This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1101
A25-1102

Minnesota Police and Peace Officers Association,
Respondent,

vs.

Minnesota Board of Peace Officer Standards and Training,
Appellant.

Filed April 20, 2026
Affirmed in part, reversed in part, and remanded
Segal, Judge[*]

Ramsey County District Court
File No. 62-CV-25-522

Cassandra B. Merrick, Christopher W. Madel, Madel PA, Minneapolis, Minnesota; and

Stephen Foertsch, Bruno Law PLLC, Golden Valley, Minnesota (for respondent)

Keith Ellison, Attorney General, Michael McSherry, Nick Pladson, Assistant Attorneys General, St. Paul, Minnesota (for appellant)

Leita Walker, Isabella Salomão Nascimento, Anna Kaul, Ballard Spahr LLP, Minneapolis, Minnesota (for amici curiae American Public Media Group, Axios Media Inc., Hubbard Broadcasting, Inc., The Invisible Institute, Pro Publica Inc., Star Tribune Media Company LLC, and TEGNA, Inc.)

Mahesha P. Subbaraman, Subbaraman PLLC, Minneapolis, Minnesota (for amicus curiae Minnesotans for Open Government)

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Segal, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Judge

In this action alleging violations of the Minnesota Government Data Practices Act (MGDPA), Minn. Stat. §§ 13.01-.991 (2024 & Supp. 2025), appellant board challenges the district court's denial of its motion to dismiss under Minnesota Rule of Civil Procedure 12 based on respondent association's lack of standing and failure to state a claim upon which relief can be granted. Appellant also challenges the district court's grant of respondents' motion to certify a class action.[1]

We affirm the district court's determination that respondent association has standing. As to the denial of the motion to dismiss for failure to state a claim, we agree with appellant that the district court applied an incorrect legal standard but, nevertheless, affirm the denial because we cannot conclude to a certainty that no facts could be introduced that would support granting the relief requested. Finally, because of deficiencies in the district court's class-certification order, we reverse that order and remand to allow the district court to make additional findings and issue a new decision on class certification.

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[1] These are consolidated appeals. Appellant filed a direct appeal of the district court's denial of its motion to dismiss for lack of standing and sought discretionary review of the district court's denial of its motion to dismiss for failure to state a claim under the MGDPA and grant of class certification. We granted discretionary review and consolidated the two appeals.

FACTS

This matter involves an assertion that appellant Minnesota Board of Peace Officer Standards and Training (the board) violated the MGDPA when it responded to a data request by disseminating, as alleged in respondents' amended complaint, the names and dates of birth of officers assigned to work undercover.[2] The board is an entity established by the legislature to, among other things, regulate the licensing of peace officers. Minn. Stat. §§ 626.84-.863 (2024); Minn. R. 6700.0100-.2600 (2023). All peace officers in Minnesota must be licensed by the board. Minn. Stat. § 626.84, subd. 1(c), (d).

Respondents are the Minnesota Police and Peace Officers Association (MPPOA) and three undercover law enforcement officers, identified as officers 1, 2, and 3, who claim that their private data was unlawfully disseminated by the board.[3] MPPOA alleges that it "represents over 90% of the police and peace officers in Minnesota" and "is the largest organization representing police and peace officers in Minnesota," with a membership of over 10,000. Officers 1, 2, and 3 seek to represent a class of undercover officers.

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[2] The background facts are drawn from respondents' verified amended complaint and the documents referenced therein.

[3] The initial complaint was brought by only MPPOA. The amended complaint joined officers 1, 2, and 3 and added the class-action claims. The amended complaint is the complaint applicable to this appeal. Respondents submitted a third amended complaint in their addendum to this court; however, the third amended complaint is outside of the record on appeal and we therefore exclude it from our consideration. *See* Minn. R. Civ. App. P. 110.01; *see also In re Nelson*, 495 N.W.2d 200, 202, 204 (Minn. 1993) (stating that court of appeals should not have considered a letter submitted to the district court after the court had issued its decision on the matter being appealed).

As the licensing agency for all peace officers in the state, the board receives certain data from individuals who desire to be, are, or were employed as peace officers. A license applicant submits "an application and documentation" before taking a licensing examination. Minn. R. 6700.0600. When an individual is appointed to a peace officer position, a chief law enforcement officer (CLEO) notifies the board of the appointment. Minn. R. 6700.0800, subp. 1. The individual, if not licensed, may then apply to the board to become licensed. *Id.*, subps. 2-3. Similarly, a CLEO notifies the board when a peace officer is terminated, after which the individual may maintain their license in an inactive status. Minn. R. 6700.1400, subps. 1-2.

Respondents allege in the amended complaint that the board "failed to protect the Undercover Law Enforcement Officers' private data"; and "in responding to a Minnesota Government Data Practices Act Request in 2024, . . . released the names and dates of birth of at least 257 Minnesota undercover police officers."[4] We refer hereinafter to the data released by the board that is the subject of respondents' amended complaint as the "disseminated data." The amended complaint explains that the board obtains information on the undercover status of officers because the board's website allows CLEOs to provide

[4] Respondents do not allege that the board actually disclosed the undercover status of any officer. The amended complaint, instead, asserts that the board disseminated the names and dates of birth of undercover officers, apparently along with those of all other licensed peace officers in the state, which the board asserts numbers in the "tens of thousands." In support of its motion to dismiss, the board submitted into the record the data request the board asserts is the request referenced in the amended complaint. That request, as relevant here, sought the names, board-issued license numbers, and law-enforcement agency affiliation for all peace officers in the state.

that information if the CLEOs "have officers working undercover whose personnel data should be kept private per [Minn. Stat. §] 13.43[, s]ubd. 5."

Respondents assert that the board's release of the disseminated data violated the MGDPA because the disseminated data is personnel data under section 13.43 and that "[a]ll personnel data maintained by a government entity relating to an individual employed as or an applicant for employment as an undercover law enforcement officer are private data on individuals." Minn. Stat. § 13.43, subd. 5. Respondents allege that, since the release of the data, "the harm to them has been immense and accumulating" and active investigations have been placed as risk. Officers 1, 2, and 3 also allege they have, for example, invested in home security and taken other measures to protect themselves and their families.

The amended complaint is styled as a class action, asserting violations of the MGDPA for, among other things, unlawfully disseminating private data under section 13.05, subdivision 4, and for failing to timely notify undercover officers of that dissemination under section 13.055, subdivision 2(a). The amended complaint seeks injunctive relief on behalf of respondents and the class members and damages on behalf of officers 1, 2, and 3 and the class members.

The board moved to dismiss the amended complaint pursuant to Minnesota Rule of Civil Procedure 12.02(e), arguing that the disseminated data was licensing data under section 13.41 of the MGDPA, not personnel data under section 13.43, and was properly classified as public. The board also moved to dismiss MPPOA's claims for lack of standing under Minnesota Rule of Civil Procedure 12.02(a). Respondents moved to certify a class pursuant to Minnesota Rule of Civil Procedure 23. The district court denied the board's motion to dismiss and granted respondents' motion for class certification.

DECISION

The board argues that the district court erred by concluding MPPOA has standing, denying its motion to dismiss for failure to state a claim, and granting respondents' motion for class certification. We address each argument in turn.

I.

We begin with the board's challenge to MPPOA's standing. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Forslund v. State*, 924 N.W.2d 25, 32 (Minn. App. 2019) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Standing presents a question of law that we review de novo. *Minn. Voters All. v. Hunt*, 10 N.W.3d 163, 167 (Minn. 2024).

"Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Generally, "[a] party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing." *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015). Additionally, "[a]n organization can assert [associational] standing [on behalf of its members,] if its members' interests are directly at stake or if its members have suffered an injury-in-fact." *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. App. 2012).

To establish that an organization has standing to bring suit on behalf of its members, it must be able to show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *see also Philip Morris*, 551 N.W.2d at 498 (acknowledging Minnesota's theory of associational standing is derived from *Hunt*). The board only contests the second and third *Hunt* elements, and thus we address only these elements.

With respect to the second *Hunt* element, the board asserts that MPPOA's "germane organizational purpose" is inadequate to ensure that it has a sufficient stake in the controversy to have associational standing because it is based solely on MPPOA's broad representation of peace officers in Minnesota. But as the organization representing over 90% of the peace officers in Minnesota, advocating for the safety of its members, including protecting undercover officers, appears germane to MPPOA's organizational purpose. Additionally, MPPOA is uniquely situated to advocate on behalf of its undercover members who understandably may be reticent to appear publicly because of their undercover status. We conclude that the second *Hunt* element is thus satisfied.

With respect to the third *Hunt* element, the board argues that "both the claims asserted and the remedies requested require the participation of MPPOA's members." As to the claims asserted, the board argues that MPPOA's right to relief "will rest on the adjudication of at least one officer's individual rights under the MGDPA." But this in itself is not a challenge to MPPOA's standing; it merely restates the very essence of associational standing—that the interests of the association's members must be "directly at stake" or "its members [must] have suffered an injury-in-fact." *Builders Ass'n*, 819 N.W.2d at 177. Indeed, "[a]ssociational standing cannot be invoked unless a member of the association has standing." *Minn. Voters All.*, 10 N.W.3d at 167. Thus, the fact that MPPOA must establish that at least one of its members has suffered an injury is not a bar to associational standing.

As to the remedies being sought, MPPOA emphasizes that it only seeks injunctive relief "to prevent the [board] from further violating its members' rights under the MGDPA, to compel the [board's] compliance with the MGDPA, and for fees and costs incurred by the MPPOA in advocating for its members' rights." This is consistent with the supreme court's approach, which more generously allows associational standing where the relief sought is equitable. *Philip Morris*, 551 N.W.2d at 498 (citing *Warth*, 422 U.S. at 515) (other citation omitted). We see no reason why proof as to individual members' damages would be required for MPPOA's claim for injunctive relief. And the fact that MPPOA seeks recovery of *its* attorney fees and costs does not change our analysis. Assuming without deciding that such relief is available to MPPOA, the recovery of MPPOA's *own* fees and costs does not implicate individual participation.[5] We therefore conclude that the

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[5] The board argues that an award of attorney fees is available under section 13.08, subdivision 1, of the MGDPA only to individuals who have suffered damages. Because resolution of this question does not impact the standing analysis and the issue has not been addressed by the district court, we need not decide the issue and express no opinion on it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally address only those questions previously presented to and considered by the district court).

third *Hunt* element is satisfied and affirm the district court's denial of the board's motion to dismiss MPPOA's claims for lack of standing.

II.

We turn next to the board's argument that the district court erred in denying its motion to dismiss respondents' MGDPA claim under Minnesota Rule of Civil Procedure 12.02(e) for "failure to state a claim upon which relief can be granted." Appellate courts apply de novo review when determining whether a complaint sets forth a legally sufficient claim. *Hoskin v. Krsnak*, 25 N.W.3d 398, 405 (Minn. 2025).

When considering whether dismissal is required by rule 12.02(e), we accept the allegations in respondents' amended complaint as true and construe all reasonable inferences in favor of the nonmoving parties, the respondents. *See id.* at 401. "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Id.* at 405 (quotation omitted). "Thus, a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 501 (Minn. 2021) (quotation omitted).

The board argues that the district court erred in concluding that the disseminated data constitutes personnel data governed by section 13.43 of the MGDPA. The board contends that the disseminated data—the names and dates of birth of peace officers—is licensing data governed by section 13.41 of the MGDPA and is properly classified as public. *See* Minn. Stat. § 13.41, subds. 2, 3, 5. Arguing that it only disseminated public data, the board maintains that there was no violation of the MGDPA, and that it is entitled to dismissal of respondents' amended complaint.

The MGDPA Framework

The MGDPA "regulates the collection, creation, storage, maintenance, dissemination, and access to government data in government entities." Minn. Stat. § 13.01, subd. 3. It applies to "[a]ll government entities" and "establishes a presumption that government data are public . . . unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." *Id.*, subds. 1, 3. "Data on individuals" are "all government data in which any individual is or can be identified as the subject of that data." Minn. Stat. § 13.02, subd. 5. Data on individuals may be classified as public or—if made not public by state or federal law—private or confidential.[6] *Id.*, subds. 3, 12, 15. Generally, a government entity may disseminate private data only to the data subject, with their informed consent, or as "specifically authorized . . . by state, local, or federal law." Minn. Stat. § 13.05, subd. 4. Government entities who violate the MGDPA are subject to liability for damages, injunctive relief, and actions to compel compliance. Minn. Stat. § 13.08, subds. 1, 2, 4.

Section 13.43 of the MGDPA governs "personnel data." Minn. Stat. § 13.43. Subdivision 1 of that section defines "personnel data," in relevant part, as "government data on individuals maintained because the individual is or was an employee of or an

[6] "Confidential data on individuals" is defined as data that are not public and not accessible by an individual who is the subject of the data. Minn. Stat. § 13.02, subd. 3. The amended complaint does not assert any claims related to "confidential data."

applicant for employment by . . . a government entity." *Id.*, subd. 1. And as noted above, subdivision 5 provides that "[a]ll personnel data maintained by a government entity relating to an individual employed as or an applicant for employment as an undercover law enforcement officer are private data on individuals." *Id.*, subd. 5.

Section 13.41 governs the treatment of data by any "licensing agency." Minn. Stat. § 13.41. Subdivision 3 of that section specifically provides that certain data of the board—"personal telephone numbers and home and email addresses of licensees and applicants for licenses"—are private data. *Id.*, subd. 3. And subdivision 5 classifies as public "[t]he license numbers, the license status, and continuing education records issued or maintained by" the board. *Id.*, subd. 5. Other portions of section 13.41 address licensing data more generally, requiring that some be classified as private data—such as "data, other than their names and designated addresses, submitted by applicants for licenses"—and some be public data—such as "application data on licensees except nondesignated addresses." *Id.*, subds. 2, 5. Section 13.41 does not specifically address names, other than as noted above, or dates of birth.

Analysis

The board challenges the district court's conclusion that the disseminated data in the hands of the board is personnel data governed by section 13.43. The district court reasoned, and respondents argue, that the disseminated data is personnel data because the board maintains its data "only because of [the officers'] employment by a government agency." Respondents maintain that the proper test for determining whether data are personnel data is a but-for test, which is the test that was applied by the district court.

Respondents reason that, because undercover officers cannot be employed without licensure, the board's data constitutes personnel data. In other words, respondents contend that, but-for the officers' employment, the board "would have no reason to maintain their data" and the data are thus personnel data governed by section 13.43. The district court's but-for test is, however, inconsistent with the supreme court's holding in *KSTP-TV v. Metropolitan Council*, 884 N.W.2d 342 (Minn. 2016).

In *KSTP-TV*, the supreme court addressed whether video recordings of two incidents on a public bus maintained by an employer, a public transit authority, were "*maintained because* the individual[, the bus driver,] is or was an employee of . . . a government entity," and were thus personnel data. 884 N.W.2d at 345 (quoting Minn. Stat. § 13.43, subd. 1 (2014)). The supreme court concluded that whether data are personnel data depends on the purpose(s) for which the data were maintained by the government entity that received the data request. *Id.* at 348. If the videos were maintained *solely* for personnel purposes, they would be personnel data. *Id.* at 346-48. But, if the videos were maintained for multiple purposes, "some of which [were] unrelated to personnel matters," the data were "not 'maintained because' the individual is an employee of the government entity." *Id.* at 346-48. The supreme court further held that the relevant time to assess the proper classification of the data is at the time of the request because the purpose(s) for maintaining the data, and therefore their proper classification, can vary over time. *Id.* at 348-50. The supreme court remanded the case for additional fact finding to determine the purpose(s) for which the video data was retained at the time of the data request. *Id.* at 350.

In *KSTP-TV*, the supreme court rejected the broad-brush "but-for-public-employment" test applied by the district court here and held that data are properly categorized as "personnel data" governed by section 13.43 only if the data are maintained solely for personnel purposes. *Id.* at 346-48. Indeed, under a but-for analysis, the personnel-data category could become so expansive, covering any number of government entities who may incidentally or otherwise possess data on someone employed by another government entity, as to effectively nullify the presumption that data are public.

Under *KSTP-TV*, instead of applying a but-for test, the district court must assess the purpose or purposes that the disseminated data was maintained by the board, judged as of the time the board received the data request. *See id.* at 346-50. The holding in *KSTP-TV* requires the district court first to determine whether at least one of the board's purposes in maintaining the disseminated data was a personnel purpose. If the district court answers that question in the affirmative, then the district court must determine whether the board maintained the disseminated data *solely* for personnel purposes. Unless it was the *sole* purpose, the disseminated data is not personnel data. *Id.* at 348-50; *see also Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 566-68 (Minn. 2016) (noting that duplicative data maintained by an entity can be both public and private at the same time depending on the category and classification accorded the data under applicable sections of the MGDPA). And, if it is not personnel data in the hands of the board, then the disseminated data is not governed by section 13.43, subdivision 5.[7]

[7] We note, however, that even if the disseminated data is not personnel data, that may not fully resolve the MGDPA issues. Respondents point to section 13.03, subdivision 4(c),

Resolving respondents' MGDPA claims thus will require an analysis of the board's purpose(s) for maintaining the disseminated data. But such an analysis requires further development of the record. Because we cannot conclude to a certainty that no facts could be introduced which would support the relief demanded, we affirm the district court's denial of the board's motion to dismiss. *Halva*, 953 N.W.2d at 501 (quotation omitted).

III.

Finally, we address the board's challenge to the district court's grant of class certification under Minnesota Rule of Civil Procedure 23. We review a district court's class-certification decision for an abuse of discretion. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. App. 2009).

"Class certification under rule 23 is a two-step process," requiring that the movant satisfy, first, "all four mandatory requirements of Rule 23.01"—numerosity, commonality, typicality, and adequacy of representation—and, second, "the requirements of one of the subdivisions of rule 23.02." *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 451-52 (Minn. App. 2002), *rev. denied* (Minn. Nov. 19, 2002). If a class is certified, the "order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23.07." Minn. R. Civ. P. 23.03(a)(2).

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which relates to data classification when data are disseminated among government entities, and to section 13.82, subdivisions 1 and 17, which relates to law enforcement data. In addition, the board noted to the district court that it may "designate otherwise public licensing data on licensees working undercover as security information," making it private pursuant to section 13.37, subdivisions 1(a) and 2(a). But the district court did not address the applicability of these sections and, because addressing the question of their applicability is not necessary for our review of the district court's denial of the board's rule 12 motion, we express no opinion on it. *See Thiele*, 425 N.W.2d at 582.

The district court's order here simply states that respondents' "Motion for Class Certification is GRANTED." The incorporated memorandum accompanying the district court's order indicates that the district court found that respondents had satisfied the four mandatory requirements of rule 23.01 and that respondents' law firm was adequate class counsel. The district court described the class in its memorandum as including "all officers whose information was designated as undercover and private to the Board and later was disclosed by the Board without the consent of the officers." The district court also stated in its memorandum that respondents satisfied the requirements for class certification under both rule 23.02(b), which is generally applicable to claims for injunctive or declaratory relief, and rule 23.02(c), which is generally applicable to claims for damages.

In this appeal, the board asserts that the district court abused its discretion by failing to make sufficient findings and in determining that the commonality and adequacy of representation elements were satisfied. The board, understandably treating the district court's description of the class in the court's memorandum as the class definition, also argues that the district court has created an impermissible "fail-safe" class, and that the district court erred to the extent that it certified a class under both rule 23.02(b) and (c) and in finding that the predominance and superiority requirements for a 23.02(c) class were satisfied.

We address first the board's challenge to the district court's finding on commonality. Rule 23.01(b) requires the district court to find that "there are questions of law or fact common to the class." Minn. R. Civ. P. 23.01(b). "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich v. Am. Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn. App. 1987), *rev. denied* (Minn. Mar. 25, 1987); *see also Peterson v. BASF Corp.*, 618 N.W.2d 821, 825 (Minn. App. 2000) (reaffirming this principle), *rev. denied* (Minn. Jan. 26, 2001). Here, there is a common question of law—whether the disseminated data was private data under the MGDPA at the time the data was requested. The district court did not err by finding the commonality requirement was satisfied.

As to the district court's findings on adequacy of representation under rule 23.01(d), the board argues that the district court failed to consider potential conflicts of interest among class members in determining that the class representatives would adequately represent the interests of other class members. The following factors have been identified as relevant in assessing adequacy of representation:

> (1) whether the representatives' interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; (2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and (3) whether the representatives have any interests that conflict with the objective of the class they represent.

Lewy, 650 N.W.2d at 454.

The district court's adequacy analysis focuses exclusively on elements one and two. The district court fails to analyze the third factor—whether the class "representatives have any interests that conflict with the objective of the class they represent." *Id.* The board provided evidence to the district court that there are six individual lawsuits already pending in district courts based on the same set of allegations. Of the six, four are pending in venues outside of Ramsey County, and the board has indicated that the plaintiffs in those suits declined the board's request to transfer venue of their suits to Ramsey County. The district court did not address this issue in its order or memorandum. This is of particular concern to the extent that the district court certified a class under rule 23.02(b) because such classes are mandatory, with no opportunity for the class members to opt out.[8] *See* Minn. R. Civ. P. 23.03(b)-(c) (addressing notice, opt-out, and judgment requirements for classes certified under rule 23.02(a)-(b) and those certified under rule 23.02(c)); *cf. Bacon v. Bd. of Pensions of the Evangelical Lutheran Church in Am.*, 930 N.W.2d 437, 441 (Minn. App. 2019) (as to classes certified under rule 23.02(a)).

It is incumbent on the district court, when ruling on a motion for class certification, to determine if the requirements of rule 23 are established "by a preponderance of the evidence," which "requires the district court to resolve factual disputes relevant to rule 23 certification requirements." *Whitaker*, 764 N.W.2d at 638. Because the district court failed to make any findings regarding potential conflicts of interest, we are unable to review the district court's adequacy determination. We therefore reverse the certification order and remand to allow the district court to make findings on this issue and issue a new

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[8] In their reply memorandum to the district court in support of their motion for class certification, respondents address the issue of potential conflicts by relying on the opportunity of class members to "opt out." But opting out is not an option for rule 23.02(b) classes. *See* Minn. R. Civ. P. 23.03(b)-(c).

We also note that, before certifying a class under rule 23.02(c), the district court is expressly required to consider "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Minn. R. Civ. P. 23.02(c)(2).

certification decision. In so ruling, we express no opinion on the outcome of this question on remand.

We next address the board's argument that the district court defined an impermissible class.[9] Rule 23 expressly requires that "[a]n order certifying a class action must define the class and the class claims, issues, or defenses." Minn. R. Civ. P. 23.03(a)(2). Here, as noted above, the district court failed to define a class in its certification order. To the extent that the description of the class in the district court's memorandum is the class definition, we agree with the board that it is an impermissible "fail-safe" class. The description of the class by the district court defines the class in terms of the outcome on the merits—only individuals who will prevail on the merits, i.e., whose *private* data was disseminated by the board without consent—are members of the class. These types of classes are known as "fail-safe" classes and are generally deemed to be impermissible because they "allow putative class members to seek a remedy but not be bound by an adverse judgment—either those class members win or, by virtue of losing, they are not in the class and are not bound." *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019) (quotation omitted).

[9] Respondents assert that the board has forfeited this argument because the board did not raise this argument before the district court. The board responds that, because the issue arose only after the district court issued its ruling containing the class definition, the issue is not forfeited. But we need not resolve this question. Because we accepted discretionary review of the district court's class certification decision, we address this issue in the interests of judicial economy, regardless of whether it was otherwise preserved. *See* Minn. R. Civ. App. P. 103.04.

Although there are no Minnesota appellate court decisions holding that "fail-safe" class definitions are improper, Minnesota courts look to federal caselaw under rule 23 of the Federal Rules of Civil Procedure because of the similarities with Minnesota's rule 23. *See Whitaker*, 764 N.W.2d at 635. And numerous federal courts of appeals have concluded that "fail-safe" class definitions are improper, including the Eighth Circuit Court of Appeals. *See Orduno*, 932 F.3d at 716-17; *see also* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions*, § 3:6, at 71 n.1 (6th ed. 2025). We are persuaded by the logic of these opinions and conclude that the district court's description of the class in its memorandum would create an impermissible "fail-safe" class. Thus, if the district court determines on remand that it is appropriate to certify a class, the district court must define the class in an order (as required by rule 23.03(a)(2)) in a manner that avoids class membership being dependent on the outcome of the case on the merits.

The board's next argument related to class certification is that the district court abused its discretion by apparently granting certification under both rule 23.02(b) and (c). The board maintains that certification under both provisions is improper. As the board points out, there are fundamental differences between certification under rule 23.02(b) and (c). *See* Minn. R. Civ. P. 23.03(b)-(c). And there is caselaw suggesting that certification of a class under both may not be appropriate. *Cf. Bacon*, 930 N.W.2d at 443 ("[W]hen a class is eligible for certification under rules 23.02(a) and (c), rule 23.02(a) controls."); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) (stating that, under the Federal Rules of Civil Procedure, "[w]hen either subsection (b)(1) or (b)(2) is applicable, . . . (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation”). But other courts have used approaches based on bifurcating the action or certifying separate classes. *See, e.g.*, *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477, 480 (8th Cir. 2016) (discussing this approach); *see also* 2 Rubenstein, *supra*, § 4:38 (discussing hybrid classes). Because we are reversing the class certification decision and remanding for additional findings on adequacy of representation and, if the district court finds that representation is adequate, for a class definition, we decline to address this issue at this time.

We turn finally to the board’s argument that the district court abused its discretion in assessing predominance and superiority for purposes of rule 23.02(c). The board’s argument on this issue is based on the same argument used to challenge commonality—that there are too many variable elements of proof for the class members to satisfy this requirement, including “proof that *each* putative class member’s data were classified as ‘private’ at the time of the alleged disclosure,” “proof that each class member’s particular private data were shared with a person not authorized by law to access it,” proof of causation between the dissemination and damages suffered, and that the types and amounts of damages will vary by class member.

Rule 23.02(c) requires the district court to find, among other things, that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Because the need for such findings may be obviated by the district court’s adequacy findings and they will be impacted by the class definition, we similarly decline to address this issue at this juncture.

Affirmed in part, reversed in part, and remanded.