No. 08-1156

IN THE

Supreme Court of the United States

AT&T MOBILITY LLC AND
AT&T MOBILITY CORPORATION.,
Petitioners,

v.

CHARLENE SHORTS AND
PALISADES COLLECTIONS LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest federation of business companies and associations, with an underlying membership of more than three million business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in seeking review of the Fourth Circuit's decision in this matter, which created an enormous loophole in the Class Action Fairness Act ("CAFA"). The Chamber played a significant role in the design and enactment of CAFA. And the Chamber's members are frequently defendants in lage interstate class actions in which the existence of removal au-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

thority under CAFA is at issue. Accordingly, the central question presented by this petition – whether counterclaim defendants are statutorily barred from invoking CAFA's removal provisions – is of significant and widespread importance to the Chamber and its members. Given the profound effect that the decision below will have on the Chamber's members absent review, the Chamber files this *amicus* brief in support of the petition.

INTRODUCTION AND SUMMARY

Four years ago, our nation took a critical step toward ending class action abuse with the enactment of CAFA. The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity jurisdiction allowing them to bring interstate class actions involving tens or even hundreds of millions of dollars in certain state courts that came to be known as "magnet jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an ex parte basis and approving class settlements that primarily benefited the plaintiffs' attorneys. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions. The results have been dramatic: "magnet jurisdictions" have seen a marked drop in class action activity and reports of class action abuse are waning. *See, e.g.*, Ted Frank, *The Class Action Fairness Act Two Years Later*, AEI Liability Outlook (Mar. 2007), *available at* http://www.aei.org/docLib/20070327_Liability.pdf.

The decision below – issued over a forceful dissent by Judge Niemeyer – threatens to erase these advances and put magnet jurisdictions back in business by barring counterclaim defendants from invoking CAFA's removal provisions. In this case, Palisades Collection LLC ("Palisades") brought a debt collection proceeding against Respondent Charlene Shorts arising out of an unpaid cellular telephone bill. Shorts then transformed that suit into a multi-million dollar putative statewide class action by filing a counterclaim class action against Palisades and Petitioners AT&T Mobility LLC and AT&T Mobility Corporation, alleging violations of the West Virginia Consumer Credit & Protection Act. Pet. App. 3a. The proposed class action created by the counterclaim – involving more than 160,000 potential class members and putting at least $16 million in controversy, *id*. 20a-21a – is precisely the type of large, interstate class action over which CAFA was intended to create federal jurisdiction; indeed, the district court specifically noted that the putative class action clearly satisfies each of CAFA's jurisdictional prerequisites, *id*. 54a-55a ("It appears, then, that this Court would have jurisdiction over this case, if it ha[d] been properly removed."). Nonetheless, the court of appeals held that removal was improper because the putative class action was brought as a counterclaim as opposed to a free-standing case. *Id*. 20a.

Judge Niemeyer dissented. He explained that the majority's holding was contrary to the purpose and text of CAFA, which allows "any" defendant to seek removal. *Id*. 23a (citing 28 U.S.C. § 1453(b)). He also dissented from the denial of rehearing, after

declining to request a poll because he "prefer[red] to release this case to the early consideration of the Supreme Court." *Id.* 36a-37a.

The Chamber fully agrees with each of the arguments raised in the Petition for Writ of Certiorari regarding the proper construction of CAFA and the suitability of this case as a vehicle for resolving this important issue. The Chamber writes separately, however, to emphasize three further arguments that support certiorari. First, the decision below, if left undisturbed, will have an immediate, substantial impact on class action litigation in the United States, largely undoing the changes instituted by CAFA. As the procedural history set forth in the Petition makes clear, this is essentially a test case regarding the viability of evading CAFA's requirements through counterclaim class actions and thereby "reviving" the abusive state court class action practice that existed pre-CAFA. *See* Pet. 5-9. In fact, one of the plaintiffs' litigation consultants has authored a law review article extolling the use of the counterclaim class action as a means for circumventing CAFA, and analogous counterclaim class actions are currently pending across the country. *See id.* 23 n.10 (citing cases). Moreover, the "counterclaim class action" is a relatively easy tactic for other plaintiffs' attorneys to copy. As a practical matter, plaintiffs' attorneys will have little trouble finding debt collection proceedings or other small-scale litigation to serve as a vehicle for such counterclaim class actions; indeed, if need be, plaintiffs' attorneys could engineer the requisite initial proceeding by, for example, having a potential counterclaim plaintiff fail to pay certain bills. In short, if this Court de-

clines to review and reverse the court of appeals' decision, the result will be widespread circumvention of CAFA, substantially compromising the statute's effectiveness.

Second, the court of appeals' decision is inconsistent with holdings of other circuits recognizing that under CAFA, each defendant stands alone, with independent removal rights based on its individual circumstances. Since CAFA's enactment, numerous courts have concluded – primarily in the context of proceedings involving the applicability of CAFA to class actions commenced prior to CAFA's effective date – that the actions and conduct of one defendant in a multi-defendant class action have no bearing on the ability of another defendant to remove under CAFA. These holdings follow from the statutory text, which allows "any" defendant to remove. 28 U.S.C. § 1453(b). The decision of the court below, however, effectively precludes Petitioners from removing on the basis of an independent action taken by Palisades Collection LLC, specifically Palisades' initiation of the original debt collection proceeding. Petitioners' only involvement in this proceeding is as defendants in a multi-million dollar, interstate class action – in that regard, they are identically situated to the various defendants across the country who remove class actions under CAFA every day. And yet, because Palisades' original suit allowed the Plaintiff-Respondent to bring her class action as a counterclaim, the court of appeals denied Petitioners the right to remove under CAFA. This decision cannot be reconciled with prior CAFA jurisprudence, and – if left undisturbed – would create substantial

confusion in lower courts on how to apply CAFA in multi-defendant proceedings.

Finally, granting the Petition for Writ of Certiorari would permit this Court to resolve a longstanding circuit split on the important jurisdictional issue of a third-party defendant's removal rights. The court of appeals predicated its decision in part on the understanding that this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), precludes all counterclaim defendants from exercising removal rights. But the Court in *Shamrock Oil* only addressed whether a counterclaim defendant who was the original plaintiff in the case possessed removal rights. The Court found that he did not because he had initiated litigation in state court and therefore, "having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." *Id.* at 106. *Shamrock Oil* did not decide whether counterclaim defendants who were not the original plaintiffs in the suit – *i.e.*, defendants like Petitioners here – enjoy the right of removal, and the lower courts have split on whether the *Shamrock Oil* rule extends to such additional counterclaim defendants. As a general matter, the Chamber, like Petitioners, contends that Congress created a new rule regarding removal rights in enacting CAFA, and that *Shamrock Oil* is not applicable to removals under CAFA. But to the extent the Court concludes otherwise, this case provides a vehicle for clarifying the scope of *Shamrock Oil*'s reach.

For these reasons, as well as those raised by Petitioners, the Court should grant the Petition.

ARGUMENT

I. THE DECISION BELOW INVITES THE VERY TYPES OF ABUSE THAT CONGRESS ENACTED CAFA TO PREVENT.

The Court should grant the Petition for Writ of Certiorari first and foremost because the decision below carves an enormous loophole in CAFA that would severely compromise the statute's effectiveness. CAFA was enacted primarily to extend federal diversity jurisdiction to large, interstate class actions involving substantial amounts in controversy. Although the Framers created diversity jurisdiction to ensure that proceedings involving parties from different states and sufficiently large quantities of money were adjudicated in federal court, the federal diversity statute prior to CAFA provided federal jurisdiction only for those class actions in which every putative class member's claim exceeded the individual amount-in-controversy requirement of $75,000. *See* S. Rep. 109-14, at 8, 10-11. CAFA was intended to restore the intent of the Framers and end various stratagems that certain lawyers had undertaken to keep class actions out of federal court. *See id.* at 24 ("[A] system that allows state court judges to dictate national policy . . . from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."); *id.* at 10 ("[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.").

In the roughly four years since CAFA was passed, it has largely succeeded in achieving these goals,

with recent studies noting that significantly more class actions have been removed to federal court than in the years prior to CAFA's enactment. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, Federal Judicial Center (Apr. 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf. But the decision of the court below threatens to restore (to a significant extent) the pre-CAFA status quo. If allowed to stand, the court of appeals' ruling that counterclaim defendants have no removal rights would provide plaintiffs' attorneys with a simple tool for evading CAFA – bringing class actions as counterclaims.

Indeed, confirming the viability of this stratagem is likely one of the primary goals of Plaintiff-Respondent's counsel in this litigation; as Petitioners note, one of Plaintiff-Respondent's litigation consultants authored a law review article advocating the use of counterclaims to evade CAFA's restrictions. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007).

The Tidmarsh article provides a playbook for plaintiffs' counsel seeking to evade CAFA in this manner. According to the article, in the "typical scenario," a consumer "fails to make a required payment under the contract to the other party – usually a financial institution that sells credit, mortgage, or insurance products." *Id.* at 196-97. After the service provider sues in state court to recover the relatively

small sum due under the contract, the consumer promptly asserts a counterclaim class action, alleging that the contractual term on which the debt collection action is based violates state law. *Id.* at 197. "If consumers can successfully avoid federal court with this tactic . . . the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake," and "[t]he entire litigation dynamic and its center of gravity switches in an instant." *Id.* at 199. The article observes that "[f]aced with this reality, financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies." *Id.*

The article further highlights that the "tactic" employed in this case is no anomaly, but rather is certain to become a recurring problem. Pointing to a number of recent counterclaim class actions brought in state court, including this case, the article boasts that such cases "reveal just the tip of an approaching iceberg." *Id.*; *see also* Pet. 23 n.10 (citing cases); Don Zupanec, 24 No. 2 *Federal Litigator* 7 (Feb. 2009) (describing use of this tactic as "an increasingly frequent scenario"). The Tidmarsh article leaves no doubt: this is a test case for circumventing CAFA, and unless the Court grants review, plaintiffs' lawyers quickly will replicate it across the country.

In sum, the purpose of CAFA was to change the nature of class action practice in the United States by closing loopholes in the federal diversity jurisdiction statute and ensuring that class action settlements were not approved unless they served the interest of the actual parties to the litigation. CAFA

has by and large succeeded in that endeavor, thereby reducing the burdens of class action abuse on American consumers, businesses, and courts. But if the court of appeals' decision to deny CAFA removal rights to all counterclaim defendants is allowed to stand, it will undermine the statute's central purpose and reverse the improvements of the past four years. Plaintiffs' attorneys would have an easy way to avoid federal jurisdiction for class actions, and, as the Tidmarsh article makes clear, they would hasten to take advantage of it. The Court should grant review to avoid that result.

II. THE DECISION BELOW IS IN TENSION WITH DECISIONS OF OTHER CIRCUITS HOLDING THAT ONE DEFENDANT CANNOT ELIMINATE ANOTHER'S REMOVAL RIGHTS UNDER CAFA.

The Court should also grant the Petition because the decision below is likely to breed significant confusion over the application of CAFA in multi-defendant proceedings. One of the principal changes that CAFA made to removal practice was to disaggregate the removal rights of different defendants. Under traditional removal principles, a multi-defendant action could only be removed to federal court if all defendants consented to removal; thus, each defendant's removal rights fundamentally were linked to the rights of the other defendants. CAFA eliminated this linkage, allowing "any" one defendant in a multi-defendant action to act independently of any others in removing a case to federal court. 28 U.S.C. § 1453(b). The decision of the court below, however, runs contrary to this principle, preventing Petitioners from exercising their right of re-

moval because of the actions of their co-defendant – *i.e.*, Palisades' decision to bring a debt collection action against Ms. Shorts. This interpretation of CAFA is in tension with several other rulings that have been issued under the statute.

Thus far, the overwhelming majority of courts applying CAFA have analyzed the circumstances of each class action defendant independently in determining whether such defendant may remove pursuant to CAFA. This issue has arisen most frequently in the context of whether a new defendant named after CAFA's date of commencement has independent authority to remove a case.[2] Courts have been virtually unanimous in holding that CAFA allows the newly added party to independently seek removal, regardless of the removal rights of other defendants. *See, e.g.*, *Braud v. Transp. Serv. Co.*, 445 F.3d 801, 808 (5th Cir. 2006) ("The language of CAFA is plain that any single defendant can remove (without the consent of other defendants) the entire class action . . . ."); *Schorsch v. Hewlett Packard Co.*, 417 F.3d 748, 749 (7th Cir. 2005); *Prime Care of Ne. Kan. LLC v. Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006); *Robinson v. Holiday Universal, Inc.*, Civ. A. No. 05-5726, 2006 U.S. Dist. LEXIS 7252 (E.D. Pa. Feb. 23, 2006); *Adams v. Fed. Materials Co.*, Civ. A. No. 05-90, 2005 U.S. Dist. LEXIS 15324, at *13 (W.D. Ky. July 28, 2005).[3] Thus, for example,

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[2] Because CAFA does not apply retroactively, defendants in a suit pending at the time the statute went into effect cannot seek removal pursuant to its provisions.

[3] Only the Ninth Circuit has held to the contrary, and it has done so based on California state law regarding when an

a class action commenced long before CAFA's enactment with respect to three defendants might be removed to federal court by a fourth defendant added after CAFA's effective date – the fact that the first three defendants are barred from removing under CAFA would have no bearing on the fourth defendant's removal rights.

The Fourth Circuit's opinion here is in tension with the application of CAFA in these cases. Petitioners in this case were strangers to this litigation until Plaintiff-Respondent filed her counterclaim and class allegations. They have participated in this litigation only as out-of-state defendants facing multi-million dollar class actions; accordingly, their circumstances are functionally identical to those of numerous class defendants who remove on the basis of CAFA every day. Under an approach that analyzed Petitioners' right of removal independently, they clearly would be able to invoke CAFA jurisdiction. Yet, according to the decision below, Petitioners are precluded from invoking CAFA because their fellow defendant, Palisades, previously had instituted a state court action against Plaintiff-Respondent.

In short, the decision below suggests that there are circumstances in which one defendant's conduct can affect another defendant's removal rights under CAFA. Such an approach is at odds both with the text of § 1453(b), which indicates that a defendant's right to remove under CAFA turns solely on that specific defendant's capacity to satisfy the removal

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action commences. *McAtee v. Capital One, F.S.B.*, 479 F.3d 1143, 1148 (9th Cir. 2007).

requirements, and with the decisions of courts of appeals analyzing removal rights under CAFA on a defendant-by-defendant basis. The Court should grant the petition to resolve this conflict and affirm that each defendant's removal rights under CAFA are unaffected by the presence or conduct of any other defendant.

III. GRANTING THE PETITION WOULD ALLOW THIS COURT TO RESOLVE LONG-STANDING UNCERTAINTY OVER THE REACH OF *SHAMROCK OIL*.

Finally, review is warranted because this case potentially provides the Court with the opportunity to clarify the scope of *Shamrock Oil*, 313 U.S. 100, which defined the removal rights of counterclaim defendants under the traditional removal statute, 28 U.S.C. § 1441. *Shamrock Oil* holds that the "plaintiff" in an action in which a counterclaim is filed may not seek removal of the case to federal court. *Id.* at 103. As a general matter, the Chamber agrees with Petitioners that *Shamrock Oil* is inapplicable to the CAFA removal provision, 28 U.S.C. § 1453. This is so because, as Judge Niemeyer explained in his dissent, the statute at issue in *Shamrock Oil* allowed "*the* defendant" to remove, 28 U.S.C. § 1441(a), in contrast to CAFA, which allows "*any* defendant" to remove, 28 U.S.C. § 1453(b). Pet. App. 23a.

But even if the Court disagrees and believes that *Shamrock Oil* is implicated in CAFA's construction, review is still warranted because the lower courts are split on whether the *Shamrock Oil* rule applies to counterclaim defendants, such as Petitioners, who were not plaintiffs in the original action. Although

the court below held that *Shamrock Oil* does extend to such additional counterclaim defendants, *id.* 10a-11a, several other courts have reached the opposite conclusion. *See, e.g.*, *State of Tex. v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Mace Sec. Int'l, Inc. v. Odierna*, No. 08-60778-CIV, 2008 WL 3851839, at *4 (S.D. Fla. Aug. 14, 2008); *H&R Block, Ltd. v. Housden*, 24 F. Supp. 2d 703, 706 (E.D. Tex. 1998). Accordingly, granting the Petition would permit the Court to clarify the conflict in the lower courts on this issue.

In *Shamrock Oil*, this Court held that a counterclaim defendant who was the original plaintiff could not remove an action to federal court because "the *plaintiff*, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." 313 U.S. at 106 (emphasis added). The Court quoted Congress's view that it was "just and proper to require the plaintiff to abide his selection of a forum," *id.* at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1st Sess. 1887)), and noted that, if the plaintiff "elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause," *id.*; *see also* Pet. App. 25-26 n.11. In other words, the Court in *Shamrock Oil* based its decision in significant part on the fact that the party seeking to remove had initiated the underlying action and had chosen the state court forum. According such a party the ability to remove therefore arguably would be at odds with the fundamental premise of the removal statute and diversity jurisdiction – to protect an out-of-state defendant hauled into state court by in-state plaintiffs

from the potential of unfair bias. *See* S. Rep. 109-14, at 8.

But *Shamrock Oil* did not decide whether a similar rule should apply to additional counterclaim defendants, like Petitioners, who have never "submitted [themselves] to the jurisdiction of the state court" and have never made any "selection of a forum" by which they should be required to abide. As noted above, such counterclaim defendants are essentially indistinguishable from traditional defendants in terms of their involvement in litigation. The effect of extending *Shamrock Oil* to additional counterclaim defendants therefore is to bind such parties to a forum they have not selected and a jurisdiction to which they have not submitted themselves. In light of the reasoning of *Shamrock Oil* and fundamental removal principles, such an extension seems plainly unwarranted. *See* Michael C. Massengale, Note, *Rigorous Uncertainty: A Quarrel with the "Commentators' Rule" Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants*, 75 Tex. L. Rev. 659, 676 (1997) (explaining that "[i]t is a far stretch to move from" *Shamrock Oil*'s narrow holding to the contention that an additional defendant cannot remove).

In sum, the Chamber believes that *Shamrock Oil* does not extend to CAFA removals. But even if it did, review would be all the more appropriate, because the Circuits are at odds on the applicability of *Shamrock Oil* where, as here, the counterclaim defendant was a stranger to the case before the counterclaim was filed. For this reason too, the Petition should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Petitioners, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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