NO. 16-560

# In the Supreme Court of the United States

ASCIRA PARTNERS, LLC, ET AL.,

*Petitioners,*

–v–

SCOTT DANIEL, ET AL.,

*Respondents.*

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

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly denied Petitioners' appeal of an order remanding an alleged "mass action" under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(11) ("CAFA"), pursuant to 28 U.S.C. § 1453 (c)(4), where: (i) the Court of Appeals initially granted Petitioners permission to appeal the remand order under 28 U.S.C. § 1453(c)(1), (ii) the Court of Appeals had 60 days from the date the appeal was filed to render its judgment under 28 U.S.C. § 1453(c)(2), (iii) Petitioners never sought an extension of the 60-day period, which they were permitted to do under 28 U.S.C. § 1453(c)(3), and the Court of Appeals did not render a judgment within the 60-day period, and, consequently, (iv) the Court of Appeals dismissed the appeal, pursuant to 28 U.S.C. § 1453(c)(4), which states that "the appeal shall be denied" without the extension.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The undersigned counsel represents all the Respondents listed within the Petition at Pet.App.30-37 except Respondents Kelly LeMaster (# 125), Dennis Thomas (# 199), Delana Wheaton (# 214), and Dawn Wolfe (# 218). Each Respondent is either a natural individual, the next friend of a minor or legally disabled individual, or a personal representative of a decedent's estate. None of the Respondents is a non-governmental corporation or other entity.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### CASES

## TABLE OF AUTHORITIES—Continued



## STATUTES

## TABLE OF AUTHORITIES—Continued

## STATUTORY PROVISION INVOLVED

### 28 U.S.C. § 1453. Removal of Class Actions

#### (a) Definitions

In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

#### (b) In general

A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

#### (c) Review of Remand Orders

##### (1) In general

Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

> **(2) Time period for judgment**
>
> If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).
>
> **(3) Extension of time period**
>
> The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—
>
> (A) all parties to the proceeding agree to such extension, for any period of time; or
>
> (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.
>
> **(4) Denial of appeal**
>
> If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

* * * *

## INTRODUCTION

There are no "compelling reasons" to grant the Petition for a Writ of Certiorari. *See* Sup. Ct. R. 10. The

Sixth Circuit Court of Appeals' unreported July 27, 2016 *Order* denying Petitioners' appeal from the district court's remand order (Pet.App.1-3) was required by the straightforward text of 28 U.S.C. § 1453(c)(4), and the Sixth Circuit's compliance with the statutory command does not conflict with prior decisions of this Court or another court of appeals in applying this statute. This Court and the courts of appeals that have discussed the statute's requirement that an appeal of a remand order be denied upon the expiration of the time to decide an appeal—the Second, Third, Fifth, Sixth, Seventh, Ninth, Eleventh and D.C. Circuits—have all reached the same conclusion: once a Court of Appeals exercises its discretion and grants an application for permission to appeal a remand order, pursuant to 28 U.S.C. § 1453(c)(1), the Court must render a final judgment within 60 days unless an extension is granted under 28 U.S.C. § 1453(c)(2) and (3), and if a final judgment is not issued by the end of the 60-day period, plus any extension of that period, then "the appeal shall be denied" under 28 U.S.C. § 1453(c)(4).

Petitioners do not contest that the statute requires denial of an appeal if the court of appeals is unable to decide it within the statutory period, but argue nonetheless that review of the issues decided in the underlying district court decision is appropriate under *Dart Cherokee Basin Operating Company, LLC v. Owens*, 135 S.Ct. 547 (2014). That case is readily distinguishable from this one. *Dart Cherokee* involved this Court's review of the Tenth Circuit's abuse of discretion under 28 U.S.C. § 1453(c)(1) by denying an application for permission to appeal a remand order where, under the circum-

stances of the case, it was evident that the court of appeals must have based its decision on an erroneous view of the law. In this case, the Sixth Circuit denied the appeal under 28 U.S.C. § 1453(c)(4) because Petitioners failed to make a motion to extend the decision period and the case was not decided within 60 days. Under these facts, Congress mandated that "the appeal shall be denied" and the Sixth Circuit lacked any discretion to exercise regarding its decision. The denial of an appeal under such circumstances, unlike the Tenth Circuit's denial of leave to appeal in *Dart Cherokee*, does not suggest in any way that the Sixth Circuit adopted one or both of the alternate grounds for the district court's decision. In any event, the unpublished decisions of the district court and the Sixth Circuit here carry no precedential weight, have no binding effect except to the parties and those in privity with them, and cannot establish the existence of conflicts with decisions of other courts of appeals over any point of law.

## STATEMENT OF THE CASE

The 226 lawsuits initially removed to the district court consist of related medical malpractice cases alleging that petitioner Abubakar Atiq Durrani, M.D. performed negligent and unnecessary surgeries that resulted in complications and injuries. (Pet.App.7). During the times Dr. Durrani performed his wrongful surgeries on Respondents, he lived, worked, and operated in the Greater Cincinnati area. (Pet.App.18).

Dr. Durrani fled Ohio to Pakistan to avoid federal criminal prosecution on various charges. *Id.*

Respondents also brought related state law claims against various hospital and surgical centers and related individuals for negligence; negligent credentialing, supervision, and retention of Dr. Durrani; fraud; and spoliation of evidence. (Pet.App.7). Some of these hospital and surgical center parties and related individuals include petitioners West Chester Hospital/UC Health, Cincinnati Children's Hospital Medical Center and affiliated individuals, Good Samaritan Hospital/TriHealth, Inc., and Journey Lite of Cincinnati, LLC and affiliated individuals. (Pet.App.7 and 29-30).

Some of these lawsuits were originally filed in Hamilton County, Ohio and others were originally filed in Butler County, Ohio. (Pet.App.7, n. 3). Respondents have voluntarily dismissed nearly all of the Butler County cases and re-filed them in Hamilton County. (Pet.App.7). All of the re-filed cases (and the majority of the cases originally filed in Hamilton County) have been assigned to Hon. Robert P. Ruehlman, Judge, Hamilton County, Ohio Court of Common Pleas, who consolidated all of the "Durrani cases" in his Court. (Pet.App.7). Petitioners removed 226 of those lawsuits in this proceeding.

Trials of Respondents' cases have been agonizingly slow. To expedite trial settings, Respondents suggested several options available to Judge Ruehlman. (Pet.App.7). Among others, Respondents proposed joint trials or smaller group trials of the separate cases, Judge Ruehlman entered an order setting the cases for trial in four groups, and

Petitioners immediately removed. (Pet.App.8-9). None of the trials scheduled have occurred to date because of Petitioners' removals of the 226 cases to federal court. (Pet.App.21).

Petitioners removed the 226 cases to the United States District Court for the Southern District of Ohio, Western Division (at Cincinnati). Petitioners argued that Respondents' proposal of a joint trial of the claims of over 100 Respondents created a "mass action" subject to federal jurisdiction under 28 U.S.C. § 1332(d)(11). (Pet.App.9).

Respondents moved to remand the 226 cases to the Hamilton County Court of Common Pleas. Respondents contended that these removals were the latest defense tactic to engage in judge shopping and delay the trials for the 226 cases, and that these cases are not removable under CAFA. The parties filed opposition and reply memoranda.

On February 13, 2016, the district court entered its *Order Remanding These Civil Actions*. (Pet.App.4-22). This decision is unpublished. The 226 cases were remanded to the state court for two reasons. First, district court held that it lacked mass action jurisdiction because the requirement that there be a "civil action" in which a joint trial was proposed for claims of at least 100 plaintiffs was not satisfied. (Pet.App.10-16). Although the district court acknowledged Respondents' joint trial proposal presented to Judge Ruehlman, it held that there could be no mass action jurisdiction where each of the suits covered by the proposal involved fewer than 100 plaintiffs, and the cases were not combined into a single suit. (Pet.App.13-16).

Second and alternatively, the district court declined jurisdiction under CAFA's discretionary Totality of the Circumstances Exception, 28 U.S.C. § 1332 (d)(3). (Pet.App.16-20). The district court reviewed each complaint included in the alleged "mass action" and found as facts that between one-third and two-thirds of the Respondents and the "primary Defendants" are Ohio citizens. (Pet.App.16-18). The district court applied the Totality of the Circumstances Exception to decline to exercise jurisdiction after weighing the factors listed in 28 U.S.C. § 1332(d)(3)(A)-(F) as well as the procedural history of the 226 cases. (Pet.App.19-20).

Petitioners filed an application to the Sixth Circuit Court of Appeals for permission to appeal from the district court's remand order pursuant to 28 U.S.C. § 1453(c)(1). On May 25, 2016, the court granted Petitioners leave to appeal and their appeal was docketed on that day. (Pet.App.2 and 23-26).

Pursuant to 28 U.S.C. § 1453(c)(2), the Sixth Circuit had 60 days from May 25, 2016, to decide the appeal unless an extension was agreed to by all parties or requested and granted for "good cause shown and in the interests of justice" under 28 U.S.C. § 1453(c)(3). (Pet.App.2). The last day for the Sixth Circuit to issue its final judgment was Monday, July 25, 2016, because the actual 60th day was on Sunday, July 24, 2016. Petitioners do not mention within their *Statement of the Case* that they never sought or obtained an extension of the 60-day decision period from the court. Petitioners acknowledge, however, that the court did not enter a final judg-

ment within the period.[1] (Pet.App.2). Under these facts, the Sixth Circuit entered its unpublished *Order* on July 27, 2016, and held, "Thus, by law, the appeal is DENIED". *Id.* (Court's emphasis)—that law being 28 U.S.C. § 1453(c)(4).

Petitioners then filed a petition for rehearing en banc following the denial of their appeal. (Pet.App.27). The petition for en banc review was denied in an unpublished *Order*, entered September 20, 2016:

> The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.
>
> Therefore, the petition is denied.

*Id.* The Order makes clear that the Sixth Circuit considered and rejected Petitioners' argument that their challenges to the merits of the district court's opinion constituted a valid reason for overturning the panel's decision to deny the appeal as required by 28 U.S.C. § 1453(c)(4).

Petitioners then moved the Sixth Circuit to stay the mandate. That motion was denied and the mandate issued on September 28, 2016.

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[1] Petitioners deliberately accuse the Sixth Circuit of "intentionally letting the 60-daystatutory period for issuing a decision run." (Petition, page 12) The attack on the integrity of the court is wholly unwarranted speculation.

Petitioners then applied to Circuit Justice Elena Kagan to recall and stay the Sixth Circuit's mandate on the ground that "there is a reasonable probability that this Court will grant certiorari and a fair prospect that the judgment will be reversed. . . ." Justice Kagan denied the application on October 9, 2016, under Application No. 16A326.

Petitioners now petition this Court for a writ of certiorari to review the Sixth Circuit's unpublished *Order*, entered July 27, 2016, that denied their appeal of the district court's remand order pursuant to 28 U.S.C. § 1453(c)(4). The Petition should be denied.

## REASONS FOR DENYING THE WRIT

The Sixth Circuit's *Order*, entered July 27, 2016, denying Petitioners' appeal of the district court's remand order is a straightforward and correct application of 28 U.S.C. § 1453(c)(4). The decision is wholly consistent with the decisions of this Court and other courts of appeals that have addressed the application of 28 U.S.C. § 1453(c)(4) where the petitioner had not sought or obtained an extension of the 60-day time limit and the appellate court had not issued is final judgment within the time allotted, pursuant to 28 U.S.C. § 1453(c)(2) and (3). The Sixth Circuit's denial of the appeal reflects no more than that the time for decision expired without extension before the court had resolved the appeal, and did not decide or even suggest a view on the underlying merits of the removed case. As an unpublished decision, moreover, the

Sixth Circuit's decision carries no precedential weight, has no binding effect on anyone other than the parties and those in privity with them, and, thus, suggests no conflict with decisions of other courts of appeals. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

## I. THE SIXTH CIRCUIT CORRECTLY DENIED PETITIONERS' APPEAL OF THE DISTRICT COURT'S REMAND ORDER PURSUANT TO 28 U.S.C. § 1453(c)(4)

The rule of decision here, 28 U.S.C. § 1453(c), supplies the procedure for an appellate court's review of a district court's remand order, as follows:

> (c) Review of remand orders.—
>
> (1) In general
>
> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action[2] to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

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[2] For purposes of 28 U.S.C. § 1453, a "mass action" shall be deemed to be a class action removable under 28 U.S.C. § 1332(d)(2) through (10) if it otherwise meets the provisions of those paragraphs.

> **(2) Time period for judgment**
>
> If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).
>
> **(3) Extension of time period**
>
> The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—
>
> (A) all parties to the proceeding agree to such extension, for any period of time; or
>
> (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.
>
> **(4) Denial of appeal**
>
> If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied. (emphasis added).

Ordinarily, remand orders "[are] not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). There is an exception, however, for cases invoking CAFA. 28 U.S.C. § 1453(c)(1). In such cases, "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand." *Id.* CAFA is designed to settle jurisdictional issues early.

*Lewis v. Verizon Communications, Inc.*, 627 F.3d 395, 398 (9th Cir. 2010). Thus, an appeal must be filed "not more than 10 days" after a remand order is entered. 28 U.S.C. § 1453(c)(1).

By the presence of the word "may" at 28 U.S.C. § 1453(c)(1), Congress intended for courts of appeals to have discretion to accept or deny an appeal of a district court's order granting or denying a motion to remand a mass action. Conversely, Congress' use of the mandatory "shall" at 28 U.S.C. § 1453(c)(4) " . . . normally creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("a mandatory 'shall' . . . impose(s) discretionless obligations"); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (calling shall "language of an unmistakably mandatory character"); *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969, 1972 (2016) ("Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement."); *United States v. Ostrander*, 411 F.3d 684, 688 (6th Cir. 2005) (summarizing cases and holding that defendant's "assertion that 'shall' does not create a mandatory command simply flies in the face of standard interpretation."). Thus, the Sixth Circuit had no discretion to exercise as to whether to decide Petitioners' appeal under 28 U.S.C. § 1453(c)(4) once time for deciding the appeal expired.

In *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), this Court recognized the rule at 28 U.S.C. § 1453(c)(4) "that if a final judgment on the appeal in a court of appeals is not issued before the end of 60 days (with a possible 10-day extension), the appeal shall be denied."

*Id.* at 83. Thereafter, Sixth Circuit discussed the procedure to review a district court's order remanding a "class action" or "mass action" to the court from which it had been removed in *In Re: Mortgage Electronic Registration Systems, Inc.*, 680 F.3d 849 (6th Cir. 2012). The *MERS* Court stated the decision matrix thusly:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." § 1447(d). The [Class Action Fairness Act, 28 U.S.C. § 1332(d)] however, provides that we "may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order." § 1453 (c)(1). The statute further requires that: "[i]f the court of appeals accepts an appeal. . . . the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3)." § 1453(c)(2). An extension to this time limitation may be granted "for any period of time" if all parties agree, or "for a period not to exceed 10 days" if the extension is "for good cause and in the interest of justice." § 1453 (c)(3)(A), (B). <u>If a final judgment is not issued before the end of the sixty-day time period</u>, or the extended period if such an extension

> has been granted under section 1453(c)(3), "the appeal shall be denied." § 1453(c)(4).

*MERS*, 680 F.3d at 852 (emphasis added).

The Sixth Circuit correctly denied this appeal by operation of 28 U.S.C. § 1453(c)(4). The Court initially granted Petitioners permission to appeal from the district court's remand order on May 25, 2016, pursuant to 28 U.S.C. § 1453(c)(1), and their appeal was docketed on that day. (Pet.App.23). Significantly, Petitioners never sought or obtained an extension of 60-day deadline. More than 60 days had passed since May 25, 2016, no extension had been sought by Petitioners or granted by the Court, and no final judgment had been issued by July 25, 2016. *Id.* Consequently, the Sixth Circuit correctly denied the appeal by a straightforward application of 28 U.S.C. § 1453(c)(4). Under these facts, there is no "compelling reason" to grant the Petition.

## II. THERE IS NO CONFLICT BETWEEN THE DECISION IN THIS CASE AND THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICATION OF 28 U.S.C. § 1453(c)(4)

The *Friend* and *MERS* Courts' discussions of the procedures governing appeals of remand orders at 28 U.S.C. § 1453(c) are not aberrations from the rules of statutory construction, but fall squarely within the mainstream of other federal appellate courts that have considered the time limitations for filing a final judgment under 28 U.S.C. § 1453(c)(2) and (3), and the consequence for not doing so established by 28 U.S.C. § 1453(c)(4).

All courts of appeals that have considered the statutory framework have held that once a court of appeals grants an application for permission to appeal pursuant to 28 U.S.C. § 1453(c)(1), the court cannot render any final judgment other than denial of an appeal more than 60 days after it is accepted unless an extension is granted under 28 U.S.C. § 1453(c)(3). 28 U.S.C. § 1453(c)(2); *Morgan v. Gay*, 471 F.3d 469, 472 (3d Cir. 2006); *Braud v. Transport Service Co. of Illinois*, 445 F.3d 801, 803, n. 2 (5th Cir. 2006); *Hart v. FedEx Ground Package System, Inc.*, 457 F.3d 675, 679 (7th Cir. 2006); *Lewis*, 627 F.3d at 398-399; *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326-1327, n. 2 (11th Cir. 2006); and *In re: U-Haul International, Inc.*, No. 08-7122, 2009 WL 902414 at *3 (D.C. Cir. Apr. 6, 2009). If a judgment on the appeal is not issued by the end of the 60-day period, plus any extension of that period, then "the appeal shall be denied" under 28 U.S.C. § 1453(c)(4). *Maytag Corp.*, 450 F.3d at 1326-1327, n. 2; *DiTolla v. Dora Dental IPA of New York*, 469 F.3d 271, 274 (2d Cir. 2006); *Lewis*, 627 F.3d at 398-399; *U-Haul Intnl.*, 2009 WL 902414 at *3; *Miara v. First Allmerica Financial Life Ins. Co.*, 379 F.Supp.2d 20, 27, n. 7 (D. Mass. 2005).

There is no conflict among the other courts of appeals that have considered the time limitations of review of remand orders under 28 U.S.C. § 1453(c). If this case had been brought within the Second, Third, Fifth, Seventh, Ninth, Eleventh, or D.C. Circuits, the result would have been the same as in the Sixth Circuit—"the appeal shall be denied." 28 U.S.C. § 1453(c)(4). The Sixth Circuit's decision regarding the application of 28 U.S.C. § 1453(c)(4) to the facts here is consistent with the decisions of other circuit

courts that have discussed the issue. There are no decisions by this Court or the courts of appeals that conflict on this point.

## III. PETITIONERS' EFFORT TO CREATE CONFLICTS AMONG THE COURTS OF APPEALS THROUGH THE APPLICATION OF THE SIXTH CIRCUIT'S UNPUBLISHED DECISION THAT DENIED THEIR APPEAL IS UNAVAILING

Petitioners ask within their *Questions Presented* section of the Petition whether this Court should resolve two alleged circuit conflicts supposedly arising from the entry of the Sixth Circuit's July 27, 2016, *Order*. The Court can confidently answer each question in the negative.

The Sixth Circuit's decision denying Petitioners' appeal (Pet.App.1-3) and the district court's remand order (Pet.App.4-22) are both unpublished decisions. In the Sixth Circuit, unpublished opinions carry no precedential weight and have no binding effect on anyone except against the parties to the action and their privities. *Sheets v. Moore*, 97 F.3d 164, 167 (6th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997). This principle was recently reaffirmed by the Sixth Circuit in *Graiser v. Visionworks of America, Inc.*, 819 F.3d 277, 283 (6th Cir. 2016)(an unpublished court of appeals ruling is not binding precedent), a case in which Petitioners' counsel participated. Of course, the Sixth Circuit's decision will bind the parties and those in privity with them under the doctrine of *res judicata. Nevada v. United States*, 463 U.S. 110, 129-130 (1983); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326, n. 5 (1979) ("Under the doctrine of *res judicata*, a judgment on the merits in a prior suit

bars a second suit involving the same parties or their privies based on the same cause of action."). Nevertheless, an unpublished Sixth Circuit decision, like the one here, cannot serve as a valid basis to manufacture a conflict among other Courts of Appeal.

Petitioners argue that the Sixth Circuit's decision fails to decide various issues they initially presented within their application for leave to appeal. But the court's decision to deny their appeal did not reflect any decision on the merits of those issues; it involved only compliance with the statutory mandate that an appeal the court is not able to decide within 60 days be denied. It is true that the presence of CAFA-related questions is a factor in allowing an application for leave to appeal in the first place under 28 U.S.C. § 1453(c)(1). *College of Dental Surgeries of Puerto Rico v. Connecticut General Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009). However, the presence of these questions has no bearing on the Court of Appeal's decision whether to deny the appeal under 28 U.S.C. § 1453(c)(4) due to the lapse of the decision deadline at 28 U.S.C. § 1453(c)(2) and (3). Congress' use of the words "the appeal shall be denied" at 28 U.S.C. § 1453(c)(4) removes any discretion the Sixth Circuit might have had to reach the merits of the appeal here. Its *Order* en banc (Pet.App.27) reflects this analysis. To the extent Petitioners' questions presented are read to raise the merits of the underlying CAFA issues, they are not properly presented, because the propriety of the court of appeals' Orders denying the appeal does not turn on the answer to those questions.

Lastly, this Court's decision of *Dart Cherokee Basin Operating Company, LLC v. Owens*, 135 S.Ct. 547 (2014), provides no basis for Petitioners' attempt to ascribe the district court's reasoning to the Sixth Circuit in order to create a basis for assertion of circuit conflicts. In *Dart Cherokee*, the Tenth Circuit denied an appellant's application for review of a remand order under 28 U.S.C. § 1453(c)(1). The standard of review by this Court was abuse of discretion and this Court concluded that the Court of Appeals had abused its discretion in denying the appeal under 28 U.S.C. § 1453(c)(1) by basing its decision on an erroneous view of the law. *Id.*, 135 S.Ct. at 555.

In our case, the Sixth Circuit duly exercised its discretion at 28 U.S.C. § 1453(c)(1) by granting Petitioners' application for permission to appeal. (Pet.App.23-26). *Dart Cherokee* does not discuss the procedure for the entry of a final judgment on such an appeal. However, Congress did address the point, and the procedure is codified at 28 U.S.C. § 1453(c)(2), (3), and (4). *Dart Cherokee* cannot be employed to judicially graft an abuse of discretion standard of review onto a Court of Appeals decision denying an appeal where Congress has unequivocally mandated that an appeal shall be denied when the 60-day timeframe has lapsed and where Petitioners never sought and obtained any extension. 28 U.S.C. § 1453(c)(4).

Additionally, the *Dart Cherokee* Court stated that the reason it could hold that the Tenth Circuit abused its discretion in denying the petitioners' application for permission to appeal under 28 U.S.C. § 1453(c)(1) was that "[t]here are many signals that the Tenth Circuit relied on the legally erroneous premise that

the District Court's decision was correct." *Dart Cherokee*, 135 S.Ct. at 555. Here, the only signal is that the Sixth Circuit did not complete its task in the limited time allotted. Moreover, given that the district court's decision here rested on alternate grounds, there is no way at all to attribute to the court of appeals a view as to whether one or the other was correct.

Last, an argument that the *Dart Cherokee* Court found persuasive, and that Petitioners try to invoke here, was that "[i]n practical effect, the Court of Appeals' denial of review established the law not simply for this case, but for future CAFA removals sought by defendants in the Tenth Circuit," 135 S.Ct. at 556, and thus "froze the governing rule in the Circuit for this case and future CAFA removal notices." *Id.* at 557. That view rested, in part, on the fact that the evidentiary issue raised in *Dart Cherokee* (*i.e.*, whether a removal petition's jurisdictional averments must be supported by evidence submitted with the removal petition) would not arise in the future because defense attorneys would comply with the requirement of making evidentiary submissions along with their removals. *Id.*

The Sixth Circuit's ruling here presents no similar dilemma. If a future case were to present either of the legal issues decided by the district court, a defendant could simply remove the case and present the issue for decision. The Sixth Circuit's decision to grant leave to appeal in this case would provide good reason to think that an appeal of an adverse decision would again be allowed so that the court of appeals could resolve the questions not addressed here. There

would be no reason to think that the court would again lack time to resolve the appeal (particularly if the case presented only one of the two issues, simplifying the court's task, and if the defendant undertook the effort to obtain an extension of the time for decision, if necessary).

## IV. THE UNDERLYING ISSUES ARE LIKELY MOOT BECAUSE OF THE OHIO SUPREME COURT'S RECENT VACATING OF THE STATE TRIAL JUDGE'S ORDER CONSOLIDATING TRIALS

On November 15, 2016, the Ohio Supreme Court entered a decision holding that Judge Ruehlman was without jurisdiction "to transfer the Durrani cases to himself from the other judges to whom the cases had originally been assigned or to consolidate the Durrani cases for purposes of trial." *State ex rel. Durrani v. Ruehlman*, Slip Opinion No. 2016-Ohio-7740, ¶ 26 (Ohio Nov. 15, 2016). The Ohio Supreme Court further held that "because Judge Ruehlman lacked the authority to order the consolidation of the underlying malpractice cases . . . , [it vacated] Judge Ruehlman's order consolidating the cases, and [issued] a writ of prohibition ordering him to refrain from taking any further action in the cases not originally assigned to him except for returning each one to the originally assigned judge." *Id.*, ¶ 28.

Upon the Ohio Supreme Court's vacating Judge Ruehlman's trial consolidation order, it is problematic whether there ever will, in fact, be joint trials of Respondents' cases against Petitioners. While the vacating of Judge Ruehlman's order of consolidation might not affect removal jurisdiction, given that at the time of removal there arguably was a "proposal" for

joint trials, this Court's review would be particularly unwarranted here because, in light of the Ohio Supreme Court's decisions, the underlying cases may now be just garden-variety, individual malpractice cases. Federal jurisdiction over such cases lies far beyond the concerns that led to Congress' enactment of CAFA.

## CONCLUSION

There is no compelling reason for this Court to grant the Petition. This Court and all the courts of appeals that have considered 28 U.S.C. § 1453(c)(4) state that an appeal of the grant or denial of a district court's remand order "shall be denied" where the petitioner has not sought or obtained an extension of the 60-day decision period and the appellate court has not entered its judgment within the time period. Under that straightforward reading of 28 U.S.C. § 1453 (c)(4), the Sixth Circuit correctly denied Petitioners' appeal. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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