No. 23-434

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This interstate class action belongs in federal court under CAFA. And this case is a prime candidate for this Court's review. The decision below created two outcome-determinative circuit splits—both of which upended well-settled principles of federal jurisdiction and threaten to cripple CAFA's statutory scheme. The Third Circuit's outlier decision not only fell on the wrong side of both of those intractable divides, but also contradicted this Court's precedent. Unless the Court grants review, enterprising plaintiffs' attorneys will be able to exploit the resulting jurisdictional patchwork to keep nationwide class actions out of federal court.

The brief in opposition does not dispute that this case presents exceptionally important questions. Nor does it dispute that this case provides a clean vehicle for resolving them. It similarly does not dispute any of the facts: that Plaintiffs originally filed their claim as a class action, that the "operative facts and the legal theory" are "identical" to that class action complaint, Pet.App.5, and that Plaintiffs manipulated their pleadings in an attempt to destroy federal jurisdiction.

Such tactics would not have worked elsewhere. And while Plaintiffs try to wave away the circuit splits by misreading conflicting precedents and ignoring the reality of this case, those efforts fall flat. The circuits cannot agree on how to determine whether a suit constitutes a "class action" under CAFA. Nor can they agree on whether plaintiffs may destroy CAFA jurisdiction through post-removal maneuvers.

Plaintiffs' defense of the decision below fares no better. As to the first question presented, Plaintiffs

fail to explain why courts should—contrary to this Court's direction in *Standard Fire*—forbid pleading artifices for "factual" but not "legal" requirements. Pet.App.10. Nor do they offer any persuasive reason to think that their latest complaint is anything but a class action. Indeed, Plaintiffs admit that they seek to litigate this case on behalf of an interstate class that "consists of . . . all" the "members of [Exchange]." BIO.1; *see* Pet.App.100. And they admit that, as in a Rule 23 action, a court will need to authorize them to proceed as representatives of those other Subscribers. BIO.3. This is thus a "class action" in both substance and form—and whatever rule provides for such a "representative" lawsuit, it is at the very least "similar" to Rule 23. 28 U.S.C. § 1332(d)(1)(B).

Turning to the second question, Plaintiffs muster only a halfhearted response. Their argument ignores *Red Cab* and its progeny. And, like the Third Circuit, Plaintiffs fail to grapple with the unique jurisdictional rules that govern removal cases. Those rules—which undisputedly apply in the CAFA context—should have prevented Plaintiffs from destroying vested federal jurisdiction here.

In short, the Third Circuit's holdings split with multiple circuits and violate this Court's precedent twice over. The Court should grant certiorari and reverse.

ARGUMENT

I. The First Question Presented Warrants Review.

When it comes to federal jurisdiction, this Court has repeatedly stressed that substance trumps form—

particularly in removal cases. Pet.16-17 (collecting cases). Plaintiffs do not dispute that general rule, nor that it applies to factual issues in the CAFA context. Instead, Plaintiffs double down on the Third Circuit's novel exception to that rule for "legal" inquiries. BIO.18 (quoting Pet.App.10).

That approach directly conflicts with *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588 (2013). And it clashes with decisions of other circuits as well. Those courts recognize the need to examine a complaint's substance in deciding whether it pleads a "class action" for CAFA purposes. It is also beyond dispute that the Third Circuit would have reached a different result under that approach. Plaintiffs' latest complaint—like their first—asserts a common claim on behalf of a group of over two million Subscribers. And Plaintiffs concede that they cannot "prevail" unless, "at some point," they satisfy a court that they are "authori[zed]" to represent all members of that class. BIO.3. That is, the court must certify Plaintiffs as the "representative parties" who may fairly and adequately sue "on behalf of all members," Fed. R. Civ. P. 23(a), for a typical claim challenging a singular event that equally affected each of them, *see* Pet.9. That is a class action.

A. The Decision Below Conflicts With This Court's Precedent And Cements A Circuit Split.

The Third Circuit's myopic focus on factual versus legal predicates contradicts *Standard Fire*. As the Petition demonstrated—and as Plaintiffs do not contest—*Standard Fire* "turned on a *legal* determination that the plaintiff there 'lacked the

authority' to proceed under the pleading artifices he deployed to avoid CAFA." Pet.18 (quoting *Standard Fire*, 568 U.S. at 593). This Court relied on the "legal principles" that "stipulations must be binding and that a named plaintiff cannot bind precertification class members." 568 U.S. at 593. And, in doing so, it foreclosed the fact-versus-legal distinction that the Third Circuit viewed as dispositive. Pet.App.9-10.

Plaintiffs try to downplay *Standard Fire* and *Freeman v. Blue Ridge Paper Products Inc.*, 551 F.3d 405 (6th Cir. 2008), as involving efforts aimed solely at avoiding CAFA's amount-in-controversy requirement. BIO.18-19. But courts outside the Third Circuit apply the same principles to "look beyond the four corners of a complaint" in addressing the "legal requirement" of whether a case is a "class action." Pet.App.10; *see Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, 731 F.3d 740, 742-45 (7th Cir. 2013); *Williams v. Emps. Mut. Cas. Co.*, 845 F.3d 891, 900-02 (8th Cir. 2017).

Plaintiffs fail to meaningfully distinguish those decisions. On its face, the Seventh Circuit's decision in *Addison* undisputedly applied a different test than the Third Circuit did below. In fact, it specifically rejected the plaintiff's argument—which the Third Circuit accepted here—that "courts should look only to the complaint in determining whether a given claim is a class action," notwithstanding legal ploys designed to "disguise the true nature" of the suit. *Addison*, 731 F.3d at 744-45. The Seventh Circuit looked beyond formalistic labels to determine whether the case "is in substance a class action." *Id.* at 742. And that test made all the difference to the outcome in *Addison*, as it would have here. Like *Addison*, this case involves

"a single person or a small group of people" seeking "to represent the interests of a larger group." Class Action, *Black's Law Dictionary* 304 (10th ed. 2014). Accordingly, it "is in substance a class action that was properly removed to federal court." *Addison*, 731 F.3d at 741.

Plaintiffs cannot square the decision below with the Eighth Circuit's decision in *Williams* either. They concede that the garnishment statute invoked by the plaintiff in *Williams* "does not authorize a plaintiff to bring suit on behalf of others" at all. BIO.16. And that legal artifice would have been dispositive in the Third Circuit, which looks solely to the "rule under which the case is filed." Pet.App.11 (citation omitted). Like the Seventh Circuit, however, the Eighth Circuit refused to "prioritize [the] complaint's use of magic words" over its substance. *Williams*, 845 F.3d at 901. As a result, the Eighth Circuit held, as a matter of law, that the case was a "class action" under CAFA. *See id.* at 901-02. Because the Third Circuit rejected the Seventh and Eighth Circuit's test, it reached the opposite result.

B. The Decision Below Is Wrong And Jeopardizes CAFA's Protections.

Unable to harmonize the circuits' divergent approaches to CAFA's "class action" requirement, Plaintiffs try to defend the Third Circuit's side of the divide. But their arguments all fail.

This Court's precedent and CAFA's text make clear that this is a "class action." Pet.15-18, 22-26. To hold otherwise would impermissibly "exalt form over substance." *Standard Fire*, 568 U.S. at 595. Plaintiffs'

"first complaint against [Indemnity] was explicitly a class action," thereby confirming the "true nature" of this dispute. *Addison*, 731 F.3d at 744-45.[1] And nothing of substance has changed since then. Indeed, the decision below acknowledged that the "operative facts" and "legal theory" are "identical" to that class action complaint, Pet.App.5, and that the "real parties in interest here" are the millions of Subscribers in the class that Plaintiffs seek to represent, Pet.App.16-17. Moreover, Plaintiffs filed their latest complaint under rules that they say allow for this litigation "by one or more members of a large group of persons on behalf of all members of the group." Class Action, *Barron's Dictionary of Legal Terms* 92 (5th ed. 2016); *see* BIO.3.

Plaintiffs protest that they have nominally styled their complaint "on behalf of an unincorporated association." BIO.20. But Plaintiffs cannot escape the fact that "an unincorporated association is not a legal entity and has no legal existence separate and apart from that of its individual members." *AK Steel Corp. v. Viacom, Inc.*, 835 A.2d 820, 824 (Pa. Super. Ct. 2003). Thus, as Plaintiffs admit, "Exchange" is simply the group that "consists of" Erie's Subscribers. BIO.1. This suit is brought "on behalf of" that class of individuals through representative plaintiffs—just as in any class action. Pet.App.100; *see also* Fed. R. Civ. P. 23.2.

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[1] Plaintiffs note that *Addison* would have reached the same conclusion "even if [the plaintiff] had not filed the first complaint" explicitly as a class action. BIO.15 (alteration adopted; citation omitted). But there, as here, the initial class action complaint "made the true nature of th[e] action more transparent." *Addison*, 731 F.3d at 744.

Contrary to Plaintiffs' belief, their proffered *parens patriae* and private attorney general cases do not "agree" with the Third Circuit's approach. BIO.9-10. None of those decisions involved procedural gamesmanship—as in this case, *Addison*, and *Williams*—so they are simply inapposite. In addition, none of those cases, save one, appears to endorse the Third Circuit's exacting standard, which effectively requires that the rule invoked by plaintiffs be *identical* to Rule 23. Pet.23-24; *see Nessel ex rel. Michigan v. Amerigas Partners, L.P.*, 954 F.3d 831, 837 (6th Cir. 2020). In fact, unlike the Third and Sixth Circuits, many of those courts recognize that "a 'similar' state statute or rule need *not* contain all of the . . . conditions and administrative aspects of Rule 23." *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 217 (2d Cir. 2013) (emphasis added; citation omitted). Those courts simply look for "a procedure by which a member of a class whose claim is typical" can represent "all others in the class, such that it would not be unfair to bind all class members to the judgment." *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 175 (4th Cir. 2011). After all, the only "similar[ity]" CAFA mentions is that "representative persons" be permitted to pursue the lawsuit "as a class action." 28 U.S.C. § 1332(d)(1)(B).

That describes this case to a tee. As purported trustees *ad litem*, Plaintiffs claim to be typical and adequate representatives pursuing a common claim "on behalf of" and "to benefit all" two-million-plus Subscribers nationwide. Pet.App.100. They concede that—similar to a class certification proceeding—they will have to "present evidence of their authority" to represent their fellow Subscribers. BIO.3. And they

cannot dispute that every one of those Subscribers will be bound by the judgment if the court permits Plaintiffs to proceed. *See Ritz v. Erie Indem. Co.*, 2019 WL 438086, at *6 (W.D. Pa. Feb. 4, 2019). The same cannot be said in *parens patriae* cases, which in no way "bar" individuals from later pursuing claims "on their own." *Minnesota ex rel. Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 717 (8th Cir. 2023). And, unlike in *parens patriae* cases, which seek to vindicate "quasi-sovereign interest[s] distinct from the interests of particular private parties," *Purdue*, 704 F.3d at 215 (quotation marks omitted), the named plaintiffs here allegedly "suffered a . . . common injury," *Minnesota*, 63 F.4th at 717, and are "member[s] of the class" they hope to represent, *West Virginia*, 646 F.3d at 176. This case is thus "brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B).

* * *

Plaintiffs offer no good reason to deny certiorari on the first question presented. Their efforts to obscure the circuit split are unavailing. And their attempts to excuse the Third Circuit's errors fail. The Court should grant review.

II. The Second Question Is Squarely Presented And Warrants Review.

Plaintiffs barely defend the Third Circuit's refusal to apply the *Red Cab* rule. BIO.22-24. Under that longstanding tenet of federal jurisdiction, a 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); *see St. Paul*

Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293-94 (1938). And, as the Petition explained, that rule should have foreclosed Plaintiffs' transparent effort to destroy federal jurisdiction here. Pet.28-33. In fact, Plaintiffs do not dispute that "Congress incorporated the *Red Cab* rule into CAFA." Pet.30. Nor do they dispute that jurisdiction "attached in a federal court under CAFA" when Indemnity properly removed Plaintiffs' initial class action complaint. *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 768 F.3d 425, 427 (5th Cir. 2014).

Plaintiffs similarly have no answer to the "overwhelming" and otherwise "unanimous" circuit precedent that forbids post-removal maneuvers from ousting vested CAFA jurisdiction. *Louisiana v. Am. Nat'l Prop. & Cas. Co.*, 746 F.3d 633, 640 (5th Cir. 2014); *see* Pet.28-29. So, they simply ignore it, instead urging that the second "question is not presented in this case." BIO.22. That is incorrect. The second question presented is "[w]hether plaintiffs can destroy vested federal CAFA jurisdiction by voluntarily dismissing and then refiling an amended version of their complaint." Pet.ii. Those are precisely the circumstances at issue. *See* Pet.10-12 (detailing procedural history).

Plaintiffs retort—again exalting form over substance—that they did not technically amend their complaint. BIO.23. Yet, "[i]n practical terms, Plaintiffs' actions" of dismissing and refiling their case "were no different from a situation where a party amends a pleading." *Vodenichar v. Halcón Energy Props., Inc.*, 733 F.3d 497, 509 (3d Cir. 2013). That is why courts have "repeatedly stated that it is

inappropriate for a plaintiff to use voluntary dismissal as an avenue for seeking a more favorable forum." *Thatcher v. Hanover Ins. Grp., Inc.*, 659 F.3d 1212, 1214 (8th Cir. 2011). The *Red Cab* rule applies to voluntary dismissals just the same. Indeed, "it would be passing strange to bar a Plaintiff from divesting a federal court of jurisdiction by using Rule 15 to amend his complaint but allow him to do so using Rule 41" voluntary dismissals. *Loper v. Lifeguard Ambulance Serv., LLC*, 2020 WL 8617215, at *10 (N.D. Ala. Jan. 10, 2020). And nowhere is that more true than in the CAFA context. Opening such a jurisdictional loophole would "run directly counter to CAFA's 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)).

The brief in opposition also wrongly asserts that the "new complaint" was "filed by a new plaintiff." BIO.23. The same plaintiffs filed both complaints, through the same counsel. Pet.App.93-94, 132-33. And, in all events, this Court's precedent holds that party substitution "make[s] no difference for purposes of the *Red Cab* rule" once the court has "'acquired jurisdiction of the controversy.'" Pet.32 (quoting *Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894)). Plaintiffs fail to address that precedent, and they do not dispute that "the controversy is the same as before." Pet.32.

Finally, Plaintiffs straw man Indemnity's position by arguing that "forum-manipulation concerns" "cannot create subject-matter jurisdiction." BIO.23. Indemnity has never suggested that evidence of forum shopping can create jurisdiction out of whole cloth.

Instead, the point (which Plaintiffs again do not dispute) is that—in a removal case—plaintiffs cannot "oust the district court's jurisdiction once it has attached." *Red Cab*, 303 U.S. at 293. In that way, the rules of removal jurisdiction are simply different. *See Rockwell v. Int'l Corp. v. United States*, 549 U.S. 457, 474 n.6 (2007). "[T]hough it is sometimes possible for a plaintiff who sues in federal court to amend away jurisdiction," courts have long held that "nothing filed after removal affects jurisdiction." *In re Burlington N. Santa Fe Ry. Co.*, 606 F.3d 379, 380-81 (7th Cir. 2010) (citing *Red Cab*, 303 U.S. at 293); *see* Pet.27 (explaining the rationale for this distinction). In ignoring that critical distinction and the removal context of this case, Plaintiffs commit the same fundamental error as the Third Circuit. Pet.29-30.

* * *

Notwithstanding Plaintiffs' machinations, federal jurisdiction over this matter remains secure. The Third Circuit held otherwise only by violating this Court's directions and splitting from the unanimous decisions of its sister circuits. This Court should grant certiorari to restore uniformity in the law.

III. This Case Provides An Excellent Vehicle For Resolving These Important Questions.

Plaintiffs do not (and cannot) deny the importance of the questions presented. The circuit splits those questions have produced illustrate the lower courts' confusion in delineating CAFA's jurisdictional bounds. And the resulting uncertainty on these recurring questions has significant, real-world consequences. This case alone implicates the rights and interests of an interstate class of two million Subscribers. And plaintiffs' lawyers in other cases can exploit the Third Circuit's outlier decision by cherry-picking representative plaintiffs to manipulate jurisdiction. Pet.33-34. Allowing the decision below to stand would thus "promote the kind of procedural gaming CAFA was enacted to prevent" in class actions going forward, thereby depriving defendants and absent class members alike of the federal forum that Congress sought to provide. *Williams*, 845 F.3d at 901.

This case is also the ideal vehicle to provide necessary guidance on these critical CAFA-related questions. The issues are fully preserved and squarely addressed in a published opinion. And, because the Third Circuit granted Indemnity's appeal, this Court need not limit its review to whether the Third Circuit abused its discretion. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 95 (2014). This is the rare case where the Court can review these highly consequential issues *de novo*.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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