No. 23-434

IN THE

Supreme Court of the United States

ERIE INDEMNITY COMPANY,
Petitioner,

v.

ERIE INSURANCE EXCHANGE, BY TROY STEPHENSON, CHRISTINA STEPHENSON, AND STEVEN BARNETT, TRUSTEES AD LITEM,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly held that the Class Action Fairness Act does not provide federal jurisdiction over this case, which was brought on behalf of an unincorporated association pursuant to state law that is not similar to Federal Rule of Civil Procedure 23.

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INTRODUCTION

This case concerns a lawsuit filed by respondent Erie Insurance Exchange (Exchange) against petitioner Erie Indemnity Company (Indemnity) in Pennsylvania state court. Exchange is a Pennsylvania unincorporated association that operates as a reciprocal insurer. It is owned by, and consists of, its policyholders, all of whom are members of it. Pursuant to a longstanding authorization in Pennsylvania law, the members purchase insurance policies and receive indemnification for any losses out of Exchange's pool of funds. The pool is made up of fees, including insurance premiums and other charges, paid by the members.

Indemnity is the managing agent and attorney-in-fact for Exchange. For these services, Indemnity is permitted to retain up to 25 percent of all premiums for policies written or assumed by Exchange. The balance of the premiums is to be used for insurance losses and other operational costs incurred by Exchange; any excess of premiums over such expenses may be distributed to Exchange's members as dividends.

Challenging the fee retained by Indemnity, Exchange sued Indemnity in state court using a Pennsylvania state law, known as Rule 2152, that addresses the procedure for suits by on or on behalf of an unincorporated association or, in the alternative, Rule 2177, which addresses suits by insurance exchanges. Indemnity, relying on the Class Action Fairness Act (CAFA), unsuccessfully sought to remove the case to federal court.

Indemnity's petition is premised on the notion that the lawsuit is a class action for purposes of CAFA and

thus removable under CAFA. That premise is wrong, and Indemnity's disagreement on the state-law question whether the state-law rules are properly invoked in this case does not convert the lawsuit into a class action, which involves allegations, procedures, and requirements not applicable here. Moreover, the existence of an earlier case, pleaded as a class action, does not convert this case into one, regardless of any factual overlap. Furthermore, there is no conflict among the circuits as to any question presented in the case. Indeed, Indemnity cites no other appellate decision addressing whether a suit on behalf of an unincorporated association is a class action, other than one consistent decision of the Third Circuit addressing the same rules. For all these reasons, this case presents no issue worthy of review.

STATEMENT

Pennsylvania Class Actions

Pennsylvania law provides for class actions. Under Pennsylvania Rule of Civil Procedure 1702, members of a class may sue on behalf of the class where they meet the requirements of numerosity, commonality, typicality, and adequate representation, and where the court determines that proceeding as a class action is a fair and efficient method for adjudication of the controversy. *See* Pa. R. Civ. P. 1708 (setting forth criteria for determining whether a class action is a fair and efficient method of adjudicating the controversy). The Pennsylvania Rules specify that a class-action complaint must set forth the "averments of fact in support of the prerequisites" of Rules 1702 and 1708. *Id*. Rule 1704(b). They also set forth requirements as to the timing of a motion for class certification, *id*. Rule 1707, the content of the court's decision granting

or denying the motion, *id*. Rule 1710, the timing and contents of notice to class members, *id*. Rule 1712, and other specific procedures for class-action lawsuits.

None of these class-action rules and procedures is applicable in this case.

Pennsylvania Rules 2152 and 2177

A. This case was brought pursuant to Pennsylvania Rule 2152 or, in the alternative, Rule 2177. Adopted in 1939, Rule 2152 provides: "An action prosecuted by an association shall be prosecuted in the name of a member or members thereof as trustees ad litem for such association. An action so prosecuted shall be entitled 'X Association by A and B, Trustees ad Litem' against the party defendant." 231 Pa. Code § 2152 (as amended, 1975); *see Underwood v. Maloney*, 256 F.2d 334, 337 (3d Cir. 1958) (stating that, under Pennsylvania law, a suit by an unincorporated association may not be maintained as a class action, but instead must be brought on behalf of the unincorporated association itself), *cited in Erie Ins. Exchange v. Erie Indem. Co.*, 722 F.3d 154, 159 (3d Cir. 2013) (hereafter, *Erie I*). To prevail in such an action, the members must at some point present evidence of their authority to sue as trustees ad litem. *Highway Truck Drivers & Helpers, Loc. 107 v. Cohen*, 172 A.2d 824, 827 (Pa. 1961).

As an alternative to Rule 2152, the complaint relies on Rule 2177, which requires suits by "a corporation or similar entity" to be pursued "in its corporate name." 231 Pa. Code § 2177. Under Pennsylvania law, a suit under Rule 2177 is "prosecuted in the same way suits by other unincorporated associations are prosecuted under Rule 2152, i.e. 'by some of the members in their own names on behalf of or as

representing all.'" *Erie I*, 722 F.3d at 159 (quoting *Barford v. Beaner Elec. Co.*, 11 Pa. D. & C. 51, 55 (Pa. Ct. Common Pleas 1927)). Like a suit under Rule 2152, a suit under Rule 2177 "is properly understood as a suit by one entity, not by 'a conglomerate of individuals.'" *Id.* (quoting *Long v. Sakleson*, 195 A. 416, 420 (Pa. 1937)).

In both Rule 2152 and Rule 2177 actions, the plaintiffs do not have to plead or prove numerosity, commonality, typicality, or any other facts supporting a class action. They do not have to move for certification. They do not have to provide notice to a class. In short, none of the procedures that are standard in a class action apply to an action under Rule 2152 or 2177. And in contrast to a class action, which provides a means of aggregating the separate claims of individual class members, Rules 2152 and 2177 provide means by which an entity that is not a juridical person can pursue claims that belong to the entity itself.

B. In 2012, in an unrelated case, Exchange, through four members as trustees ad litem, sued Indemnity in state court pursuant to Rule 2152. *See Erie I*, 722 F.3d at 157. The complaint alleged state-law claims for breach of contract, breach of fiduciary duty, and equity, and requested relief on behalf of all members of Exchange. *Id.* There too, Indemnity removed the case to federal court, alleging that the case constituted a class action under CAFA. There too, the Third Circuit disagreed.

To start, the court addressed CAFA's plain text, which authorizes removal of a "class action," defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or

rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). "Like the other Courts of Appeals to have construed CAFA's definition of 'class action,'" the Third Circuit found "no ambiguity" in the statutory text. *Erie I*, 722 F.3d at 158 (citation omitted). The court explained that "Rule 2152 contains none of the defining characteristics of Rule 23 of the Federal Rules of Civil Procedure." *Id.* at 158–59. For example, it does not provide for class certification, does not impose requirements such as numerosity or commonality, does not specify the form and substance of notice that must be given to absent class members, does not permit members to opt out, and does not provide for the appointment of a lead plaintiff or class counsel. *Id.* at 159 (citing Fed. R. Civ. P. 23). The court explained that, "[f]ar from 'authorizing an action to be brought by [a] representative person[] as a class,' 28 U.S.C. § 1332(d)(1)(B), Rule 2152 merely authorizes suits by representatives *on behalf of an unincorporated association*." *Id.* (alterations in original). The court also noted its long-standing precedent that "suits by members of an unincorporated association (such as those contemplated by Rule 2152) may *not* be brought as a class action." *Id.* (citing *Underwood*, 256 F.2d at 337).

In addition, as in this case, Indemnity argued that Rule 2152 was not the proper vehicle for a suit by Exchange, which Indemnity asserted should instead have invoked Rule 2177. The Third Circuit observed that "Rule 2177 is even less like Rule 23" than Rule 2152. *Id.* "In any event," the court explained, "we need not resolve the state-law question of whether Rule 2152 or Rule 2177 provides the proper basis for filing a suit by an insurance exchange …. Plaintiffs are the

masters of their complaints and are free to choose the statutory provisions under which they will bring their claims." *Id.* (citations and internal quotation marks omitted). Further, the court continued, "[i]f the case is procedurally unsound under Pennsylvania's rules, the Commonwealth's courts are best suited to correct the problem." *Id.* For present purposes, the point was that, under Rule 2152, "a suit by Exchange is properly understood as a suit by one entity, not by a conglomerate of individuals." *Id.* (citation and internal quotation marks omitted).

Also as in this case, Indemnity "resort[ed] to a series of extra-textual arguments and to a complicated analysis of the Complaint." *Id.* at 160. Among other things, it argued that the Rule 2152 action was a class action because it was a representative action on behalf of the real parties in interest. The Third Circuit rejected this argument as well, explaining that "[e]ven if this case were viewed as a suit by all of Exchange's members against Indemnity on Exchange's behalf, it would still bear little resemblance to a Rule 23 action." *Id.* at 161.

Procedural Background

In 2021, Exchange filed this case against Indemnity in Pennsylvania state trial court. The complaint alleges that Indemnity breached its fiduciary duty by charging an excessive management fee. It invokes Pennsylvania Rule 2152, which authorizes members of an association to bring suits in the name of the association as trustees ad litem, and, in the alternative, Rule 2177, which authorizes a corporation or similar entity to prosecute an action in its corporate name.

Indemnity removed the case to federal court based on two arguments: first, that the action is essentially a class action because Exchange stands in for a class of subscribers, and second, that the case is a continuation of an earlier-filed putative class action, *Stephenson v. Erie Indemnity*. The *Stephenson* case had also originated in state court and, on behalf of a class of Pennsylvania residents, alleged breach of fiduciary duty based on excessive fees. Indemnity had removed the case to federal court, and the plaintiffs subsequently had voluntarily dismissed it.

The district court granted Exchange's motion to remand, rejecting both of Indemnity's jurisdictional theories. Indemnity then petitioned for leave to appeal pursuant to 28 U.S.C. § 1453(c), which allows the courts of appeals to accept appeals of orders granting or denying a motion to remand a class action. The Third Circuit accepted the appeal, Pet. App. 33, but ruled against Indemnity. It held that the "District Court correctly determined that this case [is] neither a class action as that term is defined in CAFA nor a continuation of the voluntarily dismissed class action in *Stephenson*." *Id.* at 18–19.

To start, the court of appeals ruled that, under the 2013 precedent in *Erie I*, "this case is not a class action on its face." *Id.* at 8. And the court rejected Indemnity's assertion that decisions of this Court noting that CAFA is given a "liberal construction" undermine the conclusion that a Rule 2152 or 2177 action is not similar to a Federal Rule 23 class action. *Id.* at 9 (citing *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014)). Nonetheless, the court explained that it would "cut through any pleading artifice" to determine whether the case was "in substance an interstate class action." *Id.*

Acknowledging Indemnity's request that the court look outside the complaint to assess CAFA jurisdiction, the court noted that almost every case in which courts, including this Court, have done so involved factual inquiries. Here, the court continued, the issue was not factual, but the legal question "whether the Pennsylvania procedural rules governing Exchange's claim are similar to [Federal] Rule 23." *Id.* at 10. On that issue, the court stated, "there are no facts beyond the Complaint that could alter our conclusion that the relevant state rules are dissimilar to Rule 23 and that this case therefore falls beyond the scope of CAFA jurisdiction." *Id.* Responding to Indemnity's invocation of policy, the Third Circuit stated that "CAFA's text leaves no wiggle room." *Id.* at 11.

"Recognizing the challenge that it faces in characterizing this individual claim as a class action, Indemnity [had] a fallback position" on appeal. *Id.* at 12. It argued that this case was removable under CAFA because it was a continuation of *Stephenson*—the class action that had been dismissed. The Third Circuit rejected that argument as well. The court agreed with Indemnity that "events occurring subsequent to removal … do not oust the district court's jurisdiction once it has attached." *Id.* (omission in original; quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938)). And it assumed both that the rule applies to CAFA jurisdiction and that the district court had jurisdiction in *Stephenson*. *Id.* at 13. Nonetheless, it was clear to the court that "this case is not a continuation of *Stephenson*." *Id.* Rather, the court explained, "[i]t is hornbook law that a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if

the action had never been filed." *Id*. (citation and internal quotation marks omitted).

Although the court of appeals was "not blind" to the "overlap between this case and *Stephenson*," its disagreement with Indemnity's conclusion was firm: "[W]e are not prepared to essentially set aside a basic principle of Anglo-American law: that distinct cases filed by distinct plaintiffs deserve distinct judicial treatment." *Id*. at 18.

Indemnity's petition for rehearing was denied, with no judge calling for a vote. *Id*. at 31.

REASONS FOR DENYING THE WRIT

I. Indemnity's first question presented does not warrant review.

A. No appellate authority supports the position that an action under Rule 2152 or Rule 2177 is a class action under CAFA.

1. The courts of appeals agree on how to determine whether an action is a class action under CAFA.

CAFA's plain language limits federal jurisdiction over class actions under 28 U.S.C. § 1332(d) to actions filed under state laws or procedures that authorize actions to be brought "as … class action[s]" and that are "similar" to Rule 23. *Id*. § 1332(d)(1)(B). The courts of appeals that have addressed the issue agree that CAFA's language requires a comparison of the state statute or rule under which the action is brought to Rule 23 to determine whether the state procedure "closely resembles Rule 23 or is like Rule 23 in substance or in essentials." *West Virginia ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 174 (4th

Cir. 2011); *see Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 716 (8th Cir. 2023); *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 836–37 (6th Cir. 2020); *Baumann v. Chase Inv. Servs. Corp.,* 747 F.3d 1117, 1122–23 (9th Cir. 2014); *Erie I*, 722 F.3d at 156 (3d Cir.); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 216–17 (2d Cir. 2013); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012), *rev'd on other grounds*, 571 U.S. 161 (2014)[1]; *LG Display Co. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011); *see also Coquina Crossing Homeowners Ass'n v. MHC Operating Ltd. P'ship*, 2022 WL 843582, at *5–*8 (M.D. Fla. Mar. 22, 2022) (finding no CAFA jurisdiction in a case brought under a law authorizing a mobile homeowners' association, acting as a representative, to bring an action on behalf of all mobile homeowners in a park).

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[1] This Court in *Hood* held that a parens patriae action brought by a state attorney general is not a "mass action" subject to CAFA jurisdiction under 28 U.S.C. § 1332(d)(11). *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 164 (2014). That holding is not directly applicable here. In addition, however, the Fifth Circuit in *Hood* agreed with every other circuit to address the issue that a parens patriae action is not a "class action" under CAFA because it is not brought as such under a law or rule similar to Rule 23. *See* 701 F.3d at 799 (explaining that the action was brought under a statute that "does not require that suits brought by the State satisfy any requirements that resemble the adequacy, numerosity, commonality, and typicality requirements of class action lawsuits under Rule 23"). This Court did not disturb that holding, and the Fifth Circuit reaffirmed it on remand. *See Mississippi ex rel. Hood v. AU Optronics Corp.*, 559 F. App'x 375 (5th Cir. 2014) (per curiam) (holding that the original panel decision on the class action issue was "a proper holding" and remains valid and binding).

In each of these cases, the courts have held that cases brought under various state-law procedural mechanisms that are unlike Rule 23 in form and substance are not class actions, even when non-parties may ultimately share in any recovery. The courts of appeals have based their holdings on the dissimilarities between those actions—parens patriae actions, state-law private attorney general actions, and other types of state-law representative actions—and class actions, such as the absence of requirements of numerosity, commonality, typicality, adequacy of representation, and notice that characterize Rule 23 class actions.

The decisions of the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits on this issue are consistent not only in their method of analysis, but also in their conclusion: Actions brought under statutes that lack the essential characteristics of Rule 23 class actions are not class actions under section 1332(d)(1)(B). *See, e.g.*, *Nessel*, 954 F.3d at 833, 837 (holding that a "representative action" under the Michigan Consumer Protection Act that does not require a showing of "the core class action requirements of numerosity, commonality, typicality, and adequate representation" is not "similar" to Rule 23 for purposes of removal under CAFA).

2. An action under Rule 2152 or Rule 2177 is not a class action under CAFA.

Like every court of appeals to have addressed a similar question under CAFA, the Third Circuit in this case considered whether the state-law procedures at issue are similar in form or substance to Rule 23. Following the courts' uniform approach, the Third

Circuit correctly held, as explained above, *supra* pp. 7–8, that Rules 2152 and 2177 are not similar to Federal Rule 23: The Pennsylvania rules do not provide for class certification, do not require a showing of numerosity or commonality, do not address class notice, do not permit members to opt out, and do not provide for the appointment of a lead plaintiff or class counsel. *See Erie I*, 722 F.3d at 159; *see also Underwood*, 256 F.2d at 337 (stating that a claim on behalf of an unincorporated association may not be brought as a class action).

Dismissing the claims alleged as a "pleading artifice," Pet. 16, Indemnity says little about the two rules and nothing to explain how their procedures resemble those of Rule 23. Instead, Indemnity argues that a Rule 2152 or 2177 action is brought on behalf of unnamed "real parties in interest." *Id.* at 22, 25. But CAFA does not provide for federal jurisdiction over all representative actions or turn on whether nonparties are arguably the "real parties in interest." *Cf. Mississippi ex rel. Hood*, 571 U.S. at 173 (in the context of CAFA's mass action provision, stating "the provision of CAFA governing transfer motions confirms our view that the term 'plaintiffs' refers to actual named parties as opposed to unnamed real parties in interest"). It authorizes federal jurisdiction over civil actions filed under Federal Rule 23 or a "similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Pennsylvania has such a "similar" rule. *See* 231 Pa. Code, ch. 1700 (Rules of Civil Procedure 1701–1717). But this case was not brought under it. Rather, this case was brought under Rule 2152 or, in the alternative, 2177, which "contain[]

none of the defining characteristics" of a class action. *Erie I*, 722 F.3d at 158–59. "Far from 'authorizing an action to be brought by [a] representative person[] as a class,' 28 U.S.C. § 1332(d)(1)(B), Rule 2152 merely authorizes suits by representatives on behalf of an unincorporated association." *Id.* at 159 (emphasis omitted; alterations in original). And Rule 2177 says only that "[a]n action shall be prosecuted by or against a corporation or similar entity in its corporate name."[2]

3. The holding that this action is not a class action does not conflict with decisions of other courts of appeals or this Court.

The question whether a Pennsylvania Rule 2152 or Rule 2177 action has the characteristics of a Federal Rule 23 class action concerns a specific state law and implicates no disagreement among the lower courts. Indemnity cites no other appellate decision addressing whether a suit on behalf of an unincorporated association is a class action other than *Erie I*. Indemnity also does not describe the procedures of Rule 2152 or Rule 2177, and it does not discuss any of the court of appeals cases concerning representative

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[2] The petition incorrectly quotes the Wright & Miller treatise as support for the proposition that "Rule 23.2 confirms that representative lawsuits brought to benefit an unincorporated association's members … are 'proceeding[s] in the nature of a class action.'" Pet. 25 (alteration in original; quoting 7C Wright & Miller, *Fed. Prac. & Proc.* § 1861 (3d ed. Apr. 2023 Update)). Wright & Miller does say that "a proceeding in the nature of a class action by or against an unincorporated association is expressly made available in the federal courts under Rule 23.2." 7C Wright & Miller, *Fed. Prac. & Proc.* § 1861. It does *not* say, however, that other types of representative actions brought to benefit an association's members are class actions.

actions cited above. Nonetheless, Indemnity contends that the decision below conflicts with decisions of the Seventh and Eighth Circuits, as well as this Court's decision in *Standard Fire Insurance Co. v. Knowles*, 568 U.S. 588 (2013). That contention is wrong on all counts.

First, citing *Addison Automatics, Inc. v. Hartford Casualty Insurance Co.*, 731 F.3d 740 (7th Cir. 2013), Indemnity asserts that the Seventh Circuit and the Third Circuit disagree. In *Addison*, the plaintiff, while purporting to sue in its individual capacity, asserted insurance claims that had been assigned to the plaintiff "as class representative" to settle an earlier class action. *Id.* at 741. "The settlement made clear that Addison's status as assignee depended on its continuing role as class representative." *Id.* Addison had earlier sued as a class representative asserting the assigned claims; the defendant had removed the suit; and Addison had then dismissed it and filed a new suit in state court that omitted the class allegation. The court's holding that the case was removable, however, did "not depend" on that background. *Id.* at 744. Rather, the court held that the second case was removable because it, too, was a class action: The plaintiff "ha[d] standing to pursue relief … only in its capacity as class representative," and its claims were brought to secure the rights provided to the class in the earlier settlement. *Id.* at 742. Under these circumstances, the court held that "[b]y pursuing the rights assigned to it as class representative in the state court class action, Addison is necessarily continuing that class action." *Id.* at 743; *see id.* at 744 (stating that, on the facts of the case, Addison "remains the representative of a class that

was actually certified 'under Rule 23 or the state equivalent'").

Addison lends no support to Indemnity's argument here. *Addison* involved a class representative's assertion of claims belonging to class members, not the assertion of claims of an unincorporated association. And whereas in *Addison* the action was filed expressly in the plaintiff's capacity as a class representative to pursue rights assigned to it as the class representative in the earlier class action, this Rule 2152 or 2177 case has no comparable history. Moreover, in *Addison* the Seventh Circuit made clear that its "decision would [have been] the same even if Addison had not filed th[e] first complaint," *id.*, whereas here, Indemnity relies heavily on the earlier lawsuit to support its characterization of the claims asserted in this lawsuit as class claims.

Turning to the Eighth Circuit, Indemnity cites *Williams v. Employers Mutual Casualty Co.*, 845 F.3d 891 (8th Cir. 2017). Similar to *Addison*, the plaintiff in *Williams* had previously been designated a class representative, and brought a garnishment action in state court, expressly "as class representative," to collect on the judgment in the class action certified under Missouri Rule of Civil Procedure 52.08, the state analogue to Federal Rule 23. *Id.* at 895. The Eighth Circuit held that removal was proper. In rejecting the plaintiff's argument to the contrary, the court, without suggesting any disagreement, cited several court of appeals decisions holding that suits filed under "state statutes that allow a plaintiff to sue in a representative capacity, but are otherwise dissimilar to Rule 23" are not removable under CAFA. *Id.* at 900. Distinguishing those cases, the court explained that, in each of them, "the plaintiff cited

some rule or statute that purportedly allowed the plaintiff to proceed as the representative of a group of people, but that otherwise was not sufficiently similar to Rule 23 for purposes of CAFA." *Id.* Unlike the statutes or rules at issue in those cases, the court explained, Missouri's equitable garnishment statute does not authorize a plaintiff to bring suit on behalf of others. "Rather, it is clear from the pleadings that Williams can bring this case only because of her status as the representative of the class certified under Rule 52.08, an undisputed analogue of Rule 23." *Id.*; *id.* at 901 ("[A]lthough the complaint omits reference to Rule 52.08, it is clear from the face of the complaint that Rule 52.08 is the precise rule under which Williams proceeds in her effort to enforce the judgment obtained for the benefit of the class.").

Williams poses no conflict with the Third Circuit's decision in this Rule 2152 or 2177 action. Unlike the garnishment state at issue in *Williams*, Rules 2152 and 2177 are among those "state statutes that allow a plaintiff to sue in a representative capacity, but are otherwise dissimilar to Rule 23." *Id.* at 900. In fact, the earlier Third Circuit decision holding that a Rule 2152 action is not removable under CAFA, *Erie I*, 722 F.3d at 158–59, is among those cases expressly distinguished by, not disagreed with by, the Eighth Circuit. *See Williams*, 845 F.3d at 899–900.

Likewise, the decision below is not inconsistent with *Standard Fire*. In fact, the Third Circuit quoted the same points from that opinion as does the petition. *Compare* Pet. App. 9, 11, *with* Pet. 15. In *Standard Fire*, this Court held that a named plaintiff in a purported class action could not use a stipulation to keep the amount in controversy under CAFA's jurisdictional minimum, because "a plaintiff who files

a proposed class action cannot legally bind members of the proposed class before the class is certified." 568 U.S. at 593. The case did not concern (or address) the proposition, plain on the face of CAFA and on which the courts of appeals agree, *see supra* I.A.1, that state-law representative actions are removable under CAFA only when their procedures resemble the procedures of Rule 23.

Nonetheless, Indemnity argues that the complaint in this case uses "creative labeling" to avoid CAFA jurisdiction and that such "artifice[]" runs counter to *Standard Fire*'s comment that it would "exalt form over substance" to hold that a court cannot consider the possibility that a non-binding stipulation as to the amount in controversy may not survive class certification. Pet. 15; *see* Pet. i, 1, 2, 3, 13, 20, 25 (repeating the "form over substance" mantra). To begin with, to the extent that a member of Exchange wished to assert the association's rights, there is nothing "creative" about doing so using Rule 2152 (or, in the alternative, Rule 2177), which is the proper means of doing so under Pennsylvania law. *See Underwood*, 256 F.2d at 337 (stating that, under Pennsylvania law, a suit by an unincorporated association may not be maintained as a class action, but instead must be brought on behalf of the unincorporated association itself).

Furthermore, neither *Standard Fire*'s reference to "form over substance" nor the opinion more generally draws into question the many cases holding that, under CAFA, state-law mechanisms for representative actions are removable only when their procedures resemble the procedures of Rule 23. And the Third Circuit's recognition that it was "bound by Congress's decision to limit CAFA jurisdiction to cases filed under

state procedural rules similar to Rule 23," Pet. App. 12, is not inconsistent with any aspect of *Standard Fire*.

Purporting not to see a distinction between "legal" and "factual" issues, Pet. 19, Indemnity asserts that the decision below creates an "exception" to *Standard Fire* by holding that, in considering CAFA jurisdiction, it would look outside the complaint as to factual predicates, but not legal requirements. *Id.* at 18 (citing Pet. App. 10). Indemnity complains that a factual/legal distinction is "nowhere in" the *Standard Fire* opinion. *Id*. What the Third Circuit said on this point, after noting that "the overwhelming majority of CAFA cases in which courts have looked beyond the four corners of the complaint have turned on CAFA's amount in controversy requirement—a quintessentially factual inquiry," Pet. App. 10, was this:

> But the primary obstacle preventing *this* case from falling within CAFA's definition of a class action is a quintessentially legal requirement: whether the Pennsylvania procedural rules governing Exchange's claim are similar to Rule 23. Search as we might, there are no facts beyond the Complaint that could alter our conclusion that the relevant state rules are dissimilar to Rule 23 and that this case therefore falls beyond the scope of CAFA jurisdiction.

Id.; *see id*. at 10–11 (quoting *Erie I*, 722 F.3d at 160, for the point that "[n]o amount of piercing the pleadings will change the statute or rule under which the case is filed"). To be sure, Indemnity vigorously disagrees with the court's conclusion, but the court's conclusion in no way disagrees with *Standard Fire*.

Indemnity also contends that the decision below is inconsistent with *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), where the court looked outside the complaints to determine the amount in controversy. *See* Pet. 21. There, after initially filing a single class action, the plaintiffs "divide[d] the suit into five separate suits, each covering a successive six-month time period," and each seeking in damages an amount just under CAFA's $5 million threshold. *Freeman*, 551 F.3d at 407. The Sixth Circuit held that the cases were properly removed and consolidated, where the plaintiffs' counsel agreed that the only reason for breaking one class action into five class actions was to seek more than $5 million while also avoiding CAFA's amount-in-controversy threshold. *Id.* at 407–08. As the Third Circuit correctly noted, the amount in controversy is "a quintessentially factual inquiry." Pet. App. 10. In addition, in contrast to this case, it was undisputed in *Freeman* that the cases, filed as class actions, satisfied CAFA's prerequisite that removable actions be "filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure." 28 U.S.C. § 1332(d)(1)(B). Here, that prerequisite is not satisfied.

Finally, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015), on which Indemnity relies, Pet. 22, has nothing at all to do with the issue here. There, a plaintiff sued an entity, OBB, that qualified as a foreign state for purposes of the Foreign Sovereign Immunities Act, in connection with injuries she incurred when trying to board a train in Austria. She argued that the commercial activity exception to the Act applied because she had purchased her Eurail

pass in the United States. This Court, though, found "nothing wrongful about the sale of the Eurail pass standing alone." *OBB*, 577 U.S. at 35. And accordingly, it held that she could not recast her personal injury claim based on unsafe conditions at the Austrian train station into a claim about the sale of the Eurail pass in the United States, in order to create jurisdiction that the federal courts otherwise did not have. *Id*. at 36.

Here, Indemnity does not argue that Exchange's complaint relies on a "feint of language" with respect to its substantive claim. Pet. 21 (quoting *OBB*, 577 U.S. at 36). It argues that the procedural devices invoked by Exchange, Rule 2152 or Rule 2177, are similar to a Federal Rule 23 class action for purposes of CAFA. *See* Pet. 22 (asserting that "[t]his case is and always has been a class action"). Whether that is so turns on the characteristics of a Rule 2152 or Rule 2177 action. And on that issue, Indemnity says little other than to assert that both a class action and actions under those Rules action are brought by a "small group" to represent a "larger" one. Pet. 25. Again, however, a Rule 2152 action is brought on behalf of an unincorporated association, not a group. And Rule 2177 addresses suit by "a corporation or similar entity in its corporate name," not by a group. In addition, CAFA does not apply to *all* representative actions. *See supra* I.A.1. It applies only to a "civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). Neither *OBB* nor any other decision of this Court or the courts of appeals suggests

any flaw in the Third Circuit's holding that this case is not such as action.

B. Indemnity's view that this case cannot be pursued via Rule 2152 or 2177 does not render the case a class action and further supports denial of the petition.

Because an action under Pennsylvania Rule 2152 or 2177 is not similar to a Federal Rule 23 class action, CAFA plays no role in this case. Indemnity, however, also argues that Exchange's decision to plead its case under those rules should be overlooked because claims brought under Rules 2152 and 2177 are "pleading artifices," Pet. 14, or because this case is not a proper Rule 2152 or 2177 action, *id*. 11 n.2 (asserting that the Rules are not "viable here").

To start, the state rules are not "artifices" to bypass class actions, let alone avoid federal jurisdiction over them. The Pennsylvania legislature enacted Rule 2152 in 1939 and amended it only once, in 1975. *See* 231 Pa. Code § 2152. It enacted Rule 2177 in 1943 and amended it once, also in 1975. *See id*. § 2177. Indemnity may not approve of the mechanisms, but its disapproval offers no more basis for rejecting the Pennsylvania legislature's choice to enact Rules 2152 and 2177 than for rejecting its choice later to enact Rules of Civil Procedure that, when applicable, provide for class actions under procedures similar to Federal Rule 23. *See* 231 Pa. Code, ch. 1700 (1977).

As for Indemnity's questioning the viability of this action under Rule 2152 or 2177, that question is not relevant to the question of CAFA jurisdiction. Although not fully explained, Indemnity's theory seems to be that this case is properly deemed a class action because (in its view) neither Rule 2152 nor Rule

2177 is a "viable" approach. Pet. 11 n.2. But as the Third Circuit said when Indemnity challenged the use of Rule 2152 in 2013, "[i]f the case is procedurally unsound under Pennsylvania's rules, the Commonwealth's courts are best suited to correct the problem." *Erie I*, 722 F.3d at 159. Indemnity thus errs in asking to "rewrite the Complaint to create jurisdiction under the pretense of correcting a state-law error." *Id.* Indeed, Indemnity's skepticism about the Rules' applicability here thus highlights that this case does not warrant review in this Court.

Furthermore, if Indemnity believes that both Rule 2152 and Rule 2177 are unavailable to Exchange, the proper avenue for raising that argument would be a preliminary objection in state court. If the state court agreed with Indemnity, it would uphold the objection and dismiss the case. If it did not agree, this case would proceed under one of those rules. Either way, however, *this* case would not proceed as a class action.

Finally, Indemnity, in both this case and *Erie I*, sought to remove a Rule 2152 action under CAFA. However, a Westlaw search does not show any party in any other case suggesting that a Rule 2152 or Rule 2177 action is removable under CAFA. That fact, as well as the fact that Rule 2152 actions are infrequent, underscores that this case does not warrant review.

II. The second question stated in the petition is not presented in this case.

The second question stated in Indemnity's petition is whether "plaintiffs can destroy vested federal CAFA jurisdiction by voluntarily dismissing and then refiling an amended version of their complaint." Pet. ii. That question is not presented in this case, because

the complaint in *this* case is *not* an amendment to a complaint. It is a new lawsuit, by a new plaintiff.

Indemnity seeks to analogize the facts here to cases concerning post-removal amendments to complaints. Pet. 26–28. Those cases are inapposite because, again, Exchange's complaint is not an amendment, *see* Pet. App. 93, and none of the cases concern a new complaint filed by a new plaintiff asserting non-removable claims. Thus, as the Third Circuit stated, Indemnity's approach would require courts to "set aside a basic principle of Anglo-American law: that distinct cases filed by distinct plaintiffs deserve distinct judicial treatment." *Id.* at 18.

Moreover, Indemnity's forum-manipulation concerns, Pet. 26, cannot create subject-matter jurisdiction. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (explaining that "no action of the parties can confer" jurisdiction because "principles of estoppel do not apply" to the question whether jurisdiction exists); *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17–18 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties."). Likewise, purported concern about "forum-shopping" is both irrelevant to the jurisdictional issue and unwarranted in any event: Notably, although invoking that buzzword, Indemnity offers no support for the far-fetched assertion that the decision below and the 2013 decision in *Erie I*, specific to Pennsylvania Rule 2152, have caused plaintiffs to "flock[] to the state courts of Pennsylvania, Delaware, and New Jersey." Pet. 34.

In sum, Indemnity cites no authority that supports the proposition that a federal court can properly exercise subject-matter jurisdiction over a case that, standing alone, does not provide any basis for federal subject-matter jurisdiction, solely because the court had jurisdiction over an earlier case concerning similar facts. *Cf. Erie I*, 722 F.3d at 162 ("We are not permitted, by CAFA or otherwise, to hold that the subsequent filing of a lawsuit may create subject matter jurisdiction over a previously filed suit, where no jurisdiction existed in the first place."). No case stands for that remarkable proposition. There is no conflict on the question. And there is no reason for this Court's review to consider it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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