No. 21-8001

In the United States Court of Appeals for the District of Columbia Circuit

EXXON MOBIL CORPORATION, DEFENDANT-PETITIONER

v.

BEYOND PESTICIDES, PLAINTIFF-RESPONDENT

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1815) (THE HONORABLE TIMOTHY J. KELLY, J.)

PETITION FOR PERMISSION TO APPEAL PURSUANT TO THE CLASS ACTION FAIRNESS ACT

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GLOSSARY OF ABREVIATIONS

CAFA ..... Class Action Fairness Act of 2005

Consumer Protection Act ..... D.C. Consumer Protection Procedures Act

ExxonMobil ..... Exxon Mobil Corporation

Pursuant to the Class Action Fairness Act and Federal Rule of Appellate Procedure 5, Exxon Mobil Corporation respectfully petitions for permission to appeal the order of the district court dated March 22, 2021, remanding this case to the Superior Court of the District of Columbia.

INTRODUCTION

This case presents the recurring and exceptionally important question whether a representative action filed on behalf of all consumers in the District of Columbia under Section 28-3905(k)(1) of the D.C. Consumer Protection Procedures Act qualifies as "class action" under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d)(1)(B). This Court has confronted similar questions in three prior petitions for permission to appeal, and each time it denied the petition on the ground that additional guidance was needed from the D.C. Court of Appeals. That court finally provided the necessary guidance in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015), holding that a plaintiff's representative action under the Consumer Protection Act was governed by the D.C. equivalent of Federal Rule of Civil Procedure 23. This is the first petition presenting the question since *Rotunda* was issued. This case thus presents a long-awaited opportunity for the Court to resolve an important question of federal law.

In the decision below, the district court held that this action did not qualify as a "class action" because respondent did not plead the case as a class

action and sought only injunctive relief. That ruling cannot be squared with *Rotunda*, the text of the Consumer Protection Act, or the plain meaning of CAFA. In addition, the district court determined that the amount in controversy for purposes of diversity jurisdiction was not satisfied. That determination was also erroneous, and it implicates an important and recurring question of federal jurisdiction in its own right. Because this case plainly satisfies the relevant considerations for determining whether to grant review of a remand order under CAFA, the petition for permission to appeal should be granted.

QUESTIONS PRESENTED

1. Whether a representative action filed on behalf of consumers in the District of Columbia under Section 28-3905(k)(1) of the D.C. Consumer Protection Procedures Act qualifies as "class action" under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(1)(B).

2. Whether the district court incorrectly applied the non-aggregation principle to conclude that this action did not satisfy the amount-in-controversy requirement for diversity jurisdiction, 28 U.S.C. § 1332(a).

STATEMENT OF THE FACTS

1. Respondent Beyond Pesticides, plaintiff below, is a nonprofit corporation headquartered and incorporated in the District of Columbia. D. Ct. Dkt. 1-4, at 20 (Compl.); D. Ct. Dkt. 1-2. Petitioner Exxon Mobil Corporation

(ExxonMobil), defendant below, is an energy company headquartered in Texas and incorporated in New Jersey. Compl. 22.

In May 2020, Beyond Pesticides filed a complaint against ExxonMobil in D.C. Superior Court under the D.C. Consumer Protection Procedures Act. The complaint alleges that ExxonMobil engaged in "deceptive advertising" prohibited by the Consumer Protection Act by informing consumers about its efforts to invest billions of dollars in renewable energy and environmentally protective technology. Compl. 3-4. In Beyond Pesticides' view, ExxonMobil's advertisements, though factually accurate, were misleading because those expenditures did not form a sufficiently "significant proportion" of ExxonMobil's "overall business." *Id.* at 3.

The complaint asserts a single claim under Section 28-3905(k)(1)(D) of the Consumer Protection Act, which permits a "public interest organization" to file suit "on behalf of the interests" of a "class of consumers" if those consumers could have proceeded in their own right and the organization has a "sufficient nexus" with the consumers' interests to represent them "adequately." The complaint seeks declaratory and injunctive relief "on behalf of" Beyond Pesticides and "the general public of the District of Columbia." Compl. 23, 26. Beyond Pesticides also seeks "costs and disbursements," including "reasonable attorneys' fees." Compl. 26; *see* D.C. Code § 28-3905 (k)(2)(B).

2. ExxonMobil removed this action to federal court based on two grounds. *See* D. Ct. Dkt. 1. One ground was the Class Action Fairness Act. D. Ct. Dkt. 1, at 8-11. ExxonMobil argued that CAFA's definition of "class action" includes actions brought under a "[s]tate statute" that authorized "an action to be brought by 1 or more representative persons as a class action," 28 U.S.C. § 1332(d)(1)(B), and that Beyond Pesticides was purporting to proceed on behalf of a "class of consumers" under Section 28-3905(k)(1)(D). *See* D. Ct. Dkt. 1, at 9-10. ExxonMobil further argued that, in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015), the D.C. Court of Appeals held that a representative action under the Consumer Protection Act requires the plaintiff to proceed under D.C. Superior Court Rule of Civil Procedure 23—which is "identical" to its federal counterpart (*see* D.C. Super. Ct. R. Civ. P. 23 cmt.). *See* D. Ct. Dkt. 1, at 10. ExxonMobil also alleged that the parties were diverse, that the requisite class size was present, and that the $5 million amount-in-controversy requirement was satisfied. *See id.* at 10-11.

ExxonMobil also asserted that the district court had diversity jurisdiction under 28 U.S.C. § 1332(a). *See* D. Ct. Dkt. 1, at 3-8. With respect to the amount-in-controversy requirement, ExxonMobil explained that the cost for it to comply with the requested injunctive relief would exceed $75,000. *See id.* at 4-7. ExxonMobil further alleged that any statutory award of attorney's fees would almost certainly exceed $75,000 given the complex nature of the case

and the rates previously charged by Beyond Pesticides' counsel. *See id.* at 7-8.

Beyond Pesticides filed a motion to remand and sought fees and costs. As is relevant here, Beyond Pesticides argued that a representative action on behalf of absent D.C. consumers under Section 28-3905(k)(1) does not qualify as a "class action" under CAFA because it does not "bear the hallmarks" of a "Rule 23 class action[]." D. Ct. Dkt. 10-1, at 9 (citation omitted). In addition, Beyond Pesticides argued that the amount-in-controversy requirement for diversity jurisdiction was not satisfied based on what is known as the non-aggregation principle. Under that principle, "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement" in order for diversity jurisdiction to arise. *Zahn* v. *International Paper Co.*, 414 U.S. 291, 294 (1973). Beyond Pesticides argued that, because the consumers in the District of Columbia that it purported to represent had "separate and distinct claims for relief," D. Ct. Dkt. 12, at 6, ExxonMobil's cost of compliance with any injunction and the potential amount of any fee award had to be "divided among the members of the D.C. general public" on a "pro rata basis," D. Ct. Dkt. 10-1, at 3 (emphasis omitted).

3. The district court granted the motion to remand. App., *infra*, 1a. The court first held that this action is not a "class action" under CAFA because Beyond Pesticides made "no allegations in its complaint about a potential class

and did not bring its action under [D.C.] Superior Court Rule of Civil Procedure 23." *Id.* at 5a. The court noted that other judges in the district had reached similar conclusions in other cases. *See id.* The court rejected ExxonMobil's reliance on the D.C. Court of Appeals' decision in *Rotunda*, concluding that *Rotunda* applies only to "suits for *damages*." *Id.* at 6a n.2.

The district court also determined that the amount-in-controversy requirement for diversity jurisdiction was not satisfied. App., *infra*, 2a-5a. Applying the non-aggregation principle, the court noted that other judges in the district had concluded that, in suits under the Consumer Protection Act, "the total cost of compliance must be divided by the number of the injunction's beneficiaries," even where compliance would cost the same "no matter how many plaintiffs assert claims." *Id.* at 3a, 4a. The court reasoned that the non-aggregation principle also applied to the assessment of statutory attorney's fees, again citing decisions from other judges in the district. *See id.* at 4a.

The district court denied Beyond Pesticides' requests for fees and costs, citing "the lack of binding precedent on the issues presented." App., *infra*, 6a.

RELIEF SOUGHT

The petition for permission to appeal should be granted, and the order remanding the case to the D.C. Superior Court should be reversed.

REASONS FOR GRANTING THE PETITION

CAFA authorizes a court of appeals to review an order granting or denying a motion to remand. 28 U.S.C. § 1453(c)(1); *see* 28 U.S.C. § 1451. When deciding whether to grant review under CAFA, courts of appeals consider factors such as whether the petition for permission to appeal presents a novel, important, and recurring question; whether the district court's decision was incorrect or at least "fairly debatable"; whether the balance of harms supports granting review, including whether post-judgment review is available; and whether there is any impediment to review, such as the need for additional factual development. *See*, *e.g.*, *Dominion Energy, Inc.* v. *City of Warren Police & Fire Retirement System*, 928 F.3d 325, 334 (4th Cir. 2019); *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008) (considering "importance" and "novelty"). Those factors, however, are not "rigid rules"; the decision whether to grant review is ultimately "committed to the informed discretion of the reviewing court." *BP America, Inc.* v. *Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1035 (10th Cir. 2010); *accord*, *e.g.*, *Dominion Energy*, 928 F.3d at 334. Here, the relevant considerations weigh strongly in favor of review.

A. The CAFA Question Warrants Review

Review is warranted to resolve the question whether actions under Section 28-3905(k)(1) of the Consumer Protection Act, including actions seeking injunctive relief, qualify as "class actions" for purposes of CAFA.

1. The CAFA Question Is Novel, Important, And Recurring

Actions filed in D.C. Superior Court under Section 28-3905(k)(1) are frequently removed to federal court under CAFA, and district judges have issued numerous decisions addressing whether such actions qualify as "class actions." *See, e.g.*, *Toxin Free USA* v. *J.M. Smucker Co.*, Civ. No. 20-1013, 2020 WL 7024209, at *3 (D.D.C. Nov. 30, 2020); *Hackman* v. *One Brands, LLC*, Civ. No. 18-2101, 2019 WL 1440202, at *3-*4 (D.D.C. Apr. 1, 2019); *Animal Legal Defense Fund* v. *Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64 (D.D.C. 2017); *National Consumers League* v. *Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 35-36 (D.D.C. 2014); *Zuckman* v. *Monster Beverage Corp.*, 958 F. Supp. 2d 293, 305 (D.D.C. 2013); *Stein* v. *American Express Travel Related Services*, 813 F. Supp. 2d 69, 73 (D.D.C. 2011); *National Consumers League* v. *General Mills, Inc.*, 680 F. Supp. 2d 132, 137 (D.D.C. 2010); *Breakman* v. *AOL LLC*, 545 F. Supp. 2d 96, 102 (D.D.C. 2008).

As the court below recognized, this Court has not yet decided whether an action under Section 28-3905(k)(1) is a "class action" under CAFA. *See* App., *infra*, 6a. The Court previously considered petitions for permission to appeal in three different cases presenting that question, but the Court denied each petition on the ground that the District of Columbia courts had not yet decided whether such lawsuits must be litigated as class actions. *See* Order, *Monster Beverage Corp.* v. *Zuckman*, No. 13-8006 (Dec. 16, 2013); Order, *In*

re General Mills, No. 10-8001 (June 25, 2010); Order, *In re U-Haul International, Inc.* No. 08-7122, 2009 WL 902414 (Apr. 6, 2009).

The D.C. Court of Appeals provided the awaited guidance in *Rotunda* v. *Marriott International, Inc.*, 123 A.3d 980 (2015). The court affirmed the dismissal of a Section 28-3905(k)(1) action because the plaintiff had not proceeded with the case as a class action under D.C. Superior Court Rule of Civil Procedure 23. The court reasoned that Rule 23 governed actions brought by "[o]ne or more members of a class" as "representative parties," which included the type of action authorized by Section 28-3905(k)(1). *Id.* at 985. The Consumer Protection Act, the court continued, was "virtually silent" on how representative actions under the Act should proceed. *Id.* In the absence of any statutory provision indicating otherwise, the court rejected the argument that the D.C. Council had silently "abrogated or repealed" the application of D.C. Civil Rule 23 "in favor of improvised due process and management devices for a whole sub-set of representative actions." *Id.* at 986, 988. In short, the D.C. Court of Appeals has now held that Rule 23 applies to Section 28-3905(k)(1) actions.

The question whether a representative action under Section 28-3905(k)(1) qualifies as a "class action" under CAFA is now ripe for adjudication by this Court. Neither this Court nor any other court of appeals has addressed that question in the wake of *Rotunda*. And this Court's "resolution of th[e] question could be dispositive of [a district court's] jurisdiction under

CAFA" in this case and many others. *U-Haul*, 2009 WL 902414, at *4 (Rogers, J., dissenting); *cf. Coleman* v. *Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (finding "important" the question whether a district court may look outside the pleadings to determine whether CAFA's local-controversy exception applies). This case thus presents the Court with an ideal opportunity—for the first time since the D.C. Court of Appeals' decision in *Rotunda*—to resolve this recurring and important question.

2. The Decision Below Was Incorrect

The district court erred in holding that this action does not constitute a "class action" under CAFA. *See* App., *infra*, 1a-7a.

a. CAFA defines the phrase "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar [s]tate 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). The question here is whether Section 28-3905(k)(1) of the Consumer Protection Act "authoriz[es]" a "representative person[]" to bring a suit as a "class action" in "similar" fashion to Federal Rule 23. 28 U.S.C. § 1332(d)(1)(B). The ordinary meaning of "class action" is a "lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group." *Black's Law Dictionary* 267 (8th ed. 2004); *accord Newberg on Class Actions* § 1.1 (4th ed. 2002). And CAFA's legislative history indicates that the

definition of "class action" should be "interpreted liberally" to include not only lawsuits that are "labeled" as class actions but also lawsuits that "resemble" one. S. Rep. No. 14, 109th Cong., 1st Sess. 35 (2005).

The reasoning of *Rotunda* demonstrates that any action under Section 28-3905(k)(1) is a "class action" for purposes of CAFA. As the D.C. Court of Appeals held, a representative action under Section 28-3905(k)(1) cannot proceed unless the plaintiff seeks certification under D.C. Civil Rule 23, which is "identical" to Federal Rule of Civil Procedure 23 (*see* D.C. Super. Ct. R. Civ. P. 23 cmt.). *See Rotunda*, 123 A.3d at 984-985. In reaching that conclusion, the court recognized that an action under Section 28-3905(k)(1) is one in which a lead plaintiff represents the interests of absent consumers. *See id.* An action under that provision is therefore a "class action" under the ordinary understanding of that phrase.

In fact, where (as here) a public-interest organization files an action under subsection (D) of Section 28-3905(k)(1), the Consumer Protection Act itself imposes additional safeguards that confirm the class nature of such an action. For example, the statute makes clear that a plaintiff organization cannot proceed on behalf of a "class of consumers" under subsection (D) unless those consumers have a claim in their own right. D.C. Code § 28-3905(k)(1)(D)(i). The statute also requires a plaintiff organization to have a "sufficient nexus" to the class's interests in order to represent them "adequately," as a way of

tailoring the Rule 23 requirements of typicality and adequacy to the circumstances of a nonprofit serving as lead plaintiff. D.C. Code § 28-3905(k)(1)(D)(ii).

b. The district court gave three reasons for its decision that this action does not constitute a "class action" under CAFA. Each is incorrect.

The district court first reasoned that Beyond Pesticides "makes no allegations in its complaint about a potential class and did not bring its action under Superior Court Rule of Civil Procedure 23." App., *infra*, 5a. That is true as far as it goes, but it does not go very far. For one thing, CAFA permits removal of a suit that is "in substance a class action," even if the plaintiff "attempt[s] to disguise the true nature of the suit" by disclaiming any intent to proceed on a representative basis. *Addison Automatics, Inc.* v. *Hartford Casualty Insurance Co.*, 731 F.3d 740, 742 (7th Cir. 2014). For another, *Rotunda* provides that an action under Section 28-3905(k)(1) is subject to dismissal if the plaintiff attempts to refuse class treatment. *See* 123 A.3d at 982, 989.

The district court next noted that other judges in the district had previously ruled that actions under Section 28-3905(k)(1) do not bear the "hallmarks of Rule 23 class actions": namely, "adequacy of representation, numerosity, commonality, typicality, [and] the requirement of class certification." App., *infra*, 5a (citation omitted). But that conclusion is incorrect after *Rotunda*: a plaintiff can no longer proceed under Section 28-3905(k)(1) without

moving for class certification and proving each of the ordinary Rule 23(a) factors. *See* 123 A.3d at 988. And as already explained, the Consumer Protection Act itself imposes supplemental requirements in representative actions brought by public-interest organizations. *See* pp. 11-12, *supra*. In any event, a state statute need not mirror Federal Rule 23 exactly in order to satisfy CAFA; it is sufficient that the statute "provide a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class, such that it would not be unfair to bind all class members to the judgment entered for or against the representative party." *West Virginia ex rel. McGraw* v. *CVS Pharmacy, Inc.*, 646 F.3d 169, 175 (4th Cir. 2011). That describes a representative action by a public-interest organization under Section 28-3905(k)(1)(D).

Finally, the district court addressed *Rotunda* in a footnote, concluding that it required only "suits for *damages*" under Section 28-3905(k)(1) to proceed as class actions. Citing *Animal Legal Defense Fund*, 249 F. Supp. 3d at 64, the district court stated that the "concerns" expressed in *Rotunda* about the dangers of representative actions for money damages proceeding outside the Rule 23 framework did not apply in actions seeking injunctive relief. *See*

App., *infra*, 6a n.2. Other courts in this circuit have reached the same erroneous conclusion. *See Toxin Free USA*, 2020 WL 7024209, at *3; *Hackman*, 2019 WL 1440202, at *3-4; *Animal Legal Defense Fund*, 249 F. Supp. 3d at 64.

To be sure, *Rotunda* involved a representative suit for damages, and the D.C. Court of Appeals accordingly focused on the need for Rule 23(b)(3)'s notice and opt-out procedures in such an action. *See* 123 A.3d at 985-987. But the Court's analysis did not turn—expressly or implicitly—on the form of the requested relief. Instead, the court analyzed whether the Consumer Protection Act "clearly or explicitly" "abrogated or repealed" the application of D.C. Civil Rule 23 to "representative suits" under the Consumer Protection Act. 123 A.3d at 988 (brackets omitted). The court saw no "unambiguous evidence" that the D.C. Council "meant to displace the Rule 23 framework" in Section 28-3905(k)(1) suits, and it therefore held that the rule applied. *Id.*

Nothing in either the Consumer Protection Act or the D.C. Civil Rules supports distinguishing between actions for damages and actions for injunctive relief in determining whether Rule 23 applies. The Consumer Protection Act provides a private right of action for both damages and injunctive relief, and it contains no provisions even hinting that the representative nature of the suits it authorizes differs based on the type of relief sought. In addition, the D.C. Civil Rules do not apply differently depending on the type of relief sought; they govern "all civil actions and proceedings in the Civil Division of

the Superior Court." D.C. Super. Ct. R. Civ. P. 1. For those reasons, the district court erred in concluding that this action does not qualify as a "class action" under CAFA.

3. The Balance of Harms Favors Appellate Review

The risk of harm to ExxonMobil from denying review far outweighs any potential harm to Beyond Pesticides. A defendant that has properly removed a case from state court has a "right and privilege secured" by "the [C]onstitution and laws of the United States" to proceed with the litigation in federal court. *Southern Pacific Co.* v. *Denton*, 146 U.S. 202, 207 (1892). If the remand order here is allowed to stand, "[t]he probability that a state court or the Supreme Court will review the federal jurisdictional question after the merits of the case have been decided is almost non-existent." *Coleman*, 627 F.3d at 1101. ExxonMobil's right to proceed in a federal forum may thus be lost if the remand order is not corrected now.

A remand without appellate review would also expose ExxonMobil to a risk of harm in two other ways. First, the D.C. courts might act with "bias against" ExxonMobil as an "out-of-State defendant[]"—precisely the type of risk that Congress sought to address when enacting CAFA. *See* 28 U.S.C. § 1711 note (congressional finding 4(B)). Second, if Beyond Pesticides were to amend its complaint after remand so that it expressly asserts class claims, the lack of an authoritative decision from this court would make it unclear whether

ExxonMobil could attempt to remove the case a second time—and would likely risk ExxonMobil facing yet another demand for fees and costs.

Any risk of harm to Beyond Pesticides from delay is minimal. CAFA requires a court of appeals to render judgment within 60 days after granting a petition for review, subject only to one 10-day extension in the absence of the respondent's consent. *See* 28 U.S.C. § 1453(c)(2)-(3). And because "no discovery has been taken" and there are "no ongoing proceedings" in D.C. Superior Court with which this Court "might interfere," there is "relatively little concomitant probable harm" to Beyond Pesticides. *BP*, 613 F.3d at 1035.

4. There Is No Impediment To Review

If this Court grants the petition, it will face no barrier to deciding the CAFA question presented. That question is purely legal in nature; "no additional factual development is required" for this Court to decide it. *Dominion Energy*, 928 F.3d at 335. And now that this Court has the benefit of *Rotunda*, there is no need to wait for further guidance from the D.C. courts or to certify a question to the D.C. Court of Appeals. *Cf.* pp. 8-9, *supra*; *U-Haul*, 2009 WL 902414, at *4 (Rogers, J. dissenting). *Rotunda* provides the necessary "discernible path" to resolve the question. *K&D LLC* v. *Trump Old Post Office LLC*, 951 F.3d 503, 510 (D.C. Cir. 2020) (citation omitted).

For that reason and the others discussed above, the Court should grant review to decide whether an action under Section 28-3905(k)(1) of the Consumer Protection Act qualifies as a "class action" for purposes of CAFA. And because the parties are minimally diverse and ExxonMobil plausibly pleaded that the aggregate amount in controversy exceeds $5 million, the district court's remand order should be reversed. *See* 28 U.S.C. § 1332(d)(2); *Dart Cherokee Basin Operating Co.* v. *Owens*, 574 U.S. 81, 89 (2014); D. Ct. Dkt. 1, at 10-11.

B. The Diversity Question Warrants Review

The Court should also grant review to decide whether the district court erred by concluding that, under the so-called non-aggregation principle, the amount in controversy was not satisfied for purposes of diversity jurisdiction.

1. The Court Has Appellate Jurisdiction To Reach The Diversity Question

Under CAFA, a court of appeals may review any ground for removal asserted by the defendant in a case removed under CAFA. The relevant provision of CAFA authorizes courts of appeals to review an "order" of a district court "granting or denying a motion to remand a class action to the [s]tate court from which it was removed." 28 U.S.C. § 1453(c)(1). The ordinary meaning of "order" is a "command, direction, or instruction," and in particular a "written direction or command delivered by a court or judge." *Black's Law Dictionary* 1129 (8th ed. 2004). The "order" here is thus the command that

the case return to state court. And "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015).

This court has already recognized as much in an analogous setting. Under 5 U.S.C. § 7123(a), a court of appeals has jurisdiction over any "final order" of the Federal Labor Relations Authority relating to an arbitration award if the order "involves an unfair labor practice." As the Court explained just last year, "[t]he most natural interpretation" of that provision is that, "[b]y granting the court jurisdiction to review the entire order," the court is not limited to reviewing "only the portion of the order that discusses the alleged unfair labor practice." *National Weather Service Employees* v. *Federal Labor Relations Authority*, 966 F.3d 875, 879-880 (2020).

The Supreme Court too has interpreted several statutes permitting appellate review of an "order" to permit review of issues fairly encompassed by the order but separate from the particular issue that permitted the appeal. *See*, *e.g.*, *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008) (28 U.S.C. § 1292(a)(1)); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204 (1996) (28 U.S.C. § 1292(b)); *White* v. *Regester*, 412 U.S. 755, 761 (1973) (28 U.S.C. § 1253); *see also BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021) (presenting a similar issue in the context of 28 U.S.C. § 1447(d)).

Adhering to CAFA's plain text, several courts of appeals have held that they have jurisdiction under CAFA to review issues in a remand order beyond the CAFA ground for removal. *See Nevada* v. *Bank of America Corp.*, 672 F.3d 661, 672-673 (9th Cir. 2012); *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009) (per curiam); *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005). Only one court of appeals has suggested otherwise, and it declined to review the additional issues primarily because it was "[f]acing [its] CAFA deadline." *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 (5th Cir. 2017). This Court has not yet decided the issue. But given the plain text of CAFA and the body of precedent involving materially identical statutes, the Court should adopt the majority approach.

2. The Court Should Review The Diversity Question

In the decision below, the district court rejected removal on diversity grounds because, in its view, the amount in controversy was not satisfied. It reached that conclusion by applying the non-aggregation principle, which provides that "multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional-amount requirement" in order for diversity jurisdiction to arise. *Zahn* v. *International Paper Co.*, 414 U.S. 291, 294 (1973). The district court's reasoning was erroneous, and it implicates an important and recurring question of federal law. The diversity question presented thus also warrants review.

Contrary to the district court's conclusion, the non-aggregation principle does not preclude removal of this case. That principle does not apply where "two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder* v. *Harris*, 394 U.S. 332, 335 (1969). Here, Beyond Pesticides and the parties it represents have an undivided interest in the injunctive relief being sought, because the nature of that relief does not depend on "the number of plaintiffs" or "the values of their individual claims." *Williams* v. *Purdue Pharma Co.*, Civ. No. 02-556, 2003 WL 24259557, at *5 (D.D.C. Feb. 27, 2003). Instead, the relief that Beyond Pesticides seeks—modification of ExxonMobil's advertising—is an all-or-nothing proposition, regardless of the number of plaintiffs. The relative benefit to individual consumers of such an injunction is thus of "no interest" to ExxonMobil, rendering the non-aggregation principle inapplicable. *See Allen* v. *R & H Oil & Gas Co.*, 63 F.3d 1326, 1331 & n.7 (5th Cir. 1995) (collecting cases).

In any event, in an action seeking injunctive relief, the "relevant test" for determining the amount in controversy is whether "the cost to each defendant of an injunction running in favor of one plaintiff" exceeds $75,000. *Synfuel Technologies, Inc.* v. *DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). Indeed, as this Court has held, the amount in controversy is satisfied "with respect to all of the plaintiffs" when the "costs that the [defendant]

would incur if the plaintiffs prevailed" exceeds the jurisdictional threshold. *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 473 (1975).

The district court nevertheless ruled that the non-aggregation principle precluded removal here, primarily because other judges in the district had reached similar conclusions in actions seeking injunctive relief under Section 28-3905(k)(1). *See* App., *infra*, 3a. Those decisions decline to follow this Court's precedent on the ground it conflicts with the non-aggregation principle. *See, e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 59; *Breathe DC* v. *Santa Fe Natural Tobacco Co.*, 232 F. Supp. 3d 163, 171 (D.D.C. 2017); *Witte* v. *General Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (D.D.C. 2015).

Those decisions are incorrect. If the cost to the defendant when any individual plaintiff prevails exceeds the jurisdictional threshold, then the amount in controversy as to each individual plaintiff exceeds the threshold. That is because the amount in controversy is not the aggregation of individual claims, but inherent in the claim asserted whether by one or many. As the Seventh Circuit has recognized, that reasoning *implements*—not *ignores*—the non-aggregation principle. *See Synfuel Technologies*, 463 F.3d at 652.

The district court also erred in applying the non-aggregation principle to Beyond Pesticides' request for statutory attorney's fees. That principle has no logical application where (as here) attorney's fees will be awarded to and benefit only one plaintiff. In addition, disaggregating attorney's fees "between

[a named plaintiff] and the general public on a pro rata basis" necessarily "underestimate[s] the portion of fees properly attributed to [the plaintiff] in [its] role as the initial plaintiff." *Zuckman*, 958 F. Supp. 2d at 301. And while the district court stated that the amount of a likely award of attorney's fees is "speculative" here, *see* App., *infra*, 4a n.1, it is practically certain—and at a minimum "plausible"—that attorney's fees of $75,000 will be reached in complex civil litigation by an attorney charging $700 per hour. *See Dart Cherokee*, 574 U.S at 89; D. Ct. Dkt. 1, at 7-8.

The question of how to apply the non-aggregation principle in actions under Section 28-3905(k)(1) is recurring and often dispositive of whether a case can be removed on diversity grounds. District courts in this circuit are deciding it incorrectly—including in the decision below. The Court should thus consider the diversity question in addition to the CAFA question, both of which independently warrant review.

CONCLUSION

The petition for permission to appeal should be granted.

Respectfully submitted,

/s/ Kannon K. Shanmugam

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APRIL 1, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 5(c)(1) and 32(c)(2), that the foregoing Petition for Permission to Appeal Pursuant to the Class Action Fairness Act is proportionately spaced, has a typeface of 14 points or more, and contains 5,180 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 1, 2021

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to D.C. Circuit Rule 28(a)(1), as follows:

(A) Parties and amici. The parties, intervenors, and amici that appeared before the district court and are participating in this appeal are Exxon Mobil Corporation and Beyond Pesticides.

(B) Rulings under review. The ruling for which permission to appeal is being sought is the district court's memorandum and order of March 22, 2021, remanding the case to state court.

(C) Related cases. The are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 1, 2021

CORPORATE DISCLOSURE STATEMENT

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEYOND PESTICIDES, *Plaintiff*, v. EXXON MOBIL CORPORATION, *Defendant*.	Civil Action No. 20-1815 (TJK)

MEMORANDUM AND ORDER

Plaintiff Beyond Pesticides filed this lawsuit in the Superior Court of the District of Columbia, asserting claims under the D.C. Consumer Protection Procedures Act for false and misleading advertising. After Defendant Exxon Mobil removed the case, Beyond Pesticides moved to remand and for costs and expenses. For the reasons explained below, the Court will grant Beyond Pesticides' motion to remand for lack of subject-matter jurisdiction but deny its request for fees and costs.

I. Background

In May 2020, Beyond Pesticides filed this lawsuit against Exxon Mobil Corporation ("Exxon Mobil") in the Superior Court of the District of Columbia, asserting claims under the District of Columbia Consumer Protection Procedures Act (DCCPPA), specifically D.C. Code § 28-3905(k)(1)(A) and (D). ECF No. 1-4 ("Compl.") ¶¶ 150–53. Beyond Pesticides alleges that Exxon Mobil's advertising relating to its investments in alternative energy is false and misleading because it overstates how much of Exxon Mobil's business is devoted to clean energy. *See, e.g.*, *id.* ¶¶ 10–12. Beyond Pesticides seeks a declaration that Exxon Mobil's conduct violates the DCCPPA, an order enjoining such conduct, and attorneys' fees, costs, and

prejudgment interest. *Id.* at 26. Not long after, Exxon Mobil removed the case to this Court based on both diversity jurisdiction and the Class Action Fairness Act ("CAFA"). ECF No. 1 ¶¶ 7, 24. Beyond Pesticides then moved to remand and for fees and costs. ECF No. 10.

II. Legal Standard

"A civil action filed in state court may only be removed to a United States district court if the case could originally have been brought in federal court." *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 30 (D.D.C. 2014) (citing 28 U.S.C. § 1441(a)). Because removal implicates "significant federalism concerns," a court must "strictly construe[] the scope of its removal jurisdiction." *Downey v. Ambassador Dev., LLC*, 568 F. Supp. 2d 28, 30 (D.D.C. 2008) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107–09 (1941)). "When it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court must remand the case . . . ." *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 196 (D.C. Cir. 2002) (citing 28 U.S.C. § 1447(c)–(d)). "The party seeking removal of an action bears the burden of proving that jurisdiction exists in federal court." *Animal Legal Defense Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 56 (D.D.C. 2017) (quoting *Downey*, 568 F. Supp. 2d at 30).

III. Analysis

Exxon Mobil argues that subject-matter jurisdiction is proper under either (1) the federal diversity jurisdiction statute or (2) a "class action" provision under CAFA. The Court disagrees on both counts.

A. Diversity Jurisdiction

District courts have jurisdiction over an action if complete diversity exists among the parties and the amount in controversy is greater than $75,000. 28 U.S.C. § 1332(a). Beyond

Pesticides does not dispute that the parties are in complete diversity, *see* ECF No. 1 ¶¶ 11–12; Compl. ¶¶ 125, 134, but contends that more than $75,000 is not at issue. In response, Exxon Mobil argues that the amount-in-controversy requirement is satisfied based on the total cost of compliance with the requested injunction—*i.e.,* the cost of correcting advertising or investing more capital in alternative energy—as well as the attorneys' fees that Beyond Pesticides seeks. ECF No. 11 at 6–18.

The problem for Exxon Mobil is that total cost of its compliance is not a proper measure of the amount in controversy because it would violate the non-aggregation principle. Under that rule, "the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement." *Animal Legal Defense Fund*, 249 F. Supp. 3d at 59–60 (quoting *Snyder v. Harris*, 394 U.S. 332, 335 (1969)). And in suits brought under D.C. Code § 28-3905(k)(1), like this one, courts in this District have consistently applied the non-aggregation principle to hold that, if a purported amount in controversy is calculated by reference to a defendant's cost of compliance with an injunction, the total cost of compliance must be divided by the number of the injunction's beneficiaries. *See, e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 60; *Breathe DC v. Santa Fe Nat. Tobacco Co.*, 232 F. Supp. 3d 163, 171 (D.D.C. 2017); *Witte v. Gen. Nutrition Corp.*, 104 F. Supp. 3d 1, 6 (D.D.C. 2015); *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 105–07 (D.D.C. 2008). Exxon Mobil does not try to do so. Instead, it cites its total alleged cost of compliance and argues that the non-aggregation principle does not apply because of an exception for cases in which "two or more plaintiffs unite to enforce a single title or right in which they have a common interest." ECF No. 11 at 9 (quoting *Snyder v. Harris*, 394 U.S. 332, 335 (1969)). But whatever its applicability in other contexts, no court in this District has ever applied that exception to permit circumvention of the non-

aggregation principle in a case brought by a single plaintiff involving the type of claims and relief at issue here. *See* ECF No. 10-1 at 3–4.

Exxon Mobil also contends that the attorneys' fees sought by Beyond Pesticides satisfy the amount in controversy requirement, but this argument comes up short too. Courts in this District have also applied the non-aggregation principle to attorneys' fees. *See, e.g.*, *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 141 (D.D.C. 2010); *Breakman*, 545 F. Supp. 2d at 107. As with its cost-of-compliance estimate, Exxon Mobil does not try to calculate Beyond Pesticides' attorneys' fees on a pro rata basis.[1]

Undeterred, Exxon Mobil argues that aggregation is warranted because it will incur the same cost no matter how many plaintiffs assert claims. ECF No. 11 at 11–15. But another court in this District has already persuasively rejected this very argument. In *Animal Legal Defense Fund*, the court explained that "[t]he key question courts consider with respect to aggregation is not whether an injunction would cost Defendant more or less depending on the number of beneficiaries, but instead whether Plaintiff and the members of the general public have separate and distinct claims that could be brought independently against Defendant with respect to the challenged conduct." 249 F. Supp. 3d at 61–62. There, as here, a nonprofit organization challenged certain advertising on behalf of consumers—each of whom has a separate claim. In other words, "this is not a case where no member of the 'general public' could enforce the right at issue in the absence of others." *Breathe DC*, 232 F. Supp. 3d at 171. Accordingly, the non-aggregation principle still applies. Because Exxon Mobil has provided no estimate showing that

[1] Even if the non-aggregation principle did not apply, Exxon Mobil's bald claim that, at lead counsel's $700-an-hour rate, "the amount in controversy will exceed $75,000 so long as [lead counsel] *alone* bills just 110 hours to this complex litigation," ECF No.1 ¶ 21, is too speculative to meet its burden. *See, e.g.*, *Animal Legal Defense Fund*, 249 F. Supp. 3d at 63.

its pro rata cost of compliance would exceed $75,000, it has not met its burden to prove the required amount in controversy. Thus, it has not shown that this Court possesses diversity jurisdiction.

B. CAFA Jurisdiction

Exxon Mobil also argues that removal is appropriate under a CAFA provision that extends federal jurisdiction to certain class actions. 28 U.S.C. § 1332(d)(2). Under this provision, "federal courts have original jurisdiction over cases where minimal diversity is satisfied (that is, where at least one plaintiff is diverse from at least one defendant), the number of putative class members is greater than one hundred, and the total amount in controversy as to all plaintiffs is greater than $5 million." *Nat'l Consumers League*, 36 F. Supp. 3d at 34. The statute defines "class actions" 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).

Beyond Pesticides makes no allegations in its complaint about a potential class and did not bring its action under Superior Court Rule of Civil Procedure 23. And as it argues, courts in this District have consistently—and persuasively—concluded that suits on behalf of consumers brought under the DCCPPA, including under § 28-3905(k)(1)(D), are "private attorney general suits" and not class actions as defined by CAFA, in cases "where [a] plaintiff has not brought a 'class action' under D.C. Superior Court Rule 23." *Nat'l Consumers League*, 36 F. Supp. 3d at 35–36 ("Absent the 'hallmarks of Rule 23 class actions; namely, adequacy of representation, numerosity, commonality, typicality, or the requirement of class certification,' courts have held that private attorney general statutes 'lack the equivalency to Rule 23 that CAFA demands.'"); *Animal Legal Defense Fund*, 249 F. Supp. 3d at 64 ("This D.C. Code section does not require

class proceedings and is a 'separate and distinct procedural vehicle from a class action,' to which CAFA does not apply." (quoting *Breakman*, 545 F. Supp. 2d at 101)). Exxon Mobil cites no authority to the contrary. For these reasons, this suit is not a class action under CAFA, and the Court lacks jurisdiction under that statute as well.[2]

C. Fees and Costs

Beyond Pesticides seeks "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." ECF No. 10-1 at 11 (quoting 28 U.S.C. § 1447). "A court may award such fees if the removing party lacks 'an objectively reasonable basis for seeking removal.'" *Breathe DC*, 232 F. Supp. 3d at 172 (quoting *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005)). The Court cannot say that Exxon Mobil's conduct meets that standard, given the lack of binding precedent on the issues presented, and so it will decline to order fees and costs.[3]

[2] The District of Columbia Court of Appeals has carved out an exception to this rule for suits for *damages* under D.C. Code § 28-3905(k)(1), which it concluded are "in essence . . . class action[s]." *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980, 982 (D.C. 2015). But here, Beyond Pesticides does not seek damages, only declaratory and injunctive relief. *See Animal Legal Defense Fund*, 249 F. Supp. 3d at 64–65 ("The concerns raised by . . . *Rotunda* related to suits for damages, not for the type of injunctive relief sought here . . . ." (citing *Rotunda*, 123 A.3d at 985, 988–89)).

[3] Beyond Pesticides points to one DCCPPA case presenting similar removal questions when the court awarded expenses. ECF No. 10-1 at 11. But there, defendants also made other arguments the court characterized as "inappropriate" and "obviously unpersuasive," including a baseless claim of unethical conduct against opposing counsel, and the District of Columbia Court of Appeals had not yet decided *Rotunda*. *Stein v. Am. Exp. Travel Related Servs.*, 813 F. Supp. 2d 69, 71 n.1 (D.D.C. 2011).

IV. Conclusion and Order

For the reasons set forth above, it is hereby **ORDERED** that Plaintiff's Motion to Remand, ECF No. 10, is **GRANTED.** Because the Court lacks subject-matter jurisdiction, this case is **REMANDED** to the Superior Court of the District of Columbia. The Court declines to award fees or costs.

SO ORDERED.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: March 22, 2021

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for petitioner Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on April 1, 2021, a copy of the attached Petition for Permission to Appeal Pursuant to the Class Action Fairness Act was sent, by third-party commercial carrier for delivery overnight and by electronic mail, to the following counsel:

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I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

APRIL 1, 2021