No. _____

In the

Supreme Court of the United States

ERIE INDEMNITY COMPANY,
Petitioner,

v.

ERIE INSURANCE EXCHANGE, an unincorporated association, by TROY STEPHENSON, CHRISTINA STEPHENSON, and STEVEN BARNETT, trustees *ad litem*, and alternatively, ERIE INSURANCE EXCHANGE, by TROY STEPHENSON, CHRISTINA STEPHENSON, and STEVEN BARNETT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the ability of class action plaintiffs to subvert the jurisdictional protections of the Class Action Fairness Act ("CAFA") and the removal statutes through procedural gamesmanship. This Court has emphasized that courts must not "exalt form over substance" when assessing federal CAFA jurisdiction. *Standard Fire Ins. Co v. Knowles*, 568 U.S. 588, 595 (2013). And it has long held that post-removal events "do not oust the district court's jurisdiction once it has attached." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). This case turns on those two principles. Plaintiffs here filed a class action complaint against Erie Indemnity Co. ("Indemnity") in state court. After Indemnity removed to federal court, Plaintiffs voluntarily dismissed and refiled an amended version of their complaint—which pleaded the same claim, based on the same legal theory and facts, and sought the same sort of class-wide relief on behalf of all Erie Insurance policyholders nationwide. But, in an effort to thwart federal jurisdiction, Plaintiffs purported to restyle their class action under different state rules. The decision below held that such maneuvering could defeat federal CAFA jurisdiction.

The questions presented are:

1. Whether plaintiffs can evade federal CAFA jurisdiction through pleading artifices, while pursuing a representative action for the purported benefit of a class of millions of individuals nationwide.

2. Whether plaintiffs can destroy vested federal CAFA jurisdiction by voluntarily dismissing and then refiling an amended version of their complaint.

PARTIES TO THE PROCEEDING

Petitioner Erie Indemnity Co. was defendant in the district court and appellant before the Third Circuit. The nominal plaintiff-appellee is Erie Insurance Exchange, an unincorporated association, by Troy Stephenson, Christina Stephenson, and Steven Barnett, trustees *ad litem*, and alternatively, Erie Insurance Exchange, by Troy Stephenson, Christina Stephenson, and Steven Barnett. As the panel recognized, however, the "real parties in interest" here are "all" of the individual policyholders in the Erie Insurance Exchange. Pet.App.16-17.

CORPORATE DISCLOSURE STATEMENT

Erie Indemnity Co. is a publicly traded company. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings:

- *Stephenson v. Erie Indem. Co.*, No. GD-21-010046 (Pa. Ct. Com. Pl. Allegheny Cnty.), notice of removal filed Oct. 20, 2021.
- *Stephenson v. Erie Indem. Co.*, No. 2:21-cv-01444 (W.D. Pa.), notice of voluntary dismissal filed Nov. 2, 2021.
- *Erie Ins. Exch. v. Erie Indem. Co.*, No. GD-21-014814 (Pa. Ct. Com. Pl. Allegheny Cnty.), notice of removal filed Jan. 27, 2022.
- *Erie Ins. Exch. v. Erie Indem. Co.*, No. GD-21-014814 (W.D. Pa.), judgment entered Sep. 28, 2022.
- *Erie Ins. Exch. v. Erie Indem. Co.*, No. 23-2053 (3d Cir.), judgment entered June 22, 2023.
- *Erie Indem. Co. v. Stephenson*, No. 1:22-cv-00093-CRE (W.D. Pa.), motion for preliminary injunction filed September 1, 2023.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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This case presents two legal questions concerning federal jurisdiction that have divided the lower courts. The central issue animating both questions is whether class action plaintiffs can thwart federal jurisdiction under the Class Action Fairness Act ("CAFA") through pleading artifices and post-removal gamesmanship. And because the Third Circuit granted discretionary review and then issued a reasoned opinion, this case presents an ideal vehicle for this Court to resolve these important issues.

In 2005, Congress enacted CAFA in response to widespread "abuses of the class action device" that had occurred in state-court litigation. CAFA § 2(a)(2) (codified as a note to 28 U.S.C. § 1711). Since then, this Court has emphasized that the Act's "primary objective" is to "ensur[e] 'Federal court consideration of interstate cases of national importance,'" and it has therefore warned lower courts not to "exalt form over substance" when assessing CAFA jurisdiction. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (quoting CAFA § 2(b)(2)). Nearly a century ago, this Court also made clear that a defendant's "statutory right of removal" is not "subject to the plaintiff's caprice." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). As a result, once a defendant has removed a case to federal court, plaintiffs cannot destroy that vested jurisdiction through post-removal maneuvers.

Those jurisdictional rules operate in tandem. And, until now, the lower courts have consistently followed both of them. In the years following *Standard Fire*, the Seventh and Eighth Circuits enforced this Court's

command not to exalt form over substance by refusing to allow plaintiffs to hide their class actions through artful pleading. A growing chorus of lower courts have also faithfully applied *Red Cab* to reject post-removal efforts by plaintiffs to manipulate their class actions back to state court through amendment or voluntary dismissal. But the decision below broke new and demonstrably incorrect ground on both fronts—and thereby enabled Plaintiffs to defeat CAFA jurisdiction.

This is precisely the type of case that Congress had in mind when it enacted CAFA. Troy Stephenson, Christina Stephenson, and Steven Barnett ("Plaintiffs") filed their case against Erie Indemnity Co. ("Indemnity") under Pennsylvania's class action rules, seeking millions of dollars on behalf of a sprawling class of insurance policyholders ("Subscribers"). Indemnity properly removed Plaintiffs' interstate class action to federal court. At that point, having "perfected" the removal, federal jurisdiction attached to this controversy, and Plaintiffs "could not defeat that jurisdiction." *Red Cab*, 303 U.S. at 294. But, in a transparent effort to do just that, Plaintiffs dismissed and refiled their case in Pennsylvania state court once again. Although their second complaint invoked different state procedural rules, in substance it was identical. Plaintiffs[1] still alleged the same claim based on the same operative facts. And they continued, through their same counsel, to seek the same sort of class-wide injunctive relief and damages for the purported benefit of "all" two-million-plus Subscribers nationwide.

[1] Susan Rubel, who was listed as a fourth plaintiff in the original complaint, was not listed on the second complaint.

Pet.App.100. Indemnity removed again, explaining that neither Plaintiffs' dismiss-and-refile tactic nor the labels they affixed to their latest complaint could thwart federal jurisdiction.

In holding otherwise, the Third Circuit issued an outlier decision that threatens to "promote the kind of procedural gaming CAFA was enacted to prevent." *Williams v. Emps. Mut. Cas. Co.*, 845 F.3d 891, 901 (8th Cir. 2017). In conflict with the Seventh and Eighth Circuits, the court elevated form over substance and refused to cut through Plaintiffs' "coy pleading." *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 745 (7th Cir. 2013). And it did so while applying a cramped understanding of CAFA's "class action" definition that defies CAFA's text and this Court's command that "CAFA's 'provisions should be read broadly.'" *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014) (quoting S. Rep. No. 109-14, at 43 (2005)). Worse, it circumvented this Court's holdings by engrafting a novel exception onto this Court's rule in *Standard Fire*, proclaiming that courts may countenance pleading artifices directed at legal—as opposed to factual—inquiries. *Standard Fire* squarely refutes such an exception.

The Third Circuit also allowed Plaintiffs' post-removal dismiss-and-refile gambit to destroy federal jurisdiction. But that, too, conflicts with this Court's holding in *Red Cab*, and it splits with decisions from the Second, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. If permitted to stand, the combination of these errors will enable plaintiffs' lawyers to defeat defendants' removal rights and maneuver nationwide

class actions back into state court—in violation of CAFA's statutory design and this Court's precedents.

The Court should thus grant certiorari to restore uniformity in the law, to correct the Third Circuit's errors on these issues of exceptional importance, and to vindicate Indemnity's congressionally conferred right to have this massive, interstate class action decided in federal court.

OPINIONS BELOW

The Third Circuit's opinion is reported at 68 F.4th 815 and reproduced at Pet.App.1-19. The district court's opinion is unreported but available at 2022 WL 4534746 and reproduced at Pet.App.20-29.

JURISDICTION

The Third Circuit issued its opinion on May 22, 2023, and denied a timely rehearing petition on June 22, 2023. Pet.App.1, 30-31. On September 6, 2023, Justice Alito extended the time to file a petition for writ of certiorari from September 20, 2023, to October 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the Appendix: CAFA, Pub. L. No. 109-2, § 2, 119 Stat. 4-5 (2005); 28 U.S.C. § 1332; and 28 U.S.C. § 1441(a). *See* Pet.App.34-45.

STATEMENT OF THE CASE

A. Legal Background

Article III extends the federal "judicial Power" to "Controversies . . . between Citizens of different

States." U.S. Const. art. III, § 2, cl. 1. In such disputes, local interests "might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice" in the state courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). The Framers thus enabled litigants "to have the[se] controversies heard, tried, and determined before the national tribunals." *Id.* And the First Congress reinforced that protection by providing defendants the right to remove certain diversity actions to federal court, notwithstanding the plaintiff's choice of a state forum. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (1789).

That practice has continued unabated ever since. *See Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344 (1976); 28 U.S.C. § 1441(a). And, consistent with the removal protections that Congress has afforded defendants, this Court has long held that a plaintiff cannot "take away [a defendant's] privilege" to "invoke the jurisdiction of the federal court" after the defendant's proper removal. *Red Cab*, 303 U.S. at 296. Thus, post-removal actions "do not oust the district court's jurisdiction once it has attached." *Id.* at 293.

CAFA is built on these principles. When Congress enacted CAFA in 2005, it recognized that then-prevalent "[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers." CAFA § 2(a)(4). In response, it passed CAFA with the "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 568 U.S. at 595 (quoting CAFA § 2(b)(2)). To that end,

Congress significantly "relaxed" the requirements for diversity jurisdiction, *Dart Cherokee*, 574 U.S. at 84, which in turn "expand[ed] defendants' opportunities to remove" class actions to federal court, Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1630 (2006). Indeed, "CAFA represents the largest expansion of federal jurisdiction in recent memory." *Id.* at 1643.

Among CAFA's reforms, Congress eliminated the complete diversity requirement for invoking federal jurisdiction, instead requiring only minimal diversity. *See* 28 U.S.C. § 1332(d)(2)(A); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267-68 (1806). It likewise "abrogate[d] the rule against aggregating claims." *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 571 (2005); *see* 28 U.S.C. § 1332(d)(6). And it permitted removal to federal court "without regard to whether any defendant is a citizen of the State in which the action is brought." 28 U.S.C. § 1453(b). Congress expanded the right of removal in other ways too. It allowed "any defendant" to remove "without the consent of all defendants." *Id.* It nixed the limitation on removals based on events that occur more than a year after filing, *see id.*, and it provided for appellate review of orders remanding class actions to state court, *see id.* § 1453(c)(1).

Congress also defined a "class action" broadly to include "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or *similar* State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id.* § 1332(d)(1)(B) (emphasis added). That is, the state statute or rule

need not be *identical* to Rule 23 to support federal jurisdiction. It need only permit a "representative" to bring an "action" on behalf of a "class." *Id.* Consistent with this expansive definition, the CAFA Senate Report notes that the term "class action" should be "interpreted liberally," and that CAFA's "application should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." S. Rep. No. 109-14, at 35.

Taken together, CAFA's provisions demonstrate that Congress was "concerned that state courts were biased against defendants to [class] actions," and it thus "passed a law facilitating their removal." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1751 (2019) (Alito, J., dissenting). Despite that robust protection, however, "CAFA has inspired some of the most creative lawyering in recent decades, as plaintiffs' attorneys seek to evade CAFA class and mass action provisions and to retain aggregate litigation in state court forums." Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 Rev. Litig. 591, 593 (2013).

B. Factual Background

The present dispute involves a form of insurance structure known as a reciprocal insurance exchange. Like many other states, Pennsylvania authorizes individuals and other entities—known as "subscribers"—to "exchange reciprocal or inter-insurance contracts with each other" to "provid[e] indemnity among themselves" for insurable losses. 40 Pa. Stat. § 961. The idea is to create a "system of insurance" whereby subscribers "underwrite each other's risks against loss" through the management of

"an attorney-in-fact, common to all." *Neel v. Crittenden*, 44 A.2d 558, 561 (Pa. 1945) (citation and emphasis omitted); *see also* 40 Pa. Stat. § 963.

The Erie Insurance Group ("Erie") is one such reciprocal insurance system organized under Pennsylvania law. Pet.App.50. And it comprises two key components relevant to this litigation: "Indemnity" and "Exchange." Pet.App.50-51. Indemnity is a public corporation that manages the insurance functions and operations for Erie's millions of Subscribers. Pet.App.51. Those Subscribers are spread across twelve states and the District of Columbia. Pet.App.50. Exchange, meanwhile, serves as the technical, legal insuring entity. Pet.App.51. It does not have (nor is required to have) any directors, officers, or employees. Pet.App.51. Nor does it have any bylaws or constitution. Pet.App.69. As a result, Subscribers "neither have a vote in any matter concerning Exchange nor a say in [any] other way about the functioning of Exchange." Pet.App.73. Those matters are left entirely to Indemnity.

The foundational contract that creates and makes this structure work is the Subscriber's Agreement. Pet.App.51-52, 165-67. Every Subscriber individually signs a materially identical version of that single-page Agreement, to which Exchange is not a party. Pet.App.51. In doing so, Subscribers agree to pay their respective premiums, and to exchange reciprocal insurance obligations with one another. Pet.App.165. Each Subscriber also individually and identically appoints Indemnity as "Attorney-in-Fact" to manage Erie's web of reciprocal obligations, as well as the exchange and oversight of policies, the collection of

premiums, the investment and reinvestment of funds, the settlement of claims, and the performance of other insurance functions. Pet.App.51-52, 165-66. In return, each Subscriber individually and identically agrees that Indemnity may "retain up to 25% of all premiums written or assumed" by Erie as "compensation" for its management services. Pet.App.166.

That "Management Fee" is set on a nationwide basis and applies equally to all Subscribers, regardless of their location or policy type. Pet.App.53. In other words, it "is one, undifferentiated, across-the-board fee, the burden of which is borne equally by each [S]ubscriber in all the jurisdictions in which [Erie] does business." Pet.App.53.

C. Procedural History

For over a decade, a small number of Subscribers have challenged Indemnity's compensation practices and its contractually authorized 25% Management Fee through a series of class actions. *See* Pet.App.56-67. That string of class litigation has resulted in multiple federal judgments in Indemnity's favor, each of which dismissed complaints that specifically invoked CAFA jurisdiction. In *Beltz v. Erie Indemnity Co.*, 279 F. Supp. 3d 569 (W.D. Pa. 2017), *aff'd*, 733 F. App'x 595 (3d Cir. 2018), the district court dismissed a set of putative class claims (including one for breach of fiduciary duty) with prejudice, and the Third Circuit affirmed. Pet.App.60-61. Then, in *Ritz v. Erie Indemnity Co.*, 2019 WL 438086 (W.D. Pa. Feb. 4, 2019), a Subscriber filed another putative class action, alleging—just as Plaintiffs have here—that Indemnity breached its fiduciary duty by "unreasonably taking

the maximum allowable percentage" under the Subscriber's Agreement. *Id.* at *4; *see* Pet.App.138-39, 159-61. The *Ritz* court held that all Subscribers are in privity with one another and, as a result, res judicata flowing from *Beltz* barred those class claims as well. Pet.App.62-63.

Despite those rulings, Plaintiffs here were undeterred. Only two years after *Ritz*, they initiated this latest challenge to the Management Fee by suing Indemnity in Pennsylvania state court. Pet.App.63. They alleged the same breach-of-fiduciary-duty theory that was precluded in *Ritz*. *See* Pet.App.64-67, 138-39, 159-61. And they explicitly filed their case under Pennsylvania's class action rules. Pet.App.155-59. Yet, in a futile effort to evade federal jurisdiction and the federal judgments that precluded their claims, Plaintiffs purported to limit their putative class to Pennsylvania "residents." Pet.App.155. That decision was odd, given that all Subscribers are equally and uniformly affected by the Management Fee, are all in privity with one another, and would therefore all be bound by the court's judgment. *See Ritz*, 2019 WL 438086, at *5-6.

But regardless of the peculiar class definition that Plaintiffs had contrived to escape federal court, they still pleaded an interstate class action that satisfied all of CAFA's requirements. Pet.App.82. That is because the Pennsylvania "residents" identified in Plaintiffs' complaint included *citizens* of multiple states. Pet.App.189-94; *see Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905) ("[R]esidence and citizenship [are] wholly different things[.]"). The amount in controversy far exceeded $5,000,000. Pet.App.195.

And Plaintiffs sought to represent a class of thousands if not millions of Subscribers. Pet.App.195. Accordingly, Indemnity properly exercised its right to remove the controversy to federal court. Pet.App.64, 168; *see* 28 U.S.C. §§ 1332(d)(2), 1441(a).

Plaintiffs did not challenge the propriety of removal by moving to remand. Nor did they otherwise challenge federal jurisdiction under CAFA. Instead, Plaintiffs filed a notice of voluntary dismissal. Pet.App.64. They then quickly refiled another complaint in state court. Pet.App.64. But nothing other than their procedural labels had changed. Plaintiffs pleaded the same claim, through the same counsel, based on the same facts, and they sought the same sort of class-wide relief—"to benefit all members of Exchange." Pet.App.65-67, 94, 161. Only this time, Plaintiffs tried to disguise their class action by proclaiming themselves trustees *ad litem* for the Exchange and formally styling their complaint under Pennsylvania Rules of Civil Procedure 2152 and 2177. Pet.App.99.[2]

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[2] It bears mentioning that neither of those rules is viable here. Rule 2152 permits an action to be "prosecuted by an association" through "trustees ad litem." Pa. R. Civ. P. 2152. But an insurance exchange is not an "association" within the meaning of Pennsylvania's rules. *See* Pa. R. Civ. P. 2151 (excluding "a corporation or similar entity as defined in Rule 2176" from the definition of "association"); Pa. R. Civ. P. 2176 (defining "corporation or similar entity" to include "any . . . insurance association or exchange"). So Plaintiffs cannot proceed through that mechanism. Nor can they invoke Rule 2177. That rule permits an action to be "prosecuted *by* . . . a corporation or similar entity." Pa. R. Civ. P. 2177 (emphasis added). It does not

Indemnity again removed, arguing that neither Plaintiffs' artful labeling nor their post-removal amendment through dismissal-and-refiling could destroy federal jurisdiction. Pet.App.68-84. The District Court disagreed, holding that the jurisdictional inquiry turned solely on the procedural rules that Plaintiffs deployed in their latest complaint. Pet.App.23-26.

The Third Circuit granted Indemnity's petition for permission to appeal the Remand Order. Pet.App.32-33; *see* 28 U.S.C. § 1453(c). Then, after full merits briefing and oral argument, the court ultimately affirmed. Pet.App.3. Finding itself "bound to follow" the Third Circuit's previous decision in *Erie Insurance Exchange v. Erie Indemnity Co.*, 722 F.3d 154 (3d Cir. 2013) ("*Sullivan*"),[3] which interpreted CAFA's class action definition narrowly to require that the relevant state procedural rule mimic Rule 23's requirements, the court "conclude[d] that this case is not a class action on its face." Pet.App.9. It observed, however, that "[t]his does not end [the jurisdictional] inquiry," because a reviewing court "must cut through any

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"contemplate a suit filed *by a member* on behalf of an [unincorporated] association," as Plaintiffs have purported to do here. *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 159 (3d Cir. 2013) (emphasis added). The rules Plaintiffs have invoked in their latest complaint are thus wholly inapposite. And, in all events, the Subscriber's Agreement—which is executed by Indemnity and each Subscriber (not Exchange)—makes clear that Indemnity has the exclusive authority to act on behalf of the Exchange. *See* Pet.App.98, 165-66. Neither Plaintiffs nor their counsel possess such authority.

[3] Joseph S. Sullivan and Anita Sullivan purported to act as trustees *ad litem* in that prior litigation.

pleading artifice to identify whether the case is in substance an interstate class action." Pet.App.9-10. The Third Circuit conceded that "[t]he operative facts and the legal theory" were "identical" to those in Plaintiffs' original class action complaint. Pet.App.5. But then the court *refused* to consider the substance of Plaintiffs' case because, it said, reviewing courts may "look beyond the four corners of a complaint only when addressing factual predicates"—and the Third Circuit believed that Plaintiffs' evasive labeling did not implicate "facts beyond the Complaint." Pet.App.10-11.

Turning to *Red Cab*, the Third Circuit did not dispute that jurisdiction attached when Indemnity first removed Plaintiffs' case to federal court. Pet.App.13. But it once again elevated form over substance to allow Plaintiffs to escape that vested jurisdiction. In particular, even though *Red Cab* and its progeny hold that post-removal events "do not oust the district court's jurisdiction once it has attached," 303 U.S. at 293, the Third Circuit turned to *non-removal* cases to support the fictitious notion that a Rule 41(a) dismissal "leaves the situation as if the action never had been filed," Pet.App.13 (citation omitted). It thus concluded that "this case is not a continuation" of Plaintiffs' class action, despite the admittedly "substantial factual and legal overlap." Pet.App.13, 18.

REASONS FOR GRANTING THE PETITION

Both of the Third Circuit's flawed holdings conflict with precedent from other circuits and this Court. And both open dangerous loopholes that threaten to undermine CAFA's statutory design. Rather than allow those problematic circuit splits to persist, this Court should grant certiorari to resolve these important issues of federal CAFA jurisdiction.

I. This Court Should Grant Certiorari To Resolve A Circuit Split As To Whether Pleading Artifices Can Thwart Federal CAFA Jurisdiction.

The circuits are divided over the ability of named plaintiffs to avoid CAFA's removal protections by artful labeling. The Third Circuit, in this case, held that Plaintiffs' formalistic labels are dispositive as to whether a case is a "class action," whereas the Seventh and Eighth Circuit have looked beyond labels to examine the actual substance of a dispute. The Third Circuit's outlier position is at odds with this Court's precedent, as well as CAFA's text, history, and legislative design.

Congress designed CAFA to provide a necessary bulwark against abuses in representative litigation. It found that such "[a]buses" had proliferated in "State and local courts" over the preceding decade. CAFA § 2(a)(2), (4); *see Home Depot*, 139 S. Ct. at 1752-53 (Alito, J., dissenting). And it determined that this pattern of abuse was "undermin[ing] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers." CAFA § 2(a)(4). Congress thus enacted

CAFA with the express aim of "restor[ing] the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance." *Id.* § 2(b)(2). It also deliberately structured CAFA so that plaintiffs could not "'game' the procedural rules" to keep such interstate cases in state court. *Williams*, 845 F.3d at 901 (quoting S. Rep. No. 109-14, at 4); *see also F5 Capital v. Pappas*, 856 F.3d 61, 81 (2d Cir. 2017) ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." (emphasis omitted) (quoting *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008)).

In *Standard Fire*, this Court enforced that statutory design by holding that courts should not "exalt form over substance" when assessing efforts by plaintiffs to avoid CAFA jurisdiction. 568 U.S. at 595. The lower courts have since followed *Standard Fire* to reject such pleading artifices aimed at evading CAFA's jurisdictional reach. But the Third Circuit took a different approach here. Even though other Erie Subscribers have brought two prior federal class actions under CAFA alleging strikingly similar claims; even though Plaintiffs here originally filed their case under Pennsylvania's class action rules; and even though they continue to seek class-wide injunctive relief and damages on behalf of and to benefit "all" two-million-plus Subscribers nationwide, the Third Circuit "decline[d] to treat this case as a class action" based solely on the creative labeling in Plaintiffs' latest complaint. Pet.App.12. Because that elevation of form over substance is irreconcilable with *Standard Fire* and the uniform holdings of other circuits, it warrants this Court's review.

A. By Indulging Plaintiffs' Pleading Artifices, The Third Circuit Created A Circuit Split.

There is a "time-honored precept" of federal law that "substance trumps form" when assessing jurisdiction. *Aguilar v. U.S. Immigration & Customs Enforcement Div. of the Dep't of Homeland Sec.*, 510 F.3d 1, 16 (1st Cir. 2007) (citing *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 259 (1933) (declaring that the Court was "concerned, not with form, but with substance," in determining its jurisdiction)). Indeed, for over a century, this Court has stressed that "where [federal] jurisdiction depends upon the presence of controversies of a particular character or the existence of prescribed questions or conditions, substance and not mere form is the test of power." *United States ex rel. Brown v. Lane*, 232 U.S. 598, 600 (1914); *see also, e.g.*, *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 254 (1905) (stating, in a removal case, that "court[s] always look[] to substance and not to mere forms").

That principle has particular force in the removal context. "[T]he removal statute grants defendants a right to a federal forum." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 137 (2005). Accordingly, "courts should not sanction devices that are intended to prevent a removal to a Federal court where one has that right." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

Nowhere in CAFA did Congress intend to disturb that rule which forbids plaintiffs from "us[ing] artful pleading to close off [a] defendant's right to a federal forum." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (citation omitted). Nor would it have

made any sense for Congress to have done so. After all, Congress enacted CAFA to "facilitate" removal. *Dart Cherokee*, 574 U.S. at 89. And, if class action plaintiffs could engage in artful pleading to defeat federal jurisdiction, that would "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 568 U.S. at 595 (quoting CAFA § 2(b)(2)). Thus, "*Standard Fire* instruct[ed] courts to look beyond the complaint to determine whether [a] putative class action meets [CAFA's] jurisdictional requirements." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 981 (9th Cir. 2013) (citing *Standard Fire*, 568 U.S. at 594-96).

Standard Fire also demonstrates that substance trumps form for *both* legal *and* factual questions alike. There, this Court held that a class action plaintiff could not "avoid removal to federal court" by including a stipulation that "artificial[ly] cap[ped]" the damages sought to $5 million. 595 U.S at 591, 594-95. Though that pleading device formally placed the case below CAFA's jurisdictional threshold, this Court unanimously held that the district court "should have ignored" it. *Id.* at 596. And it reached that conclusion based solely on "legal principles"—namely, that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." *Id.* at 593. This Court did not need to look for "facts beyond the Complaint" to reject the plaintiff's gamesmanship. Pet.App.10.

As in *Standard Fire*, Plaintiffs here have artificially structured their pleadings in an obvious effort to undermine CAFA's jurisdictional protections.

In their latest complaint, they have tried to conceal their class claims under the guise of inapposite state procedural rules. *See supra* note 2. And they have purported to bring their case in the name of Exchange—despite the fact that Plaintiffs have no authority to seize control of that unincorporated association or litigate unilaterally on its behalf. In fact, Plaintiffs have conceded as much in their pleadings, by averring that *Indemnity* is the entity that "exercises control and authority over all aspects of Exchange." Pet.App.98.

The Third Circuit disputed none of this. Instead, it manufactured a novel exception to the rule this Court announced in *Standard Fire*, holding that courts may "look beyond the four corners of a complaint *only* when addressing factual predicates, not legal requirements." Pet.App.10 (emphasis added). That factual-versus-legal distinction is found nowhere in *Standard Fire*. In fact, it is irreconcilable with that decision—which turned on a *legal* determination that the plaintiff there "lacked the authority" to proceed under the pleading artifices he deployed to avoid CAFA. 568 U.S. at 593. This Court "d[id] not agree that CAFA forbids the federal court[s] to consider" such *legal* problems when addressing whether removal jurisdiction exists. *Id.* at 594. But the Third Circuit took precisely the opposite approach.

In doing so, it ignored that—in substance—this case is indisputably a class action. Everyone here agrees that Plaintiffs, like the plaintiffs in *Standard Fire*, are pursuing a representative action "to benefit all" of the millions of others they seek to represent. Pet.App.100. Indeed, the Third Circuit acknowledged

that "any benefit" they "recover[] here would flow to 'all members of Exchange' no matter where they reside." Pet.App.17 (citation omitted). And the potential amount of such recovery exceeds CAFA's jurisdictional threshold. Pet.App.83. Nevertheless, the Third Circuit held that it was barred from reaching the commonsense conclusion that this is a class action, because Plaintiffs' machinations were "legal" rather than "factual"—whatever that illusory distinction means. Pet.App.10.

That holding not only conflicts with *Standard Fire*, but also splits with decisions from multiple other circuits that have faithfully applied that decision. To start, it is directly at odds with the Seventh Circuit's decision in *Addison*, 731 F.3d 740. There, as here, the plaintiff voluntarily dismissed a class action removed under CAFA and "quickly filed yet another state court lawsuit," insisting that the new suit was an individual action and thus "'not a class action' under Federal Rule of Civil Procedure 23 or any state equivalent." *Id.* at 741-42. The defendant again removed the case under CAFA. *Id.* at 742. At first, employing reasoning akin to the Third Circuit's here, the district court credited that artifice and held that "the complaint's language asserting that Addison was suing only as an individual plaintiff showed conclusively that the suit did not fit CAFA's definition of a class action." *Id.* at 742. And, just as the Third Circuit here held that it could not "look beyond the four corners of [the] complaint," Pet.App.10, the plaintiff urged on appeal that "courts should look only to the complaint" in determining whether the case "is a class action," *Addison*, 731 F.3d at 744.

But that view was "not persuasive" to the Seventh Circuit. *Id.* Rather than assess the complaint "in a vacuum," the court followed this Court's direction in *Standard Fire*, refused to "exalt form over substance," and cut through Addison's "coy pleading" to the reality of the dispute. *Id.* at 743-45 (citation omitted). That led the Seventh Circuit to hold that the case remained "in substance a class action [that] was properly removed to federal court, notwithstanding Addison's artificial attempt to disguise the true nature of the suit." *Id.* at 742. The Seventh Circuit thus did exactly what the Third Circuit refused to do here.

The Eighth Circuit's decision in *Williams*, 845 F.3d 891, similarly heeded *Standard Fire*'s direction. The plaintiff there declined to invoke any class action rule in her complaint. *See id.* at 899. In turn, she argued that her representative suit was "not a class action because it was not 'filed under' Rule 23 or a state-law analogue." *Id.* But the district court was unconvinced. It concluded that—while the plaintiff's complaint may have been "labeled otherwise"—it still pleaded "a class action because [the case was] a class action in substance." *Id.* And the Eighth Circuit agreed. Like the Seventh Circuit in *Addison*, and unlike the Third Circuit here, it held that the plaintiff's legal labeling was not dispositive in determining whether the case met CAFA's "class action" definition. *See id.* at 901. "To hold otherwise," the court explained, "would prioritize a complaint's use of magic words over its factual allegations." *Id.* And it would "promote the kind of procedural gaming CAFA was enacted to prevent." *Id.* Accordingly, the Eighth Circuit concluded that the plaintiff's "action was necessarily"

a class action "even though the complaint omit[ted] explicit reference to such a rule." *Id.* at 902.

The decision below squarely conflicts with these decisions. Contrary to the Third Circuit, the Seventh and Eighth Circuits "look[] beyond the four corners of the complaint" in assessing the "legal requirement" of whether a case is a "class action" under CAFA. Pet.App.10. And those circuits are not alone in rejecting evasive efforts to defeat CAFA jurisdiction based on legal flaws in the plaintiffs' pleadings. For instance, even before *Standard Fire*, the Sixth Circuit refused to allow plaintiffs to avoid federal jurisdiction by filing multiple lawsuits covering discrete time periods that kept each below CAFA's amount-in-controversy requirement. *See Freeman*, 551 F.3d at 407-09. The Third Circuit characterized *Freeman* as raising a "quintessentially factual inquiry." Pet.App.10. But, as the Sixth Circuit's decision itself noted, there was no "factual dispute as to the amount of damages" there at all. 551 F.3d at 409. Instead, the Sixth Circuit held that plaintiffs cannot—*as a matter of law*—splinter a single claim into separate lawsuits covering distinct time periods to avoid CAFA's jurisdictional threshold. *See id.* at 407-09. As the Sixth Circuit explained, allowing plaintiffs to "artificially structur[e] their suits to avoid federal jurisdiction" in that way would undermine Congress' "obvious purpose in passing the statute—to allow defendants to defend large interstate class actions in federal court." *Id.* at 407.

So too here. "To allow [Plaintiffs'] 'recasting' of [their] complaint" would improperly "'give jurisdictional significance to a feint of language,'

thereby effectively thwarting [CAFA's] manifest purpose" and this Court's admonition that substance trumps form when assessing CAFA jurisdiction. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015) (alterations adopted; citation omitted); *see Standard Fire*, 568 U.S. at 595. Because the decision below opens a circuit split, while violating this Court's precedents and frustrating Congress' statutory design, the Court should grant review.

B. The Decision Below Is Wrong.

In addition to creating a circuit split, the decision below is wrong. This case is and always has been a class action that belongs in federal court. In fact, Plaintiffs know that their case is "in substance a class action." *Addison*, 731 F.3d at 741. That is why *they* filed it as such. Pet.App.155-59. In other Circuits, that would have been dispositive. But the Third Circuit indulged Plaintiffs' pleading artifices in violation of *Standard Fire* and CAFA.

Plaintiffs' original complaint—which they filed as a class action—revealed the "true nature of the[ir] suit." *Addison*, 731 F.3d at 742. Indeed, the decision below acknowledged that, *in substance*, nothing changed in Plaintiffs' relabeled second complaint. The "operative facts" and "legal theory" in both complaints are "identical." Pet.App.5. And Plaintiffs continue to seek class-wide relief "to benefit all" Subscribers nationwide. Pet.App.100. As the Third Circuit itself recognized, those millions of individuals—that class of Subscribers—are the "real parties in interest" in this case. Pet.App.16-17. In the Seventh and Eighth Circuits, binding precedent would have prevented Plaintiffs from "avoid[ing] federal jurisdiction for

[this] lawsuit that resembles a class action in all respects simply by omitting from the complaint the name of the rule" under which they might legitimately proceed. *Williams*, 845 F.3d at 901; *see Addison*, 731 F.3d at 742-45; *see also Badeaux v. Goodell*, 358 F. Supp. 3d 562, 567 (E.D. La. 2019).

The panel reached the opposite conclusion in part based on previous circuit precedent that adopted a highly restrictive view of CAFA's scope that is itself at odds with this Court's directions. *See* Pet.App.11-12. In *Sullivan*, a split Third Circuit panel held—unlike its sister circuits—that the Plaintiffs' labeling was dispositive in assessing whether a case is a "class action." *See* 722 F.3d at 160. The *Sullivan* majority then reasoned that Pennsylvania Rule 2152 is not sufficiently "similar" to Federal Rule 23 because it does not specifically (1) "provide for class certification mechanisms," (2) "list requirements such as numerosity or commonality," (3) "specify the form and substance of notice" required for absent class members, (4) "permit individual class members to opt-out," or (5) "provide for the appointment of a lead plaintiff or class counsel." *Id.* at 158-59. *But see id.* at 163 (Roth, J., dissenting) (If a complaint "quacks like a class action, it is a class action.").

But *Sullivan* was wrong, and its application in this case only highlights its distortive effect on CAFA jurisdiction. In particular, *Sullivan* and the decision below have combined to thwart CAFA's statutory design by permitting removal only when plaintiffs invoke Rule 23 or an *identical* (rather than "*similar*") state procedural rule. 28 U.S.C. § 1332(d)(1)(B) (emphasis added). That wooden approach violates

this Court's command that "CAFA's 'provisions should be read broadly'" in favor of federal jurisdiction. *Dart Cherokee*, 574 U.S. at 89 (citation omitted). And, as this case shows, the Third Circuit's unduly narrow interpretation simply encourages representative plaintiffs to try to shoehorn their class actions into state procedural rules that lack all the safeguards of federal Rule 23. Such contorted suits present an even greater possibility for "abuses" that "harm[] class members" and "defendants that have acted responsibly." CAFA § 2(a)(2). Thus, they are the cases where the federal class action "protections"—which are "grounded in due process"—are most needed. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). That is why Congress did not demand complete overlap between Rule 23 and the relevant state statute or rule. In fact, not all states even have such a carbon-copy class action rule. *See* S. Rep. No. 109-14 at 13-14. Instead, CAFA's text requires "similar[ity]" in only one respect—that the state rule authorizes "representative persons" to bring a "class action" on behalf of others. 28 U.S.C. § 1332(d)(1)(B).

To the extent Pennsylvania Rule 2152 or Rule 2177 authorizes this suit at all,[4] they fit squarely within that definition. After all, a "class action" is simply a "lawsuit in which the court authorizes a single person

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[4] Again, the fact they do not only underscores that Plaintiffs' artificially pleaded suit is "in substance a class action," *Addison*, 731 F.3d at 742, and highlights that the Third Circuit should have "look[ed] beyond the complaint"—as other circuits would have done—to hold that CAFA jurisdiction exists, *Rodriguez*, 728 F.3d at 981; *see Williams*, 845 F.3d at 901; *Addison*, 731 F.3d at 745; *Freeman*, 551 F.3d at 407-08.

or a small group of people to represent the interests of a larger group." *Black's Law Dictionary* 304 (10th ed. 2014); *accord Barron's Dictionary of Legal Terms* 92 (5th ed. 2016) ("a suit brought by one or more members of a large group of persons on behalf of all members of the group" (emphasis omitted)); *New Oxford American Dictionary* 320 (3d ed. 2010) ("a lawsuit filed . . . by an individual or small group acting on behalf of a large group"). In their latest complaint, as in their first, Plaintiffs still purport to be that small group of people representing the interests of a larger, interstate group of Subscribers. *See* Pet.App.100 (alleging that Plaintiffs "bring this case to benefit all members of Exchange"). The Third Circuit recognized that the individuals comprising this class are the "real parties in interest." Pet.App.16-17. And Rule 23.2 confirms that representative lawsuits brought to benefit an unincorporated association's members—like this one—are "proceeding[s] in the nature of a class action." 7C Wright & Miller, *Fed. Prac. & Proc.* § 1861 (3d ed., Apr. 2023 Update). They are, in other words, "similar" to a case filed under Rule 23. 28 U.S.C. § 1332(d)(1)(B). CAFA's text provides for federal jurisdiction over such representative suits. And this Court's review is warranted to resolve this important definitional question under CAFA.

* * *

All this leads to one inescapable conclusion: Plaintiffs' latest complaint—like their first—pleads an interstate class action that belongs in federal court. That is true under a faithful application of CAFA's statutory text and this Court's clear directions in *Standard Fire* not to elevate form over substance. The

Third Circuit's contrary decision cements a circuit split as to whether plaintiffs' creative labeling can thwart CAFA jurisdiction. It engrafts an unwarranted exception onto *Standard Fire*'s holding. And it ensconces an improperly restrictive interpretation of CAFA's statutory scope. Only this Court's review can restore uniformity in the law.

II. This Court Should Grant Certiorari To Confirm That Post-Removal Maneuvers Cannot Oust Federal CAFA Jurisdiction.

In addition to sanctioning Plaintiffs' fictitious labeling, the decision below contravenes longstanding precedents that prohibit plaintiffs from using post-removal maneuvers to destroy federal jurisdiction. That, too, creates a circuit split and warrants this Court's intervention.

A. By Allowing Plaintiffs To Destroy Vested Federal Jurisdiction, The Decision Below Created Another Circuit Split.

As this Court has stressed, removal cases raise unique "forum-manipulation concerns." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007). Those concerns "are legitimate and serious." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356 n.12 (1988). And they "dictate that [federal courts] guard" against plaintiffs' efforts following removal "to manipulate [their] way back into state court." *Wright Transp., Inc. v. Pilot Corp.*, 841 F.3d 1266, 1272 (11th Cir. 2016). That is because the defendant's "right to a federal forum becomes 'fixed' upon filing of a notice of removal." *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696, 700 (2020) (per curiam)

(citation omitted). And no amount of post-removal gamesmanship can defeat that right.

These core principles of removal jurisdiction are long established. Eighty-five years ago, in *Red Cab*, this Court held that post-removal events cannot destroy vested federal jurisdiction. There, a lower court concluded that a plaintiff's post-removal amendment ousted jurisdiction. *See* 303 U.S. at 285. But this Court unanimously reversed. *Id.* at 296. In doing so, the Court explained that a defendant's "statutory right of removal" is not "subject to the plaintiff's caprice." *Id.* at 294. Thus, "events occurring subsequent to removal . . . do not oust the district court's jurisdiction once it has attached." *Id.* at 293; *see also, e.g.*, *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.). And this "well established rule" holds true regardless of whether those post-removal events are "beyond the plaintiff's control or the result of his own volition." *Red Cab*, 303 U.S. at 293-94.

This rule that "nothing filed after removal affects jurisdiction" makes eminent sense. *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380 (7th Cir. 2010). It ensures the stability of federal court jurisdiction. *See id.* at 381. It avoids imposing a "drain on the resources of the state judiciary, the federal judiciary[,] and the parties involved." *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 507 (5th Cir. 1985) (citation omitted). And, most importantly, it "serves the salutary purpose of preventing the plaintiff from being able to destroy the jurisdictional choice that Congress intended to afford a defendant in the removal statute." *Id.*; *see Red Cab*, 303 U.S. at 294.

The *Red Cab* rule applies with special force in the CAFA context. Indeed, before the decision below, "[e]very circuit that has addressed the question ha[d]" followed *Red Cab*'s lead to "h[old] that post-removal events do not oust CAFA jurisdiction." *Louisiana v. Am. Nat'l Prop. & Cas. Co.*, 746 F.3d 633, 639 (5th Cir. 2014). For instance, the Fifth Circuit has explained that "[a]llowing [plaintiffs] to avoid federal jurisdiction through a post-removal amendment would turn the policy underlying CAFA on its head." *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 768 F.3d 425, 429 (5th Cir. 2014). And the Seventh Circuit has emphasized that "allowing plaintiffs to amend away CAFA jurisdiction after removal would present a significant risk of forum manipulation" that would defeat "CAFA's purpose of allowing putative class actions to be litigated in federal court." *Burlington*, 606 F.3d at 381.

The Second, Eighth, Ninth, and Tenth Circuits have likewise rejected post-removal attempts to unravel vested CAFA jurisdiction through voluntary dismissal or amendment. *See Thatcher v. Hanover Ins. Grp., Inc.*, 659 F.3d 1212, 1214-15 (8th Cir. 2011) (holding that "it is inappropriate for a plaintiff to use voluntary dismissal as an avenue for seeking a more favorable forum" once the defendants have "exercised their right to removal under CAFA"); *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 102 (2d Cir. 2015) (concluding that "jurisdiction under CAFA is secure even though, after removal, the plaintiffs amended their complaint to eliminate the class allegations" (quotation marks omitted)); *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1277-79 (9th Cir. 2017) (prohibiting "post-removal amendments that

change the nature of the claims or the make up of the class" from defeating jurisdiction); *Reece v. AES Corp.*, 638 F. App'x 755, 775 (10th Cir. 2016) (rejecting plaintiffs' offer to narrow their class definition to include only Oklahoma "citizens," because "post-removal amendments are ineffective to divest a federal court of jurisdiction" (emphasis omitted)).

The Third Circuit's decision conflicts with that "overwhelming" and previously "unanimous" circuit authority. *Louisiana*, 746 F.3d at 640. And it conflicts with this Court's decision in *Red Cab*. Even though jurisdiction had undisputedly "attached in a federal court under CAFA," *Cedar Lodge*, 768 F.3d at 427, the Third Circuit allowed Plaintiffs to "bring the cause back to the state court at [their] election" through their dismiss-and-refile gambit, *Red Cab*, 303 U.S. at 294. Other circuits would not have countenanced such an "improper forum-shopping measure." *Thatcher*, 659 F.3d at 1215.

B. The Third Circuit's Position Is Untenable.

Tellingly, the Third Circuit did not dispute that Indemnity had properly removed Plaintiffs' initial complaint. Pet.App.13. Nevertheless, the court failed to apply the well-established rules governing removal jurisdiction described above. It instead cited a trio of *non-removal* and *non-CAFA* cases for the proposition that a Rule 41(a) voluntary dismissal "leaves the situation as if the action never had been filed." Pet.App.13 (quoting *United States v. L-3 Commc'ns*

EOTech, Inc., 921 F.3d 11, 19 (2d Cir. 2019)).[5] But even those cases recognize that this is merely the "usual effect." *L-3 Commc'ns EOTech*, 921 F.3d at 18. There are "limits [to] that characterization." *Nelson v. Napolitano*, 657 F.3d 586, 588 (7th Cir. 2011). And one of those is in the case of removal. After all, the Federal Rules "do not . . . limit the jurisdiction of the district courts." Fed. R. Civ. P. 82. And, as already explained, the jurisdictional principles that govern following removal differ from an ordinary case originally filed in federal court. *See, e.g.*, *Rockwell*, 549 U.S. at 474 n.6; *In Touch*, 788 F.3d at 101; *Burlington*, 606 F.3d at 381. After a defendant has properly removed, plaintiffs cannot "deprive the district court of jurisdiction" over the controversy or "take away [the defendant's] privilege" to have the matter adjudicated in federal court. *Red Cab*, 303 U.S. at 292, 296. Plaintiffs' *post-removal* ploy thus had no bearing on the jurisdictional inquiry.

The Third Circuit's errors did not stop there. The court also ignored that Rule 41(a)(1)(A) is expressly made "[s]ubject to . . . any applicable federal statute." CAFA is one such statute that prohibits the use of post-removal maneuvers from destroying federal jurisdiction. After all, it is clear that Congress incorporated the *Red Cab* rule into CAFA. Courts

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[5] *See L-3 Commc'ns EOTech*, 921 F.3d at 14 (*qui tam* complaint filed in Southern District of New York); *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1155-56 (9th Cir. 2002) (action seeking injunction filed in California district court); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 84-85 (1st Cir. 1990) (diversity action filed in Eastern District of Pennsylvania and then transferred to District of Maine).

must presume "that Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). And when Congress enacted CAFA in 2005, *Red Cab*'s "gloss" on the diversity and removal statutes, "and the hoary tradition behind it, were well established." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Accordingly, "the fact that Congress amended" those statutes through CAFA "without explicitly repealing the established [*Red Cab*] doctrine itself gives rise to a presumption that Congress intended to embody [*Red Cab*] in [CAFA]." *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 782 (1985).

Nothing rebuts that presumption. In fact, "[l]egislative history confirms [it]." *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993). The CAFA Senate Report specifically identifies *Red Cab* as "establish[ing] th[e] principle"—which CAFA "does not alter"—that "once a complaint is properly removed to federal court, the federal court's jurisdiction cannot be 'ousted' by later events." S. Rep. No. 109-14, at 70; *cf. Dart Cherokee*, 574 U.S. at 89 (citing the Senate Report). Thus, because Rule 41(a)(1) is "subject to" CAFA, and because CAFA incorporates the *Red Cab* rule, federal jurisdiction "was not divested by [P]laintiff[s'] subsequent action" of voluntarily dismissing and refiling their case. 303 U.S. at 294 (citation omitted). Plaintiffs' initial filing of their case as a class action that satisfied all of CAFA's requirements "fixe[d] the right of [Indemnity] to remove." *Id.*

In the end, the Third Circuit's position cannot be squared with *Red Cab* and its progeny. And the court's attempt to distinguish Plaintiffs' latest complaint as

one now "[f]ormally" "pled in Exchange's name" fares no better. Pet.App.16. For, even if that artful case captioning were permitted, it would make no difference for purposes of the *Red Cab* rule. Once the district "court acquired jurisdiction of the controversy," the law is "well settled" that "no subsequent change of the parties could affect that jurisdiction." *Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894); *see Red Cab*, 303 U.S. at 295 n.27 ("Change of parties by substitution or by intervention does not oust the jurisdiction[.]"). There can be no doubt that the controversy is the same as before. Even the Third Circuit admitted that Plaintiffs had alleged facts and legal theories that were "identical" to those in Plaintiffs' initial class action complaint. Pet.App.5.

In all events, it is well established that the case "caption is not determinative as to the identity of the parties to the action," or to a court's "subject matter jurisdiction over the claims." 5A Wright & Miller, *Fed. Prac. & Proc.* § 1321 (4th ed., Apr. 2023 Update); *see also United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009) ("A person or entity can be named in the caption of a complaint without necessarily becoming a party to the action."). The decision below acknowledged that the "real parties in interest" are "all" of Erie's individual Subscribers, not Exchange. Pet.App.16-17. That only confirms that this proceeding is a continuation of Plaintiffs' class action challenging Indemnity's Management Fee.

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In sum, the Third Circuit should have followed the well-established precedent of its sister circuits and this Court. Federal jurisdiction "attached to th[is]

controversy" upon Indemnity's initial removal, and "having so attached, it could not be divested by any subsequent events." *Clarke v. Mathewson*, 37 U.S. (12 Pet.) 164, 171 (1838) (Story, J.); *see Red Cab*, 303 U.S. at 293. The Third Circuit's departure from that well-settled rule calls out for this Court's review.

III. The Questions Presented Are Exceptionally Important, And This Case Presents An Ideal Vehicle For Resolving Them.

Both of the questions presented are exceptionally important. CAFA is "the most significant legislative reform of complex litigation in American history." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008). Yet if the decision below is allowed to stand, it will open a massive loophole in the jurisdictional scheme that Congress created to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 568 U.S. at 595 (quoting CAFA § 2(b)(2)). Indeed, it will provide plaintiffs' attorneys with a blueprint to evade CAFA's reach and shirk the procedural protections that Congress sought to afford defendants and absent class members alike in federal court. *See* CAFA § 2(a)(2)(A), (3), (4)(B)-(C). To avoid federal jurisdiction after a defendant exercises its right of removal, plaintiffs need only dismiss, scrub the class action label, and refile their class action in a state court within the Third Circuit.

Such jurisdictional jiujitsu would not fly elsewhere. Other circuits have repeatedly rejected pleading artifices and post-removal tactics aimed at thwarting CAFA jurisdiction. *See supra* Sections I.A., II.A. But that is cold comfort for defendants and absent class

members with the Third Circuit's outlier decision on the books. "Forum-shopping is of particular concern in nationwide class action suits, where plaintiffs' attorneys can essentially cherry-pick whom they wish to make a named plaintiff and decide for themselves" where to file suit. *Allapattah Servs. v. Exxon Corp.*, 362 F.3d 739, 764 (11th Cir. 2004) (Tjoflat, J., dissenting from the denial of rehearing en banc), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546 (2005). That means that plaintiffs' attorneys will have little trouble flocking to the state courts of Pennsylvania, Delaware, and New Jersey to avoid those circuits that have rejected the Third Circuit's mistaken approach. And that also shows why this Court's immediate intervention is necessary. An "intolerable conflict" exists in the law "when litigants are able to exploit [the] conflict[] affirmatively through forum shopping." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

This case also provides an ideal vehicle to address the questions presented. Too often, courts of appeals deny CAFA petitions for permission to appeal without explanation. *See* 28 U.S.C. § 1453(c)(1) (providing the courts discretion to accept appeals of remand orders). But here the Third Circuit granted Indemnity's petition. Not only does this signify the importance of the questions presented, *see Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (per curiam) ("[A] key factor in determining whether to accept an appeal is 'the presence of an important CAFA-related question[.]'" (citation omitted)), but it also gives this Court the benefit of a reasoned

appellate decision. And it enables this Court to review the issues *de novo*, rather than through the lens of abuse-of-discretion review that would apply following a denial of permission to appeal. *See Dart Cherokee*, 574 U.S. at 95; *id.* at 97 (Scalia, J., dissenting); *cf. also id.* at 102 (Thomas, J., dissenting) (arguing that this Court "lack[s] jurisdiction to review" a "denial of permission to appeal").

Further, this case presents the paradigmatic case for CAFA jurisdiction, and is therefore an appropriate vehicle through which to address these CAFA issues. It concerns a national insurance business with over two million Subscribers in more than a dozen jurisdictions. Pet.App.82. And Plaintiffs challenge a singular decision that affects Subscribers uniformly, regardless of their geography. Pet.App.53. Congress sought to expand federal jurisdiction for cases like this one, which present issues of national import that affect interstate commerce. Yet, through artifices and post-removal maneuvers, Plaintiffs have succeeded in accomplishing precisely what Congress sought to foreclose.

In short, this case provides the Court with a clean opportunity to resolve a pair of highly consequential circuit splits regarding CAFA jurisdiction. There is no voluminous record for this Court to sift through. No factual development is needed. Both issues have been preserved and exhaustively briefed. And those pure legal questions are each squarely teed up for this Court's resolution. The Third Circuit was wrong on both fronts, and reversal on either would afford Indemnity the relief that it seeks under CAFA—the ability "to have a federal tribunal adjudicate the

merits" of this interstate class action. *Dart Cherokee*, 574 U.S. at 91 (citation omitted). This Court should grant certiorari to "vindicate" that "legal entitlement" before this case "leave[s] the ambit of the federal courts for good." *Id.* (citation omitted).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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