No. _____

In the Supreme Court of the United States

ASCIRA PARTNERS, LLC, *et al*.,
Petitioners,

v.

SCOTT DANIEL, *et al*.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve the circuit conflict over whether, for the purposes of the 100-plaintiff requirement for mass action jurisdiction under the Class Action Fairness Act ("CAFA"), specifically 28 U.S.C. § 1332(d)(11)(B), jurisdiction is proper where multiple suits, each involving fewer than 100 plaintiffs, are proposed to be tried jointly and, when combined, encompass the claims of more than 100 plaintiffs, as the Seventh, Eighth, and Ninth Circuits hold, or whether mass action jurisdiction arises only if a single suit contains the claims of at least 100 plaintiffs, as the Sixth Circuit now holds?

2. Whether this Court should resolve the circuit conflict over the time at which citizenship should be determined under CAFA's exceptions to federal jurisdiction, where the courts of appeals use three different times for such determination—some courts determine jurisdiction at the time the complaint was filed, while others determine citizenship at the time the case became removable, and the Sixth Circuit now determines citizenship at the time the cause of action arose?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the trial court and the court of appeals are numerous and therefore are listed separately as follows:

Petitioners (Defendants-Appellants below) are the individuals and entities listed at Pet. App. 29-30.

Respondents (Plaintiffs-Appellees below) are the individuals listed at Pet. App. 30-37.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, undersigned counsel state as follows:

None of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

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Defendants ASCIRA Partners, LLC, Patrick Baker, Bariatric Partners of Texas, Inc., Bariatric Partners of Texas, LLC, C. Francis Barrett, Jeffrey Bogle, Joseph Broderick, M.D., Margaret Buchanon, Center for Advanced Spine Technologies, Inc., Dr. Haleem Chaundhary, Cincinnati Children's Hospital Medical Center, Edward Crane, M.D., Trace Curry, Tom Daskalakis, Jeff Drapalik, Abubakar Atiq Durrani, M.D., Naveed Fazlani, M.D., Dr. Douglas Feeney, Elliott Fegelman, M.D., Good Samaritan Hospital, Michael Gould, Paula Hawk, Matthew Hardin, M.D., Julie Holt, Jamie Hunter, Kevin Joseph, Journey Lite of Cincinnati, LLC, Carol King, James A. Kingsbury, Timothy Kremchek, Rev. Damon Lynch, Jr., Jerry Magone, M.D., David McClellan, Myles Pensak, M.D., Riverview Health Institute, LLC, Ron Rohlfing, David Schwallie, Jill Stegman, Cyndi Trafficant, TriHealth, Inc., UC Health, West Chester Hospital, LLC, Creighton B. Wright, M.D., and Jeffrey Wyler petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the trial court granting Plaintiffs' remand motions (Pet. App. 4) is not published in the *Federal Supplement* but is available at 2016 WL 591608. The order granting the petition for leave to appeal (Pet. App. 23) and the decision of the court of appeals affirming the order of the trial court (Pet. App. 1) are unreported.

JURISDICTION

These cases were timely removed to federal court under 28 U.S.C. § 1332(d). The trial court remanded the cases, but stayed its decision pending appeal. Pet. App. 21. The Sixth Circuit accepted the appeal (Pet. App. 25) and affirmed the trial court's remand order by declining to issue a written opinion within the 60 days allotted under 28 U.S.C. § 1453(c). Pet. App. 2. The court of appeals denied Defendants' request for rehearing *en banc* on September 20, 2016. Pet. App. 27. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

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[1] The Sixth Circuit resolved Defendants' appeal by allowing the statutory 60-day period to lapse after full briefing. The panel, however, also made clear that it had "fully considered" the issues in the case. Pet. App. 27. There is, therefore, no obstacle to granting the writ. Indeed, this Court has accepted jurisdiction over the denial of a petition to appeal and then reversed based on the underlying merits. *See, e.g.*, *Dart Cherokee Basin Operating Co., LLC v. Owens*, — U.S. —, 135 S. Ct. 547, 554-55 (2014); *Standard Fire Ins. Co. v. Knowles*, — U.S. —, 133 S. Ct. 1345, 1348 (2013). This case does not raise the concern addressed by the dissent in *Dart* because the Sixth Circuit considered the case after complete briefing. Pet. App. 27. *Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 547, 559-62 (Scalia, J., dissenting) (Court should have dismissed case as improvidently granted because only issue before the Court was whether Tenth Circuit abused discretion by denying permission to appeal).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs.

* * * *

(d)(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which–

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(d)(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(d)(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A)(i) over a class action in which–

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(A)(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of

the State in which the action was originally filed.

* * * *

(d)(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

* * * *

(d)(11)(A) For purposes of the subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(d)(11)(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

STATEMENT OF THE CASE

The Sixth Circuit has created circuit splits on two important jurisdictional questions under the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, codified as 28 U.S.C. §§ 1332(d)(2)-(4) and 1332(d)(11). Unless the Court resolves these questions, whether a case is subject to federal court jurisdiction will depend on the Circuit within which the case is filed. Either the Sixth Circuit is incorrectly declining jurisdiction that it has, or the other Circuits are exercising jurisdiction that they do not have.

The first question arises because the Sixth Circuit, adopting the decision of the trial court, expressly rejected decisions from the Seventh, Eighth, and Ninth Circuits.[2] Those courts all agree that mass action jurisdiction under 28 U.S.C. § 1332(d)(11) is present where plaintiffs propose a joint trial of multiple cases, each with less than 100 plaintiffs, that together encompass the claims of more than 100 plaintiffs. Only the Sixth Circuit disagrees.

The second question relates to all CAFA cases, not only mass actions. The Sixth Circuit has created a third method to determine citizenship for the purposes

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[2] Although the only written opinion is the trial court's order remanding the case, the Sixth Circuit's adoption of the trial court's decision is legally significant. Pet. App. 27. *See Dart Cherokee Basin Operating Co., LLC*, 135 S. Ct. at 556 ("[T]he 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. … Consequently, the law applied by the District Court … will be frozen in place for all venues within the Tenth Circuit.").

of CAFA's jurisdictional exceptions. The Sixth Circuit departed from all other Circuits by determining the citizenship of the parties at the time the cause of action arose, rather than at the time the complaint was filed or the time the case became removable. The Sixth Circuit's unprecedented new test further fractures how the Circuits apply key CAFA provisions, creating a three-way circuit split.

These questions arise in this medical malpractice action, which originated in Ohio state courts. Plaintiffs filed 226 individual malpractice cases related to medical care provided by Dr. Abubakar Atiq Durrani at the defendant health care facilities with which other defendants are affiliated. Pet. App. 7. Some Plaintiffs filed their cases in Hamilton County, Ohio, Common Pleas Court. Other Plaintiffs filed in Butler County, Ohio, Common Pleas Court (*id.* at 7 n.3.), but were voluntarily dismissed and refiled in Hamilton County after four trials in Butler County resulted in defense verdicts.[3] The Hamilton County Common Pleas Court consolidated all of the cases before a single judge. *Id.* at 7.

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[3] *See, e.g.*, *Shell v. Durrani*, No. CA2014-11-232, 2015 WL 5786897, at *2 (Ohio Ct. App. Oct. 5, 2015) ("On August 19, 2014, the jury returned a verdict in favor of Dr. Durrani and CAST … [and] the trial court dismissed all claims against [West Chester Hospital, LLC] and UC Health."); *Kranbuhl-McKee v. Durrani*, No. CV 2013 02 0667 (Butler Cnty. C.P. Aug. 25, 2015) (same); *Martin v. Durrani*, No. CV 2013 02 0522 (Butler Cnty. C.P. Aug. 4, 2015) (same) (appeal of grant of new trial motion pending); *Marshall v. Durrani*, No. CV 2013 02 0524 (Butler Cnty. C.P. Mar. 17, 2015) (same).

On December 7, 2015, Plaintiffs submitted a lengthy "binder," in which they unambiguously requested that the state court judge set "ALL" of the cases for one single, combined trial, or at a minimum, several smaller group trials. *Id.* at 7-8. The state court set four smaller trials and one "massive group trial" in "all remaining" cases, which could include more than 400 plaintiffs' medical malpractice claims. *Id.* at 8-9.

The request in the binder constituted a joint trial proposal, which is a removable mass action under 28 U.S.C. § 1332(d)(11)(B)(i) ("[T]he term 'mass action' means any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."). Defendants timely removed the cases.[4]

The trial court remanded all of the cases for two reasons. First, it held that it lacked mass action jurisdiction because the "100-plaintiff" element was not satisfied. Pet. App. 14-16. In the trial court's view, mass action jurisdiction exists only where a single complaint contains the claims of at least 100 plaintiffs. *Id*. The trial court expressly rejected decisions from three other Circuits that reached the opposite result. *Id.* at 14-15. Its decision was grounded on "the absence of binding authority from the Supreme Court or the Sixth Circuit on the issue presented." *Id.* at 16. As a consequence, a group of plaintiffs can artificially split a large lawsuit into smaller actions involving fewer

[4] Neither the courts below nor Plaintiffs dispute that the binder is a joint trial proposal. Pet. App. 13 n.10. There also is no dispute that the amount in controversy threshold is met. *Id.*

than 100 plaintiffs but consolidate them for trial—exactly what happened here—all without triggering removal under CAFA. Every previous court of appeals to confront this question has rejected this tactic because it essentially makes CAFA mass action jurisdiction meaningless.

Second, the trial court alternatively declined jurisdiction under CAFA's discretionary "totality of the circumstances" test. *Id.* at 16-20. Under that exception, which applies in all CAFA cases and not just mass actions, if more than one-third but less than two-thirds of plaintiffs and all "primary defendants" are citizens of the state where a class or mass action is filed, a court may decline jurisdiction based upon the consideration of six statutory factors. 28 U.S.C. § 1332(d)(3). In contrast, if any primary defendant is not a citizen of the state where a class or mass action is filed, then a court has no discretion to decline jurisdiction under the totality of the circumstances exception. *Id.* The trial court conducted its own review of the mass action complaints and determined that between one-third and two-thirds of Plaintiffs and at least some of the primary defendants in the mass action (including Dr. Durrani) are Ohio citizens. Pet. App. 18.

Dr. Durrani undisputedly is one of the primary defendants. He allegedly was a citizen of Ohio when the causes of action arose. But he undisputedly was a citizen of Pakistan when these cases were removed (*see* Pet. App. 9, 18-19 (Plaintiffs request service of process on Dr. Durrani in Pakistan)) and when nearly all of the complaints were filed. *See id.* The trial court decided to determine Dr. Durrani's citizenship at the time the cause of action arose. *Id.* at 18 ("Dr. Durrani lived,

worked, and operated locally *at the time these causes of actions arose* …. [Thus], the Court consider[ed] Dr. Durrani a citizen of Ohio for the purposes of this inquiry." (emphasis added)). This new citizenship test diverges from the tests used by other courts of appeals for the exceptions to CAFA. In other Circuits, citizenship is determined under the CAFA exceptions at the time the case becomes removable or at the time the complaint is filed (a circuit split in itself). Under either test, the trial court lacked discretion to decline mass action jurisdiction under the totality of the circumstances exception.

Following its new test, the trial court then weighed the factors listed in the statute, an analysis that would not have been conducted if citizenship had been determined under the other Circuits' tests. *Id.* at 19-20. On that basis, but recognizing the unsettled law on these issues, it declined jurisdiction but *sua sponte* stayed the cases pending Defendants' request for review by the Sixth Circuit.

Defendants petitioned for permission to appeal under 28 U.S.C. § 1453(c). One panel of the Sixth Circuit granted the petition because the case presented five issues that are "important, unsettled, and recurrent" and will "escape meaningful appellate review." Pet. App. 24. Those questions included (1) whether a joint trial plan for Plaintiffs' cases transforms their individually filed actions into a "mass action" for purposes of removal under CAFA, and (2) at

what point in time is a defendant's citizenship determined. *Id.* at 25.[5]

The issues were fully briefed. On July 27, 2016, a majority of a different panel of the Sixth Circuit denied Defendants' appeal by intentionally letting the 60-day statutory period for issuing a decision run. Pet. App. 2-3. Judge White noted that she would have issued a decision vacating and remanding the case for further development of the citizenship issue. *Id.*

Defendants sought *en banc* review, which was denied on September 20, 2016. The panel stated that "the issues raised in the petition [for rehearing] were fully considered upon the original submission and decision in this case," leaving no doubt that the Sixth Circuit was adopting the trial court decision without a written opinion. Pet. App. 27. Defendants asked the Sixth Circuit to stay the mandate. That motion was denied and the mandate issued on September 28, 2016.

Defendants now petition this Court for a writ of certiorari to review the Sixth Circuit's judgment. This

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[5] The other issues that the panel identified are " ... who constitutes a 'primary defendant'; … whether a case may have more than one primary defendant; … and whether the relevant statutory factors for determining whether the totality-of-the-circumstances exception applies is a non-exhaustive list." Pet. App. 25. These questions are secondary issues that arise in the context of the point in time that citizenship is to be determined. *See* Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary questions fairly included therein."). While Defendants anticipate discussing these issues in their merits brief, the Court need not reach them to grant Defendants full relief here.

Court should grant this petition to settle these important questions of federal law.

REASONS FOR ALLOWING THE WRIT

The Sixth Circuit's decision creates circuit splits on two important CAFA jurisdictional questions. As a result of the first split, access to federal courts under CAFA now varies based on the state in which plaintiffs choose to file.

The decision below is especially troublesome because it all but forecloses mass action jurisdiction within the Sixth Circuit. Under the Sixth Circuit's reasoning, a group of plaintiffs can artificially split a large lawsuit into smaller actions involving fewer than 100 plaintiffs, and then consolidate them for trial—exactly what happened here—all without risking removal under CAFA. *See* Pet. App. 15-16. Every other Circuit to confront this question has rejected this tactic. The Sixth Circuit acknowledged that it was intentionally taking a view contrary to all of the other courts of appeals that had considered this question. *Id.* at 14-15.

This Court must also resolve the second question because there now are three different points in time at which courts determine citizenship for the purposes of CAFA's jurisdictional exceptions, depending on where the mass action is filed. The Court must clarify the law to avoid inconsistent access to federal court jurisdiction. Prior to this case, different courts of appeals have used two different standards. Some determine citizenship at the time the complaint is filed and others when a case becomes CAFA removable. The Sixth Circuit in this case added a third choice—the

time the cause of action arose—which finds no support in the other circuits. *Id.* Indeed, the Sixth Circuit's citizenship test is not recognized in any CAFA cases. The result is meaningful. Allowing three different times for determining citizenship could lead to gamesmanship in pleading, as well as increased forum shopping, which CAFA was intended to reduce. This Court should grant this petition and resolve the circuit conflict regarding these key CAFA mass action provisions.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER WHETHER CAFA MASS ACTION JURISDICTION IS PROPER WHERE MULTIPLE SUITS, EACH INVOLVING FEWER THAN 100 PLAINTIFFS, ARE PROPOSED TO BE TRIED JOINTLY AND, WHEN COMBINED, ENCOMPASS THE CLAIMS OF MORE THAN 100 PLAINTIFFS.

CAFA defines a "mass action" as "any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). The first question in this petition is whether CAFA mass action jurisdiction exists where plaintiffs propose a joint trial of more than 100 plaintiffs even if there is no single civil action with more than 100 plaintiffs. The Sixth Circuit said no because Plaintiffs filed numerous, individual cases, "not one civil action with more than 100 plaintiffs," despite the fact that Plaintiffs requested one joint trial. Pet. App. 7-8. This departs from the decisions of three sister circuits.

A. There is a direct conflict between the Sixth Circuit and the Seventh, Eighth, and Ninth Circuits.

The Sixth Circuit consciously created a circuit split when it refused to find federal jurisdiction in this case. By holding that a joint-trial proposal of at least 100 plaintiffs does not constitute a CAFA mass action, the Sixth Circuit acknowledged that it was intentionally taking a view contrary to the other courts of appeals that had considered the question. *Id.* at 14-15. The Seventh, Eighth, and Ninth Circuits all agree that mass action jurisdiction is present where plaintiffs propose a joint trial of multiple cases that together encompass the claims of more than 100 plaintiffs. *See Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014) (en banc) (removal proper in mass action consisting of several cases, each with fewer than 100 plaintiffs, where together, suits involved over 100 plaintiffs); *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1161-62 (8th Cir. 2013) (removal proper in mass action consisting of three suits, each with fewer than 100 plaintiffs, yet exceeded the 100-plaintiff threshold when suits were combined for trial); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570-71 (7th Cir. 2012) (removal proper in mass action consisting of ten cases with fewer than 100 plaintiffs each, where, combined, the cases involved several hundred plaintiffs).

These circuit courts agreed for good reason—to find otherwise vests plaintiffs with the unrestrained ability to evade federal CAFA jurisdiction. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative

interpretations consistent with legislative purpose are available."). Congress created mass action jurisdiction to permit federal jurisdiction over cases in which the claims of 100 plaintiffs would be tried together. *See Atwell*, 740 F.3d at 1161; *see also Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1193-98 (11th Cir. 2007). When plaintiffs request a joint trial encompassing the claims of 100 or more plaintiffs, they create federal jurisdiction under CAFA. *See Corber*, 771 F.3d at 1223 (noting that "while plaintiffs are masters of their complaints, they are also the masters of their [joint trial proposals]"); *Atwell*, 740 F.3d at 1162-63 (finding that "the distinct claims of these more than 100 plaintiffs, filed in the same court against the same defendant and asserting common issues, become a single, removable mass action because plaintiffs proposed to try their separate cases jointly"). Mass action jurisdiction arose here because Plaintiffs decided to seek joint trial of their individual cases. *See* Pet. App. 8. *See also Corber*, 771 F.3d at 1223 ("[W]e assess whether there has been a proposal for joint trial, [and] we hold plaintiffs responsible for what they have said and done.").

Here, Plaintiffs do not dispute that they proposed a joint trial of more than 100 plaintiffs. *See* Pet. App. 8. Every other court of appeals to reach the issue has determined that mass action jurisdiction exists where the plaintiffs propose such a joint trial. The Sixth Circuit has created a split and is the sole outlier regarding this issue.

B. The Sixth Circuit's decision is wrong.

The Sixth Circuit's decision raises form over substance. It distinguishes between when plaintiffs (a) propose a joint trial of a single case that encompasses the claims of more than 100 plaintiffs, and (b) propose a joint trial of multiple cases that encompass the claims of more than 100 plaintiffs. *Id.* There is no logical reason to draw that distinction. In both scenarios, the result in the same, and CAFA jurisdiction is proper, because "claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). The Sixth Circuit, however, found that "the plain language of the statute would seem to indicate that a mass action derives from a *single civil action*."[6] Pet. App. 15. Its interpretation is contrary to every court of appeals that has addressed the issue and ignores well-established CAFA jurisprudence. *See, e.g.*, *Atwell*, 740 F.3d at 1161-65.

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[6] Contrary to the view of the courts below, this Court's decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*,—U.S.—, 134 S. Ct. 736 (2014) does not support this interpretation. *See* Pet. App. 10, 15-16. There, this Court held that a defendant cannot satisfy the 100-plaintiff element by tallying up unnamed "parties in interest" who are not actually plaintiffs in any suit that is part of the removed mass action. *AU Optronics*, 134 S. Ct. at 744. That is not the case here. Instead, consistent with *AU Optronics*, "100 or more [named] persons," whom are also named plaintiffs, proposed a joint trial. *See id.* at 742-44. This Court did not even suggest that mass action jurisdiction is limited to a single civil action. *See also Parson v. Johnson & Johnson*, 749 F.3d 879, 886-88, 892 (10th Cir. 2014) (emphasizing, after *AU Optronics*, that individually filed cases, each with fewer than 100 plaintiffs, would become removable as a mass action under CAFA if "their claims [were] proposed to be tried together").

Moreover, the Sixth Circuit is inconsistent with CAFA's legislative history. *See* S. Rep. 109-14, at 48 (2005). Congress predicted Plaintiffs' tactic to consolidate individual cases for trial and determined that they remain subject to mass action jurisdiction:

> If a number of ***individually filed cases*** are consolidated solely for pretrial proceedings—and not for trial—those cases have not truly been managed in a way that makes them mass action warranting removal to federal court. On the other hand, ***if those same cases are consolidated exclusively for trial,*** or for trial and pretrial purposes, ***and the result is that 100 or more persons' claims will be tried jointly, those cases have been sufficiently merged to warrant removal of such mass action to federal court***.

Id. (emphasis added); *id.* at 46 ("New subsection 1332(d)(11) expands federal jurisdiction over mass action—suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status.").

Nevertheless, groups of plaintiffs can now artificially split a large lawsuit into smaller actions in the Sixth Circuit—all involving fewer than 100 plaintiffs but still consolidate them for trial—without triggering removal under CAFA. This was not Congress's intent, and it is not the correct law. The Seventh, Eighth, and Ninth Circuits are correct, the Sixth Circuit is wrong, and a writ of certiorari should issue.

C. CAFA mass action jurisdiction is an important and recurring issue that this Court should review.

The scope of federal jurisdiction—and a party's access to a federal forum—is an important and recurring issue. *See, e.g.*, *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 549 (2005) (resolving a circuit split over the correct interpretation of supplemental jurisdiction under 28 U.S.C. § 1367). A unanimous panel of the Sixth Circuit determined that this very jurisdictional issue is "important, unsettled, and recurrent" when it granted Defendants' petition for leave to appeal. Pet. App. 24-25. Moreover, the recurrent nature of this issue is highlighted by the previous circuit split on this issue between the Ninth Circuit and the Eighth and Seventh Circuits. The Ninth Circuit ultimately resolved the circuit split when it decided to join the other circuits. *See Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1220 (9th Cir. 2014) (en banc). The Sixth Circuit here intentionally reopened it. Pet. App. 14-16. This Court should now address this recurring issue.

Further, CAFA was enacted to curb perceived abuses of plaintiffs who could "game the system" and avoid removal of large class actions to federal court. *See* S. Rep. 109-14, at 10-11 (2005). "The data suggests that [CAFA] is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment." Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1607 (2008). With this increasing number of class and mass actions in federal court, a lack of uniformity in the interpretation and application of 28 U.S.C.

§ 1332(d)(11) is unfair to litigants. Defendants should not be denied a federal forum (if that is their preference and right), depending upon whether a group of plaintiffs filed their original state court complaints in Ohio, Indiana, or Missouri. In Ohio, for example, a large group of plaintiffs can intentionally break up their cases into separate complaints of 99 plaintiffs, ask that all of the cases be tried together, and the federal courts remain barred to defendants. But the same tactic a few miles away in Indiana results in federal court jurisdiction.

The problem is that either the Sixth Circuit is wrongfully declining jurisdiction that it has, or the other Circuits are exercising jurisdiction that they do not have. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) ("It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded."); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 747 (2012) ("Federal courts … have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given."). *See also* Sup. Ct. R. 10(a). Without clarification by this Court, plaintiffs are being denied their right to stay in state court by an overly expansive interpretation of CAFA jurisdiction, or defendants are being denied their right to federal court by an overly restrictive interpretation of CAFA jurisdiction.

Moreover, litigants (and district courts) will benefit from a clear allocation of judicial responsibility between state and federal courts. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Courts have an

independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it. So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case."). *See also Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 464 n.13 (1980) ("[L]itigation over whether the case is in the right court is essentially a waste of time and resources."); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 549 (1995) (Thomas, J., concurring) (noting that a "clear, bright-line" jurisdictional rule "ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction"). This Court should grant this petition and clearly define the scope of federal mass action jurisdiction under CAFA.

II. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT OVER THE TIME AT WHICH CITIZENSHIP SHOULD BE DETERMINED UNDER CAFA'S EXCEPTIONS TO FEDERAL JURISDICTION.

The Sixth Circuit also affirmed the trial court's decision to decline jurisdiction under 28 U.S.C. § 1332(d)(3) because it determined that all of the primary defendants were citizens of Ohio at the time that the causes of action arose. Pet. App. 16-20. Under that totality of the circumstances exception, which applies to all CAFA cases, if more than one-third but less than two-thirds of plaintiffs and all "primary defendants" are citizens of the state where a class or mass action is filed, a court may decline jurisdiction based upon the consideration of six statutory factors. *Id.* The second question in this petition is at what point

in time the citizenship of a person should be determined.

The Sixth Circuit has decided that citizenship for purposes of CAFA's jurisdictional exceptions is determined at the time the cause of action arose. The question of when to measure citizenship arose when the court tried to determine the threshold question of whether the totality of the circumstances exception could be applied under 28 U.S.C. § 1332(d)(3). Pet. App. 17-18. If any primary defendant was not a citizen of Ohio, then the Sixth Circuit had no discretion to decline jurisdiction under the exceptions. *See* 28 U.S.C. § 1332(d)(3); *Leonor v. Provident Life & Accident Co.*, 790 F.3d 682, 691 (6th Cir. 2015) ("'[T]he primary defendants' must mean all the primary defendants."). The court evaluated Dr. Durrani's citizenship "at the time these causes of actions arose." *Id.* at 18. This test is not employed by any other court and the decision below did not cite any supporting case. Instead, the Sixth Circuit's new test conflicts with several courts of appeals—some of which determine citizenship at the time the action becomes removable, while others look to the time of the filing of the complaint. The decision below exacerbates this split and creates further confusion regarding citizenship under CAFA's exceptions.

A. There is a direct conflict between the Sixth Circuit and the Third, Fifth, and Seventh Circuits, and the Sixth Circuit's decision is inconsistent with the law of every other Circuit.

Generally under CAFA, "[c]itizenship of the members of the proposed plaintiff classes shall be determined … as of the date of filing of the complaint or amended complaint." 28 U.S.C. § 1332(d)(7). However, "if the case stated by the initial pleading [was] not subject to Federal jurisdiction," citizenship is determined "as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction." *Id.* Although the statute refers to plaintiffs' citizenship, the same analysis applies to defendants' citizenship. *See Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 152-53 (3d Cir. 2009) (conducting the same 28 U.S.C. § 1332(d)(7) analysis for defendants' citizenship). Dr. Durrani unquestionably was a citizen of Pakistan when these cases became removable under 28 U.S.C. § 1332(d)(11). *See* Pet. App. 18.

A mass action does not become removable until plaintiffs "propose" that the claims of 100 or more persons "be tried jointly." 28 U.S.C. § 1332(d)(11). This proposal may arise at several different times during the course of litigation, such as when plaintiffs request the court to consolidate individual cases, *Atwell v. Boston Sci. Corp.*, 740 F.3d 1160, 1165 (8th Cir. 2013), when plaintiffs file only one complaint, *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011), or when plaintiffs—as they did here—file a pre-trial request that explicitly asks the court to schedule one "massive

group trial." Pet. App. 7-9. Regardless, the "snapshot" of CAFA citizenship is taken when plaintiffs "serve paper" that indicates the existence of federal jurisdiction. *See* S. Rep. 109-14, at 44 (2005); 28 U.S.C. § 1332(d)(7). While that paper may be the complaint in some mass actions, *see Bullard v. Burlington Northern Santa Fe. Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (144 plaintiffs in one complaint), it is often "other paper" that triggers CAFA mass action jurisdiction. *See Atwell*, 740 F.3d at 1161 (mass action jurisdiction created on plaintiffs' motion); *Corber*, 771 F.3d at 1222 (mass action jurisdiction created on plaintiffs' petition for consolidation); *In re Abbott Labs, Inc.*, 698 F.3d at 570 (mass action jurisdiction created—over a year after complaints were filed—on plaintiffs' motion to consolidate and transfer cases). Thus, the better rule for determining citizenship for the purposes of CAFA's jurisdictional exceptions is at the time when the mass action becomes removable. *Compare* 28 U.S.C. § 1332(d)(7), *with* 28 U.S.C. § 1332(d)(11)(B)(i). (Indeed, some courts appear to have determined citizenship at the time of removal. *See Myrick v. WellPoint, Inc.*, 764 F.3d 662, 665 (7th Cir. 2014) (requiring plaintiffs to produce some evidence that would allow the court to determine citizenship "on the date the case was removed"); *Kaufman*, 561 F.3d at 152-53 (3d Cir. 2009).)

A few courts broadly hold that "[c]itizenship, for purposes of proving an exception to CAFA, must be analyzed as of the date the complaint or amended complaint was filed." *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 573 (5th Cir. 2011) (relying on 28 U.S.C. § 1332(d)(7)); *Martin v. Lafon Nursing Facility of the Holy Family, Inc.*, 548 F. Supp. 2d 268, 271 (E.D. La. 2008) (same). However, in those traditional class

action cases, the original complaint, on its face, established federal jurisdiction under 28 U.S.C. § 1332(d)(2)—thus, the default provision of 28 U.S.C. § 1332(d)(7) applied. *See Hollinger*, 654 F.3d at 658 (defining the proposed class in the original complaint); *Martin*, 548 F. Supp. 2d at 270 (same). This is a very different situation than a situation where federal jurisdiction does not arise until some "amended pleading, motion, or other paper" creates jurisdiction. *See* 28 U.S.C. § 1332(d)(7) (evaluating plaintiffs' citizenship as of the date of service of the "other paper" creating federal jurisdiction); 28 U.S.C. § 1332(d)(11)(B). These cases fall under the requirement that the determination of citizenship, at the earliest, is when the action became removable. *See id.*; *see also Kaufman*, 561 F.3d at 152-53.

Even if this Court were to determine that CAFA citizenship should be determined as of the time of filing the complaint, this mass action remains subject to federal court jurisdiction. According to Plaintiffs' allegations, Dr. Durrani returned to Pakistan sometime in December 2013. *See* Pet. App. 18. Nearly all of the 226 cases were filed after December 2013, when, even according to Plaintiffs, Dr. Durrani was a citizen of Pakistan. Therefore, even if the Court applies this standard, the totality of the circumstances exception cannot apply because not all of the primary defendants are Ohio citizens (nor have Plaintiffs shown otherwise) where Dr. Durrani was already a citizen of Pakistan.[7]

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[7] When Defendants petitioned the Sixth Circuit for permission to appeal, Plaintiffs argued for the first time that Dr. Durrani should be considered an Ohio citizen because he was a "fugitive on the

B. The Sixth Circuit's decision is wrong.

Plaintiffs do not dispute that Dr. Durrani was already a citizen of Pakistan when these cases became removable and when almost all of the cases were filed. The court below found that Dr. Durrani was a citizen of Ohio even though he was a Pakistani citizen who had returned to Pakistan to avoid criminal prosecution in the United States. *See* Pet. App. 18. Plaintiffs do not dispute that Dr. Durrani is located in Pakistan, and the state court made that finding as a matter of law. *See id.* at 19 n.15. Indeed, Plaintiffs have repeatedly attempted to serve Dr. Durrani (and a related business) in Pakistan. *See id.* They also convinced the state court to instruct the jury that Dr. Durrani had fled to Pakistan and that they could draw a negative inference because of it. *See id.*

The court below ignored the fact that Dr. Durrani is a citizen of Pakistan at either possible relevant time by creating a new test for determining citizenship. *Id.* at 18. It evaluated Dr. Durrani's citizenship "at the time these causes of actions arose." *Id.* No court of appeals before this case has ever determined CAFA citizenship at the time the causes of actions arose. This generates greater confusion regarding the citizenship of a person for purposes of CAFA's jurisdictional exceptions, which can now fluctuate between three different tests

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lam." They also argued that as long as one primary defendant is a resident of Ohio, the totality of the circumstances test applies. The Sixth Circuit did not address these issues when it adopted the trial court decision. Although Defendants anticipate discussing these questions in their merits brief (*see supra* note 5), the law is settled and is ancillary to the questions presented here.

depending upon the circuit. The Sixth Circuit test is unsupported. The rule in the Third and Seventh Circuits is correct. A writ of certiorari should issue.

C. Citizenship for purposes of CAFA's jurisdictional exceptions is an important and recurring issue that this Court should review.

The second question is important and recurring, as one panel of the Sixth Circuit found. Pet. App. 24-25. There now are three different methods for determining citizenship under the CAFA exceptions, which causes uncertainty regarding federal court jurisdiction. Additionally, it affects both class actions and mass actions under CAFA.

Consistency and predictability are important issues regarding federal jurisdiction. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case. Simple jurisdictional rules also promote greater predictability. … Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court."). The Sixth Circuit's decision provides neither. Instead, the Sixth Circuit's unprecedented citizenship test is unworkable for several reasons, not the least of which is that these hundreds of plaintiffs' causes of action arose on different dates (*i.e.*, the date that each particular alleged act of malpractice occurred). *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (abandoning decisions that are "are unworkable or are badly reasoned"). If CAFA citizenship is determined at the time the cause of actions arose, it could vary within the same mass action if there are several "causes of

actions" that have conflicting citizenship (*e.g.*, a defendant moved to a different state after the first cause of action arose but before the second cause of action arose). This case further highlights the problem—where a mass action, by definition, includes the claims of 100 or more individuals. *See* 28 U.S.C. § 1332(d)(11)(B)(i). Here, different plaintiffs were allegedly injured at hundreds of different times. If the time of injury is the time to determine citizenship, which plaintiff's injury should govern? And of course the time a cause of action arose is not necessarily when an injury occurred. In a fraud case, for example, the cause of action might arise at different times for different plaintiffs depending on when each plaintiff discovers the fraud. There is no logical basis for determining citizenship at the time the cause of action arose.

This confusion is compounded by the fact that three different tests are now utilized by different court of appeals. The importance of this issue is underscored by this Court's history of granting certiorari where the petition involves a circuit split over issues related to CAFA. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, — U.S. —, 135 S. Ct. 547, 553 (2014) ("We granted certiorari to resolve a division among the Circuits on [CAFA removal notices]."); *Mississippi ex rel. Hood v. AU Optronics Corp.*, — U.S. —, 134 S. Ct. 736, 741 (2014) ("We granted certiorari to resolve this split of authority [under 28 U.S.C. § 1332(d)(11)(B)(i), CAFA's mass action provision]."); *Standard Fire Ins. Co. v. Knowles*, — U.S. —, 133 S. Ct. 1345, 1348 (2013) ("And, in light of divergent views in the lower courts [regarding CAFA's matter in controversy], we granted the writ."); *Hertz Corp.*, 559 U.S. at 82 ("And, in light

of differences among the Circuits in the application of the test for corporate citizenship [under CAFA removal], we granted the writ."). For all these reasons, this recurring and important issue merits a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that its petition be granted and that a writ of certiorari issue for both questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-3549

[Filed July 27, 2016]

SCOTT DANIEL, et al.,)
)
Plaintiffs-Appellees,)
)
v.)
)
ASCIRA PARTNERS, LLC; PATRICK BAKER;)
BARIATRIC PARTNERS OF TX LLC;)
BARIATRIC PARTNERS OF TX, INC.;)
C. FRANCIS BARRETT; JEFFERY BOGLE;)
JOSEPH BRODERICK, MD; MARGARET)
BUCHANON; HALEEM CHAUNDHARY;)
CHRIST HOSPITAL; CINTI CHILDREN'S)
HOSP MED CTR; CTR FOR ADVANCED)
SPINE TECH, INC.; TRACE CURRY;)
TOM DASKALAKIS; JEFF DRAPALIK;)
ABUBAKAR AITQ DURRANI, MD; NAVEED)
FAZLANI, MD; DOUGLAS FEENEY;)
ELLIOTT FEGELMAN; GOOD SAMARITAN)
HOSPITAL; MICHAEL GOULD; MATTHEW)
HARDIN, MD; PAULA HAWK; JULIE HOLT;)
JAMIE HUNTER; KEVIN JOSEPH;)
JOURNEY LITE OF CINTI, LLC; CAROL)
KING; JAMES A. KINGSBURY; TIMOTHY)
KREMCHEK; DAMON LYNCH, JR.; JERRY)

MAGONE, MD; DAVID MCCLELLAN; EDWARD CRANE; MYLES PENSAK, MD; RIVERVIEW HEALTH INSTITUTE LLC; RON ROHLFING; DAVID SCHWALLIE; JILL STEGMAN; CYNDI TRAFFICANT; TRIHEALTH INC.; UC HEALTH; W CHESTER HOSP, LLC; CREIGHTON B. WRIGHT, MD; JEFFREY WYLER,	)
Defendants-Appellants,	)

O R D E R

Before: MERRITT, DAUGHTREY, and WHITE, Circuit Judges.

In this appeal, the defendants-appellants seek reversal of the district court's order remanding a purported "mass action" to state court. Because the defendants sought to remove a "mass action" to federal court pursuant to 28 U.S.C. § 1332(d), their appeal of the district court's remand order is automatically denied if our Court does not issue a final judgment on the appeal within 60 days of the appeal being filed (or 70 days, if a 10-day extension is granted). 28 U.S.C. §§ 1332(d)(11)(A); 1453(c).

This appeal was docketed on May 25th. More than 60 days have since passed, no extension has been sought or granted, and our Court has not issued a final judgment on this appeal. Thus, by law, the appeal is **DENIED**.

Judge White would have issued an order within the 60-day period vacating the district court's order and

remanding for further factual development on the citizenship issues.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Judge Timothy S. Black

[Filed February 13, 2016]

IN RE DR. DURRANI MEDICAL MALPRACTICE CASES

Case Nos.: **1:16-cv-004 (lead)**, 1:16-cv-005, 1:16-cv-007, 1:16-cv-008, 1:16-cv-009, 1:16-cv-010, 1:16-cv-011, 1:16-cv-012, 1:16-cv-013, 1:16-cv-014, 1:16-cv-015, 1:16-cv-016, 1:16-cv-017, 1:16-cv-018, 1:16-cv-019, 1:16-cv-020, 1:16-cv-021, 1:16-cv-022, 1:16-cv-023, 1:16-cv-024, 1:16-cv-025, 1:16-cv-026, 1:16-cv-027, 1:16-cv-028, 1:16-cv-029, 1:16-cv-030, 1:16-cv-031, 1:16-cv-032, 1:16-cv-033, 1:16-cv-034, 1:16-cv-035, 1:16-cv-036, 1:16-cv-037, 1:16-cv-038, 1:16-cv-039, 1:16-cv-041, 1:16-cv-042, 1:16-cv-043, 1:16-cv-044, 1:16-cv-045, 1:16-cv-046, 1:16-cv-047, 1:16-cv-048, 1:16-cv-049, 1:16-cv-050, 1:16-cv-051, 1:16-cv-052, 1:16-cv-053, 1:16-cv-054, 1:16-cv-055, 1:16-cv-056, 1:16-cv-057, 1:16-cv-058, 1:16-cv-059, 1:16-cv-060, 1:16-cv-061, 1:16-cv-062, 1:16-cv-063, 1:16-cv-064, 1:16-cv-065, 1:16-cv-066, 1:16-cv-067, 1:16-cv-068, 1:16-cv-069, 1:16-cv-070, 1:16-cv-071, 1:16-cv-072, 1:16-cv-073, 1:16-cv-074, 1:16-cv-075, 1:16-cv-076, 1:16-cv-077, 1:16-cv-078, 1:16-cv-079, 1:16-cv-080, 1:16-cv-081, 1:16-cv-082, 1:16-cv-083,

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ORDER REMANDING THESE CIVIL ACTIONS[1]

These civil actions are before the Court on Plaintiffs' motions for immediate remand and the parties' responsive memoranda.[2] Defendants allege that the

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[1] Not all of these civil actions are subject to motions to remand. Nonetheless, all were removed pursuant to the mass action provision of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(11). For the reasons set forth in this Order, the Court finds that it does not have jurisdiction pursuant to that provision. Accordingly, the Court must remand all of these civil actions, regardless of whether motions to remand were filed. *See Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir.1990) (citation omitted) (the issue of "subject matter jurisdiction may be raised *sua sponte* at any juncture because a federal court lacks authority to hear a case without subject matter jurisdiction."); *see also Probus v. Charter Communications, LLC*, 234 Fed. App'x 404, 406 (6th Cir. 2007) ("Despite [the defendant's] failure to move to remand, the district court should have *sua sponte* addressed the issue of subject matter jurisdiction."); Fed. R. Civ. P. 12(h)(3) ("If the Court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action").

[2] Defendants filed motions for leave to file sur-replies on the ground that Plaintiffs raised several arguments for the first time in their replies. It is well-established that failure to raise an argument in a motion acts as a waiver of that argument. *See Scottsdale Ins. Co. v. Flowers,* 513 F.3d 546, 553 (6th Cir. 2008). However, one of the primary purposes of this rule is to allow the non-moving party a fair opportunity to respond to all arguments. *Id.* As such, and for good cause shown, Defendants' motions for leave to file sur-replies are **GRANTED**. Because Defendants attached their proposed sur-replies to their motions for leave, Defendants need not re-file them. In formulating this Order, the

Court has jurisdiction over these 227 civil actions pursuant to the mass action provision of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(11).

I. BACKGROUND

Most of these civil actions were filed in the Hamilton County Court of Common Pleas and ultimately assigned to Judge Robert Ruehlman.[3] Plaintiffs allege that Defendant Abubakar Atiq Durrani, M.D. ("Dr. Durrani") performed unnecessary surgeries on them that resulted in complications and injuries. Plaintiffs also bring claims against various hospital Defendants for negligence; negligent credentialing, supervision, and retention; fraud; and spoliation of evidence.

On December 7, 2015, in preparation for a case management conference regarding these cases, Plaintiffs' counsel submitted to Judge Ruehlman a lengthy binder of documents which included motions, descriptions of Plaintiffs' positions on pre-trial issues, and lists of cases. *See* Plaintiffs' Binder for December 14, 2015 Case Management Conference (the "Binder").

Plaintiffs' counsel claimed to represent Plaintiffs in 520 individual cases, including 172 cases already filed

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Court considers all arguments presented, including those advanced in Plaintiffs' replies and Defendants' sur-replies.

[3] Some of these civil actions were originally filed in Hamilton County, and others were originally filed in Butler County. Plaintiffs voluntarily dismissed a number of the Butler County cases and re-filed them in Hamilton County. Some of the cases that remained pending in Butler County were also removed to this Court, on the same theory outlined in the Hamilton County cases.

in Hamilton County, 258 cases that counsel planned to dismiss in Butler County and to refile in Hamilton County, and 40 cases that were the subject of a pending motion to transfer from Butler County to Hamilton County. *See* Binder at 8, 19–29, 209–23, 226–35.

In the Binder, Plaintiffs requested that Judge Ruehlman set "ALL" of these cases for one single, combined trial or, at a minimum, several smaller group trials. *See* Binder at 179–80 (listing "[o]ne scheduled trial for ALL cases [to begin] August 1, 2016" as Plaintiffs' top choice in a list of their "Preferences in Order of Preference for Trial Settings"); *id.* at 180 (listing "Group Trials with Many Options" as Plaintiffs' second choice); *id.* at 126 (stating that "[t]he Court has many options [for setting trial dates, including] [s]chedul[ing] one trial. . . . [or] [s]et[ting] trials by groups . . . ."); *id.* at 153–77 (attaching *Suida v. Howard*, Nos. C-000656, C-000687, 2002 WL 946188 (Ohio Ct. App. May 10, 2002) and citing the case for the proposition that "group trials [are] allowed]").

In a December 15, 2015 order, Judge Ruehlman scheduled several trials as follows:

1. February 29, 2016: trial in *Mike & Amber Sand v. Abubakar Atiq Durrani, et al.*, Hamilton County Common Pleas Case No. A1506694;

2. March 14, 2016: trial in *Steven Andrew Schultz v. Abubakar Atiq Durrani, et al.*, Hamilton County Common Pleas Case No. A 1506861;

3. May 2, 2016: trial in 14 cases involving Cincinnati Children's Hospital Medical Center;

4. August 1, 2016: trial in 24 cases involving "West Chester/UC Health and any hospital named as a Defendant in the C1C2/False Pannus cases";

5. January 2, 2017: a "massive group trial" in "all remaining Dr. Durrani cases," which "could take six months to a year."

General Order on all Dr. Durrani Hamilton County Cases for Case Management Conference December 14, 2015, Hamilton County Common Pleas Case No. A1506577 ("General Order") at 11–15.

Defendants argue that, in the Binder, Plaintiffs proposed a joint trial of the claims of over 100 Plaintiffs, and thereby created a "mass action" under 28 U.S.C. §1332(d)(11), which "mass action" is subject to federal jurisdiction.

II. STANDARD OF REVIEW

"Generally, a civil case brought in a state court may be removed by a defendant to federal court if it could have been brought there originally." *Rogers v. Wal–Mart Stores, Inc.,* 230 F.3d 868, 871 (6th Cir. 2000) (citing 28 U.S.C. § 1441(a)). "The removing party bears the burden of demonstrating federal jurisdiction, and all doubts should be resolved against removal." *Harnden v. Jayco, Inc.*, 496 F.3d 579, 582 (6th Cir. 2007) (citing *Eastman v. Marine Mech. Corp.,* 438 F.3d 544, 549 (6th Cir. 2006)) (emphasis added).

III. ANALYSIS

A. CAFA and the Mass Action Provision

As explained by the Supreme Court:

> Congress enacted CAFA in order to "amend the procedures that apply to consideration of **interstate** class actions." 119 Stat. 4. In doing so, Congress recognized that "[c]lass action lawsuits are an important and valuable part of the legal system." CAFA § 2. It was concerned, however, that certain requirements of federal diversity jurisdiction, 28 U.S.C. § 1332, had functioned to **"**kee[p] **cases of national importance"** in state courts rather than federal courts. CAFA § 2.
>
> CAFA accordingly loosened the requirements for diversity jurisdiction for two types of cases—"class actions" and "mass actions." The Act defines … "mass action" to mean "any civil actio**n** . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(d)(11)(B)(i).

Mississippi ex rel. Hood v. AU Optronics Corp., 134 S.Ct. 736, 739–40 (2014) (emphasis added). The Supreme Court also expressly found that "the term 'persons' in § 1332(d)(11)(B)(i) refers to the individuals who are proposing to join as plaintiffs in a single action[.]" *Id.* at 742 (emphasis added).

B. Timeliness of Removal

As an initial matter, the Court considers whether the removals of these civil actions were timely. Defendants argue that they first ascertained the existence of the mass action when they received the Binder, and that they timely removed the cases within 30 days.

When a plaintiff's initial pleading does not state a case that is removable under CAFA, the defendant must file a notice of removal "within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable. 28 U.S.C. § 1446(b)(3).[4]

Plaintiffs note that they moved to consolidate the Hamilton County cases as early as November 2014; that, in January 2015, an order of consolidation was entered in the Hamilton County cases over the Defendants' objection; and that the cases filed in Butler County had been consolidated under Judge Guckenberger (who has since recused). (*See* Ex. 1 to Plaintiffs' Motions to Remand; Plaintiffs' Replies.)[5]

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[4] Cases that were dismissed and refiled by Plaintiffs in Hamilton County *after* December 7, 2015 may be removable pursuant to 28 U.S.C. § 1446(b)(1), which provides that the notice of removal must be filed "within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."

[5] The relevant Ohio rule refers separately to requests for joint trials and requests for consolidation. *See* Ohio Civ. R. 42.

Plaintiffs argue that, prior to the submission of the Binder, they had been asking for joint trials for years.[6]

Plaintiffs' allegations of Defendants' judge-shopping cause the Court significant pause.[7] Nonetheless, Plaintiffs fail to provide any documentation showing prior requests for joint trials (which would negate the timeliness of the removals). Accordingly, the Court cannot find that the removals were not timely filed.[8]

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[6] Plaintiffs also argue that the Binder could not have triggered removal because it was neither a pleading, nor formally filed with the court. Plaintiffs' application of the statute is too narrow. Section 1446(b)(3) provides that Defendant may ascertain removability from "other paper." The Sixth Circuit has recognized a variety of documents as "other paper," including hearing transcripts and deposition testimony. *See Berera v. Mesa Med. Group, PLLC*, 779 F.3d 352, 364 (6th Cir. 2015) (citing Charles Alan Wright, *et al*., 14C *Federal Practice and Procedure* § 3731 (4th ed. 2009) (finding that "documents such as deposition transcripts, answers to interrogatories and requests for admissions, . . . amendments to ad damnum clauses of complaints, and correspondence between the parties and their attorneys or between the attorneys" may constitute "other papers" under § 1446(b)(3))).

[7] Defendants removed these cases only after their attempts to remove Judge Ruehlman from the cases and to vacate the consolidation of the cases had failed in the appellate courts. (Ex. 1 to Plaintiffs' Motions to Remand).

[8] Indeed, the Sixth Circuit has held that the requirements of § 1446(b) are procedural rather than jurisdictional. *Music v. Arrowood Indem. Co.*, 632 F.3d 284, 287 (6th Cir. 2011). For this reason, even if Plaintiff could later produce such documentation, the Court would not be divested of jurisdiction.

C. Statutory Requirements

CAFA defines a mass action as follows:

> [T]he term "mass action" means **any civil action** (except a [class action]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a) [which is currently $75,000].

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).[9]

For federal jurisdiction to attach, a mass action must also satisfy several other requirements, which are applicable to class actions. *See* 28 U.S.C. § 1332(d)(11)(A). Those provisions include a minimal diversity requirement and a requirement that the aggregate amount in controversy for the mass action "exceeds the sum or value of $5,000,000, exclusive of interest and costs." *See* 28 U.S.C. § 1332(d)(2).[10] "Cases

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[9] Following this definition, the statute lists a number of exclusions, which are not relevant here. *See* 28 U.S.C. § 1332(d)(11) (B)(ii).

[10] To the extent that Plaintiffs contend that the parties are not minimally diverse or that the amount in controversy requirement has not been met, Plaintiffs' arguments are not well taken. While Plaintiffs assert that Defendants fail to prove "any" of the mass action requirements, Plaintiffs provide no explanation for their belief that the amount in controversy is not satisfied. However, the Court finds that this requirement is easily met in light of the number of Plaintiffs, the catastrophic injuries alleged by Plaintiffs,

in this area necessarily are fact-specific, due to the need to apply CAFA's statutory principles to the particular jurisdictional facts involved." *Parson v. Johnson & Johnson*, 749 F.3d 879, 890 (10th Cir. 2014) (emphasis added).

Here, Plaintiffs argue that because these cases have not been presented as a single civil action, they are not removable as a mass action. That is, Plaintiffs argue that their plethora of individual cases does not constitute a civil action (**singular**) in which the claims of 100 or more persons are proposed to be tried jointly.

It is well established that the plaintiff is the master of the complaint. Accordingly, state court plaintiffs with common claims against a common defendant may bring separate cases with fewer than 100 plaintiffs each to avoid federal jurisdiction under CAFA. *See, e.g., Atwell v. Boston Sci. Corp.*, 740 F.3d 1160, 1162–63 (8th Cir. 2013); *Scimone v. Carnival Corp.,* 720 F.3d 876, 881–82 (11th Cir. 2013); *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009).

However, some courts have approved mass action removal of civil actions having less than 100 plaintiffs where (1) the plaintiffs propose that their claims be tried jointly and (2) the civil actions, when combined, will involve at least 100 plaintiffs. *See, e.g.*, *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218, 1220 (9th Cir.

Plaintiffs' requests for punitive damages, and past verdicts in related cases. As to the minimal diversity requirement, Plaintiffs allege that there is no federal diversity, but do not specifically contest that the parties are minimally diverse. And, for example, the record reflects that Plaintiff Steven Schultz is a citizen of Indiana, whereas Defendant UC Health is a citizen of Ohio.

2014) (en banc) (removal proper where plaintiffs in several actions alleged injuries arising from their use of Darvocet and Darvon, among other pain relievers); *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1161–62 (8th Cir. 2013) (removal proper where three groups of plaintiffs alleged injuries arising from the use of transvaginal mesh); *In re Abbott Labs., Inc.*, 698 F.3d 568, 570–71 (7th Cir. 2012) (removal proper where several hundred plaintiffs filed ten lawsuits alleging injuries arising from their use of Depakote).[11] The Sixth Circuit has not addressed this issue.

In the fact-specific context of the present cases, this Court is not convinced, especially in the absence of Sixth Circuit precedent, that the claims of *individual* Plaintiffs alleging *medical malpractice*, who filed distinct law suits, can be combined for the purpose of the "civil action" requirement and/or the "100 or more persons" requirement. First, the plain language of the statute would seem to indicate that a mass action derives from a *single civil action*. *See* 28 U.S.C. § 1332(d)(11)(B)(i) ("the term 'mass action' means any civil action . . .") (emphasis added). Moreover, the Supreme Court has expressly found that "the term 'persons' in § 1332(d)(11)(B)(i) refers to the individuals who are proposing to join as plaintiffs in a single

[11] Darvocet, Darvon, Depakote, and transvaginal mesh are products used extensively, and nationwide, thus rendering cases arising from their use "cases of national importance." *See also In re McKesson Corp, et al.*, Nos. 13-0504 to 13-0510, slip op. (6th Cir. Feb. 23, 2015). The malpractice of a single doctor in one community does not equate with the nationwide use of prescription drugs or medical devices.

action[.]" *Mississippi ex rel. Hood*, 134 S.Ct. at 742 (emphasis supplied).

Here, we have hundreds of civil actions (with most including a single plaintiff), and not one civil action with more than 100 plaintiffs (or anything close to that).

Further, application of mass action jurisdiction in these circumstances would not be consistent with Congress' intent. Unlike the cases considered by other circuits, the claims here do not present product liability claims, which clearly are **cases of national importance**, given nationwide usage of the products. Instead, the cases here involve the actions of a single doctor, who performed all of the surgeries at issue in Cincinnati-area hospitals. Here, the underlying cases are state law medical malpractice claims, not cases of national importance. These cases do not involve interstate controversies. They present quintessentially localized, state law claims.

In the absence of binding authority from the Supreme Court or the Sixth Circuit on the issue presented, and in light of the well-established principle that all doubts should be resolved against removal, the Court finds that these removed civil action**s** do not comprise a mass action as defined in 28 U.S.C. § 1332(d)(11).

D. Totality of the Circumstances Exception

Plaintiffs argue that various statutory exceptions to the mass action provision would either require or allow the Court to decline jurisdiction. Here, the Court focuses on the totality of the circumstances exception. 28 U.S.C. § 1332(d)(3). That Section provides:

A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar

> claims on behalf of the same or other persons have been filed.

Plaintiffs bear the burden of proof as to the applicability of this exception. *See Myrick v. WellPoint, Inc.,* 2014 WL 4073065, at *2 (7th Cir. Aug. 14, 2014).

As an initial matter, the Court must determine the extent to which Plaintiffs and Defendants are citizens of Ohio. Upon the Court's own review of the complaints filed in the state court cases, the Court concludes that at least one-third but less than two-thirds of Plaintiffs are citizens of Ohio. Defendants are local health care facilities/hospitals, the local Center for Advanced Spine Technologies (Dr. Durrani's wholly-owned business), and Dr. Durrani.

Dr. Durrani is the only Defendant whose citizenship is disputed by Defendants. Dr. Durrani lived, worked, and operated locally at the time these causes of actions arose. Dr. Durrani was a citizen of Ohio prior to his flight to Pakistan to avoid federal criminal prosecution. Accordingly, the Court considers Dr. Durrani a citizen of Ohio for the purposes of this inquiry.[12]

Second, the Court must consider the various factors set forth in 28 U.S.C. § 1332(d)(3)(A)–(F). These civil actions are of local concern, because they are medical malpractice actions arising out of the actions of a single local doctor. Plaintiffs' claims are governed solely by

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[12] Even if Dr. Durrani is not a citizen of Ohio for the purposes of this inquiry, the other primary Defendants are. If they were not, any Defendant could have removed a number of these cases pursuant to traditional diversity jurisdiction principles . . . but nobody did.

Ohio law. By filing individual civil actions based solely on state law, Plaintiffs clearly sought to avoid federal jurisdiction. Given the location of the surgeries at issue—Hamilton County and Butler County—each has a distinct nexus with Plaintiffs, Defendants, and the alleged harm. Upon the Court's own review of the complaints filed in the state court cases, the Court determines that the number of Plaintiffs from Ohio is substantially larger than the number of citizens from any other state.[13] The only factor that cuts against remand is whether, during the last three years, one or more class actions asserting similar claims on behalf of the same or other persons have been filed.[14]

While it is not a factor explicitly mentioned in the statute, the Court also considers the procedural history of these cases under the rubric of the totality of the circumstances. The majority of these cases have been pending in state courts since 2014. However, **Defendants only moved for removal once Judge Ruehlman issued rulings that were highly unfavorable to Defendants**[15] **and set trial dates**

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[13] There are also some Plaintiffs from Kentucky (where Plaintiffs' lawyers have their offices) and Indiana, portions of which, along with portions of Ohio, comprise the Greater Cincinnati area.

[14] Even then, the class actions referenced in Defendants' briefs involve billing practices and claims against the hospital defendants for negligent credentialing, supervision, and retention; and fraud. While there is admittedly some overlap with the issues at stake in these case, the class actions do not involve medical malpractice claims.

[15] *See, e.g.,* Judge Ruehlman's General Order of December 15, 2015 at pages 2-4, "Proposed Sanction Order for Dr. Durrani's Flight"

(beginning on February 29, 2016). The Court does not condone Defendants' attempts to undo a state court judge's dutiful work on the eve of trial. Defendants should not be permitted to game the system to remove long-pending state court cases. While both sides have engaged in their fair share of forum shopping—it is time to get on with it.

Weighing the totality of the circumstances, the Court finds that the interests of justice are served by remanding these civil actions.

E. Attorney's Fees and Costs

Plaintiffs seek attorney's fees and costs pursuant to 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." *Id.*

"Absent unusual circumstances, courts may award attorneys' fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005). An award of attorneys' fees under § 1447(c) "is inappropriate where the defendant's attempt to remove the action was 'fairly supportable,' or where there has not been at least some finding of fault with the defendant's decision to remove." *Chase Manhattan Mortg. Corp. v. Smith*, 507 F.3d 910, 913 (6th Cir. 2007).

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and "Proposed Instruction to the Jury." (*See* Case No. 1:16-cv-004 (Lead Case), Doc. 1, Exhibit C, PAGEID# 329-331).

While not prevailing, Defendants' arguments are at least objectively reasonable, in light of the lack of controlling Sixth Circuit precedent regarding the mass action provisions. *Cf. A Forever Recovery, Inc. v. Twp. of Pennfield*, 606 Fed. App'x 279, 281 (6th Cir. 2015) (noting that a defendant lacks an objectively reasonable basis for removal where "well-settled case law makes it clear that federal courts lack jurisdiction to hear the case."). The Court finds that, notwithstanding the number of cases that were removed, there are no unusual circumstances which would justify an award of fees and costs. Accordingly, the Court declines to award Plaintiffs attorney's fees and costs pursuant to 28 U.S.C. § 1447(c).

IV. CONCLUSION

Accordingly, for the foregoing reasons:

1. Plaintiffs' motions to remand are **GRANTED**;

2. These cases are to be **REMANDED** to the state court from which they were removed;

3. However, enforcement of this Order is hereby **STAYED** pending the outcome of any accepted appeal by the Court of Appeals for the Sixth Circuit;

4. **The Clerk SHALL NOT BEGIN EFFECTUATING REMAND until this Court specifically directs via entry of a new, separate Order**.

IT IS SO ORDERED.

Date: 2/13/2016

s/ Timothy S. Black
Timothy S. Black
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16-0304

[Filed May 25, 2016]

In re: ABUBAKAR AITQ DURRANI, M.D., et al.,	)
Petitioners.	)

O R D E R

Before: SUTTON and COOK, Circuit Judges; HOOD, District Judge.*

Dr. Abubakar Atiq Durrani and numerous health providers and entities, the defendants named in numerous related medical malpractice actions removed to the district court under the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 ("the CAFA"), petition to appeal the district court's order remanding this putative mass action to state court. Plaintiffs oppose the petition, and Defendants reply. Plaintiffs move to strike the reply as unauthorized. Defendants move for leave to file a reply, and Plaintiffs oppose leave.

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Federal Rule of Appellate Procedure 5, governing petitions for permission to appeal, neither authorizes nor prohibits the filing of a reply. Fed. R. App. P. 5. We need not address, however, whether a reply is permissible under the rule, either with or without leave of court, because we reach the same result on the Defendants' petition regardless of whether we consider the reply.

We accordingly turn to the merits of that petition for permission to appeal. Defendants argue that multiple suits involving fewer than one hundred plaintiffs constitute a mass action when the plaintiffs proposed that the actions be jointly tried and, combined, the actions encompass the claims of more than one hundred plaintiffs. Defendants also argue that the district court erroneously declined jurisdiction under the totality-of-the-circumstances exception because: (1) Plaintiffs failed to carry their burden of proving that one-third to two-thirds of the plaintiffs and all primary defendants were Ohio citizens; and (2) the district court erroneously considered an extra-statutory factor—the procedural history—in declining jurisdiction.

Granting a CAFA petition is within our discretion. *See* 28 U.S.C. § 1453(c)(1). The statute does not provide any criteria for accepting or denying review, but "[d]iscretion to review a remand order is not rudderless." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 555 (2014). Courts consider whether the question presented in the appeal is "important, unsettled, and recurrent" and whether it will "escape meaningful appellate review" absent an appeal. *Coll. of Dental Surgeons of P.R. v. Conn. Gen.*

Life Ins. Co., 585 F.3d 33, 39 (1st Cir. 2009). Courts also consider whether the CAFA-related question is consequential to the resolution of the case and whether the record is sufficiently developed for review. *Id*. at 38.

Defendants raise several issues in their petition that meet these criteria, including: (1) whether a joint trial plan for Plaintiffs' cases transforms their individually-filed actions into a mass action for purposes of removal under the CAFA; (2) who constitutes a "primary defendant"; (3) whether a case may have more than one primary defendant; (4) at what point in time a defendant's citizenship is determined and where a fugitive defendant's domicile lies; and whether the relevant statutory factors for determining whether the totality-of-the-circumstances exception applies is a non-exhaustive list. Thus, review of the district court's remand order is appropriate.

A decision in a CAFA appeal should be rendered in sixty days, unless an extension of time is agreed to by all parties or a ten-day extension is granted for good cause. 28 U.S.C. § 1453(c)(2), (3). This sixty-day period begins to run when a petition to appeal is granted. *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012).

The motion to strike and the motion for leave to file a reply are **DENIED AS MOOT**. The petition for permission to appeal is **GRANTED**. The parties are not limited to arguing only those issues set forth above but, in view of the strict time limitations for resolution of the appeal, the briefing and submission will be accelerated. The clerk is **DIRECTED** to enter an abbreviated briefing schedule and to expedite submission to the court.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 16-3549

[Filed September 20, 2016]

SCOTT DANIEL, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
ASCIRA PARTNERS, LLC, ET AL.,	)
	)
Defendants-Appellants.	)
	)

O R D E R

BEFORE: MERRITT, DAUGHTREY, and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. 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.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX E

PETITIONERS

The following individuals and entities are defendants in the proceedings in the trial court and/or the appeals court:

1. ASCIRA Partners, LLC
2. Patrick Baker
3. Bariatric Partners of Texas, Inc.
4. Bariatric Partners of Texas, LLC
5. C. Francis Barrett
6. Jeffrey Bogle
7. Joseph Broderick, M.D.
8. Margaret Buchanon
9. Center for Advanced Spine Technologies, Inc.
10. Dr. Haleem Chaundhary
11. Cincinnati Children's Hospital Medical Center
12. Edward Crane, M.D.
13. Trace Curry
14. Tom Daskalakis
15. Jeff Drapalik
16. Abubakar Atiq Durrani, M.D.
17. Naveed Fazlani, M.D.
18. Dr. Douglas Feeney
19. Elliott Fegelman, M.D.
20. Good Samaritan Hospital
21. Michael Gould
22. Paula Hawk
23. Matthew Hardin, M.D.
24. Julie Holt
25. Jamie Hunter

26. Kevin Joseph
27. Journey Lite of Cincinnati, LLC
28. Carol King
29. James A. Kingsbury
30. Timothy Kremchek
31. Rev. Damon Lynch, Jr.
32. Jerry Magone, M.D.
33. David McClellan
34. Myles Pensak, M.D.
35. Riverview Health Institute, LLC
36. Ron Rohlfing
37. David Schwallie
38. Jill Stegman
39. Cyndi Trafficant
40. TriHealth, Inc.
41. UC Health
42. West Chester Hospital, LLC
43. Creighton B. Wright, M.D.
44. Jeffrey Wyler

The Christ Hospital was a party below but is not a Petitioner here.

RESPONDENTS

The following individuals are plaintiffs in the proceedings in the trial court and appeals court:

1. Freida Aaron
2. Patricia Lynn Adams
3. Michelle Agee (Durrani)
4. Michelle Agee (Bariatric Partners)
5. Laura Aker
6. Jimmy Allen
7. Katrina Allen
8. Bradley Arnold

9. Thomas Augst
10. Joshua Ault
11. Amanda Ayers
12. Gayle Bachman
13. Caidan Bailey
14. Paul Baker
15. Joseph Baumgardner
16. Michelle Beavan
17. Emily Beckelhimer
18. Troy Beckelhimer
19. Cathy Beil
20. Mackenzie Bender
21. Denise Benge
22. Nick Benge
23. Shawnda Benton
24. Trey Billing
25. Edythe Bishop
26. Anthony Bode
27. Barbara Boggs
28. Kaitlyn Boggs
29. Kaitlyn Boggs
30. Doris Botner
31. Christina Brashear
32. Melissa Braucher
33. Dominique Bray
34. Alan Breitenstein
35. Rebecca Breitenstein
36. Michael Brophy
37. Tara Brown
38. Kayla Burton
39. Kathleen Bushelman
40. Brenda Butler
41. Timothy Byrd
42. Patrick Calligan
43. Jan Campbell

44. Robert Campbell
45. Andrew Carr
46. Chris Clark
47. John Collins
48. David Conger
49. Kenneth Conger
50. Michael Cook
51. Melissa Cotter (on behalf of son Jacob)
52. Eric Courtney
53. Karen Crissinger
54. Forrest Crowe (on behalf of daughter K.C.)
55. Joi Crowe
56. Joy Cullins
57. Kathryn Curley
58. Margaret Dailey
59. Scott Daniel
60. Joseph Davis
61. Ollie Deaton
62. Stefanie Deaton
63. Damon Deck
64. Kristine Dority
65. Deborah Doyle
66. Natasha Dressman
67. Jacob Durham
68. Connie Ellington
69. Richard Elliott
70. Tracy Esselman
71. Arlene Fait
72. Linda Favaron (executrix for estate of Neil Favaron)
73. Jacob Feltner
74. Karen Feltner
75. Troy Fite
76. Shamyia Ford
77. Julie Freeman

78. Douglas Gabbard
79. Christine Geralds
80. Christina Goldstein
81. Carla Griessman
82. Jenny Grimm
83. Taura Halbert (on behalf of son Paris)
84. Alyssa Hall
85. Denise Hamilton (on behalf of W.H.)
86. David Harris
87. Adam Hartman
88. Chris Haynes (on behalf of daughter Emily)
89. Minuet Healy
90. Barbara Hensley
91. Laura Hensley
92. Ryan Hensley
93. Katherine Hersley (on behalf of E.H.)
94. Kathy Hersley
95. Alissa Hightchew
96. Celeste Hoffman
97. Robert James Houghton II
98. Tammy Hughes
99. Kevin Hunley
100. George Hutchinson
101. Martha Hutton
102. Tracy Janson
103. Amber Johnson
104. Chelsea Johnson
105. Karen Johnson
106. Roger Johnson
107. Bradley Jonas
108. Sara Jonas
109. Sydney Jones
110. Tammy Jones
111. Jacqueline Judkins
112. Phyllis Judkins

113. Joshua Kauffman
114. Maggie Knauer
115. Knauer (executor for the estate of Christopher)
116. Rose Koehler
117. Shannon Koehler
118. Michael Koelblin
119. Brandon Lacinak
120. Victoria Landrum
121. Lyndon Langford (on behalf of N.L.)
122. Michael Legendre
123. Patricia Legendre
124. Beth Ann Leisring
125. Kelly LeMaster
126. Adrian Lilly
127. Derek List
128. Kimberly Luse
129. K.R. Mahlenkamp
130. Jack Marcheschi
131. Stacy Martin
132. Robert Masters
133. Brandon Mathis
134. Heather McCann
135. Kyra McClendon
136. Kevin McDonald
137. Candi McKinney
138. Grant McKinney
139. Tyler McKnight
140. Kameron McNeal
141. Kerry McNeal
142. Tonia McQueary
143. Dawn Merland
144. Tiffany Messerschmidt
145. Lyndsey Middendorf
146. Samantha Mink
147. Stephani Moore

148. Steven Mueller (on behalf of Sarah Mueller)
149. Jennifer Myers
150. Charles Nelson
151. Gary Neu
152. Rahman Nisbette
153. Michelle Noble
154. Michael Kingsley Babatunde Odulana
155. Angela Pennington
156. Heather Pickett
157. Heather Pickett
158. Antoine Powell
159. Leslie Powers
160. Leslie Powers (for estate of Heather Heffner)
161. Lawrence Pridemore
162. Carol Pummell
163. Mary Ravenscraft
164. Todd Ray
165. Samantha Redrow
166. Mark Reed
167. Teresa Robbinson-Woods
168. Dorothy Rose
169. Faye Rosebery
170. Christina Rutter (on behalf of C.R.)
171. Mike Sand
172. Kimberly Schmidt
173. Kevin Schmit
174. Patrick Schmit
175. Brandon Schoborg
176. Susan Schock
177. Steven Andrew Schultz
178. Ronald Schuster
179. David Scott
180. Alexandra Scully
181. Ruth Sears
182. Dana Setters

183. Asia Shannon
184. Charlann Shepherd
185. Patricia Shott (executrix for estate of Gregory Shott)
186. Heather Slayback
187. Donald Smith
188. Orris Smoote
189. David Snider
190. Sherrie Spangenberg
191. Earl Thomas Stamps Jr.
192. Tempie Stephenson
193. Deon Stigall
194. Ryan Tackett
195. Ryan Tanner
196. Alex Taylor
197. Benjamin Thaeler
198. Adrienne Thomas
199. Dennis Thomas
200. Connie Underwood
201. Jacklen Upchurch
202. Jordan Vance
203. Shannon Wallace
204. Vicki Wallace
205. Katherine Walls
206. Gerald Walsh
207. Lindsey Walsh
208. Tracey Walsh
209. Helen Ward
210. Daniel Webber
211. Cathleen Weber
212. Brandon Webster
213. Laura Weisbecker
214. Delana Wheaton
215. Alisa Wilson (on behalf of J.W.)
216. Robert Wilson

217. William Wolder
218. Dawn Wolfe
219. Billy Wolsing
220. Teresa Worley
221. Cory Wright
222. Cheryl Wyatt
223. Emanuel Wyatt
224. Evelyn Young
225. Hannah Zmyslo
226. Mary Zureick