No. 20-50909

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiff-Appellee,

v.

USAA LIFE INSURANCE COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Case No. 5:17-CV-967

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN COUNCIL OF LIFE INSURERS SUPPORTING DEFENDANT-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Defendant-Appellant's Certificate of Interested Persons, the following listed persons and entities as described in Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

Amici Curiae

I. The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in The Chamber of Commerce of the United States of America.

II. The American Council of Life Insurers

The American Council of Life Insurers has no parent corporation. No publicly held company has any ownership interest in The American Council of Life Insurers.

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INTEREST OF AMICI CURIAE

The district court's erroneous class-certification decision presents multiple issues of outsized importance for *amici* and their members nationwide.[1] The certification arises in the insurance context, but its errors cannot be cabined to any particular industry.

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 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 its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases raising issues important to the nation's business community.

The American Council of Life Insurers ("ACLI") is the largest life-insurance trade association in the United States, representing the interests of approximately 290 member companies operating in the United States and

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief, and only *amici*, their members, or their counsel did so. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for both parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

abroad. ACLI member companies are among the leading providers of life-insurance products. In the United States, these companies represent more than 90% of industry assets. ACLI regularly advocates the interests of life insurers and their millions of policyholders and beneficiaries before state and federal legislators, state insurance commissioners and regulators, and the courts. ACLI frequently files amicus briefs in cases such as this that involve issues of great importance to its members.

ACLI has a unique industry-wide perspective on certain issues raised in this case, particularly regarding the role of state regulation in the life-insurance industry. ACLI has a vital interest in ensuring that member companies may continue to operate under the established rules that determine which law and which regulatory authority governs their policies and their relationships with policyholders. ACLI has a clear interest in addressing any decision that would interfere with its members' ability to offer financially solvent life-insurance policies or that would require a costly and disruptive overhaul of insurers' future business and pricing processes.

Both *amici* appear in this Court because their members have a strong interest in promoting predictable, rational, and fair legal standards. Their members are particularly likely to be defendants in putative class actions. *Amici's* members accordingly have a keen and continuing interest in

ensuring that courts rigorously and consistently apply Rule 23's requirements before certifying a class.

SUMMARY OF ARGUMENT

As USAA has articulated, the district court's class-certification ruling warrants reversal for several independent reasons. The district court's errors cannot be fully remediated by remand, and in fact require decertification. This Rule 23(f) appeal presents this Court with the opportunity to correct those serious errors and provide important clarification on issues that are likely to recur in subsequent class actions. *Amici* write separately to emphasize three points that are of particular importance to class-action jurisprudence.

First, the district court lowered the *Daubert* standard of admissibility to be more permissive in the class-certification context. Just days ago, this Court joined the majority of Circuits to hold that *Daubert* fully applies at class certification. *Prantil v. Arkema Inc.*, __ F.3d __, No. 19-20723, 2021 WL 222722, at *2 (5th Cir. Jan. 22, 2021). The decision in this case should underscore not only that *Arkema* is the law, but that it has no loopholes. Only if expert testimony meets the *Daubert* standard at class certification will district courts fulfill their important gatekeeping role at the momentous point when *putative* class actions might—or might not—transform into *real*

class actions. The district court here clearly applied a lower standard of scrutiny to the expert evidence on which it relied, and that alone warrants reversal.

Second, even if the *Daubert* issue could (in theory) be corrected on remand, this Court should make clear that basic Rule 23 principles preclude a nationwide class of policyholders here. Serious intraclass conflicts make it impossible to satisfy the adequacy and predominance requirements, and the ascertainability morass that would flow from the inability to know in advance *who* would be harmed or helped likewise militates against certification. Under Rule 23, a class representative cannot be "adequate" where, as here, he pursues a theory that will result in harm—and certainly no possible benefit—to absent class members.

Many absent class members have not been injured under Plaintiff's theory, meaning that many members of the certified class lack Article III standing. At the very least, their presence in the case raises a serious constitutional question about the propriety of federal jurisdiction, and that question in turn should lead the Court to resolve the remaining Rule 23 issues against certification.

Third, this Court should declare that the claims presented by this nationwide class cannot be universally adjudicated under Texas law. This

Court has repeatedly decertified multi-state or nationwide classes where differences in state law make it impossible to satisfy the Rule 23 requirements. The district court's approach violates constitutional principles, including the Commerce Clause and Due Process Clause. Additionally, as a policy matter, the district court's approach—if adopted more broadly—is likely to result in widespread harm to businesses, consumers, and even the states themselves. That concern is amplified by the fact that a judgment for a certified class here would impose serious consequences on the carefully regulated insurance industry, result in the financial insolvency of many insurance products, and shift authority from where Congress has left it—with the States—to individual federal courts exercising nationwide jurisdiction.

ARGUMENT

The *Daubert* error alone justifies an emphatic reversal. But for several reasons, the Court should not stop there. The district court's additional errors go beyond *Daubert*; they compel not merely reversal and remand, but independently preclude any possible certification. They are also errors that recur in class-certification proceedings. Repudiating those errors, therefore, will lead to the expeditious resolution of this case, clarify the law in this Circuit, and prevent the order below from being cited in other class-certification proceedings as merely "overruled on other grounds."

I. The class-certification gatekeeping role precludes the district court's watered-down *Daubert* analysis.

As is increasingly common in class actions, the court below could not certify a class without relying on expert opinions. But the district court departed from the thorough reliability analysis prescribed by Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court instead deemed it an open question "whether courts should conduct a full *Daubert* inquiry at the Rule 23 class certification stage," ROA.1483-84, then proceeded to apply a deferential rather than rigorous approach. That was wrong,[2] but to the extent that there *was* any doubt, this Court's recent decision in *Arkema* has removed it: "[T]he *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify." 2021 WL 222722, at *2. "[I]f an expert's opinion would not be admissible at trial, it should not pave the way for certifying a proposed class." *Id*.

[2] The district court (ROA.1483-84) acknowledged this Court's precedents, under which "a careful certification inquiry is required and findings must be made based on adequate admissible evidence to justify class certification." *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *see also Bell v. Ascendant Sols., Inc.*, 422 F.3d 307, 313 (5th Cir. 2005). But the district court then followed an unpublished decision by a magistrate judge that suggested that district courts in this Circuit apply a "limited" *Daubert* analysis at the class-certification stage. ROA.1484 (citing *Cone v. Vortens, Inc.*, No. 4:17-CV-00001-ALM-KPJ, 2019 WL 4451146, at *2 (E.D. Tex. Sept. 17, 2019)). The district court was also swayed by arguments that some California federal courts "have applied the limited *Daubert* analysis." *Id*.

at *7.

Arkema mandates reversal. Precisely because expert testimony has become so important in class certifications across the country, this issue is recurring, and *amici* address it briefly to urge the Court to do more than simply cite *Arkema*. It would be beneficial for the jurisprudence if the Court explains why, even without *Arkema* (which the district court did not have before it), the approach below was harmful and erroneous. Such a holding would fortify *Arkema* and further clarify the law of this Circuit.

The Court should take this opportunity to emphasize the impropriety of half-measures and end-runs in class certification. "Given the impact of certification, district courts must analyze Rule 23 with special attention." *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 545-47 (5th Cir. 2020). "No less than due process is implicated." *Id.* at 547. *Daubert* must play *at least* as important a role in class-certification contexts as elsewhere, and a *Daubert*-lite analysis—if *ever* useful—is improper here because of how corrosive it would be to the foundations of a dubiously certified class.

A. A rigorous *Daubert* analysis at class certification is necessary to ensure that this critical (and in practice often dispositive) decision is not made based on inadmissible evidence. *Arkema* did not purport to break new ground; it instead saw its decision as a necessary application of existing law.

2021 WL 222722, at *3.

The Supreme Court forecast as much. Noting that the district court in *Wal-Mart Stores, Inc. v. Dukes* had found *Daubert* inapplicable to expert testimony at the certification stage, the Supreme Court expressed its disagreement with that conclusion: "We doubt that is so." 564 U.S. 338, 354 (2011). The Court, without needing to formally resolve the question (because so much else was amiss), nonetheless took the trouble to fire that shot across the bow. In *Comcast Corp. v. Behrend*, the Supreme Court cranked it up a notch, "emphasiz[ing]" that district courts must conduct a "rigorous analysis" to determine if the class certification requirements have been met. 569 U.S. 27, 33-34 (2013). And in *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court cited Rule 702 in its discussion of the inferences that could be raised from expert testimony "so long as [it] is *otherwise admissible*." 136 S. Ct. 1036, 1049 (2016) (emphasis added). Taken together, these Supreme Court pronouncements "should remove any vestigial doubt about the appropriateness of full-blown *Daubert* analysis at the class certification stage." 1 McLaughlin on Class Actions § 3:14 (17th ed. 2020).

Most circuits, to one degree or another, received the message and have reached the result reflected in *Arkema*, which consciously joined the

majority view. The Third,[3] Seventh,[4] and Eleventh Circuits[5] expressly and unambiguously require that expert testimony at class certification satisfy *Daubert*, just as *Arkema* does. 2021 WL 222722, at *3 (discussing those circuits' cases). The Second Circuit has not had occasion to resolve the question, but has signaled its support.[6]

Only the Eighth[7] and Ninth Circuits[8] have applied a lesser standard,

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[3] *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015) ("Expert testimony that is insufficiently reliable to satisfy the *Daubert* standard cannot 'prove' that the Rule 23(a) prerequisites have been met 'in fact,' nor can it establish 'through evidentiary proof' that Rule 23(b) is satisfied.'").

[4] *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) (per curiam) ("[W]hen an expert's report or testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis . . . ."); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 813 (7th Cir. 2012) (describing the "unworkable logical conundrum" that a contrary rule would impose).

[5] *Sher v. Raytheon Co.*, 419 F. App'x 887, 890-91 (11th Cir. 2011) (at least "a *Daubert*-like critique" of expert testimony at certification is indispensable, given the court's obligation to "make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification").

[6] Relying on case law describing the "flexible" nature of the *Daubert* inquiry, the Second Circuit affirmed a ruling where the record established that the district court properly "considered the admissibility of the expert testimony" and "ma[de] the requisite findings." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129-30 (2d Cir. 2013).

[7] The Eighth Circuit embraces a "tailored" *Daubert* analysis "in light of the criteria for class certification and the current state of the evidence." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613-14 (8th Cir. 2011).

[8] The Ninth Circuit has stated that the class certification stage "warrant[s] greater evidentiary freedom," and encourages district courts to evaluate admissibility under *Daubert* as a non-dispositive factor that "go[es] to the

although it is not clear that the lax approach below would even survive in those circuits.

B. The majority view is correct—the Supreme Court's guidance, and the decisions requiring a full *Daubert* analysis for expert testimony at class certification, proceed as they do to avoid undermining Federal Rule of Civil Procedure 23(b)(3) and Federal Rule of Evidence 702.

"Rule 23 does not set forth a mere pleading standard" and the party seeking certification must affirmatively "prove" its requirements. *Chavez*, 957 F.3d at 545-46 (citing *Dukes*, 564 U.S. at 350). Rule 23(b)(3) requires a party seeking class certification to demonstrate both (1) that questions common to the class members predominate over questions affecting only individual members, and (2) that class resolution is superior to alternative methods for adjudication of the controversy. Fed. R. Civ. P. 23. "Determining whether the plaintiffs can clear the predominance hurdle set by Rule 23(b)(3) also requires [the court] to consider 'how a trial on the merits would be conducted if a class were certified.'" *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) (citation omitted). Courts could not truly consider how a trial on the merits would be conducted without a thorough

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weight that evidence is given at the class certification stage." *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1005-06 (9th Cir. 2018), *cert. dismissed* 139 S. Ct. 1651 (2019).

Daubert analysis; expert testimony that fails that standard logically must be excluded, or else the very purpose of contemplating the trial on the merits would be foiled.

Federal Rule of Evidence 702 implicates the same concerns. Rule 702—amended to codify the gatekeeping mandate from *Daubert* and its progeny, *see* Fed. R. Evid. 702 advisory committee's note to 2000 amendment—imposes requirements that apply to *all* stages of a civil proceeding, subject to only a few limited exceptions, none of which applies here. *See* Fed. R. Evid. 1101(a), (d).

The two gatekeeping roles—from Rule 23 and Rule 702—should interlock *more* rather than *less* tightly in the class-action context:

- "As the Supreme Court has repeatedly reminded us, 'the class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 764 (5th Cir. 2020) (quoting *Dukes*, 564 U.S. at 348) (internal quotations omitted). As a result, Rule 23 imposes multiple conditions before a district court may certify a class. "A district court must engage in a 'rigorous analysis'" when determining whether Rule 23's requirements have been met. *Chavez*, 957 F.3d at 544; *see also Dukes*, 564 U.S. at 350-51.

- Similarly, expert testimony departs from two general principles—that a witness must testify based on personal knowledge and that opinion testimony is often unreliable and irrelevant. *See, e.g.*, *United States v. Wallace*, 961 F. Supp. 969, 976 n.3 (N.D. Tex. 1996) (explaining that "the use of expert testimony is a well established exception" to the personal knowledge requirement and the Federal Rules of Evidence "set forth specific requirements" regarding admissibility "[i]n order to safeguard against abuses of this exception"). Hence *Daubert*'s requirement that district courts "serve as gatekeepers" and "ensur[e] the reliability and relevance of all expert evidence." *Certain Underwriters at Lloyd's, London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 269 (5th Cir. 2020).

Putative classes like this one—where class certification depends on expert testimony—implicate *multiple* departures from traditional rules, each of which separately imposes gatekeeping duties on the district courts. Few moments in civil litigation could *less* warrant watering down *Daubert* than the class-certification stage.

Moreover, reliance on expert testimony in class actions has only increased in recent years. *See, e.g.*, Saby Ghoshray, *Hijacked by Statistics, Rescued by* Wal-Mart v. Dukes*: Probing Commonality and Due Process*

Concerns in Modern Class Action Litigation, 44 Loy. U. Chi. L.J. 467, 470-71 (2012) ("contemporary class action litigation has ushered in an exponential growth of litigants—in part . . . because of statistical modeling"). And it is hardly novel to note the intense settlement pressure on defendants resulting from class certification. *See, e.g.*, *Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("[C]lass certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits") (citation omitted); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) ("Certification as a class action can 'coerce the defendant into settling on highly disadvantageous terms, regardless of the merits of the suit.'") (citing Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment). The certification decision has been described as not only "a game-changer," but "often the whole ballgame" in class actions. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). Consequently, class certification often presents the *only* opportunity for a district court to evaluate expert testimony, making it especially troubling when courts diminish that task.

But suppose that a certification decision does not force a settlement. Even so, what a waste of the parties' and the court's time and resources to

conduct and manage classwide discovery and reach the merits phase—only to *then* determine that the very expert testimony on which certification turned was unreliable all along. It is hard to imagine such an inefficient and prejudicial system *except* for the hope of forcing settlement.

Finally, and perhaps most importantly, the rights of class members are "fundamentally alter[ed]" by certification. *Chavez*, 957 F.3d at 547. That is why Rule 23 requires courts to scrutinize the evidence to ensure that the rights and interests of absent class members are preserved. Applying a *Daubert*-level review at the certification stage affords another level of protection to absent class members, thus ensuring that classes are not certified and the rights of absent class members potentially impaired by unreliable expert testimony.

* * *

Arkema correctly required that *Daubert* be applied to expert testimony at class certification. This Court should confirm and underscore that principle. But for the reasons that follow, the Court should not stop there.

II. Plaintiff's legal theory creates unavoidable intraclass conflicts that make certification improper as a matter of law.

Even if there had been no *Daubert* problem, certification should be off the table for independent Rule 23 reasons. The district court plainly erred by finding that Plaintiff could serve as an adequate class representative

despite advocating for a contract interpretation that objectively could not help many class members and will certainly harm many others. Rule 23 deficiencies often travel in packs, and here not just adequacy, but also ascertainability, predominance, and even Article III jurisdiction contribute to the impropriety of certification.

A. A class representative is not adequate when his or her theory could not help absent class members and will certainly harm others.

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement mandates consideration of "the risk of 'conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (citation omitted). The problem for this class, as USAA's brief explains, is that relief for Plaintiff *cannot* benefit many class members, and the only way to avoid a finding that the class's success would *harm* many class members is by devising a speculative, theoretical solution that depends on actions that USAA almost certainly could not take without threatening the viability of the insurance product. USAA Br. 27-29. But establishing adequacy is not a game of speculation—it is a rigorous assessment of reality that "requires a case-specific inquiry into whether, '*as a practical matter*,' one class member's relief

in an adjudication would impair the interests of nonparties." *Chavez*, 957 F.3d at 550 (citation omitted).

*In*adequacy is present if, as here, certification would allow some "class members [to] hijack litigation . . . to pursue their preference at the expense of others." *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 316 n.28 (5th Cir. 2007). "The interests of all class members must be fundamentally consistent." *Id*. As the Eleventh Circuit put it, "[t]o our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1189-90 (11th Cir. 2003) (collecting cases). "Rule 23(a)(4) . . . preclude[s] class certification where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members." *Id*. at 1190. This principle is hardly novel, which makes the ruling below especially puzzling.[9]

After all, this case provides an unusually clear example. Plaintiff's

[9] *See also, e.g., Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (holding that "a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"); *Morris v. McCaddin*, 553 F.2d 866, 870-71 (4th Cir. 1977) (class certification is "inappropriate" where "the interests of the named plaintiffs [are] antagonistic to the interests of many of the unnamed members of the class").

theory that USAA must set its rates based only on future mortality expectations will necessarily result in some class members facing higher rates—and thus being worse off—in the future. Certification is improper where "the class collapses into distinct groups of winners and losers, as there is a fundamental conflict between those who were harmed and those who were benefitted" by the challenged conduct. *Almonor v. BankAtlantic Bancorp, Inc.*, 261 F.R.D. 672, 677 (S.D. Fla. 2009). That is precisely the case here—except that the groups, while unquestionably existing, are not "distinct" at all. As USAA explained, *ex ante* determinations of *who* would be helped or hurt are impossible because of the many variables that depend on future developments or choices and thus make objective classification impossible. USAA Br. 24.

Amici are particularly troubled by the district court's implication that it is fine to certify a class when a court can be virtually certain that some policyholders will be worse off, but it has no idea how to figure out who they are. Individual behavior, such as partial withdrawals, can affect whether the policyholder is charged above or below the mortality-only rate. Beyond the obvious adequacy problem, ascertainability and predominance problems arise from such a muddled starting point. If class treatment is inappropriate when it could degenerate "into multiple lawsuits separately tried," *Bell*, 339

F.3d at 307 (citation omitted), how much worse is it when the *parties* to those hypothetical "multiple lawsuits" could not even be identified until after a final judgment?

B. Class certification is improper—at the very least as an application of constitutional avoidance—where many class members have suffered no injury and thus lack standing.

One feature of this case that warrants particular attention is the *certainty* that many policyholders in the class have paid rates lower than they would—and unquestionably no *higher* than they would—under Plaintiff's mortality-only theory. Nor do many policyholders face any risk of future harm from *USAA's* current rate-setting practices—if they are to be harmed, it could only be if *Plaintiff's* theory prevails. An insurmountable problem with this certified class is that it includes both policyholders who have been injured under Plaintiff's theory and those who have not. Serious standing and redressability concerns (among other things) inevitably flow from that misalignment. Nor is there any cure, as any attempt to weed out uninjured individual policyholders, *even if* theoretically possible, would create burdensome mini-trials that would defeat predominance.

At the very least, this Article III issue makes the certification decision easier. In the context of statutory construction, if one "construction of a statute would raise serious constitutional problems, the Court will construe the

statute to avoid such problems" by adopting a plausible reading that poses no such problems. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Confronting the serious constitutional issue may be unavoidable if the text is clear, but if it is not, then potential constitutional collisions may safely be delayed. Likewise here: *denying* certification in light of the infirmities discussed in this brief and USAA's brief is the sounder choice because it will avoid having to reach the serious Article III question.

After all, the Court would *have* to reach the Article III question before it could affirm. This Court recently held that, if it denies certification, "there is no need to separately decide whether the class additionally fails under Article III." *Flecha*, 946 F.3d at 768. The corollary, of course, is that when a court *grants* class certification, Article III concerns cannot be avoided. *Id.* And *Flecha* made clear that "the standing issues in [that] case are real. Countless unnamed class members lack standing." *Id.* The same issue arises here and "the standing issues" are just as "real" now.

The district court failed to analyze whether the nationwide class satisfied Article III. ROA.1479-1514. If anything, the district court appeared to concede that the nationwide class contains many members who "were not injured" because they had not paid rates that were higher than what was

allegedly "contractually permitted." ROA.1503. The district court did not dispute that those class members had suffered no injury and would not be entitled to any damages, but certified a nationwide class anyway.

This Court has not yet formally resolved "whether standing must be proven for unnamed class members," but noted that other circuits "have held that 'no class may be certified that contains members lacking Article III standing.'" *Flecha*, 946 F.3d at 768 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). The Court wrote at length in *Flecha* to express its concerns about a class with "many unnamed class members . . . who lack the requisite injury to establish Article III standing." *Id.* Judge Oldham would have gone even further. Nothing in Rule 23 exempts the class-certification stage from the standard Article III obligation to establish standing at each "successive stage[ ] of the litigation," *id.* at 770 (Oldham, J., concurring) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)), and, if anything, the standing analysis should be "particularly rigorous at this stage, given the transformative nature of the class-certification decision," *id.* at 770.

At the very least, the standing issue here is a serious one. The Court's current precedent allows it to deny certification without reaching standing. Given that starting point, the principle of constitutional avoidance counsels

reversal. Indeed, constitutional avoidance strongly favors denial of certification on the Rule 23 grounds rather than remanding solely on the *Daubert* issue, which would risk further preserving an action in which Article III jurisdiction is dubious.

III. This nationwide class cannot proceed under only Texas insurance law—and subjecting it to each state's law makes a nationwide class improper.

The district court's error is magnified—by a factor approaching 50—because it certified a nationwide class of policyholders, yet plans to adjudicate *all* their claims under Texas law. Differences in state insurance and contract law (at the least) preclude certification of a nationwide class, and this Court consistently and repeatedly has reversed certification of multi-state or nationwide classes for that reason regardless of the legal context of the underlying claims.[10] But the *insurance* context here makes the certification below particularly troubling. The contracts expressly and sensibly choose to be governed by the law of the policyholder's state, which makes sense in light of Congress's longstanding insistence that insurance remain primarily and

[10] *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 742 (5th Cir. 1996) (vacating predominance finding where district court "conducted a cursory review of state law variations and gave short shrift to the defendants' arguments concerning [state-law] variations"); *see also Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 255 (5th Cir. 2020); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 313 (5th Cir. 2000); *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 724 (5th Cir. 2007).

comprehensively regulated at the *state* level. The decision below is both erroneous and dangerous, especially to the insurance industry's participants—both insurers and policyholders.

A. The district court's order upends the comprehensive regulatory scheme governing insurance policies.

The district court's willingness to sidestep the intraclass conflicts raises significant concerns that affect not only the members of this nationwide class, but the insurance industry as a whole. The certification below relies on serious misunderstandings of how life insurance works. The certification decision also cavalierly sets aside the appropriate role of state regulators because, wholly aside from any ultimate merits ruling, the certification of a nationwide class in this context undermines states' roles in governing insurance relationships.

1. Noticeably absent from the district court's ruling is any practical consideration of *how* USAA could comply with Plaintiff's requested relief in the future. The district court's analysis presumes that USAA could somehow use the old rate structure for certain policyholders while applying Plaintiff's mortality-only structure for others. ROA.1502-03. That approach would be impossible.

First, life-insurance companies face regulatory, economic, and legal constraints that prevent them from following Plaintiff's approach. Many

states, including Texas, prohibit life-insurance companies from discriminating between insureds of the same class when setting rates. *See* Tex. Ins. Code § 541.057. An insurer may "discriminate" between insureds only if it is "appropriate under generally accepted actuarial standards." *Fleisher v. Phx. Life Ins. Co.*, 18 F. Supp. 3d 456, 479 (S.D.N.Y. 2014); *see also Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 247 (Tex. App.—Austin 2008, no pet.).

If an insurer must set rates for some policyholders based solely on mortality expectations, there would be no actuarial justification for maintaining lower rates for *other* policyholders, which, if left unchanged, would create a cascade of losses that would defeat the policy's financial sustainability. Decades of comprehensive state insurance regulation, which requires insurers to provide financially solvent life-insurance policies, cannot be tossed aside so readily. The mere certification of the class, however, erroneously implies that courts *can* treat life-insurance products in this way, regardless of the ultimate result on the merits.

Second, the policies themselves contain non-discrimination clauses stating that "[a]ny changes to cost of insurance rates will apply to all persons of the same age, sex and rate class." ROA.51. An insurer is likely to face claims of liability for breaching those provisions if it fails to apply cost of

insurance rate changes across policyholders in an actuarially sound manner.

2. Applying Texas law to a nationwide class of life-insurance policyholders—regardless of the ultimate result in any particular case—also threatens businesses, consumers, and the states themselves. The district court exceeded its authority in certifying the class, providing further reasons to decertify.

First, extraterritorial application of state law, particularly in the insurance context, harms businesses' ability to arrange their offerings and services with predictability. Uncertainty as to which state's laws will govern a given activity is sometimes unavoidable, but it is never *desirable*. At one basic level, the certification decision here would needlessly impose time-consuming, costly, and difficult burdens in attempting to simultaneously comply with all fifty states' laws. And, of course, when states impose inconsistent obligations, the endeavor becomes literally impossible.

The reality is that some jurisdictions and forums are more likely than others to be the locus of nationwide class actions. The *in terrorem* effect of certification—and especially nationwide certification—is all the more reason to treat casual choice-of-law determinations, as here, with great skepticism.

Second, the extraterritorial application of one state's law harms consumers. Consumers have an interest in their own state's laws applying to

their business transactions. Waving away 98% of state law to select one of the fifty states signals a view that the diversity of legal norms is essentially a relic, amounting either to one state actually exercising hegemony over the rest (at the election of a given plaintiff) or to the stealthy emergence of a new federal common law over which states have no real authority.

Such an approach cannot avoid increased customer confusion, either. Courts have long raised concerns regarding the length and complexity of insurance policies as it is. *Tonkovic v. State Farm Mut. Auto. Ins. Co.*, 521 A.2d 920, 926 (Pa. 1987) (expressing concern over "lengthy, complex, and cumbersomely written" insurance applications and policies). But insurance policies—indeed, contracts of all kinds—will only become even lengthier, more unwieldy, and harder to decipher for the average consumer, as businesses go back to the drawing board in an effort to comply with the laws, regulations, and warning and disclaimer requirements of all fifty states. Such lawyer-driven reforms cannot help consumers. *See Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 869 (7th Cir. 2010) (warning that "information overload" makes warnings and disclaimers "worthless to consumers"). And inevitably, the increased costs of compliance borne by businesses will be passed on to consumers in the form of higher prices.

Finally, extraterritorial application of state law injures the states

themselves, even though *one* state may *seem* empowered in any particular case. States "maintain[]" what have always been recognized as "precise and detailed regulatory schemes for the insurance industry." *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring). As a result, each state has a strong interest in applying its own laws to the insurance policies purchased by and delivered to its citizens. *See Battley v. Ranger Ins. Co.*, 212 F.3d 595 (5th Cir. 2000)) (per curiam) (applying the law of the state where the policy was issued to one of its citizens "is necessary to protect that state's policy interest in regulating its insurance industry"); *see also Halliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 544 n.23 (5th Cir. 2019) ("state regulation of the insurance industry shows the state's interest in adjudicating disputes related to that industry").

This Court should confirm that state laws should not be applied extraterritorially, which would protect business and consumers and promote federalism.

B. The extraterritorial application of state law to this nationwide class violates the Due Process Clause and Commerce Clause.

Beyond the foregoing concerns, the district court's (1) disregard of the clear and unambiguous choice-of-law provision in the policies at issue, and

(2) its subsequent determination that Texas had a more significant interest than the insureds' home states, ROA.1498-99, violates important constitutional limitations. These problems provide yet another basis for reversal.

First, the Due Process Clause constrains extraterritorial application of state law. It acts "as an instrument of interstate federalism." *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780-81 (2017). These concerns are naturally heightened for areas of state regulation that have been left to the states' individual policymaking discretion. A state "must have 'a significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class" for its law to be applied in a constitutionally permissible manner. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (citation omitted). Conversely, a state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" *Id.* at 821. In short, "due process concerns create constitutional limitations on a state's application of its law to the claims of nonresident class members in a nationwide class action." *Rikos v. Procter & Gamble Co.*, No. 1:11-cv-226, 2012 WL 641946, at *3 (S.D. Ohio Feb. 28, 2012). Ultimately, these principles protect *every* state—the state whose law would exercise dominion over the others' in one case will find the

tables turned soon enough in another.

USAA has well explained why most of its policyholders would never expect *Texas* law (rather than their own state's law) to govern all their insurance rights and obligations—certainly not just because USAA is headquartered in San Antonio. *See, e.g.*, *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005) ("There is no indication out-of-state parties 'had any idea that [Texas] law could control' potential claims" when they entered into the policies.); *see also Shutts*, 472 U.S. at 822 (holding that "the expectation of the parties" is an important due process consideration).

Second, the extraterritorial and hegemonic application of state law also implicates the Commerce Clause. The Supreme Court has repeatedly rejected attempts by states to "control conduct beyond the boundaries of the State" and regulate "commercial activity occurring wholly outside" their borders. *Healy v. Beer Inst.*, 491 U.S. 324, 336-37 (1989); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571, 585 (1996) (holding that one state may not "impos[e] its regulatory policies on the entire Nation").

Again, the insurance context is instructive. Congress has consciously and expressly left insurance regulation to each state. The McCarran-Ferguson Act's chief effect is to avoid federalizing that area of law, and instead leaving it with each state sovereign. But as the *Healy* Court held, "the

Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." 491 U.S. at 336-37. The district court's decision here inescapably results in the same effect prohibited in *Healy*—it allows Texas law to control conduct beyond the boundaries of this state. This cannot stand. There is no indication that Texas even *wants* to control other states' insurance regimes—but it is certain that Texas would disapprove a federal court creating a precedent that would allow any or all of the other states to commandeer Texas's own supervision of insurance within its borders.

CONCLUSION

This Court should reverse the order granting class certification.

Dated: February 1, 2021

Respectfully submitted,

By: */s/ Evan A. Young*

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2021, I electronically filed the foregoing using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record.

Dated: February 1, 2021

/s/ Evan A. Young
Evan A. Young

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G), the undersigned certifies this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the portions of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,425 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with Georgia 14-point font for text and footnotes.

Dated: February 1, 2021

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