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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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Respondent Owens agrees with Petitioners that 28 U.S.C. § 1446(a)—the only statute in the United States Code that specifies what a notice of removal must contain—requires allegations of the grounds for removal, not evidence of those grounds. Resp. Br. 34. He could hardly argue otherwise: "Short and plain statement of the grounds for removal" is a pleading standard, not a demand for evidence. "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); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)

("When the words of a statute are unambiguous," the "first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

It's no surprise, then, that Owens uses his response brief to talk about everything *but* § 1446(a). Topics include the standard of proof that a district court must apply to decide jurisdictional questions, the so-called "presumption" against removal, the differences between federal plaintiffs and removing defendants, the purported inequity of allowing a defendant to "hold back" jurisdictional evidence from the notice of removal, *amici*'s lack of "respect" for "federalism," and so on. But none of those topics is the issue in this case. This case is about what a removing defendant must include in the notice of removal. Section 1446(a) answers that question with a pleading standard, and a familiar one at that: The "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008).

Owens avoids any discussion of § 1446(a)—even going so far as to call the provision "irrelevant." Resp. Br. 34. But ignoring the statute does not make it go away. Congress established a pleading standard for the notice of removal, not an evidentiary requirement. Owens's arguments about other aspects of removal procedure cannot change that fact. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms.").

In all events, Owens's arguments about ancillary issues are not just ancillary; they're also wrong.

ARGUMENT

I. SECTION 1446 ESTABLISHES A PLEADING STANDARD FOR THE NOTICE OF REMOVAL.

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 . . . in such action." 28 U.S.C. § 1446(a). Section 1446(a) speaks for itself: It calls for allegations of the grounds for removal, not evidence of those grounds. If Congress wanted to require evidence of federal jurisdiction in the notice of removal, it would have said so. It did not. This Court "appl[ies] statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive . . . .").

A. Owens cannot rewrite § 1446(a), so he ignores it. Instead of grappling with the statutory pleading standard, Owens contends that Petitioners "conveniently ignore[]" § 1446(c)—the provision that, according to Owens, "specifies the procedural requirements for both alleging and proving the amount in controversy." Resp. Br. 2. Of course, Petitioners did not ignore § 1446(c); they discussed the provision at some length in their opening brief, explaining how it confirms that a removing defendant must allege the grounds for federal jurisdiction in the notice of removal and can wait for a challenge to those

allegations to present evidence of jurisdiction. Pet. Br. 12-15.[1]

At any rate, Owens misses the point. The Question Presented is not whether a removing defendant must prove jurisdictional allegations by a preponderance of the evidence once those allegations are challenged. The Question Presented is whether a district court errs in refusing to consider evidence of federal jurisdiction simply because the evidence was not attached to the notice of removal.

Section 1446(a) answers that question—the statute calls for allegations, not proof—and § 1446(c) reinforces the statutory pleading standard. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("a statute is to be read as a whole"). Section 1446(c)(2)(A) provides that, in certain cases when the amount in controversy is unclear from the face of 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"—which means "[t]o state positively" (*Black's Law Dictionary* 139 (10th ed. 2014)) or "to declare." 1 *Oxford English Dictionary* 708 (2d ed. 1989). It does not say "prove."

Section 1446(c)(2)(A) does not suit Owens's argument, so he brushes it aside and focuses on § 1446(c)(2)(B), which provides that "removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the

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[1] By its terms, 28 U.S.C. § 1446(c)(2) applies only to removals "on the basis of the jurisdiction conferred by section 1332(a)"—the ordinary diversity statute. But "[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) (internal quotation marks omitted).

district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)." But § 1446(c)(2)(B) does not address the requirements for a notice of removal; it specifies the standard (preponderance of the evidence) that the district court must apply *after* the removing defendant has "asserted" the grounds for federal jurisdiction and the plaintiff has challenged (or the court has questioned) those allegations. Section 1446(a) specifies what a notice of removal must contain: allegations. Section 1446(c) then sets out the standard of proof that the district court must apply if those allegations are challenged. The statute leaves no doubt about that sequencing.

If it did, the legislative history would erase it. "[R]esort to secondary materials is unnecessary to decide this case" (*Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)), but the House Judiciary Committee Report behind § 1446(c) also forecloses Owens's proposed construction of the statute:

> In adopting the preponderance standard, new paragraph 1446(c)(2) would follow the lead of recent cases. *See McPhail v. Deere & Co*., 529 F.3d 947 (10th Cir. 2008); *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006). As those cases recognize, defendants 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 (2011) (emphasis added). Of course, a dispute about jurisdictional allegations cannot arise until after a defendant files the notice of removal.

Undeterred, Owens contends that the House Report's citation to the Tenth Circuit's *McPhail* decision confirms that Congress intended to require evidence of jurisdiction in the notice of removal. Resp. Br. 22-23. But the House Report doesn't end with the citation to *McPhail*. In the sentences that follow, the Report says that defendants "may simply allege or assert that the jurisdictional threshold has been met" and that the "district court must make findings of jurisdictional fact to which the preponderance standard applies" only "[i]n case of a dispute." H.R. Rep. No. 112-10, at 16.

Regardless, *McPhail* did not address the requirements for a notice of removal and certainly did not adopt Owens's construction of § 1446. On the contrary, the *McPhail* court—following Judge Easterbrook's opinion in *Meridian Security Insurance Co. v. Sadowski*, 441 F.3d 536 (7th Cir. 2006)—held that "'[w]hat the proponent of jurisdiction must "prove" is *contested factual assertions*.'" *McPhail v. Deere & Co*., 529 F.3d 947, 954 (10th Cir. 2008) (emphasis added) (quoting *Meridian Sec*., 441 F.3d at 540); *see also McPhail*, 529 F.3d at 955 ("To recap: a proponent of federal jurisdiction must, if material *factual allegations are contested*, prove those jurisdictional facts by a preponderance of the evidence.") (emphasis added, internal quotation marks omitted). "Factual assertions." "Factual allegations." Not proof. No matter which way Owens turns, § 1446(a)'s pleading standard is staring him in the face. He can "shut it out for a time, but it ain't going away." Elvis

Presley (describing truth, purportedly in a hand-written note in his King James Bible).

Owens works so hard to avoid § 1446(a)'s plain language that he fails to consider the implications of his argument. By his proposed reading of the statute, Congress established a pleading standard *and* an evidentiary requirement for the same document—the notice of removal. Resp. Br. 34. That begs the question: Why include a pleading requirement at all if the defendant must prove jurisdiction through the same document? Owens's construction renders § 1446(a)'s pleading standard superfluous. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (refusing to adopt an interpretation of a statute that would render a piece of it "insignificant, if not wholly superfluous") (internal quotation marks omitted).[2]

B. Section 1446 tracks this Court's longstanding approach to jurisdictional challenges. In *Wilson v. Republic Iron & Steel Co*., 257 U.S. 92 (1921), *McNutt v. General Motors Acceptance Corp*., 298 U.S. 178 (1936), and *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the Court made clear that the proponent of federal jurisdiction does not need to offer evidence of jurisdiction until after a challenge to jurisdictional

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[2] Owens claims that the seven circuits cited in Petitioners' opening brief "follow the Tenth Circuit Rule." Resp. Br. 13. The opposite is true. *See* Pet. Br. 11-12; *see also, e.g.*, *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (Easterbrook, J.) ("The removing party, as the proponent of federal jurisdiction, bears the burden of describing how the controversy exceeds $5 million. This is a pleading requirement, not a demand for proof."); *Pretka v. Kolter City Plaza II*, *Inc.*, 608 F.3d 744, 774 n.29 (11th Cir. 2010) ("[Section 1446(a)] would make little sense if a defendant were categorically barred from supplementing its 'short and plain statement' with additional evidence and explanation.").

allegations. *See Wilson*, 257 U.S. at 97-98 ("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."); *McNutt*, 298 U.S. at 189 ("If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."); *Hertz*, 559 U.S. at 96-97 ("When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof.").

Owens has no good response to this Court's precedents. He tries to distinguish *Wilson* by arguing that "when *Wilson* was issued in 1921, removal required a verified petition stating 'facts,' i.e., evidence akin to an affidavit or declaration today." Resp. Br. 26-27. But the "verified petition" requirement in the old version of § 1446(a) did not function as an evidentiary requirement; it was a precursor to the Rule 11 requirement that appears in the statute today. *See* H.R. Rep. No. 100-889, at 71 (1988) ("The present requirement of a verified petition is changed to a requirement that a notice of removal be signed pursuant to Civil Rule 11 . . . in keeping with general modern distaste for verified pleading."); 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][ii][A] (3d ed. 2014) ("The potential for the imposition of Rule 11 sanctions was deemed an adequate substitute for the former requirement of verification.").

Owens discounts *McNutt* because it "was an original jurisdiction, not removal jurisdiction, case." Resp. Br. 27. But he admits that in *Hertz*—which *was* a removal case—this Court relied on *McNutt*. *See Hertz*, 559 U.S.

at 96. And even *McPhail* (another removal case) relied on *McNutt*. *See McPhail*, 529 F.3d at 953.

Owens's only answer to *Hertz* is that its statement about jurisdictional allegations "was dicta since Hertz submitted with the removal notice an 'unchallenged declaration.'" Resp. Br. 27 (quoting *Hertz*, 559 U.S. at 97). That may be true, but *Hertz*'s dictum echoes the holdings in *Wilson* and *McNutt*.

C. Owens also cobbles together a few quotes from prominent treatises—Wright & Miller's *Federal Practice and Procedure*, *Moore's Federal Practice*, and *Newberg on Class Actions*. Treatises cannot trump the statute. Regardless, the treatises support Petitioners, not Owens.

Owens latches onto a single sentence in Wright & Miller: "Many . . . federal courts have adopted a standard that requires the defendant to present facts in the notice of removal establishing the sufficiency of the jurisdictional amount by 'a preponderance of the evidence' which must be based on more than conclusory or speculated assertions." Resp. Br. 12 (quoting 14AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3702.2 (4th ed. 2009)). Owens takes that sentence to mean that a removing defendant must include evidence in the notice of removal. That is not what the treatise is saying, a fact confirmed by other language in the very same passage: "[R]emoving defendants *simply may allege or assert* that the jurisdictional threshold has been met. . . . *In case of a dispute*, the district court must make findings of the jurisdictional facts to which the preponderance standard applies." 14AA Wright et al., § 3702.2 (emphasis added). In focusing myopically on one sentence from the treatise, Owens missed the sentence's context.

Owens makes the same mistake with *Moore's Federal Practice*. After quoting language from the treatise about how the removing party must "demonstrate" jurisdiction only "if the jurisdictional allegations are challenged"—language that forecloses his argument—Owens contends (incredibly) that the treatise "supports the Tenth Circuit Rule." Resp. Br. 30 (quoting 16 James Wm. Moore, *Moore's Federal Practice* § 107.30[2][a][i] (3d ed. 2013)). As proof, Owens points to another statement from the treatise—that the "'failure to include the requisite jurisdictional facts in the removal petition cannot be cured by amendment after the 30-day removal period has expired.'" Resp. Br. 30 (quoting 16 Moore, § 107.30[2][a][i]). Owens misunderstands that sentence. It concerns efforts to cure insufficient removal allegations by amendment; it says nothing about how or when a removing defendant must prove jurisdictional allegations.

Owens's citation to *Newberg on Class Actions* is similarly off the mark. *See* Resp. Br. 28 (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 6:16 (5th ed. 2014)). The passage that Owens quotes suggests that, unlike a federal plaintiff's jurisdictional allegations—which "will be accepted unless it can be shown to a legal certainty that the plaintiff cannot collect that amount"—a removing defendant's jurisdictional allegations are entitled to no such presumption of correctness. *See* 2 Rubenstein, § 6:16. That observation is beside the point. Whatever the purported differences between a federal plaintiff and a removing defendant, their jurisdictional pleading burden is the same. *Compare* Fed. R. Civ. P. 8(a)(1) ("a short and plain statement of the grounds for the court's jurisdiction"), *with* 28 U.S.C. § 1446(a) ("a short and plain statement of the grounds for removal").

II. NO PRESUMPTION CAN TRANSFORM "SHORT AND PLAIN STATEMENT OF THE GROUNDS FOR REMOVAL" INTO A DEMAND FOR EVIDENCE.

Unable to explain away § 1446(a), Owens tries to change the subject by invoking the so-called "presumption" against removal. According to Owens, "federalism . . . dictates the strict construction of removal statutes." Resp. Br. 11 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941)). "The Tenth Circuit Rule," he argues, "pays homage to this Court's historical narrow view of removal jurisdiction." Resp. Br. 10.

No presumption could change § 1446(a)'s plain language. The statute requires a notice of removal to contain a "short and plain statement of the grounds for removal." How would the Court interpret that language "strictly"? The statute says what it says. This Court's "job is to interpret Congress's decrees . . . neither narrowly nor broadly, but in accordance with their apparent meaning." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 612 (2004) ("federal courts should interpret and apply removal statutes in a strictly neutral manner").

At any rate, there is no presumption against removal. *See* Washington Legal Foundation Br. 14-19; Defense Research Institute Br. 11-14. This Court has never announced such a presumption. *See Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (Easterbrook, J.) ("There is no presumption against federal jurisdiction in general, or removal in particular."). Quite the opposite: The

Court has repeatedly held that "[a] statute affecting federal jurisdiction must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (internal quotation marks omitted); *see also Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 661 (1923) ("there is nothing in this which suggests that the plain terms of the [removal] act of 1888 . . . should be taken otherwise than according to their natural or ordinary signification").

Shamrock does not say otherwise. There, this Court addressed whether a plaintiff who sues in state court can later remove the case to federal court if the defendant files a counterclaim. 313 U.S. at 100. The removal statute had previously permitted "removal by 'either party,'" but by the time that *Shamrock* was decided, Congress had amended the statute to permit removal only by the "defendant or defendants." *Id*. at 107 (internal quotation marks omitted). The Court held that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts [was] one calling for the strict construction of such legislation." *Id*. at 108.

Thus, when the *Shamrock* Court used the words "strict construction," it was referring, not to some overriding *constitutional* prerogative to interpret jurisdictional statutes narrowly, but to the *congressional* policy of restricting removal jurisdiction that existed in 1941.

Times have changed. Since 1941, Congress has liberalized removal standards. *See* Washington Legal Foundation Br. 17, 18 & n.8; Defense Research Institute Br. 9-11. That is why this Court in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), rejected the argument that *Shamrock* required strict

construction of an ambiguous removal provision: "[W]hatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id*. at 697.

The Class Action Fairness Act of 2005 (CAFA) is one such statutory development. CAFA "unquestionably expanded" removal jurisdiction to make it easier for defendants to remove large class actions—reversing "the restrictive federal jurisdiction policies of Congress" that drove the strict construction in *Shamrock*. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 342 (4th Cir. 2008) (Niemeyer, J., dissenting). There is no presumption against removal in any context, and certainly not in the class context. "The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions." *Back Doctors*, 637 F.3d at 830.

III. THE TENTH CIRCUIT'S APPROACH COMPLICATES THE REMOVAL PROCESS.

Owens agrees that "when judges must decide jurisdictional matters, simplicity is a virtue." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013). But he suggests that the Tenth Circuit's approach—which requires a removing defendant to attach evidence of jurisdiction to the notice of removal even when the plaintiff does not contest federal jurisdiction—is simpler than § 1446(a)'s approach. "What could be simpler and more commonsensical," Owens asks, "than submitting available evidence with the notice removing the case from the plaintiff's chosen forum?" Resp. Br. 40.

The first rejoinder to Owens's simplicity argument is the same as to all his other arguments: Section 1446(a) establishes a pleading standard. Congress could have required a removing defendant to include all sorts of things in the notice of removal—an affidavit, receipts, an Excel™ spreadsheet—but it chose to require only a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). This Court applies statutes as written, not as litigants would rewrite them. *See Great N. Ry. Co.*, 343 U.S. at 575; *see also 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.").

At any rate, Owens has things backwards: Requiring evidence in the notice of removal would "complicate a case, eating up time and money" as the defendant works to prove jurisdictional allegations that might never be—and often aren't—disputed. *Hertz*, 559 U.S. at 94. And in many (if not most) cases, defendants will feel compelled to gather that evidence within 30 days from the filing of the state-court complaint because of concern (sometimes warranted) over missing the 30-day removal window. *See* 28 U.S.C. §§ 1446(b)(1) and (b)(3). That takes time and money—taxing both the court's and the parties' resources.

How is that simpler than simply alleging the grounds for removal?

IV. PETITIONERS' NOTICE OF REMOVAL SATISFIED § 1446(a)'s PLEADING STANDARD.

Owens also argues that, even if Petitioners are correct that a notice of removal must contain only allegations of the grounds for removal, Petitioners' "conclusory" allegations did not satisfy the statutory pleading standard. Resp. Br. 34-35.

Petitioners' jurisdictional allegations were far from conclusory. Petitioners alleged that they and at least some putative class members 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, based on all those facts, the amount in controversy exceeds $8.2 million. Pet. App. 39a-40a. As Judge Hartz noted in his dissent from the denial of rehearing en banc, "[a]llegations of the amount in controversy are ordinarily much more abbreviated." Pet. App. 5a.[3]

There is no need to belabor the point: The jurisdictional allegations in Petitioners' Notice of Removal satisfied § 1446(a)'s call for a "short and plain

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[3] Once Owens challenged the allegations in the Notice of Removal, Petitioners submitted a declaration establishing federal jurisdiction. Pet. App. 75a-80a. That declaration included new facts that Petitioners learned after filing the Notice of Removal—including Owens's assertion in a post-removal mediation statement that the amount in controversy is "in excess of $21.5 million." Pet. App. 79a. Petitioners did not "withhold" evidence from the Notice of Removal. Resp. Br. 17. They followed § 1446(a)'s plain teaching.

statement of the grounds for removal." *Cf*. Pet. App. 4a (Hartz, J., dissenting) ("[T]here should be no dispute that Petitioners' notice of removal was adequate, even if we apply *Ashcroft v. Iqbal* . . . ."); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

V. THIS COURT CAN AND SHOULD ANSWER THE QUESTION PRESENTED.

The lone *amicus* party supporting Owens—Public Citizen Litigation Group—does not try to defend Owens's construction of § 1446. Instead, Public Citizen raises a new argument about the scope of this Court's certiorari review. It contends that the Court cannot answer the Question Presented but instead is limited to deciding whether the Tenth Circuit abused its discretion in denying permission to appeal.

No party raised that non-jurisdictional argument at the certiorari stage, so it is waived. *See* S. Ct. R. 15.2; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010). Regardless, Public Citizen's argument crumbles upon inspection. Because the Tenth Circuit's denial of the petition for permission to appeal was a "case in the court of appeals" under 28 U.S.C. § 1254(1), this Court can review the merits of the lower court rulings.

Shortly after Congress created the writ of certiorari to give this Court discretion over part of its docket (*see* Act of Mar. 3, 1891, 26 Stat. 826, 828), the Court held in *Forsyth v. City of Hammond*, 166 U.S. 506 (1897)—a case that Public Citizen never cites—that

> [u]nquestionably the generality of this provision [authorizing review of federal appellate decisions by writ of certiorari] was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a *comprehensive and unlimited power*. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. *It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein*. All that is essential is that there be a case pending in the Circuit Court of Appeals . . . .

Id. at 513 (emphasis added). Put another way, if there was a "case" in the Tenth Circuit, then this Court has the power to review the merits of the decisions below. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 79 (10th ed. 2013) ("Congress intended that this certiorari jurisdiction over cases in the federal courts of appeals be both discretionary and unlimited in scope.").

Public Citizen concedes that, under *Hohn v. United States*, 524 U.S. 236, 241-42 (1998), "the court of appeals' decision denying permission to appeal was a decision in a case in the court of appeals over which this Court has certiorari jurisdiction under § 1254." Public Citizen Br. 15-16.[4] It nevertheless argues that

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[4] *See also*, *e.g.*, *Ex parte Quirin* 317 U.S. 1, 24 (1942) ("Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari."); Stephen M. Shapiro et al., *Supreme Court Practice* 80 (10th ed. 2013) (the Court has broadly interpreted the word "cases" in 28 U.S.C. § 1254(1) "to include not only a full-

this Court is confined to answering the narrow question of whether the Tenth Circuit abused its discretion in denying permission to appeal—a question that Public Citizen contends is not worth the Court's time. *Id*. at 16. But *Forsyth* refutes Public Citizen's characterization of this Court's certiorari power: That power "is not affected by the condition of the case as it exists in the Court of Appeals" and "may be exercised before or after any decision by that court and irrespective of any ruling or determination therein." *Forsyth*, 166 U.S. at 513.

Nixon v. Fitzgerald, 457 U.S. 731 (1982), proves the point. *Nixon* was a civil suit seeking damages from former President Nixon for an employment decision that he made in his official capacity while in office. *Id*. at 738-40. The district court denied President Nixon's motion to dismiss based on his claim of absolute immunity, and the D.C. Circuit dismissed Nixon's interlocutory appeal, holding that the district court's order "failed to present a serious and unsettled question" sufficient to bring the case within the collateral order doctrine. *Id*. at 742-43 (internal quotation marks omitted). President Nixon sought Supreme Court review, and Fitzgerald argued that, because the D.C. Circuit dismissed the case for want of jurisdiction, "the District Court's order was not an appealable 'case' properly 'in' the Court of Appeals within the meaning of § 1254." *Id*. at 742. This Court rejected Fitzgerald's argument and held that the Court possessed certiorari jurisdiction under § 1254. *Id*. at 742, 743 & n.23.

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blown appeal from a district court decision but also any kind of motion or application made to a court of appeals that results in an order bearing the imprimatur of the court of appeals or a judge thereof").

But the Court did more than that. It also resolved the underlying merits question that the D.C. Circuit never addressed—whether President Nixon was entitled to absolute immunity: "Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution." 457 U.S. at 742, 743 & n.23. Public Citizen tries to distinguish *Nixon* by suggesting that the case involved the "exceptional circumstances" of a claim against a former President (Public Citizen Br. 17), but this Court's certiorari power does not wax and wane based on parties' perceptions of how important they or their underlying claims are. The Court has decided the merits after the circuit court declined discretionary review in circumstances not involving a former Commander-in-Chief. *See*, *e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 449 (1997) (resolving the merits of a habeas petitioner's challenge after the circuit court exercised its discretion to deny a certificate of probable cause).

Standard Fire—which came to this Court in the same procedural posture as this case—is another example of the Court's deciding the merits on certiorari review after the circuit court denied discretionary review. *Standard Fire*, 133 S. Ct. at 1348. The Court did not limit its review to deciding whether the Eighth Circuit abused its discretion in denying permission to appeal but instead resolved the underlying merits question about CAFA's amount-in-controversy requirement. *Id*. Public Citizen contends that the parties in *Standard Fire* "appear to have overlooked" the issue that it raises here (Public Citizen Br. 2), but the respondent in *Standard Fire* made a similar argument to the one that Public Citizen makes (*see* Greg Knowles's Brief in Opposition to The

Standard Fire Insurance Company's Petition for a Writ of Certiorari 6-11), without success.

Regardless, the outcome should be the same whether this Court reviews the district court's remand order or the Tenth Circuit's order denying permission to appeal. The decisions below rest on a clearly erroneous interpretation of § 1446—ossified in the Tenth Circuit's jurisprudence—and implicate questions of national importance about removal procedure. Remand orders are not appealable outside the CAFA context (28 U.S.C. § 1447(d)), so this Court can answer the Question Presented only in the class context—where Congress has expressed its clear intent to permit appellate review of remand orders. *See* 28 U.S.C. § 1453(c)(1) ("notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed").

The question of what a notice of removal must contain "is a pure issue of law, appropriate for [this Court's] immediate resolution." *Nixon*, 457 U.S. at 743 n.23.

CONCLUSION

The district court's order remanding this case to Kansas state court should be reversed.

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