No. 18-168

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

REPLY BRIEF FOR PETITIONER

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)

December 5, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

In their brief in opposition, respondents (collectively, "Chesapeake") candidly concede that there is a circuit split over whether plaintiffs can use a presumption to prove that a class of state residents comprises at least two-thirds state citizens for purposes of certain mandatory-abstention provisions under CAFA. That circuit split warrants review and resolution. The split is well-established and unlikely to benefit from further percolation. It is also squarely presented here: the Tenth Circuit treated the presumption as an independent and dispositive ground for denying petitioner relief, and the Court need not consider other issues raised by the parties below. The use of this historical presumption furthers both judicial efficiency and congressional intent, and this Court should ensure the consistent and fair application of federal law by granting review.

ARGUMENT

I. CHESAPEAKE CONCEDES THERE IS AN ONGOING CIRCUIT SPLIT

Chesapeake concedes (at 10-18) that, at the very least, the Sixth Circuit's decision in *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016), breaks with multiple other circuits. It tries to minimize the import of this split in several ways. But Chesapeake fails to explain adequately why this Court should allow this deep circuit split to fester rather than granting review to resolve the disagreement.

A. Chesapeake's Reframing Of The Circuit Split As Five-To-One Ignores The Actual Courts Of Appeals' Decisions

As the petition explains (at 10-18), the circuits have staked out multiple distinct positions on the residency-domicile presumption. The Sixth Circuit

has held that the residency-domicile presumption is appropriate and may, by itself, suffice to prove the two-thirds class citizenship required by the CAFA exceptions. The Seventh, Eighth, and Tenth Circuits have held that such a presumption is improper. And the Fifth and Ninth Circuits have agreed that the presumption is appropriate but stated that it generally will not suffice without further evidence.[1]

Chesapeake's attempt to isolate the Sixth Circuit as a lone outlier, aligned against five other circuits, at most demonstrates continued confusion among the circuits. But Chesapeake is wrong in its characterization of the split. For example, although Chesapeake contends that the Ninth Circuit has joined the Seventh Circuit, the Ninth Circuit disagrees: "We *do not think, as the Seventh Circuit suggested*, that evidence of residency can never establish citizenship." *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880, 886 (9th Cir. 2013) (emphasis added). The Ninth Circuit also clarified its position – and its disagreement with the Seventh Circuit's view – in *King v. Great American Chicken Corp.*, 903 F.3d 875 (9th Cir. 2018). There, the court considered a case in which the parties had stipulated that 67% of class members had last known addresses in the relevant state, California. *Id.* at 879. The court agreed that last known addresses constituted evidence of residency, and it reaffirmed that evidence of residency *can* prove domicile. *Id.* However, it held that the stipulation that *just over* two-thirds of class members were residents was too

---

[1] Chesapeake notes that some courts have considered the Eleventh Circuit to have taken the same position as the Seventh Circuit in *Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2006), but concedes "the Eleventh Circuit did not specifically address whether plaintiffs could presume citizenship from residency." Opp. 15.

close to the requisite two-thirds citizenship requirement. In other words, the parties did not leave a sufficient "cushion" between the percentage of residents and the necessary percentage of citizens to account for the fact that a few residents were likely not citizens. *Id.* at 879-80. The court explicitly noted, however, that a similar stipulation could be sufficient if it "provided a more substantial cushion." *Id.* at 880. This formulation of the rule is closer to the Sixth Circuit's in *Mason* than to the Seventh Circuit's in *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010).

Chesapeake also errs when it groups the Fifth Circuit together with the Seventh Circuit. It does so by misconstruing the Fifth Circuit's decision in *Hollinger v. Home State Mutual Insurance Co.*, 654 F.3d 564 (5th Cir. 2011) (per curiam). The court there held that at least two-thirds of the class members were citizens based on judicial notice of census data, evidence of residency – *not* citizenship – and the residency-domicile presumption. *Id.* at 572 (noting "statistics about Texas *residents*") (emphasis added). Thus, the Fifth Circuit ruled that abstention was mandatory based on no record evidence other than evidence of residency – in particular, class members' car registrations in the state of Texas.[2]

That holding is not substantially different than the Sixth Circuit's position. Indeed, *Mason* does not dispense with evidence entirely. Instead, *Mason* holds that, where class members will have to prove – with evidence – they are local residents in order to qualify as class members, they may also be *presumed* to be

---

[2] Petitioner would prevail under the Fifth and Ninth Circuits' approach, as well as under the Sixth Circuit's, because the presumption would be supported here by additional record evidence. App. 9a.

local citizens. If a person cannot prove residency, he is not a class member, so the presumption applies only to a class of *proven* residents. Thus, contrary to Chesapeake's repeated suggestion (at i, 7, 9-11, 15, 18, 19 n.3, 25, 34), this case does not involve "unproven allegations of residency." The Sixth Circuit, like the others, requires proof of residency; the only question is what *else* the class must do to prove citizenship.

B. Multiple Circuits Have Reaffirmed The Circuit Split Since *Mason*

Continued percolation is likely to exacerbate, rather than resolve, this circuit split. Although Chesapeake argues (at 18) that this split is not yet entrenched, its own case citations demonstrate otherwise.

The petition notes that, since the Sixth Circuit's *Mason* decision, two circuits have already weighed in on this issue: *Hargett v. RevClaims, LLC*, 854 F.3d 962 (8th Cir. 2017), and the Tenth Circuit's decision below. Likewise, the Fourth Circuit has quoted *Mason* approvingly in *Scott v. Cricket Communications, LLC*, 865 F.3d 189 (4th Cir. 2017). Chesapeake's brief in opposition also acknowledges that, since the petition was filed, the Ninth Circuit addressed the issue again in *King*.

Future percolation is unlikely to add more substance to this debate or convince any of the circuits to change their positions. Each of the circuits to address the issue over the last two years has reaffirmed its prior position. That is true of the decision below, as well: although it is unpublished, the Tenth Circuit specifically noted that its prior unpublished decision guided the result here. App. 7a. And the significant district court confusion on this issue (*see* Pet. 19-20) further demonstrates that review by this Court now will serve judicial efficiency.

C. Continued Disagreement Among Circuits Calls For Review Even In The Absence Of A Forum-Shopping Problem

An ongoing circuit split provides ample justification for this Court's review because one of the Court's primary purposes is to ensure uniformity in the application of federal law. Chesapeake relies heavily on the argument that this circuit split is unworthy of review because there is no obvious forum-shopping problem. But this Court grants review to resolve conflicts among the courts of appeals, *see* Sup. Ct. R. 10(a), which only occasionally pose forum-shopping concerns.

A brief survey of the Court's docket demonstrates that many, if not most, grants of certiorari do not involve forum-shopping concerns. The Court regularly grants certiorari to resolve circuit divisions in criminal cases, for example, in which forum-shopping presents little or no concern. *See*, *e.g.*, *Rita v. United States*, 551 U.S. 338, 346 (2007). The overarching purpose of the writ of certiorari "is to ensure the integrity and uniformity of federal law," *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring), regardless of whether a particular disharmony poses a risk of forum-shopping.

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

A. This Case Squarely Presents The Issue, Which The Tenth Circuit Treated As Independently Dispositive

Petitioner seeks review of a limited question, which the Tenth Circuit treated as an independent ground on which petitioner could prevail: whether a class defined as residents of a state may be presumed to consist of at least two-thirds citizens of that state for purposes of the home-state CAFA exception.

Petitioner argued in the Tenth Circuit that "a rebuttable presumption of citizenship arises from his allegation that the proposed class members are Oklahoma residents" and that, as a consequence, "the district court was required to abstain." App. 6a. The Tenth Circuit considered that position in Part II of its decision, concluding that it would not follow *Mason* and rejecting petitioner's argument that the district court should be required to remand this case to state court.

That is all that petitioner asks this Court to review. In the Tenth Circuit's view, the rebuttable presumption presented an independently sufficient ground for petitioner to prevail below, as it only addressed the sufficiency of petitioner's evidence after it first rejected application of the presumption. App. 8a. Although Chesapeake now contends that Nichols should not have prevailed on the strength of the residency-domicile presumption because of other record evidence, this Court need not consider whether the Tenth Circuit correctly decided ancillary issues the petition does not present.[3]

Further, Chesapeake's contention that the proposed class here is not defined in terms of residence is misplaced. First, the Tenth Circuit considered the class definition here adequate to show the class was, in fact, composed of Oklahoma residents. App. 6a. This Court need not reconsider the Tenth Circuit's treatment of this fact-specific question in order to address the propriety of the presumption at issue. Moreover, the

---

[3] Chesapeake focuses primarily on evidence that might suggest class members were not, in fact, citizens: first, that some class members appear to have second homes, Opp. 35, and, second, that some class members were not natural persons, Opp. 32. These are precisely the types of evidence defendants may use to *rebut* the presumption that residents of a state are not citizens.

class of "Oklahoma Resident[s]," A23-24 (Class Action Petition ¶ 13), is defined *conjunctively* to ensure that class members are residents. Not only must class members have local addresses for both their royalty checks and tax forms, but – as Chesapeake fails to acknowledge – class members must also be exempt from an Oklahoma withholding tax on non-residents. *Id.* Either would suffice as a definition for residence, and both, doubly so. The Tenth Circuit, though rejecting the residency-domicile presumption, never suggested that petitioner failed to satisfy the predicate residency.

In short, the question presented was dispositive below, and the ancillary issues Chesapeake raises are no obstacle to review of that question here.

B. The Unpublished Decision Below Does Not Weigh Against Review

The fact that the decision below is unpublished should not prevent review of this important issue. The Tenth Circuit, in a signed opinion by Judge Lucero, considered the circuit split at some length and provided a full explanation of its decision. App. 1a-10a. It also noted that it was following its prior decision in *Reece v. AES Corp.*, 638 F. App'x 755 (10th Cir. 2016), indicating this rule likely is, as a practical matter, established law in the Tenth Circuit. Thus, although the Court often declines to review unpublished decisions because they fail to provide the court's full reasoning, that concern is not present here. Similarly, the Court may consider circuit splits unripe where they arise from non-precedential decisions, as a court may change course. Again, that concern is absent here: even if the Tenth Circuit is free to change course in the future, that does not erase the deep circuit split, because there are still published decisions from at least five other circuits on the question.

Further, twice in recent years the Court has granted review of unpublished decisions in CAFA cases. It did so in both *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588 (2013), and *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014). That pattern likely reflects the Court's recognition that, although courts of appeals *can* publish decisions within the statutorily limited time period, *see* 28 U.S.C. § 1453(c)(2), the time limit makes it more likely that cert-worthy issues will nevertheless result in unpublished decisions. The unpublished decision below therefore should not weigh against review.

III. THE COURT BELOW ERRED BECAUSE A RESIDENCY-CITIZENSHIP PRESUMPTION IS APPROPRIATE

A. As Multiple Circuits Have Recognized, The Presumption Accords With "Common Sense"

As multiple circuits have recognized, the residency-domicile presumption is consistent with common sense. Though Chesapeake raises several other arguments on the merits, it does not seriously contest this point. Indeed, the logic of the residency-domicile presumption has appealed not only to the Sixth Circuit, which viewed it as a "common sense inference[]," *Mason*, 842 F.3d at 393, but to the Seventh Circuit, which rejected it despite finding that it was "[s]ensible" to infer domicile from residency, in the absence of more information, *Sprint Nextel*, 593 F.3d at 674. The Ninth Circuit, in *Mondragon*, similarly acknowledged that refusing to apply the presumption effectively "requir[es] evidentiary proof of propositions that appear likely on their face." 736 F.3d at 884.

Where courts agree that a proposition is "common sense" or "likely on its face," it makes perfect sense to presume its truth and put the burden on the opposing

party to disprove it. "Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977). A burden of proof "supported by common sense and probability" serves "judicial economy" by minimizing the necessity of litigation. *Basic Inc. v. Levinson*, 485 U.S. 224, 245-46 (1988). The residency-domicile presumption has served that purpose since at least 1853, *see Ennis v. Smith*, 55 U.S. (14 How.) 400 (1853), putting the burden on the party who seeks to prove the less likely proposition – that a state resident is not also a domiciliary.[4]

B. The Presumption Is Consistent With The Remainder Of The Diversity Jurisdiction Statute

Applying the historic residency-domicile presumption here is consistent with the ordinary rules of diversity jurisdiction. Petitioner is not asking, as Chesapeake suggests (at 9), that "citizenship" be treated differently for purposes of CAFA than for other diversity jurisdiction provisions. On the contrary, the presumption *relies* on the fact that state citizenship for purposes of § 1332(d) generally requires domicile.

It is black-letter law that a federal court may not presume citizenship from residency when *establishing* federal jurisdiction. *See Robertson v. Cease*, 97 U.S. 646 (1878). But that follows from the presumption

---

[4] Consistent with common sense, U.S. census data confirm that the vast majority of Americans do not move out of their state each year. *See*, *e.g.*, U.S. Census Bureau, State-to-State Migration Flows: 2017 (in 2017, roughly 97.7% of Americans lived in the same state as they had one year prior), https://www2.census.gov/programs-surveys/demo/tables/geographic-mobility/2017/state-to-state-migration/State_to_State_Migrations_Table_2017.xls.

against federal jurisdiction generally. In contrast, this Court has explicitly held that a district court may presume citizenship from residence when establishing a *lack* of federal jurisdiction. *See Anderson v. Watts*, 138 U.S. 694, 707 (1891). That is precisely what petitioner seeks here.

C. Chesapeake's Alternatives For Proving Class Citizenship Undercut Congressional Intent

As many circuits have noted, plaintiffs' burden to prove a CAFA exception "should not be exceptionally difficult to bear." *Mondragon*, 736 F.3d at 886. A heavy burden is inconsistent with Congress's intent to allow primarily state-centered actions to remain in state court. *See Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.*, 485 F.3d 793, 797 (5th Cir. 2007) ("[N]othing in CAFA's text suggests that Congress meant to impose a heightened burden of proof on parties attempting to remand a class action lawsuit to state court."). And for the mandatory-abstention provisions – "local controversy" and "home state" – Congress chose two-thirds local citizenship as the cutoff point between national and local class actions. Allowing plaintiffs to utilize the historically accepted residency-domicile presumption is the best means of effectuating this congressional intent.

Chesapeake proposes two expensive and time-consuming alternatives for plaintiffs seeking remand. First, it notes (at 12) the Eighth Circuit's view that plaintiffs can use affidavits or statistical evidence to meet their burden of showing that the class consists of at least two-thirds citizens. *See Hargett*, 854 F.3d at 966 n.2. It is not clear how non-expert affidavits would help plaintiffs meet their burden of proving citizenship, because a class may number in the thousands. And, although plaintiffs can seek expert

assistance, that route inevitably devolves into a mini-trial in which defendants seek to poke holes in the statistical evidence. *See*, *e.g.*, *Evans*, 449 F.3d at 1166 (finding that a survey of 10,000 potential plaintiffs was inadequate). Certainly, citizenship cannot be "readily proven," Opp. 34, by this method.

Second, Chesapeake suggests plaintiffs can assure themselves of a state-court forum by defining their class in terms of citizens of a state. Opp. 29 (citing *Sprint Nextel*, 593 F.3d at 676, and *Hargett*, 854 F.3d at 966). But this is overkill, and, although Chesapeake (at 30) expresses confusion as to why, a judicial requirement of a class definition of 100% citizens subverts congressional intent when Congress's direction is that a class be considered local if it comprises merely 67% citizens.

D. Federal Courts' Normal Presumption Against Abstention Applies Only To Judicially Created Abstention Doctrines

Chesapeake also contends that presuming domicile from residency is improper in the CAFA-exception context because it runs afoul of the presumption against abstention. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). But that rule merely limits *judicial* exceptions to congressional grants of jurisdiction – in other words, judicially created exceptions to statutes. It has no application to CAFA, in which "Congress explicitly enumerated" exceptions, *Preston*, 485 F.3d at 797, that courts should interpret in accordance with ordinary rules of background law, including the long-standing historical residency-domicile presumption.

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)

December 5, 2018