No. 21-683

IN THE

Supreme Court of the United States

JOHN C. KITCHIN, JR., NORTH WEST AUTO BODY CO., AND MARY MENKE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

BRIDGETON LANDFILL, LLC, REPUBLIC SERVICES, INC., ALLIED SERVICES, LLC, AND ROCK ROAD INDUSTRIES, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the "local controversy" exception of the Class Action Fairness Act ("CAFA"), a federal district court must decline jurisdiction over a class action in which, among other requirements, there is a local defendant "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb).

All circuits that have addressed this element agree that the local-controversy exception requires a court to compare the local defendant's alleged conduct to that of all the defendants to determine whether the local defendant's alleged conduct is an important ground for the asserted claims in view of the alleged conduct of all the defendants.

The petition's question presented is more properly stated as follows:

Does a plaintiff seeking remand under CAFA's local-controversy exception fail to carry the plaintiff's burden to show that the local defendant's conduct forms a significant basis for the claims asserted by the proposed class by alleging that an out-of-state defendant "owns, oversees, and directs the . . . decisions and conduct" of the local defendant and by otherwise alleging that all defendants caused the putative class members' injuries without identifying specific acts of each defendant?

RULE 29.6 STATEMENT

There is no publicly held corporation that owns 10% or more of Allied Services, LLC's stock. Allied Services, LLC is a Delaware limited liability company. Its two members are Allied Waste North America, LLC and Allied Waste Landfill Holdings, Inc. Allied Waste North America, LLC is a Delaware limited liability company. Its sole member is Allied Waste Industries, LLC, a Delaware limited liability company. Allied Waste Industries, LLC's sole member is Republic Services, Inc., a Delaware corporation with its principal place of business in Arizona. Allied Waste Landfill Holdings, Inc. is a Delaware corporation with its principal place of business in Arizona.

Rock Road Industries, Inc. is not an existing entity, having merged into Bridgeton Landfill, LLC effective April 9, 2018.

There is no publicly held corporation that owns 10% or more of Bridgeton Landfill, LLC's stock. Bridgeton Landfill, LLC is a Delaware limited liability company. Its sole member is Allied Waste North America, LLC. Allied Waste North America, LLC is a Delaware limited liability company. Its sole member is Allied Waste Industries, LLC, a Delaware limited liability company. Allied Waste Industries, LLC's sole member is Republic Services, Inc., a Delaware corporation with its principal place of business in Arizona.

There is no publicly held corporation that owns 10% or more of Republic Services, Inc.'s stock. Republic Services, Inc. is a Delaware publicly traded corporation with its principal place of business in Arizona and has no parent company.

RELATED PROCEEDINGS

In addition to the related proceedings identified in the petition for a writ of certiorari, *Kitchin v. Bridgeton Landfill, LLC*, No. 18SL-CC00613 (Cir. Ct. St. Louis Cty.) is a related proceeding as defined in Rule 14.1 of this Court.

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

This Court should deny review because the question presented as framed by petitioners is not squarely at issue in this case and because no circuit has endorsed petitioners' view that the "local controversy" exception to the Class Action Fairness Act ("CAFA") can be met by undifferentiated allegations that the local and non-local defendants all engaged in the same conduct.

Petitioners proceed from the false premise that they merely alleged below that the local and non-local defendants engaged in the same alleged conduct. But as the Eighth Circuit recognized, and petitioners ignore here, their pleading alleged that the parent corporation non-local defendant "owns, oversees, and directs the environmental decisions and conduct" of the alleged local defendant. Pet. App. 12a. This eviscerates petitioners' contention that conduct by the alleged local defendant forms a "significant basis" for their claims and makes clear that the question presented—whether the significant-basis element of CAFA's local-controversy exception "can be satisfied where the local and non-local defendants engaged in the *same* alleged conduct," Pet. i (emphasis added)—is not squarely presented in this case.

Moreover, the petition alleges that there is a circuit split over the significant-basis element of the local-controversy exception, but in reality, every circuit to address the issue agrees—based on a case petitioners cited below but never cite to this Court, *see Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 149 (3d

Cir. 2009)—that the significant-basis element should be applied by comparing the local defendant's alleged conduct to that of all defendants to determine whether the local defendant's conduct is an important ground for the claims asserted in view of all defendants' conduct. Contrary to petitioners' contention, no circuit has endorsed the position that the significant-basis element can be met merely by alleging that "the local and non-local defendants engaged in the same alleged conduct." Pet. i. The "circuit split" manufactured by petitioners merely reflects inherent variations in case-by-case comparisons between or among the defendants' conduct in cases involving an array of claims and a number of defendants. In fact, the purported "split" is so amorphous that petitioners' definition of it before this Court is different from how they defined the supposed split to the Eighth Circuit.

Other reasons also militate against review by this Court. Petitioners failed to establish two additional elements of the local-controversy exception that the Eighth Circuit did not reach. Thus, even if petitioners could be found to satisfy the significant-basis element of the local-controversy exception, there would be other reasons for the case to remain in federal court. And indeed, petitioners never sought to stay the court of appeals' mandate, so the case was returned to the federal district court months ago, and petitioners never sought a stay there, either.

Review of the Eighth Circuit's correct and well-reasoned opinion should be denied.

STATEMENT

I. HISTORY OF CAFA

In 2005, Congress passed CAFA to facilitate the resolution of interstate class actions in federal court.

See Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350 (2013); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (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") (quoting S. Rep. No. 109-14, at 43 (2005)). CAFA was drafted to expand federal jurisdiction over class actions by creating subject-matter jurisdiction based on, *inter alia*, minimal diversity of the parties. 28 U.S.C. §§ 1332(d)(2), 1453. As this Court has explained, "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart*, 135 S. Ct. at 554.

Congress included an exception in CAFA requiring a federal district court to abstain from jurisdiction over "a truly local controversy—a controversy that uniquely affects a particular locality to the exclusion of all others." S. Rep. No. 109-14, at 39. The local-controversy exception "is a narrow exception that was carefully drafted to ensure that it does not become a jurisdictional loophole." *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 822 (8th Cir. 2010) (quoting S. Rep. No. 109-14, at 39). To abstain from exercising jurisdiction under this exception, a federal court must find that all conjunctive elements of the exception apply to the unique facts of the case. 28 U.S.C. § 1332(d)(4)(A)(i). Most pertinent here, the exception requires that there be at least one defendant "from whom significant relief is sought by all members of the plaintiff class," "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class," and who "is" a citizen of the state in which the class action was originally filed. *Id.* § 1332(d)(4)(A)(i)(II).

There is no such local defendant here.

II. HISTORY OF THE CASE

A. Factual Background

This case arises out of the generation of radioactive materials by federal government contractors in St. Louis, Missouri as part of the Manhattan Project, the disposal of some of those materials at the West Lake Landfill ("West Lake") in Bridgeton, Missouri, and the ownership and operation of that landfill by the predecessors to a Delaware limited liability company. Pet. App. 2a-3a. As part of federal government efforts to dispose of Manhattan Project wastes, radiologically impacted materials were sold to private entities, including eventually the private entity that disposed of the materials at West Lake. *Id.* at 2a. West Lake is now a National Priorities List federal Superfund site governed by the United States Environmental Protection Agency. *Id.*

B. Petitioners' Complaint

Petitioners seek to represent a putative class of property owners and current or past residents of St. Louis County, Missouri, alleging that, over the span of decades, radioactive materials were released to the environment in and around West Lake. Pet. App. 3a. Petitioners' First Amended Class Action Petition ("Complaint") asserts causes of action for trespass, permanent nuisance, temporary nuisance, negligence per se, strict liability, and civil conspiracy, as well as for injunctive relief and punitive damages. *Id.*

Petitioners brought this lawsuit in Missouri state court against respondents: Republic Services, Inc. ("Republic"), Bridgeton Landfill, LLC ("Bridgeton"), and Allied Services, LLC ("Allied"), who are all out-of-state defendants; and Rock Road Industries, Inc.

("Rock Road"), a former affiliate no longer in existence, and the only alleged Missouri-citizen defendant when the Complaint was filed. *Id.*

Petitioners' Complaint divides respondents into two groups, namely the owners and operators of the landfill. Petitioners' Complaint puts Rock Road in the owner category, but merely alleges that Rock Road "owned or owns the West Lake Landfill." *Id.* at 12a. By contrast, in the same paragraph, petitioners allege that non-local defendant Republic "owns, oversees, and directs the environmental decisions and conduct" of the other three defendants, including Rock Road, and "operates the . . . West Lake Landfill[ ]." *Id.* (alterations in original). The Complaint's remaining paragraphs fail to distinguish in any meaningful way the alleged conduct of Rock Road from the alleged conduct of non-local defendants Republic, Allied, and Bridgeton. *Id.* at 13a. Without differentiating among the four respondents, petitioners allege that each respondent "maintained daily operational and managerial control over the management and environmental decisions" for the site, and that these decisions "gave rise to the violations of law and damage to property alleged in this [Complaint]." *Id.*

C. Federal District Court

With the consent of the other respondents, Bridgeton removed petitioners' Complaint to the U.S. District Court for the Eastern District of Missouri under CAFA by demonstrating minimal diversity, at least 100 members in the proposed class, and more than $5 million in controversy. Pet. App. 3a. Petitioners did not dispute CAFA jurisdiction, but nevertheless moved for remand based on, *inter alia*, the local-

controversy exception. *Id.* at 3a-4a. Respondents opposed the motion, detailing why the local-controversy exception did not apply. *Id.* at 8a.

The district court found that it had CAFA jurisdiction, but remanded the case to state court after determining that CAFA's local-controversy exception required it to abstain from exercising its jurisdiction. *Id.* at 44a. The district court found that the local-controversy exception applied because petitioners met each of the elements pertaining to the local defendant: (i) Rock Road's alleged conduct formed a significant basis for petitioners' claims; (ii) petitioners sought significant relief from Rock Road; and (iii) Rock Road was a "local" defendant based on its status as a Missouri citizen when the Complaint was originally filed. *Id.* at 46a-48a.

D. Eighth Circuit Appeal

On appeal to the U.S. Court of Appeals for the Eighth Circuit, respondents challenged the district court's application of the local-controversy exception, arguing that petitioners failed to meet each element of the exception pertaining to the local defendant under 28 U.S.C. § 1332(d)(4)(A)(i)(II): the significant-relief element (subpart (aa)); the significant-basis element (subpart (bb)); and the local-defendant element (subpart (cc)). Pet. App. 8a.

In addition to challenging the district court's conclusion that respondents had satisfied the significant-basis element, respondents argued that the district court erred in remanding because petitioners failed to meet their burden of establishing the significant-relief element of the local-controversy exception where the district court did not compare the relief sought from the alleged local defendant with the relief sought from

the non-local defendants. *Id.* Respondents also argued that the district court erred when it concluded that Rock Road was a local defendant because Rock Road did not exist and thus was not a citizen of Missouri when the local-controversy exception was invoked. *Id.*

The Eighth Circuit reversed and remanded, agreeing with respondents that petitioners failed to carry their burden to show that the conduct of Rock Road—the only possible "local defendant"— "forms a significant basis for the claims asserted" in petitioners' Complaint. *Id.* In deciding whether the significant-basis element was met, the Eighth Circuit substantively analyzed Rock Road's alleged conduct as compared to the alleged conduct of other defendants, which all other circuits to consider the issue have deemed necessary to evaluate the significant-basis element. *Id.* at 12a-14a.

The Eighth Circuit reasoned that there was no local defendant whose conduct formed a significant basis for petitioners' claims because, with rare exception, petitioners "simply alleged that 'Defendants' engaged in conduct causing" petitioners' injuries "without identifying specific acts of each defendant or otherwise parsing out in any meaningful way [Rock Road's] particular, injury-causing conduct." *Id.* at 9a. Where there were exceptions, and petitioners did differentiate the conduct of Rock Road and the other defendants, those allegations failed to show that Rock Road's conduct was an important ground for the asserted claims in view of the alleged conduct of all defendants. *Id.* at 13a. For example, the court explained that, "[i]f anything, the allegation that Republic Services 'owns, oversees, and directs the environmental decisions and conduct' of Rock Road Industries as well

as the other two defendants suggests the opposite." *Id.* at 12a-13a. Similarly, "[t]o the extent the[ ] parallel allegations differ" with respect to defendants' operational and managerial control over West Lake, "they do so because [petitioners] alleged *more* about the other defendants' conduct than they do about Rock Road Industries' conduct." *Id.* at 13a (emphasis added). Therefore, the court concluded, the allegations distinguishing conduct among defendants "undermine rather than support the conclusion that Rock Road Industries' conduct 'forms a significant basis for [petitioners'] claim[s].'" *Id.* at 13a-14a (second alteration in original).[1]

Because the Eighth Circuit's conclusion that petitioners have failed to meet the significant-basis element sufficed to reverse, it did not address whether petitioners had established that they sought significant relief from Rock Road (subpart aa of the local-controversy exception) or that the now-nonexistent Rock Road "is" a Missouri citizen for purposes of the local-controversy exception (subpart cc). *Id.* at 8a n.2.

Judge Stras concurred in the judgment, reasoning that a simpler route would be to hold that, for purposes of the local-controversy exception, the citizenship of a defendant is decided at the time of removal, rather than the filing of the complaint, and that there

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[1] The Eighth Circuit also held that, even if the court were to consider extrinsic evidence offered by petitioners, that evidence would not meet their burden to satisfy the significant-basis element. Pet. App. 15a. Petitioners do not raise before this Court any issue regarding whether extrinsic evidence can be considered to satisfy a party's burden to show that the local-controversy exception applies, and thus the issue is not before the Court on this petition.

was no local defendant because Rock Road did not exist at the time of removal. *Id.* at 18a-19a.

Petitioners filed a petition for rehearing or rehearing *en banc* based on, among other grounds, an alleged circuit split between a "broad" interpretation of the significant-basis element (ostensibly adopted by the Sixth and Ninth Circuits) on the one hand, and a "narrow" standard (supposedly adopted by the Eighth, Fifth, Tenth, and Third Circuits) on the other. Petition for Rehearing *En Banc* (No. 19-2072) ("Rehearing Petition") at 2. The Eighth Circuit denied the petition without comment. Pet. App. 51a.

E. Remand To Federal District Court

Petitioners did not request that the Eighth Circuit stay the mandate, and the court of appeals therefore remanded the case to the federal district court, where it is being litigated today. Since remand to the district court, an order for a Rule 16 conference has been entered, and respondents have filed a third-party complaint.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because the question presented as framed by petitioners is not squarely presented in this case, the supposed circuit split divined by petitioners does not actually exist, and additional prudential considerations militate against review.

I. THE QUESTION PRESENTED BY PETITIONERS IS NOT SQUARELY PRESENTED ON THIS RECORD.

The question presented by petitioners—whether the significant-basis element of the local-controversy exception "can be satisfied where the local and non-

local defendants engaged in *the same* alleged conduct," Pet. i (emphasis added)—is not squarely presented in this case because, as the Eighth Circuit recognized, the Complaint *does* include allegations that are specific to Rock Road, the alleged local defendant, and that illuminate the relationship among the various defendants. Put another way, the Complaint does not allege "the same" conduct for all defendants. And those allegations that differ among the defendants directly refute the proposition that Rock Road's alleged conduct forms a significant basis for petitioners' claims.

For example, the Complaint alleges that "Republic Services 'owns, oversees, and directs the environmental decisions and conduct' of" Rock Road, which, as the Eighth Circuit explained, would suggest that Rock Road's conduct is *not* a significant basis for petitioners' claims. Pet. App. 12a-13a. As the Eighth Circuit summarized, "any 'substantive distinctions' revealed by the[ ] allegations undermine rather than support the conclusion that Rock Road Industries' conduct 'forms a significant basis for'" petitioners' claims. *Id.* at 13a-14a. Notably, petitioners studiously avoid mentioning these allegations of their Complaint and these aspects of the Eighth Circuit's opinion in their petition.

Thus, to the extent that the Court would want a good vehicle to decide whether the significant-basis element can be met where all of the defendants "engaged in the same alleged conduct," this case is not it.

II. THERE IS NO CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The petition presents no circuit split warranting review by this Court. To the contrary, the circuits are in broad general agreement on many aspects of CAFA

jurisdiction and the local-controversy exception, as well as the standard for evaluating whether a local defendant is one "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb). The illusory nature of the alleged circuit split is laid bare by the fact that petitioners' own definition of the supposed split has shifted over time. And, as demonstrated by a review of the pertinent circuit-level decisions, any supposed split merely reflects case-specific variations in application of the comparative analysis used by all circuits under the significant-basis element of the local-controversy exception. Indeed, no circuit court has explicitly adopted petitioners' proposed rule of law that the significant-basis element "can be satisfied where the local and non-local defendants engaged in the same alleged conduct," Pet. i, and, in light of the substantial, thoroughly reasoned authority to the contrary, there is no reason to think that any circuit would endorse that proposed rule in the future.

A. The Circuits Are In Broad Agreement On CAFA Jurisdiction And The Local-Controversy Exception.

The circuits uniformly recognize that CAFA was intended to expand federal jurisdiction over class actions by creating subject-matter jurisdiction based on minimal diversity of the parties. *See*, *e.g.*, *Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1262 (10th Cir. 2014) ("In enacting CAFA, Congress intended to 'expand substantially federal court jurisdiction over class actions.' . . . Thus, 'its provisions should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant.'") (quoting S. Rep. No. 109-

14, at 43 (2005)); *Atwood v. Peterson*, 936 F.3d 835, 839 (8th Cir. 2019) ("Congress enacted CAFA in 2005 to curb perceived abuses of the class action device by providing for federal court consideration of interstate cases of national importance.") (alteration and internal quotation marks omitted); *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 149 (3d Cir. 2009).

The circuits also agree that the local-controversy exception to CAFA jurisdiction is an abstention doctrine rather than a jurisdictional rule; accordingly, the party seeking remand bears the burden to establish that the exception applies. *See*, *e.g.*, *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("[W]hen a party seeks to avail itself of an express statutory exception to federal jurisdiction granted under CAFA, . . . the party seeking remand bears the burden of proof with regard to that exception."); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 676 (7th Cir. 2006); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Kaufman*, 561 F.3d at 153; *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 564 F.3d 75, 78 (1st Cir. 2009); *Westerfeld*, 621 F.3d at 822; *Woods*, 771 F.3d at 1262; *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 389 (6th Cir. 2016); *Brinkley v. Monterey Fin. Servs., Inc.*, 873 F.3d 1118, 1121 (9th Cir. 2017); *Bartels ex rel. Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 681 (4th Cir. 2018).

And there is broad agreement that the local-controversy exception is a narrow and non-jurisdictional exception to CAFA's grant of federal subject-matter jurisdiction that should be narrowly construed, with any doubts about its applicability resolved against remand to state court. *See*, *e.g.*, *Evans*, 449 F.3d at 1163-64 (The local-controversy provision is a "narrow

exception that was carefully drafted to ensure that it does not become a jurisdictional loophole," and "all doubts [are] resolved 'in favor of exercising jurisdiction over the case.'") (quoting S. Rep. No. 109-14, at 39, 42); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023 (9th Cir. 2007) (holding that CAFA exceptions are non-jurisdictional because they "*require* federal courts—although they *have* jurisdiction . . . to '*decline to exercise jurisdiction*'") (internal citation omitted); *Westerfeld*, 621 F.3d at 822 (recognizing the local-controversy exception is intended to be narrow); *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 360 (5th Cir. 2011) (same); *Mason*, 842 F.3d at 392 (noting that because "the local controversy exception is not jurisdictional . . . a party asserting the exception does not encounter" presumptions against federal jurisdiction); *Scott v. Cricket Commc'ns, LLC*, 865 F.3d 189, 196 n.6 (4th Cir. 2017) (same, quoting *Mason*).

Finally, the circuits agree that, because the elements of the local-controversy exception are conjunctive, the proponent of remand must establish each and every element of the exception or the case must remain in federal court. *See*, *e.g.*, 28 U.S.C. § 1332(d)(4)(A); *Opelousas*, 655 F.3d at 361 (recognizing that failure to establish any element would require reversal of the district court's remand order); *Woods*, 771 F.3d at 1265 ("A federal district court must decline to exercise jurisdiction under CAFA if the plaintiffs can satisfy all three of [the local-controversy exception] requirements.").

B. The Circuits Agree On Applying A Comparative Approach To The Significant-Basis Element.

The significant-basis element of the local-controversy exception requires that the proponent of remand show that a local defendant's "alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb). CAFA does not further define the meaning of "significant basis." The Third Circuit was the first to consider the question, and, based on its analysis of the statutory text, adopted a comparative approach:

> In relating the local defendant's alleged conduct to all the claims asserted in the action, the significant basis provision effectively calls for comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants. . . . If the local defendant's alleged conduct is a significant part of the alleged conduct of all the Defendants, then the significant basis provision is satisfied. Whether this condition is met requires a substantive analysis comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants.

Kaufman, 561 F.3d at 156.[2]

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[2] The Third Circuit suggested:

> [T]he District Court could, on remand, inform its comparison of the local defendant's alleged conduct to the alleged conduct of all the Defendants by con-

[Footnote continued on next page]

In adopting this comparative approach, the Third Circuit rejected "the assumption that the local defendant's conduct is significant as long as it is 'more than trivial or of no importance.'" *Id.* at 157 (internal citation omitted). As the court explained:

> Whether the local defendant's alleged conduct is significant cannot be decided without comparing it to the alleged conduct of all the Defendants. The word "significant" is defined as "important, notable." *Oxford English Dictionary* (2d ed. 1989). The local defendant's alleged conduct must be an *important* ground for the asserted claims in view of the alleged conduct of all the Defendants.

Id. (emphasis in original).

No circuit has disagreed with this approach. Instead, every circuit to address the issue has adopted a comparative approach to the significant-basis element, and nearly every one of those circuits has expressly cited and followed *Kaufman*, including the Eighth Circuit in the decision below. *See* Pet. App. 9a;

> sidering such possible areas of inquiry as: 1) the relative importance of each of the claims to the action; 2) the nature of the claims and issues raised against the local defendant; 3) the nature of the claims and issues raised against all the Defendants; 4) the number of claims that rely on the local defendant's alleged conduct; 5) the number of claims asserted; 6) the identity of the Defendants; 7) whether the Defendants are related; 8) the number of members of the putative classes asserting claims that rely on the local defendant's alleged conduct; and 9) the approximate number of members in the putative classes.

561 F.3d at 157 n.13.

see also, *e.g.*, *Westerfeld*, 621 F.3d at 825; *Opelousas*, 655 F.3d at 361; *Woods*, 771 F.3d at 1266; *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118-19 (9th Cir. 2015); *Allen v. Boeing Co.*, 821 F.3d 1111, 1118 n.5 (9th Cir. 2016); *Mason*, 842 F.3d at 395-97; *Roppo v. Travelers Com. Ins. Co.*, 869 F.3d 568, 584 (7th Cir. 2017); *Walsh v. Defs., Inc.*, 894 F.3d 583, 592-93 (3d Cir. 2018); *Atwood*, 936 F.3d at 840.

C. Petitioners' Amorphous And Shifting Circuit Split Is Illusory.

In the face of this uniformity regarding the contours of the significant-basis element of CAFA's local-controversy exception, petitioners manufacture a supposed circuit split as to whether the element "can be satisfied where the local and non-local defendants engaged in the same alleged conduct." Pet. i. But, as an examination of the relevant cases makes clear, *no* circuit court has endorsed the proposition that the same alleged conduct by the local and non-local defendants can be sufficient to satisfy the significant-basis element.

As an initial matter, the illusory nature of the supposed split is manifested by petitioners' shifting characterizations of the split and the circuits' alignment on that purportedly disputed issue. In the Rule 35(b) Statement of their Rehearing Petition, petitioners asserted that "[a] conflict exists between federal Circuits regarding the comparison of conduct between defendants to determine whether the acts of a local defendant form a 'significant basis' for the claims asserted by a proposed plaintiff class." Rehearing Petition at 2. Petitioners then cited cases from the Ninth

and Sixth Circuits allegedly on one side of the split[3] and cases from the Third, Fifth, Eighth, and Tenth Circuits on the other side.[4] Thus, petitioners suggested that the Eighth Circuit was in the majority of a 4-2 split. And petitioners' argument for rehearing linked the alleged circuit split directly to *Kaufman*: "The Eighth Circuit's 'narrow' application of the significant basis analysis utilized in the instant case is the progeny of the Third Circuit's opinion in *Kaufman* . . . ." *Id.* at 12.

Remarkably, before this Court, petitioners have now discerned a new constellation of circuits, with the Ninth Circuit's view now ascendant and in the majority of a 3-2 split in which the Sixth and Tenth Circuits join the Ninth Circuit on one side, and the Fifth and Eighth Circuits are the only circuits on the other side. *See* Pet. 14-15. *Kaufman* has gone into total eclipse and is nowhere mentioned or even cited in the petition.

As shown below, however, closer examination of the pertinent circuit decisions shows the alleged circuit split merely reflects the case-by-case comparative analysis contemplated by CAFA and *Kaufman*, and that no circuit has endorsed petitioners' view that the significant-basis element can be met where the local

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[3] *See Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011); *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016); *see also* Rehearing Petition at 9-11.

[4] *See Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144 (3d Cir. 2009); *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819 (8th Cir. 2010); *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358 (5th Cir. 2011); *Woods v. Standard Ins. Co.*, 771 F.3d 1257 (10th Cir. 2014); *see also* Rehearing Petition at 2, 12-13.

and non-local defendants allegedly engaged in the same conduct.

***Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011):** The Ninth Circuit framed the question presented in *Coleman* as "whether a federal district court is limited to the complaint in deciding whether two of the criteria for the local controversy exception are satisfied," namely the "significant relief" and "significant basis" elements. 631 F.3d at 1012-14. Nowhere in the opinion does the court address whether the significant-basis element "can be satisfied where the local and non-local defendants engaged in the same alleged conduct." Pet. i. The Ninth Circuit instead undertook a comprehensive analysis of whether extrinsic evidence is relevant to the significant-basis and significant-relief inquiries, and concluded that the statutory text "unambiguously directs the district court to look only to the complaint in deciding whether" those criteria are satisfied. *Coleman*, 631 F.3d at 1015. The court then applied its holding to the plaintiff's wage-and-hour complaint and concluded that it "sufficiently alleges conduct of [the local defendant] that forms a significant basis for the claims" because the "complaint alleges that [the local defendant] employed the putative class members during the relevant period." *Id*. at 1020. Thus, *Coleman* not only is silent on the legal issue raised in the petition but also arose in circumstances where the plaintiff *differentiated* between the defendants by alleging that the local defendant was the "actual employer" of the putative class members. *Id.*[5]

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[5] Petitioners cite other Ninth Circuit decisions (Pet. 16-17), but those cases do not substantiate their purported split. Each ad-

[Footnote continued on next page]

The opinion is therefore entirely consistent with the Eighth Circuit's reasoning that the significant-basis element is not met where a complaint does "not allege any substantive distinctions between the conduct of the local and nonlocal defendants." Pet. App. 10a (internal quotation marks omitted).[6]

***Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016):** In *Mason*, the Sixth Circuit began its analysis by agreeing with the

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dressed the significant-basis element using a comparative analysis based on allegations that differentiated among defendants, and none of them endorsed petitioners' proposed rule of law. *Benko*, 789 F.3d at 1119 (the local defendant allegedly "conducted illegal debt collection agency activities with respect to thousands of files each year," which "constituted between 15 to 20% of the total debt collection activities of all the Defendants"); *Allen*, 821 F.3d at 1121 ("Plaintiffs allege that they have been harmed by [the local defendant's] *independent* failure for over ten years to properly investigate and remediate the spreading toxic chemical plumes.") (emphasis added); *Christmas v. Union Pac. R.R. Co.*, 698 F. App'x 887, 889 (9th Cir. 2017) ("The complaint alleges that the Local Defendants are 'responsible for scheduling hours and days of work.' This is precisely the conduct that plaintiffs claim is illegal.").

[6] In the context of resolving divergent views among *district courts within the Eighth Circuit*, the court of appeals reiterated the belief, first expressed in its earlier decision in *Atwood*, 936 F.3d at 841, that its approach to the significant-basis element is at odds with that of the Ninth Circuit. Pet. App. 10a-12a. In light of *Atwood*, respondents espoused the same view in their appellate briefing. *See* C.A. Br. for Appellants 21-22. But the Eighth Circuit did not discuss the allegations or holding in *Coleman* in either *Atwood* or the decision below. And, as explained above, close examination of *Coleman* reveals that it is consistent with the Eighth Circuit's decision because the complaint in *Coleman* involved allegations that differentiated between the two defendants and highlighted the local defendant's significant role in the alleged wrongdoing.

Eighth Circuit and other circuits that the significant-basis element "'effectively calls for comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants.'" 842 F.3d at 395-96 (quoting *Kaufman*, 561 F.3d at 156). The court then examined the differentiated allegations of professional negligence against local and non-local engineering firms. The complaint alleged that "all engineering work was conducted 'through [the local defendant],'" "that [it] was formed to conduct [the non-local defendant's] work in Michigan," and that the engineering firms had been retained in reliance on the local defendant as the "entity that 'work[ed] with several water systems around the state'—to 'perform quality control.'" *Id*. at 396 (last alteration in original). Because the failure of "that quality control is the very core" of the claim, the court concluded the local defendant's "conduct forms an 'important' and integral part of plaintiffs' professional negligence claim" and that the significant-basis element was therefore met. *Id*. The opinion does not discuss or endorse petitioners' proposed rule of law that the significant-basis element would be satisfied by an allegation that the local and non-local defendants engaged in the same conduct, and there was no such allegation at issue in the case.

***Woods v. Standard Ins. Co.*, 771 F.3d 1257 (10th Cir. 2014):** Like *Coleman* and *Mason*, *Woods* did not consider the question posed by petitioners, namely whether undifferentiated allegations against the local and non-local defendants can satisfy the significant-basis element. In *Woods*, the complaint made extensive allegations against non-local defendants but barely mentioned the local defendant, 771 F.3d at 1260, and, as petitioners concede, "the Tenth Circuit found that [the] local defendant did not satisfy the 'significant basis' requirement where she was merely

'an isolated role player in the alleged scheme implemented by' the non-local defendants," Pet. 17.

Petitioners nevertheless point to dicta in *Woods* discussing a prior Tenth Circuit case that considered *other elements* of the local-controversy exception—the significant-relief element and the local-defendant element—and found that the significant-relief element was met because "all class members were seeking to hold the [local] company jointly and severally liable." Pet. 17 (alteration in original) (quoting *Woods*, 771 F.3d at 1267 (discussing *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1267 (10th Cir. 2009) (per curiam))). Far from supporting petitioners' proposed rule of law, however, *Coffey* did not even address the significant-basis element because it was uncontested in that case. *See* 581 F.3d at 1244 ("The Freeport Defendants *do not dispute that BZC's conduct formed a significant basis for the claims asserted* by the proposed plaintiff class, but they argue that plaintiffs failed to show that BZC is a defendant from whom significant relief is sought or that BZC is a citizen of Oklahoma.") (emphasis added). Moreover, a plaintiff's effort to impose joint-and-several liability on a defendant does not mean that the plaintiff is alleging that each defendant engaged in the same conduct but only that, in the plaintiff's view, each defendant should be deemed equally responsible as a matter of law. Thus, the language in *Woods* and *Coffey* regarding alleged joint-and-several liability of all defendants relates to the significant-relief element, not the significant-basis element.[7]

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[7] *See also Evans*, 449 F.3d at 1167 n.7 (distinguishing separate requirements of "significant basis" and "significant relief," and explaining that the "mere fact that relief might be sought against

[Footnote continued on next page]

***Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358 (5th Cir. 2011):** Based on reasoning squarely consistent with the Eighth Circuit's analysis here, the Fifth Circuit in *Opelousas* found the plaintiff's allegations regarding the local defendant to be insufficient to satisfy the significant-basis element. The complaint "contain[ed] no information about the conduct of [the local defendant] relative to the conduct of the other defendants." *Opelousas*, 655 F.3d at 361; *see also id.* at 362 ("Clearly nothing in the complaint distinguishes the conduct of [the local defendant] from the conduct of the other defendants."). Thus, like the Eighth Circuit below, the Fifth Circuit held that the plaintiff failed to carry its burden to establish the significant-basis element based on a comparative and case-specific review of the record. *Id.* at 362.

Accordingly, none of these opinions departs from—or is even in tension with—the Eighth Circuit's conclusion in the decision below that "the allegations in the complaint do not satisfy the significant-basis requirement" because, other than the allegations that diminish the alleged role of Rock Road compared to the non-local defendants, "nothing in the complaint distinguishes the conduct of Rock Road Industries from the conduct of the other defendants." Pet. App. 11a (brackets and internal quotation marks omitted). Like the Fifth Circuit's decision in *Opelousas*, the Eighth Circuit has made clear that a complaint's "conclusory allegations that the local defendants engaged

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[the local defendant] for the conduct of others (via joint liability) does not convert the conduct of others into conduct of [the local defendant] so as to also satisfy the 'significant basis' requirement").

in the same conduct as the nonlocal defendant" are insufficient to defeat CAFA removal under the local-controversy exception. *Id.* (brackets and internal quotation marks omitted); *see also Atwood*, 936 F.3d at 840-41 (comparing local defendant's alleged conduct to that of all the defendants, and concluding that "CAFA removal is not foreclosed by the complaint's conclusory allegations that the local defendants engaged in same conduct as the diverse defendant"). No circuit has endorsed the contrary proposition, urged here by petitioners, that conclusory allegations of the same conduct by all defendants will or must suffice, and every case cited by petitioners reaches an outcome that is consistent with the Eighth Circuit's refusal to remand here.

In fact, as demonstrated above, the circuits that have considered this aspect of CAFA all recognize that the question whether the local defendant's alleged conduct provides a significant basis for the claims asserted is and should be decided by a comparative analysis focused specifically on the case at hand—the nature of the claims asserted, the number and respective roles of the various defendants, and a host of other considerations within CAFA's significant-basis framework. Petitioners are asking this Court to announce a rule that no circuit has embraced, namely that a state court plaintiff may avoid federal court jurisdiction and comparative analysis under the significant-basis element merely by pleading that all defendants engaged in the same alleged conduct. There is no reason for the Court to take that unprecedented step, undermining CAFA.

III. THERE ARE ADDITIONAL REASONS WHY CERTIORARI SHOULD BE DENIED.

Contrary to petitioners' assertion, this case is in no way a "perfect vehicle" (Pet. 24) for certiorari review. In addition to the fundamental defects that the question presented is not squarely presented here (*supra* Section I), and the alleged circuit split is illusory (*supra* Section II), certiorari should be denied for several additional reasons.

First, even if certiorari were granted, it is unlikely to change the forum in which this suit is litigated because petitioners failed to establish all three conjunctive elements pertaining to the local defendant, which are necessary for the local-controversy exception to apply. The majority of the Eighth Circuit panel held that the significant-basis element was not met and that this holding "suffices to reverse," Pet. App. 8a n.2, and it was therefore unnecessary for the court of appeals to address whether the other two elements were also absent—namely whether Rock Road is a defendant from whom significant relief is sought and whether Rock Road "is" a Missouri citizen. Concurring in the judgment, Judge Stras reasoned that, because Rock Road no longer existed at the time of removal, there "is" no local Missouri citizen as required to invoke the local-controversy exception. Pet. App. 18a-19a. Thus, even if this Court were to grant petitioners relief as to the significant-basis element of the local-controversy exception, the outcome would be a remand to the Eighth Circuit to consider challenges to the other two local-defendant elements of the local-controversy exception, where respondents would have

a substantial likelihood of prevailing on one or both of those elements and defeating remand.[8]

Second, certiorari should be denied as unduly disruptive to the course of this litigation, which is now moving forward on remand from the Eighth Circuit to the United States District Court for the Eastern District of Missouri. Petitioners never requested that the Eighth Circuit stay the mandate under Rule 41, nor did they request any stay from the district court, where the case has been pending since August 2021. Since remand, an order for a Rule 16 conference has been entered, and respondents have filed a third-party complaint. The district court's resources applied to this case on remand from the Eighth Circuit will have been wasted if the case is later returned to state court.

Finally, petitioners' other arguments about the suitability of this case for review cannot withstand scrutiny. The Eighth Circuit's decision is plainly correct on the record presented because the Complaint asserts that Rock Road played an insignificant role when compared to the alleged conduct of Republic, which petitioners alleged "'owns, oversees, and directs the environmental decisions and conduct'" of Rock Road, Pet. App. 12a—an allegation that on its face is fatal to petitioners' significant-basis argument.

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[8] In addition, the Eighth Circuit very recently issued an opinion rejecting the decision upon which the district court relied in denying federal subject-matter jurisdiction under the Price-Anderson Act. Pet. App. 33a-37a; *see Banks v. Cotter Corp.*, No. 21-1160, __ F.4th __, slip op. at 11 n.2 (8th Cir. Jan. 7, 2022) ("This Court rejects *Strong v. Republic Services, Inc.*, 283 F. Supp. 3d 759 (E.D. Mo. 2017) . . . ."). This new Price-Anderson Act opinion offers yet another reason why a grant of certiorari is unlikely to change the forum for this case.

Moreover, the issue framed by petitioners does not recur frequently. Although petitioners assert that disputes over the local-controversy exception often arise in actions involving environmental contamination, they offer a lengthy string citation that merely catalogues potential types of environmental contamination. Pet. 24-25. Only four of those cases focus on the significant-basis element. *See Ictech-Bendeck v. Progressive Waste Sols. of LA, Inc.*, 367 F. Supp. 3d 555 (E.D. La. 2019); *MD Haynes, Inc. v. Valero Mktg. & Supply Co.*, 2017 WL 1397744 (S.D. Tex. Apr. 19, 2017); *Mason*, 842 F.3d 383; *Allen*, 821 F.3d 1111. And none of them suggests that the prevailing law requiring comparison of conduct among defendants is flawed or unworkable in environmental contamination cases or that plaintiffs bringing such claims have satisfied their burden to establish the significant-basis element of CAFA's local-controversy exception if they allege that the local and non-local defendants engaged in the same conduct. Petitioners' proposed rule of law has no support in environmental cases—or in any other area of jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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