No. 13-719

IN THE

Supreme Court of the United States

DART CHEROKEE BASIN OPERATING CO., LLC, *ET AL.*,

Petitioners,

v.

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

Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

July 2014

QUESTION PRESENTED

Whether this Court has jurisdiction to review the merits of the district court's remand order on a writ of certiorari to the court of appeals, when the court of appeals exercised its discretion to deny petitioner leave to appeal under 28 U.S.C. § 1453(c) and no basis has been shown for setting that decision aside.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in litigation over the use and misuse of class action procedures, and its lawyers have filed briefs on behalf of parties or amici curiae in many such cases.[2] Public Citizen also has an interest in the proper construction of statutory provisions defining and limiting the jurisdiction of federal trial and appellate courts, including this Court. Public Citizen attorneys have frequently represented parties or amici before this Court in cases involving significant issues of federal jurisdiction, including questions of original, removal, and appellate jurisdiction.[3]

---

[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

[2] *See*, *e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013); *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

[3] *See*, *e.g.*, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Will v. Hallock*, 546 U.S. 345 (2006).

These interests converge in cases involving removal jurisdiction under the Class Action Fairness Act (CAFA), and Public Citizen has submitted amicus briefs in this Court's previous ventures into that area. *See Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

Public Citizen submits this brief because the parties in this case, like the parties in *Standard Fire*, appear to have overlooked or given short shrift to a significant threshold issue of jurisdiction: whether this Court may review the merits of a district court's decision to remand to state court a case removed under CAFA when the court of appeals, exercising its discretion under 28 U.S.C. § 1453(c), has denied permission to appeal that decision. Because a proper resolution of this case requires determination of this threshold question, and because the issue has not been adequately addressed by the parties, Public Citizen believes that this amicus brief will assist the Court in determining what issues are properly before it in this case and correctly disposing of them.

STATEMENT

1. CAFA's Provision for Permissive Appeals of Remand Orders—Federal law provides for removal to federal court of many, but not all, cases filed in state courts over which the federal courts possess original subject matter jurisdiction. *See* 28 U.S.C. §§ 1441–1445. Federal courts are required to remand removed cases to state court if they find that they lack subject matter jurisdiction or if removal was procedurally defective. In most cases, 28 U.S.C. § 1447(d) forecloses review of such a remand "on appeal or otherwise." *See Kircher v. Putnam Funds Trust*, 547 U.S.

at 640. That prohibition on review of a district court's remand order applies to this Court as well as to the courts of appeals. *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 466–67 (1947) ("An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here.").

In enacting CAFA, Congress not only expanded the scope of the federal courts' original and removal jurisdiction over class actions involving state-law claims and parties with minimal diversity of citizenship, *see* 28 U.S.C. §§ 1332(d), 1453(b), but also altered the availability of appellate review for decisions remanding cases removed under CAFA. Congress did not, however, make CAFA remand orders appealable as a matter of right. Rather, CAFA provides that, with one exception, "[s]ection 1447"—which includes the general prohibition on appellate review of remands—"shall apply to any removal of a case under this section." *Id*. § 1453(c)(1). The one exception to § 1447's applicability is "that 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 if application is made to the court of appeals not more than 10 days after entry of the order." *Id.* (emphasis added). Thus, under the statute's plain language, absent permission from the court of appeals, which triggers the exception to § 1447's application, appellate review of a remand order remains barred by § 1447(d).

2. The Denial of Permission to Appeal in This Case—In this case, the district court remanded

a class action removed under CAFA "for lack of subject matter jurisdiction." Pet. App. 28a. The district court based its ruling in large part on its understanding that Tenth Circuit precedent requires a court to consider only facts set forth in the notice of removal to determine subject matter jurisdiction when the existence of federal jurisdiction is not evident on the face of the plaintiff's complaint. Pet. App. 26a–27a. The court's order is unclear about whether the flaw the court saw in the removal notice was the failure to *allege* a non-conclusory factual basis for jurisdiction or the failure to attach all the *evidence* that the removing party would rely upon to meet its burden of proving the existence of jurisdiction under the applicable preponderance standard.[4] That ambiguity is reflected in the court's statement of its holding that it lacked subject matter jurisdiction because "[t]he jurisdictional facts alleged in the Petition and Notice of Removal do not show by a preponderance of the evidence that the amount in controversy exceeds $5 million," as required for CAFA diversity jurisdiction. Pet. App. 28a; *see* 28 U.S.C. § 1332(d)(2).

Regardless of its reasoning, such a jurisdictional remand order in a non-CAFA case would not be "reviewable on appeal or otherwise" by virtue of § 1447(d). *See Kircher*, 547 U.S. at 640–42. Seeking to avail itself of CAFA's exception to that bar on appel-

---

[4] *Compare id*. at 27a (stating that the removing party was "obligated to *allege* all necessary jurisdictional facts in the notice of removal" but had failed to "*allege* all of these facts" in the notice) (emphasis added), *with id*. at 26a (stating that "reference to factual allegations *or evidence* outside of the petition and notice of removal is not permitted to determine the amount in controversy") (emphasis added).

late review, Dart Cherokee Basin Operating Co., the class action defendant that had removed the case, filed a timely petition for permission to appeal to the Tenth Circuit. A divided panel of the court denied permission to appeal without explanation, saying only that the court had acted "[u]pon careful consideration of the parties' submissions, as well as the applicable law." Pet. App. 13a.

Dart Cherokee sought en banc rehearing of the denial of permission to appeal, but the court denied the petition by an evenly divided vote of the court's then eight unrecused active judges. Pet. App. 1a–2a. (Two judges were recused, and two more have subsequently joined the court.) The four judges who voted to deny the petition did not explain their decision, but the four who would have granted it filed a dissent arguing that the district court's decision was consistent with neither Tenth Circuit precedent nor the removal statute, and that the court of appeals should have granted permission to appeal to clarify the law. Pet. App. 2a–12a.

Dart Cherokee then filed a petition for a writ of certiorari asking this Court to review the merits of the underlying remand order, but not the propriety of the Tenth Circuit's refusal to allow the appeal. The petition posed only the question "[w]hether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal," Pet. i, and did not argue that the denial of leave to appeal was error. The brief in opposition joined issue on whether the district court's decision (which it equated throughout with "the Tenth Circuit Rule," *see* Br. in Opp. 8, 15, 17, 18, 23, 25, 26, 34) was correct and whether it merited review, with-

out pointing out that, absent some grounds for overturning the court of appeals' denial of leave to appeal, the merits of the district court's decision were not subject to appellate review. *See* Br. in Opp. 1–35.

The parties' merits briefs are likewise devoted to arguing the correctness of the district court's decision, with no argument about whether the court of appeals abused its discretion or otherwise erred in denying leave to appeal, and only a passing nod by Dart Cherokee to the question whether this Court has jurisdiction to review the district court's order. Pet. Br. 1. ("The Court has jurisdiction under 28 U.S.C. § 1254(1). *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Hohn v. United States*, 524 U.S. 236, 242 (1998).").

SUMMARY OF ARGUMENT

Both parties ask this Court to decide an issue that is not properly before it. This Court's certiorari jurisdiction extends only to cases "in the courts of appeals." 28 U.S.C. § 1254. Under the terms of CAFA's removal provision and governing precedents of this Court, the only matter "in" the court of appeals on an application for permission to appeal is whether permission should be granted. Absent grounds for reversing the court of appeals' decision to deny permission to appeal, the merits of the district court's decision are not before any appellate court, including this one.

Dart Cherokee's reliance on *Standard Fire* to support its bald assertion that this Court has jurisdiction to address the merits of the district court's decision is wholly misplaced: *Standard Fire* did not address the issue of the existence or scope of this Court's jurisdiction to review district court remand orders in the face of a court of appeals' denial of leave to appeal, and it

therefore has no precedential weight with respect to jurisdiction.

As for *Hohn*, it stands decisively against Dart Cherokee's claim that the merits of the district court's decision are before this Court. *Hohn* held that when a court of appeals denies leave to appeal, the reviewable "case" that is "in the court of appeals" is the request for leave to appeal, not the merits of the appeal. Although the denial of leave to appeal is reviewable by this Court on a writ of certiorari, the only issue in the case is whether the court of appeals erred in denying leave to appeal; the request for leave to appeal by itself does not place the merits "in" the court of appeals or within this Court's certiorari jurisdiction.

Thus, the only question properly before the Court in this case is whether the court of appeals abused its discretion when it denied leave to appeal. If it did not, then the district court's remand order remains unreviewable by any court. Moreover, showing that the court of appeals erred in denying leave to appeal must require more than demonstrating that the *district court* erred, for if a court of appeals were required to grant leave to appeal whenever a district court erred, then it would no longer have discretion over whether to permit an appeal: To determine whether there was an error that required it to allow the appeal, it would have to decide the merits. Such an approach would transform the permissive appeal afforded by CAFA into an appeal as a matter of right.

In this case, there is no proper basis for finding that the court of appeals abused its discretion in denying permission to appeal. There is no indication that the Tenth Circuit based its denial of leave on an in-

correct legal ruling (or on any legal ruling at all), on a clearly erroneous view of the facts, or on consideration of improper factors. Given the breadth of a court of appeals' discretion to deny a permissive appeal, the court of appeals could have denied review for any number of legitimate reasons.

Perhaps more importantly, the parties to this case have devoted no attention to the question whether the court of appeals abused its discretion. Indeed, Dart Cherokee has not attempted to demonstrate that the denial of permission to appeal was a reversible error under any standard of review. As a result, this court has received no briefing on what factors should guide a court of appeals' exercise of discretion to hear CAFA appeals, what considerations are improper or indicative of abuse of discretion, whether a court of appeals has a duty to explain its decision to deny leave to appeal, or how, if at all, this Court may review a court of appeals' exercise of discretion when the court provided no explanation. Nor, of course, have the parties attempted to relate these considerations to the question whether, in the circumstances of this case, the court of appeals' order constitutes an abuse of discretion.

In light of the parties' failure to address these key matters, all of which are essential to any thoughtful consideration of the sole issue within the Court's jurisdiction, the Court has no basis for concluding that the court of appeals' denial of leave to appeal was an abuse of discretion. The Court should, therefore, either affirm the denial of leave to appeal on the ground that Dart Cherokee has not shown it to be improper or dismiss the writ as improvidently granted.

ARGUMENT

I. The Court Must Begin by Determining the Scope of Its Jurisdiction.

Like any federal court, this Court has "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Accordingly, even when the parties do not dispute the Court's jurisdiction, this Court "bear[s] an independent obligation to assure [itself] that jurisdiction is proper." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

Here, this Court's jurisdiction depends on 28 U.S.C. § 1254, which provides certiorari jurisdiction to review "[c]ases in the courts of appeals." Because the statute makes this Court's jurisdiction contingent on the existence and scope of the courts of appeals' jurisdiction, this Court has often recognized that it must resolve issues concerning a court of appeals' jurisdiction before reaching merits issues. *See*, *e.g.*, *Will v. Hallock*, 546 U.S. at 349; *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982). When such issues come to its attention, the Court is obligated to address them even if they are not raised by a party. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *United States v. Storer Broad. Co.*, 351 U.S. 192, 197 (1956). In such cases, what was "properly 'in' the Court of Appeals" is a "threshold question" that the Court must address before reaching the merits. *United States v. Nixon*, 418 U.S. 683, 690 (1974).

Contrary to Dart Cherokee's assertion, *Standard Fire* is not precedent for the view that the Court has jurisdiction to review CAFA remand orders following

a court of appeals' denial of leave to appeal because the decision neither considered nor addressed that issue. In *Standard Fire*, as here, a district court had remanded a case removed under CAFA, ruling that it lacked jurisdiction because the amount-in-controversy requirement had not been met, and the court of appeals had denied permission to appeal without expressing any view on the merits of the district court's decision. *See Knowles v. Standard Fire Ins. Co.*, 2012 WL 3828891 (8th Cir. Jan. 4, 2012), *reh'g en banc denied*, 2012 WL 3828845 (8th Cir. Mar. 1, 2012). This Court granted certiorari and reversed the district court on the merits of its remand order, but, as in this case, the parties did not argue that this Court lacked jurisdiction to address the merits without first considering the propriety of the court of appeals' denial of permission to review. As a result, this Court's opinion nowhere addressed that question.[5] Rather, although noting that the court of appeals had exercised its statutory discretion to decline review, the Court proceeded to review the merits of the district court's remand order without considering any jurisdictional impediments to doing so. *See* 133 S. Ct. at 1348.

---

[5] The respondent's brief in opposition in *Standard Fire* pointed out that the Eighth Circuit had not decided the merits, but did not suggest that the merits of the district court's order were not properly before this Court on a writ of certiorari; the brief argued only that the issue was not worthy of this Court's attention absent an appellate decision. *See* Br. in Opp. 6–8, *Standard Fire* (No. 11-1450). Public Citizen's amicus brief on the merits also did not address the issue of the effect of the denial of permission to appeal on this Court's jurisdiction, as we, too, overlooked the question.

This Court has long recognized that decisions that address the merits without considering and ruling on jurisdictional impediments are not precedents on the issue of jurisdiction: "the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *see also*, *e.g.*, *FEC v. NRA Political Victory Fund,* 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952). *Standard Fire* thus "does not stand for the proposition that no [jurisdictional] defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448–49 (2011). "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [it]." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974).

II. The Court's Jurisdiction Over This Case Is Limited to the Question Whether the Tenth Circuit Properly Denied the Application for Permission to Appeal.

Because *Standard Fire* does not resolve the issue, this Court must determine at the outset what case was "in the court of appeals" within the meaning of 28 U.S.C. § 1254 to identify what issues, if any, are properly before it on a writ of certiorari to that court. That determination requires consideration of the statutory authority for appellate consideration of remand orders under CAFA.

A. A federal court of appeals may obtain jurisdiction to hear an order remanding a class action under CAFA by "accept[ing]" the appeal on an application to review the remand order under § 1453(c)(1). If the court of appeals accepts the appeal, the merits of the

remand order are "in the court of appeals," and this Court can subsequently grant certiorari to consider the merits as well. *See Hertz Corp. v. Friend*, 559 U.S. 77, 83 (2010). If, however, the court of appeals denies the application, the merits of the district court's remand order are never before the appellate court, and appellate review of the remand order remains prohibited by § 1447(d). In that circumstance, the only "case" in the court of appeals is the request for review, and the only issue properly subject to review by this Court under § 1254 is the propriety of the court of appeals' resolution of that case—that is, its denial of the application. The merits of the district court's remand decision, by contrast, were never "in the court of appeals" because the court of appeals did not allow them in.

These propositions follow directly from *Hohn v. United States,* 524 U.S. 236, this Court's most robust engagement with what constitutes a case "in" the court of appeals under § 1254. *Hohn* concerned the habeas corpus statute's requirement that a habeas petitioner obtain a "certificate of appealability," or "COA," before he may appeal a district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1)(B). In *Hohn*, a judge of the court of appeals had denied a COA on the ground that the petitioner had failed to make the required "substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and the issue before this Court was whether that threshold determination as to whether to allow an appeal was reviewable by the Court under § 1254.

This Court held that it had jurisdiction to consider that limited issue because "Hohn's application for a certificate of appealability constitutes a case under

§ 1254(1)." 524 U.S. at 241. In filing that application with the appellate court, Hohn had placed "[t]he dispute over [his] *entitlement to a certificate*" in the court of appeals and, through § 1254, before the Court once it granted certiorari. *Id.* (emphasis added). Thus, the Court had jurisdiction to consider, not the underlying merits of the habeas petition, but only the "threshold jurisdictional inquir[y]" whether the court of appeals should have granted a COA and allowed an appeal of the merits. *Id*. at 249.

This Court's decisions following *Hohn* make clear the filing of an application for a COA does not itself place the underlying merits dispute in the court of appeals and does not allow this Court to skip over the question whether a COA should have issued and proceed directly to the merits. Rather, as the Court has emphasized, "until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Thus, this Court's review of the denial of a COA "is not the occasion for a ruling on the merit of [a] petitioner's claim," even though appealability in the habeas context depends on whether a claim is substantial, a determination that obviously requires a preliminary assessment of the merits. *Id*. at 331. Indeed, "the statute forbids" an appellate court to "sidestep[]" the process by deciding the merits without first determining whether a COA may issue. *Id*. at 336; *see also id*. at 342. Accordingly, in *Miller-El*, this Court ruled only on whether the court of appeals erred in denying a COA, and remanded for the court of appeals to decide the merits of the appeal when it determined that the court had erred. Only after the court of appeals affirmed the denial of the petition on the merits did this Court take up the

merits and hold that the petitioner was entitled to habeas relief. *See Miller-El v. Dretke*, 545 U.S. 231, 235 (2005).

Similarly, in *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court considered only legal issues posed by the denial of a COA, not the merits of the habeas petitioner's claim. *See id*. at 485. As the Court pointed out in *Slack*, the holding of *Hohn* was that the Court has "statutory certiorari jurisdiction *to review the denial of a COA*." *Id*. at 482 (emphasis added). As *Hohn*, *Miller-El*, and *Slack* illustrate, jurisdiction to review that question is not the same as jurisdiction to decide the underlying merits.

If the filing of an application for a COA by itself placed both the entitlement to such a certificate and the merits of the underlying appeal "in" the circuit court, this Court could grant certiorari to consider the merits without determining whether the standards for a COA had been met, thus "sidestep[ping]" § 2253(c). *Miller-El*, 537 U.S. at 336. This Court could then use its certiorari power to hear "cases in the courts of appeals" to decide suits which Congress intended to keep *out* of the courts of appeals. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) ("Congress intended the COA process … to further limit the courts of appeals' jurisdiction over habeas appeals.").

Thus, *Hohn* and its progeny do not suggest that this Court may consider the merits of an appeal without first determining whether that appeal was properly "in" the appellate court. To the contrary, they confirm that considering the propriety of the court of appeals' decision not to accept an appeal is a prerequisite to consideration of the merits.

This Court's consideration of cases in which courts of appeals have held they lack jurisdiction to hear an appeal under 28 U.S.C. § 1291 because of the absence of a final judgment demonstrates the same point. In such instances, a case was "in the court of appeals," making review proper under § 1254, but the issue presented by such a case is whether the court of appeals correctly determined that it lacked jurisdiction. The "case" before the court of appeals did not comprehend the merits of the nonappealable order, and this Court cannot leapfrog the threshold jurisdictional issue to decide the underlying merits.

If this Court determines, in such a case, that a court of appeals correctly refused to accept jurisdiction of an appeal, the Court's inquiry ends: It cannot proceed further to address the merits of the issue that was not before the court of appeals, but must affirm. *See*, *e.g.*, *Johnson v. Jones*, 515 U.S. 304, 320 (1995). Conversely, if the court of appeals has incorrectly *asserted* jurisdiction over an appeal, the propriety of the appeal itself presents a "case in the court of appeals" over which this Court has certiorari jurisdiction under § 1254, but the determination that the court of appeals lacked jurisdiction requires vacatur or reversal of the lower court's decision without consideration of the merits of the issue, which itself was never *properly* "in" the court of appeals. *See*, *e.g.*, *Will v. Hallock*, 546 U.S. at 355; *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723–24 (1977).

B. Application of these principles here shows that, although Dart Cherokee is correct in asserting that 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 un-

der § 1254, Dart Cherokee is fundamentally wrong about the nature of that case and the issues it presents. The case in the court of appeals was the application for permission to appeal, and the issue that the case presents here is whether the denial of permission was reversible error. If the denial of permission was not error, then, the merits of the district court's remand order are not, and have never been, "in" the court of appeals and, therefore, are not properly before this Court.

This conclusion not only flows from the logic of *Hohn*, but is also strongly reinforced by a consideration not present in that case: §1447(d)'s bar to any review of a district court's remand order, which by the terms of § 1453(c)(1) applies to CAFA cases *except* when the court of appeals "accept[s] an appeal." Reviewing the correctness of the district court's remand order in the face of a proper exercise of the court of appeals' discretion *not* to accept an appeal would violate the command of § 1447(d), which applies to this Court as much as to the courts of appeals. *Flowers*, 330 U.S. at 466–67.[6]

---

[6] Section 1447(d) also precludes the possibility that the Court could review the remand order via a common-law writ of certiorari and thus bypass the question whether the merits of the order were "in the court of appeals" under § 1254. By its plain terms, § 1447(d)—which, as discussed above, remains applicable absent permission to appeal from the court of appeals—bars review of district court remand orders through common-law writs as well as appeal. *See*, *e.g.*, *Gravitt*, 430 U.S. at 723. Common-law certiorari, moreover, generally "may not be used as a substitute for an authorized appeal," and is "not permissible" where a statute forecloses or limits review. *U.S. Alkali Exp. Ass'n v. United States*, 325 U.S. 196, 203 (1945). Thus, this Court has "rejected use of the all writs provision to enable the Court to review a low-

(*Footnote continued*)

If this Court were to determine that a court of appeals was somehow *required* to exercise its discretion to accept an appeal in a particular case, it arguably would have *discretion*, in exceptional circumstances, to proceed to consider the merits without first remanding to the court of appeals. *See*, *e.g.*, *Nixon v. Fitzgerald*, 457 U.S. at 744–58 (deciding merits of former president's claim of absolute immunity after first holding that the court of appeals erred in dismissing the appeal under 28 U.S.C. § 1291). Addressing the merits issues in such a case would be comparable to issuing a writ of certiorari before judgment in the court of appeals: This Court's holding that the court of appeals erred in declining to hear the appeal would mean that the appeal itself was properly in the court of appeals, providing this Court with jurisdiction over that "case" even though the court of appeals had not yet ruled on its merits.

This Court's rules make clear, however, that granting certiorari before judgment is appropriate "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. More typically, because the Court values "the benefit of thorough lower court opinions to guide [its] analysis of the merits," and generally "do[es] not decide in the first instance issues not decided below," the Court will "remand for resolution of any claims the lower courts' error prevented them from addressing" when it has

---

er court's determination where jurisdiction did not lie under an express statutory provision." *Pa. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985).

"reverse[d] on a threshold question." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (internal quotation marks and citations omitted). In any event, however, the choice of proceeding or remanding would not arise unless this Court first decided the sole issue properly within its jurisdiction in the first instance: whether the court of appeals erred in refusing to accept the appeal.

III. Whether the Court of Appeals Abused Its Discretion in Denying Review Is a Different Question from Whether the District Court Erred in Remanding.

Unlike the availability of a COA in a habeas case, which turns to a significant degree on a legal determination that can be reviewed de novo by this Court, whether to permit an appeal of a CAFA remand order is a wholly discretionary determination subject to review only for abuse of discretion. Section 1453(c) provides that a court of appeals "may accept an appeal" from a remand order in a CAFA case. "The word 'may' clearly connotes discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). And the Senate Report accompanying CAFA's enactment confirms what the statute's language makes clear: The statute "provides discretionary appellate review of remand orders." S. Rep. No. 109-14, at 49 (2005).

Moreover, § 1453(c)'s permissive language echoes that of 28 U.S.C. § 1292(b), which provides that when a district court certifies that an interlocutory order is appropriate for immediate appeal, the court of appeals "may thereupon, in its discretion, permit an appeal" if a party makes a timely application for permission. This Court has long recognized that permission to appeal under § 1292(b) is committed to the discretion of

the courts of appeals. *See*, *e.g.*, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 n.9 (1994); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

As this Court recently reiterated, "decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744 (2014) (internal quotation marks and citation omitted). Whether a court of appeals abused its discretion in declining to permit an appeal is a fundamentally different decision from whether a district court erred as a matter of law in concluding that it lacked jurisdiction and remanding a case.

To be sure, application of an abuse of discretion standard may, in some cases, involve consideration of issues of law. *See id*. at 1749. In particular, a court would "necessarily abuse its discretion [by] bas[ing] its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, if a court of appeals states that its decision to deny permission to appeal is based on the resolution of a legal issue, this Court may decide that legal issue in determining the propriety of the court of appeals' denial of leave to appeal. For example, in *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972), this Court reviewed (and affirmed on the merits) a court of appeals' ruling that a discretionary appeal under § 1292(b) was barred in a government civil antitrust case by another statute, the Expediting Act of 1903. *Id.* at 410–11.

Likewise, if a court of appeals were to deny permission to appeal on the stated ground that the decision of the district court was *correct on the merits*, that issue also would be properly within the scope of

this Court's certiorari jurisdiction over the case decided by the court of appeals. For example, in *Pearson Education, Inc. v. Liu*, the Second Circuit denied leave for an interlocutory appeal under § 1292(b) because, as its order denying review stated, its prior opinion in *John Wiley & Sons, Inc. v. Kirtsaeng*, 654 F.3d 210 (2011), had resolved the issue by "holding that the first sale doctrine, codified at 17 U.S.C. § 109(a), does not apply to copies of copyrighted works produced outside of the United States." *Pearson Educ., Inc. v. Liu*, No. 10-894, Order (2d Cir. Nov. 18, 2011). When this Court reversed the Second Circuit on this point of law in *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), it deprived the order denying review in *Liu* of its stated legal basis. Thus, it was an appropriate exercise of this Court's certiorari jurisdiction to grant certiorari, vacate the denial of review, and remand. *Liu v. Pearson Educ., Inc.*, 133 S. Ct. 1630 (2013).

Here, by contrast, there is nothing to indicate that the court of appeals based its decision to deny permission to appeal on a determination that the district court's decision was correct or on any particular view of the law. And outside of the unusual circumstances where a court of appeals expressly decides the merits of an appeal while ostensibly denying permission to appeal, the propriety of denying review does not turn on the correctness of the underlying order. If an appeals court's denial of leave to appeal were subject to reversal merely because the district court erred in issuing the underlying order, an appellate court could *never* properly deny a § 1453(c) appeal without first deciding the merits adversely to the party seeking leave to appeal. If a court of appeals must decide the merits to deny leave to appeal, the appeal is no longer

permissive, but effectively an appeal as a matter of right. Such a result would transform the permissive "may accept" in § 1453(c) into a directive that appellate courts "shall accept" an appeal from a district court's remand order.

IV. There Is No Proper Basis for Holding That the Tenth Circuit Abused Its Discretion in Denying Permission to Appeal.

When the issue posed by this case is properly framed—whether the court of appeals abused its discretion in denying the appeal—it becomes apparent that Dart Cherokee has shown no proper basis for overturning the court of appeals' exercise of discretion. Dart Cherokee has not even attempted to show that the denial of permission to appeal was improper, and there are no evident bases for finding that the court of appeals abused its discretion.

Except when a discretionary decision is premised on an erroneous view of the law or on clearly erroneous factual findings—neither of which is the case here—establishing that a court abused its discretion generally requires a showing that it considered impermissible factors, failed to consider factors that it was required to consider, or balanced the relevant factors unreasonably or arbitrarily. *See*, *e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Dart Cherokee has made no such showing.

Although the court of appeals did not state reasons for its decision, appellate courts are generally not required to give reasons for discretionary denials of appellate review. *See Kraus v. Bd. of County Rd. Comm'rs*, 364 F.2d 919 (6th Cir. 1966) ("[I]t is not incumbent upon this court to express our reasons for granting or denying an application for permission to

take an interlocutory appeal"). Under § 1292(b), courts occasionally explain their actions granting or denying permission to appeal, "but ordinarily action is taken by simple order." Charles Wright *et al.*, 16 *Federal Practice & Procedure* § 3929 (4th ed. 2014). The permissive appeal model embodied in § 1292(b), and later borrowed in § 1453(c), was originally based on this Court's discretionary certiorari jurisdiction, which requires no statement of reasons for the denial of review; thus, the Senate Report on the legislation including § 1292(b) expressly contemplated that "permission might be denied without specifying reasons." *Id*. (citing S. Rep. No. 85-2434, 1958 U.S. Code Cong. & Admin. News 5255, 5257).

Absent any obligation by the court to explain itself, consideration of both the breadth of discretion granted by § 1453(c) and the factors that the Tenth Circuit and other courts of appeals have identified as relevant to the exercise of that discretion strongly weighs against a finding of abuse of discretion here. First, although this Court has never considered the scope of discretion under § 1453(c), it has pointed out that § 1292(b), which similarly provides broadly that a court of appeals "may" permit an interlocutory appeal (and which similarly is an exception to a general principle prohibiting such an appeal), grants the courts of appeals exceptionally broad discretion. The Court has stated that an "appellate court may deny the appeal [under § 1292(b)] for any reason, including docket congestion." *Coopers & Lybrand*, 437 U.S. at 475. In *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. at 883 n.9, the court reiterated that, under § 1292(b), "the discretion to decline to hear an appeal is broad." Although this Court engaged in review of legal issues embedded in orders denying leave

to appeal under § 1292(b) in *Tidewater* and *Liu*, this Court has never to our knowledge held that the denial of an appeal under § 1292(b) was an abuse of discretion. The similar language of § 1453(c) suggests similarly broad discretion, making demonstration of an abuse of discretion similarly difficult.

Second, the Tenth Circuit, like the other courts of appeals, has held that an important consideration in determining whether to permit an appeal under § 1453(c) is "the presence of an important CAFA-related question." *See BP Am., Inc. v. Okla. ex rel. Edmondson*, 613 F.3d 1029, 1034 (10th Cir. 2010) (quoting *Coll. of Dental Surgeons of Puerto Rico v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 38 (1st Cir. 2009)) (internal quotation marks omitted). "A common theme" running through the decisions of several circuits is that such a question generally counsels in favor of accepting an appeal under § 1453(c), while "[t]he presence of a non-CAFA issue (even an important one) is generally not thought to be entitled to the same weight." *Coll. of Dental Surgeons*, 585 F.3d at 38; *see also, e.g.*, *Louisiana v. Am. Nat. Prop. Cas. Co.*, 746 F.3d 633, 636 (5th Cir. 2014); *Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010); *see also* S. Rep. No. 109-14, at 49 ("The purpose of [§ 1453(c)] is to develop a body of appellate law interpreting [CAFA].")

The issue here, although it arose in an action removed under CAFA, concerns not CAFA but a generally applicable procedural question: when allegations or evidence of the amount in controversy must be presented to establish federal removal jurisdiction. Thus, Dart Cherokee's statement of the question presented makes no mention of CAFA. *See* Pet. Br. i ("Must a

defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is including the required 'short and plain statement of the grounds for removal' enough?"). Because the same issue could arise in a case removed on the basis of conventional diversity jurisdiction, or any other jurisdictional basis—in which case a district court's holding that a removal petition must contain allegations or evidence demonstrating jurisdiction would be unreviewable—the court of appeals could rationally have concluded that the happenstance that the issue arose in a CAFA case was not sufficient to justify invocation of an appeal mechanism designed for resolving important CAFA-related issues. In short, the Tenth Circuit could properly have declined the application based on consideration of a factor used by many circuits in deciding whether to accept a § 1453(c) appeal.

The Tenth Circuit judges who denied leave to appeal may also have construed the district court's order differently than does Dart Cherokee. They may have concluded that, fairly read, the order turned on whether Dart Cherokee's removal notice contained adequate, non-conclusory *allegations* of facts supporting the amount in controversy, rather than on whether the notice was accompanied by *evidence*. *See supra* page 4. So viewed, the case would present only a fact-bound issue of application of the well-settled principle that a removal notice must sufficiently allege a factual basis for its amount-in-controversy allegations.[7] A

---

[7] *See*, *e.g.*, *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008) (stating that when a plaintiff's complaint does not allege the amount in controversy, a defendant removing under CAFA must satisfy the "pleading requirement" of "explain[ing] plausi-

(*Footnote continued*)

reasonable judge could conclude that such a question, of little interest to anyone other than the parties, did not merit an interlocutory appeal.

Upholding a decision challenged as an abuse of discretion does not require the reviewing court to agree with the decision or to conclude that, in the same circumstances, it would have made the same decision. *See*, *e.g.*, *Piper*, 454 U.S. at 257; *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). Instead, the question is whether the party challenging the decision has demonstrated that a rational decisionmaker considering appropriate factors could not have reached that decision. In view of the scope of the court of appeals' discretion and the factors that are at least potentially appropriate considerations guiding its exercise, no abuse of discretion is evident here.

V. This Court Should Either Affirm the Tenth Circuit's Denial of Permission to Appeal or Dismiss the Writ as Improvidently Granted.

In light of Dart Cherokee's failure to carry its burden of demonstrating that the court of appeals abused its discretion in denying permission to appeal the remand order in this case, it would be appropriate simp-

---

bly how the stakes exceed $5 million"); *Lupo v. Human Affairs Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994) (stating that a removal notice must "allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount"); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (proponent of federal jurisdiction "must allege in his pleading the facts essential to show jurisdiction"); Wright *et al.*, 14AA *Federal Practice & Procedure* § 3702.2 ("Conclusory assertions [in a removal notice] will not be sufficient.").

ly to affirm the court of appeals' order denying leave to appeal. Should the Court do so, it should also make clear that it is not ruling on the correctness of the underlying remand order, which is not a matter properly before the Court.

Alternatively, the Court may dismiss the writ as improvidently granted. That disposition would be proper for a number of reasons. First, the Court granted certiorari to consider the question presented, and an unanticipated obstacle to reaching the question that the Court thought merited review is a common reason for such a dismissal. *See*, *e.g.*, *Nike, Inc. v. Kasky*, 539 U.S. 654, 656–63 (2003) (Stevens, J., concurring). Second, the issue whether the court of appeals abused its discretion in issuing an order denying permission to appeal is not itself one that would appear independently to merit this Court's consideration, yet, for the reasons set forth above, that issue is the sole question presented by the court of appeals' action, and considering it is at the very least a necessary antecedent to reaching the question presented by Dart Cherokee.

Third, absent adequate briefing on an issue, this Court generally refrains from deciding it. *See*, *e.g.*, *Slack v. McDaniel*, 529 U.S. at 485. A complete inquiry into whether the court of appeals abused its discretion in denying review would entail briefing by the parties on that issue, which should involve attention to the nature of the court's discretion, the considerations relevant to its exercise, the role (if any) that an assessment of the correctness of the underlying remand order should play in the court of appeals' decision to entertain an appeal, whether the courts have an obligation to explain a decision denying review,

and, if not, whether and how an abuse of discretion may be shown. Because the only issue properly before the Court in this case is the one that the parties have not briefed, the only alternatives to deciding it based on inadequate briefing are dismissing the writ or ordering rebriefing and reargument, and the latter course does not seem justified here.

If, notwithstanding these considerations, the Court should determine either that it is unnecessary to consider the propriety of the denial of leave to appeal before addressing the merits, or that the court of appeals acted improperly in denying review, it should explain those conclusions so that litigants may understand what issues are properly placed before this Court when a court of appeals has denied leave to appeal, and/or what considerations may render a court of appeals' decision to deny leave to appeal improper. In particular, if the Court were to conclude that an appellate decision to deny permission to appeal under § 1453(c) is subject to reversal whenever the underlying remand decision is erroneous, it should clearly say so, so that courts of appeals would understand that although the statute appears to give them discretion whether or not to entertain an appeal, they are actually obliged to decide the merits of the remand decision in every case.

Assuming, as we do, that the Court would stop short of adopting that position, if the Court were nonetheless to determine that the court of appeals abused its discretion by denying permission to appeal in the particular circumstances of this case, the best course would be to remand the case to allow the court of appeals to decide the merits of the appeal in the first instance. As the dissenters from the denial of re-

hearing pointed out, the Tenth Circuit has not clearly decided that a remand petition must be accompanied by evidence demonstrating the existence of jurisdiction. *Compare, e.g.*, *McPhail v. Deere & Co.*, 529 F.3d 947, 956 (10th Cir. 2008) ("[B]eyond the complaint itself, other documentation can provide the basis for determining the amount in controversy—either interrogatories obtained in state court before removal was filed, or affidavits or *other evidence submitted in federal court afterward*." (emphasis added)), *with Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (refusing to consider facts set forth in jurisdictional brief that were not included in the notice of removal). Moreover, if the Tenth Circuit were to consider the appeal, it might well construe the remand order as turning on the adequacy of Dart Cherokee's allegations, rather than on a rule precluding consideration of evidence outside the removal notice. Its resolution of the appeal, then, would be based on those allegations, not on the "rule" that the parties here debate.

Thus, how the court of appeals would resolve this case if it decided the appeal on the merits is unknown, and a merits decision by that court might obviate any perceived need for further review of the question posed by Dart Cherokee. Even if it did not, this Court, if it considered the case after review by the Tenth Circuit on the merits, would have the benefit of the fully articulated view of an appellate court to guide its consideration.

Again, however, the proper course is for this Court neither to reach the merits nor to remand them, but to affirm or to dismiss the writ. In advocating these alternatives, we recognize that it may seem unpalatable to allow a district court remand order based on a

possibly erroneous legal theory to stand unreviewed on appeal. Unreviewed error is obviously a potential consequence of a regime in which jurisdictional remand orders are completely unreviewable, as is true under § 1447(d) in most cases. *See Kircher*, 547 U.S. at 645 (holding a district court's remand order unreviewable under § 1447(d) although it was based on a legal theory that this Court had expressly held to be incorrect in a recent decision). The risk of unreviewed error is also inherent in the variation of the appealability regime created by § 1453(c), in which the courts of appeals stand as gatekeepers exercising discretion over whether to permit appeals. Taking that risk is the choice Congress made in providing for discretionary appeals rather than appeals as a matter of right.

Moreover, other cases may present opportunities for appellate consideration of the legal theory underlying the district court's action in the Tenth Circuit or this Court. The ambiguity of the Tenth Circuit's own law on the point makes it likely that the issue will again arise in that circuit, and the court might well make a different decision about whether to allow an appeal if the issue came before a different panel, or if an order denying leave to appeal were considered en banc by the full complement of the court's active judges. Even if the issue never makes its way back to the Tenth Circuit, it also could potentially be addressed by this Court, if there were sufficient reason to do so, in a case arising from another circuit that did not require evidence to be presented along with a removal notice.

Regardless of the likelihood of these possibilities, however, the merits of the district court's remand decision are not presented by this case, in which the sole

issue is whether the court of appeals properly denied permission to appeal, and in which there is no basis for holding that it did not.

CONCLUSION

The Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

July 2014