No. _____

IN THE

Supreme Court of the United States

LOCKWOOD, ANDREWS & NEWNAM, P.C., *et al.*,

Petitioners,

v.

JENNIFER MASON, *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

The Class Action Fairness Act of 2005 creates federal diversity jurisdiction over certain class actions, but requires district courts to "decline to exercise" such jurisdiction if, among other things, two conditions are satisfied: (1) "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," and (2) "at least 1 defendant * * * whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class * * * is a citizen of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A).

This case presents two questions concerning Section 1332(d)(4)(A):

1. Whether the Sixth Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—that a plaintiff seeking the remand of a class action, in which class membership is not limited to forum-state citizens, need not present any evidence that greater than two thirds of proposed class members are such citizens.

2. Whether the Sixth Circuit correctly held—consistent with the Ninth Circuit, but in conflict with the Fifth, Tenth, and Eleventh Circuits—that a plaintiff seeking remand has adequately pled that a particular defendant's conduct forms a "significant basis" of the class's claims when it has made only undifferentiated and conclusory allegations regarding the conduct of multiple defendants.

PARTIES TO THE PROCEEDING

Petitioners in this Court, who were defendants in the Circuit Court for the County of Genesee, Michigan, and the United States District Court for the Eastern District of Michigan, and appellants in the United States Court of Appeals for the Sixth Circuit, are Lockwood, Andrews & Newnam, P.C., a Michigan corporation, and Lockwood, Andrews & Newnam, Inc., a Texas corporation. Leo A. Daly Company, a Nebraska corporation, was a defendant in the trial courts below but was not an appellant in the Sixth Circuit and is not a petitioner here.

Respondents in this Court, who were named plaintiffs representing a putative class in the Circuit Court of Genesee County and the Eastern District of Michigan and appellees in the Sixth Circuit, are Jennifer Mason, Carl Rogers II, Teresa Springer, Jeffery Dushane, Deborah Culver, Dr. Tristin Hassell, Adam Dill, and David Yeoman.

RULE 29.6 STATEMENT

Lockwood, Andrews & Newnam P.C. is a professional corporation whose sole controlling member is an officer of Lockwood, Andrews & Newnam, Inc. It otherwise has no parent corporation, and no publicly owned corporation owns 10% or more of its stock.

Lockwood, Andrews & Newnam, Inc. is a wholly owned subsidiary of the Leo A. Daly Company.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 842 F.3d 383. The opinion of the district court (App., *infra*, 40a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2016. On January 18, 2017, Justice Kagan granted Petitioners' application to extend the time to file this petition until March 16. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). See *Hertz Corp.* v. *Friend*, 559 U.S. 77, 83 (2010).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(d)(4) provides, in relevant part:

> A district court shall decline to exercise jurisdiction under [the Class Action Fairness Act]—
>
> (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; [and]
>
> (II) at least 1 defendant is a defendant * * *
>
> (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.

Section 1332 of the Judicial Code is reproduced in full at App., *infra*, 52a-61a.

STATEMENT

This case arises out of the water crisis in Flint, Michigan. Respondents brought suit in state court against Petitioners—a Texas-based engineering firm and its Michigan affiliate—seeking to represent a class of Flint's residents and property owners. Petitioners removed the case to federal court pursuant to the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in relevant part at 28 U.S.C. § 1332(d)(2)). It is undisputed that such removal was proper. But the district court subsequently remanded the case pursuant to a provision of CAFA known as the "local controversy exception," which requires district courts to "decline to exercise jurisdiction" if each of several requirements are satisfied. 28 U.S.C. § 1332(d)(4)(A).

Over the dissent of Judge Kethledge, a divided panel of the Sixth Circuit affirmed. In doing so, the panel majority parted ways with six other circuits in construing one of the exception's requirements and deepened a split among four other circuits as to another. Each of the two questions presented here is important and recurring. And if left uncorrected, the majority's flawed answers to both questions will encourage the very gamesmanship that Congress enacted CAFA to prevent.

The first question concerns whether a plaintiff seeking remand must present any evidence that greater than two-thirds of proposed class members are "citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(I). Until now, every court of appeals to address the issue—six in all—had held that some such evidence is required. But, over Judge Kethledge's dissent, the

panel majority below held otherwise. It reasoned that a state's *residents* may be presumed to be its *citizens* for purposes of the local controversy exception—with the upshot being that Respondents did not need to introduce any evidence to meet this requirement. The Sixth Circuit's holding disregards centuries of this Court's case law, including *Steigleder* v. *McQuesten*, 198 U.S. 141, 143 (1905), which held that "residence and citizenship [are] wholly different things," and *Robertson* v. *Cease*, 97 U.S. 646, 648 (1878), which held that a "naked averment" of residence is "insufficient to show * * * citizenship."

The second question concerns the requirement that there be at least one local (*i.e.*, forum-state citizen) defendant whose "alleged conduct" forms "a significant basis" of the plaintiff's claims. 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(bb), (cc). In the Fifth, Tenth, and Eleventh Circuits, a plaintiff seeking remand must have made individualized allegations about the conduct of the local defendant that permits the district court to evaluate whether such conduct is "significant" when compared to that of diverse defendants. But the panel majority below, again over the vigorous dissent of Judge Kethledge, joined the Ninth Circuit in holding that undifferentiated allegations about what various defendants collectively did suffice. Respondents were thus able to establish that the conduct of the local defendant here was significant when compared to that of its diverse parent through nothing more than the "enigma[tic]" allegation that the latter acted "through" the former. App., *infra*, 35a-36a. This kind of "naked assertion" unaccompanied by any "well-pleaded facts" would not be enough to get *into* federal court. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-79

(2009). Surely more is required to *defeat* a federal court's otherwise proper exercise of jurisdiction—particularly in light of Congress's concerns about the games that lawyers play to do just that.

This Court should intervene to reverse the decision below and restore national uniformity on these important issues of class action law and federal jurisdiction.

A. Statutory Framework

Before CAFA, federal courts had diversity jurisdiction over class actions only if every named plaintiff was diverse from every named defendant. *Snyder* v. *Harris*, 394 U.S. 332, 340 (1969). The citizenship of unnamed class members was irrelevant. Because plaintiffs' attorneys have substantial flexibility in selecting the named parties in a class action, however, this rule resulted in "abuses," which prevented "cases of national importance" from being heard in federal court. Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 5; accord S. Rep. No. 109-14 at 10-11 (2005). Such cases were left to state courts, which Congress found "sometimes act[ed] in ways that demonstrate[d] bias against out-of-State defendants." Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 5.

Congress enacted CAFA to remedy these abuses. CAFA grants district courts jurisdiction over class actions where the amount in controversy exceeds $5 million and any one class member is diverse from any one defendant. 28 U.S.C. § 1332(d)(2). It also permits defendants to remove such class actions to federal court. 28 U.S.C. § 1453(b).

CAFA also contains three provisions that provide for the remand of otherwise properly removed class

actions. See 28 U.S.C. §§ 1332(d)(3), (d)(4)(A), (d)(4)(B). The provision relevant here is known as the "local controversy exception," although that term does not appear in the statute. It provides that a district court "shall decline to exercise jurisdiction" if each of several conditions are met. *Id.* § 1332(d)(4)(A).

The first such condition relevant here is that "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate [be] citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(A)(i)(I). The statute uses the word "citizen," which has for purposes of diversity jurisdiction long been equated with "domicile," at least where natural persons are involved. *E.g.*, *Williamson* v. *Osenton*, 232 U.S. 619, 624 (1914). In turn, a long legal tradition considers domicile to be "established by" (1) "physical presence in a place," coupled with (2) "one's intent to remain there." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989).

The other requirement of the local controversy exception relevant here is that there be at least one defendant who is a citizen of the forum state and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(bb), (cc). The courts of appeals that have construed this requirement all agree that it "'effectively calls for comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants.'" App., *infra*, 25a (quoting *Kaufman* v. *Allstate N.J. Ins. Co.*, 561 F.3d 144, 156 (3d Cir. 2009)). The requirement is satisfied if the complaint pleads facts showing that "'the local defendant's alleged conduct is a significant part of

the alleged conduct of all the Defendants.'" *Id.* at 26a; see also *id.* at 25a (citing other circuits following *Kaufman*).

The courts of appeals to have construed the local controversy exception also all agree that it is not "jurisdictional." App., *infra*, 17a-18a (collecting cases). After all, "a court could not 'decline' jurisdiction that it never had in the first place." *Clark* v. *Lender Processing Servs.*, 562 F. App'x 460, 465 (6th Cir. 2014). The party seeking remand thus "bears the burden of establishing each element of the exception by a preponderance of the evidence." App., *infra*, 10a (collecting cases from nine other circuits); cf. *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) ("[W]henever the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.").

B. Respondents' Class Action

This is one of approximately twenty class actions arising out of the Flint water crisis that are currently pending in both state and federal courts. Respondents filed their case in Michigan state court and then amended their complaint. App., *infra*, 73a. Petitioners then removed to federal court, *id.* at App., *infra*, 40a, invoking jurisdiction under CAFA, see 28 U.S.C. §§ 1332(d)(2), 1453(b).

Petitioners are Lockwood, Andrews & Newnam, Inc. ("LAN Inc."), a Texas engineering firm, and Lockwood, Andrews & Newnam, P.C. ("LAN P.C."), its Michigan affiliate. The complaint alleges that Petitioners provided consulting and engineering services to the city of Flint in connection with the City's decision to source water from the Flint River. App., *infra*, 78a-85a. The complaint does not

differentiate between the two Petitioners in any meaningful way. It alleges that LAN P.C. was "incorporated in 2008 by LAN Inc.," after the latter was retained to perform studies for Flint, *id.* at 75a, and it is undisputed that Flint's contractual relationship was only with LAN Inc. The complaint alleges that "[a]t all relevant times, LAN Inc. conducted business in [Michigan] *through* LAN PC," but does not explain what that means. *Id.* at 76a (emphasis added). The complaint also alleges that LAN P.C. worked out of LAN Inc.'s Chicago office. *Id.* at 75a. Other than that, the complaint simply lumps the two entities together under the acronym "LAN" and alleges all their conduct jointly. *Id.* at 74a, 79a-92a.[1]

Respondents are eight individuals who allege that they "were residents of Flint" and suffered harm as "individuals, parents of minors and as property owners." *Id.* at 75a. They propose to bring this case "on behalf of themselves and all other [*sic*] similarly situated." *Id.* at 74a. Though the complaint says the terms "Class" and "Class Members" are "defined below," *id.*, it contains no such definition nor any other description of the proposed class. At oral argument before the court of appeals, Respondents clarified that their proposed class includes anyone who either was a resident of Flint *or* who owned property there (whether or not they also resided there). Oral Arg. at 21:30-22:13, 32:40-33:17,

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[1] The complaint also named the Leo A. Daly Company ("LAD"), a Nebraska corporation, as a defendant but contained no allegations regarding LAD other than that LAD was Petitioners' alter ego. App., *infra*, 92a-93a. LAD did not appeal the district court's decision and is not a petitioner here.

available at http://bit.ly/2kZEsTi. That definition would appear to sweep in both natural and legal persons.

C. Proceedings In The District Court

Shortly after Petitioners removed, Respondents moved to remand pursuant to CAFA's local controversy exception. They introduced no evidence with their motion; instead, they argued that the court could determine from their complaint alone that all elements of the exception were satisfied. Dist. Ct. Doc. 10 at 23.

Petitioners objected, observing that the complaint alleged only that some undefined percentage of class members were *residents* of Michigan. Dist. Ct. Doc. 14 at 18-19. CAFA requires that two-thirds of class members be *citizens*—a concept distinct in several ways from residents. *Ibid.* Petitioners also objected that Respondents' decision not to differentiate between the conduct of LAN Inc. and LAN P.C. in their complaint foreclosed a conclusion that the latter's conduct "form[ed] a significant basis for the claims asserted." *Id.* at 24. In reply, Respondents again declined to present any evidence of citizenship, and instead simply asked the district court to "take judicial notice that the citizenship of the vast majority, if not all, of the class members is Michigan and that the locus of injury is Flint." Dist. Ct. Doc. 18 at 4 n.2.

The district court ordered the case remanded to state court. It acknowledged that the class was not "expressly limited to Michigan citizens," App., *infra*, 45a, but held that it could presume that two-thirds of class members were citizens because residence was "prima facie proof" of citizenship. *Id.* It justified

that inference by asserting—though not based on any facts in the record—that Flint did not have "a large number of college students, military personnel, owners of second homes, or other temporary residents," so there were "no circumstances * * * suggesting that these Flint residents [were] anything other than citizens of Michigan." *Id.* at 46a.

The district court did not address the "significant basis" requirement of CAFA's local controversy exception. It mistakenly conflated that requirement with a separate "significant relief" requirement in the exception that is not at issue here. *Id.* at 47a-49a

D. Proceedings In The Sixth Circuit

Noting the "important, unsettled, and recurrent" legal questions presented by this case, the court of appeals granted permission to appeal. App., *infra*, 39a. A divided panel then affirmed, over Judge Kethledge's dissent.

1. The panel majority first held that Respondents carried their burden of establishing that more than two-thirds of proposed class members were Michigan citizens, even though Respondents had introduced no evidence to support the point. *Id.* at 14a-15a. In doing so, the panel majority held that Respondents were entitled to a "rebuttable presumption that each resident class member was domiciled [in Flint]," and thus was a Michigan citizen—and faulted Petitioners for not introducing evidence "undermining th[at] inference." *Id.* at 14a. The panel majority all but ignored Respondents' own statements that the proposed class *also* included non-resident property owners, noting only in passing that "property owners[hip is] another strong indicator of domicile." *Id.* at 24a.

The panel majority conceded that other circuits have "explicitly rejected" reliance on such presumptions in this very context. *Id.* at 15a; see also *id.* at 19a. Those other circuits, the majority recognized, relied in part on this Court's holdings that a "naked averment of residence is insufficient to show * * * citizenship." *Id.* at 14a-15a (quoting *Robertson*, 97 U.S. at 648, and citing *Steigleder*, 198 U.S. at 143, and *Bingham* v. *Cabot*, 3 U.S. (3 Dall.) 382, 383-84 (1798)). But those circuits' reliance on this Court's precedents was in error, the panel majority reasoned, because this Court had rejected the use of presumptions only when courts are asked to *take* jurisdiction, not when Congress requires them to *decline* it, as here. *Id.* at 19a-20a.

To further excuse the lack of evidence here, the panel majority also concluded that a "residency-domicile presumption fits particularly well in the CAFA exception context" because, in its view, demonstrating the citizenship of "a mass of individuals, many of whom may be unknown," is "exceptional[ly] difficult[]." *Id.* at 18a-19a. Because it thought the inquiry so difficult, the panel majority thought Respondents should not be put to it—even though, as plaintiffs, they singularly control the composition of the class they seek to represent. Instead, the court thought it better to shift the burden to Petitioners (the defendants), requiring them to prove that proposed class members were *not* citizens if Petitioners wanted to remain in federal court. *Id.* at 25a.

2. The panel majority also held that the "alleged conduct" of LAN P.C., the sole Michigan defendant, "form[ed] a significant basis" of Respondents' claims (see 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb)). It expressed

"agree[ment] with the district court" on this issue (App, *infra*, 27a)—even though the district court did not actually address it.

Although the panel majority purported to interpret this requirement as other circuits have, *id.* at 25a, it did not compare the alleged conduct of LAN P.C. to that of the diverse defendants, such as LAN Inc. Nor could it have done so. As the panel majority acknowledged, the complaint alleged Respondents' conduct in the collective—more specifically, that LAN, Inc. did all of its work "through LAN, P.C." *Id.* at 26a. Indeed, although the panel majority concluded "that Flint relied on LAN, P.C. * * * to perform 'quality control'" and "[t]he failure to provide that quality control is the very core of plaintiffs' professional negligence claim," *id.* at 27a, it relied upon an allegation in the complaint that attributed such conduct to *both* Respondents, see *id.* at 81a (¶ 30(c)).

3. Judge Kethledge dissented as to both holdings. He observed that the majority's ruling on the citizenship requirement conflicted with that of "every circuit to have considered the issue." App., *infra*, 31a. He noted that every other circuit has "held that 'there must ordinarily be at least some facts in evidence from which the district court may make findings regarding the class members' citizenship for purposes of CAFA's local-controversy exception.'" *Ibid.* (quoting *Mondragon* v. *Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013)).

Judge Kethledge was not persuaded by the majority's effort to distinguish this Court's precedents. As he explained, federal courts have a "'virtually unflagging obligation'" to exercise jurisdiction given to them (as CAFA gives

jurisdiction here). *Id.* at 34a (quoting *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). And they "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Ibid.* (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). Hence, "we cannot presume a fact that allows us to *decline* jurisdiction, any more than we can presume a fact that allows us to find that jurisdiction exists in the first place." *Ibid.*

Judge Kethledge also disagreed that the citizenship requirement of the local controversy exception could be met here based solely on a presumption regarding residence. He noted, based on Respondents' statements at oral argument, that "the class [also] include[d] Flint 'property owners' who need not be residents of Flint (or Michigan)," and "whose numbers are anyone's guess." *Id.* at 32a-33a. Thus even *with* the majority's presumption, there was no "basis to conclude that two-thirds * * * of the putative class-members are Michigan citizens," without recourse to another presumption equating property ownership with citizenship. *Id.* at 33a.

In lieu of "all the dueling presumptions," Judge Kethledge would have started with the simple question of whether Respondents, as the party with the burden, had produced evidence of the class members' citizenship. *Id.* at 34a. Because they had not, he would have held that Respondents had failed to meet their burden and thus that the district court was obligated to exercise its jurisdiction. *Ibid.*

4. As to the local controversy exception's "significant basis" requirement, Judge Kethledge observed that the majority's opinion conflicted with a Fifth Circuit ruling that conclusory, undifferentiated

allegations about the conduct of local and diverse defendants do not suffice. App., *infra*, 36a (citing *Opelousas Gen. Hosp. Auth.* v. *FairPay Sols., Inc.*, 655 F.3d 358, 362 (5th Cir. 2011)). He added that Respondents' main allegation specific to LAN P.C.—that LAN Inc. conducted business "through" LAN P.C.—was "an enigma" at best, and "an exercise in studied ambiguity" at worst. *Id.* at 35a, 36a. Either way, it was not adequate to meet a party's burden or to defeat a federal court's exercise of jurisdiction.

As Judge Kethledge noted in conclusion, "[i]t should take a better showing than this for a federal court to cast off its unflagging duty to exercise the jurisdiction assigned to it by Congress." *Id.* at 37a.

REASONS FOR GRANTING THE PETITION

As both the panel majority and dissent acknowledged, this case presents circuit splits on "important, unsettled, and recurrent" issues of federal law affecting the proper division of authority between federal and state courts over high-stakes class action lawsuits. App., *infra*, 39a; see App., *infra*, 15a, 19a, (majority); *id.* at 31a (dissent). *First*, the opinion below created, and took the underside of, a 6-1 circuit split as to whether a plaintiff can obtain a remand based on CAFA's local controversy exception without presenting *any* evidence of proposed class members' citizenship. *Second*, it deepened a 3-2 circuit split as to whether undifferentiated allegations about the conduct of multiple defendants can satisfy the requirement that a local defendant's conduct be "significant" when compared to that of non-local defendants. These circuit splits involve important questions concerning the proper administration of class actions under CAFA and undermine the national uniformity that

CAFA was intended to achieve. This Court should intervene and reverse.

I. The Sixth Circuit's Holding That A Plaintiff May Obtain A Remand Under CAFA Without Evidence Of Class Members' Citizenship Creates A Circuit Split And Is Wrong

A. The Sixth Circuit's Ruling Conflicts With Those Of Six Other Courts Of Appeals

Six courts of appeals have held that, to satisfy the citizenship requirement of CAFA's local controversy exception, there must be evidence of class members' citizenship, at least where class membership is not limited by definition to state citizens. The decision below was the first to depart from that rule.

1. The Eleventh Circuit applied the evidence-of-citizenship rule in the first appellate decision construing the local controversy exception. See *Evans* v. *Walter Indus., Inc.*, 449 F.3d 1159 (11th Cir. 2006). Like the opinion below, it held that when plaintiffs seek a remand pursuant to the exception, they bear the burden of proof. *Id.* at 1164-65 & n.3. And from the premise that plaintiffs have a burden of proof, the court reached the (unremarkable) conclusion that they must put on evidence to meet that burden. *Id.* at 1164 n.3 ("The local controversy exception will require evidence about the composition of the plaintiff class.").

Plaintiffs had, in fact, submitted evidence of the *residence* of over five thousand class members, but the court found such evidence insufficient to meet plaintiffs' "burden of demonstrating that more than two-thirds of the plaintiff class are Alabama

citizens." *Id.* at 1166. The Eleventh Circuit recognized that "evidence of class citizenship might be difficult to produce," but that difficulty was largely "a function of the composition of the class," which plaintiffs of course had "designed." *Ibid.* The court concluded that the case should not have been remanded.

2. One year later, the Fifth Circuit followed suit in requiring evidence of citizenship. In a class action brought on behalf of patients at a New Orleans hospital during Hurricane Katrina, plaintiffs offered evidence that 200 of 242 patients had a "primary residence" in Louisiana. *Preston* v. *Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 793, 798 (5th Cir. 2007). They "presented no evidence, however, to demonstrate that these patients not only resided in [Louisiana] * * * but also were *domiciled* in Louisiana." *Ibid.* (emphasis in original). Evidence of residency was not enough because, as the Fifth Circuit explained, "[a] party's residence in a state alone does not establish domicile." *Ibid.*

The plaintiffs argued for a rebuttable presumption, like the one adopted by the decision below. *Id.* at 799. But the Fifth Circuit refused to "assume that a person's state of residence and state of citizenship are the same unless rebutted with sufficient evidence." *Ibid.* Because the plaintiffs had provided "no evidence of [class members'] intent" to remain in Louisiana, the Fifth Circuit explained, "the district court could not * * * remand under the local controversy exception." *Id.* at 801. The case's "undeniably local character" did not excuse plaintiffs from meeting their burden under CAFA. *Id.* at 800.

3. The Seventh Circuit followed suit in *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010).

The proposed class there was limited by definition to "Kansas residents * * * who (1) had a Kansas cell phone number, (2) received their cell phone bill at a Kansas mailing address, and (3) paid a Kansas 'USF fee,' which is applied to all long-distance calls within Kansas." *Id.* at 671. The district court had ruled that the class definition, limited as it was to a subset of Kansas residents with strong Kansas ties, "made it more likely than not that two-thirds of the putative class members are Kansas citizens." *Id.* at 673. And the Seventh Circuit agreed that the "vast majority" of Kansas residents, particularly those with Kansas cell phone numbers, likely "view [Kansas] as their true home." *Ibid.* Indeed, the court's own internet research suggested Kansas's population of military members and out-of-state college students was a "drop in the bucket." *Id.* at 674.

Nonetheless, the Seventh Circuit reversed because the "plaintiffs didn't submit any evidence about citizenship." *Id.* at 673. The district court's reasoning, the Seventh Circuit held, was "all guesswork. Sensible guesswork, based on a sense of how the world works, but guesswork nonetheless." *Id.* at 674. Because "[t]here are any number of ways in which [a court's] assumptions" about class members' citizenship could be wrong, *ibid.*, the court of appeals held that plaintiffs must submit some evidence about citizenship to ground a court's inquiry and obtain a remand, *id.* at 675-76. Or, the Seventh Circuit noted, the plaintiffs could have limited their class to "Kansas *citizens*," which would have guaranteed, by definition, that the class satisfied the citizenship requirement of the local controversy exception. *Id.* at 676. But, because they

had done neither, they had failed to meet their burden, making remand improper. *Ibid.*[2]

4. In 2013, the Ninth Circuit, "join[ing] the other circuits that ha[d] considered the issue" at the time, likewise held that "there must ordinarily be at least some facts in evidence from which the district court may make findings regarding class members' citizenship for purposes of CAFA's local controversy exception." *Mondragon* v. *Capital One Auto Fin.*, 736 F.3d 880, 884 (9th Cir. 2013). The one exception to this evidence requirement were classes "defined as limited to citizens of the state in question." *Id.* at 881-82. In all other cases, a citizenship determination not based on evidence would "be based on guesswork." *Id.* at 882.

In *Mondragon*, the plaintiff had defined two subclasses of individuals who had bought cars from a San Diego dealership and registered them in California. But the Ninth Circuit refused to "infer from those definitions that more than two-thirds of the class members were citizens of California." *Ibid.*; see also *id.* at 884 (fact that a class member "may have a residential address in California does not mean that person is a citizen of California"). Courts

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[2] Following *Sprint Nextel*, the Seventh Circuit later reached the same conclusion as to the similarly worded citizenship requirement in CAFA's "home-state" exception, codified at 28 U.S.C. 1332(d)(4)(B). See *Myrick* v. *WellPoint, Inc.*, 764 F.3d 662, 665 (7th Cir. 2014) ("[P]laintiffs needed to produce some evidence that would allow the court to determine the class members' citizenships.").

may "make reasonable inferences" about citizenship, but only "from facts in evidence." *Id.* at 886.[3]

5. The Eighth Circuit followed suit in 2015. *Hood* v. *Gilster-Mary Lee Corp.*, 785 F.3d 263 (8th Cir. 2015). In *Hood*, the court reversed a remand order grounded in the presumption that residence is prima facie proof of citizenship in the CAFA context. *Id.* at 265. In doing so, the Eighth Circuit endorsed the "persuasive" reasoning of the Seventh Circuit in *Sprint Nextel*, explaining that plaintiffs have many ways to meet their burden under CAFA—but that reliance on a presumption alone is not one of them. *Id.* at 265-66.

6. Last year, the Tenth Circuit became the sixth circuit to hold that a plaintiff seeking remand "must marshal and present some persuasive substantive evidence * * * to establish the [State] citizenship of the class members." *Reece* v. *AES Corp.*, 638 F. App'x 755, 770 (10th Cir. 2016). "[P]roof of residency is not enough." *Id.* at 774; accord *id.* at 769. "And it is even more obvious that mere property ownership in a state does not necessarily equate to citizenship" either. *Id.* at 769. For those reasons, "a demonstration that the proposed class members are property owners or residents of [a] state will not

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[3] The Ninth Circuit acknowledged that some courts had—in other contexts—permitted a presumption that a person's residence is his domicile. But it said that it had not "yet adopted" such a presumption in the CAFA context, and declined "to reach that issue here." *Mondragon*, 736 F.3d at 886. Thus, the rule in the Ninth Circuit remains that without *any* evidence, judicial determinations of citizenship are mere "guesswork" and an insufficient basis for courts to decline to exercise their jurisdiction. *Id.* at 882.

suffice in the absence of further evidence demonstrating citizenship." *Id.* at 772.

7. Thus, six circuits have held that "CAFA does not permit the courts to make a citizenship determination based on a record bare of any evidence showing class members' intent to be domiciled" in the relevant state. *Preston*, 485 F.3d at 803. Below, Petitioners "relied on [this] case law from other circuits." App., *infra*, 25a. In any of those circuits—and in many other district courts[4]—they would have prevailed.

The Sixth Circuit, however, was "not persuaded [that] this line of cases presents compelling authority." *Id.* at 15a. Instead, it dismissed this Court's (and other circuits') precedents, and upheld the remand order based solely on the "inference that a person's residence is presumptively his domicile," *id.* at 21a, coupled with a similar inference about the significance of property ownership, *id.* at 24a. While all other circuits require evidence of class members' intent to establish citizenship, the court below sought to craft a rule that would permit remand while "avoid[ing] the exceptional difficulty of proving the citizenship of a class." *Id.* at 19a. This circuit split is stark and can be resolved only by this Court.

B. The Sixth Circuit's Rule Misreads CAFA And Undermines Its Policies

The decision below is also wrong for at least three reasons.

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[4] See, *e.g.*, *McMorris* v. *TJX Cos., Inc.*, 493 F. Supp. 2d 158, 162 (D. Mass. 2007) (requiring evidence of citizenship and rejecting presumption based on residency); *Hart* v. *Rick's NY Cabaret Int'l, Inc.*, 967 F. Supp. 2d 955, 964 (S.D.N.Y. 2014) (same).

1. It conflicts with this Court's holdings and its approach to statutory interpretation. "[I]t has long been settled that residence and citizenship [are] wholly different things within the meaning of * * * the laws defining and regulating the jurisdiction of the [courts] of the United States." *Steigleder*, 198 U.S. at 143. "[A]ccording to the uniform course of decisions in this [C]ourt," a "naked averment of * * * residence * * * is insufficient to show * * * citizenship in [a] State." *Robertson*, 97 U.S. at 648; accord *Denny* v. *Pironi*, 141 U.S. 121, 123 (1891); *Brown* v. *Keene*, 33 U.S. (8 Pet.) 112, 115 (1834) (Marshall, C.J.) (refusing to "infer[] [citizenship] argumentatively" from record establishing only residence); *Bingham*, 3 U.S. at 383-84 ("str[iking] off the docket" case "and many others" because record demonstrated only "inhabitancy," not citizenship).

The majority below attempted to distinguish these cases on the ground they applied *only* in the "unique context of federal diversity jurisdiction." App., *infra*, 17a. But Congress expressly directed that the local controversy exception be codified as part of 28 U.S.C. § 1332, the diversity jurisdiction statute that this Court has for centuries interpreted as *not* permitting an inference of citizenship from residence. Pub. L. No. 109-2, § 4(a), 119 Stat. 9. "[I]t is not only appropriate but also realistic to presume that Congress * * * expected its enactment to be interpreted in conformity with" this well-established precedent. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 699 (1979). Indeed, Congress's "repetition of the same language in a new statute indicates [its] intent to incorporate" that language's "judicial interpretations as well." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006). And "[a]pplication of that presumption is particularly

apt" where, as here, Congress used "the same word[] * * * in a provision that appears in the same statute." *Id.* at 86.

The opinion below, however, requires one to believe that Congress understood that residence *would* presumptively establish citizenship for purposes of 28 U.S.C. §§ 1332(d)(3) and (d)(4), but *would not* do so any other time the word "citizen" is used in that section—including in § 1332(d)(2) (CAFA's minimal diversity grant), which was enacted *at the exact same time* and is codified *in the immediately preceding sentence*. If Congress had intended such a peculiar interpretation to apply, it surely would have said so.[5]

2. A residency-domicile presumption is also at odds with several of CAFA's goals. All "presumption[s] * * * in law[] are the product of both factual understandings and policy concerns," and so should only be applied with attention to context and the presumption's "underlying basis." *Mullins Coal*

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[5] Congress certainly knows how to make clear when it wants a presumption to apply, including presumptions based on residency. See, *e.g.*, 11 U.S.C. § 1516(c) ("In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."); 42 U.S.C. § 5305(c)(4). Indeed, the U.S. Code teems with clearly expressed presumptions. See, *e.g.*, 15 U.S.C. § 1825(d)(5); 18 U.S.C. § 1469(a); 18 U.S.C. § 3488; 26 U.S.C. § 6064; 30 U.S.C. § 921(c); 38 U.S.C. § 108(b); 38 U.S.C. § 1118(a); 42 U.S.C. § 5205(b). Furthermore, "when Congress wanted a * * * requirement in CAFA to be satisfied" by residency, "it explicitly said so." *Miss. ex rel. Hood* v. *AU Optronics*, 134 S. Ct. 736, 742 (2014). See, *e.g.*, 28 U.S.C. § 1715(b) (requiring notice of class action settlement to "official[s] of each State in which a class member resides").

Co. v. *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 484 U.S. 135, 157 (1987). Though presumptions may "seem to roam the legal landscape like Don Quixote in hopes of doing good," they "cannot be sensibly deployed in all settings." 1 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 3:8 (4th ed. 2013).

The very few cases in which this Court has suggested—usually in dicta—that residency may give rise to a presumption of domicile or citizenship all involved *a known individual's* citizenship, not the citizenship of a class of unknown persons. See *District of Columbia* v. *Murphy*, 314 U.S. 441, 455 (1941); *Anderson* v. *Watts*, 138 U.S. 694, 706 (1891); *Mitchell* v. *United States*, 88 U.S. (21 Wall.) 350, 352 (1874); *Ennis* v. *Smith*, 55 U.S. (14 How.) 400, 423 (1852); *Shelton* v. *Tiffin*, 47 U.S. (6 How.) 163, 185 (1848). And there were generally strong policy reasons to shift the burden, by operation of a presumption, onto the party with the best access to relevant evidence. Thus, in *Murphy*, this Court held that the District of Columbia taxation authority could properly take "the place where a man lives * * * to be his domicile until facts adduced establish the contrary." 314 U.S. at 455. But the Court did not pull that presumption from the ether. It justified its use by its information-producing function: placing the "burden upon the individual," this Court explained, puts it on the person "who knows best whence he came, what he left behind, and his own attitudes" and gives that person motivation to produce such information to prove his "domicile elsewhere if he is to escape the [District's] tax." *Ibid.*

The opposite is true in this case. The panel majority below reasoned that, because of the

"exceptional difficulty of proving the citizenship of a class of over 100 individuals," a presumption should operate against the party trying to remain in federal court (here, Petitioners). App., *infra*, at 19a. But Petitioners—as defendants—have *less* access than Respondents to information about the citizenship of class members. So, no "difficulty" is "avoid[ed]" by placing the burden on Petitioners. *Ibid*. Instead, the difficulty is simply shifted from the party with the most access to the information (Respondents) to the party with the least.

Worse still, relieving plaintiffs of the need to introduce evidence to obtain a remand encourages the very sort of "[a]buses in class actions" that CAFA was designed to curtail. Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 5; see also S. Rep. No. 109-14 at 10 (noting Congress's concern about "plaintiffs' lawyers" who "'game the system'" through artful pleading). The complaint in this case—with its nebulous-at-best class definitions—is precisely the type of loose pleading that Congress sought to discourage. The Sixth Circuit's rule gives plaintiffs every incentive to file such vague complaints, thereby making it harder for defendants to know *whose* citizenship they need to disprove. What results is a game of legal whack-a-mole, with plaintiffs shifting their class's purported scope each time defendants make an adequate evidentiary showing. But plaintiffs would have every incentive to define their classes clearly if *they* were required to make the initial evidentiary showing, as they are in every other circuit.

Moreover, the Sixth Circuit's rule invites opportunistically timed remand motions. A developed record would aid judicial adjudication of remand motions and CAFA sets no time limitation

on such motions. But plaintiffs have an incentive to move right away if the absence of evidence is the other party's problem. (Indeed, in this case, Respondents rushed to remand before Petitioners could even get a ruling on their Rule 12(e) motion for a more definitive statement.) The rule in other circuits does not create this perverse incentive.

In sum, "the question in this case is not simply whether there exists some background principle" presumptively equating residency with citizenship—much less whether such presumption is "neutralized" by a countervailing one. *AU Optronics*, 134 S. Ct. at 745. "[T]he question is whether Congress intended that courts" employ a residence-citizenship presumption "when deciding whether" CAFA's local controversy exception applies. *Id.* Neither the statute's text nor its policies give any reason to think Congress did.

3. Finally, as Judge Kethledge observed in dissent, federal courts have a "'virtually unflagging obligation * * * to exercise the jurisdiction given them.'" App., *infra*, 34a (quoting *Colo. River*, 424 U.S. at 817). Thus, the entire premise of the panel majority's analysis is false: a party asserting the local controversy exception *does* indeed "encounter a * * * countervailing presumption" that "neutralizes" whatever "presumptive force" residency has in establishing domicile, App., *infra*, 18a, to wit, the countervailing presumption that courts are to exercise the jurisdiction Congress grants them. See *Second Employers' Liab. Cases*, 223 U.S. 1, 58 (1912) ("the existence of * * * jurisdiction creates an implication of duty to exercise it."); accord *Bank of U.S.* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

The panel majority's effort to distinguish this principle away is unavailing. The majority asserted that the obligation to exercise jurisdiction applies only in the face of "judge-made" abstention doctrines, not statutory abstention provisions, like the local controversy exception. App., *infra*, 22a. But lower courts have long interpreted Congressional directives *not* to exercise jurisdiction according to "principles developed under the judicial abstention doctrines." *In re Pan Am. Corp.*, 950 F.2d 839, 846 (2d Cir. 1991) (discussing statutory abstention in bankruptcy cases under 28 U.S.C. § 1334(c)); see also *Passa* v. *Derderian*, 308 F. Supp. 2d 43, 57 (D.R.I. 2004) (same for statutory abstention under Multiparty, Multiforum, Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369(b)).

As these courts have recognized, a decision to decline or abstain from taking jurisdiction—whether grounded in judicial prudence or statutory text—is still an *exception* to the general rule articulated by Congress. And it is one that "courts should not be too quick" to employ lest it undermine Congress's "manifest purpose," *Pan Am.*, 950 F.2d at 845—in this case, "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub L. No. 109-2, § 2(b)(2), 119 Stat. 5. The upshot, as Judge Kethledge observed, App., *infra*, 34a, is that a party seeking remand should be held to its burden—and not given the benefit of a presumption facilitating remand that is at odds with the statutory scheme.

II. The Sixth Circuit's Construction Of CAFA's Significant Basis Requirement Deepens A Circuit Split And Is Wrong

A. The Courts Of Appeals Are Sharply Divided Over What Must Be Pled To Satisfy The Significant Basis Requirement

The decision below also exacerbates another split among the circuits. The split concerns a second requirement of CAFA's local controversy exception: that there be "at least 1 defendant" who is a forum-state citizen and whose "alleged conduct" forms "a significant basis for the claims asserted by the proposed plaintiff class." 28 U.S.C. §§ 1332(d)(4)(A)(i)(II)(bb), (cc).

Superficially, the courts of appeals have a common understanding of this requirement: "this provision 'effectively calls for comparing the local defendant's alleged conduct to the alleged conduct of all the Defendants.'" App., *infra*, 25a (quoting *Kaufman*, 561 F.3d at 156).

In practice, however, the circuits use wholly different standards that lead to divergent results in materially similar situations. In the Fifth, Tenth, and Eleventh Circuits, a plaintiff seeking remand must plead facts showing what each defendant *itself* did in order to demonstrate that the local defendant's conduct is significant in comparison to that of other defendants. But in the Ninth Circuit and, now, the Sixth Circuit, undifferentiated allegations about what *all* defendants did are enough to establish that the conduct of one of the defendants—the local one—is comparatively "significant." The result is that the very same collective allegations that could suffice to

obtain remand in some circuits could not, as a matter of law, do so in others.

1. The Eleventh Circuit's opinion in *Evans*, *supra*, was the first appellate decision to construe the significant basis requirement. Plaintiffs alleged that certain manufacturers—including one, U.S. Pipe, who was a local defendant—had injured them through the release of toxic waste. *Evans*, 449 F.3d at 1161. But even when supplemented by an affidavit, the complaint provided no "insight into whether" the local defendant "played a significant role in the alleged contamination, as opposed to a lesser role, or even a minimal role." *Id*. at 1167. Nor was it sufficient, the court held, that the local defendant might be responsible for some of the conduct of diverse defendants; that "does not convert the conduct of others into conduct of U.S. Pipe so as to * * * satisfy the 'significant basis' requirement" either. *Id*. at 1167 n.7. What is needed to satisfy the requirement is factual allegations ascribing significant *conduct* to the local defendant specifically. *Ibid*. Because there were none, the Eleventh Circuit held remand inappropriate.

2. The Fifth Circuit articulated a similar requirement in *Opelousas General Hospital Authority* v. *FairPay Sols., Inc.*, 655 F.3d 358 (5th Cir. 2011). There, the plaintiff filed suit in Louisiana against three defendants: a Texas bill-review company, an Illinois insurance company, and a Louisiana insurance company (LEMIC). *Id*. at 359-60. According to plaintiffs, the Texas bill-review company conspired with the insurance companies to under-calculate the amount that the insurance companies owed.

In explaining why the plaintiff "failed to meet its burden to establish that the conduct of LEMIC, the local defendant, form[ed] a significant basis for the claims asserted," *id*. at 363, the Fifth Circuit pointed to the fact that the complaint "contain[ed] no information about the conduct of LEMIC relative to the conduct of the other defendants," *id*. at 361. Indeed, "nothing in the complaint distinguishe[d] the conduct of LEMIC from the conduct of the other defendants." *Id*. at 362. Endorsing the Eleventh Circuit's analysis in *Evans*, the court also held that allegations of joint *legal* liability are not sufficient *factual* allegations that a defendant's conduct was significant. *Id*. at 363. Absent some individualized allegations about LEMIC's conduct, there was no "basis to compare LEMIC's conduct to that of the other defendants to determine whether [it] [wa]s significant." *Id*. at 362.

3. More recently, the Tenth Circuit reached a similar conclusion. In *Woods* v. *Standard Insurance Co.*, 771 F.3d 1257 (10th Cir. 2014), the court addressed a complaint alleging that diverse defendant Standard Insurance Company had breached obligations in connection with certain insurance policies. Included as a local defendant was Standard's sole in-state representative who, plaintiffs alleged, "knew or should have known" of all of Standard's fraud. *Id*. at 1260.

The Tenth Circuit, however, rejected the conclusion that the local defendant's conduct was "significant" on the basis of that allegation. *Id*. at 1268. The court noted that plaintiffs had made individualized allegations about the local defendant "only briefly in their complaint, * * * in one paragraph." *Id*. at 1260. And the court refused to

credit that one paragraph's conclusory assertion that the local defendant "knew or should have known" of the other defendants' fraud because there were no "factual allegations [explicating] why [she] knew or should have known." *Id.* at 1268. Because "Congress enacted CAFA to prevent abuse" by plaintiffs' lawyers, the court felt compelled to "interpret the significant local defendant requirement strictly so that plaintiffs and their attorneys may not defeat CAFA jurisdiction." *Id.* at 1265. "[U]nder this lens," the court "ha[d] little difficulty concluding" that plaintiffs had not pled that the agent was a significant local defendant. *Id*. at 1266-67.

4. The Ninth Circuit has taken a conflicting (and misguided) approach. In *Coleman* v. *Estes Express Lines, Inc*., 631 F.3d 1010 (9th Cir. 2011), the plaintiff brought suit in California against his out-of-state employer, Estes Express, and its California subsidiary, Estes West. The complaint there merely alleged that "each and all of the acts and omissions alleged herein was [*sic*] performed by, or is attributable to" both defendants. *Id*. at 1013. Thereafter, "the complaint referred to actions taken by 'Defendants,' rather than actions taken separately by Estes Express or Estes West." *Ibid*. Despite this absence of any specific allegations about the local defendant's conduct, the court purported to conduct a comparative analysis and concluded that the local defendant's conduct formed a significant basis for the plaintiff's claims. *Id*. at 1020.

5. The decision below joins the Ninth Circuit's side of this split. The court concluded that LAN P.C.'s conduct formed "an 'important' and integral part of plaintiffs' professional negligence claim." App., *infra*, 27a. But the allegations on which the

court relied do not distinguish between (Michigan-citizen) LAN P.C. and (Texas-citizen) LAN Inc., making it impossible to compare their conduct.

The court relied on two allegations. The first was the allegation that "all engineering work was conducted 'through LAN P.C.,'" the Michigan corporation. *Id.* at 26a (quoting plaintiffs' complaint). As Judge Kethledge noted in dissent, however, "the complaint never explains what the plaintiffs mean by their allegation that [LAN Inc.] conducted business 'through' [LAN P.C.]" *Id.* at 36a. "Instead, that phrase remains an exercise in studied ambiguity," *ibid.*, an "enigma," *id.* at 35a. The phrase is even more conclusory and unexplicated than the "knew or should have known" allegation rejected by the Tenth Circuit in *Wood*.

Second, the majority relied on the complaint's allegation "that Flint relied on LAN, P.C.—as the LAN entity that 'worked with several water systems around the state'—to 'perform quality control,'" observing that these allegations made LAN P.C.'s conduct "significant" because "[t]he failure to provide that quality control is the very core of plaintiffs' professional negligence claim." *Id.* at 27a (alteration omitted). But the complaint no more makes those allegations against LAN P.C. than against LAN Inc. As Judge Kethledge noted in dissent, the complaint "define[s] both * * * entities collectively as 'LAN,' which for the remainder of the complaint is the subject of every verb describing conduct allegedly forming the basis of the plaintiffs' claims." *Id.* at 35a-36a. The complaint contains no non-conclusory factual allegations about the local defendant's actual conduct. As Judge Kethledge (at 36a) observed, such a complaint, in which "nothing * * * distinguishes

the conduct of [the local defendant] from the conduct of the other defendants," *Opelousas*, 655 F.3d at 362, would not have passed muster in the Fifth Circuit. Nor would it have in the Tenth or Eleventh Circuits either. Here too, the circuit split is stark and can only be resolved by this Court.

B. The Sixth Circuit's Approach Ignores Basic Pleading Requirements And Undermines CAFA

The approach of the Sixth and Ninth Circuits is wrong.

For starters, it is inconsistent with basic pleading standards. Just as Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009), CAFA must require more than unadorned, the-defendants-both-did-everything-together allegations to defeat a federal court's exercise of jurisdiction. If "naked assertions" unaccompanied by "well-pleaded facts" are not enough for a party to get *into* federal court, *id.* at 678-79, surely they are not enough to *defeat* a federal court's otherwise proper exercise of jurisdiction. Yet the Ninth Circuit has adopted a magic-words standard—under which a complaint alleging that "each and all of the acts and omissions" were committed by both defendants suffices, *Coleman*, 631 F.3d at 1013—that flies in the face of this Court's admonition that a "formulaic recitation" of "labels and conclusions" "will not do." *Iqbal*, 556 U.S. at 678 (quotation marks omitted). And now the Sixth Circuit has followed suit by accepting as sufficient here the allegation that one defendant worked "through" another.

The approach of the Sixth and Ninth Circuits also invites the very "abuses" that Congress intended CAFA to curtail. See Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 5. Congress enacted CAFA out of a concern that plaintiffs' lawyers were able "to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14 at 4. As the Senate Report notes, "plaintiffs' counsel frequently and purposely evade[d] federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity." *Id*. at 10. "If all it takes to keep a class action in state court is to name one local retailer, it is no surprise that few interstate class actions meet the complete diversity requirement." *Ibid*.

The Sixth and Ninth Circuit's approach reintroduces that problem by allowing "plaintiffs and their attorneys [to] defeat CAFA jurisdiction by routinely naming at least one state citizen as a defendant," *Woods*, 771 F.3d at 1265, and adding a conclusory and enigmatic—and so likely immune from Rule 11—allegation about that defendant's joint conduct with the others. Future plaintiffs will need no further incentive than the approach adopted below to structure their complaints as enigmatically as possible. This Court "should not sanction [such] devices intended to prevent a removal to a Federal court." *Wecker* v. *Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907). The evasion countenanced below is hardly different than the evasions Congress enacted CAFA to prevent and thus threatens to let the local controversy exception swallow CAFA's rule of expanded diversity jurisdiction.

This is a case in point. Without specific allegations as to LAN P.C., the Sixth Circuit had no way to know whether plaintiffs actually had a good-faith basis to believe it performed the allegedly negligent conduct that forms the basis of Respondents' complaint or, instead, was simply "lumped" in with LAN Inc. As Judge Kethledge noted, "[i]t should take a better showing than this for a federal court to cast off its unflagging duty to exercise the jurisdiction assigned to it by Congress." App., *infra*, 37a.

III. Both Questions Presented Are Recurring And Of Exceptional Importance

The scope of CAFA's local controversy exception presents recurring questions of exceptional national importance. Class actions are obviously important: indeed, they constitute the largest cases pending in courts, in terms of both dollar value as well as the number of individuals who are represented. See NEWBERG ON CLASS ACTIONS § 1:17 (5th ed. 2016) (describing the billions of dollars involved and noting that "class actions are a significant segment of the economy"). And CAFA, the enactment of which coincided with a 72% increase in diversity class action filings, *id.* at § 1:18, has been called the "most significant change in class action practice since" Rule 23's amendment in 1966. Sherman, *Class Action Fairness Act and the Federalization of Class Actions*, 238 F.R.D. 504, 504 (2007).

The local controversy exception itself is frequently litigated in the lowers courts. From 2009 through 2016 alone, district courts applied the local controversy exception in at least 153 separate cases. See App., *infra*, 98a (table of cases). It follows from CAFA's other requirements that these cases together

involved *at least* 15,300 class members and $765 million, and, in all likelihood, many times that number and amount.

Division among the lower courts undermines a central purpose of CAFA: a uniform body of federal procedure for class actions of national importance. Congress intended to provide a federal forum for "interstate cases of national importance" based on diversity jurisdiction, Pub L. No. 109-2, § 2(b)(2), 119 Stat. 5, which has as its "basic rationale" "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties," *Hertz*, 559 U.S. at 85. That is why, as this Court has recognized, "'CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" *Dart Cherokee Basin Operating Co., LLC* v. *Owens*, 135 S. Ct. 547, 554 (2014) (quoting S. Rep. No. 109-14 at 43). And the rules adopted by the court below not only undermine national uniformity, they foster the very abuses that Congress enacted CAFA to prevent.

Moreover, this Court will have fewer opportunities to intervene as the circuit splits ossify. The courts of appeals "may," but need not, accept appeals of CAFA remand orders. 28 U.S.C. § 1453(c). The Sixth Circuit accepted the appeal here because Petitioners raised "a number of issues" that "are 'important, unsettled, and recurrent.'" App., *infra*, 39a. As circuit law settles, though, parties will have less reason to seek permission to appeal—and courts will have less reason to grant it—thus preventing splits from ever reaching this Court. Moreover, given the Sixth Circuit's holding, it is hard to imagine that any future defendant—in the few

circuits that have not addressed the citizenship requirement—will rely only on the absence, as a legal matter, of the existence of a residency-citizenship presumption. Instead, they will adduce evidence that the presumption should not apply in their particular case, making their cases less suitable vehicles for addressing the question cleanly presented here.

Finally, this Court's resolution of the issues presented here will not only help bring uniformity to the lower courts on the local controversy exception, it will also aid lower courts' application of CAFA's other exceptions. The so-called "home state exception," which also requires a court to decline jurisdiction, also turns on the citizenship of the plaintiff class. 28 U.S.C. § 1332(d)(4)(B); see *Sprint Nextel*, 593 F.3d at 672. So, too, does the discretionary exception in subsection (d)(3).

Only guidance from this Court can bring needed clarity to the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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