No. 20-1008

IN THE
Supreme Court of the United States

STATE FARM LIFE INSURANCE COMPANY,
Petitioner,

v.

MICHAEL G. VOGT,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

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

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 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. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's members depend on courts to apply "a rigorous analysis" before certifying a class. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Instead of closely examining whether Vogt and his counsel could fairly and adequately represent their proposed class here, both the district court and the Eighth Circuit brushed aside glaring conflicts of interest. If the Eighth Circuit's erroneous reasoning stands, it will invite similar abuses of the class-action device in the future—

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of amicus curiae's intention to file this brief at least 10 days prior to the due date. Counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

enriching class counsel at the expense not only of defendants, but also of absent class members whom those counsel cannot fairly represent. The Chamber has an interest in ensuring that courts honor the procedural protections that Rule 23 affords to defendants and absent class members alike. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-10 (1985) (observing that absent class members' rights are safeguarded in part because "the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum," including by raising the alarm when "the absent plaintiffs would not be adequately represented").

SUMMARY OF ARGUMENT

The Eighth Circuit erred in upholding the district court's class certification order and resultant judgment. There was an intractable conflict between current and former policyholders in the class. Current policyholders faced the risk that a judgment in favor of the class would result in higher rates in the long term. Former policyholders did not face that risk. In light of that conflict, class counsel could not adequately represent the absent class members who might be harmed by class counsel's litigation strategy. In individualized litigation, a plaintiff's lawyer would never have adopted a legal strategy that would ultimately harm his own client in the long run. It follows that the case should not have proceeded as a class action.

This case warrants plenary review. It exemplifies lower courts' unwillingess to adhere to the principle that Rule 23 is a procedural rule that does not alter substantive rights. Alternatively, the Court should hold

this petition for *TransUnion LLC v. Ramirez*, No. 20-297. The petitioner in *TransUnion* asks this Court to vindicate the principle that class actions cannot alter substantive rights. If the Court reaffirms that principle, its ruling necessarily would establish that the Eighth Circuit erred here.

ARGUMENT

I. The Eighth Circuit's Decision Is Wrong.

The Eighth Circuit affirmed the judgment in favor of the class despite glaring intra-class conflicts. In doing so, the court departed from the most basic premise of class action law: class actions are a procedural device akin to joinder, allowing courts to efficiently resolve multiple claims without altering substantive rights. Rather than abiding by that bedrock principle, the court improperly allowed claims to be aggregated together that would never have proceeded in individualized litigation.

A. Rule 23 Bars Certification Of Classes With Inter-Class Conflicts.

Rule 23 permits class certification "only if" the court finds that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625

(1997).[2] In order to be adequate, the putative class representative "must be part of the class and possess *the same interest*" as those he seeks authority to represent. *Id.* at 625-26 (quotation marks omitted; emphasis added). Thus, "if the representative or counsel have conflicting interests [with those of class members], representation will not be adequate." 3 William B. Rubenstein, *Newberg on Class Actions* § 7:31 Westlaw (5th ed., database updated Dec. 2020). At a minimum, Rule 23 requires "the structural protection of independent representation" for distinct subclasses "with conflicting interests." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999).

Although the adequacy requirement is codified in Rule 23, it is rooted in due process. "The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). When the class representative's interests conflict with the interests of those he purports to represent, the litigation "no more satisfies the requirements of due process than a trial by a judicial officer who ... may have an interest in the outcome of the

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[2] "The adequacy-of-representation requirement tends to merge with the ... typicality" requirement of Rule 23(a). *Amchem*, 521 U.S. at 626 n.20 (internal quotation marks and alteration omitted). Here, Vogt's conflict of interest (which makes him an inadequate representative) is interwoven with the fact that his situation is not "typical" of many class members. For simplicity, we address the issues under the adequacy rubric here.

litigation." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Given this due-process concern, Rule 23 demands robust protections against both "inequity and potential inequity," *Ortiz*, 527 U.S. at 858, as a precondition to class certification.

The upshot of these principles is that "disparate groups cannot be mixed together under Rule 23(a) where the economic reality of the situation leads some class members to have economic interests that are significantly different from—and potentially antagonistic to—the named representatives purporting to represent them." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1195 (11th Cir. 2003).

B. The Intra-Class Conflict Should Have Precluded Class Certification Here.

As State Farm's petition explains, class counsel relied on a damages model that generates higher cost of insurance rates for some policyholders as compared to their actual rates. In other words, if State Farm begins interpreting its policies in the way that, according to class counsel, it is legally required to do, then a subset of the class members will pay higher rates in the long run. This problem, of course, does not affect policyholders who have given up their policies and will not pay *any* rates in the long run. But it will affect policyholders who choose to keep their policies.

As such, there was an intra-class conflict. For certain current policyholders, class counsel's damages model created a substantial probability of future harm. For former policyholders, class counsel's damages model was

unambiguously beneficial. A lawyer cannot fairly and adequately represent both a plaintiff who has an interest in not pursuing a strategy, and also a plaintiff for whom that same strategy promises only upside.

The Eighth Circuit brushed off this conflict, finding State Farm's argument "entirely speculative" because it "relies on nothing more than conjecture about how this lawsuit will affect State Farm's future dealings with current policyholders." Pet. App. 16a-17a. That reasoning was incorrect. The risk that Plaintiffs' strategy poses for longstanding policyholders is hardly "speculative." A final judicial order construing the insurance contract has obvious significance for how the contract may be implemented or construed in the future. Even in the absence of injunctive relief requiring State Farm to comply with the Eighth Circuit's interpretation going forward, the Eighth Circuit's opinion surely makes it likely that State Farm will do so. Diverging from that interpretation would invite future lawsuits, while complying with that interpretation would almost certainly ensure that State Farm would avoid future liability—even in a suit by a longstanding policyholder who would be harmed by such an interpretation. Indeed, if a longstanding policyholder were to sue State Farm, State Farm could invoke the Eighth Circuit's opinion affirming the district court as precedent establishing that State Farm's interpretation is correct.

Further, there is nothing unusual about an intra-class conflict that depends on what might happen after final judgment is entered. As State Farm accurately explains, other courts of appeals hold that the prospect of future harm for a subset of class members can create

an intraclass conflict. *See* Pet. 20-21 (discussing *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299 (5th Cir. 2007)). This Court, too, has reached the same conclusion. *See Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 331 (1980) (explaining that an intra-class conflict would bar "the same [named] plaintiff" from representing both employees and new applicants in an employment discrimination case, because, if the plaintiffs prevail, the applicants might go on to "compete with employees for fringe benefits or seniority" later). The Eighth Circuit's dismissive assertion that the conflict was "speculative," merely because the prospect of future harm was a risk rather than a guarantee, did not adequately take account of the conflict at stake.

The same conclusion follows from considering how the conflict here would be treated outside the class-action context. In order to adequately and ethically represent a longstanding policyholder in this matter, a lawyer would doubtless have to advise her of the risk that she may ultimately pay more if she prevails in this suit. And if the client determined that the risks outweighed the benefits—as she quite likely would—the lawyer would have to drop the case, or at least alter the damages model.

But here, those policyholders never received that advice, and never were able to make an informed decision about whether class counsel's strategy would do them more harm than good. Nor did class counsel have any incentive to take account of those policyholders' interests. Class counsel's own client—the class representative—was not among the class members who faced a risk of heightened rates in the future. Moreover,

class counsel itself had an interest in making the class as large as possible. A larger class means a larger judgment. And because class counsel's fee consisted of a one-third percentage share of the classwide judgment, D. Ct. Dkt. 458, a larger judgment means a larger fee award. Of course, for current policyholders, the victory was Pyrrhic, because their share of the classwide award—already reduced in light of the fee award—risked being outweighed by the extra premiums they would have to pay in the long run. But that downside risk was borne only by the policyholders and not by class counsel, who benefited from the classwide award without having to pay any extra insurance premiums.

The result was a proceeding in which absent class members received inferior representation precisely *because* they were absent class members. That should never have happened. Policyholders are not entitled to any less zealous and independent representation just because a different policyholder initiated a class action. "A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). "And like traditional joinder," a class action "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* In fact, if anything, the absence of any affirmative consent by absent class members militates in favor of a heightened concern for potential conflicts in the class-action context. Here, however, the Eighth Circuit affirmed a class certification order that stripped class members of their

right to an unconflicted lawyer and ultimately harmed them in the long run. The Eighth Circuit gravely erred in affirming the certification of a class with such a gaping intraclass conflict.

II. This Court Should Grant Plenary Review, Or, Alternatively, Hold The Case For *TransUnion*.

This case is sufficiently important to warrant plenary review. As State Farm correctly explains, the circuits apply disparate standards in deciding whether a conflict warrants decertification. More fundamentally, this case illustrates a cross-cutting problem: courts persistently allow class certification to alter parties' substantive rights, in violation of the principle that Rule 23 is a procedural rule that leaves substantive rights intact.

State Farm accurately recounts the disarray among circuit courts on when intraclass conflicts warrant decertification. In this case, the Eighth Circuit applied the most class-counsel-friendly rule conceivable: even when there is a substantial risk that a substantial number of class members will be harmed by their participation in the litigation, the class litigation can still proceed. In the Eighth Circuit's view, anything short of a guarantee that class members will be harmed is "speculative." Other circuits have more rigorously screened for intracircuit conflicts, rightly holding that classes cannot be certified, or should eventually be decertified, if a judgment in the class's favor will harm the legal interests of class members. Pet. 18-21. The widespread disarray among the lower courts on this fundamental issue of adequate representation calls out for guidance from this Court.

Moreover, this case provides an opportunity for the Court to reaffirm the core principle that class actions are not a mechanism to alter substantive rights. If Rule 23 lived up to its billing as a purely procedural rule, this case would have been easy. Suppose a policyholder asks a contingency-fee lawyer to investigate claims against his insurance company. Suppose the lawyer then sues the insurance company and obtains a judgment on behalf of the policyholder—without ever telling his client that, if the insurance company follows the legal rule that *he himself advocated for*, the client will pay more money in the future. It would be obvious that the lawyer acted unethically—and the lawyer could not avoid ethics scrutiny merely by asserting that it was "speculative" that the insurer would adhere to the court's interpretation of the insurance policy. For precisely that reason, it should have been obvious that the current policyholders should not have been included in the class.

The fact that the Eighth Circuit reached the contrary conclusion betrays the need for guidance from this Court. The Eighth Circuit is not alone in its fundamental misunderstanding of the class action device. In case after case, this Court has reversed lower-court decisions that failed to recognize the principle that class actions do not alter substantive rights.

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for instance, this Court reversed a Ninth Circuit decision upholding the certification of a class of millions of Wal-Mart employees pursuing claims of employment discrimination. As the Court observed, the plaintiffs "wish[ed] to sue about literally millions of employment decisions at once. Without some glue holding the alleged

reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.* at 352. Had the Ninth Circuit understood Rule 23 as a procedural rule that did not alter substantive rights, it would have immediately recognized that class certification was unwarranted. If the case proceeded as a class action, there would be no way for Wal-Mart to present the type of individualized factual defenses that are standard fare in Title VII litigation; as such, class certification had the impermissible effect of stripping Wal-Mart of its substantive rights.

Likewise, in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), this Court reversed a Third Circuit decision upholding a class-certification order in which class counsel was unable to proffer a damages model capable of isolating the damages attributable to the legal wrong. The Court resolved the case by reciting a basic precept of civil litigation: "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory." *Id.* at 35. Had the case proceeded on an individualized basis, any court would have held that a case could not proceed to the jury when the plaintiff offered no reliable way of proving damages. It followed ineluctably that the case could not proceed to the jury merely because multiple plaintiffs' claims were conjoined via a class action.

Even in cases where this Court has affirmed the use of collective litigation, the Court has taken care to emphasize that class litigation does not alter the substantive rights of class members. In *Tyson Foods*,

Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016), this Court held that a plaintiff could use a representative study to establish an employer's liability in a collective action under the Fair Labor Standards Act. The Court rested that conclusion on its determination that the study *would have* been admissible even if the litigation had proceeded on an individualized basis: "In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right.'" *Id.* at 1046 (quoting 28 U.S.C. § 2072(b)). By the same token, a class action that *does* abridge substantive rights *cannot* proceed.

Unfortunately, this Court's decisions have not stopped lower courts from issuing class certification orders that have the effect of altering substantive rights. It is imperative that the Court reject such orders and do so in no uncertain terms. The Court should grant certiorari to reaffirm that if a class member's claim cannot proceed in individualized litigation, it cannot proceed in a class action.

Alternatively, the Court should hold this case pending *TransUnion*. Like the lower-court rulings in *Wal-Mart*, *Comcast*, and this case, the lower-court ruling in *TransUnion* erroneously allowed a class action to strip a litigant of substantive rights. In *TransUnion*, a class action proceeded to judgment, even though many class members did not suffer any individual injury, let alone an injury comparable to the class representative's.

In individualized litigation, those class members' claims would have been dismissed for lack of standing; or at a minimum, the court would not have permitted inflammatory evidence that some other customer suffered a harm entirely dissimilar from the individual plaintiff's own experience. *TransUnion* is easily resolved by reiterating that Rule 23 is a procedural device that does not alter substantive rights.

If the Court reaffirms that principle in *TransUnion*, the Court's holding will confirm that the Eighth Circuit erred in this case. Therefore, at a minimum, this case should be held for *TransUnion*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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