No. __-____

IN THE
Supreme Court of the United States

BILL G. NICHOLS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CHESAPEAKE OPERATING, LLC AND CHESAPEAKE EXPLORATION, LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

REX A. SHARP
BARBARA FRANKLAND
LARKIN E. WALSH
REX A. SHARP, P.A.
5301 W. 75th Street
Prairie Village, KS 66208
(913) 901-0505

KEVIN J. MILLER
Counsel of Record
T. DIETRICH HILL
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(kmiller@kellogghansen.com)

August 3, 2018

QUESTION PRESENTED

The Class Action Fairness Act of 2005 ("CAFA") grants federal courts subject-matter jurisdiction over certain minimally diverse class actions, but requires district courts to decline jurisdiction in certain cases if, among other things, at least two-thirds of the class members are citizens of the state in which the action was originally filed. *See* 28 U.S.C. § 1332(d). The Sixth Circuit has held that, where the class is limited to state residents, this Court's long-standing presumption that a person's residence is his domicile allows the court to presume that the class consists of at least two-thirds citizens, and puts the burden on the defendant to rebut that presumption. The Fifth and Ninth Circuits have allowed the use of this presumption but required the plaintiff to offer at least some record evidence of class members' residency to prove their citizenship. The court below, joining the Seventh and Eighth Circuits, held that such a presumption is never permissible. The question presented is:

When determining the citizenship of a class for purposes of CAFA's home-state exception, 28 U.S.C. § 1332(d)(4)(B), does this Court's long-standing residency-domicile presumption allow a court to presume that a class defined as state residents consists of at least two-thirds state citizens, or must a plaintiff come forward with additional evidence of citizenship?

PARTIES TO THE PROCEEDINGS

Petitioner Bill G. Nichols, on behalf of himself and all others similarly situated, was the plaintiff and the appellant in the proceedings below.

Respondents Chesapeake Operating, LLC and Chesapeake Exploration, LLC were the defendants and the appellees in the proceedings below.

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Bill G. Nichols, on behalf of himself and all others similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals' order and judgment (App. 1a-10a)[1] is unpublished, but it is available at 718 F. App'x 736. The district court's order (App. 11a-17a) is not reported, but it is available at 2017 WL 4052810.

JURISDICTION

The court of appeals entered its judgment on March 7, 2018. On May 29, 2018, Justice Sotomayor extended the time for filing a petition for certiorari to and including August 3, 2018. App. 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1453(c)(1), which grants discretionary power to hear appeals concerning orders granting or denying remand under the Class Action Fairness Act of 2005.

STATUTORY PROVISIONS INVOLVED

Section 1332(d) of Title 28 of the U.S. Code is reproduced at App. 18a-23a.

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[1] References to "App. __a" are to the appendix bound together with this petition; references to "A__" are to the appendix filed in the Tenth Circuit.

INTRODUCTION

The Class Action Fairness Act of 2005 ("CAFA") grants federal courts subject-matter jurisdiction over minimally diverse class actions in which the amount in controversy exceeds $5,000,000. *See* 28 U.S.C. § 1332(d)(2). It requires district courts to abstain from exercising that jurisdiction, however, if two-thirds of the members of the proposed class (or classes) are citizens of the state in which the action was originally filed and if certain other requirements are met. *See id.* § 1332(d)(4). If the class plaintiff can show that one of these "CAFA exceptions" applies, the district court must remand the case to state court.

This case presents the question whether a class that, by definition, consists of residents of a particular state can be presumed to consist of at least two-thirds citizens of that state, subject to rebuttal by the removing defendant. The Sixth Circuit, relying on this Court's historical presumption that a person's residence is his domicile until proven otherwise, has held that a class of state residents can be presumed to be made up of at least two-thirds citizens of that state. The Fifth and Ninth Circuits have held that such a presumption may be appropriate in light of the entire record, but that generally a class definition alone will not meet the class plaintiff's burden of proof. The court below, joining the Seventh and Eighth Circuits, held that such a presumption can never exist. The Sixth, Eighth, Ninth, and Tenth Circuits, along with at least one commentator, have acknowledged this division among the circuits.

This question has important implications for class actions that are essentially local in nature. Congress enacted CAFA to extend federal jurisdiction to class actions of nationwide scope, but it created exceptions

to ensure that state courts continued to adjudicate class actions that were overwhelmingly not diverse. The decision below fails to honor Congress's careful delineation of the limits of federal jurisdiction over class actions and is inconsistent with this Court's presumption that in-state residents are also domiciled there.

STATEMENT OF THE CASE

A. Statutory Framework

In CAFA, Congress expanded federal district courts' diversity jurisdiction to include a limited set of minimally diverse actions. *See* 28 U.S.C. § 1332(d). As relevant here, CAFA grants the district courts "original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." *Id.* § 1332(d)(2)(A). However, Congress also provided "certain exceptions for class actions that involve matters of principally local or state concern." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 n.1 (2014). In some cases involving such matters, a district court "may . . . decline to exercise jurisdiction." 28 U.S.C. § 1332(d)(3). But under the so-called "home-state exception," a district court "*shall* decline to exercise jurisdiction" over a class action in which "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." *Id.* § 1332(d)(4)(B) (emphasis added). A district court must also decline jurisdiction, under the "local-controversy exception," if more than two-thirds of all class members are citizens of the state in which the action was originally filed, at

least one significant defendant is a citizen of the same state, and no similar class action has been filed in the three preceding years. *Id.* § 1332(d)(4)(A).[2]

A defendant may at any time remove to federal court a state-court action that satisfies the requirements of § 1332(d)(2) pursuant to 28 U.S.C. § 1446, and a plaintiff may in turn move for remand under § 1447. *See id.* § 1453(b), (c). In its notice of removal, a defendant need only provide "a plausible allegation" of the facts necessary for the district court to have jurisdiction. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). If the plaintiff challenges jurisdiction, the defendant then must prove, by a preponderance of evidence, that the jurisdictional requirements are satisfied. *See id.* The courts of appeals have generally held, however, that, once federal jurisdiction is established, the plaintiff bears the burden of proving by a preponderance of the evidence that the district court must decline jurisdiction under the home-state or local-controversy exceptions. *See*, *e.g.*, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679-80 (7th Cir. 2006).

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[2] *See generally* 2 *McLaughlin on Class Actions* § 12.6 (14th ed. Oct. 2017 update). The overall phrasing of paragraph (4) is somewhat odd, as it requires reading subparagraph (B) as a continuation of subparagraph (A)(i):

> (4) A district court shall decline to exercise jurisdiction under paragraph (2)—
>
> (A)(i) over a class action in which—
>
> . . . .
>
> (B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

It is therefore common ground that, in order to meet its burden of proof on the home-state exception, the plaintiff must convince the district court that it is more likely than not that at least two-thirds of the members of the proposed class are citizens of the home state. For purposes of diversity jurisdiction, an individual is a citizen of the state in which he is domiciled, *see Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989), meaning the last place he has resided with the intent to remain indefinitely, *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). Historically, courts have presumed, in the absence of evidence to the contrary, that a person's residence is his domicile. *See Anderson v. Watts*, 138 U.S. 694, 706 (1891) ("[t]he place where a person lives is taken to be his domicile until facts adduced establish the contrary"). As described in greater detail below, the question that has divided the circuits is whether a plaintiff seeking to prove that CAFA's home-state exception applies may use that well-founded presumption to meet the burden of proof.

B. Factual and Procedural Background

1. Petitioner Bill G. Nichols is the lessor and royalty owner of certain natural gas wells in Beaver County, Oklahoma. A22 (Class Action Petition ¶ 7 ("CAP")). Respondents Chesapeake Operating, LLC (f/k/a Chesapeake Operating, Inc.) and Chesapeake Exploration, L.L.C. (together, "Chesapeake") are in the business of producing, operating, and marketing gas and constituent products from wells in, among other places, Beaver County. A22-23 (*id.* ¶¶ 8-9). Nichols leases the minerals in the land to Chesapeake. A22 (*id.* ¶ 7). In turn, Chesapeake, as lessee, agrees to develop the well, extract natural gas and related

products from it, process and condition those minerals, and sell them in the commercial marketplace. A26-27 (*id.* ¶¶ 21-22, 24). Chesapeake pays Nichols and other lessors one-eighth of the revenue generated, calculated under Chesapeake's internal and confidential accounting practices. A27-28 (*id.* ¶¶ 24-26).

2. Suspecting Chesapeake of underpayment, petitioner filed a class-action petition in Oklahoma District Court in Beaver County, Oklahoma, on August 9, 2016. The CAP defined the putative class to include, with certain exceptions not relevant here, "[a]ll persons who are (a) an '*Oklahoma Resident*'; and[] (b) a royalty owner in Oklahoma wells where Chesapeake Operating, LLC (f/k/a Chesapeake Operating, Inc.) and/or Chesapeake Exploration, LLC is or was the operator . . . from January 1, 2015 to the date Class Notice is given." A23-24 (CAP ¶ 13). The CAP in turn defined "*Oklahoma Resident*" *conjunctively* as

> Persons to whom, from January 1, 2015 to the date suit was filed herein, (a) Chesapeake mailed or sent each monthly royalty check on an Oklahoma well to an Oklahoma address (including direct deposit); (b) Chesapeake mailed or sent a 1099 for both 2014 and 2015 to an Oklahoma address; (c) the Settlement Administrator in *Fitzgerald Farms, LLC v. Chesapeake Operating, Inc.*, Case No. CJ-10-38, Beaver County, Oklahoma mailed or sent a distribution check and 1099 to an Oklahoma address; *and*[] (d) except for charitable institutions, were *not* subject to the Oklahoma Withholding Tax for Nonresidents on royalties paid in 2014 to the date suit was filed.

Id. (emphasis added in part).

The CAP alleged that each of the class members was a citizen of Oklahoma. A24 (*id.* ¶ 14). The CAP also

alleged that the class included royalty owners for more than 1,000 wells, many of which had multiple royalty owners. *Id.*

3. On September 15, 2016, Chesapeake removed the case to the United States District Court for the Western District of Oklahoma. A9-19. In invoking federal subject-matter jurisdiction, Chesapeake conceded that it was an Oklahoma citizen, but sought to rebut the allegation in the CAP that each of the class members was an Oklahoma citizen by giving one example of a person who allegedly met the class definition but was nevertheless not an Oklahoma citizen. A12-14 (*id.* ¶¶ 9-14).

Nichols moved to remand. Among other things, Nichols argued that the district court was required to remand because of CAFA's home-state exception, 28 U.S.C. § 1332(d)(4)(B). A140-55. Nichols contended that residence is prima facie evidence of domicile and that the court should therefore presume that at least two-thirds of the proposed class of state residents are also state citizens. A145-48. Nichols also offered statistical evidence in the form of an expert report as an independent basis for mandatory abstention under CAFA. A158-209; *see also* A149-54.

On September 13, 2017, the district court denied the motion to remand on the basis of the home-state exception. It rejected both Nichols' proposed presumption and the statistical evidence Nichols offered as an alternative basis for finding the home-state exception satisfied. App. 15a-17a.

4. Nichols petitioned the Tenth Circuit for permission to appeal from the denial of his remand motion. A711-41. Nichols argued that one of the two unsettled CAFA-related questions presented by the appeal was whether "the district court err[ed] in denying remand

where, even assuming the [expert statistical] evidence was imperfect and could be ignored, two-thirds or more of the Class are Oklahoma citizens?" A725. The court initially denied permission to appeal. A815-16. In its order denying permission, the court explained that it was "not persuaded that the proposed appeal present[ed] an opportunity to resolve an unsettled CAFA-related question." A816.

Nichols petitioned for panel rehearing or rehearing en banc. A837-52. The court granted panel rehearing and granted Nichols permission to appeal. A932-33.

After full briefing, the Tenth Circuit affirmed the district court's denial of Nichols' motion to remand. App. 1a-10a. The court first considered *de novo* the district court's rejection of the presumption that a class of state residents consists at least two-thirds of state citizens. App. 5a-8a. The court surveyed the circuit split between the Sixth Circuit and others, including the Eighth Circuit, and concluded that use of such a presumption would be improper. App. 6a-8a. In doing so, the court expressly adopted the reasoning of the dissenting opinion from the Sixth Circuit's decision in *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2242 (2017). The court then reviewed the district court's assessment of Nichols' statistical evidence for clear error and, finding no reversible error, affirmed. App. 8a-10a.

REASONS FOR GRANTING THE PETITION

Under CAFA, district courts have jurisdiction over minimally diverse class actions in which the amount in controversy is more than $5,000,000. They also have a congressional mandate to abstain from exercising that jurisdiction in certain cases in which, among other things, two-thirds or more of the class members are citizens of the state in which the action was originally filed. This case presents the opportunity to resolve a deep and persistent division of authority over what a class plaintiff must do to show that a sufficient number of class members are citizens to invoke CAFA's mandatory-abstention provisions.

The decision below perpetuates a circuit conflict among the Sixth Circuit, two circuits in partial agreement with the Sixth Circuit, and three other circuits that expressly disagree. The Sixth Circuit holds that a class that by definition consists of state *residents* need not provide additional evidence to show that a sufficient fraction of class members are citizens; instead, the burden is on defendants to rebut the presumption that at least two-thirds of the in-state resident class members are citizens. *See Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2242 (2017). The Fifth and Ninth Circuits have held that such a presumption is proper in some, but not all, cases, depending on the district court's review of the entire record. That position clashes with the views of the Seventh, Eighth, and Tenth Circuits, which hold that a class plaintiff must provide evidence that proves, without reliance on *any* presumption, that a sufficient number of class members are state citizens. The Sixth, Eighth, Ninth, and Tenth Circuits have expressly acknowledged the conflict.

District courts in circuits that have not yet addressed this issue have also reached conflicting conclusions regarding if and when a presumption is appropriate, and will continue to do so. District courts within the same circuit, and sometimes even different judges within the same district, have disagreed with one another. Without guidance from this Court, the lower courts will continue to issue divergent rulings as they are repeatedly confronted with litigants citing all sides of this circuit split, and there is no prospect that the disagreement will abate.

This case presents the Court with a clean vehicle for resolving this split and clarifying whether, as the Tenth Circuit held in this case, CAFA abrogates this Court's traditional presumption of domicile based on residency, such that a plaintiff seeking to represent a class of in-state residents must prove the citizenship of the proposed class members in order to invoke CAFA's mandatory-abstention provisions.

I. THE TENTH CIRCUIT'S HOLDING THAT THERE IS NO REBUTTABLE PRESUMPTION THAT CLASS MEMBERS RESIDING IN A STATE ARE CITIZENS OF THAT STATE DEEPENS A CLEAR CIRCUIT SPLIT

The Tenth Circuit's decision below made clear that there is, and will continue to be, division among the circuits over whether, in the CAFA context, there is a rebuttable presumption that residents of a state are also citizens of that state. The Sixth Circuit has held that a class plaintiff may rely on this presumption to meet her burden of proving that one of CAFA's mandatory-abstention provisions applies. The Tenth Circuit considered and expressly rejected the Sixth Circuit's reasoning, following its own prior unpublished decision, the dissent from the Sixth Circuit's

opinion in *Mason*, 842 F.3d at 397 (Kethledge, J., dissenting), and the opinions of the Seventh and Eighth Circuits in holding that a plaintiff can never rely on the class definition and that no such presumption applies. The Fifth and Ninth Circuits agree in part with the Sixth Circuit's approach, holding that the presumption applies in at least some circumstances, but also have explained that a plaintiff must generally provide record evidence to meet his burden of proof. These circuits thus have adopted something of a middle ground between the approaches of the Sixth Circuit, on the one hand, and the Seventh, Eighth, and Tenth Circuits, on the other. By taking three distinct approaches, the circuit courts have created confusion and inconsistency in the application of CAFA's home-state exception, resulting in different abstention standards and jurisdictional outcomes depending solely upon which circuit court decides the issue.

A. The Sixth Circuit Has Held That, Under CAFA, State Residents May Be Presumed To Be State Citizens In The Absence Of Contradicting Evidence

In *Mason*, the Sixth Circuit concluded that a class plaintiff could prove that two-thirds of a class consisted of citizens of a particular state by relying on the long-standing and rebuttable presumption that state residents are also state citizens. The defendants had removed a state-court class action to the Eastern District of Michigan on the basis of CAFA. 842 F.3d at 388. The plaintiffs moved for remand under the local-controversy exception, which, like the home-state exception, requires that two-thirds of the class be citizens of the state in which the action was originally filed. *Id.*; *see* 28 U.S.C. § 1332(d)(4)(A)(i)(I). The district court found that each element, including the

two-thirds citizenship requirement, was satisfied, and ordered remand. In particular, the district court agreed with the plaintiffs that it could presume that a class consisting of "residents and property owners in the City of Flint" consisted of at least two-thirds Michigan citizens. *See Mason*, 842 F.3d at 389.

Reviewing the district court's remand order under 28 U.S.C. § 1453(c), the Sixth Circuit approved the district court's use of that presumption to find the citizenship requirement met. It began with the "long-standing proposition[]" that "the law affords a rebuttable presumption that a person's residence is his domicile." *Mason*, 842 F.3d at 390. The court noted that that presumption had been used since at least 1790, and embraced by this Court in at least four cases since 1853. *Id.* The court also considered and rejected the argument that mere residence is insufficient, as a matter of law, to show citizenship. Presuming citizenship based on residency, the court held, is inappropriate to prove federal subject-matter jurisdiction, because the "*presumption* against federal jurisdiction" overcomes the historical "residency-domicile presumption." *Id.* at 391-92. Mandatory abstention under CAFA, however, is not jurisdictional – the statute instructs district courts to "decline to exercise jurisdiction," 28 U.S.C. § 1332(d)(4), necessarily implying that they have jurisdiction – so there is no basis to reject the long-standing residency-domicile presumption. The Sixth Circuit also rejected the view that applying the presumption in the CAFA context conflicts with the principle that abstention is disfavored. *Mason*, 842 F.3d at 394. Abstention is ordinarily disfavored because it is a judicially created exception to congressional grants of jurisdiction. *See generally Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

That principle, the court said, is "inapplicable" to Congress's "explicit directive" in CAFA that district courts abstain under certain circumstances. *Mason*, 842 F.3d at 394-95.

The Sixth Circuit also noted that the presumption "fits particularly well in the CAFA exception context, where the moving party is tasked with demonstrating a fact-centered proposition about a mass of individuals, many of whom may be unknown at the time the complaint is filed and the case removed to federal court." *Id.* at 392. With no jurisdictional barriers at issue, "[a]ffording the moving party a rebuttable presumption of citizenship based on residency avoids the exceptional difficulty of proving the citizenship of a class of over 100 individuals, given the nature and timing of the citizenship inquiry under the local controversy exception." *Id.* at 392-93.[3]

B. The Fifth And Ninth Circuits Require Evidence Of Citizenship But Consider The Residency-Domicile Presumption Proper Under Some Circumstances

For largely the same reasons offered by the Sixth Circuit, the Fifth and Ninth Circuits have indicated that using the residency-domicile presumption is sometimes proper. Both courts – like the Seventh,

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[3] The Fourth Circuit cited *Mason* in *Scott v. Cricket Communications, LLC*, 865 F.3d 189 (4th Cir. 2017), with the implication that in an appropriate case that court might follow *Mason* in accepting the presumption. It noted that "CAFA-exception cases holding that 'a rebuttable presumption that a person's residence is his domicile'" were inapplicable to jurisdictional questions like the amount in controversy, but did not suggest that such a presumption was erroneous in the context of CAFA exceptions. *Id.* at 196 n.6 (quoting *Mason*, 842 F.3d at 390).

Eighth, and Tenth Circuits, *see infra* Part I.C – generally require record evidence of citizenship. Unlike those courts, however, the Fifth and Ninth Circuits allow plaintiffs to use the presumption that state residents are state citizens to meet their burden of proving citizenship in appropriate cases.

In *Preston v. Tenet Healthsystem Memorial Medical Center, Inc.*, 485 F.3d 793 (5th Cir. 2007), the Fifth Circuit addressed whether a class of Louisiana hospital patients consisted of at least two-thirds Louisiana citizens for purposes of the local-controversy exception. The class representatives argued that "proof of citizenship based on a party's residence alone permits the district court to assume that a person's state of residence and state of citizenship are the same unless rebutted with sufficient evidence," and the court agreed that that principle found at least some "support in the case law of [its] sister circuits." *Id.* at 799. The court further agreed that it would be proper for a district court to "consider[] the entire record to determine whether the evidence of residency was simultaneously sufficient to establish citizenship." *Id.* at 800. But the court found that the minimal record evidence in *Preston* failed even to establish residency, and thus did not trigger "the presumption that a person's residency forms an adequate basis for inferring citizenship." *Id.* In a subsequent case, the Fifth Circuit found the local-controversy exception satisfied by relying in part on the "common sense presumption" that evidence of residence is also evidence of domicile and citizenship. *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 573 (5th Cir. 2011) (per curiam).

The Ninth Circuit has similarly indicated that the presumption is sometimes, but not always, appropriate. In *Mondragon v. Capital One Auto Finance*, 736 F.3d

880 (9th Cir. 2013), the court addressed a class of vehicle purchasers in California. The court cited the Seventh Circuit's decision in *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010), for the proposition that "there must ordinarily be at least some facts in evidence from which the district court may make findings regarding class members' citizenship for purposes of CAFA's local controversy exception." 736 F.3d at 884. As to the residency-domicile presumption, the court agreed that "numerous courts treat a person's residence as prima facie evidence of the person's domicile," but it found that, in the context of a class of vehicle purchasers, "the issue" of whether the Ninth Circuit should adopt that presumption was "not squarely presented." *Id.* at 886. Nevertheless, the court went out of its way to reject the view of the Seventh Circuit "that evidence of residency can never establish citizenship." *Id.* That view, the Ninth Circuit wrote, was inconsistent with the general rule that "district courts are permitted to make reasonable inferences from facts in evidence." *Id.* Instead, it agreed with the Fifth Circuit that "a court should consider 'the entire record' to determine whether evidence of residency can properly establish citizenship." *Id.* (quoting *Preston*, 485 F.3d at 800).

C. The Seventh, Eighth, And Tenth Circuits Entirely Reject The Use Of The Residency-Domicile Presumption

In the first case to consider such a presumption, *Sprint Nextel*, the Seventh Circuit examined and rejected the use of the residency-domicile presumption to prove that the home-state exception applied. The class at issue consisted of persons who had a Kansas cell phone number, received their cell phone bill at a Kansas address, and paid a certain fee for calls within

Kansas. 593 F.3d at 671. Although the plaintiffs offered no evidence of citizenship, the district court found "that the class definition itself, keyed as it is to Kansas cell phone numbers and mailing addresses, made it more likely than not that two-thirds of the putative class members are Kansas citizens." *Id.* at 673.

The Seventh Circuit acknowledged that there was some appeal to this argument. It agreed that "one would think that the vast majority of individual Kansas cell phone users do in fact live in that state and that the vast majority of them view it as their true home," and "imagine[d] that only a fraction of businesses that use Kansas cell phone service are not Kansas citizens." *Id.* at 673-74. Thus, it was, "[a]ll in all, . . . inclined to think that at least two-thirds of those who have Kansas cell phone numbers and use Kansas mailing addresses for their cell phone bills are probably Kansas citizens." *Id.* at 674. Nevertheless, the court found that logic insufficient. Because its assumptions could be undercut in "any number of ways," the court instead held that the district court had erred by relying on the class members' phone numbers and mailing addresses to find that the class citizenship requirements were met. *Id.*

The Eighth Circuit, in *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263 (8th Cir. 2015), agreed with the Seventh Circuit. There, the court reversed a district court order that "relied on last-known addresses to conclude that over two-thirds of the potential class members were Missouri citizens." *Id.* at 265. Acknowledging that the Missouri district courts had applied the residency-citizenship presumption for years, the Eighth Circuit stated simply that it found "[m]ore persuasive . . . the Seventh Circuit's general rule" established in *Sprint Nextel*. *Id.* at 265-66.

Thus, last known addresses – in *Hood*, derived from evidence rather than class definition – could not suffice to prove citizenship. After the Sixth Circuit's contrary decision in *Mason*, the Eighth Circuit confirmed that it would continue to follow the Seventh Circuit, expressly holding that "merely alleging a proposed class of [state] residents" was inadequate to prove state citizenship. *Hargett v. RevClaims, LLC*, 854 F.3d 962, 966 (8th Cir. 2017). The court specifically rejected the Sixth Circuit's view that residency establishes a rebuttable presumption of citizenship. *See id.* at 966 n.2.

In the decision below, the Tenth Circuit considered and rejected the Sixth Circuit's reasoning, following instead its own prior unpublished decision and the precedential opinions from other circuits that "reject the applicability of a rebuttable presumption of citizenship in the context of a CAFA exception invoked based on the mere allegation of residence." App. 7a-8a.

Before the decision below, the Tenth Circuit had also rejected the residency-domicile presumption in another unpublished opinion, *Reece v. AES Corp.*, 638 F. App'x 755 (10th Cir. 2016). There, the class members were "all citizens and/or residents and/or property owners of the State of Oklahoma within" the vicinity of the defendants' facilities. *Id.* at 759. On appeal, the class representatives argued, among other things, that the class definition sufficed by itself to make it more likely than not that two-thirds of the class were Oklahoma citizens. *Id.* at 772. The court rejected that argument, squarely holding that "[a] demonstration that the proposed class members are property owners or residents of that state will not suffice in the absence of further evidence demonstrating citizenship." *Id.* The class plaintiffs, the Tenth

Circuit held, needed (and failed) to produce "evidence sufficient to show that the residents and property owners were also citizens." *Id.*

The decision below cited *Reece*, *see* App. 5a n.3, 7a, leaving little doubt that, despite the non-precedential status of the opinion, the Tenth Circuit has joined the Seventh and Eighth Circuits in holding that the residency-domicile presumption can never be sufficient to meet plaintiff's burden.[4]

Thus, the circuits are divided into three distinct camps. The Sixth Circuit disagrees with the Seventh, Eighth, and Tenth Circuits' view that a class definition including residency never suffices alone to show class citizenship. But the approach adopted by the Tenth Circuit below also expressly conflicts with the approach taken by the Fifth and Ninth Circuits, which acknowledge that a presumption of citizenship follows from class members' residency. As noted, the Ninth Circuit explicitly disagreed with the Seventh Circuit's approach. *See Mondragon*, 736 F.3d at 886. The Sixth Circuit acknowledged that it was disagreeing with cases from the Fifth, Seventh, and Tenth Circuits. *See Mason*, 842 F.3d at 393. And both the Eighth and Tenth Circuits have explicitly rejected *Mason*, cited its dissent, and reaffirmed their prior holdings since that case. *See Hargett*, 854 F.3d at 966 n.2; App. 7a-8a.

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[4] In *Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2006), the Eleventh Circuit held that class plaintiffs had failed to meet their burden of proving that a CAFA exception applied because they failed to produce evidence showing that the class of Alabama "property owners, lessees, [and] licensees of properties" were also Alabama citizens. *Id.* at 1165-66. The court did not explicitly address whether domicile (and therefore citizenship) could be presumed from residency.

D. District Courts In Other Circuits Continue To Struggle When Confronted With CAFA-Exception Citizenship Issues

Plaintiffs invoke the CAFA exceptions regularly when seeking remand of truly local class actions in district courts, and, without guidance from this Court or their respective courts of appeals, district courts in other circuits come to varying conclusions on the issue of the residency-domicile presumption. A number of courts have held, like the Sixth Circuit, that a proposed class limited to state residents creates a rebuttable presumption that at least two-thirds of the class are state citizens. For example, in *Ellis v. Montgomery County*, 267 F. Supp. 3d 510 (E.D. Pa. 2017), the district court, in the absence of binding precedent from the Third Circuit, found *Mason* more persuasive than other circuits' decisions and applied the residency-domicile presumption. *Id.* at 518-19; *see also Kurovskaya v. Project O.H.R., Inc.*, 251 F. Supp. 3d 699, 703 (S.D.N.Y. 2017) (inferring that a class limited to "individuals currently residing" in New York consisted of at least two-thirds New York citizens). Other courts have employed similar presumptions to infer a likelihood of citizenship from class definitions. *See*, *e.g.*, *Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 80-81 (S.D.N.Y. 2006) (Chin, J.) (presuming that at least two-thirds of a class were New York citizens where the class definition included the requirement that members work in New York); *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451, 461 (D.N.J. 2007) (presuming that at least one-third of a class of local bank customers were citizens of New Jersey). Other district courts have rejected the residency-domicile presumption. *See*, *e.g.*, *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 160, 166 (D. Mass.

2007) (rejecting argument that a class limited to "[r]esidents of Massachusetts" could be presumed to consist of at least two-thirds Massachusetts citizens). In some instances, different district courts within the same circuit or even judges within the same district have come to inconsistent conclusions. *Compare Ellis*, 267 F. Supp. 3d at 518-19, *with Nop v. American Water Res., Inc.*, Civil No. 15-1691 (RBK/AMD), 2016 WL 4890412, at *4 (D.N.J. Sept. 14, 2016) (expressly following the Seventh Circuit's decision in *Sprint Nextel*), *and Schwartz v. Comcast Corp.*, No. Civ.A. 05-2340, 2006 WL 487915, at *6 (E.D. Pa. Feb. 28, 2006) (refusing to presume two-thirds of class were citizens based on arguments "premised on the assumption that residence is an effective proxy for domicile"). Thus, the inconsistency and confusion among the circuits extends to the district courts.

II. THE TRADITIONAL RULE THAT RESIDENCY IS PRIMA FACIE EVIDENCE OF DOMICILE SHOULD CONTINUE TO APPLY IN THE CAFA CONTEXT

The long-standing rule that a person's residence may be presumed to be her domicile, in the absence of contrary evidence, should apply when determining whether CAFA exceptions apply. The decision below incorrectly holds that class members who are by definition Oklahoma residents must provide additional evidence before a court may find by a preponderance that at least two-thirds of the class are domiciled in Oklahoma and therefore Oklahoma citizens. There is no basis to hold that CAFA implicitly abrogated this Court's residency-domicile presumption or established a different standard of proof than other legal proceedings in which domicile is at issue.

As the Sixth Circuit explained in *Mason*, the rule that residence is prima facie evidence of domicile, and that the defendant has the burden to rebut that conclusion, has a long history. This Court appears to have first applied this presumption in *Ennis v. Smith*, 55 U.S. (14 How.) 400 (1853), where the litigants disagreed on the domicile of the decedent in a will dispute. The plaintiffs contended that he was domiciled in France at the time of his death; the defendants argued that "there [wa]s no evidence to prove the domicil, as alleged," because, although the decedent was residing in France, "[m]ere residence[] is not in itself proof of a change of domicil" from his country of origin. *Id.* at 410. The Court, citing (among other things) Joseph Story's Commentaries on the Conflict of Laws, rejected this argument. The Court held that the only "amount of proof . . . necessary" to prove "a *prima facie* domicil of choice" is "residence" in that place. *Id.* at 422-23. Residence alone "casts upon him who denies the domicil of choice, the burden of disproving it." *Id.* at 423. The Court continued: "Where a person lives, is taken *prima facie* to be his domicil, until other facts establish to the contrary." *Id.* Thus, the burden of proof was on the defendants to disprove that France was the decedent's domicile, not on the plaintiffs alleging that fact. *Id.* at 423-24.

This Court has since applied that presumption in a number of cases. In *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 352 (1875), and *Desmare v. United States*, 93 U.S. 605, 610 (1877), the Court applied it in cases involving illegal trading between Union and Confederate States during the Civil War. In *Anderson v. Watts*, 138 U.S. 694, 707 (1891), the Court found federal diversity jurisdiction lacking, relying partly on the presumption. And in *District of Columbia v.*

Murphy, 314 U.S. 441, 455 (1941), the Court reversed a finding that an individual was not domiciled in the District of Columbia, and not subject to local tax, on the basis that the individual had not rebutted the presumption of domicile based on his residence in the District.

The rule that an allegation of residency alone does not suffice to invoke federal diversity jurisdiction is limited to that specific context. In *Robertson v. Cease*, 97 U.S. 646 (1878), the Court held that the residency-domicile presumption does not allow a court "to infer argumentatively, from the mere allegation of 'residence,'" that a plaintiff is a citizen for purposes of diversity jurisdiction. *Id.* at 650. But that holding was based on the paramount "presumption . . . that a cause is without its jurisdiction unless the contrary affirmatively appears." *Id.* at 649. That limits the applicability of the residency-domicile presumption *only* when used *affirmatively* to show jurisdiction. As *Anderson* shows (citing *Robertson*), the presumption still applies, even in diversity cases, when used to *disprove* the existence of jurisdiction.

The *Robertson* rule therefore does not limit the presumption's validity for purposes of the CAFA exceptions – they are not jurisdictional, and, moreover, no federal court would be inferring or presuming its own jurisdiction. It was therefore error for the Seventh, Eighth, and Tenth Circuits to rely on cases like *Robertson*, in which the question was whether federal courts could presume the necessary citizenship to give themselves jurisdiction. *See Sprint Nextel*, 593 F.3d at 673 (citing *Meyerson v. Harrah's E. Chicago Casino*, 299 F.3d 616, 617 (7th Cir. 2002) (per curiam)); *Hargett*, 854 F.3d at 965 (citing *Pattiz v. Schwartz*, 386 F.2d 300, 300-01 (8th Cir. 1968));

App. 8a (citing *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 781 F.3d 1233, 1238 (10th Cir. 2015)).

Nor is there any other sufficient basis to reject the historical residency-domicile presumption in this context. The Seventh Circuit explained in *Sprint Nextel* that it would not rely on "guesswork," even "[s]ensible guesswork, based on a sense of how the world works." 593 F.3d at 674. But legal presumptions are always, in a sense, best guesses based on how the world works; they are ordinarily rebuttable so that the opposing party has the opportunity to prove that, in a particular case, that (usually correct) guess is wrong. And as several courts have acknowledged, the residency-domicile presumption is very likely to be accurate in CAFA-exception cases. *See id.* at 673 ("[O]ne would think that the vast majority of [class members] . . . view [Kansas] as their true home."); *Mondragon*, 736 F.3d at 884 ("We acknowledge that our holding may result in some degree of inefficiency by requiring evidentiary proof of propositions that appear likely on their face."). Moreover, the courts need not create a new presumption here; they need only apply an old one, long endorsed by this Court.

The dissent's reasoning in *Mason* also fails to justify abandoning the presumption. In his dissent, Judge Kethledge focused on the rule that abstention is disfavored. *See Mason*, 842 F.3d at 397 (Kethledge, J., dissenting). Abstention is, in most cases, "'an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959)). But it is narrow because a district court ordinarily cannot

"refuse to discharge the responsibility, imposed by Congress," to adjudicate diversity cases. *County of Allegheny*, 360 U.S. at 187. Here, however, Congress has imposed a responsibility on federal courts to *abstain* from exercising jurisdiction in clearly enumerated circumstances. A presumption against abstention would be inconsistent with CAFA, rather than with the district court's general obligation to exercise jurisdiction. Further, this Court generally assumes that Congress legislates with full knowledge of existing background law, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), and should assume that it enacted CAFA with full awareness of this Court's long-standing residency-domicile presumption.

As the Sixth Circuit noted, the presumption is particularly apt in the context of the CAFA exceptions. A class plaintiff must prove that it is more likely than not that two-thirds of class members are state citizens, but may have difficulty determining who all the class members are, let alone their subjective intentions to reside indefinitely in the state. *See Mason*, 842 F.3d at 392-93. For this reason, commentators have unanimously argued in favor of permitting class plaintiffs to make use of this traditional presumption. *See* Tim Barham, *Class Action Water Crisis: Resolving Flint's New Split Over CAFA's Local Controversy Exception*, 70 BAYLOR L. REV. 149, 170 (2018) (noting this circuit split and arguing that *Mason*'s approach is "practically commendable"); Jacob R. Karabell, *The Implementation of "Balanced Diversity" Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 302 (2009); Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 1021 (2008); Stephen J. Shapiro, *Applying the Jurisdictional*

Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach, 59 BAYLOR L. REV. 77, 135 (2007).

In sum, the Sixth Circuit properly applied the historical residency-domicile presumption in the CAFA home-state exception context, because there are no contrary presumptions or compelling reasons not to do so. The court below erred when it failed to apply that presumption.

III. PROOF OF CITIZENSHIP UNDER CAFA'S MANDATORY-ABSTENTION PROVISIONS IS AN IMPORTANT AND RECURRING ISSUE

CAFA substantially increased the number of diversity-based class actions in federal court. Where such actions have been removed, plaintiffs often move for remand immediately. The CAFA exceptions therefore present an important and recurring threshold issue in a large number of class actions. Moreover, the exceptions effectuate Congress's federalism concerns, ensuring that national cases remain in federal court, while state courts continue to adjudicate local controversies. Jettisoning the traditional residency-domicile presumption effectively precludes plaintiffs from demonstrating that their case is of local, not national, importance and thus vitiates CAFA's mandatory-abstention provisions and the federalism interests animating those provisions.

A. Forcing Class Plaintiffs To Redefine Their Classes So That Only State Citizens Are Class Members Would Frustrate Congressional Intent

Although CAFA generally expanded federal jurisdiction over class actions, Congress carefully provided

"certain exceptions for class actions that involve matters of principally local or state concern." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 740 n.1 (2014). "These exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state." *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 682 (7th Cir. 2006). To allow state courts to adjudicate truly local disputes, CAFA creates what is effectively a sliding scale of local interest. If one-third or fewer of the class members are citizens of the "home" state, the federal district court must exercise jurisdiction. If greater than one-third but less than two-thirds of the class are citizens, the district court *may*, after considering a number of factors, decline to exercise jurisdiction. *See* 28 U.S.C. § 1332(d)(3). And if two-thirds or more of the class are citizens of the home state, and certain other requirements are met, the mandatory-abstention provisions come into play and the district court must decline jurisdiction. *See id.* § 1332(d)(4). In other words, Congress drew the truly-local line at two-thirds of the proposed class, assuming that the other requisites are satisfied.

The Seventh Circuit's rule, now adopted by the Eighth and Tenth Circuits, threatens to stymie Congress's careful balance. As that court suggested, the easiest way for a class plaintiff to avoid doubt as to whether two-thirds of a class comprises citizens of a state is to define the class in part as state citizens: "it doesn't take any evidence to establish that Kansas citizens make up at least two-thirds of the members of a class that is open only to Kansas citizens." *Sprint Nextel*, 593 F.3d at 676. The Eighth Circuit similarly

explained that a plaintiff could meet his burden "through a class explicitly limited to local citizens." *Hargett*, 854 F.3d at 966; *see also Mondragon*, 736 F.3d at 885 & n.5 ("Mondragon could have limited the class by defining it to consist only of California citizens"). In moving to remand a case under one of the CAFA exceptions, a plaintiff has the burden of proof; but by the very nature of a class action, "marshaling evidence of citizenship for the unnamed class members may be a formidable task." *Preston*, 485 F.3d at 801. Class plaintiffs, rather than risk litigating the citizenship issue, will feel pressure to define classes in terms of state citizens.

That outcome is not what CAFA requires or what Congress intended. Congress balanced local interests against the federal interest in adjudicating national litigation by setting the benchmark for mandatory abstention at two-thirds of the class. "Proper application of these exceptions should promote the type of judicial federalism that Congress intended," and courts should "take care to effectively enforce the congressional directive that situates 'local' controversies in state fora." Karabell, 84 N.Y.U. L. REV. at 324, 326. In doing so, a district court should be allowed to exercise "common sense," *Hollinger*, 654 F.3d at 573, in determining whether it should decline jurisdiction in favor of a state court. In contrast, exercising jurisdiction even when a federal court is "inclined to think" that the requisites for abstention are met, *Sprint Nextel*, 593 F.3d at 674, fails to honor the "delicate balance" struck by Congress, *Hart*, 457 F.3d at 682; *see also* Karabell, 84 N.Y.U. L. REV. at 331-32 ("[t]he judiciary has the responsibility to forge a reasonable standard so as to prevent the exceptions from being nonexistent"). And allowing district courts to utilize a

common-sense presumption in the CAFA abstention context "fits with [this Court's] practice of reading jurisdictional laws, so long as consistent with their language, to respect the traditional role of state courts in our federal system and to establish clear and administrable rules." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016).

B. The Standard For Remand Under CAFA Is A Threshold Issue In Many Cases Of Local And National Significance

The federalism issues raised by CAFA and the CAFA exceptions are recurring and will continue to challenge federal district and circuit courts regularly. CAFA was a major expansion of federal diversity jurisdiction. It has had "an enormous impact in shifting most class actions to federal court," Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 745 (2013), "approximately doubl[ing]" the number of diversity-based class actions, Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1562 (2008). When those class actions are originally filed in state court and removed to federal court, plaintiffs often file motions to remand, in one analysis winning more than half of their motions. *See id.* at 1579-81. And by definition, millions of dollars are at stake in cases subject to removal under CAFA. As remand is a threshold issue in many, if not most, cases, the question whether plaintiffs may rely on a residency-domicile presumption to prove that a CAFA exception applies presents an important and recurring issue. The volume of decisions cited in this petition confirms that the issue arises frequently in the lower courts.

Allowing this confusion in the lower courts to continue also runs contrary to the "congressional intent that CAFA be used to provide for more uniform federal disposition of class actions affecting interstate commerce." *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1197 (11th Cir. 2007). Different outcomes for similar classes in different circuits undercut Congress's goal of uniformity, particularly in the context of a jurisdictional statute. *Cf. Merrill Lynch*, 136 S. Ct. at 1567-68; *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1131 (2015) (noting this Court's "rule favoring clear boundaries in the interpretation of jurisdictional statutes"). Not only are the six circuits discussed above currently divided, but district courts in circuits that have not yet spoken will continue to be confronted with uncertainty over this issue. The exercise of federal jurisdiction should not vary between circuits, districts, or judges.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

A. The Question Presented Was Dispositive In The Decision Below

This case turns on whether, as the Sixth Circuit has held, a court should presume that class members who are state residents are also state citizens. If the court below had agreed with the Sixth Circuit, it would have required the district court to remand this action to state court. In short, the question whether the presumption applied was dispositive as to whether the court would exercise federal jurisdiction.

In Part II of its decision, the Tenth Circuit described petitioner's argument on the presumption issue as follows:

> Nichols contends that a rebuttable presumption of citizenship arises from his allegation that the

> proposed class members are Oklahoma residents. And because Chesapeake did not offer evidence that more than one-third of the proposed class members are not Oklahoma residents, Nichols says, the district court was required to abstain.

App. 6a. The court acknowledged that *Mason* supported that conclusion. *Id.* But the court went on to reject *Mason* (citing instead Judge Kethledge's dissent) and thus reject petitioner's argument that remand was required based on the residence allegations inherent in the class definition.[5]

Having rejected the *legal* argument that would have entitled petitioner to remand under the home-state exception, the court "therefore turn[ed] to the *evidence* [petitioner] submitted to show that two-thirds or more of the proposed plaintiff class members were Oklahoma citizens." App. 8a (emphasis added). In Part III of its decision, the court independently rejected petitioner's evidence-based arguments under a clear-error standard. Petitioner does not seek review of that ruling here. It is clear that the court below viewed his evidentiary showing as an independent basis to argue for remand, and thus that, if the court had accepted the residency-domicile presumption, that presumption alone would have entitled petitioner to remand on the basis of his class definition.

B. The Fact That The Decision Below Is Unpublished Does Not Affect Whether Granting The Writ Is Proper

Although the decision below is unpublished, that presents no barrier to this Court's granting certiorari.

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[5] Chesapeake conceded that the other requirement of the home-state exception, Chesapeake's own Oklahoma citizenship, was met.

This Court regularly grants certiorari to review unpublished opinions. *See*, *e.g.*, *Eastern Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61 (2000); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520 (1999); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997). Where an unpublished opinion entrenches a disagreement that multiple circuits have weighed in on in precedential opinions, there is no reason to wait for an additional published opinion before resolving the split. *See*, *e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452, 453 (1993) (reviewing an unpublished opinion of the Ninth Circuit that perpetuated a long-standing circuit split).

In the CAFA context, the Court has also granted certiorari to review denials of petitions to appeal. *See Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554-58 (2014) (reversing Tenth Circuit on CAFA removal issue); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 591 (2013). *In Knowles*, this Court did not even have the benefit of a reasoned opinion below. *See Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828891, at *1 (8th Cir. Jan. 4, 2012) (one-sentence denial of permission to appeal); *Knowles v. Standard Fire Ins. Co.*, No. 11-8030, 2012 WL 3828845, at *1 (8th Cir. Mar. 1, 2012) (two-sentence denial of petition for panel rehearing and petition for rehearing *en banc*). In the CAFA context, even important issues like this one may result in summary orders or unpublished opinions because the courts of appeals have a statutory 60-day period in which they must render judgment, *see* 28 U.S.C. § 1453(c)(2), which likely discourages circuit judges from writing precedential opinions. Thus, certiorari to review unpublished opinions is particularly appropriate in CAFA jurisdictional cases.

Further, courts of appeals should not use the mechanism of unpublished opinions to avoid creating precedent (and, as a potential consequence, diminish the odds of review by this Court). *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., dissenting from the denial of certiorari). In the decision below, the Tenth Circuit weighed in on a circuit split and expressly noted that it had resolved this issue only in a previous unpublished opinion. *See* App. 7a (citing *Reece*, 638 F. App'x at 769). Its decision not to publish its decision is, at best, in tension with 10th Cir. Local Rule 36.1, which states that "[d]isposition without opinion . . . means that the case does not require application of new points of law that would make the decision a valuable precedent." That choice presents, if anything, "another reason to grant review," *Plumley*, 135 S. Ct. at 831 (Thomas, J., dissenting from the denial of certiorari), not a reason to avoid reviewing the decision. And, in any event, as discussed above, a number of circuit courts have now weighed in with varying approaches to this exact issue, making the issue ripe for this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

REX A. SHARP
BARBARA FRANKLAND
LARKIN E. WALSH
REX A. SHARP, P.A.
5301 W. 75th Street
Prairie Village, KS 66208
(913) 901-0505

KEVIN J. MILLER
Counsel of Record
T. DIETRICH HILL
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(kmiller@kellogghansen.com)

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