No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,

Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

A defendant seeking to remove a case to federal court must file a notice of removal containing "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Consistent with that statutory pleading requirement, seven circuits require a notice of removal to contain only *allegations* of the jurisdictional facts; they do not require the notice to include *evidence* supporting federal jurisdiction. District courts in those circuits may consider evidence supporting removal even if submitted later in response to a motion to remand.

Here, in a clean break from § 1446(a)'s plain language, the Tenth Circuit let stand a district court order remanding a class action to state court even though the district court refused to consider evidence establishing federal jurisdiction under the Class Action Fairness Act (CAFA) simply because the evidence was not attached to the notice of removal. (The evidence, which was not disputed, came later in response to the motion to remand.)

The question presented is:

Must a defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is including the required "short and plain statement of the grounds for removal" enough?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption includes the names of all parties to the proceedings below.

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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The district court's remand order is unpublished but is electronically available at 2013 WL 2237740 and reproduced at Pet. App. 15a. The Tenth Circuit's order denying permission to appeal is unpublished and reproduced at Pet. App. 13a. The Tenth Circuit's order denying rehearing en banc is reported at 730 F.3d 1234 and reproduced at Pet. App. 1a.

JURISDICTION

On June 20, 2013, the Tenth Circuit denied permission to appeal the district court's remand order. Pet. App. 13a. On September 17, 2013, it denied rehearing en banc. Pet. App. 1a. Petitioners filed their petition for a writ of certiorari on December 13, 2013; this Court granted the petition on April 7, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1). *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Hohn v. United States*, 524 U.S. 236, 242 (1998).

STATUTORY PROVISIONS INVOLVED

The statute governing removal procedure (28 U.S.C. § 1446) provides as follows:

> (a) Generally.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Other relevant statutory provisions are reproduced in the Statutory Appendix.

STATEMENT

A defendant seeking to remove a case to federal court must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a)." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008).[1]

Contrary to § 1446(a)'s pleading standard, the Tenth Circuit requires a notice of removal to include evidence of the grounds for removal, not merely allegations of those grounds. District courts in the circuit are constrained to ignore evidence of jurisdictional facts if the evidence is not included in the notice of removal.

1. Respondent Brandon Owens filed a putative class action in Kansas state court against Petitioners Dart Cherokee Basin Operating Company, LLC and Cherokee Basin Pipeline, LLC. Owens seeks royalty payments under certain oil and gas leases. He did not specify a damages amount in his complaint and instead included a generic prayer for "damages [that

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[1] Under Federal Rule of Civil Procedure 8(a),

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

he and putative class members] have suffered and will suffer up to the time of trial." Pet. App. 34a-35a.

Under CAFA, a class action is removable to federal court if there is minimal diversity, at least 100 putative class members, and at least $5 million in controversy. 28 U.S.C. § 1332(d); *see also Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (CAFA "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity"). This case satisfies CAFA's jurisdictional requirements, so Petitioners removed it to federal court, filing a Notice of Removal and attaching the required process, pleadings, and orders served on them. Pet. App. 37a.

Petitioners' Notice of Removal contained the required "short and plain statement of the grounds for removal": Petitioners alleged that they and at least some putative class members (including Owens) are citizens of different States; that the putative class includes approximately 400 people; that the putative class members hold royalty interests in approximately 700 oil and gas wells; that the case involves a dispute about those wells' production since January 1, 2002; that Owens seeks three types of damages; and that—given the nature of the claims asserted, the putative class's size, and the proposed class period's length—the amount in controversy exceeds $8.2 million. Pet. App. 39a-40a. Those allegations would satisfy Rule 8's pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Pet. App. 5a (Hartz, J., dissenting) ("Allegations of the amount in controversy are ordinarily much more abbreviated.").

Owens moved to remand the case to state court. He did not dispute the jurisdictional allegations but

argued that the Notice was "deficient as a matter of law" because it contained no evidence showing that the case satisfies CAFA's $5 million amount-in-controversy requirement. Pet. App. 53a.

In response, Petitioners submitted a declaration from one of Dart's corporate officers. The declaration included Petitioners' updated damages calculations and other facts that Petitioners discovered after removal—including Owens's assertion in a mediation statement that the amount in controversy is "in excess of $21.5 million." Pet. App. 75a-80a.

Owens did not dispute the facts in Petitioners' declaration and "offer[ed] no affidavit, declaration, or other evidence challenging [Petitioners'] calculation." Pet. App. 21a. Instead, Owens argued that the Notice of Removal could "not be cured" by submitting evidence in response to a remand motion. Pet. App. 21a, 91a-92a.

2. The district court granted Owens's motion and remanded the case to state court. Pet. App. 15a. Believing that Petitioners were required to prove CAFA jurisdiction in the Notice of Removal, the court noted that Petitioners "fail[ed] to incorporate any evidence supporting [the amount-in-controversy] calculation in the Notice of Removal" and held that "in the absence of such evidence, the general and conclusory allegations of the Petition and Notice of Removal do not establish by a preponderance of the evidence that the amount in controversy exceeds $5 million." Pet. App. 25a-26a. The court refused to consider Petitioners' declaration because, in its view, the "Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." *Id.* at 26a &

n.37 (citing *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284 (10th Cir. 2001); *Okla. Farm Bureau Mut. Ins. Co. v. JSSJ Corp.*, 149 F. App'x 775 (10th Cir. 2005)).

3. Petitioners sought permission to appeal the district court's remand order (*see* 28 U.S.C. § 1453(c)), but a divided panel of the Tenth Circuit denied the petition. Pet. App. 13a. Petitioners then sought rehearing en banc, but the Tenth Circuit denied that petition in a split 4-to-4 vote. Pet. App. 1a.

Judge Hartz (joined by Judges Kelly, Tymkovich, and Phillips) dissented from the denial of rehearing en banc. In Judge Hartz's view, the district court's decision "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court." Pet. App. 3a; *see also id.* at 2a (Hartz, J., dissenting) ("[This Court] has let stand a district-court decision that will in effect impose in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.").

Emphasizing that § 1446(a) "parrots Rule 8," Judge Hartz explained that "there should be no dispute that Petitioners' notice of removal was adequate." Pet. App. 4a. He pointed to this Court's decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), where the Court assumed that it was enough for a party seeking removal to allege (not prove) the jurisdictional facts in the notice of removal. Pet. App. 6a-7a (quoting *Hertz*, 559 U.S. at 96-97 ("When challenged on *allegations of jurisdictional facts,* the parties must support their allegations by competent proof.") (emphasis added)).

Judge Hartz underscored that § 1446(a) requires allegations, not evidence, of jurisdiction:

> The burden imposed by the district court on Petitioners was excessive and unprecedented. The notice of removal adequately alleged jurisdiction, Petitioners' evidence of jurisdiction was more than adequate, and there was no basis for requiring Petitioners to submit that evidence before the adequacy of the notice was challenged.
>
> * * *
>
> In short, I think it is important that this court inform the district courts and the bar of this circuit that a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation.

Pet. App. 7a-8a, 11a.

SUMMARY OF ARGUMENT

I. A defendant seeking to remove a case to federal court must file a notice of removal "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). By its plain terms, the statute establishes a pleading standard: A notice of removal must contain allegations of the grounds for removal, not evidence of those grounds.

A. Section § 1446(a)'s call for a "short and plain statement of the grounds for removal" mirrors Rule 8's pleading standard. It is enough for a notice of removal to contain allegations of the grounds for removal; evidence can come later (including in response to a motion to remand). Seven circuits have held or assumed as much.

B. Recent additions to § 1446(c)(2) confirm that the notice of removal must include allegations (not proof) of the grounds for federal jurisdiction. Those new provisions—which apply when the amount in controversy is uncertain from the face of the complaint—make clear that a defendant must present evidence supporting federal jurisdiction only after a challenge to the jurisdictional allegations in the notice of removal.

C. Section 1446 tracks this Court's long-standing approach to jurisdictional challenges. Since at least *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), the Court has recognized that a party does not need to present evidence supporting jurisdictional allegations until those allegations are challenged.

II. The Tenth Circuit's demand for evidence in the notice of removal significantly burdens removing defendants, complicates the removal process, and conflicts with CAFA's objectives.

A. Section 1446(a) imposes a straightforward pleading burden—one instantly familiar to most litigators. The Tenth Circuit's approach saddles defendants with an evidentiary burden that has no basis in the statute. A defendant in the Tenth Circuit who lacks proof of jurisdictional facts cannot remove a case without first gathering that evidence to include in the notice of removal. That investigation might require the defendant to search its own records and may even lead the defendant to seek discovery in state court—often under the belief (perhaps correct, perhaps not) that § 1446(b)(1)'s 30-day removal window is closing. Either way, the Tenth Circuit's approach to removal drives up litigation costs early in litigation, forcing defendants to gather evidence supporting jurisdictional allegations that may never be disputed.

B. The Tenth Circuit's atextual approach also unnecessarily complicates the removal process. It jettisons § 1446(a)'s requirement of "a short and plain statement of the grounds for removal" in favor of a complicated approach that can lead to sprawling evidentiary submissions on jurisdictional allegations that may never be challenged. Simplicity is a virtue in jurisdictional matters (*see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)), including in jurisdictional pleading. The Tenth Circuit's approach is the opposite of simple.

C. The Tenth Circuit's demand for evidence in the notice of removal also runs counter to CAFA's objectives. Congress enacted CAFA to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire*, 133 S. Ct. at 1350 (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5). The Tenth Circuit's rule thwarts CAFA's objectives by keeping class actions out of federal court on a technicality that has no basis in any statute.

Through CAFA, Congress also sought to change then-existing law that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions." S. Rep. No. 109-14, at 10 (2005). Far from discouraging gamesmanship, the Tenth Circuit's approach invites it. It encourages a state-court plaintiff to try to avoid federal court by including ambiguous allegations about damages, placing the burden on the defendant to marshal evidence supporting removal (even when the jurisdictional facts are not challenged).

"[T]here should be no dispute that Petitioners' notice of removal was adequate." Pet. App. 4a (Hartz,

J., dissenting). This Court should reverse the district court's order remanding the case to state court.

ARGUMENT

I. THE REMOVAL STATUTE REQUIRES A NOTICE OF REMOVAL TO CONTAIN "A SHORT AND PLAIN STATEMENT OF THE GROUNDS FOR REMOVAL," NOT EVIDENCE OF JURISDICTIONAL FACTS.

A defendant seeking removal to federal court must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a). On its face, § 1446(a) establishes a pleading standard, not a demand for proof.

A. Section 1446(a)'s call for "a short and plain statement of the grounds for removal" tracks Rule 8's pleading standard.

In interpreting a statute, this Court "always turn[s] first to one, cardinal canon before all others": the plain-meaning rule. *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992). The Court presumes that "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted). "When the words of a statute are unambiguous," the "first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank,* 503 U.S. at

254 (quoting *Rubin v. United States,* 449 U.S. 424, 430 (1981)).

This Court's analysis should start and stop with § 1446(a)'s plain language. The statute requires a notice of removal to contain "a short and plain statement of the grounds for removal." That is a pleading standard. It requires allegations, not evidence. If Congress had intended to require evidence of jurisdiction in the notice of removal, it would have said so. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort.").

Section 1446(a)'s pleading standard is a familiar one. The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a)." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3733 (4th ed. 2009) ("Section 1446(a) requires only that the grounds for removal be stated in 'a short and plain statement'—terms borrowed from the pleading requirement set forth in Federal Rule of Civil Procedure 8(a)."); 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][i] (3d ed. 2013) ("The 'short and plain statement' requirement mirrors the language of the general pleading rules.").[2]

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[2] Rule 8 and its "short and plain statement" requirement first came into force in 1938. From the very beginning, courts interpreted Rule 8(a)'s call for a "short and plain statement of the grounds upon which the court's jurisdiction depends" to require only allegations. *See*, *e.g.*, *Barnhart v. W. Md. Ry. Co.*, 128 F.2d 709, 710 (4th Cir. 1942). Congress enacted 28 U.S.C. § 1446(a) in

As it reads today, § 1446(a) reflects Congress's efforts to make removal pleading easier than it was under the old version of the statute. Before 1988, § 1446(a) required a defendant seeking removal to file a "verified petition containing a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C. § 1446(a) (1982). In 1988, Congress amended the statute to "simplify the 'pleading' requirements for removal" by changing the then-existing "requirement of a verified petition . . . to a requirement that a notice of removal be signed pursuant to Civil Rule 11." H.R. Rep. No. 100-889, at 71 (1988). In doing so, Congress rejected the tendency of "some courts to require detailed pleading" based on the "requirement that the petition of removal state the facts supporting removal." *Id.*[3] The current version of § 1446(a)—which drops the old requirement of a "verified petition" and makes no mention of the "facts" supporting removal—"requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish [sic] by civil rule 8(a)." H.R. Rep. No. 100-889, at 71-72.

Consistent with § 1446(a)'s plain language, seven circuits have held or assumed that it is enough to

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1948, borrowing the "short and plain statement" language from Rule 8.

[3] Even under the old version of § 1446(a), courts recognized that the statute's call for a "short and plain statement" established a pleading standard. *See, e.g.*, *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965) (interpreting the old version of § 1446(a): "[W]e have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings . . . ."), *aff'd*, 384 U.S. 780 (1966); *Barrow Dev. Co. v. Fulton Ins. Co.,* 418 F.2d 316, 317 (9th Cir. 1969) (treating the old version of § 1446(a) as a pleading standard).

allege the grounds for federal jurisdiction in the notice of removal. Those courts do not require the defendant to attach evidence to the notice of removal; evidence can come later, including in response to a motion to remand. *See Ellenburg*, 519 F.3d at 194; *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 205 (2d Cir. 2001); *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965); *Spivey v. Vertrue*, *Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 944-45 (8th Cir. 2012); *Janis v. Health Net, Inc.*, 472 F. App'x 533, 534-35 (9th Cir. 2012); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 774 n.29 (11th Cir. 2010). *Cf.* Pet. App. 3a (Hartz, J., dissenting) (explaining that the decision below "imposes an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court"). Section 1446(a) admits of no other interpretation.

B. Other provisions in § 1446 confirm that the statute requires allegations (not evidence) in the notice of removal.

"Short and plain statement" means short and plain statement. This Court does not need to venture past those words to conclude that a notice of removal must contain allegations (not evidence) of the grounds for removal. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (internal quotation marks omitted). But other parts of the statute confirm that the pleading standard in § 1446(a) is no illusion. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("a statute is to be read as a whole"). Like § 1446(a),

those other provisions make plain that a defendant may simply allege the grounds for removal in the notice of removal; evidence can come later in response to a challenge to those allegations.

Three years ago, Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011. The 2011 Act added two paragraphs to § 1446(c) "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011).

Section 1446(c)(2)(A) provides that, in certain cases when the amount in controversy is unclear from the complaint, the "notice of removal may *assert* the amount in controversy." 28 U.S.C. § 1446(c)(2)(A) (emphasis added). The statute says "assert" the amount in controversy, not "prove" or "provide evidence of" the amount in controversy. Section 1446(c)(2)(B) provides that "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." *Id.* § 1446(c)(2)(B).[4]

Read together, those provisions confirm that a defendant seeking removal may allege the grounds for federal jurisdiction in the notice of removal and can

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[4] Although 28 U.S.C. § 1446(c)(2) applies only to removals under the general diversity statute (28 U.S.C. § 1332(a)), "'[t]here is no logical reason . . . [to] demand more from a CAFA defendant than other parties invoking federal jurisdiction.'" Pet. App. 11a (Hartz, J., dissenting) (quoting *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1247 (10th Cir. 2012)); *see also, e.g.*, *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 977 (9th Cir. 2013) (holding that the preponderance standard applies under CAFA when there is a challenge to jurisdictional facts).

wait for a challenge to those allegations to present evidence of jurisdiction. As the House Judiciary Committee Report behind the statute reveals, that is how Congress conceives of the removal process:

> [D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, defendants *may simply allege or assert that the jurisdictional threshold has been met*. Discovery may be taken with regard to that question. *In case of a dispute*, the district court must make findings of jurisdictional fact to which the preponderance standard applies.

H.R. Rep. No. 112-10, at 16 (emphasis added). Of course, a dispute about jurisdictional allegations in a notice of removal cannot arise until *after* a defendant files the notice.[5]

In many cases, allegations of jurisdictional facts go unchallenged, but in those cases where the plaintiff moves to remand or the federal district court questions the jurisdictional allegations, the need for evidence arises only after the challenge. *See* 16 Moore, § 107.30[2][a][i] ("At any rate, if the jurisdictional allegations are challenged, whether by a party or by the court, the removing party must demonstrate that removal jurisdiction is proper."). At that point, the defendant bears the burden of establishing federal

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[5] That is precisely how things played out in *Standard Fire*. There, Standard Fire filed a notice of removal containing only allegations of the jurisdictional facts. *See* Notice of Removal, *Knowles v. Standard Fire Ins. Co.*, No. 4:11-cv-04044-PKH (W.D. Ark. May 18, 2011), ECF No. 1. When the named plaintiff moved to remand, Standard Fire submitted a declaration supporting its jurisdictional allegations. *See* Affidavit of Brian N. Harton, *id.* (July 5, 2011), ECF No. 9-9.

jurisdiction (*see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)), relying on whatever evidence it can muster. But just as a federal plaintiff does not have to submit evidence of jurisdiction along with a complaint, a removing defendant does not have to submit evidence along with a notice of removal. *Cf. Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11th Cir. 2000) ("there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition").[6]

C. This Court has consistently held that a defendant does not need to present evidence supporting jurisdictional allegations until the allegations are challenged.

It should come as no surprise that Congress established a pleading standard for the notice of removal and contemplated a defendant submitting evidence of jurisdictional facts only after a challenge: That has long been this Court's approach to jurisdictional disputes.

Take *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), for instance. There, the Court explained that a removing defendant does not need to present

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[6] Even in the Tenth Circuit (as in other circuits), a defendant who fails to include the required "process, pleadings, and orders" can cure that "minor procedural defect" by supplementing the notice of removal "either before or after expiration of the thirty-day removal period." *Countryman v. Farmers Ins. Exch.*, 639 F.3d 1270, 1272-73 (10th Cir. 2011); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3733 (4th ed. 2009). And yet the Tenth Circuit forbids a defendant from "curing" a "defect" (the purported failure to include evidence in the notice of removal) that has no basis in the statute.

evidence of jurisdictional facts until after jurisdictional allegations are challenged:

> If a removal is effected, the plaintiff may, by a motion to remand, plea, or answer, take issue with the statements in the petition [for removal]. If he does, the issues so arising must be heard and determined by the District Court, and at the hearing the petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding. *But if the plaintiff does not take issue with what is stated in the petition [for removal], he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it.*

Id. at 97-98 (emphasis added) (citations omitted). The Court later endorsed the same approach in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936):

> *If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner*, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.

Id. at 189 (emphasis added).

The Court recently applied *McNutt*'s teaching in the CAFA context, explaining that "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010) (citing *McNutt*, 298 U.S. at 189). Evidence is required after a challenge, not before—and certainly not in the notice

of removal, which requires only allegations of the grounds for removal.

* * *

Petitioners' Notice of Removal satisfied § 1446(a)'s call for a "short and plain statement of the grounds for removal." The Notice included detailed allegations of the facts supporting CAFA jurisdiction—allegations that would satisfy Rule 8's pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Pet. App. 4a (Hartz, J., dissenting) ("[T]here should be no dispute that Petitioners' notice of removal was adequate."). On top of that, Petitioners submitted an unchallenged declaration establishing CAFA jurisdiction. Pet. App. 20a-21a.

But the case now sits in state court for the simple fact that Petitioners did not attach the declaration to the Notice of Removal. No one disputes that the declaration establishes federal jurisdiction, but the district court ignored the declaration because it thought that Tenth Circuit precedent required it to assess jurisdiction based only on the complaint and the Notice of Removal. The Tenth Circuit's approach betrays § 1446's plain language and this Court's longstanding approach to jurisdictional challenges.

II. THE TENTH CIRCUIT'S APPROACH PLACES A SIGNIFICANT BURDEN ON REMOVING DEFENDANTS, IS UNNECESSARILY COMPLEX, AND RUNS COUNTER TO CAFA'S OBJECTIVES.

The Tenth Circuit's demand for evidence in the notice of removal flouts § 1446's plain language. It is also bad policy, for at least three reasons.

A. The Tenth Circuit's demand for evidence in the notice of removal places a significant burden on defendants early in litigation.

Section 1446(a)'s "short and plain statement" language imposes a straightforward pleading requirement on defendants—one immediately familiar to those who practice in federal court. But the Tenth Circuit's contrary approach places a significant burden on removing defendants, requiring them to marshal proof of jurisdictional facts even before a challenge to jurisdictional allegations—and in many cases to do so within the brief 30-day removal window.

Because a defendant in the Tenth Circuit must prove the jurisdictional facts at the time of removal, defendants who lack proof of those facts when the state-court complaint is filed must search their own records or perhaps even consider seeking discovery in state court to develop the required proof. Otherwise, they could face remand for failing to support the notice of removal with evidence. That investigation takes time and money—all to support jurisdictional allegations that may never be disputed. The Tenth Circuit's departure from § 1446(a)'s pleading standard drives up early-stage litigation costs—a result at odds with this Court's efforts to curb discovery costs in the nascent stages of disputes. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007) (citing reports and commentary bemoaning rising discovery costs); Thomas E. Willging et al., Fed. Judicial Ctr., *Discovery and Disclosure Practice, Problems, and Proposals for Change* (1997) (studying increases in discovery costs).

What is more, in many (if not most) cases, defendants will feel compelled to gather the necessary evidence within 30 days from the filing of the state-

court complaint because of concern over missing the 30-day removal window. Under 28 U.S.C. §§ 1446(b)(1) and (b)(3), a defendant must file a notice of removal "within 30 days after the receipt . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based" or "if the case stated by the initial pleading is not removable, . . . within 30 days after receipt . . . 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." Missing the removal deadline can result in remand. *See, e.g.*, *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995).

In some cases, concern over the initial 30-day window may be unwarranted: "Every circuit that has addressed the question" has held that the "30-day removal clock does not begin to run until the defendant receives a pleading or other paper that affirmatively and unambiguously reveals that the predicates for removal are present." *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013). But there is no guarantee that the district court will agree with the defendant about whether the removal clock is ticking. And the price of a mistaken judgment on that score is too much to pay: Remand orders are *not* appealable outside the CAFA context (28 U.S.C. § 1447(d)) and not *automatically* appealable in the CAFA context. *Id.* § 1453(c)(1).

B. Requiring evidence in the notice of removal trades the simplicity of § 1446(a)'s pleading burden for the unnecessary complexity of jurisdictional discovery.

Requiring evidence of jurisdiction in the notice of removal also complicates the removal process. The requirements for federal jurisdiction are straightforward. *See* 28 U.S.C. §§ 1331, 1332. So is § 1446(a)'s call for a "short and plain statement of the grounds for removal." If "administrative simplicity is a major virtue in a jurisdictional statute" (*Hertz*, 559 U.S. at 94),[7] then it surely is a virtue in jurisdictional pleading.

The Tenth Circuit's approach to § 1446 is not simple. It's unnecessarily complex. The court of appeals has eschewed § 1446(a)'s simple pleading requirement in favor of a complex process that often leads to extensive, front-loaded discovery and sprawling submissions of evidence. Its approach "complicate[s] a case, eating up time and money" as the defendant works to prove jurisdictional allegations that might never be disputed. *Hertz*, 559 U.S. at 94.

C. The Tenth Circuit's approach also runs counter to CAFA's objectives.

Requiring removing defendants to attach evidence to the notice of removal would be bad enough in the

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[7] *See also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("[s]imple jurisdictional rules . . . promote greater predictability," which "is valuable to corporations making business and investment decisions"); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) ("[W]hen judges must decide jurisdictional matters, simplicity is a virtue.").

mine run of cases, but it is indefensible in the class context, where Congress has relaxed the standards for removing a case to federal court.[8]

CAFA "enable[s] defendants to remove to federal court any sizable class action involving minimal diversity." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011); *see also Standard Fire*, 133 S. Ct. at 1350 (CAFA's "primary objective" is to "ensur[e] Federal court consideration of interstate cases of national importance") (internal quotation marks omitted); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006) ("The language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction."). "Its 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." S. Rep. No. 109-14, at 43; *see also id.* at 35 (CAFA's "overall intent" "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

The Tenth Circuit's approach undermines CAFA's objectives by keeping large-scale class actions out of

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[8] The district court below ignored CAFA's goal of making removal easier and instead applied a so-called "strong presumption against removal." Pet. App. 28a. No such presumption exists in any removal context (*see Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003)), and certainly not under CAFA. *See* S. Rep. No. 109-14, at 42 (2005) ("And if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case.").

In all events, no presumption could change § 1446(a)'s plain meaning. "Short and plain statement" means what it says.

federal court based on a technicality that has no basis in the removal statute. Even though the district court recognized that Petitioners' declaration likely established CAFA jurisdiction (*see* Pet. App. 20a-21a), it ignored the declaration simply because Petitioners did not attach it to the Notice of Removal. That additional procedural obstacle—crafted out of thin air—frustrates Congress's intent by making it more difficult to remove interstate class actions to federal court.

That is not all. The Tenth Circuit's rule also contravenes Congress's intent to reverse then-existing law that "enabl[ed] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10. In *Standard Fire*, this Court cited that congressional objective in rejecting a named plaintiff's efforts to game CAFA's jurisdictional requirements. *See* 133 S. Ct. at 1350; *see also Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008) ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction.").

The Tenth Circuit's approach to removal does not discourage gamesmanship. It invites it. It encourages plaintiffs to omit allegations touching on jurisdictional requirements in an effort to evade federal court. A plaintiff seeking to remain in state court can include vague allegations about damages, forcing the defendant to gather enough evidence to support removal under CAFA. By giving plaintiffs leverage to complicate the removal process (or perhaps even to thwart removal), the Tenth Circuit's approach opens the door for the type of jurisdictional game-playing that Congress sought to end.

CONCLUSION

For all these reasons, this Court should reverse the district court's order remanding this case to state court.

Respectfully submitted,

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APPENDIX

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The statute governing removal procedure (28 U.S.C. § 1446) provides as follows:

> (b) Requirements; generally.—(1) The notice of removal of a civil action or proceeding shall 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, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> * * *
>
> (3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed 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.
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> * * *
>
> (c) Requirements; removal based on diversity of citizenship.—
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> * * *
>
> (2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

> (A) the notice of removal may assert the amount in controversy if the initial pleading seeks—
>
> (i) nonmonetary relief; or
>
> (ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and
>
> (B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

CAFA's removal provision (28 U.S.C. § 1453) provides as follows:

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

CAFA's jurisdictional provision (28 U.S.C. § 1332(d)) provides as follows:

> (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;

* * *

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

* * *

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.