Nos. 18-3419 & 18-3434

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL VOGT, on behalf of himself
and all others similarly situated,

Plaintiff-Appellee-Cross-Appellant,

v.

STATE FARM LIFE INSURANCE COMPANY,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Missouri, Central Division
Civil Action No. 2:16-04170-NKL

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

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Public Citizen believes that class actions are an important tool for seeking justice where a defendant's wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost-effective to redress individually. In that situation, a class action offers the best means for both individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of claims on a broad basis, consistent with due process. Public Citizen has often participated as amicus curiae in cases involving arguments that, if accepted, would impair the utility of class actions, such as the arguments presented by State Farm and its amici here, which simultaneously demand class definitions

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

that include no uninjured members and insist that a class may not be defined by reference to whether its members were injured. *See, e.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

INTRODUCTION & SUMMARY OF ARGUMENT

The judgment in this case awarded substantial damages of over $34 million to a class consisting of nearly 24,000 State Farm policyholders, all but 29 of whom were found to have suffered damages included in the award. However, because the jury found that a tiny handful of class members did not suffer compensable damages, and because the trial court entered a post-trial order clarifying that another 487 policyholders who had never been injured were not members of the class, State Farm and one of its amici curiae (Washington Legal Foundation, or "WLF") argue that the class must now be decertified. They assert, first, that certification was improper because the class included uninjured members who lacked standing. Second, WLF argues that the district court's post-trial clarification did not correct that supposed flaw because it revealed that the class was, all along, an improper "fail-safe" class—one defined to include only members who are ultimately determined to be entitled to win on the merits. Thus, the argument goes, the district court faced a catch-22: If the class included any uninjured class members, the class as a whole must fail for lack of standing, but if the trial court trimmed the class to exclude those members, it transformed the class, retroactively, into a fail-safe class. Either way, State Farm and

its amicus conclude, the entire class action, and the multimillion-dollar award to thousands of class members, must be wiped away because a few policyholders did not have the same entitlement to recovery as the vast majority of the class.

These arguments are fundamentally flawed, as a matter of both fact and law. As the district court correctly held, the class did not encompass any uninjured members. The 29 class members found not to be entitled to damages did not lack standing: They, like the rest of the class, suffered an injury from overcharges, but their injury resulted in no net compensable damages because it was offset by lower charges at other times. As this Court held in a recent decision also involving State Farm, *Stuart v. State Farm Fire & Cas. Co.*, 910 F.3d 371 (8th Cir. 2018), the presence of such *injured* class members who ultimately fail to prove compensable damages does not affect a class's standing.

As for the 487 uninjured policyholders, they were not excluded because they attempted and failed to prove their claims on the merits. Rather, they were identified before the class was certified and excluded from it at the time of certification. That they were never part of the class negates any suggestion that their lack of injury affects the class's standing. The district court's post-trial order merely clarified that they were never members and specifically identified them to avoid any dispute as to whether they were part of the class. The order did not transform the class into an improper "fail-safe" class.

Setting aside that the arguments are factually unfounded, the legal premises on which those arguments rest are also fundamentally wrong. Neither Article III nor Rule 23 requires decertification of any class that includes a few members ultimately found to lack compensable damages, or even to be completely uninjured. If a small number of class members not only have no valid claim on the merits, but also lack standing, it is entirely appropriate to exclude them from the class and the effect of any merits judgment.

Likewise erroneous is the assertion that excluding such members from a class may turn a properly defined class into an improper "fail-safe" one. Although this Court has not yet weighed in on whether a "fail-safe" class definition is improper on its face, and other courts of appeals have disagreed about using the "fail-safe" label to distinguish permissible and impermissible class definitions, courts have long recognized that class certification is premised on a clearly defined class, based on objective criteria. That requirement ensures that class members are bound by a merits judgment whether favorable or unfavorable to the class, and enables ready identification of those whom the judgment binds. A class defined in part by whether its members suffered injury does not violate that principle. And more to the point here, excluding from the class a small number of uninjured members—while retaining within the class, and binding to the judgment, any class members who lose

on the merits—in no way violates the requirement of an objective class definition or otherwise impairs the policies served by that requirement.

Pushed to its logical conclusion, the argument that a class definition may neither encompass any uninjured members nor be pruned before final judgment to exclude such members would subvert the carefully conceived structure and purpose of Rule 23 and create a system so inefficient that class actions would be diminished to the point of extinction. The demand for a perfect class definition and the insistence that it is improper to adjust that definition to reflect the results of discovery and trial proceedings are at odds with a practical and reasonable construction of the Rule. In this case, for example, acceptance of State Farm's and WLF's arguments would render a federal jury trial a wasted effort and deny a recovery benefiting thousands of class members merely because a handful of fellow policyholders lacked valid claims. The Rule does not endorse, let alone require, that outcome. The class was properly defined in accordance with Rule 23 and in compliance with the Rules Enabling Act.

ARGUMENT

I. Assertions that the class included uninjured members provide no basis for decertifying it or setting aside the judgment in its favor.

Although this Court has stated that a "class must be defined in such a way that anyone within it would have standing," the "analysis of standing is not a review of the merits." *Stuart*, 910 F.3d at 377. "The fact that some plaintiffs may be unable to

succeed on their claims does not necessarily mean that they lack standing to sue." *Id.* It is within district courts' discretion to determine how best to handle subsets of uninjured class members that may be revealed as a case proceeds to the merits. *See* Fed. R. Civ. P. 23(c)(1)(C); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."). For example, courts may amend the class definition or grant summary judgment to defendants as to those plaintiffs who lack damages. *Stuart*, 910 F.3d at 377–78; *see also In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 617–18 (8th Cir. 2011).

A. The district court's actions were fully consistent with these principles, and the class it certified included no uninjured members either at the time of certification or when the court entered final judgment. The 487 uninjured policyholders were never part of the class, and the court's post-trial order clarifying their status confirmed that the class consisted entirely of policyholders who had suffered an Article III injury in fact. Further, as the district court explained, the 29 members who remained in the class but were not entitled to a share of the award were not *uninjured*; rather, their claims for damages failed on the merits.

Although State Farm and WLF state that the 487 uninjured policyholders were only removed from the class after the jury verdict, *see* WLF Br. 11–12; State Farm Br. 45, the course of the proceedings contradicts those assertions. The 487

policyholders, who were not subject to the unauthorized charges challenged in the litigation or received immediate refunds of them, were identified before the class was certified, and class counsel acknowledged that they had suffered no injury and should be excluded from the class—a point State Farm did not contest. *See* ADNDM 59. In certifying the class, the district court stated expressly that the uninjured policyholders were to be "excluded from the class." *Id.* Accordingly, "State Farm agreed that the class notice would be modified to state that 'policy owners who did not suffer any harm' were excluded from the class," *id.* at 76—a statement that counsel for both parties and the court understood as a reference to the 487 uninjured policyholders. As a result, "no claim on their behalf was ever tried or submitted to the jury." *Id*. The district court's post-trial order "identif[ied] the 487 policy owners and exclude[d] them from the class to avoid any technical dispute" as to whether they were within the class definition. *Id.* As the district court explained, the order was entered to provide "clarity," not to make a substantive change to the composition of the class. *Id.*

A better approach might have been to state more clearly at the time of certification that the class definition did not include these specific 487 policyholders, and to state in the class notice that the uninjured persons excluded from the class definition consisted of 487 policyholders who had either not paid or been refunded the contested charges. But State Farm not only failed to urge the court to take those

steps, it affirmatively agreed with the more generic statement added to the class notice to address the existence of the uninjured policyholders who were outside the class. *See* ADNDM 59. State Farm cannot now seek to sandbag the class by contending that the 487 uninjured policyholders were class members all along. *Cf. Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016) ("It was petitioner who argued against that option and now seeks to profit from the difficulty it caused.").

As for the 29 class members found to have no compensable damages, neither State Farm nor WLF takes on the district court's reasoning that those members were not uninjured and would have had Article III standing to pursue a claim even in a purely individual action. As the district court pointed out, the evidence established that those class members had "sustained an injury-in-fact" in months when State Farm overcharged them by including non-mortality factors in their cost-of-insurance charge, although they suffered no net damages because those overcharges were offset by a credit the jury allowed for other months in which State Farm charged them less than it was entitled to charge. *See* ADNDM 75.

The correctness of the district court's analysis on this point is confirmed by this Court's recent holding in *Stuart v. State Farm*, 910 F.3d at 377–78, which both State Farm and WLF fail to cite in their briefs. In *Stuart*, State Farm argued that certification of a class seeking damages for improperly depreciated claim payments

was improper because some members had "no injury." *Id.* at 376. State Farm contended that some plaintiffs would ultimately be entitled to no damages for the alleged breach of contract either because subsequent payments by State Farm made up for it or because the improperly depreciated payment was adequate to cover the costs of repairing or replacing their damaged property. *Id.* at 377. This Court rejected that argument because "[a]lthough couched as disputes about standing, State Farm's arguments really go to the merits of plaintiffs' claims." *Id*. As the Court explained, all class members who received an improperly depreciated payment in breach of contract "suffered a legal injury" sufficient to provide standing. *Id*. Like the district court here, the Court in *Stuart* concluded that the inability of some plaintiffs to "prove damages" because they "eventually recouped" their losses from State Farm through other payments "is a merits question," not a standing question affecting the legitimacy of class certification. *Id*.

Stuart directly supports the district court's finding that the 29 class members who had no net damages did not lack standing and were properly part of the class. The district court therefore did not err either in certifying the class or in keeping those policyholders in the class and binding them to the merits judgment.

B. *Stuart* reflects a more general proposition: The presence of class members with no compensable damages poses no Article III problem. Thousands of injured members in this class indisputably presented a justiciable case. Unlike the *merits*

question of plaintiffs' ultimate proof of damages, standing addresses the power of federal courts to adjudicate a case or controversy. *See Bouaphakeo v. Tyson Foods, Inc.*, 593 F. App'x 578, 585 (Nov. 9, 2014 8th Cir. 2014) (opinion of Benton, J., respecting the denial of rehearing en banc) ("The failure of some employees to demonstrate damages goes to the merits, not jurisdiction."), *aff'd* 136 S. Ct. 1036 (2016). Because the purpose of the court's jurisdiction is to empower it to declare winners and losers, "[t]here may be jurisdiction and yet an absence of merits." *Gen. Inv. Co. v. N.Y. Cent. R.R.*, 271 U.S. 228, 230 (1926). Jurisdiction "is not defeated" by a plaintiff's inability to demonstrate he can "actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946); *see also Tyson Foods*, 136 S. Ct. at 1047 ("When … the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To hold otherwise would require every damages plaintiff—in individual and class-action cases—to prove her case to avoid a jurisdictional dismissal under Rule 12(b)(1). Moreover, if a plaintiff who failed to establish damages at trial lacked standing, the proper resolution would not be judgment in defendant's favor but a jurisdictional dismissal without res judicata effect. *See Steel Co. v. Citizens for a*

Better Env't, 523 U.S. 83, 94 (1998). Such a novel rule would waste judicial resources, benefit neither plaintiffs nor defendants, and contradict the longstanding recognition that failure to prove entitlement to relief requires a merits judgment, not a jurisdictional dismissal. *See Stuart*, 910 F.3d at 377 ("[A] party to a breached contract has a judicially cognizable interest for standing purposes, regardless of the merits of the breach alleged."); *see also Gen. Inv. Co.*, 271 U.S. at 230–31; *Bell*, 327 U.S. at 682; *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009) ("[W]hen a plaintiff loses a [damages] case [at trial] because he cannot prove injury the suit is not dismissed for lack of jurisdiction.").

Moreover, Rule 23 does not require a showing that all class members have compensable damages. Such a requirement would "put the cart before the horse" by conditioning certification on plaintiffs "first establish[ing] that [they] will win the fray." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 1195. "[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Id.* at 1191 (alteration omitted). Thus, "[h]ow many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified." *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir.

2014); *see also In re Nexium Antitrust Litig.*, 777 F.3d 9, 21–22 (1st Cir. 2015); *Kohen*, 571 F.3d at 677.

If the ultimate resolution of the case on the merits is that some class members are entitled to damages and others are not, the proper course is not to decertify the class, but to allocate damages in such a manner that class members with damages receive their proper share and those without damages take nothing. Thus, in *Tyson Foods*, where the parties agreed that some class members had not shown an entitlement to damages, the Supreme Court rejected the assertion that the class must be decertified, and instead remanded for further proceedings to determine whether the award could be properly apportioned. *See* 136 S. Ct. at 1049–50. Even the concurring opinion in *Tyson Foods*, while expressing doubts about the ultimate outcome, agreed that if there were a methodology for allocating damages only to those class members who suffered damages, both certification of the class and judgment in its favor could be sustained. *See id*. at 1051–53 (Roberts, C.J., concurring).

Here, in contrast to *Tyson Foods*, State Farm raises no claim that allocating the award solely to the thousands of class members who proved compensable damages is impossible. The identity of the 29 class members who had no net damages is known, and there no need to "reverse engineer the verdict," *id*. at 1051, to ensure that it is properly allocated to the class members whose damages it reflects.

C. Even if the issue here were in fact the inclusion of *uninjured* class members, as opposed to those who had standing but were unable to prove damages, the presence of some uninjured class members would not defeat standing for the whole class. Although this Court has stated, most recently in *Stuart*, that a class "must be defined 'in such a way that anyone within it would have standing,'" 910 F.3d at 377, the discovery that a class includes some uninjured members in not fatal: "A class definition is too broad if it includes those 'who *could not* have been harmed,' but is acceptable if it includes those 'who *were not* harmed.'" *Bouaphakeo*, 593 F. App'x at 585 (opinion of Benton, J., respecting the denial of rehearing en banc) (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 758 (7th Cir. 2014)). And although this Court has held that certification is improper where some members of a class "likely have standing, and some likely do not," *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013), that logic does not apply to classes where potential members who lack standing are readily identifiable and ultimately excluded from the class.

Moreover, the Supreme Court's decision in *Tyson Foods* makes clear that the inclusion of uninjured members, even if improper, is not a defect that goes to a court's Article III jurisdiction. Accordingly, it can be addressed by weeding out uninjured members, even after trial. In *Tyson Foods*, Tyson argued in its petition for certiorari that a class may not be certified it if contains uninjured members. Its merits

brief, however, "concede[d] that '[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured.'" 136 S. Ct. at 1049. The Supreme Court held that because Tyson had abandoned the argument, "the Court need not, and does not address it." *Id*. Had the possible presence of uninjured class members presented a jurisdictional barrier under Article III to adjudication, however, Tyson's concession would not have obviated the need to address it, because a party's failure to contest standing does not eliminate a federal court's "obligation to assure [itself] of litigants' standing under Article III." *Frank v. Gaos*, __ S. Ct. __, 2019 WL 1264582, at *3 (2019). The Supreme Court's statement in *Tyson Foods* that it need not address the argument that a class may not contain uninjured members thus reflects the Court's conclusion that the question does not go to jurisdiction.

That conclusion is consistent with longstanding precedent. The Supreme Court has held time and again that an Article III "case or controversy" exists when one plaintiff has standing. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 446–47 (2009) ("[W]e have at least one individual plaintiff who has demonstrated standing .... Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n. 9 (1977))).

The same principles that apply to individual claims apply to class litigation, which, "like traditional joinder, ... leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

Although the Supreme Court has announced this principle most clearly in cases involving injunctive relief, it applies irrespective of the relief sought: If a single class member's injury suffices to create a justiciable controversy over her entitlement to redress, the controversy exists whether the *form* of redress is compensatory or preventive. Standing principles apply to actions aimed at either "obtaining compensation for, or preventing, the violation of a legally protected right." *Vt. Agency of Natural Res. v. United States ex rel. Stevens* 529 U.S. 765, 772–73 (2000). If a single plaintiff "demonstrate[s] standing … for *each form* of relief sought," the court has jurisdiction to resolve the plaintiff's claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added); *see generally* 13B Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3531.15 (3d ed. 2008). Accordingly, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen*, 571 F.3d at 676; *accord Nexium*, 777 F.3d at 31; *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 359–60 (3d Cir. 2015); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir.

2007) (en banc). As the Supreme Court put it most recently, jurisdiction over a class action depends on whether "any named plaintiff has alleged [injuries] that are sufficiently concrete and particularized to support standing." *Frank*, __ S. Ct. at __, 2019 WL 1264582, at *3.

D. Conditioning certification on proof that all class members were injured would create practical conundrums at odds with Rule 23's structure and purpose. Rule 23(c)(1)(A) requires certification at an "early practicable time," and assessing class members' injuries at certification is often infeasible because their identities are unknown. A class "will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown." *Kohen*, 571 F.3d at 677. "Such a possibility or indeed inevitability does not preclude class certification." *Id.* Avoiding that difficulty by building injury into the class definition would risk running up against a too-rigid application of many courts' disapproval of "fail-safe" class definitions, discussed *infra*. In addition, because class certification can be revisited, *see* Fed. R. Civ. P. 23(c)(1)(C), Rule 23's central efficiency goals would be thwarted by requiring complete decertification—rather than an adverse merits decision with respect to class members without damages or an adverse standing decision coupled

with exclusion of specific uninjured class members—if *any* members of a certified class were shown to be uninjured at any stage.

Here, the "487 Missouri-issued Form 94030 policy owners who never paid a COI charge that included a non-mortality charge or had such charges immediately refunded … were excluded from the class before trial and no claim on their behalf was ever tried or submitted to the jury." ADNDM 76. Another 29 out of 24,000 policy holders lost on the merits and cannot be awarded damages, *id.* at 75–76—precisely the intended outcome when plaintiffs are unable to prove their cases, *see Stuart*, 910 F.3d at 377. If the court were instead required to decertify the class of 24,000—who proved their injuries at trial—years of the district court's and the parties' time would be wasted.

Limiting Rule 23 certification to classes where all members were injured would also threaten well-established rules governing other substantive causes of action. For example, in Title VII cases using pattern-or-practice proof—generally available *only* in class actions or government enforcement actions, *see Chin v. Port Auth.*, 685 F.3d 135, 148–50 (2d Cir. 2012)—a court first adjudicates whether a discriminatory practice exists and then holds individualized hearings on each class member's injury and entitlement to a remedy, *see Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772–73 (1976); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360–61 (1977). Limiting classes to plaintiffs who show injury at the outset would

contradict *Franks*'s holding that such a showing is not necessary to class certification, but "become[s] material" only at the remedial stage. 424 U.S. at 772. As *Teamsters* explains, "[a]t the initial, 'liability' stage of a pattern-or-practice suit the [plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." 431 U.S. at 360.

Finally, the tedious work of repeatedly weeding out uninjured members and the wasteful step of decertifying classes years after the fact if any members without damages are revealed is unnecessary to prevent uninjured class members from recovering. If uninjured members come to light, several procedural solutions are available: (1) narrowing the class; (2) summary judgment as to the uninjured members; or (3) instructing the jury not to base any award of damages on uninjured individuals. *See In re Zurn Pex*, 644 F.3d at 617 (noting that courts may amend class definitions or grant summary judgment to defendants on claims that turn out to be barred); *cf. Tyson Foods*, 136 S. Ct. at 1049–50 (remanding for trial-court proceedings to determine whether class members who had no damages could be identified).

II. Excluding uninjured class members whose claims were not pursued did not render the class "fail-safe."

A. WLF's assertion that the exclusion of the 487 uninjured policyholders from the class rendered it an improper fail-safe class—an issue not included in State

Farm's statement of issues—is as misguided as the claim that the class contained uninjured members. A fail-safe class is one defined "so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ.. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). Courts that have rejected fail-safe classes have reasoned that "[s]uch a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Id.*; *see also Kamar v. RadioShack Corp.*, 375 F. App'x 734, 736 (9th Cir. April 14, 2010) ("The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established."). There is debate over "whether a 'fail-safe class' is inherently problematic." *Klein v. TD Ameritrade Holding Corp.*, 327 F.R.D. 283, 296 n.6 (D. Neb. 2018). And the Fifth Circuit, while agreeing that whether class members are bound by a judgment should not depend on whether the class prevails on the merits, has declined to adopt a per se rule that class definitions that incorporate merits considerations are invalid for that reason alone. *See In re Rodriguez*, 695 F.3d 360, 370 (5th Cir. 2012). Here, the Court need not consider whether to adopt a rule against fail-safe classes, because this class had none of the characteristics that have led courts to reject such classes, and its certification posed none of the concerns attributed to fail-safe classes.

The class here was not defined on the basis of success on the merits of its claims, nor did its exclusion of uninjured policyholders create a criterion for membership contingent on the outcome at trial. Rather, as explained above, that limitation reflected the parties' identification, before certification, of 487 specific policyholders who were uninjured under plaintiffs' theory of the case. *See* ADNDM 59. WLF's assertion that the post-trial order amending the judgment to specifically identify those policyholders and exclude them by name from the class came only after "State Farm fully litigated and prevailed against those class members," WLF Br. 12, is pure fiction. As the district court explained, "no claim on their behalf was ever tried or submitted to the jury," with State Farm's acquiescence. ADNDM 76. The exclusion of this discrete group of policyholders created neither doubt about who would be bound by a merits judgment, nor any possibility that State Farm would not benefit from a favorable merits judgment against the class.

The continued presence of the 29 class members who in fact failed to prove their damages claims on the merits and are now bound by the judgment confirms that this class was not a fail-safe class. As in *Young v. Nationwide Mutual Insurance Co.*, 693 F.3d 532 (6th Cir. 2012), plaintiffs' class "is not a proscribed fail-safe class" class because it "includes both those entitled to relief and those not." *Id.* at 538. What distinguishes these class members from the 487 who were excluded from the class definition is that their claims were pursued at trial and submitted to

the jury. Potential due process concerns associated with lack of notice to defendants or class members are not present here. Defendant State Farm was aware of the 487 excluded policyholders against whose claims it was not required to defend, and it had ample opportunity to present its defenses with respect to the 24,000 policyholders in the class. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015) ("The due process question is not whether the identity of class members can be ascertained with perfect accuracy at the certification stage but whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward.").[2]

B. In this case, the class was not defined based on whether members had valid claims or were injured. But even in cases in which a class is defined in that way, such a definition does not render either its initial certification or the exclusion of members from the class improper. Classes that are defined in part based on whether a person has a valid claim have long been accepted in the class certification context with no proliferation of problems. *See, e.g.*, *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 722 (9th Cir. 1999) ("It is implicit in the definition of the class

[2] Contradicting its point that the problem with fail-safe classes is that they prevent those who lose on the merits from being bound by the judmgnet, WLF complains that the 29 no-damages members *remained* in the class, saying they somehow received the benefit of a "favorable" judgment. But as to those members, the judgment was that they take nothing, and State Farm benefits from the preclusive effect of the judgment with respect to those plaintiffs.

that its members are persons who *claim* to have been ... denied ... benefits."); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993) ("[A]ny class of persons alleging injury from a particular action ... are linked by this common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership."), *abrogated on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

Tellingly, WLF offers no examples of a class that was defined in a way that let plaintiffs who lost on the merits escape the effect of the judgment. Rather, the examples WLF cites are cases where courts either found no fail-safe class or, if the class definition was found to be "circular" or fail-safe, other, more serious problems precluded class certification. *See* WLF Br. 9–10; *see, e.g.*, *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) (explaining that the class definition included only those "entitled to relief," but finding that decertification was also proper because common issues did not predominate). The real concern motivating the prohibition on fail-safe classes in some circuits is the desire to prevent an unfair, unpredictable result for defendants by requiring plaintiffs who lose on the merits to be bound by that decision. *Randleman*, 646 F.3d at 352. But defining class membership in terms that refer to liability or injury does not necessarily prevent individual class members who litigate their claims from being bound by the result.

For example, the court in *Kamar v. RadioShack Corp.* acknowledged that it would be "palpably unfair to the defendant" to allow a possible class member to drop out of the class if or when it is determined that she cannot prevail against the defendant. 375 F. App'x at 736. But the court affirmed certification because the district court had "narrow[ed] the class" in a way the ensured that "if a class member was not legally wronged, [defendant] will be protected from liability to that person." *Id.* Although the class definition referred to whether class members had "receiv[ed] the full amount of mandated premium pay," *id.* at 736, the court explained that it should be understood to encompass employees who were similarly situated with respect to the *claim* that they had been denied the required pay, and that the judgment would therefore bind such employees regardless of the outcome on the merits. *Id*.

Likewise, the Fifth Circuit, which has declined to adopt a per se rule against fail-safe classes, has emphasized that class definitions that define membership in terms referring to the merits of class members' claims should be construed as encompassing those persons who are "linked by a common complaint." *Rodriguez*, 695 F.3d at 370. Thus, the ultimate merits judgment will bind class members who share that "common complaint" even though "some may fail to prevail on their individual claims." *Id.*

Genuinely circular fail-safe class definitions tend to be symptoms of other certification-stage issues, most frequently a lack of commonality or a failure of

common issues to predominate. *See, e.g.*, *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 799–801 (7th Cir. 2017) (finding the original class definition created a fail-safe class and that the revised definition could not satisfy the commonality prerequisite); *Randleman*, 646 F.3d at 352. And, while concerns about the coercive power of an exaggerated class definition may in some cases be warranted, the proportion of policyholders excluded from the class based on lack of injury here was extraordinarily small, approximately 2.1 percent. *See Nexium*, 777 F.3d at 25 ("We think that a certified class may include a de minimis number of potentially uninjured parties."); *Neale*, 794 F.3d at 367 n.5; *Kohen*, 571 F.3d at 677. "In [such] circumstances … involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth." *Messner*, 669 F.3d at 826 n.15.

The class definition here accomplished exactly the objective shared both by courts that have embraced a rule against fail-safe class definitions and those that have declined to do so: It defined the class so that it excluded persons who were so situated that they did not share the *claim* that State Farm's conduct was unlawful, but included and bound all those who did, even if they did not succeed on that claim.

C. The argument that a class cannot be defined based on its members' common injury—and that even excluding uninjured members from a class definition

that is *not* based on injury also runs afoul of this prohibition—conflicts with the argument that a whole class lacks standing if a single member is uninjured. The result would be a catch-22 for plaintiffs—they may not define the class in terms of the injury that is the basis for the common claim and must simultaneously ensure that every member has both been injured and has compensable damages. These dueling requirements would not result in a more efficient or more tightly drawn class; they would instead prevent plaintiffs from certifying any class and so deprive them of any recourse for the types of harms that Rule 23 was intended to remedy. The district court adeptly handled the relevant concerns and certified the class, paying close attention to the facts and the parties' legal rights. To reverse the jury's award by holding that the court improperly certified a fail-safe class would give unprecedented power to that term and, in so doing, seriously erode Rule 23 class actions.

CONCLUSION

For the foregoing reasons and those set forth in plaintiff-appellee's brief, this Court should affirm the district court's order granting class certification.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 6,366 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on April 8, 2019.

/s/ Scott L. Nelson
Scott L. Nelson