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Waste-d Chance: The Risk of Ignoring Judicial Federalism in Local Controversies

Betsy Smith

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NOTE

Waste-d Chance: The Risk of Ignoring Judicial Federalism in Local Controversies

Kitchin v. Bridgeton Landfill, LLC, 3 F.4th 1089 (8th Cir. 2021).

*Betsy Smith**

I. INTRODUCTION

The Manhattan Project caused death and destruction in Hiroshima and Nagasaki and sparked a nuclear arms race around the world.¹ The Project's legacy is most closely associated with Los Alamos, New Mexico, the site of the primary research laboratory.² But, the primary research site, smaller project sites, and disposal sites throughout the country have been plagued by environmental consequences.³ Its effects are still being felt today, even in the world of civil procedure.⁴ One landfill in St. Louis, in particular, holds significant amounts of nuclear waste from the program and has recently sparked major class-action litigation.⁵

Class-action lawsuits, like the litigation involving the Manhattan Project nuclear waste in St. Louis, are governed by the Class Action Fairness Act of 2005 ("CAFA").⁶ CAFA grants federal jurisdiction for class actions that fit its requirements, such as an amount in controversy in

*B.J. University of Missouri, 2019; J.D. Candidate, University of Missouri School of Law, 2023; Associate Member, *Missouri Law Review*, 2021–2022; Senior Associate Editor, 2022–2023, *Missouri Law Review*. I am extremely grateful to Professor Thomas Bennett for his support, insight, and patience during the writing of this Note, as well as to Elizabeth Weaver, Mackenzie Stout, and the members of the *Missouri Law Review* for their help in the editing process.

¹ *The Manhattan Project*, ATOMIC HERITAGE FOUNDATION, <https://www.atomicheritage.org/history/manhattan-project> [<https://perma.cc/G946-YST2>] (last visited Nov. 14, 2021). The Manhattan Project was the U.S.'s atomic bomb development project during World War II that used nuclear energy, making nuclear waste in turn. *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1091 (8th Cir. 2021).

⁶ 28 U.S.C. § 1332.

excess of \$5,000,000 and minimal diversity.⁷ Even where those requirements are met, however, CAFA has certain exceptions that require remand back to state court.⁸ The local controversy exception requires a federal court to remand a case to state court where the case has a sufficiently parochial character—i.e., where a local defendant’s conduct forms a significant basis of the claim.⁹ This exception, like the larger statute of which it is a part, is rife with legal ambiguity.¹⁰

In *Kitchin v. Bridgeton Landfill, LLC*, the Eighth Circuit settled an important question about the local controversy exception: what does it mean for a defendant’s conduct to form a “significant basis” of the plaintiffs’ claims?¹¹ The *Kitchin* court adopted an approach that favors retaining federal jurisdiction for class action lawsuits, even when the controversies are local and therefore might more appropriately be decided by a state court.¹² It held that a local defendant’s conduct must be substantively distinct from other defendants’ conduct to satisfy CAFA’s “significant basis” test.¹³ To do so, the court relied on statutory interpretation and legislative purpose justifications and ultimately avoided answering a question about judicial federalism. Part II of this Note explains the relevant facts and procedural background of *Kitchin*. Part III explores the history of the local controversy exception and its various applications. Part IV discusses the Eighth Circuit’s decision and rationale. Finally, Part V analyzes the *Kitchin* holding and argues that the Eighth Circuit ultimately failed to consider the substantial implications of creating more hurdles for class action plaintiffs to litigate their claims in local state forums.

II. FACTS AND HOLDING

John C. Kitchin, Jr., and Mary Menke (“Plaintiffs”) own property in Bridgeton, Missouri, near the West Lake Landfill.¹⁴ Plaintiffs filed a complaint on behalf of a putative class against Bridgeton Landfill, LLC; Republic Services, Inc.; Allied Services, LLC; and Rock Road Industries,

⁷ *Id.* § 1332(d)(2). The Class Action Fairness Act of 2005 expanded federal diversity jurisdiction in class action lawsuits where plaintiffs seek at least \$5 million in damages and where at least one plaintiff and one defendant are from different states.

⁸ *Id.* § 1332(d)(4)(A).

⁹ 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1756.2 (3d ed. 2021).

¹⁰ *Id.* Local controversy exception cases have been litigated over which party has the burden of proof for proving the local controversy exists, what is the meaning of its greater than two-thirds of the class members requirement, and more.

¹¹ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1094, 1096 (8th Cir. 2021).

¹² *See id.*

¹³ *See id.*

¹⁴ *Id.* at 1091.

Inc. (“Defendants”), the owners and operators of the landfill.¹⁵ Of the Defendants, only Rock Road Industries was a Missouri citizen when the complaint was filed.¹⁶ The Plaintiffs sought to represent subclasses comprised of Missouri citizens who owned property or resided within an eleven square-mile area around the landfill.¹⁷

The basis of these suits stems back to the mid-1900s. In the 1940s and 1950s, a government contractor refined uranium in St. Louis in connection with the Manhattan Project, which created radioactive waste.¹⁸ In 1973, a corporation not involved in this action expelled over 46,000 tons of a soil-and-radioactive-waste mixture in West Lake Landfill.¹⁹ The nuclear waste mixture covered the municipal waste that was dumped in the landfill.²⁰ The Environmental Protection Agency placed the landfill on the Superfund National Priorities List for investigation and cleanup in 1990.²¹ In 2017 and 2018, after learning that their properties were contaminated with radioactive waste from the landfill, Plaintiffs brought suit.²²

Plaintiffs alleged that Defendants were responsible for the contamination of their property due to Defendants’ “improper acceptance and handling of radioactive waste at the landfill.”²³ Plaintiffs filed their complaint in state court.²⁴ Defendants removed the action to federal court,²⁵ claiming there was federal-question jurisdiction under the Price-Anderson Act and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),²⁶ as well as diversity

¹⁵ *Id.*

¹⁶ *Id.* Shortly after Plaintiffs filed the complaint, Defendant Rock Road Industries merged into Defendant Bridgeton Landfill, LLC. Bridgeton Landfill is the surviving entity.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ 42 U.S.C. § 2011 *et seq.* The Price-Anderson Act ensures that there is a large amount of government funds available for members of the public who are damaged by nuclear or radiological incidents. *The Price-Anderson Act*, CENTER FOR NUCLEAR SCIENCE AND TECHNOLOGY INFORMATION (Nov. 2005), <https://cdn.ans.org/policy/statements/docs/ps54-bi.pdf> [<https://perma.cc/XKU6-ZZWA>]; 42 U.S.C. § 9601 *et seq.* The Comprehensive Environmental Response, Compensation, and Liability Act requires there to be a federal superfund for uncontrolled or abandoned hazardous waste cleanup. *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive->

jurisdiction under CAFA.²⁷ Plaintiffs moved to remand, arguing that the Price-Anderson Act and CERCLA did not give federal courts jurisdiction and CAFA's local controversy exception applied.²⁸

The United States District Court for the Eastern District of Missouri remanded the case to state court, finding that the local controversy exception to CAFA applied.²⁹ Defendants appealed the court's decision to remand and challenged the district court's application of the local controversy exception.³⁰

The Eighth Circuit concluded that the local defendant's conduct did not form a "significant basis" for Plaintiffs' claims because the complaint also leveled essentially identical claims against several out-of-state defendants.³¹ And thus, the court held that the local controversy exception did not apply.³²

III. LEGAL BACKGROUND

Before CAFA, the complete diversity rule required that, in cases where more than one plaintiff sued more than one defendant, each plaintiff be diverse from each defendant to sue in federal court.³³ This complete-diversity requirement, in turn, kept most state law class actions in state court.³⁴

In 2005, Congress enacted CAFA, granting federal courts original jurisdiction over class actions where: (1) the amount in controversy exceeds \$5,000,000, and (2) there is minimal diversity.³⁵ CAFA is subject to certain exceptions, including the local controversy exception at issue in *Kitchin*.³⁶

environmental-response-compensation-and-liability-act [https://perma.cc/BFU8-VFGJ] (last visited Nov. 14, 2021).

²⁷ 28 U.S.C. § 1332(d)(2).

²⁸ *Kitchin*, 3 F.4th at 1092.

²⁹ *Id.* The district court concluded that federal-question jurisdiction did not exist, and Defendants did not challenge this decision on appeal. *Id.*

³⁰ *Id.*

³¹ *Id.* at 1094, 1096; *see also* 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb).

³² *Kitchin*, 3 F.4th at 1094.

³³ *See* *Strawbridge v. Curtiss*, 7 U.S. 267 (1806); 13E CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION § 3605 (3d ed.).

³⁴ Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PENN. L. REV. 1723, 1725 (2008).

³⁵ 28 U.S.C. § 1332(d)(2). Minimal diversity exists where at least one plaintiff is from a different state than at least one defendant. *Id.*

³⁶ *Id.*

Congress enacted CAFA because state courts were “keeping cases of national importance out of federal court,” and some legislators believed state courts demonstrated bias against out-of-state defendants and inappropriately bound residents of other states.³⁷ One legislative goal of CAFA was to resolve all doubts in favor of retaining federal jurisdiction over the case.³⁸ The purpose of increased federal jurisdiction was to create uniformity in how class action lawsuits would be processed and handled.³⁹ Records also suggest that another reason Congress enacted CAFA was to streamline class actions and avoid the “straw man” problem.⁴⁰ The straw man problem occurs when a plaintiff includes a local defendant in the complaint merely to avoid federal jurisdiction, on the theory that state courts are more plaintiff-friendly with class actions.⁴¹ However, arguments over whether federal or state courts should decide major class action suits implicate competing federal and state interests due to judicial federalism.⁴² Although CAFA generally extends jurisdiction of federal courts over class-action suits, the local controversy exception reflects a concern for local interests as it requires federal courts to decline jurisdiction over local disputes.⁴³

The local controversy exception’s roots predate the enactment of CAFA.⁴⁴ Before CAFA, if a plaintiff included a local defendant in its

³⁷ 7A WRIGHT & MILLER, *supra* note 9.

³⁸ Steven M. Puiszis, *Developing Trends with the Class Action Fairness Act of 2005*, 40 J. MARSHALL L. REV. 115, 144 (2006).

³⁹ SOMMERS SCHWARTZ, P.C., *Federal or State Class Actions*, <https://www.sommerspc.com/videos/understanding-class-action-lawsuits-federal-or-state-class/> [<https://perma.cc/4Y69-HX2U>] (last visited Nov. 14, 2021).

⁴⁰ Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1594 n.3 (2006); *See* James Wootten, President of the U.S. Chamber Inst. For Legal Reform, Testimony Before the ABA Class Action Task Force 2 (Apr. 8, 2002); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 593 (2006).

⁴¹ Sherman, *supra* note 40, at 1593, n.3; *See* James Wootten, President of the U.S. Chamber Inst. For Legal Reform, Testimony Before the ABA Class Action Task Force 2 (Apr. 8, 2002); Willging & Wheatman, *supra* note 40, at 593.

⁴² Willy E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts—A Historical Perspective and an Essay*, 3 WM. & MARY BUS. L. REV. 419, 423–24 (2012). Judicial federalism describes the federal and state court separation of judicial authority. DONALD P. HAIDER-MARKEL, JUDICIAL FEDERALISM, POLITICAL ENCYCLOPEDIA OF U.S. STATES AND REGIONS 819 (Donald P. Haider-Markel, 1st ed. 2009).

⁴³ 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3866.2, (4th ed. 2021); *see* 28 U.S.C. § 1332(d).

⁴⁴ Willging & Wheatman, *supra* note 40, at 596.

claim, the case was not removable to federal court.⁴⁵ Practically, however, defendants often removed the case to federal court and made the plaintiff seek remand to state court.⁴⁶

The local controversy exception requires federal courts to decline jurisdiction on two occasions—when:

(A)(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.⁴⁷

Parties may immediately appeal grants and denials of motions to remand cases removed under CAFA as a collateral order under 28 U.S.C. § 1291.⁴⁸

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 28 U.S.C. § 1332(d)(4)(A)–(B).

⁴⁸ 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3724 (4th ed. 2021). The ability to immediately appeal a grant or remand of removal is an exception from the general rule of appealability. The ability to immediately appeal a grant or remand of removal is an exception from the general rule of appealability. YEAZELL & SCHWARTZ, CIVIL PROCEDURE 672 (Wolters Kluwer, 10th ed. 2019). Under 28 U.S.C. § 1291, appeals can generally only be brought after a final judgment from a district court. Also, remand orders are generally not reviewable on appeal. 28 U.S.C. § 1447.

Courts review this issue *de novo*.⁴⁹ Plaintiff – typically the party seeking to remand the case to state court – has the burden to prove that an exception to CAFA, like the local controversy exception, applies and thus that the case should be remanded.⁵⁰ As a conjunctive test, the requesting party must prove that all of the elements of the local controversy exception are met.⁵¹ Courts determine whether or not the local controversy exception test is satisfied by looking at the claims alleged in the complaint.⁵² While it is typically straightforward to show that the two-thirds requirement is met for the plaintiffs and that a defendant is a citizen of the relevant state, the success of many local controversy pleadings turn on whether a defendant’s conduct formed a “significant basis” or where the “principal injuries” occurred.⁵³

A. “Significant Basis” Under the Local Controversy Exception

The local controversy exception applies if an in-state defendant’s conduct formed a “significant basis” of the plaintiff’s claims.⁵⁴ CAFA does not explicitly define what constitutes a “significant basis,” and there is currently a split among the circuits.⁵⁵ Courts apply one of two tests: (1) the comparative approach, which compares the conduct of the local defendant to the conduct of the other defendants to determine if it is a significant basis of the complaint;⁵⁶ or (2) the *Evans* approach, which defines “significant” as more than “lesser or minimal,” and analyzes the significant basis and the significant relief elements together.⁵⁷

The Eleventh Circuit follows the *Evans* approach,⁵⁸ and the First, Second, and Fourth Circuits have relied on *Evans*, though they have not

⁴⁹ *Opelousas v. Gen. Hosp. Auth. V. FairPay Sols., Inc.*, 655 F.3d 358, 360 (5th Cir. 2011). Under *de novo* review, the court substitutes its own judgment for the judgment of the trial court. *State v. Clapp*, 761 S.E.2d 710, 717 (N.C. Ct. App. 2014).

⁵⁰ 14C WRIGHT & MILLER, *supra* note 48.

⁵¹ *Atwood v. Peterson*, 936 F.3d 835, 841 (8th Cir. 2019).

⁵² *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1015 (9th Cir. 2011).

⁵³ 28 U.S.C. § 1332(d)(4)(A).

⁵⁴ *Id.*

⁵⁵ *See Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144 (3d Cir. 2009) (comparing the conduct of the local defendant to the conduct of the other defendants to determine whether the local defendant’s conduct is a significant basis); *see Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2019) (determining that significant means more than a “lesser or minimal role”); *see Coleman*, 631 F.3d at 1013 (comparing the conduct of the local defendant to the other defendants and considering equivalent conduct to be significant).

⁵⁶ *Kaufman*, 561 F.3d at 156.

⁵⁷ *Evans*, 449 F.3d at 1167.

⁵⁸ *Id.*

explicitly adopted any approach.⁵⁹ The Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits use the comparative approach.⁶⁰ Although most courts use the comparative approach,⁶¹ there is further divide within the comparative method: some courts apply a substantive distinction test, while other courts incorporate a same conduct test.⁶² Trial courts in the Eighth Circuit previously used both the substantive distinction approach and the same conduct approach before the Eighth Circuit explicitly adopted the substantive distinction approach in *Westerfeld v. Independent Processing*.⁶³

1. Substantive Distinctive Approach

The substantive distinction approach requires the local defendant's conduct to be "important" and "notable" as compared to other defendants.⁶⁴ Therefore, the complaint must allege conduct on behalf of the local defendant that is distinct from that of the other defendants.⁶⁵

Support for the substantive distinction approach comes from the plain text of the statute, the ordinary definition of "significant,"⁶⁶ and a Senate Report about CAFA.⁶⁷ For example, in *Kaufman v. Allstate New Jersey Inc.*, the Third Circuit used these familiar tools of statutory interpretation to determine what constitutes a "significant basis."⁶⁸ The court noted that CAFA's text was unambiguous, so the "statute must be construed to give effect, if possible, to every word and clause."⁶⁹ Further, the *Kaufman* court

⁵⁹ See *Caruso v. Allstate Ins. Co.*, 469 F.Supp.2d 364 (E.D. La. 2007); see *Mattera v. Clear Channel Comms., Inc.*, 239 F.R.D. 70 (S.D.N.Y. 2006); see *Eakins v. Pella Corp.*, 455 F.Supp.2d 450 (E.D. N.C. 2006).

⁶⁰ See *Kaufman*, 561 F.3d at 144; see *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 362–63 (5th Cir. 2011); see *Mason v. Lockwood, Andrews, & Newman, P.C.*, 842 F.3d 383, 396 (6th Cir. 2016); see *Sabrina Roppo v. Travelers Com. Ins. Co.*, 869 F.3d 568, 584 (7th Cir. 2017); see *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1096 (8th Cir. 2021); see *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011); see *Woods v. Standard Ins.*, 771 F.3d 1257, 1266–67 (10th Cir. 2014).

⁶¹ *Id.*

⁶² *Kitchin*, 3 F.4th at 1094.

⁶³ *City of O'Fallon v. CenturyLink, Inc.* 930 F.Supp.2d 1035, 1048–50 (Mo. Ct. App. 2013); *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 825 (8th Cir. 2010).

⁶⁴ *Kaufman*, 561 F.3d at 157.

⁶⁵ *Mason v. Lockwood, Andrews, & Newman, P.C.*, 842 F.3d 383, 396 (6th Cir. 2016).

⁶⁶ See *Kaufman*, 561 F.3d at 157; see *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 361 (5th Cir. 2011).

⁶⁷ See *Mason*, 842 F.3d at 397.

⁶⁸ *Kaufman*, 561 F.3d at 155.

⁶⁹ *Id.* (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.* 543 U.S. 157, 166–68 (2004)).

noted that courts should view statutory provisions in the context of the whole statute.⁷⁰

The *Kaufman* court first determined, by looking at the plain text of CAFA, that the significant basis provision “relates the alleged conduct of the local defendant. . . to all the claims asserted in the action.”⁷¹ Then, the court noted that there is no quantitative requirement in the statute as to what conduct forms a significant basis.⁷² The court concluded that the appropriate way to construe the significant basis provision was to compare the local defendant’s alleged conduct to all defendants’ alleged conduct.⁷³ In doing so, the *Kaufman* court rejected the district court’s analysis of significant basis as “more than trivial or of no importance.”⁷⁴ While this approach adds some clarity to the interpretation of “significant basis,” it still leaves open the possibility that courts could apply this test in completely different ways. Finally, the court looked to the dictionary.⁷⁵ It concluded that “significant” means “important” or “notable” and courts should therefore consider whether the local defendants’ conduct was an important ground of the claim when compared to the other defendants’ conduct.⁷⁶ The Fifth Circuit has explicitly relied on the *Kaufman* court’s statutory interpretation analysis.⁷⁷

Like the *Kaufman* court, the Sixth Circuit has also relied on common tools of statutory interpretation to justify the substantive distinction approach.⁷⁸ In *Mason v. Lockwood, Andrews & Newman, P.C.*, the Sixth Circuit noted that the Senate Report stated the purpose of the local controversy exception: to ensure that “a truly local controversy – a controversy that uniquely affects a particular locality to the exclusion of all others’ – remains in state court.”⁷⁹ According to the *Mason* court, the Senate Report’s stated purpose justified the substantive distinction approach, as it suggested that a controversy is not “truly local” unless the local defendant’s conduct is substantively distinct.⁸⁰ Like the *Kaufman* court, the Sixth Circuit also compared the local defendant’s conduct to the other defendants’ conduct to determine if it formed an “important” part of

⁷⁰ *Id.* (citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).

⁷¹ *Id.* at 155–56.

⁷² *Id.* at 156.

⁷³ *Id.*

⁷⁴ *Id.* at 157.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Opelousas Gen. Hosp. Auth. v. FairPay Solutions, Inc.* 655 F.3d 358, 361 (5th Cir. 2011).

⁷⁸ *Mason v. Lockwood, Andrews, & Newman, P.C.*, 842 F.3d 383, 397 (6th Cir. 2016) (citing S. Rep. No. 109-14, 39 (2005)).

⁷⁹ *Id.* (citing S. Rep. No. 109-14, 39 (2005)).

⁸⁰ *Id.* at 388 (citing S. Rep. No. 109-14, 39 (2005)).

the claim.⁸¹ Overall, courts using the substantive distinction approach typically rely on tools of statutory interpretation and the CAFA Senate Report as support for why the substantive distinction approach reaches the appropriate jurisdictional result.⁸²

2. Same Conduct Approach

While the substantive distinction approach requires a local defendant's conduct to be distinct from the other defendants, equivalent conduct suffices in the same conduct approach. The same conduct approach compares the local defendant's conduct to the other defendants' conduct, determining that the local defendant's conduct forms a significant basis of the claim if it is the same as or equivalent to the other defendants' conduct.⁸³

Courts' support for the same conduct approach – like the substantive distinction approach – comes from the plain text of the statute and congressional intent, as well as from precedent.⁸⁴ For instance, in *Allen v. Boeing Co.*, the Ninth Circuit looked to precedent and the plain text of the local controversy exception to interpret “significant basis.”⁸⁵ The *Allen* court determined that claims about a local defendant's conduct that are “important or fairly large in amount or quantity” relative to the other defendants' conduct constitute a significant basis.⁸⁶ In *Allen*, the plaintiffs alleged the same complaint against both defendants, and the court concluded that alleging the same important conduct – even with no substantive distinction – satisfies the “significant basis” prong.⁸⁷ The court stated that it did not “read the statute, [its] decisions, or the decisions of [its] sister circuits as requiring anything more” than alleging the same conduct.⁸⁸

In *Coleman v. Estes Express Lines*, the Ninth Circuit similarly began its analysis of the local controversy exception by looking at the plain text of the statute.⁸⁹ The court noted that the use of the words “sought” and “alleged” in the “significant defendant” provision indicated that the court

⁸¹ *Id.* at 396.

⁸² See *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009).

⁸³ *City of O'Fallon v. CenturyLink, Inc.* 930 F.Supp.2d 1035, 1046, 1051 (Mo. Ct. App. 2013).

⁸⁴ *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1016–17 (9th Cir. 2011); *Allen v. Boeing Co.*, 821 F.3d 1111, 1121 (9th Cir. 2015); *City of O'Fallon*, 930 F.Supp.2d at 1045.

⁸⁵ *Allen*, 821 F.3d at 1121.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Coleman*, 631 F.3d at 1015.

should look to the complaint.⁹⁰ Here, the court expanded on the plain text argument by looking to congressional intent, or, in this instance, the *lack* of congressional intent to turn the local controversy exception into a trial on the merits of the case.⁹¹ Complaints often allege the same conduct for multiple defendants, and thus the Ninth Circuit believed that requiring anything more than equivalent conduct would create mini-trials of the case.⁹² Thus, the court was satisfied that significant conduct from *both* the local defendant and out-of-state defendant was sufficient to establish a “significant basis” and avoid further litigation on the differences in significance.⁹³ The Ninth Circuit has relied on tools of statutory interpretation, precedent, and congressional intent in determining that the local controversy exception demands the local defendant’s conduct be at least the same as other defendants’ conduct to constitute a significant basis.⁹⁴

District courts using the same conduct approach have also looked to congressional intent in determining where jurisdiction is appropriate.⁹⁵ In *City of O’Fallon v. CenturyLink*, the court noted that the purpose of the local controversy exception is to keep controversies that are at their core local in state courts, which have “a strong interest in resolving the dispute.”⁹⁶ The court determined that when all of the defendants’ conduct is the same – as the plaintiff alleged in its complaint – “whether or not one defendant’s conduct is ‘worse’” is irrelevant.⁹⁷ The court cited to pre-*Westerfeld* Eighth Circuit precedent and Ninth Circuit precedent, noting that when the local defendant’s conduct mirrors the other defendant’s conduct, it constitutes a significant basis.⁹⁸ The court ultimately held that the local defendant’s conduct constituted a significant basis, justifying the decision by acknowledging that Missouri has “a strong interest in protecting its municipalities’ tax interests,” and state courts “[are] quite

⁹⁰ *Id.* at 1016.

⁹¹ *Id.* at 1016–17.

⁹² *Id.* at 1017.

⁹³ *Id.*

⁹⁴ *Allen v. Boeing Co.*, 821 F.3d 1111, 1121 (9th Cir. 2016); *Coleman*, 631 F.3d at 1017.

⁹⁵ *City of O’Fallon v. CenturyLink, Inc.*, 930 F.Supp.2d 1035, 1045 (Mo. Ct. App. 2013).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1047. Other district courts have used a similar analysis. *See Moore v. IOD Inc.*, 2016 WL 8941200 at *6 (S.D.N.Y. Mar. 24, 2016) (concluding that Congress would have used the word “predominant” rather than “significant” if Congress had intended a higher standard of conduct for a defendant to be considered a “significant defendant”).

⁹⁸ *City of O’Fallon*, 930 F.Supp.2d at 1048–50 (Mo. Ct. App. 2013) (citing *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819, 824 (8th Cir. 2010) and *Coleman v. Estes Express Lines*, 631 F.3d 1010, 1015 (9th Cir. 2011)).

capable of adjudicating this dispute.”⁹⁹ Ultimately, courts adopting the same conduct approach rely on precedent, tools of statutory interpretation, and congressional intent in determining that a local defendant’s conduct may be the same as the other defendants’ conduct and still form a “significant basis.”¹⁰⁰ Because courts that adopt the substantive distinction approach often rely on these same interpretative techniques, the determination seemingly comes down to how courts view the competing state and federal interests.

B. CERCLA, Potentially Responsible Parties, and “Significant Basis”

The *Kitchin* court also addressed a novel argument about the local Defendant’s status as a Potentially Responsible Party under CERCLA as a possible way to claim the local Defendant’s conduct formed a significant basis.¹⁰¹ In environmental superfund cleanup cases under CERCLA such as *Kitchin*, the Environmental Protection Agency (“EPA”) investigates and designates potentially liable parties as “Potentially Responsible Parties (PRPs).”¹⁰² If sued, PRPs are liable for the cost of recovery and cleanup under CERCLA.¹⁰³ The four categories of PRPs are: (1) current owners or operators of the site, (2) past owners or operators, (3) “generators,” or parties who either have hazardous substances disposed of or treated at the site or facility, and (4) “transporters”—i.e., parties who transported hazardous substances to the site.¹⁰⁴ Before *Kitchin*, no courts had ever examined whether a defendant was considered a PRP under CERCLA as part of the significant basis analysis.¹⁰⁵

⁹⁹ *City of O’Fallon*, 930 F.Supp.2d at 1051.

¹⁰⁰ See *Allen v. Boeing Co.*, 821 F.3d 1111, 1121 (9th Cir. 2016); *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1017 (9th Cir. 2011); *City of O’Fallon*, 930 F.Supp.2d at 1045.

¹⁰¹ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1097 (8th Cir. 2021).

¹⁰² *Finding Potentially Responsible Parties (PRP)*, EPA, <https://www.epa.gov/enforcement/finding-potentially-responsible-parties-prp> [https://perma.cc/2BA7-BBKN] (last visited Apr. 25, 2022).

¹⁰³ *Carrier Corp. v. Piper*, 460 F.Supp.2d 827, 834 (W.D. Tenn. 2006). Many issues among PRPs are heavily litigated. The Environmental Protection Agency can recover the cost from one PRP, who will then (likely) seek contribution from other PRPs. Michael V. Hernandez, *Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties*, 21 HARV. ENVTL. L. REV. 83, 84 (1997). However, sometimes the sued PRP can only recover proportionate shares of liability from other PRPs rather than fully shifting liability. *Id.* at 85. As CERCLA has little legislative history, courts have struggled with how to decide liability. *Id.* at 83.

¹⁰⁴ Hernandez, *supra* note 103, at 90.

¹⁰⁵ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1097 (8th Cir. 2021).

C. Policy Considerations

The “significant basis” interpretation question, on its face, seems to be strictly a question of statutory interpretation and Congressional intent. However, courts use the same tools of statutory interpretation and the same Senate Report to justify adopting the substantive distinction comparative approach and the same conduct comparative approach, suggesting that the argument ultimately boils down to a policy question about which court – state or federal – is more appropriate to hear the class action lawsuit, rather than strictly whether the local defendant’s conduct forms a “significant basis.”¹⁰⁶ Using the same tools of statutory interpretation to justify different results is a common occurrence in law, with even the majority and dissent in the same opinion turning a statutory interpretation tool on its head to justify the result that the judge believes is legally correct.¹⁰⁷ As Karl Llewellyn famously noted, “there are two opposing canons on almost every point.”¹⁰⁸ Here, tools of statutory interpretation and congressional intent are both being used to argue that either federal or state jurisdiction is more appropriate.

There are many arguments – some proven and some imaginary – in favor of retaining federal jurisdiction or in favor of state court jurisdiction.¹⁰⁹ Arguments favoring federal jurisdiction include a “perception about state court judicial reluctance to grant summary judgment.”¹¹⁰ This perception is partially based on three different considerations: (1) federal judges hear all matters related to the case, whereas state courts do not typically use a single assignment system; (2) the existence of more summary judgment motions per day in state courts; and (3) the view that federal courts are more likely to grant dispositive motions—i.e., summary judgment motions.¹¹¹ Other reasons to prefer federal jurisdiction include unanimous jury requirements, more standardized court rules, and expert evidence rules.¹¹² When enacting CAFA, the Senate determined that federal courts should retain jurisdiction for class action lawsuits because “state court judges are less careful than their federal court counterparts” and federal judges “pay closer attention

¹⁰⁶ Thomas Mayhew, *Choosing Federal or State Court in Consumer Class Actions*, 16 ASS’N OF BUS. TRIAL LAWS. REP. 3 (2007), https://www.fbm.com/content/uploads/2019/01/d4432a59-fa9f-4c3e-9c87-17abe373749c_document.pdf [https://perma.cc/8F36-WPPT].

¹⁰⁷ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 3, 401 (1950).

¹⁰⁸ *Id.*

¹⁰⁹ See Rice, *supra* note 42, at 459, 459–67.

¹¹⁰ Mayhew, *supra* note 106.

¹¹¹ *Id.*

¹¹² *Id.*; Willging & Wheatman, *supra* note 40, at 603.

to the procedural requirements for certifying a . . . class.”¹¹³ Finally, class action reformers argue that federal courts should have jurisdiction over class actions because class actions typically implicate complex, national-interest legal issues.¹¹⁴

Arguments in favor of state jurisdiction include the idea that state judges are more willing than federal judges to certify classes, and thus plaintiffs’ attorneys prefer state courts.¹¹⁵ Plaintiffs’ attorneys tend to choose state court when a high percentage of class members reside in the state where the case is filed.¹¹⁶ Proponents of state jurisdiction in class actions also argue that state judges have “authority, competence, judiciousness, and efficiency to hear and decide class actions.”¹¹⁷ Further, many parties prefer state courts because of the lower legal expenses and fewer unexpected costs.¹¹⁸ Supporters of state jurisdiction claim that allowing out-of-state corporate defendants to remove state law cases to federal courts departs from the idea of judicial federalism.¹¹⁹ Finally, state jurisdiction proponents argue that federal courts are biased toward the kind of defendants likely to be out-of-state defendants in class-actions – like corporations – even more so than state courts are biased toward in-state plaintiffs.¹²⁰ Thus, they argue, it does not make sense to move state law class actions and other class actions to federal courts because of a purported bias issue.¹²¹

The federal versus state court jurisdiction debate is, essentially, a debate over judicial federalism. Judicial federalism describes the federal and state court separation of judicial authority.¹²² In class-action lawsuits where both state and federal courts could exercise jurisdiction, history has shown that the balance between federal jurisdiction and federal deference to state jurisdiction has swung consistently with changes of statutory interpretation.¹²³ In *Kitchin*, the court ultimately favored retaining federal jurisdiction, using the “significant basis” element as an alternative to addressing judicial federalism.¹²⁴

¹¹³ Willging & Wheatman, *supra* note 40, at 593; S. Rep. No. 109-14, at 14 (2005). Some believe these assumptions are based on “untested anecdotes,” as there is no evidence to support them. Willging & Wheatman, *supra* note 40, at 594.

¹¹⁴ Rice, *supra* note 42, at 425.

¹¹⁵ Willging & Wheatman, *supra* note 40, at 593.

¹¹⁶ *Id.* at 612.

¹¹⁷ Rice, *supra* note 42, at 431.

¹¹⁸ *See id.* at 443.

¹¹⁹ *Id.* at 427.

¹²⁰ *Id.* at 444.

¹²¹ *Id.*

¹²² Donald P. Haider-Markel, *Judicial Federalism*, POLITICAL ENCYCLOPEDIA OF U.S. STATES AND REGIONS, 819.

¹²³ *Id.* at 820.

¹²⁴ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1098 (8th Cir. 2021).

IV. INSTANT DECISION

In *Kitchin*, the Eighth Circuit held that the complaint did not allege that the local defendant's conduct constituted a "significant basis" under the local controversy exception and thus declined to remand the decision to state court.¹²⁵ The court concluded that Plaintiffs' claims mainly focused on how Defendants jointly "managed and operated the landfill."¹²⁶ The court noted that the complaint did not show that the local Defendant's conduct was an important ground compared to all other defendants' actions.¹²⁷ The court pointed to the district court's finding that Defendants "all engaged in the same conduct that caused Plaintiffs' claimed injuries," which does not suffice to serve as a significant basis under the substantive distinction approach.¹²⁸ The district court, however, concluded that this allegation *did* suffice to show the local defendant's conduct formed a significant basis, seemingly following the same conduct approach.¹²⁹ The court also noted that Plaintiffs listed only one paragraph about the local Defendant's conduct in the 199-paragraph complaint.¹³⁰

The court determined that the complaint did not distinguish the local Defendant's conduct from the nonlocal Defendants' conduct.¹³¹ Rather, the court stated that Plaintiffs used a "cut-and-paste approach" when describing Defendants' conduct in the complaint.¹³² The court also concluded that Plaintiffs' allegations differed slightly because Plaintiffs alleged more about the nonlocal Defendants than the local Defendant, which the court determined is not a "substantive distinction," endorsing the substantive distinction approach in the Eighth Circuit.¹³³ The court finally concluded that merely pleading that the conduct "forms a significant basis" is a legal conclusion and cannot alone satisfy the significant-basis requirement.¹³⁴

Although the court rejected an argument from Plaintiffs about Potentially Responsible Party ("PRP") status, as Plaintiffs did not allege it in the complaint, the court continued to analyze the merits of the argument.¹³⁵ The court rejected Plaintiffs' argument that the local

¹²⁵ *Id.* at 1096.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1094.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1095.

¹³¹ *Id.* at 1096.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*; *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); 42 U.S.C. § 9607(a)(1)–(4); *Atwood v. Peterson*, 936 F.3d 835, 840 (8th Cir. 2019).

¹³⁵ *Kitchin*, 3 F.4th at 1097.

Defendant's status as a PRP acts as extrinsic evidence to show that the local Defendant's conduct does form a significant basis.¹³⁶ Rather, the court noted that "even parties not responsible for contamination may fall within the broad definitions of PRPs" under CERCLA.¹³⁷ Further, the court pointed out that Plaintiffs did not explain why the EPA categorized the local Defendant as a PRP.¹³⁸ Thus, the court concluded that the EPA's designation of the local Defendant as a PRP is not alone enough to determine that its conduct forms a significant basis under the comparative substantive distinction approach.¹³⁹

In his concurrence, Judge Stras argued that there was a more straightforward resolution to this case.¹⁴⁰ Judge Stras noted that Rock Road Industries, the only Missouri citizen and thus only local Defendant, merged with an out-of-state entity and no longer existed as a separate entity after the complaint was filed but before removal to federal court.¹⁴¹ Judge Stras argued that the court must evaluate citizenship at the time of removal and noted that there was no longer a defendant "who *is* a citizen of the State in which the action was originally filed" as required by the local controversy exception.¹⁴²

V. COMMENT

Before *Kitchin*, various circuits had formulated different approaches to determine what constitutes a "significant basis."¹⁴³ The *Kitchin* court clearly defined the split and listed the precedential breakdown of the tests, clarifying the current "significant basis" jurisprudence.¹⁴⁴

In *Kitchin*, the court held that the local defendant's conduct did not form a significant basis when the complaint alleged that the local defendant and the out-of-state defendants engaged in the same conduct.¹⁴⁵ This case not only explained and summarized the different "significant basis" interpretations,¹⁴⁶ but it definitively favored the substantive distinction sect of the comparative approach.¹⁴⁷ However, it did so

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting *U.S. v. Atl. Rsch. Corp.*, 551 U.S. 128, 136 (2007)).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1097–98.

¹⁴⁰ *Id.* at 1098 (Stras, J., concurring).

¹⁴¹ *Id.*

¹⁴² *Id.* (quoting 28 U.S.C. § 1332(d)(4)(A)(i)(II)(cc) (emphasis added)).

¹⁴³ See *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144 (3d Cir. 2009); see *Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2019); see *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011).

¹⁴⁴ *Kitchin*, 3 F.4th at 1095.

¹⁴⁵ *Id.* at 1096–97.

¹⁴⁶ *Id.* at 1094.

¹⁴⁷ *Id.* at 1095.

seemingly without considering the underlying purpose of the local controversy exception's requirement of removal to state court. The court instead relied on other courts' decisions that used statutory interpretation and looked to congressional intent to justify the substantive distinction approach.¹⁴⁸ The court asserted that the same conduct approach has not been the approach taken in the Eighth Circuit since *Westerfeld*,¹⁴⁹ but it failed to explain its rationale for strongly favoring the substantive distinction approach. Further, it argued that federal courts have a duty to retain jurisdiction over class actions, but it failed to acknowledge the purpose of the local controversy exception or the possibility that state courts have an interest in hearing local controversies.¹⁵⁰

A. *The Kitchin Court's Oversight*

The *Kitchin* court should have considered the state interest that gave rise to the local controversy exception and, at the very least, clarified its rationale. The lack of clarity in rationale perpetuates an unclear standard.¹⁵¹ As a result, the same conduct and substantive distinction dueling systems will continue to be in conflict over the desire to retain jurisdictional power.¹⁵² The court turned the "significant basis" element into a proxy for determining which court is more appropriate to hear the case, preying on the exception's ambiguity.

The *Kitchin* court dodged the policy question of judicial federalism, opting instead to use tools of statutory interpretation and legislative purpose to justify its ultimate decision that conduct needs to be substantively distinct to constitute a significant basis. While using tools of statutory interpretation can be helpful, the court's failure to consider

¹⁴⁸ *Id.* at 1093–94 (relying on a Third Circuit case using statutory interpretation and congressional intent to adopt the substantive distinction approach).

¹⁴⁹ *Id.* at 1094–95. See *Westerfeld v. Indep. Processing, LLC*, 621 F.3d 819 (8th Cir. 2010).

¹⁵⁰ *Kitchin*, 3 F.4th at 1093.

¹⁵¹ Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 3, 399 (1950).

¹⁵¹ *Kitchin*, 3 F.4th at 1095.

¹⁵² See e.g., *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144 (3d Cir. 2009); see e.g., *Evans v. Walter Industries, Inc.*, 449 F.3d 1159 (11th Cir. 2019); *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011). The differing outcomes in these three cases, discussed *supra*, Part III.A.1–2, demonstrates the conflict that still continues to this day.

anything else – i.e., public policy – created an unfair precedent for class action plaintiffs.¹⁵³

The *Kitchin* court ultimately doubted the significance of the local defendant’s conduct.¹⁵⁴ Still, it is essential to unpack the potential biases and assumptions underlying the court’s holding that the local defendant’s conduct was not significant enough because it engaged in merely the *same* conduct as out-of-state defendants.¹⁵⁵ As the Eighth Circuit Court of Appeals sets precedent for all district courts in the Eighth Circuit, it is likely that more class-actions with potentially local controversies will be litigated in federal courts after this decision. Thus, it is important to understand the court’s logic and rationale, as the meaning of “significant basis” will affect future Eighth Circuit cases.

B. What Courts Should Consider in a Significant Basis Analysis

What “significant basis” analysis would have been appropriate for the *Kitchin* court? Using the comparative approach to determine what conduct forms a “significant basis” is a clearer standard than the approach used in *Evans* and the loose tests used by other district courts. Courts have generally agreed, adopting the less ambiguous comparative approach over *Evans*.¹⁵⁶ However, determining *which* method within the comparative approach is a clearer test to apply and more in line with congressional intention is a more challenging endeavor.¹⁵⁷ This is because courts apply the same rules of statutory interpretation to the local controversy exception and still come to different conclusions about which approach is appropriate.¹⁵⁸

Another factor that influences a court’s comparative approach analysis is concern about straw man defendants.¹⁵⁹ To combat straw men, courts that have adopted the substantive distinction approach argue that requiring a complaint to allege that a local defendant’s conduct was substantively distinct from the out-of-state defendant’s conduct will

¹⁵³ Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning Live Lobsters and A Tiger Cub in the Park*, 52 MD. L. REV. 1192, 1206 (1993).

¹⁵⁴ *Id.* at 1095.

¹⁵⁵ *Id.* at 1096–97.

¹⁵⁶ See *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009); see *Opelousas Gen. Hosp. Auth. v. FairPay Sols., Inc.*, 655 F.3d 358, 362–63 (5th Cir. 2011); see *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 396 (6th Cir. 2016); *Roppo v. Travelers Com. Ins. Co.*, 869 F.3d 568, 584 (7th Cir. 2017); see *Kitchin*, 3 F.4th at 1096; *Coleman v. Estes Exp. Lines, Inc.*, 631 F.3d 1010, 1013 (9th Cir. 2011); see *Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1267 n.6 (10th Cir. 2014).

¹⁵⁷ See *supra* Part III.A.

¹⁵⁸ See *supra* Part III.A.

¹⁵⁹ See *supra* Part III.

ensure that the local defendant was more than a straw man.¹⁶⁰ However, this heightened standard runs the risk of keeping truly local controversies out of state courts where they belong according to the local controversy exception that Congress created.¹⁶¹

When analyzing congressional intent, courts also consider that, broadly, Congress enacted CAFA to retain federal jurisdiction over class actions, which Congress viewed as complex, national-interest lawsuits.¹⁶² But many courts overlook the importance of Congress explicitly carving out an exception to ensure that state courts adjudicate truly local controversies, as state courts have a greater interest in state controversies.¹⁶³ The local controversy exception exists for a reason and is mandatory for federal courts to follow for a reason: Congress wanted to retain state jurisdiction over state controversies.¹⁶⁴

Looking at the plain text of the statute, it is unclear that the substantive distinction approach correctly interprets “significant” to mean distinct from others’ conduct.¹⁶⁵ If Congress intended the behavior to be compared and for conduct to be distinctively pled, it could have written the law that way.¹⁶⁶ The *Kitchin* court asserted that “significant” plainly means “important,” but it jumps to the conclusion that “important” cannot mean “same.”¹⁶⁷ The language of CAFA does not state that “significant” does not mean “same,” and there is no reason to infer that the conduct being the “same” means it is not necessarily “significant.”¹⁶⁸ If a local defendant is engaged in the same conduct as the out-of-state defendant – conduct that is deemed important enough for the out-of-state defendant to be a part of the lawsuit – it is confounding that this same conduct is not “significant” enough to justify the state adjudicating a case that it has a clear interest to hear.

Further, it is not clear that requiring a plaintiff to allege that the local defendant’s conduct was substantively distinct from the other out-of-state defendants’ conduct will defeat the straw man problem—if it even

¹⁶⁰ 15 WRIGHT & MILLER, *supra* note 43.

¹⁶¹ *Id.*

¹⁶² Rice, *supra* note 42, at 425.

¹⁶³ City of O’Fallon v. CenturyLink, Inc., 930 F. Supp. 2d 1035, 1045 (Mo. Ct. App. 2013).

¹⁶⁴ 15 WRIGHT & MILLER, *supra* note 43.

¹⁶⁵ See Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144 (3d Cir. 2009).

¹⁶⁶ Moore v. IOD Inc., No. 14-CV-8406 (VSB), at *6, 2016 WL 8941200 (S.D.N.Y. Mar. 24, 2016). For instance, 18 U.S.C. § 1962(c) requires conduct by a person acting through an enterprise to be distinctively pled. See 18 U.S.C. § 1962(c); Prudential Ins. Co. of Am. v. Bank of Am., Nat. Ass’n, 14 F. Supp. 3d 591, 616 (D.N.J. 2014).

¹⁶⁷ *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1094 (8th Cir. 2021).

¹⁶⁸ See generally 28 U.S.C. § 1332.

exists.¹⁶⁹ Even with the same conduct approach, the local defendant is not really a “straw man” defendant, as it is a defendant who has engaged in at least the same level of conduct as the other defendants in the suit.¹⁷⁰ The strategic inclusion of a local defendant who engaged in the same level of conduct as other defendants certainly does not raise the same concerns as a typical “straw man” problem. And courts that believe the substantive distinction approach will cure the straw man problem have forgotten that where there is a will, there is a way. A plaintiff who wants to join a local straw man defendant in the lawsuit will know that all she needs to do is make the allegations about the local defendant’s conduct substantively distinct to keep the lawsuit in state court.¹⁷¹ The heightened requirement of substantive distinction within the comparative approach seems like an arbitrary test that courts use to feign compliance with congressional intent and keep complex legal cases out of state courts without analyzing whether federal court is the appropriate place for the case to be heard.¹⁷²

C. Facing the Federal Court Bias and Its Consequences

As courts have turned these same statutory interpretation and legislative purpose justifications on their heads to support different standards, the debate over retaining federal court jurisdiction or removing to state court truly boils down to underlying biases about the dual court system. The choice between federal and state jurisdiction is not a novel one, and in this case, it manifests as a debate over statutory interpretation and legislative purpose.¹⁷³ Unsurprisingly, when it comes to the local controversy exception, federal courts, especially at the appellate level, are in favor of retaining federal jurisdiction.¹⁷⁴

¹⁶⁹ *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1122 (9th Cir. 2015) (Wallace, J. dissenting).

¹⁷⁰ *City of O’Fallon v. CenturyLink, Inc.* 930 F.Supp.2d 1035, 1046, 1051 (Mo. Ct. App. 2013).

¹⁷¹ *Id.* If the court finds that the local Defendant was arbitrarily thrown in to gain state-court jurisdiction, the attorney could face sanctions (e.g., Rule 11 sanctions). *See* F.R.C.P. R.11; STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, *CIVIL PROCEDURE*, 10 ed., 409 (2019).

¹⁷² *See Benko*, 789 F.3d at 1122; *See generally* *Moore v. IOD Inc.*, No. 14-CV-8406 (VSB), 2016 WL 8941200 (S.D.N.Y. Mar. 24, 2016).

¹⁷³ Rice, *supra* note 42, at 427.

¹⁷⁴ *See Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1096 (2021) (concluding that the local Defendant’s conduct did not constitute a significant basis and determining that federal jurisdiction is proper). Notably, in *City of O’Fallon v. CenturyLink, Inc.*, a district court concluded that state jurisdiction is appropriate and noted that Missouri had a strong interest in hearing the case because the local Defendant’s conduct did constitute a significant basis. 930 F. Supp. 2d 1035, 1051 (Mo. Ct. App. 2013).

The judicial federalism debate is one that will not likely be settled over what constitutes a “significant basis” under the local controversy exception. This is especially true when looking at how the *Kitchin* court, like others, avoided the judicial federalism policy justification in favor of a more seemingly neutral statutory interpretation justification.¹⁷⁵ Still, this uncertainty has serious, detrimental effects on class action lawsuits. The danger of not having a clear, universal standard for what constitutes a significant basis will lead to continued forum shopping in class actions, ultimately meaning courts will enforce laws inequitably.¹⁷⁶ Forum shopping can cause a lack of efficiency, as well as unfairness.¹⁷⁷

This kind of vertical forum shopping – choosing between federal and state court – is made easier because of the jurisprudential vagueness of the local controversy exception’s “significant basis” prong.¹⁷⁸ Class actions exist, in part, to provide strength in numbers and allow individuals who might not otherwise have the opportunity to pursue litigation to have their day in court.¹⁷⁹ And, plaintiffs prefer state court over federal court for its convenience and cost-effectiveness, in addition to the fact that plaintiffs have local connections.¹⁸⁰ For example, plaintiffs looking for a cost-effective forum were four times more likely to file the class action in state court than to file in federal court.¹⁸¹ And plaintiffs who wanted higher jury awards were over three times more likely to file the class action in state court than in federal court.¹⁸² Finally, plaintiffs who sought convenience were over two times more likely to file a class action in state court than in federal court.¹⁸³ By making remand to federal court easier, the *Kitchin* court’s interpretation of the local controversy exception will make it more difficult for plaintiffs and their lawyers to achieve their desired goals of

¹⁷⁵ See *Kitchin* 3 F.4th at 1089; see *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009).

¹⁷⁶ Markus Petsche, *What’s Wrong with Forum Shopping - An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 INT’L LAW. 1005, 1010 (2011).

¹⁷⁷ *Id.*

¹⁷⁸ Cf. Shrey Sharma, *Do the Second Circuit’s Legal Standards on Class Certification Incentivize Forum Shopping?: A Comparative Analysis of the Second Circuit’s Class Certification Jurisprudence*, 85 FORDHAM L. REV. 877, 881 (2016).

¹⁷⁹ MARGARET M ZWISLER, ET AL., OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS 1 (Mar. 31, 2022), <https://www.lw.com/thoughtLeadership/TheClassActionsGuide-US> [<https://perma.cc/73P6-JHFH>].

¹⁸⁰ THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEY’S CHOICE OF FORUM IN CLASS ACTION LITIGATION 19 (2005), <https://www.uscourts.gov/sites/default/files/clact05.pdf> [<https://perma.cc/ER8V-SXCG>].

¹⁸¹ *Id.* at 71.

¹⁸² *Id.* at 72.

¹⁸³ *Id.* at 73.

class action litigation. It is true that defendants have just as many reasons to remove a case to federal court—and thus, the policy question often becomes a balance of respective party interests. But, in a system set up in many ways to favor the interests of wealthy defendants, the local controversy exception seemed to give some of the power back to individual plaintiffs.¹⁸⁴ The Eighth Circuit’s adoption of the substantive distinction approach hinders class-action plaintiffs’ ability to have their controversy heard in the appropriate forum. This is the type of unfairness the local controversy exception sought to prevent.

In a system committed to promoting justice and fairness, this concern should sound the alarm and make courts re-think which standard they adopt. And, even better, the Supreme Court or Congress should enact a uniform definition and approach to the “significant basis” question which respects the purpose of the local controversy exception.

VI. CONCLUSION

The plain language of CAFA makes it clear that local controversy class actions are more appropriate for state court, as evidenced by Congress’s explicit inclusion of the exception in CAFA. Yet in *Kitchin*, it was a federal court that chose to retain federal jurisdiction in reliance on the substantive distinction approach to determining what conduct constitutes a “significant basis.”¹⁸⁵ After the court’s analysis in *Kitchin*, other circuits that have yet to determinatively adopt a test may adopt the substantive distinction approach. The *Kitchin* court beefed up the precedential weight of the test and added further arguments in its favor. However, the *Kitchin* court failed to adequately explore other approaches to defining “significant” and examine the consequences of all approaches on the future of class action lawsuits.¹⁸⁶ This will place a real financial and temporal burden on future class action plaintiffs in the Eighth Circuit.¹⁸⁷ The same conduct approach comports more with congressional intent behind the local controversy exception and also gives state courts the power to adjudicate controversies that the state has an interest in—conflicts involving local plaintiffs and a local defendant.¹⁸⁸

The substantive distinction approach diverts from congressional intent and the plain language of CAFA as compared to the same conduct

¹⁸⁴ 28 U.S.C. § 1332(d)(4)(A)–(B).

¹⁸⁵ 28 U.S.C. § 1332(d)(4)(A)(i)(I); *Kitchin v. Bridgeton Landfill, LLC*, 3 F.4th 1089, 1098 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 1111 (2022).

¹⁸⁶ *See Kitchin*, 3 F.4th at 1094.

¹⁸⁷ THOMAS E. WILLGING & SHANNON R. WHEATMAN, *supra* note 180.

¹⁸⁸ 15 WRIGHT & MILLER, *supra* note 43; *City of O’Fallon v. CenturyLink, Inc.*, 930 F. Supp. 2d 1035, 1045 (Mo. Ct. App. 2013) (citing *Stevens v. Diversicare Leasing Corp.*, No. 09-6008, 2009 WL 1212488, at *5 (W.D. Ark. May 4, 2009).

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approach, but a universal standard is better than no clear standard at all when it comes to the possibility of forum-shopping. The best solution is to adopt a universal standard to inform plaintiffs and defendants of where class-action lawsuits appropriately belong and to ensure that justice may be equitably served. Ideally, the same conduct approach would be the universally adopted standard.