MANDATORY ABSTENTION IN THE CLASS ACTION FAIRNESS ACT: A SUA SPONTE JUDICIAL POWER OR DUTY?

MARTIN SIGALOW

The Class Action Fairness Act of 2005 ("CAFA") changed the landscape of class action litigation in the United States by providing a reliable federal forum for minimally diverse, expensive, and broadly interstate class actions.[1] But while CAFA straightforwardly empowers federally-inclined plaintiffs and defendants to escape local courts, it also circumscribes the power of the districts courts to exercise that jurisdiction. Two such limitations arise under CAFA's "mandatory home state" and "local controversy" exceptions (hereinafter the "proximity exceptions"), which provide, generally, that a court shall decline to exercise jurisdiction if enough defendants and plaintiffs are forum state citizens.[2]

Curiously, the prevailing view among the circuits is that the proximity exceptions are not jurisdictional bars but rather are abstention doctrines.[3] The proximity exceptions are at the rare intersection of two different kinds of abstention. First, the proximity exceptions have an uncommon source of authority. While many of the most trafficked abstention doctrines are judicially created constructions that survive by way of stare decisis, the proximity exceptions have a statutory basis. Second, the proximity exceptions have an uncommon effect. The proximity exceptions *require* abstention instead of merely permitting it. This so-called "mandatory abstention" is quite different from the more common "permissive abstention."

It is strange for a form of abstention to be both statutory and mandatory. This has sometimes made application confusing. One odd scenario arising occasionally is that a court may want to raise the proximity exceptions sua sponte *after* the parties have relinquished any opportunity to raise the exceptions themselves. Does CAFA provide a court with either the *discretion* or the *obligation* to raise the mandatory proximity exceptions sua sponte? The several

1. *See generally* 28 U.S.C. § 1332(d).
2. *See id.* § 1332(d)(3)–(4).
3. *See infra* notes 55–66 (cataloguing the circuit approaches).

district courts that have confronted this question have split on its resolution.[4]

This question can have expensive consequences. Courts have generally discovered proximity-exception difficulties in a more advanced stage of litigation because plaintiff class composition may not be clear until after a motion to dismiss or discovery with respect to the certification motion. In *Bey v. SolarWorld Industries America*, the District of Oregon discovered the applicability of the proximity exceptions about a year into litigation; in *Barfield v. Sho-Me Power Electric Co-op.*, the Western District of Missouri discovered that applicability after two years.[5] The potential cost for late-breaking sua sponte use of the exceptions is enormous since that could kick the parties back into state court to start over. In *Dugas v. Starwood Hotels & Resorts Worldwide, Inc.*, the Southern District of California dismissed an action 18 months after the filing of the complaint after the parties failed to adequately respond to its Order to Show Cause in which it raised the proximity exceptions sua sponte.[6] In both *Vitale v. D.R. Horton, Inc.*, a case out of the District of Hawaii, and *Bey*, dismissal followed about a year of litigation.[7] The fastest sua

4. *Compare* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1106–07 (D. Or. 2012) (finding that courts have the power to raise the proximity exceptions sua sponte where the parties stipulated that the factual predicates for the exceptions applied, but neither party invoked them to preclude jurisdiction), *and* Lautemann v. Bird Rides, Inc., No. CV 18-10049 PA (RAOx), 2019 WL 1670814, at *1–2 (C.D. Cal. Mar. 28, 2019) (invoking the proximity exceptions sua sponte where defendants, plaintiff class members, and injuries were localized to California, over the objections of the parties who never raised the issue), *with* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092, at *4 (W.D. Mo. Apr. 4, 2014) (determining that plaintiffs' untimeliness waived their proximity exception arguments in a litigation over two years in length and foreclosing sua sponte review), *and* Edwards v. N. Am. Power & Gas, LLC, No. 3:14-cv-1714 (VAB), 2016 WL 2851544, at *4 n.8 (D. Conn. May 13, 2016) (concluding that because CAFA exceptions are "not jurisdictional," "for the [c]ourt to consider the applicability of either of [the CAFA] exceptions, they must be raised by the parties").

5. *See Bey*, 904 F. Supp. 2d at 1109 n.3 (issuing an Order to Show Cause after almost a year when, on motion for partial summary judgment, "the purely local nature of this dispute under Oregon law became apparent"); *Barfield*, 2014 WL 1343092, at *4 (rejecting sua sponte application while considering a litigation greater in length than two years, which it characterized as at an "advanced stage").

6. Dugas v. Starwood Hotels & Resorts Worldwide, Inc., No.: 3:16-cv-00014-GPC-BLM, 2017 WL 2813712, at *1 (S.D. Cal. June 28, 2017) (raising the proximity exceptions sua sponte and dismissing a suit after 18 months of district court litigation).

7. *See* Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016) ("Defendants removed this action on August 10, 2015."); *Bey*, 904 F. Supp. 2d at 1109 (dismissing the action in December

sponte dismissal time of only five months was achieved in *Lautemann v. Bird Rides, Inc.* of the Central District of California.[8] Of course, late-breaking dismissals are tolerated in cases with genuine subject matter jurisdiction deficiencies. Must late-breaking CAFA remands or dismissals also be tolerated?

Courts always have an obligation to raise a jurisdictional defect sua sponte, even on appeal. This piece argues that the proximity exceptions are not jurisdictional conditions. Nevertheless, the statute affords the district and appellate courts discretion to consider the existence of these exceptions sua sponte. If a court discovers that the proximity exceptions apply, the court's discretion disappears, and it must dispose of the case via the exceptions. Part I briefly sketches abstention and its varieties, including the mandatory abstention at issue here. Part II integrates CAFA and its exceptions into the mandatory abstention discussion and lays out a vision of mandatory abstention's role that does not require sua sponte action. Part III analytically grounds the permissibility of sua sponte abstention, arguing that the proximity exceptions may be raised sua sponte.

I.
THE DIFFERENT SHADES OF ABSTENTION

Abstention refers to a limited number of doctrines and statutes authorizing federal courts to decline to continue to exercise jurisdiction over a case if certain predicates are satisfied. The doctrines thrived in the common law for some time and were explained by the Supreme Court to be components of the equity powers of a court in line with remedial authority.[9] Abstention itself is not a neutral idea. While abstention is an entrenched and encoded practice,

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2012); *see also* Complaint, Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103 (D. Or. Dec. 28, 2011) (No. CV 11-1555-SI), 2011 WL 6841346 (initiating the action).

8. *See Lautemann*, 2019 WL 1670814 (dismissing an action filed in November 2018 in March 2019).

9. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717–18 (1996) (situating judicial "longstanding application" of the abstention doctrines within "the common-law background against which the statutes conferring jurisdiction were enacted" and determining that they reside within the "historic powers [of] a court of equity" and, while not "a technical rule of equity procedure," empower courts to use their discretion to make equity determinations (first quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); then quoting Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100, 120 (1981) (Brennan, J., concurring); and then quoting La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959))).

caution at its exercise is repeatedly stressed.[10] This is because abstention constitutes, in effect, a refusal to hear a case that a court is permitted to hear.[11] Put another way, a court, stuck with jurisdiction placed upon it by Congress, and availed of by the parties, should not refuse to exercise that jurisdiction on a whim; doing so frustrates both party will and systemic design.[12]

Abstention's crucial virtue is that it recognizes that there are, in many litigations, values at stake in the decision to hear a case beyond those implicating the parties. Abstention contemplates the power that federal jurisdiction could have to divest state courts of the power to define their own laws and settle their own disputes according to the whims of their legislatures to help parties of their states.[13] Abstention is a tool of federalism[14] and seems to exist most prominently where general grants of federal jurisdiction empty states of important authority.

Most doctrines of abstention were judicially created in response to a particular court's refusal to hear a case. These doctrines, which this piece will call "judicial abstention" doctrines, were justified as an effort by the federal courts to be respectful of local issues and an entailment of attempts to stay out of local issues. The

10. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 72 (2013) (cautioning against a district court invoking abstention as a way of deferring to any state proceeding by warning that "[i]n the main, federal courts are obliged to decide cases within the scope of federal jurisdiction").

11. *See, e.g.*, Kade N. Olsen, Note, Burford *Abstention and Judicial Policymaking*, 88 N.Y.U. L. REV. 763, 765 (2013) ("The consequences of leaving courts with so much leeway is significant, as . . . all abstention doctrines . . . strongly implicate[ ] an individual's interest in being heard in a federal forum.").

12. *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing that discretion to not take upon or exercise jurisdiction is baked into law in many places). Although Shapiro's position has been very influential, it seems that the Supreme Court has been hostile to it. *See* Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1892, 1896–1901 (2004) (describing the widespread influence of Shapiro's article and the Supreme Court's shift to the opposite view, culminating with *Quackenbush*, 517 U.S. 706 (1996)).

13. *See* Jessica O'Brien, *To Abstain, or Not to Abstain, That is the Question: The Seventh and Ninth Circuits' Divergent Approaches to* Younger *Abstention*, 98 N.C. L. REV. 191, 191–92 (2019) ("The doctrine's importance is rooted in its aim to preserve the balance between state and federal sovereignty . . . . Without the ability to abstain, federal courts would be required to act as a quasi-foreign power, interfering in state-law issues and likely causing unnecessary tension between the state and federal governments." (internal quotation marks omitted)).

14. *Id.* at 194 ("Federalism—the sharing of authority over one geographical area by multiple, coequal, governmental units—serves as the primary justification for all variations of abstention . . . .").

judicial abstention doctrines were laid out by the Supreme Court as follows:

> We have . . . held that federal courts have the power to refrain from hearing cases that would interfere with a pending state criminal proceeding, *see Younger v. Harris*, 401 U.S. 37 (1971), or with certain types of state civil proceedings, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); . . . cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law, *see Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); cases raising issues "intimately involved with [the States'] sovereign prerogative," the proper adjudication of which might be impaired by unsettled questions of state law, *see Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); . . . cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); and cases which are duplicative of a pending state proceeding, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).[15]

The judicial abstention doctrines differ structurally from "statutory abstention" doctrines. Congress from time to time expands federal jurisdiction to cover additional areas.[16] The major statutory forms of abstention are essentially provisions with a jurisdiction-expanding statute that limit the expansion. They do so by authorizing abstention from the authority granted in other parts of the statute under certain conditions. Statutory abstention is found in the abstention provisions of the bankruptcy code,[17] the Multiparty, Mul-

15. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–17 (1996) (cleaned up).

16. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 541 & n.195 (2017) (explaining that since CAFA's passing, "Congress has enacted several modest amendments to the jurisdictional statutes, almost entirely in an expansionary direction," including: "Leahy-Smith America Invents Act, (expanding original jurisdiction and removal jurisdiction in certain intellectual-property cases); Removal Clarification Act of 2011, (expanding federal-officer removal); SPEECH Act, (providing jurisdiction over suits involving enforcement of foreign defamation judgments)").

17. *See* 28 U.S.C. § 1334(c)(2) ("Upon timely motion of a party . . . the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.").

tiforum Trial Jurisdiction Act,[18] and several other places throughout the United States Code.[19]

Statutory and judicial abstention interact with court authority very differently. Because statutory abstention provisions are contained in the same statute that they authorize declining jurisdiction about, no argument can be made that a court's refusal to exercise jurisdiction contravenes the will of Congress.[20] This is true both because there is no question that Congress authorized an abstention of this kind full stop, and also because there is no question that the doctrine of abstention applies to the particular statute at issue.[21] There is much greater potential for mischief with judicial abstention. Since those doctrines evolved organically in the courts, are only tacitly acknowledged by Congress, and apply to a host of very different grants of jurisdiction, judicial abstention carries with it the risk that a court applying an abstention doctrine is contravening the will of Congress rather than acting upon it. Perhaps for this reason, the Supreme Court in recent years has been cautious about expanding judicial abstention.[22]

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18. *See id.* § 1369(b) ("The district court shall abstain from hearing any civil action described in subsection (a) in which— (1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State.").

19. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 81 (1984) ("Since the nation's beginning, Congress has statutorily dictated federal court abstention whenever it has found federal judicial action to present a danger to the federal system. The Anti-Injunction Act, the Three-Judge Court Act, the statutory branch of the habeas corpus exhaustion requirement, the Tax Injunction Act, and the Johnson Act constitute a statutory network of legislatively directed limitations on the exercise of federal court power to disrupt state proceedings or interfere unduly with state policies.").

20. *See* Mason v. Lockwood, Andrews & Newnam, P.C., 842 F.3d 383, 394 (6th Cir. 2016) (refusing to extend the common-law doctrines surrounding "*judge-made* exceptions to the powerful default rule that Congress alone has the constitutional authority to define the contours of federal jurisdiction" and which demand "a deep sense of prudence, if not constitutional obedience, to listen when Congress directs federal courts to assume jurisdiction over particular controversies" to statutory directives, which "have no place here because Congress has expressly directed courts to decline jurisdiction over local controversies").

21. *See id.* (noting that although it has "a 'virtually unflagging obligation' to not decline jurisdiction when Congress's only word on the matter is to exercise jurisdiction," in the case where "Congress directs something different, our obligation remains with the Constitution and the text of the statute enacted by Congress").

22. *See, e.g.*, Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77–82 (2013) (limiting the doctrine of *Younger* abstention, which had grown from one case into a

It is no wonder, then, that most forms of judicial abstention are quintessentially "permissive." That is, they allow a court to abstain under certain conditions, but do not force it to, even given a finding that those conditions are met. "Mandatory" abstention, on the other hand, obligates a court to refuse to exercise its discretion if the abstention conditions are met. It is easy to see why mandatory abstention provisions are rare, and judicially created ones vanishingly so. Mandatory judicial abstention, at even its most basic level, would functionally be the judicial branch taking itself to be exactly negating an area of jurisdiction that a political branch had foisted upon it.

There is not a unified concept of mandatory abstention. As such, mandatory abstention has subsequently become an unsettled concept. And, because most forms of abstention are permissive and judicial, there is essentially no generalized literature on statutory, mandatory abstention as such to clarify that concept. This concept will be explored in detail below.

II.
CAFA AND SUA SPONTE OBLIGATIONS

A. CAFA's Structure

Generally, actions may be filed in federal court, or removed to federal court, on the basis of diversity of citizenship if there is not any plaintiff from the same state as any defendant.[23] CAFA gives class action plaintiffs and their defendants[24] the additional right to be heard in federal court for class actions worth more than $5,000,000 if "any member of a class of plaintiffs is a citizen of a State different from any defendant"[25] and if there are at least 100 plaintiff class members[26] and no "primary"[27] state defendants.[28]

multitude of different permissible abstention scenarios, to only the scenarios identified by the Supreme Court previously).

23. 28 U.S.C. § 1332 provides the diversity jurisdiction requirements for the filing of original actions in federal courts. 28 U.S.C. § 1446 allows defendants to remove on the basis of jurisdiction that would be conferred by Section 1332.

24. CAFA's expansion of jurisdiction for original actions is found in 28 U.S.C. § 1332(d), and its expansion of removal jurisdiction in those circumstances is found in 28 U.S.C. § 1453.

25. 28 U.S.C. § 1332(d)(2)(A).

26. *Id.* § 1332(d)(5)(B).

27. CAFA itself does not define this term. The Senate committee report notes that "the Committee intends that 'primary defendents [sic]' be interpreted to reach those defendants who are the real 'targets' of the lawsuit—i.e., the defendants that would be expected to incur most of the loss if liability is found" and so "should include any person who has substantial exposure to significant portions of

Since removal in a non-class suit would normally be unavailable on diversity grounds if a single plaintiff and defendant shared citizenship, CAFA's promise that federal jurisdiction could be available even under a large citizenship overlap is a clear expansion of federal authority over class actions.

The pre-CAFA general removal statute ended up testing only the named representative of a class action for diversity. This allowed enterprising plaintiffs' attorneys to carefully construct suits that either evaded or guaranteed federal jurisdiction, regardless of class size and composition, by strategically naming non-diverse or exactly diverse representatives while filling the rest of the class with members who might themselves doom or support diversity.[29] Plaintiffs could then shop for the best state forums and bind the defendants of other states to their own state's laws.[30]

CAFA was designed to prevent this maneuvering.[31] By explicitly considering the citizenship of *members*, CAFA made a federal forum available for sufficiently big class actions.[32] It allowed both plain-

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the proposed class in the action, particularly any defendant that is allegedly liable to the vast majority of the members of the proposed classes (as opposed to simply a few individual class members)." S. REP. NO. 109-14, at 43 (2005).

28. 28 U.S.C. § 1332(d)(5)(A).

29. *See* Jacob R. Karabell, *The Implementation of "Balanced Diversity" Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 303 (2009) (noting that, historically, since "only the citizenship of the named plaintiffs determined whether the action met . . . complete diversity," plaintiffs could "manufacture federal jurisdiction by strategically selecting certain plaintiffs to serve as class representatives").

30. *But see* Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1104 (2008) (arguing that the label of certain jurisdictions as supposedly extremely favorable to plaintiffs is overstated because "empirical research tends to debunk the industry complaints," noting in particular that "a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was 'no support for the "hellhole" label'").

31. This is confirmed by the Senate committee report. *See* S. REP. NO. 109-14, at 10 (2005) ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court. . . . Although the Supreme Court has held that only the named plaintiffs' citizenship should be considered for purposes of determining if the parties to a class action are diverse, the 'complete' diversity rule still mandates that all named plaintiffs must be citizens of different states from all the defendants. In interstate class actions, plaintiffs' counsel frequently and purposely evade federal jurisdiction by adding named plaintiffs or defendants simply based on their state of citizenship in order to defeat complete diversity.").

32. *See* Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 927 (2008) ("Empirical evidence shows CAFA has successfully brought more state-law diversity class actions into the federal courts.").

tiffs' filing of original actions and defendants' removal of actions where diversity would normally present a barrier.[33]

CAFA pointedly does not give every minimally-diverse class action federal status and does not contemplate the elevation of truly local conflicts to the federal system. CAFA has in mind the promotion of "national" class actions to the federal stage. Its flat refusal to cover cases with less than $5,000,000 in damages clearly has this in mind. So, too, do the provisions immediately following CAFA's grant of jurisdiction, the so-called "exceptions." While these provisions have been termed "exceptions," that word does not appear in the statute.[34] The effect of these provisions is to mandate dismissal of original actions filed pursuant to CAFA and remand of removed actions back to the states.[35]

The first of these exceptions is not the subject of this Note but helps to frame the proximity exceptions. 28 U.S.C. § 1332(d)(3), styled the "discretionary home state exception," indicates that a judge "*may*, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction"[36] over cases involving a class where one-third to two-thirds of both putative class members and "primary defendants"[37] are citizens of the forum state. This provision also specifies the considerations a judge takes

33. *See supra* note 24.

34. It is quite plausible that the pervasive use of the term "exception" to describe these provisions is at least part of the reason for some of the confusion surrounding their effect. To claim that a judge's "jurisdiction" has an exception seems to carry the connotation that its jurisdiction extends up to and against the walls of an area (the exception). As this piece will explore shortly, the proximity exceptions do not work this way. Nevertheless, this piece will still refer to these provisions as "exceptions," consistent with almost universal usage. *Cf.* Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1456 n.63 (2008) ("'Exceptions' is a loaded word in this context, because labeling a statutory provision as such, rather than, for instance, as an 'exclusion,' may have unjustified influence in determining the location of the burden of persuasion concerning the existence of subject matter jurisdiction. I use 'exceptions' here only as a concession to the shortness of life." (citations omitted)).

35. *See, e.g.*, Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016) (remanding a removed action to state court); *see also* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1105 (D. Or. 2012) (dismissing original action).

36. 28 U.S.C. § 1332(d)(3) (emphasis added).

37. This term is not defined in the statute, and there is disagreement about what it means. *See* Cameron Fredman, *Plaintiffs' Paradise Lost: Diversity of Citizenship and Amount in Controversy Under the Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 1025, 1042–44 (2006) (describing potential approaches that consider different combinations of net-worth or conduct relevance).

into account as part of the totality of the circumstances.[38] Since a judge "may" decline jurisdiction if the numerical predicates are met, the abstention is quintessentially permissive.

The proximity exceptions are contained in CAFA in § 1332(d)(4), immediately after the discretionary home state exception in § 1332(d)(3).[39] Neither of the proximity exceptions uses the word "may" to describe what a federal court must do. The first of the proximity exceptions, the "local controversy exception," provides that "a district court *shall* decline to exercise jurisdiction" if (I) more than two-thirds of the putative plaintiff class are citizens of the forum state, (II) at least one defendant is a defendant who (1) is a citizen of the forum state, (2) is alleged to have done conduct which is a significant basis for the claim, and (3) from whom significant relief is sought, and (III) the injuries were sustained in the forum state.[40] The second proximity exception, the "mandatory home state exception," provides that "a district court *shall* decline to exercise jurisdiction" if more than two-thirds of both the plaintiff's putative class and the defendants are citizens of the forum state.[41] As is apparent, these may be quite fact-based inquiries.[42]

The proximity exceptions are roughly designed to ensure that genuinely local problems are resolved in the forum state. They conform the availability of CAFA removal more closely to the general removal statute, which likewise gives home-state defendants a removal option. And, most importantly, they counterbalance the rest of CAFA's dramatic federal jurisdiction expansion.[43] The rulings that courts make about the proximity exceptions inevitably affect CAFA as a unified federal scheme for placing actions in federal court; so, the breadth of the exceptions may be a referendum on

38. 28 U.S.C. § 1332(d)(3)(A)–(F).

39. *Id.* § 1332(d)(4).

40. *Id.* § 1332(d)(4)(A)(i)(I)–(III) (emphasis added).

41. *Id.* § 1332(d)(4)(B) (emphasis added).

42. Disagreement surrounding these factors can take many forms and include matters of law as well. *See, e.g.*, Kaufman v. Allstate N.J. Ins. Co., 561 F.3d 144, 152 (3d Cir. 2009) (determining that the district court improperly applied the significant basis requirement by including in its determination harms suffered by defendants named as parties in the complaint but subsequently dismissed from the action).

43. *See* Brook v. UnitedHealth Grp. Inc., No. 06 CV 12954(GBD), 2007 WL 2827808, at *3 (S.D.N.Y. Sept. 27, 2007) ("The home state and local controversy exceptions are designed to draw a delicate balance between making a federal forum available to genuinely national litigation and allowing the state courts to retain cases when the controversy is strongly linked to that state." (internal quotation marks omitted)).

CAFA as a whole.[44] Although a great deal of litigation concerns the exceptions,[45] they are granted mostly for "purely intrastate actions"[46] and, due to their fairly stringent requirements, sparingly.[47]

The direction of large but local class actions into state fora serves primarily a federalism function. The proximity exceptions reflect a forum state's interests in its citizens, as plaintiff class members and as defendants.[48] The proximity exceptions target "purely local matters and issues of particular state concern in the state courts."[49] In those local and concerning matters, a state can choose to make its processes matter. States' procedural requirements governing class actions and underlying actions may differ. The diversity among these requirements is an important part of federalism that preserves the role of states as laboratories for ideas that, if successful, could be replicated horizontally across other states and vertically at the federal level.[50] A state has valid interests in having *its* citizens bound by the rules *it* thinks are best.

So, CAFA provides, through the proximity exceptions, a specific, congressionally-defined line at which a federal court must ac-

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44. *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1562 n.23 (2008) ("A court might take a narrow view of CAFA by construing rigorously its requirements or construing expansively its exceptions.").

45. *See* Linda S. Mullenix, *The (Surprisingly) Prevalent Role of States in an Era of Federalized Class Actions*, 2019 B.Y.U. L. REV. 1551, 1585–86 (2019) (describing the "raft of appellate litigation" generated by the myriad issues with the exceptions).

46. Michael D. Sukenik & Adam J. Levitt, *CAFA and Federalized Ambiguity: The Case for Discretion in the Unpredictable Class Action*, 120 YALE L.J. ONLINE 233, 241 (2011).

47. *See id.* at 240 ("Exceptions to federal jurisdiction are rare, because very few national class actions satisfy CAFA's stringent exception requirements.").

48. *See, e.g.*, Karabell, *supra* note 29, at 326 ("[A] conception of federalism that removes every high-value class action to federal court hardly preserves a federal-state balance. Thus, while courts should ensure that manipulative pleading does not stand in the way of federal jurisdiction over significant, interstate class actions, they must also take care to effectively enforce the congressional directive that situates 'local' controversies in state fora."). *But see* Burbank, *supra* note 34, at 1527–28, 1542 (arguing that CAFA's exceptions are designed deliberately narrowly so as to exclude local but corporate actions, revealing "CAFA's exceedingly narrow exceptions . . . as another depressing example of legislative overreaching by those who invoke the virtues of federalism when it is convenient to do so").

49. Lowery v. Ala. Power Co., 483 F.3d 1184, 1194 (11th Cir. 2007).

50. *See* Feit, *supra* note 32, at 962–63 (articulating the underlying message of CAFA as "state courts are abusing the class action vehicle" and arguing that "[i]t is fortunate for the nation that each state has the freedom to adopt its own standards and procedures for handling class and complex litigation" because states "can act as a mini-laboratory, experimenting with different amounts of tort reform, consumer protection, and due process considerations").

quiesce to those state interests.[51] When a federal court acts on a proximity exception, it is functionally heeding a direct determination of where the federal and state interests intersect.[52] The federal court must take this federalism balance seriously because the state whose interests are at issue cannot be a "primary" party to the litigation,[53] and so will be absent; so, any federal court holding concerning the reach and effect of the proximity exceptions is uniquely tied to structural interests beyond the parties.[54] Thus, given the late stage of litigation at which the proximity exceptions might arise, the invocation of the proximity exceptions against two parties who do not want to leave federal court pits the private interests of two parties against a congressionally-defined idea of institutional interests.

B. The Proximity Exceptions as Requiring Mandatory Abstention

It is widely established, but not universally so, that the proximity exceptions are forms of abstention, rather than subject-matter jurisdiction elements. While the Supreme Court has not had occasion to interpret the proximity exceptions, almost every circuit court of appeals to consider the proximity exceptions has held that they are forms of abstention. This includes the Second,[55] Fourth,[56] Fifth,[57] Sixth,[58] Seventh,[59] Eighth,[60] Ninth,[61] Tenth,[62] and Elev-

51. *See* Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1108 (D. Or. 2012) (arguing that by applying the proximity exceptions the court would not be "applying a judge-made doctrine to limit a statutory grant of jurisdiction" but instead respecting an "express determination of where to draw the line in balancing state and federal interests" by Congress).

52. *Id.*

53. 28 U.S.C. § 1332(d)(5)(A) (excluding from the CAFA jurisdictional grant "any class action in which . . . the primary defendants are States").

54. *See Bey*, 904 F. Supp. 2d at 1108 (arguing that "important institutional concerns" are implicated by the proximity exceptions because "there is . . . a greater need for vigilance by the courts in such cases to ensure that the preferences of private parties do not run roughshod over the structural interests of states").

55. *See* Gold v. N.Y. Life Ins. Co., 730 F.3d 137, 141–42 (2d Cir. 2013) (agreeing with the underlying district court that "the home state exception was not jurisdictional because the decline to exercise language inherently recognizes [that] the district court has subject matter jurisdiction but must actively decline to exercise it if the exception's requirements are met" (internal quotation marks omitted)).

56. *See* Scott v. Cricket Commc'ns, LLC, 865 F.3d 189, 196 n.6 (4th Cir. 2017) (noting that "[i]n CAFA-exception cases, the court has necessarily determined that jurisdiction exists and is only considering whether the exceptions impose a limit" on the exercise of that jurisdiction).

57. *See* Watson v. City of Allen, 821 F.3d 634, 639 (5th Cir. 2016) (recognizing that "the local controversy and home state exceptions require abstention from the *exercise* of jurisdiction and are not truly jurisdictional in nature," which follows

enth[63] Circuit Courts of Appeals. The First, Third, and District of Columbia Courts of Appeals have not taken up this issue. Relatively recently, however, district courts in all three circuits have held that the proximity exceptions are not jurisdictional requirements.[64]

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from CAFA's text which "directs district courts to decline to exercise CAFA jurisdiction where specific conditions exist" and so "does not deprive federal courts of subject matter jurisdiction" (internal quotation marks omitted)).

58. *See* Mason v. Lockwood, Andrews & Newnam, P.C., 842 F.3d 383, 386–87 (6th Cir. 2016) (noting that if the proximity exceptions are met "the district court must abstain from hearing the case, despite having jurisdiction").

59. *See* Morrison v. YTB Int'l, Inc., 649 F.3d 533, 536 (7th Cir. 2011) (recognizing that the proximity exceptions do not themselves "diminish federal jurisdiction" because their decline to exercise language "is akin to abstention").

60. *See* Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp., 636 F.3d 971, 973–74 (8th Cir. 2011) (holding that CAFA's "plain text demonstrates the district court has broad subject matter jurisdiction in CAFA actions" if the amount in controversy and minimal diversity requirements are met and so proximity exceptions "operate[ ] as an abstention doctrine").

61. *See* Adams v. W. Marine Prods., 958 F.3d 1216, 1223 (9th Cir. 2020) ("The local controversy and home state exceptions are not jurisdictional. Rather . . . we treat the local controversy and home state exceptions as a form of abstention.")

62. *See* Dutcher v. Matheson, 840 F.3d 1183, 1190 (10th Cir. 2016) ("Rather than divesting a court of jurisdiction, the local controversy exception 'operates as an abstention doctrine.'"); *see also* Reece v. AES Corp., 638 F. App'x 755, 767 (10th Cir. 2016) (same).

63. *See* Hunter v. City of Montgomery, 859 F.3d 1329, 1334 (11th Cir. 2017) (holding that CAFA's proximity exceptions' "text recognizes that the court has jurisdiction but prevents the court from exercising it if either exception applies" (citing Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1022 (9th Cir. 2007))); *see also* Hill v. Nat'l Ins. Underwriters, Inc., 641 F. App'x. 899, 905 (11th Cir. 2016) ("[T]he local-controversy exception is akin to an abstention doctrine because § 1332(d)(4) 'inherently recognizes the district court has subject matter jurisdiction by directing the court to "decline to exercise" such jurisdiction when certain requirements are met.'" (quoting *Graphic Commc'ns*, 636 F.3d at 973)).

64. *See* Saunders v. Sappi N. Am., Inc., No. 1:21-cv-002450NT, 2021 WL 5984996, at *7 (D. Me. Dec. 16, 2021) (holding that the proximity exceptions operate as mandatory abstention doctrines); Banks v. E.I. du Pont de Nemours & Co., C.A. No. 19-1672-MN-JLH, 2021 WL 7209361, at *8–9 (D. Del. Dec. 2, 2021) ("The Third Circuit Court of Appeals has not squarely confronted the issue, but other Circuit Courts have concluded that the CAFA exceptions are not jurisdictional . . . . I agree.[ ] The CAFA exceptions are not jurisdictional." (footnote omitted)); *see also* Castro v. Linder Bulk Transp. LLC, Civil Action No. 19-20442 (SDW) (LDW), 2020 U.S. Dist. LEXIS 90113, at *12–13 (D.N.J. Apr. 20, 2020) (viewing the proximity exceptions "as constituting neither a 'defect' nor 'lack of subject matter jurisdiction'" and instead "as being in an altogether different category, similar to abstention doctrines" (citations omitted)); McMullen v. Synchrony Bank, 82 F. Supp. 3d 133, 138 (D.D.C. 2015) (saying of the proximity exceptions that "[e]ven if a court otherwise has jurisdiction under CAFA, however, the statute provides mandatory abstention provisions for actions that involve matters of principally local or state concern").

Courts that have found that proximity exceptions operate as abstention doctrines generally reason from the almost facially indisputable textual argument that a court cannot decline to exercise a jurisdiction it does not originally possess.[65] The most complete and often-cited explanation is given by the Eighth Circuit in *Graphic Communications Local 1B Health & Welfare Fund "A"* (hereinafter "*Graphic Communications*"), which also recognized that CAFA does explicitly delineate jurisdictional requirements, such as the amount in controversy requirement, in one section while placing the proximity exceptions in a different section.[66] While this seems to suggest an independent, structural statutory construction argument for the abstention view, it is a stretch based on the language of *Graphic Communications* to argue that the Eighth Circuit argued this explicitly.

When the proximity exceptions' statutory conditions are raised by party motion, the exceptions' mandatory status does not present problems. There, a federal court must only decide the question brought to its attention correctly. That court could err by mistakenly holding that the proximity exceptions require abstention when they actually do not,[67] or that the proximity exceptions don't require abstention when they actually do.[68]

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65. *See, e.g.*, *Graphic Commc'ns*, 636 F.3d at 973 (arguing that a proximity exception "inherently recognizes the district court has subject matter jurisdiction by directing the court to 'decline to exercise' such jurisdiction when certain requirements are met"); *cf.* Redish, *supra* note 19, at 112 n.185 (noting of the phrase "shall have . . . jurisdiction" in the original jurisdiction context that "[t]hough one might suggest that this language is not inherently mandatory, the use of the term 'shall' tends to undermine such an argument").

66. *See Graphic Commc'ns*, 636 F.3d at 973 (noting in its explanation that the proximity exceptions operate as abstention provisions that the exceptions are "set apart from the above jurisdictional requirements in the statute").

67. *See, e.g.*, Arbuckle Mt. Ranch of Tex., Inc. v. Chesapeake Energy Corp., 810 F.3d 335, 342–43 (5th Cir. 2016) (reversing a district court's finding that the local controversy exception applied, determining there was no basis to find that plaintiff's class consisted of more than two-thirds residents of the forum state). This same error could result in permissive abstention via the discretionary home state exception as well. *See, e.g.*, Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc., 485 F.3d 793, 803–04 (5th Cir. 2007) (reversing a district court that applied the discretionary home state exception and holding that its sole evidence of putative class member citizenship, medical records, could not "form an adequate basis for the district court to make a credible estimate that two-thirds of the proposed class were citizens").

68. If a court must abstain under a proximity exception, then the failure to do so is grounds for reversal. *See, e.g.*, Bridewell-Sledge v. Blue Cross, 798 F.3d 923, 925 (9th Cir. 2015) (reversing on appeal a district court's failure to remand a case under the local controversy exception when raised by the parties).

A court dealing with the proximity exceptions sua sponte would not have the benefit of initial party movement on the issue. A court therefore typically would issue an Order to Show Cause that it should not abstain under the exceptions, and then, after considering the issue, may dismiss or remand if so required.[69] Courts evaluating the proximity exceptions in this posture have generally not conducted full evidentiary proceedings but instead have made common-sense inferences from the data in possession of the courts.[70] Courts would then make findings about the factual and non-factual predicates of CAFA including, inter alia, the citizenships of defendants and plaintiffs, the significance of defendant activity, and the similarity of other suits against the defendants.[71]

Some argue that the proximity exceptions are more plausibly characterized as jurisdictional provisions.[72] Several arguments have been made. First, other statutory provisions do not use the "shall decline" language found in the proximity exceptions, instead opting to explicitly use the word "abstain."[73] By way of statutory interpretation, it could be argued that Congress' use of a different term where another would have signaled that the concept of abstention is at play indicates that the proximity exceptions should not be understood to be abstention doctrines.

This argument is deficient in several respects. First, there is no reason to read a legal difference into the meanings of two phrases,

69. *See, e.g.*, Reddick v. Glob. Contact Sols., LLC, No. 03:15–CV–00425–PK, 2015 WL 5056186, at *1 (D. Or. Aug. 26, 2015) (remanding after issuing an Order to Show Cause).

70. *See, e.g.*, Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1096, 1102 (D. Or. 2012) (declaring it permissible "for a court to apply common sense and reasonable inferences" to determine proximity exception relevance); *see also* Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *3 n.6 (D. Haw. Aug. 9, 2016) (agreeing with *Bey*). It is beyond this piece whether that method is appropriate.

71. 28 U.S.C. § 1332(d)(4)(A).

72. This debate is perhaps academic given the large court of appeals consensus, especially since these arguments were advanced before the courts of appeals really took up the issue in earnest. But since the Supreme Court has not passed on the issue, it is worth exploring.

73. *See* Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 439, 443 n.179 (2008) (comparing the statutory language and noting of the proposition that the proximity exceptions differ from the discretionary home state exception in legal effect that "had this been the legislative intent, one expects it would have been addressed more directly"). *But see* Nicole Ochi, *Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA & MMTJA*, 41 LOY. L.A. L. REV. 965, 985 n.150 (2008) (comparing CAFA's proximity exceptions with the Multiparty, Multiforum Trial Jurisdiction Act's abstention provision, which uses the word abstain, to conclude that both provisions require abstention).

one of which is merely the longform explanation of the other; if one statute contained a reference to bachelors, and another a reference to unmarried men, it would be suspect to read the latter provision differently than its text would suggest.

Second, the proximity exceptions are set aside from the statute's list of jurisdictional predicates for CAFA jurisdiction. The placement of the proximity exceptions in the same place as the jurisdictional predicates would have been trivial. Failure to do so does signal at least some difference in intended effect.[74] The Supreme Court has indicated that the separation of a provision from a jurisdictional section to another system cuts against its jurisdictional character.[75]

Finally, at the end of the day, "courts must presume that a legislature says in a statute what it means and means in a statute what it says."[76] Congress may label its statutes' provisions as jurisdictional predicates.[77] This is especially true for the supposed jurisdictional quality of statutory provisions where the Supreme Court has allied a "clear statement rule"[78] as a "readily administrable bright line"[79] for jurisdictional quality. Congress can clearly indicate that a provision is jurisdictional; "absent such a clear statement, we have cautioned, 'courts should treat the restriction as nonjurisdictional in character.'"[80] Here, the legislature has said that a court must *decline to exercise* its jurisdiction. One can only decline to exercise the option to accept an invitation to a Thanksgiving dinner, after all, if one has been first invited.

Second, the Senate committee report seems to regard the proximity exceptions as jurisdictional limitations. The report indicates that if the requirements of the mandatory home state exception are met, then "the case would not be subject to federal

74. *Graphic Communications* does not go so far as to endorse this view. *See supra* note 66. But I do.

75. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). It is true that *Arbaugh* concerned distinguishing between jurisdictional predicates and elements of a cause of action and that it was helpful to the Court's reasoning there that the provision in question did not mention jurisdiction at all. *Id.* But the Court's reasoning applies in this context as well.

76. Carr v. United States, 560 U.S. 438, 458 (2010).

77. *See* Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("Congress is free to attach the conditions that go with the jurisdictional label to a rule . . . .").

78. Hamer v. Neighborhood Hous. Servs., 138 S. Ct. 13, 20 n.9 (2017).

79. *Arbaugh*, 546 U.S. at 515.

80. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013) (quoting *Arbaugh*, 546 U.S. at 515–16).

jurisdiction,"[81] and notes that "jurisdiction will not be extended" to those situations.[82] The report also seems to characterize the effect of the local controversy exception this way, noting that if its "criteria are satisfied, the case will not be subject to federal jurisdiction under the bill."[83] Only the permissive provision is described in the committee report with the "decline to exercise" language.[84] Immediately after this section of the report, the report groups the proximity exceptions' limitations in with the other jurisdictional limitations, such as the 100 minimum class members limitation.[85]

This argument is not fully conclusive for a few reasons. First, it is difficult to say whether the Senate report itself intended the words to express the distinction that this Note has drawn. Indeed, it is possible that phrases like "subject to jurisdiction" still express an abstention-soluble idea. Second, the inferences in the report may cut in favor of the abstention interpretation. This is because the report does make it clear that the "decline to exercise" language is not strictly jurisdictional when it is used (namely, for the permissive abstention provision). The fact that the final version of the legislation extended this language to cover the other provisions could indicate an intent to expand an abstention-soluble view to the other provisions. The report makes clear that the drafters could have used explicit jurisdiction-stripping language if they had wanted to. So, the fact that the final text of these provisions was produced before the Senate committee report was published[86] may be meaningful. Finally, and most importantly, the use of committee reports to interpret legislative history, and the use of legislative history writ large for that matter, has become increasingly controversial.[87] Even when these uses are clear, their authority to speak for what Congress intended is questionable. Interpretation of an otherwise clear provision should not be displaced by "less than a quarter-page" of the report, "a minuscule portion of the total number of reports that

81. S. REP. NO. 109-14, at 28 (2005).

82. *Id.* at 36.

83. *Id.* at 29.

84. *Id.* at 28.

85. *Id.* at 29.

86. The Senate committee report was published on February 28, 2005, 10 days after the final text of these provisions was produced. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2.

87. *Compare* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (arguing against the use of committee reports and legislative history broadly), *with* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 863–64 (1992) (arguing for the use of committee reports and legislative history broadly).

the Members of Congress were receiving (and presumably even writing) during the period in question" and so "we should try to give the text its fair meaning, whatever various committees might have had to say."[88]

Third, and most seriously, some argue that the concept of abstention itself has a discretionary component, and therefore that these provisions, which purport to remove a court's discretion and force them to mechanically withdraw jurisdiction, do not make sense as abstention doctrines.[89] The strangeness surrounding CAFA's mandatory status lends this argument some force. CAFA's exceptions, in the context of CAFA as a whole, seem to be trying to be both non-authorizing and a constraint on a grant of authority. To claim that a court always has an unambiguous power to hear a case that it unambiguously cannot entertain under certain conditions is sticky business. When a statutory, mandatory abstention doctrine is at play, in what sense is it even true that a federal court has power to hear the action? By way of an analogy, if John signs title of his house to Mary under a deed that purports to grant complete ownership of the house to Mary but in a separate provision provides that Mary cannot exercise her ownership on Wednesdays, in what sense does Mary really have complete ownership of the house?

This argument fails because it is too abstract and too extreme. If a court is wrong to say that it is has jurisdiction and sometimes cannot use it, then the phrase "mandatory abstention" could never apply to anything it did pursuant to a statute. But, in practice, courts claim to apply something called mandatory abstention pursuant to statutes all the time. Courts have unambiguously held that mandatory abstention exists in these contexts; the question is only what mandatory abstention means.

These theoretical worries should be put to a different purpose. They should be taken as a challenge to articulate a version of mandatory abstention that is itself not obviously a jurisdictional limit on a court's authority. If a court must conduct a mandatory abstention analysis itself in every CAFA case, regardless of party action, it is hard to see that provision as anything more than a jurisdictional predicate, making the current judicial practice of

88. Wis. Pub. Intervenor v. Mortimer, 501 U.S. 597, 620–21 (1991) (Scalia, J., concurring).

89. *See* Hoffman, *supra* note 73, at 429 (arguing that because the concept of abstention implies a discretionary component, the proximity exceptions are not properly viewed as forms of abstention at all).

distinguishing them on the basis of, inter alia, burdens of proof,[90] inappropriate.

The "mandatory" aspect of mandatory abstention cannot just replace all the gaps between subject matter jurisdiction and permissive abstention. There are, roughly speaking, two such gaps. First, subject matter jurisdiction gives courts an *inquiry obligation*. A federal court must ask whether it has subject matter jurisdiction continually, even if the parties do not put that question before it. Second, subject matter jurisdiction gives courts a *dispositional obligation*. A federal court that has found its subject matter jurisdiction wanting cannot maintain the case. If "mandatory abstention" gives courts both an inquiry obligation and a dispositional obligation, it is the functional equivalent of a subject matter jurisdiction predicate.

I believe "mandatory abstention" and the cases that apply it are best understood to give federal courts a dispositional obligation, but not an inquiry obligation. So, the "mandatory" aspect of the proximity exceptions simply reflects the effect that a court is required to give its finding, should it make one. An analogy to permissive abstention is illuminating. If the local controversy exception were permissive, a court could find that two-thirds of plaintiff class members and defendants were citizens of the forum state and nevertheless *choose* not to abstain on a provided ground. Thus, the "permissive" aspect of permissive abstention is that a court may make a finding that could justify abstention but need not abstain; indeed, under such circumstance it "*may* . . . decline to exercise jurisdiction."[91]

Mandatory abstention is sensibly understood not to give federal courts an inquiry obligation. A court need not inquire about the predicates for mandatory abstention in each case. Rather, a court is required to dismiss or remand any action where it finds, by argument of the parties or by its own analysis, that the elements of a proximity exception are satisfied. In this way, if indeed courts *can* raise the proximity exceptions sua sponte,[92] doing so preserves the discretionary element unique to abstention because a court can choose whether to inquire into, or make a finding based upon, an exception. A court cannot, however, find the proximity exception requirements fulfilled and nevertheless maintain its hold over a

90. *See, e.g.*, Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 680 (7th Cir. 2006) (finding that once the defendant satisfies CAFA's general requirements the burden shifts to the plaintiffs to show that exceptions apply).

91. 28 U.S.C. § 1332(d)(3) (emphasis added).

92. *See infra* Part III.

case. All this is to say: federal courts have no *obligation*, under mandatory abstention qua mandatory abstention, to raise the proximity exceptions sua sponte. Indeed, some courts have held that this is so, although their analysis and reasoning have been sparse.[93]

One possible counterargument to this interpretation of "mandatory" abstention in the CAFA context is that an inquiry obligation is especially appropriate where subject matter jurisdiction is implicated, at least circuitously. It is a bit strange, the argument goes, to let courts choose to let class actions nest in federal court when there are explicit rules about which class actions need not be in federal court.

There are two major problems with this argument. First, the "most widely applied" abstention doctrine,[94] the mandatory judicial abstention doctrine articulated in *Younger v. Harris*,[95] is best read to work exactly this way. The *Younger* doctrine generally provides that federal courts must "refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts."[96] In *Younger* itself, the Supreme Court invalidated a district court injunction enjoining an ongoing state criminal proceeding because that injunction would flout and disrespect the importance of prosecutions to the states.[97] The doctrine has been held to require abstention[98] from involvement

93. *See, e.g.*, Kuxhausen v. BMW Fin. Servs. NA LLC, 707 F.3d 1136, 1139 n.1 (9th Cir. 2013) (noting that "the obligation to raise and prove" that the proximity exceptions apply "rests on the party seeking remand," which left the court "no charge to consider those possibilities sua sponte").

94. O'Brien, *supra* note 13, at 195.

95. 401 U.S. 37 (1971).

96. Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us – Get over It!!*, 36 CREIGHTON L. REV. 375, 381 (2003).

97. 401 U.S. at 43–45, 54. ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.").

98. This Note is in accord with the vast majority of sources that describe the doctrine of *Younger v. Harris* as one of abstention. *See, e.g.*, 17B CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. § 4251 (3d ed. 2022) (noting of the doctrine of *Younger v. Harris* that it "seems to be a special application of the abstention doctrines, and has repeatedly been so characterized by the Supreme Court"); Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 477 (1997) ("There are, of course, two primary types of federal abstention . . . . The second type is

where the forum state contains ongoing criminal proceedings, certain civil enforcement proceedings, and civil orders importantly connected to the forum state court's ability to fulfill its function.[99]

The view of the proximity exceptions described above predicts this outcome for the "mandatory" aspect of *Younger* abstention. A court cannot choose to accept a legitimately argued *Younger* challenge and nevertheless retain the case. It need not spur a resting court to action, and there is no requirement that the court undertake its own investigation to determine the existence of a state court proceeding since the entire question is whether what that court has been asked to do by plaintiffs would be proper.[100] Applying this doctrine, courts may issue Orders to Show Cause once the predicates of the action clearly become enough of an issue to warrant it,[101] just as with the proximity exceptions.

Second, an inquiry obligation is less necessary than usual in the context of the proximity exceptions because courts still do have inquiry obligations in the class actions context, even into similar factual predicates, as a result of their continuing obligations under Federal Rule of Civil Procedure 23. Rule 23 provides the requirements for a class action to pass federal muster, including numerosity, adequacy, commonality, and typicality.[102] A court may grant or deny the certification of a class attempted by the parties.[103] This

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Younger abstention . . . ."). It is worth noting that the influential Hart and Wechsler's Federal Courts and the Federal System casebook, however, distinguishes them, identifying the *Younger* doctrine instead as one of "equitable restraint." *See* RICHARD H. FALLON ET AL., HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1127–44 (7th ed. 2015); *see also* WRIGHT & MILLER, *supra* (noting that an earlier edition of the Hart and Weschler's Federal Courts textbook broke from the convention of labeling the *Younger* doctrine an abstention doctrine).

99. *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013).

100. While courts of appeals may find that the *Younger* criteria are satisfied and accordingly reverse lower court decisions, the reversals can be viewed as either corrections of a finding the lower court did make, or applications of sua sponte power in itself to consider the interests at stake. The latter view better explains the relevant cases. There, the judgement of the lower court is held to be wrong because the case should have been dismissed or remanded, and, in that sense, the lower court produces the wrong result. But this result is not wrong because a district court that omitted to consider *Younger* issues should have done so sua sponte. *See, e.g.*, Morrow v. Winslow, 94 F.3d 1386, 1398 (10th Cir. 1996) (applying *Younger* sua sponte on appeal and reversing the district court without chastising the district court for failing to raise the issue sua sponte itself).

101. *See, e.g.*, Fund v. City of New York, No. 14 Civ. 2958KPF, 2014 WL 2048204, at *4 (S.D.N.Y. May 19, 2014) (issuing an Order to Show Cause).

102. FED. R. CIV. P. 23(a).

103. FED. R. CIV. P. 23(b).

order "may be altered or amended before final judgment."[104] This is because the facts as they are, or as they are known to the parties, might change between the certification dispute and a later point in the litigation.[105] This is established practice and may even be taken after a jury has rendered a verdict.[106] A court need not actually change its certification order even in light of new facts; the decision to change is discretionary.[107] But several courts have also held that Rule 23 vests courts with an inquiry obligation into the factual predicates of certification or decertification.[108]

These obligations, in short, appear to be the mirror image of the obligations for the proximity exceptions: in Rule 23, it seems that courts have an inquiry obligation but no dispositional obliga-

104. FED. R. CIV. P. 23(c)(1)(C).

105. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation. For such an order . . . 'is inherently tentative.' This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable." (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978))); *see also* Jin v. Shanghai Original, Inc., 990 F.3d 251, 262 (2d Cir. 2021) (decertifying class on the grounds that "class counsel was no longer adequately representing the class").

106. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 23.87 & n.6.1 (2022); *see also* Mazzei v. Money Store, 829 F.3d 260, 266–67 (2d Cir. 2016) (decertifying after jury verdict a class on, inter alia, typicality grounds).

107. 7AA CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. CIV. § 1785.4 (3d ed. 2022) ("[I]t must be noted that there is no requirement that the court alter its class-action order when the circumstances surrounding its initial determination change. The decision to amend a class-certification order is discretionary.").

108. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 23.87 (2022) ("Some of the Courts of Appeals have indicated that the district courts have an affirmative duty to reassess their class certification rulings as the case develops, and to decertify a class or otherwise alter a certification decision as appropriate in light of developments in the case."); *see also* Sciaroni v. Consumer (*In re* Target Corp. Customer Data Sec. Breach Litig.), 847 F.3d 608, 612 (8th Cir. 2017) ("Consistent with the Supreme Court's premise that 'actual, not presumed, conformance with Rule 23(a) remains . . . indispensable,' after initial certification, the duty remains with the district court to assure that the class continues to be certifiable throughout the litigation . . . ." (first quoting *Falcon*, 457 U.S. at 160; and then citing Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1145 (8th Cir. 1999))); Amara v. CIGNA Corp., 775 F.3d 510, 520 (2d Cir. 2014) ("Rule 23(c)(1)(C) requires courts to 'reassess . . . class rulings as the case develops,' and to ensure continued compliance with Rule 23's requirements." (quoting Boucher v. Syracuse, 164 F.3d 113, 118 (2d Cir. 1999))); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir. 1983) ("Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts.").

tion. For this reason, the idea that federal class actions would be broadly unmonitored without an inquiry obligation is unfounded. Federal courts' obligation to look into facts such as, inter alia, numerosity and typicality, may reveal class information that may go to factors like domicile which could potentially implicate the proximity exceptions. Information problematic and severe enough to get onto a court's radar with respect to the proximity exceptions may be enough to make sure that truly egregious actions may not need to have their own inquiry obligation to get detected.

It could be argued that the way the continuing Rule 23 obligations work should be imparted as well to the proximity exceptions; that is, that the "mandatory" aspect of mandatory abstention should give courts an inquiry obligation but no dispositional obligations. That would not be an appropriate inference for three reasons. First, it is not obvious why courts should be read to require two inquiry obligations into potentially similar facts. A more natural reading might be that the provisions fill in gaps in each other, rather than operating similarly to reach out at redundant data. Second, the lack of dispositional obligation makes sense in the Rule 23 context, because Rule 23 is not related at all to whether an action could be in federal court. The decertification of a class does not boot the litigant from federal court; they may still maintain their action as an individual action. On the other hand, the proximity exceptions and CAFA as a whole directly implicate the ability to be in federal court, albeit in a slightly circuitous way. Finally, the positive analogy to *Younger*, an actual abstention doctrine, is worth more than a negative analogy to a distinct doctrine, though in the class actions space.[109]

It seems, therefore, that the proximity exceptions' mandatory status does not *force* a court to consider them sua sponte. Still, *may* a court do so, even if its parties object that they have waived their arguments? Some courts that have addressed this issue have determined that a finding of *waiver* precludes a sua sponte analysis.[110] It is clear, then, that a holistic understanding of the effect of waiver is important to unravel the proximity exceptions' sua sponte permissibility.

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109. There is no argument that Rule 23's continuing obligations erode the findings in Part III, *infra*, because the thesis of the Rule 23 obligation is that a judge should (indeed must) act sua sponte. It is also of no help in Part III because the reason for the sua sponte power under Rule 23 is an inquiry obligation I have just argued the proximity exceptions lack.

110. *See generally* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092 (W.D. Mo. Apr. 4, 2014).

III.
WAIVER AND SUA SPONTE PERMISSIBILITY

A. Waiver, Generally

Cases come before judges on the motions of litigants. Much of the time, courts decide those motions with reference to the arguments contained in those motions and made by those litigants. At other times, courts might deviate, deciding issues a party never raised, sometimes further up in the appeals process, namely, sua sponte. Some very famous Supreme Court cases have been decided this way.[111] A great many other cases have been decided this way, too. But the power of a court to consider an issue sua sponte is a bit "confused,"[112] and a very brief exegesis of the area, starting with what it means for a party to lose or "waive" an argument, should be helpful.

The concept of waiver is a little "undertheorized,"[113] but this piece will attempt a rough synthesis. Parties in a litigation are subject to many rules that constrain the nature and timing of the introduction of their arguments and claims. If a party fails to abide by the rules with respect to various arguments and claims, a party may lose the power to have its arguments heard by a court, even if that party wishes it be heard.[114] A party may also lose access to its right to be heard on an argument by consent or by agreeing to the idea that it may no longer raise it.[115] Arguments are lost in all sorts of

111. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 151–52 (1908) ("Two questions of law . . . were brought here by appeal, and have been argued before us . . . . We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause."); Erie R.R. v. Tompkins, 304 U.S. 64, 83 (1938) (Butler, J., dissenting) (reprimanding the majority for not deciding "either of the questions presented but, changing the rule of decision in force since the foundation of the government").

112. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1262–63 (2002) (suggesting that "[c]ourts are confused about the power to raise and decide issues sua sponte because our appellate system embraces two conflicting historical ideas about adjudication": the adversarial process and the desire to do justice, a conflict which is "a byproduct of the merger of law and equity").

113. Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 5–6 (2014).

114. *See id.* at 10 n.35 (collecting federal rules of civil procedure that go beyond the whims of the parties).

115. *See id.* at 40 (distinguishing between three ways a party may lose access to a claim: waiver (by consent), stipulation (by agreement), and forfeiture (by lack of right)).

ways for all sorts of reasons.[116] Although there are subtle distinctions between the ways of losing access to the capacity to make an argument, this Note will refer generally to what happens, as do many pieces in this area, as the "waiver" of the argument.[117]

It is clear that a party that waives an argument loses the right to object if a judge does not raise a waived argument in deciding a controversy. It is also clear that many judicial opinions do not fixate on issues not raised by the parties, and courts operate with a broad presumption that the actions of parties control the issues considered by the judge.[118] Still, courts do, in a number of contexts, raise issues that are waived by the parties. In so doing, the court "override[s]" the waiver of the parties and may consider the issue itself—that is, sua sponte.[119] The court does so most famously in the area of subject matter jurisdiction, which is frequently described as "unwaivable."[120] The idea is that federal courts have the obligation to ensure their subject matter jurisdiction over a dispute, even if neither party disputes subject matter jurisdiction at all.[121] Federal courts may override the waiver of a party in a number of other contexts, especially "quasi-jurisdictional" ones, including, inter alia,

116. *See* Miller, *supra* note 112, at 1268 ("Courts now treat as waived even issues that were raised in the briefs, because they were not briefed with sufficient detail. Arguments in footnotes, of just one page or less, without citation of authority, incorporating briefs presented below, or presented for the first time in reply briefs or oral argument have been rejected. Even claims of waiver have been deemed waived because they were not raised at the first possible time." (footnotes omitted)).

117. *See* Dodson, *supra* note 113, at 40–41 (noting that while "the Supreme Court has fixated on these subtle distinctions and elevated their significance for resolving conflicts between party choice and judicial authority," the distinctions "can be subtle and difficult to glean in practice" and "legal nomenclature tends to sweep various party choices into a single concept of 'waiver'").

118. *See id.* at 11–12.

119. *Id.* at 9.

120. *See, e.g.*, Jessica Berch, *Waving Goodbye to Non-Waivability: The Case for Permitting Waiver of Statutory Subject-Matter Jurisdiction Defects*, 45 McGeorge L. Rev. 635, 639 (2014) ("While other defects may be waived, subject-matter jurisdiction stands alone as the single unwaivable defect.").

121. *See* Katherine A. Macfarlane, *Adversarial No More: How Sua Sponte Assertion of Affirmative Defenses to Habeas Wreaks Havoc on the Rules of Civil Procedure*, 91 Or. L. Rev. 177, 190 (2012) ("Once a defense is branded as one that affects a court's subject matter jurisdiction, a court must raise the defense sua sponte. Because jurisdictional defenses are never waived, they may be raised at any moment throughout litigation, sua sponte or otherwise - even after a district court has held a trial and reached a decision on the merits." (footnote omitted)).

ripeness, state sovereign immunity, forum non conveniens, and, very generally, abstention.[122]

Even though courts have a broad array of specified scenarios in which their sua sponte power is called upon, it is less clear that courts have the broad authority to raise any issue sua sponte that they please. But it seems three things may be concluded from the analysis above. First, the strict waiver of an issue does not prevent a court from considering that issue sua sponte; the number of times sua sponte consideration is encouraged indicates that waiver is not necessarily binding, although it might be with additional context. Second, for non-jurisdictional issues, there is still a broad understanding that waiver constrains a court.[123] Third, matters of jurisdictional analogy or import, especially to subject matter jurisdiction, have a likelihood of being considerable sua sponte.[124]

All this bears on the question of the *ability* of a court to raise a concern sua sponte, and less on any *obligation* the court might have to do so. A court's power to raise an issue does not necessitate that it do so, and grants of sua sponte power may be accompanied by provisos that clarify the power's non-obligatory status.[125] This comes with an important corollary. Since ability does not establish obligation, the lack of an obligation does not prove the lack of ability. While the *capacity* to raise issues sua sponte is prevalent, although not common, the *obligation* to raise issues sua sponte is vanishingly rare, seemingly confined to subject matter jurisdiction.[126] Therefore, it seems that it is possible in some circumstances that a court *can* override the waiver of the parties but often *need not*.

122. *See* Dodson, *supra* note 113, at 9–10 & nn.32–35 (collecting cases, rules, and statutes); *see also* Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976) (noting that "it would appear that abstention may be raised by the court sua sponte").

123. *See* Dodson, *supra* note 113, at 3 (noting that waiver is understood to "cabin the scope of the court's nonjurisdictional adjudicatory authority").

124. *See supra* note 122.

125. *See, e.g.*, Wood v. Milyard, 566 U.S. 463, 472 (2012) (finding that a district court or court of appeals could raise a habeus corpus petition's timeliness sua sponte but does not have the obligation to do so).

126. *See, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999))); *see also* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

B. Abstention and Waiver

Abstention, generally, is an area in which this distinction manifests. The Supreme Court has indicated in a brisk footnote that abstention may be raised sua sponte.[127] This footnote has been broadly interpreted by many courts as a general invitation to consider abstention doctrines sua sponte.[128] This generates no corresponding obligation for a court to consider abstention sua sponte,[129] at least qua abstention. The analysis in Part II[130] indicates that the mandatory nature of abstention does not change this. And, consistently, courts have held that the waiver of the proximity exceptions may be effective.[131] Instead, the capacity to raise the proximity exceptions sua sponte should be analyzed itself and is not foreclosed by some technical determinant.

Thus, abstention is a subject matter jurisdiction-relevant doctrine in which waiver could be ineffective if values beyond those of the parties are implicated. An analogy to *Younger* abstention is useful. Many courts have extended the Supreme Court's seemingly general invitation to abstain sua sponte to *Younger*,[132] and the

127. *See Bellotti*, 428 U.S. at 143 n.10.

128. *See, e.g.*, Jiménez v. Rodríguez-Pagán, 597 F.3d 18, 27 n.4 (1st Cir. 2010) ("As with other forms of abstention, our decision to decline jurisdiction under *Colorado River* may be sua sponte. We therefore have discretion to review the matter on appeal even if it was not raised in the court below." (citing, inter alia, *Bellotti*, 428 U.S. at 143 n.10)); Slyman v. City of Willoughby, No. 96-4028, 1998 U.S. App. LEXIS 955, at *6 n.1 (6th Cir. Jan. 16, 1998) ("The City did not argue on brief that *Thibodaux* abstention was appropriate. Regardless, the Supreme Court has indicated that abstention 'may be raised by the court sua sponte.'" (citing *Bellotti*, 428 U.S. at 143 n.10)). *But see* E. Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims for Monetary Damages and Raising* Younger *Abstention Sua Sponte on Appeal*, 81 N.D. L. Rev. 475, 490–94 (2005) (articulating the view that the *Bellotti* footnote is likely dictum, properly confined to the *Pullman* context in which the case arose, and subject to a flexibility via sensitivity to policy considerations that militated against its broad applicability).

129. *See* 17A James Wm. Moore et al., Moore's Federal Practice – Civil § 122.05 (3d ed. 2009) ("Although federal courts may raise the issue of abstention sua sponte, they are not required to do so, because abstention does not implicate subject matter jurisdiction." (collecting cases)).

130. *See supra* Part II.

131. *See, e.g.*, Gold v. N.Y. Life Ins. Co., 730 F.3d 137, 142 (2d Cir. 2013) (holding that waiver of the mandatory home state exception could be effective); Kuxhausen v. BMW Fin. Servs. NA LLC, 707 F.3d 1136, 1139 n.1 (9th Cir. 2013).

132. *See, e.g.*, Citizens for Free Speech, LLC v. Cnty. of Alameda, 953 F.3d 655, 658 (9th Cir. 2020) ("[The Plaintiff] complains that the sua sponte nature of the district court's *Younger* analysis was both untimely and prejudicial, but we find this contention unpersuasive; the court may raise abstention of its own accord at any stage of the litigation." (citing *Bellotti*, 428 U.S. at 143 n.10)).

Younger doctrine well illustrates the tension between mandatory abstention requirements and waiver. There seems to be a general directive for courts to raise *Younger* abstention when they see its predicates, and a sua sponte power to address *Younger* even when the parties are not enthusiastic about it.[133] Despite this, the special nature of *Younger* abstention also seems to make deliberate waiver of that argument nevertheless binding on a court. In particular, *Younger*'s mandatory status is complicated by the identity of the party that would seek abstention: the state or state official that would be the subject of the injunction. The Supreme Court has held, therefore, that a district court or court of appeals is not wrong to let a *state* waive its abstention arguments in certain situations. Since a state is the party whose interests the court would ostensibly be respecting by abstaining, application of abstention *against* the desire of a state is wholly against the interests served by abstention writ large (i.e., comity and federalism). Thus, the Court in *Ohio Bureau of Employment Services v. Hodory* said:

> Younger and these cited cases express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "set its own house in order" when the federal issue is already before a state tribunal. It may not be argued, however, that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. In the present case, Ohio either believes that the District Court was correct in its analysis of abstention or, faced with the prospect of lengthy administrative appeals followed by equally protracted state judicial proceedings, now has concluded to submit the constitutional issue to this Court for immediate resolution. In either event, under these circumstances Younger principles of equity and comity do not require this Court to refuse Ohio the immediate adjudication it seeks.[134]

This underscores that the values implicated by the applicable variety of abstention are very much at stake on these issues at the edge of federal jurisdiction. *Hodory* shows that waiver in a

133. *See, e.g.*, Marcus & Millichap Real Estate Inv. Servs. of Nev., Inc. v. Chandra, 822 F. App'x 597, 599–600 (9th Cir. 2020) (finding in a non-precedential order that sua sponte raising of *Younger* abstention was appropriate, that the district court had erred by not granting that abstention, and that a functional state defendant did not waive the objection despite not spending a great deal of time arguing for it).

134. Ohio Bureau of Emp. Servs. v. Hodory, 431 U.S. 471, 479–80 (1977).

mandatory context is flexible and should respect the holistic interests of those implicated by the determination. It is no surprise, then, that when one of the parties is the exact subject of those values (i.e., the state itself) the reasons for a sua sponte application evaporate; if a doctrine exists to respect the hypothetical, absent will of a state, it certainly seems inappropriate to override the actual desire of that state in the name of a hypothetical interest.

C. Arguments for the Power to Raise the Proximity Exceptions Sua Sponte

Part III(b) only establishes that the general concept of waiver should not be found to bar a court from considering the proximity exceptions sua sponte; that is to say, it moves the needle back to the middle. But the middle is a good place to start. Without the baggage of waiver obviously getting in the way, the proximity exceptions are best understood to be raisable sua sponte. There are three good reasons for this understanding.

First, the power to raise the proximity exceptions sua sponte is vital to the federalism function the proximity exceptions are organized to serve. Federalism is "central to the constitutional design" of the United States.[135] The proximity exceptions primarily involve the will of absent parties.[136] These are the exact structural considerations that give the proximity exceptions their very force: the pure interests of the parties involved could be averse to a healthy balance between the states and the federal government.[137] Even if the attorneys of a class action and the defendants would rather receive fed-

135. Arizona v. United States, 567 U.S. 387, 398 (2012). Federalism not only preserves the sovereign power of states to do as they wish but also independently protects persons from the exercise of the arbitrary power that could be available if only one government authority exerted exclusive and unbalanced influence over all persons. *See* Bond v. United States, 564 U.S. 211, 221–22 (2011) ("Federalism . . . preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right. But that is not its exclusive sphere of operation. . . . Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

136. *See* 28 U.S.C. § 1332(d)(5)(A) (exempting class actions from federal jurisdiction when "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief").

137. *See supra* Part II(a).

eral treatment, the exceptions are designed to ensure exactly that those considerations cannot always permit federal jurisdiction.[138]

A court should think carefully before using this power. Even those courts that have permitted sua sponte application of the proximity exceptions noted their raising of the issue "relatively early in the case."[139] The interests of the parties are an important part of the federal design. Nevertheless, parties cannot agree[140] to upset the balance of federal and state power simply because the alternative is costly. This is especially true for the proximity exceptions. The bare requirements of jurisdiction under CAFA are quite light, and the mandatory nature of these exceptions reflects precisely the weight placed on the courts that use them to allow states to hear at least some of the class actions that involve their citizens.[141] The court in *Bey* got it right when it indicated that federalism is an integral part of CAFA's design and should be treated as such; thus, courts should be allowed to be the caretakers that the system envisioned them as, party interests aside.[142]

Second, abstention in general is raisable sua sponte. So, it should stay that way absent a good reason.[143] There are no good reasons to deviate from this broad presumption where the proximity exceptions are concerned. The *Edwards* court rejected sua sponte application solely on the grounds that the proximity exceptions were non-jurisdictional;[144] as has been shown, mandatory ab-

138. *See supra* Part II(a).

139. Bey v. SolarWorld Indus. Am., Inc., 904 F. Supp. 2d 1103, 1109 (D. Or. 2012).

140. Or collude.

141. *See Bey*, 904 F. Supp. 2d at 1108 ("Congress extended federal jurisdiction to some cases that lacked complete diversity. But to prevent the pendulum from swinging too far in the other direction, it included the exceptions to jurisdiction set out in § 1332(d)(4) to make clear that truly local disputes still do not belong in federal court.").

142. *See id.* (arguing that institutional concerns about federalism apply especially strongly in favor of the sua sponte application of the proximity exceptions because the state is an absent party and cannot defend its interests and because the presence of these exceptions reflects a bona fide congressional judgment about federalism that must be respected).

143. *See supra* notes 127–28 and accompanying text.

144. Edwards v. N. Am. Power & Gas, LLC, No. 3:14-cv-1714 (VAB), 2016 WL 2851544, at *4 n.8 (D. Conn. May 13, 2016) (concluding that because CAFA exceptions are "not jurisdictional," "for the [c]ourt to consider the applicability of either of [the CAFA] exceptions, they must be raised by the parties"). It is worth noting that the opposite conclusion reached by the *Vitale* court—that sua sponte determination is required because a court has a jurisdictional obligation to ensure its subject matter jurisdiction—is also incorrect because it does not appreciate that the proximity exceptions are forms of abstention rather than jurisdictional predicates.

stention itself has a sua sponte valence. The *Barfield* court interpreted the party waiver of the applicability of the exceptions as precluding its power to raise them.[145] It is now clear that the mere presence of waiver, without more, cannot prevent sua sponte permissibility—the waiver might be overridable, or ineffective. Such an analysis presumes an independent reason for waiver effectiveness not provided by that court.[146]

There is one countervailing presumption that deserves attention. Many courts have noted that conflicts in the meaning of the proximity exceptions should favor federal jurisdiction.[147] There are two reasons this presumption is inapplicable here. First, the proximity exceptions' sua sponte status has no effect on the meaning of the exceptions. It only affects when a court may consider the exceptions, *whatever they mean*. So, a presumption favoring federal-jurisdiction-friendly interpretations of the proximity exceptions should not affect the prior question of when it would be appropriate to consider the exceptions. Second, the proximity exceptions' sua sponte status has no logical connection to a decrease in federal jurisdiction. It is true that, as a practical matter, the initiation of an inquiry into whether normally present federal jurisdiction should be withheld almost certainly decreases the chances of federal control in an action; after all, the only possible change as a result of the inquiry is a denial of federal jurisdiction. Nonetheless, as a logical matter, there is absolutely no relationship between a desire for federal control and an allowance to consider exceptions to federal control.[148] Furthermore, a more aggressive view of the reach of the proximity exceptions may expand CAFA in other contexts as courts try to balance the overall reach of CAFA through ruling on its various provisions.[149]

See Vitale v. D.R. Horton, Inc., CV No. 15-00312 DKW-KSC, 2016 WL 4203399, at *1 (D. Haw. Aug. 9, 2016).

145. *See generally* Barfield v. Sho-Me Power Elec. Coop., No. 2:11–cv–04321–NKL, 2014 WL 1343092 (W.D. Mo. Apr. 4, 2014).

146. *See generally id.*

147. *See, e.g.*, Evans v. Walter Indus., 449 F.3d 1159, 1163–64 (11th Cir. 2006) (quoting legislative history to argue that Congress' intentions that the proximity exceptions have narrow applicability should determine the meaning of the proximity exceptions).

148. Imagine, for instance, that a federal court raises the matter of the proximity exceptions sua sponte 100 times and holds each time that the exceptions do not apply. In this scenario, the strength of the presumption of federal control is not impaired in the slightest.

149. *See* Clermont & Eisenberg, *supra* note 44 and accompanying text.

Third, the best reading of CAFA in comparison to other abstention statutes supports the proximity exceptions' sua sponte waivability. The structure of other statutes meaningfully suggests the proximity exceptions may be raised sua sponte. Other statutes can be a helpful guide in statutory interpretation.[150] The bankruptcy code, a significant mandatory abstention statute, specifies that it cannot apply sua sponte.[151] The failure to do so in the proximity exceptions, on this view, indicates that Congress intended at least to keep sua sponte activity permissible for the courts, if not to passively condone it.[152] There exists a plausible counterargument: a closely analogous statutory, mandatory abstention doctrine not applying sua sponte indicates congressional design that its other statutory, mandatory abstention doctrines not get the sua sponte treatment. On this view, Congress' connection of mandatory abstention directly with party motion would indicate that abstention is closely connected with, and should be implied to require, a party motion to initiate. But statutes that are close in form and function are precisely those where textual differences stand out the most as indicators of Congressional design. Furthermore, the bankruptcy code's permissive abstention provision can be raised sua sponte, although its text is silent on that issue.[153] This illustrates the sense in which the absence of a sua sponte rider for the proximity exceptions is meaningful.

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150. *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 118–19 (1994) (comparing "analogous" statutes dealing with similar questions to support a reading of a federal statute).

151. 28 U.S.C. § 1334(c)(2) (requiring that "[*u*]*pon timely motion of a party* in a proceeding based upon a State law claim . . . the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction" (emphasis added)). Bankruptcy also includes a permissive abstention provision. *Id.* § 1334(c)(1) (permitting abstention "in the interest of justice, or in the interest of comity with State courts or respect for State law").

152. *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) ("No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law. Or it could have written 'primarily because of' to indicate that the prohibited factor had to be the main cause of the defendant's challenged employment decision. But none of this is the law we have." (citing 11 U.S.C. § 525; 16 U.S.C. § 511; 22 U.S.C. § 2688)).

153. *See* Jack Zarin-Rosenfeld, Note, *Designing Related-to Bankruptcy Jurisdiction*, 89 N.Y.U. L. Rev. 390, 404 & n.67 (2014) (collecting cases for the proposition that "courts still claim the power to raise permissive abstention sua sponte").

IV.
CONCLUSION

CAFA is relatively young, and our understanding of it has room to grow. The current understanding on the matter seems to be this: federal courts have the power to raise the proximity exceptions sua sponte (and even against party wishes). Those courts do not have to do so, but they may. If a court *does* look into the size and composition of the defendants and plaintiff class members and determines that CAFA's proximity exceptions apply, at its own behest or of that of the parties to the suit, it must dismiss the action or remand it to state court, whichever makes sense. This organization of federal court power preserves the intentions of Congress, the associated balance of federal power, and the statutory design. Hopefully this piece will grow our understanding of CAFA's provisions in a productive and practical way such that, perhaps, even thornier issues can emerge.[154]

154. *Cf.* Marjan Laal & Peyman Salamati, *Lifelong Learning; Why Do We Need It?*, 31 PROCEDIA SOC. & BEHAV. SCI. 399, 403 (2011).