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## Class Actions Removability and the Changing Business of the Supreme Court: Dart Cherokee Basin Operating Co. v. Owens

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CLASS ACTIONS REMOVABILITY AND THE CHANGING  
BUSINESS OF THE SUPREME COURT:  
*DART CHEROKEE BASIN OPERATING CO. V. OWENS*

*Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014)

*Stephen Carr\**

“[T]he history of the Supreme Court, as of the Common Law, derives meaning to no small degree from the cumulative details which define the scope of its business, and the forms and methods of performing it—the Court’s procedure, in the comprehensive meaning of the term. Not merely is its work of technical adjudication inseparably related to the procedural rules and practices of the Court. The essentially political significance of the Supreme Court’s share in the operations of the Union can hardly be overemphasized.”<sup>1</sup>

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INTRODUCTION

Problems of appellate jurisdiction are, by their nature, mainly pragmatic problems. The U.S. Circuit Courts of Appeals are forced to balance the need to provide timely, effective appellate review of district court decisions against the understandable desire for judicial economy.<sup>2</sup>

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\* Law Clerk, Honorable Jay P. Cohen, Florida Fifth District Court of Appeal; J.D., 2015, University of Florida Levin College of Law; M.A. 2009, Eastern Michigan University; B.S. 2006, Eastern Michigan University. I would like to thank all the staff and members of the *Florida Law Review* for their friendship. I would also like to express my sincere appreciation for the Law Review’s faculty adviser Professor Dennis Calfee, who does so many things, big and small, to make the *Florida Law Review* a great publication and organization.

1. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* vi (Johnson Reprint Co., 1972).

2. *See, e.g.,* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (discussing the challenges of appellate jurisdiction and endorsing limited exceptions to the final order doctrine,

In addition to this inherent tension between fairness and economy, the law is constantly evolving, causing caseloads to wax and wane, and continuously forcing the circuit courts to react by expanding and contracting their rules of appellate jurisdiction.<sup>3</sup> The U.S. Code generally limits appellate review to “final decisions,”<sup>4</sup> and the U.S. Supreme Court has usually instructed the circuit courts to take a narrow view of what constitutes a “final” decision.<sup>5</sup> Nevertheless, difficult cases remain.<sup>6</sup>

*Dart Cherokee Basin Operating Co. v. Owens*<sup>7</sup> was not supposed to be a difficult case. The U.S. Supreme Court granted certiorari to resolve an issue that had arisen only in the U.S. Court of Appeals for the Tenth Circuit.<sup>8</sup> According to at least one commentator, the issue presented was so simple that “the answer would seem transparently obvious to any first-year civil procedure student hoping for a passing grade.”<sup>9</sup> At oral argument, Justice Elena Kagan did not hesitate to express her agreement with the petitioner (Dart) on the merits and speculated that most of the Court shared her view as well.<sup>10</sup> However, Justice Kagan would later break from the majority’s decision, which sided with Dart on the merits,

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which requires truly final decisions before licensing appellate review). The specific ruling in *Coopers & Lybrand* was largely overruled by Rule 23(f), which now allows for interlocutory appeals of decisions denying or granting class certification. FED. R. CIV. P. 23(f).

3. See Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975) (discussing the federal courts’ pragmatic approach to the final judgment rule). In the twelve-month period preceding March 31, 2014, the eleven U.S. Circuit Courts of Appeals plus the D.C. Circuit terminated a total of 56,354 appeals while 41,588 appeals remained pending. U.S. COURTS, FED. JUDICIAL CASELOAD STATISTICS, tbl. B, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B00Mar14.pdf> (last visited July 1, 2015).

4. 28 U.S.C. § 1291 (2012).

5. The only widely recognized exception to the final decision rule, the so-called collateral order doctrine, comes from *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949). See PETER W. LOW, JOHN C. JEFFERIES JR. & CURTIS A. BRADLEY, FEDERAL COURTS AND THE LAW OF FEDERAL–STATE RELATIONS 715 (8th ed. 2014). While there are strong policy arguments for the final judgment rule, other exceptions exist when necessary to protect important federal rights. See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 10.4.1 (5th ed. 2007).

6. *E.g.*, 28 U.S.C. § 1292 grants appellate courts jurisdiction to hear interlocutory appeals in a variety of situations.

7. 135 S. Ct. 547 (2014).

8. *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-603, 2013 WL 8609250 (10th Cir. 2013), cert. granted 134 S. Ct. 1788 (2014). The Tenth Circuit was allegedly alone in requiring the defendants seeking removal to federal court under the Class Action Fairness Act to provide evidence of the amount in controversy. See Reply in Support of Petitioner for Writ of Certiorari at 2–6, *Dart*, 135 S. Ct. 547, 2014 WL 825192, at \*1–7.

9. Ronald Mann, *Opinion Analysis: Court Stretches to Correct Anachronistic Tenth Circuit Pleading Rule*, SCOTUSBLOG (Dec. 16, 2014, 9:24AM) <http://www.scotusblog.com/2014/12/opinion-analysis-court-stretches-to-correct-anachronistic-tenth-circuit-pleading-rule/>.

10. Transcript of Oral Argument at 21, *Dart*, 135 S. Ct. 547 (No. 13-719). Justice Samuel Alito thought her assessment was still a little premature. *Id.*

and join Justice Antonin Scalia’s dissent.<sup>11</sup> Thus, the final opinion created unusual alliances across ideological lines: Justices Scalia, Anthony Kennedy, and Clarence Thomas—all Republican appointees—were joined by the Democrat-appointed Justice Kagan in dissent.<sup>12</sup> In the majority, Justice Ruth Bader Ginsburg was joined by fellow Democratic appointees Justices Stephen Breyer and Sonia Sotomayor as well as two Republican appointees, Chief Justice John Roberts and Justice Samuel Alito.<sup>13</sup>

This Comment seeks to explain the strange turn of events leading to these unusual alliances and to suggest that *Dart* provides an important window into the way the Court manipulates its certiorari jurisdiction to achieve substantive policy ends. It is not surprising that the Court stretched its certiorari jurisdiction (or at least failed to do its due diligence) in granting certiorari in a decision denying federal court access to a class action. The Court has gone out of its way in recent years to expand federal jurisdiction over class actions while simultaneously trying to defang the class action device.<sup>14</sup> Although the Class Action Fairness Act (CAFA)<sup>15</sup> has provided explicit support for expanding federal court jurisdiction over class actions under the theory that the federal courts provide consistent, higher-quality justice in support of national interests, the Court has not shied away from interpreting CAFA to its limits.<sup>16</sup> In addition, *Dart* coincided with the Court’s other recent decisions attempting to clarify the pleadings standards in federal courts<sup>17</sup> and featured a strong dissenting opinion below, all of which appeared to make the decision ripe for review.

Part I of this Comment addresses the changes to federal removal practices brought about by CAFA and examines the procedural

11. *Dart*, 135 S. Ct. at 558 (Scalia, J., dissenting).

12. *See id.* at 558.

13. *See id.* at 551 (majority opinion).

14. *See, e.g.*, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (“To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”).

15. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

16. *See* Edward A. Purcell Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1856 (2008) (“Thus, CAFA’s design seemed apparent. It sought to reverse the litigation trend of the preceding decade by bringing most multistate class actions into the national courts, and it sought to reduce or eliminate the problems that class actions created by subjecting them to what would purportedly be the superior and more exacting supervision of the federal courts.”); *see also* Gil Seinfeld, *The Federal Courts as Franchise*, 97 CALIF. L. REV. 95 (2009) (arguing the federal courts provide additional advantages to litigants beyond the classic, and somewhat misleading, traditional rationales of correcting bias and promoting uniformity and expertise).

17. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (attempting to clarify the Court’s plausibility standard).

background of *Dart* more closely. Part II argues that *Dart* shows the malleability of seemingly neutral principles of appellate practice and the need to consider carefully the practical repercussion of jurisdictional and appellate rules. The Conclusion discusses what modest lessons may be gleaned from a seemingly unique decision.

### I. GETTING “IN” TO FEDERAL APPELLATE COURT

The next two Sections describe CAFA’s removal provisions and the unique procedural history in *Dart*. CAFA altered federal court jurisdiction in important ways and demonstrated a congressional intent to have the federal courts exercise greater jurisdiction over class actions based only on diversity of citizenship.

#### A. CAFA’s Removal Provisions

Few jurisdictional changes in recent years have been more significant than the changes brought by the Class Action Fairness Act, which expanded federal court jurisdiction over class actions by lowering the bar to removal of nationwide class actions.<sup>18</sup> CAFA was the latest in a long history of reforms aimed at influencing substantive legal outcomes through manipulations of supposedly neutral procedural rules of jurisdiction.<sup>19</sup> CAFA and Rule 23—the federal procedural rule on class action certification—have led to a number of important Supreme Court decisions on removability in recent years.<sup>20</sup> Several of these decisions have involved CAFA’s removal provision, which allows defendants to remove class actions to federal court when minimal diversity exists between the parties—at least one defendant must reside in a different state from at least one plaintiff—and when the amount in controversy exceeds \$5 million.<sup>21</sup> Removal both defeats the plaintiff class’s original choice to bring the controversy in state court and provides defendants’ protection in federal courts—perceived to be friendlier to defendants’ interests, especially business interests, although actual evidence of bias is

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18. For a general overview of CAFA focusing on its connections to previous efforts to implement judicial reform and the ideological implications of such reforms, see generally Purcell, *supra* note 16.

19. *See id.* at 1825–51 (describing past efforts on jurisdictional reform and their rationales); *see also* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011) (describing the role of class actions as a procedural device meant to achieve the substantive end of school integration).

20. *See, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (finding that actions by a state’s attorney general were not removable under CAFA); *Standard Fire Ins. v. Knowles*, 133 S. Ct. 1345, 1347 (2013) (holding that plaintiff class’s stipulation that it would seek less than \$5 million in damages did not prevent federal court jurisdiction under CAFA).

21. 28 U.S.C. § 1332(d)(2) (2012).

difficult to pinpoint.<sup>22</sup> Perhaps more importantly to defense attorneys, the federal courts offer a standardized legal environment with a set of procedural rules that are consistent across the country along with recent precedents and rule changes that were generally hostile to class actions, for example, changes allowing interlocutory appeals for orders certifying classes and strict standards of certification.<sup>23</sup> However, these changes also mean that the federal courts end up hearing more cases where state law provides the rule of decision.

### B. *The Litigation*

Dart Cherokee Basin Operating Co. and Cherokee Basin Pipeline (Dart)—petitioners at the Supreme Court and defendants below—were two oil and gas companies who, according to the putative class of plaintiffs, had underpaid royalties on certain oil and gas leases.<sup>24</sup> Dart removed the putative class action to the U.S. District Court for the District of Kansas on the basis of CAFA’s expanded diversity jurisdiction.<sup>25</sup> Dart’s notice of removal alleged that the underpayments totaled \$8.2 million, enough to meet CAFA’s \$5 million amount-in-controversy requirement.<sup>26</sup> Owens—plaintiffs below and respondents before the Supreme Court—filed a motion to remand the litigation to state court on the ground that Dart’s notice of removal was deficient for failing to provide evidence supporting its allegation that the amount in controversy exceeded \$5 million.<sup>27</sup> Dart responded by providing a declaration from one of its officers that included detailed calculations of damages exceeding \$11 million, but the district court read Tenth Circuit precedent to require the court to remand the case to state court.<sup>28</sup> The district court believed that it could only base its determination of whether the amount in controversy was met on the notice of removal and motion to remand,

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22. Purcell, *supra* note 16, at 1885 (“[T]here was no evidence that bias or unfairness existed in state courts generally, and in spite of their extreme and sweeping rhetoric, not even CAFA’s most unrestrained advocates purported to show otherwise.”).

23. *See, e.g.*, FED. R. CIV. P. 23(f) (allowing for interlocutory appeal of a decision to certify, or not certify, a class); *Walmart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (refusing to certify a class seeking damages for employment discrimination on the theory that individual defenses undermine the predominance of common questions); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (requiring that plaintiff class’s model of damages be sufficient to determine damages for each individual member of the class); *see also* Purcell, *supra* note 16, at 1887 (“Thus, CAFA did not so much save defendants from biased state courts as reward them with access to an alternate forum that they regarded as more favorable to their interests.”).

24. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 551 (2014).

25. *Id.* at 552.

26. *Id.*

27. *Id.*

28. *Id.*

and it could not consider the additional declaration.<sup>29</sup> Accordingly, the district court remanded the case to state court.<sup>30</sup>

Dart petitioned the Tenth Circuit for review of the motion to remand under a provision of CAFA that allows appellate courts to review remand orders, which otherwise are not subject to appellate review.<sup>31</sup> Appeals of remand orders under CAFA are discretionary though and the Tenth Circuit refused to hear Dart's appeal by a vote of 2–1 and likewise denied Dart's petition for a rehearing en banc on an evenly divided vote.<sup>32</sup> The Tenth Circuit chose not to provide its reasoning for denying the petition and merely denied without comment.<sup>33</sup> Dissenting from the order denying rehearing en banc, Judge Harris Hartz argued that refusing to hear the case would have the effect of “impos[ing] in this circuit requirements for notices of removal that are even more onerous than the code pleading requirements that I had thought the federal courts abandoned long ago.”<sup>34</sup>

The Supreme Court granted certiorari to address: “Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or is alleging the required ‘short and plain statement of the grounds for removal’ enough?”<sup>35</sup> It was not until an amicus curiae brief from a public policy institute, Public Citizen, Inc.,<sup>36</sup> that the Court discovered the possible problem with its appellate jurisdiction.<sup>37</sup> Public Citizen argued that since 28 U.S.C. § 1453(c)(1) placed the decision to accept or deny an appeal from an order remanding the class action to state court squarely within the discretion of the circuit court, the only question properly before the Court, then, was whether the Tenth Circuit had abused its discretion in refusing to take the appeal.<sup>38</sup> Since the Tenth Circuit did not consider or

29. *Id.*

30. *Id.*

31. 28 U.S.C. § 1453(c)(1) (“[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.” (emphasis added)).

32. *Dart*, 135 S. Ct. at 552.

33. *Dart Cherokee Basin Operating Co. v. Owens*, 730 F.3d 1234, 1234 (10th Cir. 2013).

34. *Id.* (Hartz, J., dissenting).

35. Petition for Writ of Certiorari at i, *Dart*, 135 S. Ct. 547, 2013 WL 6665192, at \*i.

36. Brief of Amicus Curiae Public Citizen, Inc., In Support of Respondent, *Dart*, 135 S. Ct. 547 (No. 13-719), 2014 WL 3767421.

37. *Dart*, 135 S. Ct. at 558. (Scalia, J., dissenting) (“After briefing we discovered a little snag: This case does not present that question [i.e. the question of whether parties seeking to remove to federal court must present evidence of the amount in controversy].”).

38. Brief of Amicus Curiae Public Citizen, Inc., In Support of Respondent at 6, *Dart*, 135 S. Ct. 547 (No. 13-719), 2014 WL 3767421 at \*6.

comment on the reasoning of the district court, Public Citizen argued that the Court was likewise barred from considering the merits as the only matter “in” the Tenth Circuit was the preliminary decision of whether to consider the appeal.<sup>39</sup> Public Citizen suggested that the Court could either affirm the Tenth Circuit’s decision—because it had not abused its discretion—or dismiss the writ as improvidently granted.<sup>40</sup>

Public Citizen’s brief came relatively late in the deliberations—about two months before oral argument—and raised a jurisdictional issue which the parties had not briefed.<sup>41</sup> Oral argument focused largely on the jurisdictional issue and not the actual question presented.<sup>42</sup> In its brief and at oral argument, Dart disputed the appropriateness of an abuse of discretion standard and encouraged the Court to decide the merits of the case.<sup>43</sup> Ultimately, a majority of the Court was persuaded to Dart’s position, reasoning that the abuse of discretion issue and the merits of the case were not altogether separate issues and the obvious error in the district court order suggested that an abuse-of-discretion occurred in not reviewing and reversing.<sup>44</sup> The next Part addresses the Justices’ varied views on these issues in greater detail.

## II. ANALYSIS

The following Sections analyze the reasoning of the majority and dissenting arguments in more detail and argue that questions of appellate jurisdiction cannot be completely explained by principles of appellate jurisdiction but instead reflect the judge’s personal understanding of which issues are of national importance. This is not to argue, however,

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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.

*Id.*

39. *Id.*

40. *Id.* at 25.

41. For a timeline of the briefs, see SCOTUSBLOG, *Dart Cherokee Basin Operating Company, LLC v. Owens*, <http://www.scotusblog.com/case-files/cases/dart-cherokee-basin-operating-company-llc-v-owens/> (last visited July 1, 2015).

42. *See supra* note 9 and accompanying text.

43. Transcript of Oral Argument at 4, *Dart*, 135 S. Ct. 547 (No. 13-719) (“[A]n abuse of discretion is not necessary to be shown here.”); Reply Brief for Petitioners at 16–20, *Dart*, 135 S. Ct. 547 (No. 13-719), 2014 WL 4199270, at \*16–20.

44. *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 558 (2014) (“Careful inspection . . . reveals that the two issues Public Citizen invites us to separate—whether the Tenth Circuit abused its discretion in denying review, and whether the District Court’s remand order was erroneous—do not pose genuinely discrete questions.”).



that a more principled approach would be superior, or even possible. Decisions to grant certiorari are inherently political—in a broad sense of the term<sup>45</sup>—and should be understood and analyzed as such.

### A. *The Arguments*

Justice Ginsburg’s majority opinion focused on a line of argument raised by Judge Hartz’s dissent from the Tenth Circuit’s order denying rehearing en banc—that any diligent lawyer, after observing that the Tenth Circuit let the district court’s decision stand, would feel obligated to include evidence establishing the amount in controversy along with the notice of removal.<sup>46</sup> The practical effect, then, of the Tenth Circuit’s decision to deny review was to foreclose the issue from further review and deny the defendants a right to which they are entitled under federal law.<sup>47</sup> Moreover, the majority reasoned that even if the issue were limited to the Tenth Circuit’s discretion to take the appeal, basing a decision not to review on an erroneous interpretation of the law was always an abuse of discretion.<sup>48</sup> Justice Ginsburg pointed out that the Tenth Circuit’s own precedents suggested a need to revise erroneous decisions where not reversing and remanding would create the opportunity that the erroneous view would “preclude[] any other opportunity for [the defendant] to vindicate its claimed legal entitlement [under CAFA] . . . to have a federal tribunal adjudicate the merits.”<sup>49</sup>

Justice Ginsburg also pointed out the similarity between the procedural posture of *Dart* and another recent CAFA removal decision, *Standard Fire Insurance v. Knowles*,<sup>50</sup> which itself had relied on supposed congressional intent to assert federal jurisdiction over large class actions of national importance in expanding the scope of federal appellate practice related to class actions.<sup>51</sup> Justice Ginsburg also noted that Public Citizen’s brief on the jurisdictional issue arrived after all the

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45. Specifically, decisions to grant certiorari reflect the Justices’ personal views about what ought to be the important issues of the day, how they ought to be framed, who ought to decide them, and when they ought to be decided. As *Dart* shows quite well, different views on these questions do not always track political views in the narrow sense—Democratic appointees sided with Republican appointees in the case. Still, they are always decisions made based on belief and preference rather than neutral principle.

46. *Dart*, 135 S. Ct. at 552 (citing 730 F.3d 1234 (Hart, J., dissenting)).

47. *Id.* at 556.

48. *Id.* at 555 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

49. *Id.* at 555–56 (citing *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1035 (1st Cir. 2010)).

50. 133 S. Ct. 1345 (2013). The *Standard Fire* Court held that a putative class may not stipulate to total damages less than \$5 million to avoid federal jurisdiction. *Id.* at 1348.

51. *Id.* at 1350 (“CAFA’s primary objective [was to] ensur[e] ‘Federal court consideration of interstate cases of national importance.’” (citing CAFA § 2(b)(2), 119 Stat. 5)).

other merits briefs, so Dart's lack of briefing on the issue of whether the Tenth Circuit's order was an abuse of its discretion to review could be excused.<sup>52</sup> Moreover, all of the previous briefs and motions had focused on the merits of the issue, and the district court's reliance on Tenth Circuit precedent should have put that court on notice of the basis of the district court's remand order.<sup>53</sup>

Justice Scalia, in dissent, offered a few alternative justifications that would have excused the Tenth Circuit's decision not to take the appeal. The Tenth Circuit may have felt that the case was merely a poor vehicle for resolving the question presented or that time and docket pressures would prevent it from properly disposing of the issue.<sup>54</sup> He noted that the Tenth Circuit's order did not provide any reasoning for the denial and that the Court normally refrains from presuming that an appellate court based its opinion on an erroneous view of the law.<sup>55</sup> He took issue with Justice Ginsburg's—and Judge Hartz's—argument that the issue was unlikely to arise again on appeal, noting that even discounting the possibility of incompetent attorneys, highly skilled attorneys and judges still make mistakes.<sup>56</sup> Additionally, the issue could arise in a situation where the parties disputed the sufficiency of evidence for removal. The Tenth Circuit could review the decision and hold that, in fact, CAFA requires no evidence.<sup>57</sup> Finally, Justice Scalia argued that the majority was applying waiver principles inconsistently, penalizing Owens for not raising the jurisdictional issue more thoroughly in its briefs but dismissing Dart's failure to do the same.<sup>58</sup> All of these possible factors amounted to good reasons, in the dissent's view, for dismissing the writ of certiorari as improvidently granted.<sup>59</sup>

### B. *The Practical Approach to Appellate Jurisdiction*

Both Justice Ginsburg and Justice Scalia presented principled arguments for their positions. Justice Ginsburg pointed out that a decision

52. *Dart*, 135 S. Ct. at 557 (“The parties trained their arguments in the Tenth Circuit, as they did here, on the question whether Dart could successfully remove without detailing in the removal notice evidence of the amount in controversy.”).

53. *Id.* at 557–58 (“And if the Circuit precedent on which the District Court relied misstated the law, as we hold it did, then the District Court’s order remanding this case to the state court is fatally infected by legal error.”).

54. *Id.* at 559. If the appellate court grants review, CAFA requires a decision on the remand order within sixty days. 28 U.S.C. § 1453(c)(2) (2012).

55. *Dart*, 135 S. Ct., at 559 (Scalia, J., dissenting).

56. *Id.* at 560 (citing the decision to grant certiorari in this case).

57. *Id.* at 561.

58. *Id.* (“[I]f the timing of that brief excuses Dart’s failure to address whether the Tenth Circuit abused its discretion, it should excuse Owens’ failure as well.”).

59. *Id.* at 562.

to review the district court's order, *vel non*, was properly in the Tenth Circuit and that the determination not to review the order could be considered an abuse of discretion when the order was legally erroneous.<sup>60</sup> Justice Scalia had principle on his side as well, as he noted that the Tenth Circuit's determination not to review the district court's order included no reasoning and, therefore, did not actually present the question presented."<sup>61</sup> Ultimately, procedural arguments fail to provide solutions to many jurisdictional questions; disposing of the issues thus requires a substantive approach.<sup>62</sup>

Justice Ginsburg's opinion addresses the main practical issue—whether, if the district court's order were to stand, the erroneous rule would become cemented in place.<sup>63</sup> While her opinion likely overstates the risk that the issue will never arise again on appeal, it seems probable that most attorneys in the Tenth Circuit will not wish to make precedent on so technical an issue and will comply with the district court's erroneous evidentiary requirement. Allowing such a practice to continue, at least for the foreseeable future, represents a practical denial of a procedural right that CAFA provides defendants—the right to remove actions by filing only a short, plain statement of the basis for removal.<sup>64</sup> Thus, as a practical matter, the result in *Dart* seems justified.

Nevertheless, it is important to put the Court's decision to grant certiorari in context. In its 2013 term, the Supreme Court granted review on 4.2% of the petitions received on its appellate docket, or sixty-eight cases out of 1602 petitions for appellate review.<sup>65</sup> This current rate of review contrasts with that of the 1980s, when the Court reviewed more than twice that number of petitions regularly.<sup>66</sup> Presently, the Court has near total discretion in deciding when to grant certiorari,<sup>67</sup> even for cases

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60. *Id.* at 555 (majority opinion) (“The case was ‘in’ the Court of Appeals because of Dart’s leave-to-appeal application, and we have jurisdiction to review what the Court of Appeals did with that application.” (citation omitted)).

61. *Id.* at 558–59 (Scalia, J., dissenting) (“Once we found out that the issue presented differed from the issue we granted certiorari to review, the responsible course would have been to confess error and to dismiss the case as improvidently granted.”).

62. See Redish, *supra* note 3, at 89–92.

63. *Dart*, 135 S. Ct. at 556.

64. 28 U.S.C. § 1446(a) (2012).

65. *The Supreme Court—The Statistics*, 128 HARV. L. REV. 401, 409 tbl.2(b) (2014). This figure does not include the Court’s miscellaneous other dockets. Appeals through other means are even less likely to make it to the Court. *Id.*

66. Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), <http://www.nytimes.com/2009/09/29/us/29bar.html>.

67. 28 U.S.C. §§ 1254, 1257 (providing discretion to the Court when reviewing federal appellate decisions or decisions of the state’s highest court).

arguably based on state law.<sup>68</sup> Recent reporting also highlights the ways in which the attorneys petitioning the Court play an important role in determining when the Court will grant certiorari.<sup>69</sup> The result of the trend toward greater discretion in choosing when to grant certiorari is predictable—the Justices shape the priorities of the Court to fit with their own perceptions of the important national issues needing to be resolved.<sup>70</sup> Corporate counsel and business interests are especially able to take advantage of the Court’s wide discretion as the Justices themselves often come from a corporate law background or show a familiarity and sympathy with business issues. Likewise, the Court has used its certiorari discretion to push to the forefront of national debate issues that it deems to be of political importance.

### CONCLUSION

While *Dart* was certainly right on the merits of the question presented, the Court stretched to decide a case in which the correct interpretation of the law was clear to most observers of the Court’s precedents, the actual holding of the decision under review was unclear, and the stakes were low. The Court’s argument that the issue would likely not arise again because attorneys would automatically comply with the erroneous decision also shows that the right being vindicated was of little real importance.

*Dart* shows, therefore, that when the decision under review is clearly erroneous, or the Court is interested in deciding a certain question or continuing a certain line of cases, the principles of appellate practice are malleable enough to accommodate review at any time. Two conclusions follow from this analysis: First, understanding and evaluating the Supreme Court’s certiorari jurisdiction requires a subtle understanding of the way the Court manipulates review to achieve political, social, and legal objectives. Second, observers of the Court and congressional overseers ought to be justified in asking probing questions of potential Justices prior to confirmation to try to understand how nominees’ views of national priorities will shape their approach to the business of the Supreme Court—that it is, how the Justice believes the Court should use its jurisdiction and procedures to shape government and society.

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68. See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (announcing the Court’s new policy to assume that, absent a plain statement to the contrary, state court decisions referencing federal law reflect a belief by the state court that federal law required the result and are thus appropriate for Supreme Court review).

69. Joan Biskupic, Janet Roberts & John Shiffman, *At America’s Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/investigates/special-report/scotus/> (reporting that an elite group of sixty-six attorneys, out of 17,000 attorneys who petitioned the Court, were six times more likely to have their petitions granted, and that sixty-three of these attorneys are white and fifty-five are male).

70. See FRANKFURTER & LANDIS, *supra* note 1, at v–vi.

