IN THE

United States Court of Appeals for the Third Circuit

No. 23-1053

ERIE INSURANCE EXCHANGE an unincorporated association, by TROY STEPHENSON, CHRISTINA STEPHENSON, and STEVEN BARNETT, trustees *ad litem*, and, alternatively, ERIE INSURANCE EXCHANGE, by TROY STEPHENSON, CHRISTINA STEVENSON and STEVEN BARNETT ,

Appellees,

vs.

ERIE INDEMNITY COMPANY,

Appellant.

On appeal by permission from the order of the United States District Court for the Western District of Pennsylvania in No. 2:22-cv-00166

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AND THE PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE

The Chamber of Commerce of the United States of America, The Pennsylvania Chamber of Business and Industry, The American Property Casualty Insurance Association and The Pennsylvania Coalition for Civil Justice Reform state that they have no parent corporations and that no publicly held company has a 10 per cent or greater interest in either of them.

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INTERESTS OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber was involved in organizing support for the Class Action Fairness Act ("CAFA") before its enactment, and the Chamber's members are often named as defendants in the sorts of lawsuits CAFA intended to be given a federal forum: class actions, mass actions and other cases involving a large number of plaintiffs from a number of states claiming relief based on common legal and factual issues.

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half

of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

The American Property Casualty Insurance Association (the "APCIA") is the primary national trade association for home, auto and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's members, which range from small companies to the largest insurers with global operations, represent nearly 65 per cent of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

As this case demonstrates, APCIA members can be and often are subject to class actions and other aggregate claims that CAFA intended to be re-

solved in federal courts.

The Pennsylvania Coalition for Civil Justice Reform (the "Coalition") is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. The Coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

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In this case, the plaintiffs engaged in a form of procedural gamesmanship, the purpose of which was simply and plainly to evade CAFA jurisdiction, which had already attached.[1] The District Court's allowance of that maneuver is at odds with the language and purpose of CAFA and Supreme Court authority, and the *Amici* believe this Court should reverse.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In response to longstanding abuses in state-court class actions that negatively affected virtually all stakeholders except class counsel, in 2005

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Congress enacted the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). The statute included a number of provisions to address the problems Congress identified, the most relevant of which for purposes of this case are those that expanded federal-court jurisdiction over class actions and made it easier for defendants to remove state-court class actions.

By broadening federal jurisdiction, Congress recognized the importance of having federal courts hear cases of national importance affecting large numbers of stakeholders in multiple jurisdictions. Allowing easier access to federal courts protects defendants from forum-shopping plaintiffs who too often targeted favored state courts, protects the due-process interests of class-action defendants, avoids potentially duplicative and inconsistent state-court resolutions of class actions and protects interstate commerce from potential local caprice.

Congress recognized that the balanced and deliberate legislative scheme it created in CAFA could be upset by artful procedural maneuvers by plaintiffs eager to avoid federal jurisdiction. Indeed, in its report on the bill that became CAFA, the Senate Judiciary Committee emphasized its intention for the statute to be interpreted consistently with *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938), the case in which the Supreme

Court made clear that post-removal maneuvering could not deprive a federal court of jurisdiction once it attached.

Red Cab dealt with a post-removal amendment that attempted to lessen the amount in controversy below the statutory minimum for federal jurisdiction, but its holding should inform the analysis in this case. While the plaintiffs here did not technically seek to *amend* their complaint to avoid CAFA, they accomplished the same ends by dismissing the removed complaint and immediately refiling a materially similar case in state court stripped of references to the class-action mechanism but still seeking what amounts to class relief.

When appellant Erie Indemnity Company ("Erie Indemnity") removed that second complaint, the District Court concluded that the fact that the plaintiffs dismissed their first complaint under Federal Rule of Civil Procedure 41 was critical, and that this Court had already decided the jurisdictional issue in an earlier action between the parties, *Erie Insurance Exchange v. Erie Indemnity Co.*, 722 F.3d 154 (3d Cir. 2013) (which the parties have referred to as "*Sullivan*"). The District Court was mistaken on both counts since Rule 41 is subject to applicable federal statutes, including CAFA, and *Sullivan* did not deal with plaintiffs that filed a class action only to dismiss it

after removal in an artful attempt to avoid a federal forum. And, as Erie Indemnity explains in its opening merits brief, there is cause to conclude that intervening Supreme Court authority has undermined *Sullivan*'s holding.

There is, of course, a broader concern with the result the District Court reached. CAFA has been the law for nearly two decades. It has remedied many of the problems Congress identified, and it has done so in a way that is fair to both plaintiffs and defendants. But a significant number of plaintiffs' counsel nonetheless seek to evade the statutory mandate that large-scale, multiple jurisdiction actions belong in federal court. The plaintiffs' approach in this case is hardly isolated. If the Court endorses the District Court's incorrect holding, it will invite counsel dissatisfied with CAFA removals in all manner of other cases to engineer remands in a way at odds with CAFA and *Red Cab*.

Amici urge the Court to reverse.

ARGUMENT

I. Congress enacted CAFA to remedy abuse of state-court procedures and to protect both plaintiffs and defendants.

Congress enacted the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), in response to widespread abuses of the class-action pro-

cess in state courts. CAFA's Statement of Purposes ("Purposes"), Pub. L. No. 109-2, § 2(a)(4)(A) and (b)(2), 119 Stat. 4 (2005); *see also, Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307, 320 (3d Cir. 2022); Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823 (2008) ("Purcell"). As one commentator noted, CAFA resulted from a "grinding eight-year effort" that included a number of hearings, committee reports, debate and compromise. Purcell at 1823.

Congress was strongly motivated to act. The legislature explained that class-action abuses "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." Purposes § 2(a)(2).

Those abuses affected a great many stakeholders. Congress's investigation disclosed abuses in which state-court settlements primarily benefited counsel and certain class members at the expense of others. Purposes at § 2(a)(3); Purcell at 1851-56. Congress also recognized that the then-existing practice invited plaintiffs' lawyers to target state courts perceived to favor plaintiffs—especially local plaintiffs—even though the issues might be na-

tional in scope and affect people and businesses in a number of jurisdictions. Senate Judiciary Committee Report on the Class Action Fairness Act, S. Rep. No. 109-14 at 22-25 (2005) ("Committee Report"). That strategy not only invited forum or judge shopping, it implicated significant due-process concerns for defendants that might be forced to defend major suits in jurisdictions with only marginal interests in the case or to confront potentially conflicting state-court actions. *Id.* at 21-22. And Congress explained that resolving complex actions involving large numbers of parties in multiple jurisdictions often stretched the resources of state courts. *Id.* at 13.

One of the means by which CAFA achieves its legislative purposes is by allowing federal courts to exercise jurisdiction over class actions in which the amount in controversy exceeds $5 million and any member of the plaintiff group is a citizen of a state different than any defendant. 28 U.S.C. § 1332(d)(2). As this Court explained last year in *Robert D. Mabe, Inc.*, in CAFA, Congress "made it easier both for plaintiffs to establish federal jurisdiction in original federal class actions and for defendants to remove class actions from state courts." 43 F.4th at 318 (*quoting* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1734

(2008)). As the Senate Judiciary Committee explained in its report on CAFA, "new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. *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.*" Committee Report at 43 (emphasis added).

Thus, by its text and legislative history, CAFA broadened federal jurisdiction—including removal jurisdiction—to favor consideration of interstate class actions by federal rather than state courts.

It is against this statutory background that the Court should assess the propriety of the plaintiffs in this case dismissing their properly removed class action for the express purpose of filing a materially similar case in state court in a bid to avoid federal jurisdiction.

II. CAFA, *Red Cab* and Rule 41 require rejection of the plaintiffs' post-removal attempt to avoid federal jurisdiction.

A. Congress intended CAFA's jurisdictional provisions to be interpreted consistently with Red Cab*'s rule that events subsequent to removal cannot oust federal jurisdiction.*

The Supreme Court long ago held that events that occur subsequent to removal "do not oust the district court's jurisdiction once it has at-

tached." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). In that case, the Court explained that, "if the plaintiff could, no matter how bona fide his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction[,] the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice." *Id.* at 295.

Courts have applied *Red Cab*'s reasoning to CAFA removal. Thus, a post-removal amendment could not deprive a federal court of CAFA jurisdiction. *See Louisiana v. American Nat'l Prop. & Cas. Co.*, 746 F.3d 633, 639 (5th Cir. 2014).

The Court's reasoning in *Red Cab* has resonance here. The plaintiffs filed their suit in Pennsylvania state court as a class action, and Erie Indemnity properly removed it under CAFA. The plaintiffs did not challenge the propriety of CAFA jurisdiction, nor could they have, and federal jurisdiction attached. But, in an effort to avoid federal court, the plaintiffs purported to voluntarily dismiss their complaint only to refile a substantively indistinguishable complaint in state court with only a few tweaks to remove explicit references to the class-action process.[2]

[2] As Erie Indemnity notes, the changes in the second complaint are cosmetic. While it does not refer to the Pennsylvania class-action rules, that pleading

While *Red Cab* dealt with the amount in controversy rather than the presence or absence of express language invoking the class-action process, the impermissible result is the same. The plaintiffs filed an action seeking to vindicate the asserted rights of millions of persons across a dozen states and the District of Columbia and involving millions of dollars; the defendant properly removed under CAFA's broad jurisdictional provision; and the plaintiffs tinkered with their action to try to avoid the federal jurisdiction that had already attached. *Red Cab* did not allow a plaintiff to avoid federal court by gamesmanship related to the amount in controversy, and its rule should apply equally in a case in which a plaintiff seeks to avoid federal court by means of strategic dismissal and artful repleading.

In drafting CAFA, Congress knew of *Red Cab* and made clear its intention that the holding of that case would apply to CAFA removal. In its report on the bill that became CAFA, the Senate Judiciary Committee cited *Red Cab* and explained that "[c]urrent law (that S. 5 does not alter) is also clear that, once a complaint is properly removed to federal court, the federal court's jurisdiction cannot be 'ousted' by later events." S. Rep. No. 109-14

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makes allegations of harm to all of the more than 2 million subscribers across 12 states and the District of Columbia and purports "to benefit all members of the Exchange." Complaint at ¶ 16.

at 71.

B. For purposes of applying Red Cab*'s holding, it makes no difference that the plaintiffs dismissed without prejudice instead of seeking leave to amend.*

The District Court concluded that the plaintiffs' Rule-41 dismissal notice was "effective automatically" such that the court could not consider that dismissed case in determining if removal of the plaintiffs' second complaint was appropriate. Opinion at 6. R. at App.10.

The District Court was mistaken in its analysis of the effect of the Rule-41 dismissal. As an initial matter, the Supreme Court has explained that exalting "form over substance" runs "directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (*quoting* Purposes at § 2(b)(2)). But, even on its own terms, Rule 41 does not support Plaintiffs' gamesmanship.

Rule 41 provides that a dismissal by the plaintiff without a court order is subject to other procedural rules and "any applicable federal statute ..." Fed. R. Civ. P. 41(a)(1)(A). As the Second Circuit has explained, it is not necessary that a statute refer to Rule 41 for it to be an "applicable federal statute"; a statute qualifies if the usual functioning of the rule would under-

mine "unique policy considerations underlying the [statute]." *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015). Congress's statement of purpose and the Supreme Court's admonition in *Standard Fire* demonstrate a strong federal preference for cases such as this one—involving significant interstate issues involving the asserted rights of a large group of persons—to be heard in federal court. Allowing plaintiffs to use a Rule-41 dismissal purely for purposes of evading federal jurisdiction would undeniably undermine CAFA's "unique policy considerations ...."[3]

III. The Court's decision in *Sullivan* is distinguishable from this case and, in any event, *Sullivan* is of questionable vitality.

The District Court held that this case is controlled by the Court's decision in *Sullivan*. That is not so and, in any event, the Court should revisit *Sullivan* in light of intervening authority.

In *Sullivan*, the plaintiffs brought claims in state court under Pennsylvania Rule of Civil Procedure 2152, the same rule the plaintiffs in this case

[3] The result of this analysis would be that the plaintiffs' second-filed action would be treated as effectively a continuation of their first, CAFA-controlled action since it involves the same parties and the same claims. *See Vodenichar v. Halcón Energy Props., Inc.*, 733 F.3d 497, 509 (3d Cir. 2013). That makes sense, as it would be impossible for defendants—or courts, in the case of voluntary dismissals that require court order—to know *ex ante* that plaintiffs who voluntarily dismiss their suit are doing so as part of an effort to refile and evade federal court jurisdiction.

point to in their second complaint. Erie Indemnity removed the case, the district court remanded and a divided panel of this Court affirmed. *See* 722 F.3d at 157. The majority held that the plaintiffs had not originally asserted class claims and, so, CAFA did not confer federal jurisdiction. To reach that holding, the majority mechanically compared Rule 2152 with Federal Rule of Civil Procedure 23 and concluded that "Rule 2152 contains none of the defining characteristics of Rule 23" such as certification mechanisms and requirements for numerosity and commonality. *Id.* at 158-59.

The District Court mistakenly concluded that *Sullivan* essentially controls the outcome in this case. But *Sullivan* was materially different. In that case, there was a dispute about whether there had ever been a class-action complaint and thus whether CAFA jurisdiction was ever properly invoked. Here, by contrast, there is no question that there was a CAFA-qualifying complaint that Erie Indemnity property removed. The debate was and is about the effect of the plaintiffs' post-removal conduct that sought to avoid federal jurisdiction that had already attached to the action. In other words, while *Sullivan* raised none of the concerns the Supreme Court addressed in *Red Cab*, this case squarely implicates those concerns. The District Court should have distinguished *Sullivan*.

Beyond that, there is reason to question the continuing vitality of *Sullivan*. As Erie Indemnity asserts in its opening merits brief, the Supreme Court's post-*Sullivan* analysis in *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81 (2014), undermines *Sullivan*'s rigid analysis of what constitutes a class action subject to CAFA. *Id.* at 89 (requiring that CAFA's provisions be read broadly with a "strong preference" for federal jurisdiction over interstate class actions). As Erie Indemnity contends, the Court is not bound by *Sullivan* in light of the Supreme Court's intervening authority, and the Court should revisit the issue raised in that case.

IV. Were the Court to condone the plaintiffs' gamesmanship, it would invite just the sort of mischief Congress sought to remedy in the statute and the Supreme Court rejected in *Red Cab*.

Eighty-five years ago, the Supreme Court held that the initial existence of federal jurisdiction "fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election." *Red Cab*, 303 U.S. at 294.

In enacting CAFA, Congress expressly incorporated the *Red Cab* holding because it was consistent with and necessary to the legislative intent for aggregate actions with interstate parties and effects to be heard in federal court.

In this case, the plaintiffs engaged in their procedural legerdemain to evade federal jurisdiction for what they presumably see as a tactical advantage. If this Court condones that maneuver, it will invite plaintiffs in other class actions to pursue the same forum-shopping strategy and thereby undermine CAFA's plain intent and the lesson of *Red Cab*.

The dispute at issue in this case and others like it belong in federal court, and *Amici* ask this Court to reject procedural maneuvers aimed at undermining that principle.

CONCLUSION

Amici urge the Court to reverse the District Court's remand order.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

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ELECTRONIC FILING CERTIFICATION

I hereby certify that the attached brief as provided to the Court in electronic form includes the same text as the "hard copies" of the brief filed by overnight courier with the Court. I also certify that this electronic file has been scanned with Symantec Anti-Virus software.

/s/ David R. Fine

CERTIFICATION OF WORD COUNT

I certify that this brief includes 3,254 words as calculated with the word-counting feature of Microsoft Word and including the parts of the brief specified in Federal Rule of Appellate Procedure 32.

/s/ David R. Fine

CERTIFICATE OF SERVICE

I certify that, on February 6, 2023, I filed the attached brief with the Court's CM/ECF system such that all counsel will receive service automatically and that I served two copies on the following by U.S. Mail, postage-prepaid:

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