No. 19-887

IN THE

Supreme Court of the United States

ARYEH SIMON AND SASSYA SIMON,

Petitioners,

v.

MARRIOTT INTERNATIONAL, INC., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

After voluntarily dismissing one putative class action following removal to federal court, Petitioners' counsel brought a nearly identical second one that sought to avoid a ground for removal identified in the first action. It didn't work: the district court found removal was proper under the Class Action Fairness Act and denied remand, and the Fourth Circuit denied Petitioners' application for discretionary appeal of that interlocutory order under 28 U.S.C. § 1453(c)(1). Accordingly, this case does not raise a question regarding the merits of Petitioners' jurisdictional argument, but only:

Whether the Fourth Circuit abused its discretion under 28 U.S.C. § 1453(c)(1) when it denied Petitioners' application for interlocutory appeal.

CORPORATE DISCLOSURE STATEMENT

Marriott International, Inc. (Marriott) is a publicly traded company that does not have a parent corporation. There are no publicly traded companies that own 10% or more of Marriott's stock.

Starwood Hotels & Resorts Worldwide, LLC (Starwood) is a limited liability company. Starwood's parent company is Marriott International, Inc. Marriott International, Inc., a publicly traded company, owns all of Starwood's stock.

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STATEMENT

The decision below, in all of one sentence, denied Petitioners' application for discretionary appeal pursuant to 28 U.S.C. § 1453(c)(1) of the district court's interlocutory order denying their motion to remand to state court. Whether the court below abused its discretion in denying leave to appeal is therefore the only question that can properly be presented to this Court. That question does not warrant review, based on its interlocutory posture, unique factual background, and lack of importance.

Even so, Petitioners ask this Court to consider a question that is not properly raised at this stage: whether the district court properly determined that it possesses jurisdiction under the Class Action Fairness Act (CAFA). The decision below, having declined discretionary interlocutory appeal, does not implicate that question, but only the appeals court's exercise of its discretion. Petitioners remain free to seek review on the issue of the district court's jurisdiction in the future following a final judgment. For now, however, this case presents no vehicle for review on that issue.

Even were that not so, this case does not satisfy the Court's traditional criteria for certiorari. The jurisdictional issue decided by the district court is, as that court recognized, a "narrow" issue of first impression: may class action plaintiffs pursuing claims already raised in a CAFA suit in a pending multi-district-litigation proceeding "manipulat[e] the allegations in their complaint to skirt the minimal diversity requirement of CAFA?"

Pet.App.8a. There is no circuit split on that issue because no appeals court has ever decided it—and that includes the court below. Petitioners are unable to identify a single other case that would be implicated by this Court's decision on that issue, belying any claim of importance. And while Petitioners claim that the district court's decision could have serious consequences in other cases, fifteen years of experience under CAFA demonstrates otherwise.

In any event, the district court got it right. The court drew on well-accepted limits to jurisdictional pleading to support its common-sense holding that minimal diversity exists here. No further review is warranted, particularly at this juncture.

A. The Parties' Dispute

In November 2018, Marriott announced a cyberattack on the guest reservation database of its subsidiary Starwood. Pet.App.3a. This cyberattack resulted in the filing of more than 80 consumer class actions that were consolidated in the Marriott MDL before the district court here. Pet.App.3a; *In re Marriott Int'l Customer Data Security Breach Litig.*, 19-md-2879 (D. Md.). These actions include every person in the world whose information was in the Starwood guest reservation database, including two putative class actions whose classes are broadly defined as "[a]ll persons" whose personal identifying information "was accessed, compromised, or stolen from Marriott" because of the data security incident. Pet.App.7a (quoting *Mendez v. Marriott Int'l, Inc.*, No. 19-cv-520-PWG (D. Md.) (Compl. ¶ 59, ECF No.

1) and *Trager v. Marriott Int'l, Inc.*, No. 18-cv-3745-PWG (D. Md.) (Compl. ¶ 46, ECF No. 1)).

The present case is the second of two nearly identical class actions brought by the same counsel in Connecticut state court. The first was *Frank*, which was filed in February 2019. *Frank v. Marriott Int'l, Inc.*, No. 19-cv-326 (D. Conn.) (Compl., ECF 1-1). The complaint in that case alleged there were "hundreds of millions of customers all over the world" affected by the cyberattack, but sought to represent a class consisting only of "American citizens who live abroad and whose Personal Information was accessed, compromised, or stolen in the Data Breach." *Id.* ¶¶ 59, 61. It identified no reason for including only "American citizens who live abroad." But the obvious explanation was that plaintiffs' counsel was trying to carve out a class of "stateless" plaintiffs under 28 U.S.C. § 1332, and thus avoid removal to federal court and transfer to the Marriott MDL. Pet.App.4a, 12a.

That ploy misfired. American citizens are "stateless" under Section 1332 only if they are domiciled abroad, as opposed to merely living abroad while maintaining their permanent domicile in the United States. *See Herrick Co., Inc. v. SCS Commc'ns, Inc.*, 251 F.3d 315, 322 (2d Cir. 2001). Marriott asserted as much when it removed the *Frank* action to the District of Connecticut. Plaintiffs' counsel voluntarily dismissed the case the very next day. Pet.App.4a.

Two months later, the same counsel filed this action in Connecticut state court. *Simon v. Marriott*

Int'l, Inc., 19-cv-873 (D. Conn.) (Compl., ECF 1-1). The *Simon* and *Frank* complaints are virtual carbon copies. They contain the same factual allegations, assert the same causes of action, name the same defendants, and request the same relief. Indeed, Petitioners were members of the putative class defined in *Frank*, for they too allege they are American citizens living in a foreign country, in this case Israel. *Id.* ¶ 12. The only differences were to swap out the named plaintiffs and carefully re-design the class definition to include only "U.S. citizens who are *domiciled* abroad[.]" *Id.* ¶ 66 (emphasis added); Pet.App.12a (comparing the *Simon* and *Frank* complaints and noting that the "attorney changed only 'live abroad'" in *Frank* to "'domiciled abroad'" in *Simon* "to prevent an argument that a plaintiff living abroad nonetheless was domiciled in the United States").

Marriott removed *Simon* to the District of Connecticut on June 5, 2019. Pet.App.5a. The case was transferred to the District of Maryland and consolidated into the Marriott MDL in June 2019. Pet.App.3a.

B. Proceedings Below

After transfer, Petitioners moved to remand, arguing that, because their class was defined as "[a]ll U.S. citizens who are *domiciled abroad* and whose Personal Information was compromised, accessed, or stolen in the [Marriott] Data Breach," CAFA's minimal diversity requirement is not met. Pet.App.4a-5a.

In opposition, Marriott advanced two arguments.

First, it argued that the district court possessed jurisdiction over Petitioners' claims because they were subsumed by the two putative class actions already pending before the district court on behalf of all Starwood guests, irrespective of citizenship or domicile. Pet.App.7a. Marriott argued that CAFA's minimal diversity requirement was satisfied and the court could look past its contrived class definition and base jurisdiction on the fact that Petitioners' class claims were already in federal court. Pet.App.7a.

Second, Marriott argued that federal jurisdiction was established by the earlier *Frank* action, because it raised the same claims on behalf of all members of the *Simon* class. Pet.App.4a. Unable to challenge the removal of *Frank*, counsel simply dismissed it and refiled the same claims with new named plaintiffs. Pet.App.12a. But that gambit could not disturb the district court's jurisdiction: once federal jurisdiction attaches, as it did in *Frank*, it cannot be divested by altering the class definition or swapping out the named plaintiff—even in a nominally new action.

The district court denied remand. The issue, it explained, was both "one of first impression" and "narrow": "Can a class-action plaintiff pursue a lawsuit in state court consisting of claims that already are included in a CAFA suit within an existing MDL by manipulating the allegations in their complaint to skirt the minimal diversity requirement of CAFA?" Pet.App.8a.

It found that Marriott's first argument provided a convincing answer. Pet.App.4a. Contrary to

Petitioners' claim that the district court "acknowledged the lack of minimal diversity," Pet.2, it found the minimal diversity requirement satisfied because it already had "jurisdiction over class action claims that subsume [Petitioners'] claims." Pet.App.4a. Thus, it had "jurisdiction over [Petitioners'] claims," as well. Pet.App.4a.

Petitioners, it reasoned, could not employ clever drafting to "divest[] this court of jurisdiction it already has acquired." Pet.App.11a. Analogizing their "manipulation" of jurisdictional allegations to the practice of fraudulent joinder, the district court reasoned that the Petitioners could not negate its preexisting jurisdiction over the same claims through the artifice of peeling off the "stateless" members of those putative classes. Pet.App.6a-8a. And Petitioners had not identified "any legitimate basis for the need to litigate their claims separately from the MDL because of their geographic locations—having a domicile abroad." Pet.App.11a.

Petitioners sought discretionary interlocutory appeal under 28 U.S.C. § 1453(c)(1), which the Fourth Circuit denied in a one-sentence order: "Upon consideration of submissions relative to the petition for leave to appeal denial of remand order under the Class Action Fairness Act, 28 U.S.C. § 1453(c)(1), the court denies the petition." Pet.App.1a.

REASONS FOR DENYING THE PETITION

Petitioners' request for review of the Fourth Circuit's order denying leave to appeal should be denied for three reasons:

I. This is a poor vehicle for certiorari because it does not implicate the question that Petitioners seek to present—indeed, the Court lacks jurisdiction to reach that question. At most, it presents the inconsequential question of whether the Fourth Circuit abused its discretion when it declined to accept Petitioners' appeal from the district court's order denying remand. Not even Petitioners argue that this issue merits this Court's review. Because the Fourth Circuit denied discretionary review of Petitioners' interlocutory appeal, the merits of the district court's order were never before it—nor are they raised here.

II. The issue Petitioners claim to present is not important and has not generated any split of authority. Petitioners do not point the Court to any other case in CAFA's fifteen-year history that raised the "narrow" question Petitioners would have the Court address. Pet.App.8a. An issue such as this, which has not been the subject of meaningful discussion in the federal circuits, and is raised here only due to the novel machinations of these Petitioners and their counsel, does not call for this Court's review.

III. Review is also unwarranted because the district court was correct to exercise jurisdiction over Petitioners' claims. The district court held that Petitioners cannot slice off "stateless" individuals

from an existing CAFA class action to force litigation of those same claims in a copycat action in state court. Pet.App.6a-8a. That holding is not only consistent with CAFA's minimal diversity requirement, it is also in line with precedent directing courts to "look behind" allegations where jurisdictional manipulation is at play. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014) ("We have interpreted the diversity jurisdiction statute to require courts in certain contexts to look behind the pleadings to ensure that parties are not improperly creating or destroying diversity jurisdiction.").

Moreover, an alternative, independent basis supports the decision denying remand. The *Simon* complaint was effectively a post-removal amendment of the *Frank* complaint, the first complaint filed by Petitioners' counsel. Once federal jurisdiction attaches, it cannot be destroyed by altering the class definition or switching out the named plaintiff, even in a "new" action like *Simon.* Although the district court did not reach this issue, it provides an independent basis for upholding federal jurisdiction here.

I. The Petition Does Not Raise The Question Presented By Petitioners.

The only issue that could possibly be before this Court at this stage is whether the court below abused its discretion in denying Petitioners' application for leave to appeal the district court's interlocutory order denying their motion to remand to state court. The Court lacks jurisdiction to review

the issues decided by the district court's order, including the question presented as framed by Petitioners.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1), Pet.3, which extends only to cases "in the courts of appeals." That, in turn, requires the Court to ascertain, as a "threshold question" before reaching the merits, what was "properly 'in' the Court of Appeals." *United States v. Nixon*, 418 U.S. 683, 690 (1974).

Here, the only question "in" the court of appeals was whether to exercise its jurisdiction to "accept an appeal from an order of a district court…denying a motion to remand a class action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1). Because the appeals court denied the application for leave to appeal, the merits of the district court order were never before it, and thus cannot be before this Court. *See Hohn v. United States*, 524 U.S. 236, 242 (1998) (holding as much with respect to an appeals court's denial of a certificate of appealability); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (holding that this Court's review of the denial of a certificate of appealability "is not the occasion for a ruling on the merit of [a] petitioner's claim"); *Slack v. McDaniel*, 529 U.S. 473, 481 (2000).

In a footnote, Petitioners claim that this Court may look past the Fourth Circuit's discretionary denial of review under 28 U.S.C. § 1453(c)(1) and review the merits of the district court's order denying remand. Pet.7, n.1. The Court may do so, Petitioners assert, because the Court did so in *Dart*

Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81 (2014), another case that reached the Court following a denial of leave to appeal. Pet.7, n.1; Pet.10, 26-27.

Petitioners are mistaken. The *Dart* Court reached the merits because it concluded that such review, and review of the Tenth Circuit's discretionary denial of review "do not pose genuinely discrete questions." *Dart Cherokee Basin Operating Co., LLC*, 574 U.S. at 95. There, the district court remanded the case after concluding, based on Tenth Circuit precedent, that the defendant failed to present evidence with its notice of removal that the complaint satisfied the jurisdictional amount-in-controversy requirement. *Id.* at 85-86. The Tenth Circuit then denied discretionary review based "[u]pon careful consideration of the parties' submissions, as well as *the applicable law*." *Id.* at 93. (emphasis added).

As this Court reasoned, the only way to read "the applicable law" was in reference to the Tenth Circuit's rule that "to remove successfully, a defendant must present with the notice of removal enough evidence proving the amount in controversy." *Id.* Thus, by denying review based on "the applicable law," the Tenth Circuit guaranteed that the "law applied by the District Court—demanding that the notice of removal contain evidence documenting the amount in controversy—will be frozen in place for all venues within the Tenth Circuit." *Id.* at 92. As the Court reasoned, "[f]rom all signals one can discern then, the Tenth

Circuit's denial of Dart's request for review of the remand order was infected by legal error." *Id.* at 93. And because this Court "no doubt ha[d] authority to review . . . the Tenth Circuit's denial of Dart's appeal" for abuse of discretion, it could at the same time correct "the erroneous view of the law the Tenth Circuit's decision fastened on district courts within the Circuit's domain." *Id.* at 95-96. Whether considered review of the merits, or review of the discretionary denial of review, "resolution of both issues depends on the answer to the very same question: What must the removal notice contain?" *Id.* at 95.

Here, by contrast, no such inference as to the Fourth Circuit's reasoning in denying leave to appeal is possible. Its order, of course, states only that leave was denied. Pet.App.1a. And unlike in *Dart*, which involved an otherwise-unreviewable district court order remanding to state court, the appeals court here had no particular reason to permit interlocutory appeal when review could be had following final judgment. In other words, this is not a case where, "[a]bsent an interlocutory appeal, . . . the question [will] in all probability escape meaningful appellate review." *Dart Cherokee Basin Operating Co., LLC*, 574 U.S. at 91 (quotation marks and alteration omitted).

Ignoring the possibility of post-judgment review, Petitioners claim that this is the only opportunity that this Court will have to review the merits of the district court's decision. Pet.26–27. That is incorrect. *See generally* 14C Charles Alan Wright & Arthur R.

Miller, Federal Practice & Procedure § 3741 (4th ed.) (where "the district court has denied remand, the propriety of the removal is reviewable on appeal in several different, but traditional ways[,]" including on "review of the final judgment in the case").

Likewise, this is not a case where, as a practical matter, "denial of review established the law not simply for this case, but for future CAFA removals." *Dart Cherokee Basin Operating Co., LLC*, 574 U.S. at 92. To the contrary, the decision below merely denied interlocutory appeal on an issue subject to appeal-as-of-right following final judgment and so established no law at all, as a practical matter or otherwise.

Although Petitioners assert that this unreasoned order "impliedly sanctioned the district court's construction of CAFA," Pet.26, they identify no basis for that conclusion. None is apparent from the record. Unlike in *Dart*, this is not a case where the district court relied on circuit precedent that the circuit court, in turn, presumably applied in denying appeal. *See* 574 U.S. at 91-92. To the contrary, the district court identified the jurisdictional issue as one of "first impression." Pet.App.8a.

Moreover, unlike in *Dart*, there were any number of good reasons for the court below to deny interlocutory appeal. One is the standard policy of disfavoring interlocutory appeals regarding orders and issues subject to appeal following final judgment. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). Another is the presence of an alternative basis for jurisdiction—the *Frank*

action—that the district court found unnecessary to reach. *See Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 333-34 (4th Cir. 2019) (enumerating considerations in determining whether to accept Section 1453(c)(1) appeals, including whether the question presented is consequential or likely to recur). A third is CAFA's requirement that interlocutory appeals be decided on an expedited basis, which could undermine considered development of the law, particularly in a case involving a matter of first impression. *See* 28 U.S.C. § 1453(c)(2). Fourth is the narrowness and novelty of the jurisdictional issue, which weigh heavily against the need for an appeals court's intercession at this early juncture. *See Dominion Energy, Inc.*, 928 F.3d at 333-34. In short, there were any number of good reasons apart from the merits for the Fourth Circuit to exercise its discretion the way it did, and so this Court may not presume that its ruling was premised on acceptance of merits of the district court's order. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386 (2008).

The upshot is that this case does not present the question proposed by Petitioners. The only issue before the Court is whether the Fourth Circuit abused its discretion in denying review here. And that is not a question of exceptional importance meriting the Court's review.

II. Petitioner's Question Presented Is Not Important.

This case is a one-off, reflecting the novelty of Petitioners' gambit to evade federal jurisdiction in

the face of an MDL already exercising jurisdiction over their claims. The district court concluded that this issue had never arisen before, Pet.App.8a, and there is no indication that it will ever arise again. There is no circuit authority on that issue—much less a circuit split—or even a conflict in district court authority. Petitioners do not identify a single other case that would be affected by a decision on that issue. And no *amicus curiae* weighed in to support Petitioners.

As the district court correctly observed, Petitioners' case raises a "narrow" issue "of first impression": can a class action plaintiff pursuing claims already raised in a CAFA suit in a pending MDL "manipulat[e] the allegations in their complaint to skirt the minimal diversity requirement of CAFA?" Pet.App.8a. CAFA has been the law since 2005. Pub. L. No. 109-2, 119 Stat. 4. By both Respondents' and the district court's estimation, Petitioners are the *only* litigants in the last fifteen years to try to game CAFA's minimal diversity requirement in this fashion. Pet.App.8a. While Petitioners may claim rights as progenitors of this novel approach to jurisdictional pleading, the last decade and half shows that this case is an aberration, not the beginning of a trend. Nor are Petitioners likely to invite copycats; there are, after all, good reasons why no one attempted this ploy until now and why no one has attempted it since.

Petitioners, however, warn of "jurisdictional mischief" should this Court decline review. Pet.16. According to Petitioners, failing to resolve the niche

issue addressed by the district court will collapse basic tenants of federal jurisdiction, leading to widespread abuse of removal procedures and the "dramatic[] expan[sion]" of the prudential first-to-file rule. Pet.16-17. This mischief will occur, Petitioners predict, because the district court's order permits jurisdiction "whenever a MDL, or even another federal case, is based on the same conduct or occurrence." Pet.16.

The Court can rest assured that this will not come to pass if it declines review. The only issue here is Petitioners' misreading of the district court's opinion. The district court did not hold that jurisdiction was appropriate because Petitioners' case is based on the same conduct or occurrence as others pending in the MDL. Rather, the district court held that federal jurisdiction exists because it already attached to two CAFA class actions pending in the MDL before Petitioners filed suit and Petitioners' claims are "wholly included" in those pending actions. Pet.App.10a-11a; Pet.App.4a (because "this Court has jurisdiction over class action claims that subsume the Simons' claims, this Court has jurisdiction over the Simons' claims"). They are, in effect, the same case.

In short, CAFA's minimal diversity requirement has endured fifteen years of sustained class-action litigation without any appeals court ever deciding the question posed by Petitioners. There is no cause for the Court to consider that question now.

III. The Decision Below Is Correct.

A. The District Court's Look Through The Pleadings Was Appropriate.

The district court's order denying remand is a straightforward application of governing law. Under CAFA, minimal diversity exists if "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). When they filed suit in May 2019, Petitioners sought to represent "[a]ll U.S. citizens who are domiciled abroad and whose Personal Information was compromised, accessed, or stolen in the [Marriott] Data Breach." Pet.App.6a. But by the time Petitioners brought suit, there were already two class actions pending in the MDL over which the district court undoubtedly had jurisdiction that raised the same claims and covered the same putative class members. Pet.App.7a-8a. Thus, consistent with CAFA's minimal diversity requirement, the district court refused to remand Petitioners' action because it already had CAFA jurisdiction over class actions in the MDL "that subsume the Simons' claims." Pet.App.4a, 8a. And importantly, Petitioners could not negate that jurisdiction by the artifice of peeling off the "stateless" members of those putative classes. Pet.App.6a-8a.

According to Petitioners, the district court had no choice but to accept their gerrymandered class definition at face value, without consideration of the plain evidence of jurisdictional manipulation or the goals of CAFA or the MDL process. Pet.11-12. But

no constitutional or statutory rule requires the district court to blind itself to Petitioners' gamesmanship. As the district court reasoned, their position as master of the complaint is not without limit, especially in the context of CAFA proceedings in a pending MDL. Pet.App.10a. In reaching this conclusion, the district court joined other courts that refused to condone plaintiffs' attempt to game their way out of federal court. *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-09 (6th Cir. 2008); *In re Kitec Plumbing Sys. Prod. Liab. Litig.*, 2010 WL 11618052, at *5-6 (N.D. Tex. Aug. 23, 2010). In both those cases, the courts looked past contrived class allegations that served no purpose other than to avoid CAFA by dividing what would otherwise be one federal lawsuit into multiple state court actions. The same is true in this case. That this conclusion also furthers CAFA's policies of consolidating significant putative class actions in federal court is further proof of the decision's correctness, not any error.

As the trial court observed, Pet.App.13a-14a, what Petitioners are trying to do is the other side of the fraudulent-joinder coin—what might be called "fraudulent dis-joinder." The traditional fraudulent-joinder scenario arises in the non-CAFA context, where federal jurisdiction requires *complete* diversity—a plaintiff tries to avoid jurisdiction in that instance by adding a non-diverse defendant who should not be in the case. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). Here, Petitioners are seeking

to avoid CAFA, which requires only *minimal* diversity, by separating themselves and other stateless individuals from classes that are already properly before the MDL court. The two tactics are equally improper—one a ruse to defeat complete diversity, the other to defeat minimal diversity.

Without a valid justification for structuring their putative class the way they did, Petitioners fall back to the position that "there is nothing improper about limiting a putative class to only citizens of a particular state, or in this case, to individuals who have no state citizenship." Pet.24 (citing cases). Tellingly, none of Petitioners' cases actually involve a plaintiff that structured his or her alleged class to only include those with no state citizenship. And none involve a fact pattern like the one here, where the attempt at jurisdictional manipulation is manifest.

Petitioners also try to draw a comparison between the All Writs Act in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002) and the MDL statute here, 28 U.S.C. § 1407, arguing that neither affords an independent basis for removal. Pet.18-21. But this has no bearing on this case because the district court did not tie its removal decision to the MDL statute. *See* Pet.20-21. Rather, federal jurisdiction exists here because Petitioners' claims are "wholly included" within those actions, *i.e.*, they are the *same* claims already before the district court. Pet.App.11a.

B. Another Basis for Federal Jurisdiction Exists Here.

Another reason to deny review is that answering the question posed by Petitioners could have no practical consequence in this litigation. Although the district court had no need to reach this issue, minimal diversity is also present here because it existed at the time Marriott removed the *Frank* case. The *Frank* complaint defined the class to include American citizens "living abroad," which included at least one individual diverse from the defendants, thereby satisfying CAFA's minimal diversity requirement. Pet.App.4a, 12a. As Marriott argued, because the *Simon* complaint was effectively a post-removal amendment of the *Frank* complaint, jurisdiction exists based on the definition in *Frank.* Pet.App.4a, 12a.

The removability of a case "depends upon the state of the pleadings and the record at the time of the application for removal[.]" *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 216 (1906). The law does not afford a second bite at the jurisdictional apple by amending or refiling claims to alter the class definition or to swap out the named plaintiff for another member of the putative class. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 & n.6 (2007) ("[R]emoval cases raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment."); *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 768 F.3d 425, 429 (5th Cir. 2014)

("Allowing Cedar Lodge to avoid federal jurisdiction through a post-removal amendment would turn the policy underlying CAFA on its head."); *In re Burlington N. Santa Fe. Ry. Co.*, 606 F.3d 379, 381 (7th Cir. 2010) ("[R]emoval cases present concerns about forum manipulation that counsel against allowing a plaintiff's post-removal amendments to affect jurisdiction."). Simply put, mulligans are not allowed.

On that basis, federal courts consistently have rejected attempts to secure remand based on post-removal amendments that purport to eliminate CAFA jurisdiction, whether by altering the class definition, *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277-79 (9th Cir. 2017); *Hargett v. RevClaims, LLC*, 854 F.3d 962, 966-67 (8th Cir. 2017), adding a local defendant, *Cedar Lodge*, 768 F.3d at 428-29, or eliminating the class allegations altogether, *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101-02 (2d Cir. 2015); *In re Burlington*, 606 F.3d at 381.

What happened here is the functional equivalent of a post-removal amendment and thus cannot divest the district court of jurisdiction. This provides an independent basis for jurisdiction here, making this case a poor vehicle to address the question proposed by Petitioners.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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