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# Touching a Nerve: Hertz v. Friend's Impact on the Class Action Fairness Act's Minimum Diversity Requirement

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**TOUCHING A NERVE: *HERTZ V. FRIEND*'S  
IMPACT ON THE CLASS ACTION FAIRNESS  
ACT'S MINIMUM DIVERSITY REQUIREMENT**

*Kimberly Nakamaru\**

I. INTRODUCTION

On February 23, 2010, in *Hertz Corp. v. Friend*,<sup>1</sup> the U.S. Supreme Court looked at the plain language of a federal jurisdictional statute, 28 U.S.C. § 1332(c), and unanimously decided that a corporation's "principal place of business" is the state in which its "nerve center"—typically its headquarters—is located.<sup>2</sup> The *Hertz* holding is relatively straightforward. However, the *Hertz* Court's plain-language interpretation of § 1332(c) suggests how the Court may resolve a circuit split regarding the interpretation of another federal jurisdictional statute, 28 U.S.C. § 1332(d), commonly known as the Class Action Fairness Act of 2005 (CAFA).<sup>3</sup>

CAFA, the statute granting federal jurisdiction over *Hertz*, provides that federal jurisdiction requires only "minimal diversity"—that any plaintiff is a citizen of a state different from that of any defendant.<sup>4</sup> Before Congress enacted CAFA, traditional federal diversity jurisdiction required complete diversity, meaning that all plaintiffs and defendants had to have been citizens of different states.<sup>5</sup> CAFA thus expanded federal diversity jurisdiction over class

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1. 130 S. Ct. 1181 (2010).

2. *Id.* at 1186.

3. 28 U.S.C. § 1332(d) (2006).

4. *Id.* § 1332(d)(2)(A). Federal jurisdiction under CAFA also requires that the amount in controversy "exceeds the sum or value of \$5,000,000, exclusive of interests or costs." *Id.* § 1332(d)(2).

5. *Id.* § 1332(a); *Strawbridge v. Curtis*, 7 U.S. 267, 267 (1806) (interpreting traditional diversity statute to require complete diversity).

actions. Since CAFA's enactment, however, the Supreme Court has not determined whether federal jurisdiction exists when, for example, a class of plaintiffs from California files an action under CAFA against a corporation that is incorporated in Delaware but has its principal place of business in California. For the purpose of traditional diversity jurisdiction, complete diversity is destroyed by the commonality of the plaintiff class members' California citizenships on the one hand and the corporation's principal place of business on the other. But, can the corporation rely on its Delaware citizenship to create minimal CAFA jurisdiction?

This Comment suggests that it cannot. As discussed below, the *Hertz* Court's plain-meaning interpretation of the jurisdictional statute § 1332(c) suggests that the Court will likewise adopt the Fourth Circuit's plain-meaning interpretation of § 1332(c)—which prevents a corporation sued under CAFA from creating federal jurisdiction by relying on its one diverse citizenship. Part II of this Comment describes *Hertz*'s key facts and procedural history. Part III explains how the *Hertz* Court established the “nerve center” test for determining a corporation's principal place of business. Part IV sets up the application of *Hertz* to CAFA's minimal diversity requirement by comparing the policy rationales behind § 1332(c)–(d). Finally, Part V applies *Hertz* to CAFA's minimal diversity requirement and ultimately concludes that a corporation should not be permitted to rely on its citizenship that is diverse from the plaintiffs' to remove to federal court because such reliance destroys minimal diversity and undermines the plain language of § 1332(c).

## II. STATEMENT OF THE CASE

In September 2007, plaintiffs Melinda Friend and John Nhieu filed a class action complaint in a California state court against their employer, the Hertz Corporation (“Hertz”), seeking damages under California wage and hour laws for failure to provide overtime wages, meal and rest breaks, and vacation pay.<sup>6</sup> The plaintiff class comprised California citizens who had allegedly suffered harms similar to Friend and Nhieu's.<sup>7</sup>

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6. *Friend v. Hertz Corp.*, No. C-07-5222 MMC, 2008 WL 7071465, at \*1 (N.D. Cal. Jan. 15, 2008), *aff'd*, 297 F. App'x 690 (9th Cir. 2008), *vacated*, 130 S. Ct. 1181.

7. *Hertz*, 130 S. Ct. at 1186.

On October 11, 2007, Hertz removed the action to the Northern District of California pursuant to CAFA,<sup>8</sup> which grants federal district courts jurisdiction over a class action when the matter in controversy exceeds \$5,000,000 and “any member of a class of plaintiffs is a citizen of a State different from any defendant.”<sup>9</sup> Hertz argued that the federal court had diversity jurisdiction pursuant to CAFA because Hertz and the plaintiffs were citizens<sup>10</sup> of different states.<sup>11</sup> However, Friend and Nhieu argued that removal was improper for lack of CAFA diversity jurisdiction because the class members and Hertz were all California citizens.<sup>12</sup>

To prove that it was diverse from the plaintiffs, Hertz submitted a declaration by an employee relations manager that purported to show that Hertz’s principal place of business was in New Jersey rather than in California.<sup>13</sup> The declaration stated that the “leadership of Hertz and its domestic subsidiaries” was in New Jersey and that its “core executive and administrative functions . . . [were] carried out” there and “to a lesser extent” in Oklahoma.<sup>14</sup> The declaration also stated that Hertz facilities existed in forty-four states, and that the state that accounts for 12 percent of the nation’s population, California, contained “273 of Hertz’s 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about \$811 million of its \$4.371 billion in annual revenue; and about 3.8 million of its

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8. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §§ 1331, 1453, 1711–1715 (2006)). Because CAFA will play a central role in my later analysis, it is helpful to briefly introduce it here. CAFA, a key component of President George W. Bush’s tort reform efforts, was enacted to prevent “forum shopping” between state and federal courts. Georgene M. Vairo, *The Complete CAFA: Analysis and Developments Under the Class Action Fairness Act of 2005*, LEXISNEXIS (forthcoming 2011) (manuscript at Part I.A) (on file with author). To do this, CAFA expanded federal jurisdiction over “large class actions and other complex, state-claim-based litigation in which there is minimal diversity.” *Id.* Additionally, CAFA enables state court cases that fall within CAFA’s provisions to be removed to federal court. *Id.*

9. 28 U.S.C. § 1332(d)(2)(A) (conferring CAFA jurisdiction based on amount in controversy and diversity of citizenship); *Hertz*, 2008 WL 7071465, at \*1.

10. For the purposes of diversity jurisdiction and removal, “a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .” 28 U.S.C. § 1332(c)(1).

11. *Hertz*, 130 S. Ct. at 1186. Hertz’s Notice of Removal alleged that the amount in controversy exceeded \$5,000,000, that each class member was a California citizen, and that Hertz was a Delaware citizen based on its state of incorporation and a New Jersey citizen based on its principal place of business. *Hertz*, 2008 WL 7071465, at \*1.

12. *Hertz*, 130 S. Ct. at 1186.

13. *Id.*

14. *Id.*

approximately 21 million annual [rentals].”<sup>15</sup>

At the time the *Hertz* lawsuit was filed, federal courts applied one of three different tests to determine a corporation’s principal place of business: (1) the “place of operation” test; (2) the “nerve center” test; and (3) the “total activities” test.<sup>16</sup> “[T]he ‘place of operations’ test locates a corporation’s principal place of business in the state which ‘contains a substantial predominance of corporate operations.’”<sup>17</sup> Under the place-of-operations test, the first step is to determine the amount of business activity in each state, and then, if the amount of activity is “significantly larger” or “substantially predominates” in one state that state is the corporation’s principal place of business.<sup>18</sup> The nerve-center test places a corporation’s principal place of business in the state containing the corporation’s headquarters.<sup>19</sup> Finally, the total-activities test encompasses aspects of the both the place-of-operations and the nerve-center tests and considers all relevant factors, weighing them on a case-by-case basis.<sup>20</sup>

The U.S. Court of Appeals for the Ninth Circuit applied the place-of-operations test when it determined a corporation’s principal place of business.<sup>21</sup> Accordingly, the District Court for the Northern District of California applied that test and found that California was *Hertz*’s principal place of business.<sup>22</sup> In reaching this conclusion, the district court found that the “plurality of each of the relevant business activities” was in California because “‘the differential between the amount of those activities’ in California and the amount in ‘the next closest state’ was ‘significant.’”<sup>23</sup> Due to the lack of diversity jurisdiction, the district court concluded that removal was improper

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15. *Id.*

16. 13F CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3625 (3d ed. 2009).

17. *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 500 (9th Cir. 2001) (quoting *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990)).

18. *Id.* at 500–02.

19. *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986).

20. *Gafford v. Gen. Electric*, 997 F.2d 150, 162–63 (6th Cir. 1993).

21. *Hertz Corp. v. Friend*, 297 F. App’x 690, 691 (9th Cir. 2008), *vacated*, 130 S. Ct. 1181 (2010).

22. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010).

23. *Id.* (quoting *Friend v. Hertz*, No. C-07-5222 MMC, 2008 WL 7071465, at \*4 (N.D. Cal. Jan. 15, 2008)).

and remanded the case to the state court.<sup>24</sup>

Hertz appealed the remand order.<sup>25</sup> On October 30, 2008, the Ninth Circuit affirmed the district court's holding in a memorandum order, finding that the district court had correctly applied the place-of-operations test to determine Hertz's principal place of business.<sup>26</sup> Referencing policy considerations underlying diversity jurisdiction, the Ninth Circuit concluded that Hertz was not in jeopardy of being mistreated in California courts based on its extensive California business activities.<sup>27</sup>

Not to be deterred, Hertz filed a petition for writ of certiorari.<sup>28</sup> On June 8, 2009,<sup>29</sup> the Supreme Court granted certiorari to resolve the differences among the circuit courts of appeals as to the correct test for determining corporate citizenship.<sup>30</sup>

### III. REASONING OF THE COURT

After reviewing the history of corporate citizenship and the circuit courts' disparate interpretations of the statutory provisions, the Supreme Court unanimously held that:

principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, *i.e.*, the "nerve center," and not simply an office where the corporation holds its board meetings . . . .<sup>31</sup>

The Court had three primary reasons for reaching this conclusion: (1) the statutory language of 28 U.S.C. § 1332(c)(1) supports the nerve-center approach; (2) the nerve-center approach

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24. *Id.*

25. *Id.* (citing 28 U.S.C. § 1453(c) (2006)).

26. *Hertz*, 297 F. App'x at 691, *vacated*, 130 S. Ct. 1181.

27. *Id.*

28. *Hertz*, 130 S. Ct. at 1187.

29. *Hertz Corp. v. Friend*, 129 S. Ct. 2766, 2766 (2009).

30. *Hertz*, 130 S. Ct. at 1187.

31. *Id.* at 1192.

promotes administrative simplicity; and (3) the statute's legislative history provides an interpretive benchmark based on simplicity.<sup>32</sup> This section explains and analyzes each of the Court's reasons in turn.

First, the Court performed a textual analysis on the text of 28 U.S.C. § 1332(c)(1).<sup>33</sup> The statute considers a corporation a citizen of the "[s]tate where it has its principal place of business."<sup>34</sup> The Court pointed out that the word "place" is singular and that according to the *Oxford English Dictionary*, the word "principal" refers to the "main, prominent" or "leading" place.<sup>35</sup> Furthermore, because "place" follows "[s]tate where" in the statute, the Court found that the place at issue is a leading place *within* a state rather than the state itself.<sup>36</sup>

Accordingly, the Court reasoned that a corporation's headquarters, or nerve center, is the place within a state that constitutes the corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1).<sup>37</sup> In comparison with tests that have led courts, such as the *Hertz* district court, to look at the total amount of business activities in a given state, the Court found that the nerve-center test best conforms to the spirit of the statute.<sup>38</sup>

Second, the Court opted for the comparatively simpler nerve-center test to promote administrative ease and increased predictability.<sup>39</sup> The Court considered the nerve-center test to be comparatively simpler than other tests because a corporation's headquarters, which is typically equated with its nerve center, suggests a single location.<sup>40</sup> Zeroing in on a single, predictable location, for example, is much easier than trying to choose from amongst the many places where a corporation conducts its "general business activities."<sup>41</sup>

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32. *Id.* at 1192–94.

33. *Id.* at 1192–93.

34. 28 U.S.C. § 1332(c)(1) (2006). The statute provides that a corporation is also a citizen of the "[s]tate by which it has been incorporated." *Id.*; *Hertz*, 130 S. Ct. at 1192.

35. *Hertz*, 130 S. Ct. at 1192 (citing 12 OXFORD ENGLISH DICTIONARY 495 (2d ed. 1989) (def. (A)(1)(2))).

36. *Id.* at 1193.

37. *Id.*

38. *Id.* at 1192–93.

39. *Id.* at 1193.

40. *Id.*

41. *Id.* at 1193–94.

The Court reasoned that administrative simplicity is a “major virtue” in a jurisdictional statute because “[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.”<sup>42</sup> Clear rules, then, increase the likelihood that cases will be heard on the merits, decrease the likelihood that cases will be appealed and reversed, and decrease waste of judicial resources.<sup>43</sup>

The Court also found that a clear jurisdictional test increases predictability both for corporations and for individuals—likely to be plaintiffs in cases like *Hertz*.<sup>44</sup> Corporations value predictability because it enhances their ability to make savvy business and investment decisions.<sup>45</sup> Similarly, the ability to predict which state a court will likely deem a corporation to be a citizen of is helpful to individuals deciding whether to file in state or federal court.<sup>46</sup>

Third, the Court reasoned that 28 U.S.C. § 1332(c)(1)’s legislative history indicated a preference for a simple test.<sup>47</sup> Specifically, the Committee on Jurisdiction and Venue rejected its initial version of the proposed statute as too complex and impractical to apply because it included a numerical test that deemed a corporation a citizen of the state in which it earned more than half of its gross income.<sup>48</sup> Accordingly, the Court found that the legislative history suggested that the words “principal place of business” in the statute should be interpreted to be no more complex than the rejected “half of gross income” test.<sup>49</sup> Because the nerve-center test only requires locating a corporation’s headquarters, the Court held that it better corresponded with the legislative history of 28 U.S.C. § 1332(c)(1).<sup>50</sup>

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42. *Id.* at 1193.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1194.

48. *Id.* The rejected version of the proposed statute recommended “that section 1332 of the Revised Judicial Code be amended so as to provide that a corporation may not invoke the Federal jurisdiction in a state in which it is doing business and from which it receives more than half of its gross income.” S. REP. NO. 85-1380, at 3132 (1958).

49. *Hertz*, 130 S. Ct. at 1194.

50. *Id.*

Therefore, because Hertz's unchallenged declaration indicated that its "center of direction, control, and coordination" and its headquarters were both located in New Jersey, the Court concluded that Hertz's principal place of business was New Jersey under the nerve-center test.<sup>51</sup> Accordingly, Hertz was a citizen of New Jersey and of Delaware (i.e., Hertz's place of incorporation),<sup>52</sup> and was therefore diverse from the California-based plaintiffs.<sup>53</sup> The Court then vacated the Ninth Circuit's judgment and remanded the case to the Ninth Circuit for further proceedings consistent with *Hertz*.<sup>54</sup>

IV. THE APPLICATION OF *HERTZ* TO CAFA'S  
MINIMAL DIVERSITY PROVISION REQUIRES COMPARING  
THE POLICIES UNDERLYING § 1332(C)–(D)

Although *Hertz* was a unanimous decision that provided a definitive test for interpreting where a corporation's 28 U.S.C. § 1332(c)(1) principal place of business is located, it did not mention how *Hertz* will be applied with respect to CAFA's minimal diversity standard codified in 28 U.S.C. § 1332 (d)(2). Under CAFA, federal courts have jurisdiction if "any member of a class of plaintiffs is a citizen of a State different from any defendant."<sup>55</sup> With respect to a corporate defendant that has two citizenships, however, CAFA's minimal diversity requirement can be read in two ways. Must both of a corporate defendant's § 1332(c)(1) citizenships be diverse from that of any plaintiff to warrant federal jurisdiction, or just one?

The policy concerns underlying § 1332(c)–(d) frame the issue. On the one hand, § 1332(c) aimed to prevent corporations from removing lawsuits to federal court by giving them two citizenships (state of incorporation and principal place of business), thereby increasing the chance that one of the corporation's citizenships would be the same as that of a plaintiff, destroying the complete diversity required for federal jurisdiction.<sup>56</sup> On the other hand, § 1332(d) sought to prevent class action plaintiffs from suing defendants in state courts known to be unfavorable to defendants by

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51. *Id.* at 1195.

52. *Id.* at 1189 (finding that Hertz was incorporated in Delaware).

53. *Id.* at 1195.

54. *Id.*

55. 28 U.S.C. § 1332(d)(2)(A) (2006).

56. *See Hertz*, 130 S. Ct. at 1188–90.

only requiring minimal diversity for federal jurisdiction.<sup>57</sup> Section 1332(d) therefore increased the chance that a federal court would have jurisdiction by only requiring *one* of the plaintiffs to be diverse from any *one* of the defendants. Where § 1332(c) decreased the possibility of federal jurisdiction, § 1332 (d) increased it. But both provisions were promulgated in reaction to parties manipulating jurisdiction—a key consideration in *Hertz*'s applicability to CAFA's minimal jurisdiction requirement. This section sets up *Hertz*'s application to CAFA by further comparing the policies underlying § 1332(c) and (d).

*A. Subsection 1332(c) Sought to Prevent Corporations from Manipulating Federal Court Jurisdiction*

The basic purpose of diversity jurisdiction is to grant federal court access to out-of-state parties who might otherwise be subject to local prejudice.<sup>58</sup> Accordingly, in the First Judiciary Act of 1789, Congress authorized federal courts to exercise diversity jurisdiction over suits “between a citizen of the [s]tate where the suit is brought, and the citizen of another [s]tate.”<sup>59</sup> However, the First Judiciary Act did not mention corporations.<sup>60</sup> The Court squabbled for the ensuing fifty years about a corporation's ability to invoke the federal courts' diversity jurisdiction before it held in *Louisville, C. & C. R. Co. v. Letson*<sup>61</sup> that a corporation was to be considered a citizen of its state of incorporation.<sup>62</sup>

Problems arose, however, when corporations began manipulating federal court jurisdiction by filing in federal courts in states in which they had significant business interests but in which they were not incorporated.<sup>63</sup> This circumvented the policy rationale of diversity jurisdiction because it gave the corporation a choice of two tribunals—a corporation would often choose to bring its lawsuit in federal court when there was little risk of prejudice against it in

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57. Vairo, *supra* note 8, at Part I.C–D.

58. *Hertz*, 130 S. Ct. at 1188.

59. *Id.* (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332 (2006))).

60. *Id.*

61. 43 U.S. 497 (1844).

62. *Hertz*, 130 S. Ct. at 1188 (citing WRIGHT, *supra* note 16, § 3623, at 1–7).

63. *Id.*

the state court due to the corporation's often significant contacts or interests in that state.<sup>64</sup>

To combat jurisdictional frauds and abuses, the Committee on Jurisdiction and Venue proposed in 1951—over a century after *Louisville*—that a corporation should be “deemed a citizen of the state of its original creation . . . [and] shall also be deemed a citizen of a state where it has its principal place of business.”<sup>65</sup> In 1958, Congress codified this jurisdictional test at 28 U.S.C. § 1332(c), deeming a corporation a “citizen of any [s]tate by which it has been incorporated and of the [s]tate where it has its principal place of business.”<sup>66</sup> By creating two different citizenships, Congress decreased the likelihood that a corporation could manipulate federal court jurisdiction because complete diversity would be destroyed if the plaintiffs were citizens of *either* the corporation's state of incorporation *or* its principal place of business.<sup>67</sup>

*B. CAFA's Minimal Diversity Requirement Increased Federal Jurisdiction over Large Class Actions*

While § 1332(c) impedes corporations' access to federal courts, CAFA, codified in § 1332(d), increases their access.<sup>68</sup> Like § 1332(c), § 1332(d) was enacted in response to complaints about forum shopping.<sup>69</sup> Rather than the corporation doing the forum shopping prior to § 1332(c), the class action plaintiffs often brought cases in “so-called ‘judicial hellholes’” for defendants where certain judges had reputations for certifying classes and awarding significant damages and attorney's fees.<sup>70</sup>

As a result, Congress enacted CAFA in 2005 to make it easier for defendants to remove cases to federal court.<sup>71</sup> CAFA achieved

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64. *Id.* at 1188–89 (citing S. REP. NO. 72–530, at 2, 4–7 (1932)).

65. *Id.* at 1189 (quoting JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE COMMITTEE ON JURISDICTION AND VENUE 4 (1951)).

66. *Id.* at 1190 (citing Act of July 25, 1985, Pub. L. No. 85-554, § 2, 72 Stat. 415 (1958) (codified as amended at 28 U.S.C. § 1332(c) (2006))).

67. Vairo, *supra* note 8, at Part IV.B.3, at 13.

68. *Id.* at Part I.C.

69. *Id.*

70. *Id.*

71. *Id.* at Section I.A. In addition to expanding federal jurisdiction pursuant to § 1332(d), CAFA also created a broad, new removal provision, 28 U.S.C. § 1453 (2006). *Id.* at Section I.D.1.c.

this by amending § 1332 to abolish the complete diversity requirement for class actions and to require only “minimal diversity”: if any plaintiff is diverse from any defendant, federal courts have jurisdiction, and the defendant may remove the case to federal court.<sup>72</sup>

## V. ANALYSIS

What started as a statute to increase fairness for defendants, however, has created an unforeseen potential windfall for corporate defendants sued under CAFA. Section 1332(c) provides dual citizenship for corporations on the premise that dual citizenship will prevent corporations from manipulating federal court jurisdiction.<sup>73</sup> However, the issue under CAFA is how CAFA’s minimum diversity requirement will be interpreted in light of § 1332(c)’s dual citizenship specification.<sup>74</sup> The courts of appeals are split on this issue. The Supreme Court has yet to resolve whether a corporation can remove to federal court based on minimum diversity between a member of the plaintiff class and one of the corporation’s defendants.

This part proposes that *Hertz*, which was decided pursuant to CAFA, suggests that courts will interpret the relationship between § 1332(c) and CAFA so as to prevent corporations from “creating” minimum diversity by relying on citizenship that is diverse from a member of the plaintiff class.

### A. *The Fourth Circuit Does Not Allow a Corporation to Create CAFA Jurisdiction Based on Its One Diverse Citizenship*

Some courts have held that CAFA’s minimal diversity requirement is not satisfied when a class includes only citizens of a state in which the corporate defendant is either incorporated or has

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72. 28 U.S.C. § 1332(d)(2)(A) (2006); Vairo, *supra* note 8, at Part I.D.1.a. Furthermore, while not directly relevant here, minimum diversity is also met if any member of a class of plaintiffs is a foreign state or a citizen of a foreign state, or if any member of the plaintiff class is a citizen of a state and any defendant is a foreign state. 28 U.S.C. § 1332(d)(2)(B)–(C). CAFA also expanded federal jurisdiction by making it easier for plaintiffs to meet the new \$5 million amount in controversy. *Id.* § 1332(d)(6); Vairo, *supra* note 8, at Part I.D.1.a. Rather than requiring an individual to meet the amount in controversy, CAFA allows plaintiff class members to aggregate their individual damages. 28 U.S.C. § 1332(d)(6); Vairo, *supra* note 8, at Part I.D.1.a.

73. Vairo, *supra* note 8, at Part IV.B.3.

74. *Id.*

its principal place of business because the corporation cannot prove that there is a plaintiff who is a citizen of a state different from the defendant.<sup>75</sup>

The Fourth Circuit's decision in *Johnson v. Advance America*<sup>76</sup> is the best example of an appellate court preventing a corporation from creating CAFA jurisdiction based on its one diverse citizenship.<sup>77</sup> Defendant Advance America argued that removal was proper because it met CAFA's minimal diversity requirement—the corporation was incorporated in Delaware, and therefore a Delaware citizen, which made it diverse from the plaintiff class, all of whom were citizens of South Carolina.<sup>78</sup> Although Advance America's principal place of business was in South Carolina, making it also a South Carolina citizen, it contended that its common South Carolina citizenship did not destroy the minimum diversity created by CAFA because its Delaware citizenship was diverse from the plaintiffs' South Carolina citizenship.<sup>79</sup>

The Fourth Circuit held that Advance America could not rely on its Delaware citizenship to create minimal diversity with the South Carolina plaintiffs while ignoring that the corporation was also a citizen of South Carolina.<sup>80</sup> The court explained that § 1332(c)(1)'s use of the conjunctive “and” between “[s]tate by which it has been incorporated *and* [s]tate where it has its principal place of business”<sup>81</sup> gives “dual, not alternative, citizenship to a corporation whose principal place of business is in a [s]tate different from the [s]tate where it is incorporated.”<sup>82</sup> Therefore, the court concluded that § 1332(c)(1)'s statutory language prevented Advance America from relying on its one diverse citizenship when its other citizenship

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75. *E.g.* *Smalls v. Advance Am.*, No. 2:07-3240-TLW-TER, 2008 WL 4177297, at \*2 (D.S.C. Sept. 5, 2008) (accepting report concluding that dual citizenship of a corporate defendant does not create minimum diversity under CAFA); *Sundy v. Renewable Env'tl. Solutions, LLC*, No. 07-5069-CV-SW-ODS, 2007 WL 2994348, at \*4 (W.D. Mo. Oct. 10, 2007) (finding no minimum diversity because corporate defendant was a citizen of Missouri and Delaware and all class members were citizens of either Missouri or Delaware).

76. 549 F.3d 932 (4th Cir. 2008).

77. *Id.* at 934.

78. *Id.* at 933.

79. *Id.*

80. *Id.* at 935–36.

81. 28 U.S.C. § 1332(c)(1) (2006) (emphasis added).

82. *Johnson*, 549 F.3d at 935.

would destroy federal jurisdiction.<sup>83</sup>

*B. One Court Permits a Corporation to Create  
CAFA Jurisdiction Based On Its One Diverse Citizenship*

In contrast, the court in *Fuller v. Home Depot Services, LLC*<sup>84</sup> held otherwise.<sup>85</sup> There, the Northern District of Georgia found that defendant Home Depot had satisfied minimal diversity even though its principal place of business was in Georgia and the plaintiff class comprised citizens of Georgia because Home Depot was incorporated in—and was accordingly a citizen of—Delaware.<sup>86</sup> The *Fuller* court reasoned that although Home Depot was a Georgia citizen, it was also a Delaware citizen, and therefore, was diverse from at least one member of the class as required by CAFA.<sup>87</sup> Unlike the court in *Johnson*, the *Fuller* court held that the corporate defendant could rely on its one diverse citizenship to satisfy CAFA’s minimal diversity requirement.<sup>88</sup>

*C. Hertz Suggests That a Corporate Defendant May Not Create  
Federal Jurisdiction by Counting Only One of Its Citizenships*

*Johnson* and *Fuller* each support a different method of solving the CAFA minimal diversity dilemma. *Johnson* points to a resolution based on the plain language of § 1332(c). Conversely, *Fuller* suggests that courts should look to Congress’s intent in passing CAFA to expand diversity jurisdiction over class actions.<sup>89</sup> If a class of plaintiffs files its case in a “judicial hellhole,” for example, a corporate defendant with multiple states of citizenship can rely on its diverse citizenship to create minimal diversity. This comports with CAFA’s policy of fairness to defendants by creating minimum diversity that would otherwise not exist under the *Johnson* model.

Two different statutes. Two different policies. One landmark Supreme Court case that may resolve the conflict. What the Supreme Court did in *Hertz* provides insight into how the Court might apply

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83. *Id.* at 936.

84. No. 1:07-CV-1268-RLV, 2007 WL 2345257 (N.D. Ga. Aug. 14, 2007).

85. *Id.* at \*1.

86. *Id.* at \*3.

87. *Id.*

88. *Id.*

89. Vairo, *supra* note 8, at Part IV.B.3, at 14–15.

CAFA's minimal diversity requirement to dual corporate citizenship under § 1332(c): while on the surface, the *Hertz* Court decided how to determine a corporation's principal place of business pursuant to § 1332(c), it also has provided clues for how it might determine the requirements of minimal diversity under CAFA.

In particular, the Court's thorough analysis of the statutory language suggests that the Court would adopt a minimal diversity rule, such as the one presented in *Johnson*. Just like the *Johnson* court hinged its jurisdictional finding on the word "and" in § 1332(c), the *Hertz* Court determined the meaning of "principal place of business" under § 1332(c) based on its analysis of the words "principal" and "place."<sup>90</sup> The Court's apparent focus on the statutory language suggests that the Court would likely choose a CAFA jurisdictional rule that best adheres to the language of the affected statutes, § 1332(c) and (d).<sup>91</sup>

Focusing on the statute's plain language is also consistent with federal courts' resistance to an expansive reading of CAFA.<sup>92</sup> In a study of all published CAFA cases decided between CAFA's enactment on February 18, 2005, and August 18, 2007, Professors Kevin Clermont and Theodore Eisenberg inferred that federal judges considered congressional intent arguments about helping or hindering defendants, such as those supporting the *Fuller* corporate defendant's ability to rely on its diverse citizenship, as secondary to arguments focusing on the CAFA provisions' language.<sup>93</sup> Among published district court CAFA opinions—most of which were removal cases and thus likely implicated citizenship questions—the district courts resisted an expansive reading of CAFA 63.3 percent of the time.<sup>94</sup> Similarly, federal appellate courts resisted an expansive reading of CAFA 60 percent of the time.<sup>95</sup> The federal courts' generally narrow reading of CAFA illustrates that they would be more likely to favor a plain-language argument over a congressional-intent or policy-based argument because a plain-language analysis

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90. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192–93 (2010).

91. Vairo, *supra* note 8, at Part IV.B.3.

92. Kevin Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1579 (2008).

93. *See id.* at 1567, 1577.

94. *Id.* at 1581.

95. *Id.* at 1584.

arguably stays within the statute's four corners.

In light of these statistics and of *Hertz*, the Court should opt for the *Johnson* analysis because *Johnson* decided that corporate citizenship is dual rather than alternative, based on § 1332(c)'s language, whereas *Fuller* relied on congressional intent.<sup>96</sup> Furthermore, because of its preference for plain language, the Court would likely reason that if Congress intended CAFA's minimal diversity provision to enable corporate defendants to "choose" their state of diverse citizenship to secure federal jurisdiction, then Congress would have amended § 1332(c) accordingly when it created CAFA.<sup>97</sup>

## VI. CONCLUSION

While the *Hertz* Court did not address the precise minimal diversity issue that *Johnson* and *Fuller* raised, its emphasis on the statutory language suggests that the Supreme Court is more likely to follow *Johnson* than *Fuller*. Even though *Fuller* comports with Congress's intent to expand federal diversity jurisdiction, given that (1) the Supreme Court in *Hertz* expressed a preference for plain-language analysis; (2) the federal courts have statistically rejected expansive readings of CAFA; and (3) CAFA did not amend § 1332(c) strongly suggests that Congress did not intend CAFA to "completely rewrite the most basic concepts in federal jurisdiction jurisprudence by . . . completely prevent[ing] corporate defendants from being sued in a class action in state court."<sup>98</sup> Therefore, the plight of the corporate defendant sued in a "judicial hellhole," while providing a moderately compelling rationale for removal, cannot override more than fifty years of carefully worded legislative history designed to rein in corporate forum shopping.

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96. *Johnson v. Advance Am.*, 549 F.3d 932, 935–36 (2008); *Vairo*, *supra* note 8 at Part IV.B.3, at 15.

97. *Vairo*, *supra* note 8, at Part IV.B.3, at 18.

98. *Id.* at 15 (citing *Weaver v. Nestle USA, Inc.*, No. C 08-03636 JSW, 2008 U.S. Dist. LEXIS 106168, at \*6–7 (C.D. Cal. Oct. 30, 2008)).

