No. 23-225

In The
Supreme Court of the United States

KEITH M. KRUPKA, et al.,

Petitioners,

v.

STIFEL NICOLAUS & CO., INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

In accordance with Supreme Court Rule 15.2, Respondent Stifel, Nicolaus & Company, Incorporated ("Respondent") objects to Petitioners' description of the Question Presented.

The Question Presented from a procedural or jurisdictional standpoint is more properly stated as follows:

Whether there is an issue of "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," as set forth in Supreme Court Rule 11, for this Court to grant *certiorari* before final judgment to review the Eighth Circuit's summary denial of Petitioners' 28 U.S.C. § 1453(c)(1) petition for a discretionary appeal of an interlocutory District Court order denying remand under the Class Action Fairness Act (CAFA), where:

(i) the motion to remand concerned a statutory exemption to CAFA that is narrowly construed with all doubts resolved against Petitioners;

(ii) there is no Circuit split on the issue presented, and the Eighth Circuit Court of Appeals has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," as set forth in Supreme Court Rule 10;

COUNTERSTATEMENT OF QUESTION PRESENTED—Continued

(iii) in denying the motion to remand, the District Court applied the substantive legal rule adopted by every Circuit Court of Appeals that has addressed the issue; and

(iv) the question Petitioners seek to present now may be reviewed in the future by this Court after a final judgment and after any future appeal to the Eighth Circuit.

The Questions Presented from a substantive standpoint, to the extent the Court considers the substance or merits of the Petition are more properly stated as follows:

First, whether the Eighth Circuit abused its discretion in entering its interlocutory order summarily denying (without comment) Petitioners' petition for an appeal under 28 U.S.C. § 1453(c)(1) of the District Court's order denying Petitioners' motion to remand under CAFA, which provides that "[a] court of appeals *may accept* an appeal from an order of a district court granting or denying a motion to remand a class action".

Second, to the extent the Court considers the merits of the District Court's interlocutory ruling denying Petitioners' motion to remand, the question presented is whether Petitioners met their burden to establish that the third statutory exception to federal jurisdiction under CAFA (28 U.S.C. § 1332(d)(9)(C); 28 U.S.C. § 1453(d)(3)) applies to their putative class action

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asserting claims on behalf of purchasers of municipal bonds against an underwriter/seller for alleged negligent due diligence in the underwriting of bonds and alleged negligent misrepresentations and omissions in connection with the sale of the bonds where federal jurisdiction under CAFA is broadly construed, the statutory exceptions to CAFA are narrowly construed, and all doubts relating to the application of any exception to CAFA are resolved against Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Stifel Nicolaus & Company, Incorporated ("Respondent" or "Stifel") hereby discloses the following:

Stifel Nicolaus & Company, Incorporated is a wholly-owned subsidiary of Stifel Financial Corp., which is a publicly traded company. BlackRock, Inc., a Delaware corporation, is the beneficial owner of greater than 10% of Stifel Financial Corp.'s outstanding shares.

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RESPONDENT STIFEL'S BRIEF IN OPPOSITION TO THE PETITION FOR *CERTIORARI*

I. INTRODUCTION

The Petition for writ of *certiorari* should be denied outright because it is premature, as there is no final judgment to review, and the Eighth Circuit Court of Appeals has not even reviewed the question presented regarding a narrow exception under CAFA. The Eighth Circuit merely entered an interlocutory order, denying (without comment) Petitioners' petition seeking permission to file an appeal of the District Court's denial of Petitioners' motion to remand under 28 U.S.C. § 1453(c)(1). There is no "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court," as set forth in Supreme Court Rule 11. There is nothing for this Court to review, as the Eighth Circuit has not ruled on the merits of the question presented, and the case remains pending in the District Court. Although the Petition does not have any substantive merit, the question Petitioners seek to present may be reviewed in the future by this Court after a final judgment is entered by the District Court and any future appeal to the Eighth Circuit. Until then, the Petition is premature and, therefore, should be denied.

Moreover, there is no Circuit split on the issue presented, and the Eighth Circuit has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," as set forth in Supreme Court Rule 10 to justify

granting *certiorari*. Petitioners are asking this Court to review the District Court's interlocutory order denying their motion for remand, which applied the uniform precedent from the other Circuit Courts on the narrow exception to CAFA at issue. Petitioners' position is not only contrary to fifteen years of uniform Circuit Court precedent, but it is also contrary to the statute's plain language and legislative history. Petitioners' position is also contrary to this Court's precedent holding, consistent with CAFA's legislative history, that jurisdiction under CAFA is broadly construed. Adopting Petitioners' position that the narrow statutory exception should be construed broadly would also render other provisions in the statute superfluous. The Petition should be denied.

II. JURISDICTION

Respondent objects to Petitioners' Jurisdictional Statement. Although this Court has jurisdiction under 28 U.S.C. § 1254(1) to review interlocutory decisions of a federal court of appeals, granting *certiorari* to review the interlocutory order of the Eighth Circuit in this case would be unprecedented where, as here, the case remains pending in the District Court and this Court will have the opportunity to review the issue in the future after the Eighth Circuit rules on the merits.

Petitioners' case law does not support this Court obtaining or accepting jurisdiction to review the District Court's interlocutory order in these circumstances, as there is no emergency and the case remains pending

in the District Court before appellate review. Petitioners' reliance on *Hohn v. United States*, 524 U.S. 236 (1998) is unsupportable. *Hohn* is distinguishable because the underlying order of the district court that the petitioner sought to appeal from—the denial of a motion to vacate a criminal conviction—was unquestionably final whereas here, the District Court's order denying the motion to remand is unquestionably interlocutory, and the underlying District Court action remains pending. In holding that the Court of Appeals' denial of a request for a certificate of appealability constituted a case in the court of appeals for purposes of § 1254(1) jurisdiction, this Court explained that "when the district court has denied relief *and applicable requirements of finality have been satisfied*, the next step is review in the court of appeals." 524 U.S. at 241 (emphasis added). Here, in stark contrast to *Hohn*, the applicable requirements of finality have not been satisfied, as Petitioners seek to challenge the Eighth Circuit's interlocutory order under 28 U.S.C. § 1453(c)(1) denying Petitioners' petition to appeal the District Court's interlocutory order denying their motion to remand. Thus, unlike *Hohn*, the case remains pending in the District Court, and Petitioners will have the right to appeal any final judgment of the District Court against them to the Eighth Circuit for consideration of the merits of Petitioners' objection to the District Court's jurisdiction. If the Eighth Circuit rules against Petitioners in the future as part of the normal appellate process, then a petition for *certiorari* would be ripe for potential consideration.

Standard Fire Ins. Co. v. Knowles, 568 U.S. 588 (2013), and *Dart Cherokee Basin, Operating Co., LLC v. Owens*, 574 U.S. 81 (2014), are also both distinguishable because those cases involved the review of orders *granting* a motion to remand the cases back to the state court where the Courts of Appeals declined further review. Thus, the decisions by the district courts in those cases were essentially final and not subject to future review in any federal court, but for this Court granting *certiorari*.[1] This is not the case here, where the case remains pending in the District Court after the District Court denied Petitioners' motion to remand and the Eighth Circuit denied Petitioners' request for permission to file an interlocutory appeal. There is no precedent or compelling reason that would support this Court granting *certiorari* to review the Eighth Circuit's denial of an interlocutory order—much less the District Court's order denying remand—when no final judgment has been entered and the Eighth Circuit has not ruled on the merits of Petitioners' jurisdictional challenge.[2] Even assuming the Court has

[1] It should be noted that four justices in *Dart Cherokee* questioned this Court's jurisdiction to review the underlying decision of the district court's remand order because this Court only has jurisdiction to review whether the Court of Appeals abused its discretion in denying the petitioner's request for permission to appeal the district court's remand order. *See Dart Cherokee*, 574 U.S. at 96–97 (Scalia, J., joined by Kennedy, Kagan, and Thomas, JJ., dissenting).

[2] This is not the rare type of case where the Court has granted *certiorari* to review an interlocutory order in a pending case to address an emergency affecting the health or safety of a petitioner who would be potentially harmed and without any remedy if the case was not immediately reviewed by this Court before

jurisdiction to review either of these issues, granting *certiorari* would be premature and would be an unnecessary waste of this Court's finite judicial resources, as discussed further below.

III. STATEMENT REGARDING STATUTES INVOLVED IN THE CASE

Respondent takes issue with Petitioners' statement regarding the laws involved in this matter as incomplete because Petitioners selectively quote certain statutory provisions, while leaving out various relevant provisions. The following federal statutes are pertinent to this matter:

The Class Action Fairness Act ("CAFA"), is codified, in relevant part, at 28 U.S.C. § 1332(d)(2) and (d)(9)(A)–(C), and 28 U.S.C. § 1453. The statutory provisions that are relevant to the Petition are set forth in *Appendix 1*, attached hereto.

IV. STATEMENT OF THE CASE

Respondent takes issue with Petitioners' Statement of the Case. First, Petitioners fail to alert this Court that the underlying action remains pending in the U.S. District Court for the Eastern District of Missouri after the Eighth Circuit entered its interlocutory

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a final judgment. *See*, *e.g.*, *Sell v. U.S.*, 539 U.S. 166 (2003) (Court granting *certiorari* to review whether magistrate judge's order requiring criminal defendant to involuntarily take antipsychotic drugs solely to render him competent to stand trial was constitutional).

order denying Petitioners' petition seeking permission to appeal the District Court's order denying Petitioners' motion to remand under 28 U.S.C. § 1453(c)(1). Because Petitioners, two California residents, did not timely file their Complaint within the applicable statute of limitations, Respondent filed a Motion for Judgment on the Pleadings with the District Court based on the claims being barred under the applicable statute of limitations. That Motion is currently pending before the District Court. After the District Court enters a final judgment, the parties will have the opportunity to appeal that final judgment, including any jurisdictional issues, to the Eighth Circuit.

Second, Petitioners fail to attach their Complaint to the Petition and do not even cite any of the specific allegations in their Complaint to describe their claims. (*See* Petition, pp. 2–5). The Complaint must be reviewed in order to consider the merits of their underlying challenge to the jurisdiction of the District Court—i.e., whether Petitioners met their burden to establish that their claims fall within the narrow exception to CAFA at issue while resolving all doubts against them. Petitioners did not attach their Complaint to their Petition because their actual claims and allegations show that the lawsuit clearly falls outside the narrow securities exception, as consistently held by all of the Circuit Courts to have addressed the issue. Respondent hereby attaches Petitioners' Complaint as part of *Appendix 2* to the extent the Court wishes to review it.[3]

[3] While Petitioners' claims against Respondent are false, Respondent will not address the merits of those claims in this filing.

Petitioners' Statement of the Case, respectfully, should not be considered, as it merely attempts to summarize or re-characterize its claims without any citations to the record.

V. THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED.

A. THE PETITION IS PREMATURE AND DOES NOT PRESENT A MATTER OF "NATIONAL PUBLIC IMPORTANCE" REQUIRING THE "IMMEDIATE DETERMINATION" OF THIS COURT UNDER RULE 11 TO JUSTIFY GRANTING *CERTIORARI* TO REVIEW AN INTERLOCUTORY ORDER IN A PENDING CASE.

The Petition for writ of *certiorari* should be denied outright because it is premature, as there is no final judgment to review. Petitioners are challenging an interlocutory order of the Eighth Circuit Court of Appeals, which summarily denied Petitioners' petition seeking permission to appeal the District Court's denial of Petitioners' motion to remand under 28 U.S.C. § 1453(c)(1). Granting *certiorari* would waste judicial resources, as the Eighth Circuit has the unfettered discretion under the statute to deny Petitioners' request for permission to appeal the District Court's

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Nothing herein shall be construed as an acknowledgment as to the validity of any allegation or claim asserted by Petitioners in their lawsuit.

decision for any reason without limitation. *See* 28 U.S.C. § 1453(c)(1) ("[A] court of appeals *may* accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.") (emphasis added). There is no basis to conclude that the Eighth Circuit abused its statutory discretion in denying Petitioners' request for permission to file an appeal. The Eighth Circuit has not even reviewed the question presented on the merits, and the case remains pending in the District Court.

As a general matter, this Court's *certiorari* power is "sparingly exercised." *Forsyth v. Hammond*, 166 U.S. 506, 515 (1897). It is even more rare for this Court to grant *certiorari* to review an interlocutory order. While this Court is authorized to grant *certiorari* before judgment in the Court of Appeals, *see* 28 U.S.C. § 2101(e); 28 U.S.C. § 1254(1), this "is *an extremely rare occurrence*." *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers) (emphasis added). Such a writ "will be granted only upon a showing that the case is of such *imperative public importance* as to justify deviation from normal appellate practice and to require *immediate determination* in this Court." Sup. Ct. R. 11 (emphasis added). To meet Rule 11's exacting standard, a case must be "of extraordinary constitutional moment [or] demanding [of] prompt resolution for other reasons." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 351 n.30 (1985) (Brennan, J., dissenting) (collecting cases in which *certiorari* was

granted without appellate review pursuant to the Rule 11 standard and including *United States v. Nixon*, 418 U.S. 683, 686–87 (1974) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), among others). Petitioners do not come close to meeting this standard.

Petitioners fail to acknowledge the extraordinary nature of their request and do not even claim that there is any "imperative public importance" or emergency, as required under Rule 11, for this Court to grant *certiorari* of an interlocutory order in a case that remains pending in the District Court. To the contrary, Petitioners' own arguments in their Petition show that the Rule 11 standard has not been satisfied.

Petitioners spend most of their Petition arguing that the Court should grant *certiorari* to overturn the Second Circuit's decision in *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), which was relied on by the District Court in denying Petitioners' motion to remand. (*See* Petition, at pp. 5–17); (Dist. Ct. Order, Appendix B to Petition). This, alone, shows that *certiorari* should be denied because there is no urgent need to review this 2008 opinion now before the normal appellate process is exhausted. Petitioners are not challenging a decision by the Eighth Circuit on the merits of the issue presented, but are challenging the prior Court of Appeals' opinion on the narrow statutory exception to CAFA at issue that has been in effect, and has been consistently followed by the other Circuit Courts, since 2008. There is obviously no matter of "imperative public importance" that requires this Court's "immediate determination," as required by Rule 11, for

this Court to grant *certiorari* to review an interlocutory order of the District Court merely to consider whether a 15-year-old opinion from the Second Circuit was correctly decided (although the decision was correct, as confirmed by all subsequent Circuit Courts to have addressed the issue). This Court has only ever granted *certiorari* before judgment a handful of times, when faced with extraordinary circumstances not present here. Because the parties will have the opportunity to seek this Court's review after the District Court enters a final judgment and after the appeals process is exhausted with the Eighth Circuit, the Court should deny the Petition and allow the normal appellate process to run its course.

Moreover, after the District Court enters its final judgment or after the Eighth Circuit considers any appeal, Petitioners may no longer wish to challenge the jurisdictional issue presented. Therefore, granting *certiorari* before a final judgment issues would be entirely premature.

A denial of *certiorari* now "[does] not establish the law of the case or amount to res judicata on the points raised." *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973) (writ of *certiorari* as to default judgment dismissed as improvidently granted and case remanded for ruling on damages; after final judgment and appeal, *certiorari* granted and default judgment reversed based on immunity defense). Therefore, denying the Petition will not deprive Petitioners of any rights nor prejudice their ability to raise the issue again after exhausting the appellate process. The

Petition for writ of *certiorari* should be denied as premature and because it fails to meet the extraordinary standard for review of an interlocutory order under Rule 11.

B. THE EIGHTH CIRCUIT HAS NOT ENTERED A DECISION IN CONFLICT WITH ANY OTHER CIRCUIT COURT TO JUSTIFY GRANTING *CERTIORARI* UNDER RULE 10(a).

In deciding whether to grant *certiorari*, this Court considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a). The Petition also does not satisfy this standard.

Petitioners' argument that there have been "contradictory opinions in the Eighth Circuit and elsewhere" (Petition, at p. 15) is misleading, as the Eighth Circuit has not ruled. This standard under Rule 10(a) is not satisfied because the instant case does not involve a decision by the Eighth Circuit Court of Appeals in conflict with the decision by another Circuit Court. Sup. Ct. R. 10(a). In fact, the Eighth Circuit has never considered the merits of the question presented in this case or in any prior case. (*See* District Court Order denying Motion to Remand, Petition, Appendix B, at 7a) ("The Eighth Circuit has not opined on the proper application of CAFA's securities exception."). The Eighth Circuit merely denied Petitioners' petition

for a discretionary appeal of the District Court's order denying the motion to remand under 28 U.S.C. § 1453(c)(1) without comment. (*See* Petition, Appendix A). This case remains pending in the District Court.

Because the Eighth Circuit has not "entered a decision in conflict with the decision of another United States court of appeals," as set forth in Rule 10(a), *certiorari* should be denied.

C. THERE IS NO CIRCUIT SPLIT.

While the Eighth Circuit has not ruled on the merits, which is reason enough to deny *certiorari*, there is not even a Circuit split among the Circuit Courts that have addressed the issue presented. This Court has explained that it grants *certiorari* "*to resolve disagreement among the courts of appeals* on a question of national importance." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003) (emphasis added); *see also Clay v. United States*, 537 U.S. 522, 524 (2003) (granting review of "recurring question on which courts of appeals have divided"). Petitioners all but concede that there is no Circuit split on the issue presented, but merely argue that the opinions are "muddled." (Petition, at p. 5). That is not a basis for the Court to grant *certiorari*, particularly at this interlocutory stage.

Petitioners' argument that there are different interpretations by the Circuit Courts is based on a single *dissenting* opinion from the Fourth Circuit. (*See* Petition at pp. 12–13). In reality, the Circuit Courts have consistently applied the narrow securities exception to

CAFA jurisdiction in line with Second Circuit precedent dating back to 2008. *See Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008). Indeed, the various Circuit Courts to have addressed the securities exception "***have considered—and substantially agreed with—the Second Circuit's assessments***." *Dominion Energy, Inc. v. City of Warrant Police and Fire Retirement Sys.*, 928 F.3d 325, 341 (4th Cir. 2019) (emphasis added); *Eminence Investors, L.L.L.P. v. Bank of N.Y. Mellon*, 782 F.3d 504, 509 (9th Cir. 2015) (emphasizing desire to avoid "intercircuit conflicts" and expressly "*join[ing] our sister circuit [the Second Circuit] on the issue before us*") (emphasis added). As these cases show, there is no Circuit split.

To the extent Petitioners argue that *certiorari* should be granted because there are "contradictory" opinions in certain district courts (*see* Petition, at p. 15), this is not a basis to grant *certiorari*. This Court's practice with respect to district court decisions is well known:

> *The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit*. The Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review—the courts of appeals, other federal courts of the same stature, and the highest state courts in which decisions may be had.

Eugene Gressman, et al., *Supreme Court Practice* 256 (9th ed. 2007) (emphasis added). This Court does not grant *certiorari* for a conflict between a district court decision and a circuit court decision. *See* Sup. Ct. R. 10(a). Because the Eighth Circuit has not ruled on the merits and there is no Circuit split, *certiorari* should be denied.

D. THE PETITION HAS NO SUBSTANTIVE MERIT.

The Court should deny *certiorari* for all the reasons above. In the alternative, *certiorari* should be denied because the Petition has no substantive merit.

1. CAFA is Construed to Grant Broad Federal Jurisdiction with Narrow Exceptions.

As this Court has recognized, CAFA's "provisions *should be read broadly*, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee Basin*, 574 U.S. at 89 (quoting S. Rep. No. 109–14, p. 43 (2005)) (emphasis added). CAFA is interpreted to "grant broad federal jurisdiction with narrow exceptions." *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010). The case law and legislative history establish that the exceptions to CAFA jurisdiction must be narrowly construed. *Dominion*, 928 F.3d at 336 (citing *Westerfeld*, 621 F.3d at 822;

S. Rep. No. 109–14, at 43 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 41).

It is undisputed that CAFA's initial requirements for removal were satisfied in this case because there is minimal diversity, 100 or more class members, and at least $5 million in controversy. 28 U.S.C. § 1332(d)(2). Therefore, "the burden shifts to the party seeking remand [Petitioners] to establish that one of CAFA's express jurisdictional exceptions applies." *Westerfeld*, 621 F.3d at 822. Moreover, "any doubt is resolved against remand." *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 265 (8th Cir. 2014); *accord Westerfeld*, 621 F.3d at 822. Here, the record establishes that Petitioners' motion to remand was properly denied by the District Court because Petitioners did not carry their burden to show that the narrow securities exception applies, particularly when resolving all doubts against remand, as required.

2. The Securities Exception to CAFA (28 U.S.C. § 1332(d)(9)(C), 28 U.S.C. § 1453(d)(3)) is Narrowly Construed Consistent with its Plain Language to Avoid Superfluous Results.

The narrow securities exception to CAFA jurisdiction relied on by Plaintiffs only applies if the class action "*solely* involves a claim . . . *that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security* as defined under section 2(a)(1) of the

Securities Act of 1933 (15 U.S.C. 77b(a)(1)). . . ." 28 U.S.C. § 1332(d)(9)(C) (emphasis added); 28 U.S.C. § 1453(d)(3) (providing same "exception" to CAFA jurisdiction). The seminal case addressing the securities exception is *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), which was the first Court of Appeals to interpret the statute. *Id.* at 26. In that case, the Second Circuit broke down the wording of § 1332(d)(9)(C) and § 1453(d)(3) into numbered phrases to ascertain its meaning:

> [i] [Section 1332(d)(2) and section 1453(b) and (c)] shall not apply to any class action that *solely* involves a claim . . . that relates to
>
> [ii] the rights, duties (including fiduciary duties), and obligations
>
> [iii] relating to or created by or pursuant to
>
> [iv] any security. . . .

527 F.3d at 31 (emphasis added). The Court rejected the same argument that Petitioners repeatedly make here (*see* Petition, at pp. 11, 16), that this exception applies to any and all claims that merely "*relate to any security*, because that would afford no meaning to [ii] and [iii], which are evidently terms of limitation." 527 F.3d at 31 (emphasis added). Thus, as *Cardarelli* recognized, Petitioners' position is contrary to the statute's plain language. The other Circuit Courts to have addressed the issue have agreed with *Cardarelli*'s reasoning and have rejected Petitioners' argument that the securities exception applies if the claim merely "relates to" a security. *See*, *e.g.*, *Dominion*, 928 F.3d at 341

(4th Cir.); *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 620–21 (7th Cir. 2012); *see also Cal. Div. of Labor Standards Enf't v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else."). Rather, the plain language of the statute specifically requires that the suit "solely" relates to the "*rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to*" the security itself. 28 U.S.C. § 1332(d)(9)(C) (emphasis added). This would include such claims that are traditionally within the province of state courts, such as claims relating to the failure to pay interest owed under a security or the breach of a bond trustee's duties in administering a security. *See Cardardelli*, 527 F.3d at 31–32 ("Claims that 'relate [] to the rights . . . and obligations' 'created by or pursuant to' a security must be claims grounded in the terms of the security itself, the kind of claims that might arise where the interest rate was pegged to a rate set by a bank that later merges into another bank, or where a bond series is discontinued, or where a failure to negotiate replacement credit results in a default on principal. The present claim—that a debt security was fraudulently marketed by an insolvent enterprise—does not enforce the rights of the Certificate holders as holders, and therefore it does not fall within § 1332(d)(9)(C) and § 1453(d)(3)."). But the statute's limiting language would not apply to claims, like here, seeking to recover

losses relating to misrepresentations or omissions in connection with the *purchase* of securities. *See id.*[4]

The Second Circuit in *Cardarelli* also rejected Petitioners' broad, conclusory approach that the exception should be "read to cover any and all claims that relate to any security" because that would render much of the text of the exception superfluous—not to mention the other two exceptions in § 1332(d)(9). 527 F.3d at 32. Specifically, CAFA provides three narrow exceptions to jurisdiction (the third of which is the securities exception at issue):

> Paragraph (2) [granting district courts original jurisdiction over such class actions] shall not apply to any class action that ***solely involves a claim***—
>
> (A) ***concerning a covered security*** as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 77p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> (B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

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[4] Thus, contrary to Petitioners' arguments, the "purchaser" versus "holder" distinction is supported by the plain language of the statute.

> (C) ***that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security*** (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

28 U.S.C. § 1332(d)(9) (emphasis added).

The first exception to CAFA jurisdiction shown above applies to a suit that "solely involves a claim . . . *concerning a covered security*." 28 U.S.C. § 1332(d)(9)(A) (emphasis added).[5] Petitioners failed to quote this entire statutory section in their Petition because their argument seeking such a broad interpretation of the third statutory exception would entirely negate the first exception. (*See* Petition, at pp. 1–2). Petitioners' position that their claims are excepted from CAFA jurisdiction under the third exception here because they merely "relate" to a security or a security instrument (Petition, at pp. 11, 16) would render the first exception applying to "covered securities" as superfluous and with no effect. If all claims are outside CAFA jurisdiction because they "relate" to securities or securities

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[5] Although suits "solely" concerning "covered" securities are excepted from federal jurisdiction under CAFA, the Securities Litigation Uniform Standards Act ("SLUSA"), Pub.L. No. 105–353, 112 Stat. 3227, codified as amended in part at 15 U.S.C. §§ 77p and 78bb(f), provides a separate basis to remove most state or federal securities actions brought as a class action, which involve such "covered" securities. *See Cardarelli*, 527 F.3d at 30. "Covered" securities include securities traded on a national exchange. 15 U.S.C. § 77r(b). There is no contention that the lawsuit at issue concerns a "covered security" under the applicable definition.

instruments under the third exception, as argued by Petitioners, there would be no need for the first exception to CAFA jurisdiction applying to "a *covered security*." 28 U.S.C. § 1332(d)(9) (emphasis added); *Cardarelli*, 527 F.3d at 32 (rejecting same argument asserted by Petitioners because "we prefer an interpretation that preserves the meaning of an entire subsection"). Adopting Petitioners' position would, therefore, contravene the statutory canon that this Court employs in construing federal statutes, which is to avoid an interpretation that would make any provision "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted).

Petitioners' position is also contrary to the precedent and legislative history establishing that the exceptions to CAFA are narrowly, not broadly, construed. *Dominion*, 928 F.3d at 336 (citing *Westerfeld*, 621 F.3d at 822; S. Rep. No. 109–14, at 43 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 41). The legislative history demonstrates that Congress intended the exception as "applying only to suits that seek to enforce the terms of instruments that create and define securities [such as traditional state common law claims to collect interest owed on bonds or notes], and to duties imposed on persons who administer securities." *Cardarelli*, 527 F.3d at 33 (citing S. Rep. No. 109–14, at 45 (2005)). This Court has relied on that same legislative history in broadly construing CAFA provisions. *See Dart Cherokee Basin*, 574 U.S. 89 (citing S. Rep. No. 109–14, p. 43 (2005)).

The plaintiffs' claims in *Cardarelli* did not seek to assert their rights as holders of securities to enforce the terms of the instruments creating or defining the securities or to assert claims against the persons administering those securities (such as a bond trustee), but sought to enforce their rights as purchasers seeking damages based on the defendants' failure to disclose certain information in connection with the sale of securities. 527 F.3d at 26–27. Therefore, the Court held that the narrow securities exception did not apply. *Id.* at 32; *accord Eminence*, 782 F.3d at 509 (9th Cir.) ("[T]he key distinction [from *Cardarelli*] was whether the plaintiffs were seeking to enforce their rights as holders . . . or purchasers of the certificates").

3. The Circuit Courts Have Consistently Followed *Cardarelli* and the other Second Circuit Court Decisions in their Narrow Interpretation of the Securities Exception.

All Circuit Courts to have considered the issue have followed *Cardarelli* and the other Second Circuit decisions[6] in their interpretation of the securities

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[6] *See Greenwich Financial Services Distressed Mortgage Fund 3 LLC v. Countrywide Financial Corp.*, 603 F.3d 23, 28–29 (2d Cir. 2010) (holding securities exception applied because [unlike here] the plaintiffs solely sought "enforcement of their rights as holders rather than as purchasers" in suing mortgage servicers under Pooling and Servicing Agreements or Sale and Servicing Agreements that created the securities) (quoting *Cardarelli*, 527 F.3d at 33); *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 179 (2d Cir. 2012) (holding the

exception found in § 1332(d)(9)(C) and § 1453(d)(3). *Dominion*, 928 F.3d at 341 (4th Cir.) ("Those [Circuit] courts have considered—and substantially agreed with—the Second Circuit's assessments.") (citing Second, Seventh, and Ninth Circuit cases). The Circuit Courts have uniformly rejected Petitioners' broad reading of the securities exception to cover any claim that merely relates to a security or security instrument. *See*, *e.g.*, *id.* ("As the *Cardarelli* decision explains, the securities-related exception does not apply to 'any and all claims that relate to any security.' "); *Appert*, 673 F.3d at 620–21 (7th Cir.) (same). Indeed, in relying on *dissenting* opinions from *Cardarelli* and other cases, Petitioners advance an argument that the Circuit Courts have repeatedly and unanimously rejected. (*See* Petition, at pp. 7, 11–13). Most recently, the Ninth Circuit also endorsed the same interpretation of the securities exception as set forth by the Second Circuit in *Cardarelli* and the other courts above. *Eminence*, 782 F.3d at 508.[7] That case, like all the Circuit Courts to have addressed the issue, expressly "join[ed] our sister circuit [the Second Circuit] on the issue before us." *Id.*

"sole claim presented" in the case triggered securities exception because [unlike here] "it concerns the relationship between the entity which administers the securities, The Bank of New York Mellon, and the certificateholders.").

[7] *Eminence* ultimately held that the securities exception barred CAFA jurisdiction, 782 F.3d at 510, but it did so for reasons factually distinguishable from the instant case, *see id.* ("The Second Circuit's reasoning regarding CAFA's securities exception therefore does not conflict with our conclusion above that the exception clearly applies to the causes of action in this case.").

4. The District Court's Order Properly Denied the Motion to Remand Because Petitioners Did Not Meet their Burden to Fall within the Narrow Exception to CAFA when Construing All Doubts Against them, as Required.

Petitioners not only failed to attach their underlying Complaint to the Petition, they did not quote or cite to any of the specific allegations from their suit in describing their claims because they do not want the Court to review the actual claims. (*See* Petition, at pp. 2–5). The Complaint, which is attached hereto at *Appendix 2*, shows that their claims fall outside the scope of the narrow exception.

The narrow statutory exception relied on by Petitioners only applies if the action "*solely* involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations *relating to or created by or pursuant to any security*. . . ." 28 U.S.C. § 1332(d)(9)(C) (emphasis added). As construed by the Circuit Courts, the statutory language and legislative history shows that this exception applies "only to suits that seek to *enforce the terms of instruments that create and define securities*, and to duties imposed on persons who administer securities." *Cardarelli*, 527 F.3d at 31–32 (emphasis added); *accord Greenwich*, 603 F.3d at 28–29 (2d Cir.); *Blackrock*, 673 F.3d at 176 (2d Cir.); *Dominion*, 928 F.3d at 339–41 (4th Cir.); *Eminence*, 782 F.3d at 509–10 (9th Cir.). Petitioners' lawsuit does not seek to enforce the terms of any security (such as seeking to

collect interest owed pursuant to a security) nor do Petitioners assert claims against the administrator of the securities—the bond trustee for failing to comply with its duties and obligations under the security.[8] (*See* Complaint, *Appendix 2*). Rather, Petitioners are suing Stifel, as the underwriter, based on alleged negligent underwriting and alleged misrepresentations or omissions in connection with the sale of the bonds pursuant to an offering document. (*Id.* at ¶¶ 18–70). Petitioners conceded to the District Court that the Official Statement, or offering document, in which they base their claims (*see id.*) is not itself a security, and Petitioners are not enforcing the terms any security in this case. (*See* Dist. Ct. Order, at 11a) ("*Plaintiffs concede that the Official Statement itself is not a security* but suggest that it should be treated in similar fashion . . . the foregoing precedent does not support Plaintiff's position. In cases where remand was granted, the plaintiffs sued in their capacity as holders alleging breach of fiduciary duties owed by the defendant trustees or corporate board members and related claims. . . .") (emphasis added).

Moreover, Petitioners have not sued the bond trustee relating to the administration of the securities. As shown in the Complaint, the trustee charged with

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[8] This distinguishes the present case from other Circuit Court rulings where the exception was deemed to apply in cases brought by or against administrators of securities, such as bond trustees, relating to their duties and obligations owed under security instruments. *See Greenwich*, 603 F.3d at 28 (2d Cir.); *Blackrock*, 673 F.3d at 179 (2d Cir.); *Eminence*, 782 F.3d at 509 (9th Cir.).

administering the bonds is UMB Bank, not Respondent Stifel. (*See* Complaint, *Appendix 2*, at ¶ 34). Stifel was the prior underwriter of the bonds who "serve[d] as intermediaries between bond issuers/borrowers *and the investors that purchase bonds*." (*Id*. at ¶ 46) (emphasis added). While the claims in the lawsuit have no merit, Petitioners' theory is that Stifel, as the underwriter, misrepresented or omitted material facts that should have been disclosed to them as purchasers of the bonds. (*Id.* at ¶¶ 18–70). The District Court correctly applied the uniform precedent from the Circuit Courts set forth above, in holding that Petitioners did not carry their burden to establish application of the narrow securities exception to CAFA removal because, like *Cardarelli* and unlike *Greenwich*, *Blackrock*, and *Eminence*, Petitioners' lawsuit seeks to enforce their rights as purchasers of the bonds—and not to enforce the terms of a security or to assert claims relating to the administration of the bonds (*e.g.*, claims against the bond trustee). (Dist. Ct. Order, Appendix B to Petition, at 12a) ("[W]here plaintiffs have sued as purchasers alleging misrepresentation in the sale of securities, courts have denied remand. . . . Plaintiffs have not sued the trustee and do not plead the existence of a fiduciary relationship on which their claims depend. Rather, they allege injury from Stifel's negligent due diligence and resulting misrepresentations in the offering memorandum provided to potential investors as purchasers. Applying the foregoing caselaw to this set of facts . . . remand is not warranted under the CAFA securities exception.") (citing *Cardarelli*, 527 F.3d at 32).

Importantly, Petitioners have the burden of establishing the securities exception, the exception is narrowly construed, and all doubts must be resolved against Petitioners in applying the exception. (Dist. Ct. Order, Appendix B to Petition, at 6a) (citing *Westerfeld*, 621 F.3d at 822). Moreover, the narrow exception only applies if the action "***solely*** involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security. . . ." 28 U.S.C. § 1332(d)(9)(C) (emphasis added). Thus, even if Petitioners' claims related in some way to enforcing the terms of the securities or their administration (which they do not), their claims do not "*solely*" relate to these issues, as required to trigger the exception under the statute's plain language. The District Court properly found that Petitioners have not and cannot meet their burden to trigger that narrow exception to the federal court's broad jurisdiction under CAFA. (Dist. Ct. Order, Appendix B to Petition).

VI. CONCLUSION

Based on the foregoing, the Petition for writ of *certiorari* should be denied.

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Respectfully submitted,

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