymkovich, J.), is perhaps most analogous. There, the Tenth Circuit considered a case in which, due in part to a series of appeals, the district court had rendered summary judgment in favor of the named plaintiff before the plaintiff had even

moved for class certification; State Farm then paid that judgment, again prior to class certification. The Tenth Circuit held that the case must be dismissed as moot if the "personal claims of the named plaintiffs are satisfied" before any class has been certified. *Id.* at 1138 (quoting *Reed v. Heckler*, 756 F.2d 779, 785 (10th Cir. 1985)). The court considered a number of exceptions to mootness, such as capable-of-repetition yet evading review, and found none applicable to a named plaintiff with a fully satisfied judgment before any class was certified. Even in cases where the Supreme Court has "applied the mootness doctrine less strictly in the class action context," the *Clark* court found there was no excuse for a named plaintiff who had his or her claims fully satisfied prior to class certification. *Id.*

The Tenth Circuit's clear holding that payment of a named plaintiff's judgment prior to class certification moots a case is well-reasoned and has not been rejected in any circuit. In fact, in the circumstance of fully satisfied claims, the other circuits agree, mootness must be found.[2] The Eleventh Circuit too followed this approach as early

[2] *Cruz v. Farquharson*, 252 F.3d 530, 533–34 (1st Cir. 2001); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994); *Brown v. Philadelphia Hous.*

as 1987, when in *Tucker v. Phyfer*, the Court held that a named plaintiff's claim "must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot." 819 F.2d 1030, 1033 (11th Cir. 1987).

Rather than follow the prevailing law, the lower court erroneously relied on *Stein*, 772 F.3d at 704, which featured a Rule 68 *offer of judgment*, not a literal payment of judgment. The Supreme Court has held that such offers are not sufficient to render cases moot. See *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 162 (2016). Here, by contrast, the named plaintiff received actual payment of money to satisfy his claim.

Auth., 350 F.3d 338, 343 (3d Cir. 2003); *Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980); *Murray v. Fid. Nat. Fin., Inc.*, 594 F.3d 419, 421 (5th Cir. 2010); *City of Parma, Ohio v. Cingular Wireless*, LLC, 278 Fed. App'x 636, 642 (6th Cir. 2008); *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 616 (7th Cir. 2002); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826 (8th Cir. 2008); *Emps.-Teamsters Loc. Nos. 175 & 505 Pension Tr. Fund v. Anchor Cap. Advisors*, 498 F.3d 920, 924 (9th Cir. 2007). *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019), is not to the contrary because it involved a suit seeking an injunction against a governmental policy where the court found the claims were inherently transitory, a materially different situation than full satisfaction of a judgment.

This Court should thus reject the lower court's analysis and should reaffirm that *payment* of a judgment for the named plaintiff, prior to class certification, renders the case moot. Should this Court expand *Stein* (notwithstanding *Tucker*) and somehow find to the contrary—that payment of a judgment is not enough to render a putative class moot—it would create a stark circuit conflict. See Newberg on Class Actions, § 2:11, *Mootness avoidance before a ruling on class certification* (5th ed.) (collecting cases). No such conflict is necessary when a straightforward application of Supreme Court and Eleventh Circuit precedent makes clear that the case is moot. And it would be especially unnecessary to create a circuit split in a case with a moot named plaintiff when, as here, the entire putative class has been remediated by the defendant.

III. The Rule 23 prerequisites are lacking.

In addition to running afoul of Article III, the lower court's action deviated from the class certification requirements of Federal Rule of Civil Procedure 23. These requirements are crucial safeguards grounded in fundamental due process concepts and are essential to protecting the rights of both defendants and absent class members. *See* 28 U.S.C.

§ 2072(b). If not corrected, the decision below will encourage courts to bypass the rigorous analysis required by Rule 23.

A. This class lacks the first requirement of any class: numerosity.

The district court here certified what appears to be one of the smallest numerical classes ever certified in federal court and one that falls far below the numerosity threshold of Rule 23. Because State Farm had remediated everyone it could identify as being impacted by the programming error, Plaintiff's counsel has been able to identify only *four* individuals that allegedly fit the class definition. Four individuals are plainly not "so numerous that joinder of all members is impracticable," as Rule 23 requires. Fed. R. Civ. P. 23(a)(1). Courts routinely handle matters with four joined defendants. Joinder of four defendants is highly practicable.

Indeed, although this Circuit has stated that "generally less than twenty-one is inadequate, more than forty adequate," *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986), classes with hundreds and thousands are routinely found to be too small to justify class treatment. E.g. *Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) (upholding denial of class certification for putative class

of 15,000 due to inability to show impracticability of joinder); *A.B. by C.B. v. Hawaii State Dep't of Educ.*, 334 F.R.D. 600, 607 (D. Haw. 2019) (numerosity not satisfied for putative class exceeding 300); *Jaynes v. United States*, 69 Fed. Cl. 450, 454 (2006) (numerosity lacking for putative class of 258). For its part, the Supreme Court has noted that the Title VII threshold of 15 would be a number "too small to meet the numerosity requirement" of Rule 23. *Gen. Tel. Co. of the Nw. v. Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). The district court's action is out of step with all of these precedents.

The district court's conjecture that there may be other class members who "materialize" after notice is sent was a wholly insufficient basis for class certification. Plaintiffs bear the burden of establishing Rule 23 compliance throughout the litigation. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable."). That burden is not satisfied by speculation. Here, plaintiff came forward with no specific evidence of class members too numerous to be joined in a single action, and the process of sending a class-action notice is not meant to be a fishing expedition to support certification of a class in the first place.

B. The named plaintiff is not typical of the putative class members.

In addition, plaintiff is not typical of the four unnamed class members that he alleges remain in the class. Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Here, if any of the four individuals were underpaid as a result of the programming error that affected the named plaintiff, they would have received $0.00 sales tax on their claim. These four all received some payment, just less than the full 6%. State Farm has suggested that this may have resulted from an entry error in the original claims processing, a factual scenario that bears no relationship to the factual scenario giving rise to the named plaintiff's claim.

When class members have individualized claims or atypical factual situations, adjudication through the class mechanism risks depriving the defendant of its right to "litigate its … defenses to individual claims" of the class members, and likewise risks depriving unnamed class members of their right to a named plaintiff who can adequately represent their interests. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5, 367 (2011). That is why Rule 23 requires the class representative to "possess

the same interest and suffer the same injury as the class members." *Dukes*, 564 U.S. at 348-49 (emphasis added; quotation marks omitted). Only under such circumstances can a court ensure "that the individual's claim and the class claims will share common questions of law *or fact* and that the individual's claim will be typical of the class claims." *Dukes,* 564 U.S. at 353 (quoting *Falcon*, 457 U.S. at 147, 157-58) (emphasis added). Here, despite positing a class made up of individuals with a different injury caused by a different corporate action than the one that afflicted the named plaintiff, the district court simply failed to conduct the "rigorous analysis" required by Rule 23(a). *Falcon*, 457 U.S. at 161.

IV. Improper class actions impose substantial costs on the business community.

The failure to rigorously police class actions imposes substantial harms on the business community and the public more broadly. If classes are allowed to proceed even when both the named plaintiff and the putative class has been made whole, as in this case, then burdensome class action litigation driven by the interests of attorneys rather than claimants will only increase, without any countervailing benefit to class members. The consequences for the judicial system, as well as for

businesses, their owners, customers, and employees will be extraordinarily damaging.

Class-action litigation costs in the United States are huge. They totaled a staggering $2.64 billion in 2019, continuing a rising trend that started in 2015. *See* 2020 Carlton Fields Class Action Survey, at 4 (2020), *available at* https://ClassActionSurvey.com. The cost to defend a single large class action can run into nine figures. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* 1 (July 2011) (noting defense cost of $100 million). And such actions can drag on for years even before a court takes up the question of class certification. *See* U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1, 5 (Dec. 2013), *available at* http://bit.ly/3rrHd29. ("Approximately 14 percent of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis.").

This case provides a useful example of how litigation costs drive class actions. Shortly after the suit was filed State Farm determined it had a practice of paying sales tax in the relevant jurisdiction, and that

only a programming error had led to the tax not being paid. State Farm then voluntarily remediated the injuries of the named plaintiff and all unnamed class members that it could identify. It seems reasonable to believe that State Farm would have taken the same action if it had been notified by the named plaintiff of the missing tax payment before he filed this class action lawsuit. Yet the named plaintiff did not afford State Farm the opportunity to resolve his demand without litigation. Nor did the plaintiff dismiss the litigation after State Farm redressed his injury and that of the unnamed class members. Instead, the plaintiff's counsel engaged in aggressive litigation tactics seeking more than $4 million in attorney's fees.

Courts should not countenance this fee-driven litigation. Class actions are meant to redress real injuries of class members, not to line plaintiff's attorneys' pocketbooks. If not corrected by this court, the decision below will only lead to increased litigation that could have been avoided, and litigation strategy that is concerned more with attorney's fees than with resolving Article III cases or controversies.

CONCLUSION

The judgment of the district court should be reversed and the case should be dismissed as moot.

Dated: August 12, 2021

Respectfully submitted,

/s/ *Michael Francisco*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) because it is proportionally spaced, has a typeface of 14-point Century font, and contains 3,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Michael Francisco
Michael Francisco

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, the foregoing was electronically filed with the Clerk for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. The system will serve all counsel of record.

/s/ Michael Francisco
Michael Francisco

Counsel for Amicus Curiae