CA Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291
13-6292, 13-6293, 13-6294, 13-6295, 13-6206, 13-6297

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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In re: JOHNSON & Johnson, *et al.*,

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On Appeal from the United States District Court
for the Western District of Oklahoma
Nos. 13-832-L, 13-833-L, 13-834-L, 13-836-L, 13-838-L,
13-839-L, 13-840-L, 13-841-L, 13-844-L, 13-845-L, 13-846-L
(Honorable Timothy D. Leonard)

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

_____

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January 17, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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GLOSSARY

CAFA	Class Action Fairness Act
MDL	multidistrict litigation
WLF	Washington Legal Foundation

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file. In brief, WLF is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in Oklahoma.[1] WLF's primary mission is the defense and promotion of free enterprise, and ensuring that economic development is not impeded by excessive litigation.

Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, to ensure that state-court defendants would have the option of removing their case to federal court where the suit is both substantial and involves numerous plaintiffs, and minimal diversity exists. WLF is concerned that the decision below unduly restricts the intended application of CAFA.

WLF is also concerned that the district court decided these cases based on an erroneous belief that CAFA removal jurisdiction is disfavored under our federal system of government and that any ambiguities in the law ought to be construed

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

against the party seeking removal. To the contrary, the Framers viewed federal courts' diversity/removal jurisdiction as a key component of our system of federalism. WLF is concerned that the district court's misunderstanding is significantly interfering with Congress's intent that CAFA be fully enforced so as to protect defendants' rights to a fair and impartial forum.

While WLF agrees with both grounds for reversal asserted by Appellants, including the fraudulent misjoinder argument, it addresses CAFA issues only.

STATEMENT OF THE CASE

This case raises important questions regarding the scope of CAFA, a statute adopted by Congress in 2005 to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and "mass actions," a type of multi-plaintiff lawsuit that CAFA includes within the definition of "class action." 28 U.S.C. § 1332(d)(11)(A).

Congress found that over the preceding decade there had been "abuses of the class action device," including acts by "State and local courts" that were designed to "keep[ ] cases of national importance out of Federal court" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). The legislative history explained, "Current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in

state courts." S. Rep. No. 109-14 (2005) at 4. Congress adopted CAFA to, among other things, "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* at 7.

As relevant to these appeals, CAFA permits the removal to federal court of a "mass action" that meets requirements imposed by 28 U.S.C. § 1332(d)(2)-(11). Appellees do not dispute that most of those requirements have been met: Appellees assert that their claims involve common questions of law and fact, and each claim exceeds the $75,000 jurisdictional amount, § 1332(d)(11)(B)(i); the aggregate amount in controversy exceeds $5,000,000, § 1332(d)(2)(A); not all parties are citizens of the same State, § 1332(d)(2)(A)(i); almost all of the claims appear to have arisen outside Oklahoma (the forum State), § 1332(d)(11)(B)(ii)(I); and it was not at Appellants' behest that the claims were joined before a single state-court judge. § 1332(d)(11)(B)(ii)(II). Appellees contend, however, that their claims were not removable to federal court because the claims were not "proposed to be tried jointly." § 1332(d)(11)(B)(i).

Appellees are 650 individuals from 25 States and Puerto Rico who filed product liability claims in the District Court of Pottawatomie County, Oklahoma, alleging that they suffered injuries from pelvic mesh surgical devices manufactured by Appellant Ethicon, Inc. Although the same counsel represented all 650

plaintiffs and their claims were virtually identical, the claims were divided into 11 separate petitions filed over a three-day period, with fewer than 100 plaintiffs included within each petition.

Appellees do not contest the obvious motive for dividing themselves up in this fashion: they hoped that by keeping the number of plaintiffs below 100 in each case, they could prevent removal of their claims to federal court under CAFA's "mass action" provision. Also, each of the 11 petitions included at least one plaintiff from New Jersey. Because Defendants/Appellants Johnson & Johnson and Ethicon, Inc. are citizens of New Jersey, complete diversity of citizenship between plaintiffs and defendants was eliminated by the inclusion of New Jersey plaintiffs—a transparent effort to prevent removal on the basis of diversity jurisdiction.

Although few, if any, of the 650 Appellees reside in Pottawatomie County, the choice of forum was far from fortuitous. By choosing a small county with only one district judge, Appellees cleverly guaranteed that all 650 claims would be assigned to a single judge for all purposes. *See* Appellants Br. 3 n.2.

Johnson & Johnson and Ethicon thereafter removed the 11 cases to the U.S. District Court for the Western District of Oklahoma. They asserted that removal was proper: (1) under CAFA's mass action provision: and (2) because complete

diversity of citizenship existed between both defendants and all properly joined plaintiffs.

On October 18, 2013, the district court issued 11 identical orders remanding all 650 claims back to state court. App. 1550a-1563a. Concluding that "there is a presumption against removal jurisdiction," App. 1556a, the court rejected both asserted bases for removal. The court initially rejected the fraudulent misjoinder argument and thus determined that the claims were not removable on the basis of diversity jurisdiction. App. 1556a-1559a. The court also concluded that removal was not proper under CAFA's "mass action" provision, 28 U.S.C. § 1332(d)(11). App. 1559a-1562a. It stated, "Nothing in plaintiffs' complaints or their conduct before the state court or this court amounts to a proposal that the plaintiffs' claims be tried jointly, which [CAFA] requires." App. 1562a. On December 11, 2013, this Court granted Johnson & Johnson and Ethicon's petition for permission to appeal the remand order.

SUMMARY OF ARGUMENT

These appeals turn largely on the meaning of the phrase "tried jointly," as used in § 1332(d)(11)(B)(i). Appellees assert that counsel do not propose that claims be "tried jointly" unless they propose a trial proceeding at which the trier of fact is *simultaneously* deciding the claims of all 100+ plaintiffs. *See, e.g.*,

Appellees' Opposition to Petition for Permission to Appeal ("Appellees' Opp. Br.") 7-8. CAFA's mass action provision cannot plausibly be interpreted in that manner. Actions are commonly deemed "joint" without regard to whether they proceed identically in every respect. Rather, events occur "jointly" if they occur "in conjunction, combination, or concert." *Oxford English Dictionary* (2013). The only plausible interpretation of the extraordinary steps taken by Appellees to ensure that all 650 claims would be heard for all purposes by a single judge—choosing to file 650 claims originating in 26 different States in a small Oklahoma jurisdiction in which they could be assured that the claims would all be assigned to the only district judge in the county—is that they were proposing that the lawsuits be tried "in conjunction" with one another. That is sufficient to warrant CAFA removal. It is highly doubtful that anyone would ever propose that a single jury simultaneously hear evidence regarding 650 product liability claims, but nothing in § 1332(d)(11)(B)(i) suggests that such a proposal is a prerequisite to mass action removal.

Adopting Appellees' cramped interpretation of the phrase "tried jointly" would essentially eliminate CAFA's "mass action" provision, even when the original complaint includes 100+ plaintiffs, because courts virtually never conduct simultaneous trials of all issues affecting the monetary claims of extremely large

numbers of named plaintiffs. Such massive trials could take years to complete, even when there exist numerous common questions of law or fact among the 100+ plaintiffs. Courts generally avoid construing a statute in a manner that would "make entire subsections vanish into the night." *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008).

Events leading up to adoption of CAFA in 2005 confirm WLF's understanding of the phrase "tried jointly." CAFA's mass action provision was precipitated by complaints that some state courts had adopted overly lenient joinder rules that permitted lawyers to join together in a single lawsuit the product liability claims of a large, disparate group of plaintiffs from across the country. Many complained that such "mass actions" were procedurally unfair to out-of-state defendants. Yet, although these mass actions often involved 100 or more plaintiffs, trial plans rarely called for initial jury trials involving more than several plaintiffs. Thus, under the district court's understanding of CAFA, the very sort of pre-2005 mass actions that prompted Congress to adopt CAFA's mass action provision would be unaffected by the provision. It is not plausible that Congress intended CAFA's mass action provision to operate in such a restricted manner.

In concluding that counsel for Appellees had not filed a "mass action," the district court relied heavily on the fact that CAFA "specifically excludes from the

definition of mass actions those claims that have been joined on a motion by defendants." App. 1561a (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(II)). But it was not Johnson & Johnson and Ethicon who joined the 11 cases together for all purposes. Rather, Appellees did so when they went to extraordinary lengths to ensure that all 650 claims would be heard by the same judge.

In support of its conclusion that Appellees had never proposed that the claims be tried jointly, the district court said, "plaintiffs have definitively announced their intention not to jointly try the cases," citing a statement that appeared as Paragraph 17 in all 11 petitions. App. 1562a, 223a. But the Paragraph 17 statements ("Joinder of Plaintiffs' claims is for the purpose of pretrial discovery and proceedings only and is not for trial") prove too much. Paragraph 17 indicates a desire that even the claims of the plaintiffs *within a single complaint* not be joined together for trial. If such a statement is sufficient to defeat CAFA removal, then even a single complaint with 100+ plaintiffs could not be removed.

True, at no time in the Oklahoma court did Appellees make an *explicit* proposal that the 650 claims be tried jointly. They did not have to. As the Seventh Circuit has held, "a proposal for a joint trial can be implicit" even when the plaintiffs have "never specifically asked for a joint trial." *In re Abbott Laboratories, Inc.*, 698 F.3d 568, 572 (7th Cir. 2012). A fair reading of Appellees'

actions—particularly the extraordinary measures they took to ensure that all claims were to be heard for all purposes by a single judge—leaves no doubt that Appellees were proposing that the cases be tried jointly. If their gambit succeeds in this instance and the 650 claims remain in state court, one can be sure that future plaintiffs will employ the same tactic, and removal under CAFA's mass action provision will cease.

The district court likely arrived at its pinched interpretation of CAFA because it erroneously concluded that it was required to "narrowly construe" CAFA's removal provisions and to rule against removal if it had any doubts regarding the defendants' right to remove these cases to federal court. App. 1556a. On the contrary, this Court has never specifically held that its "narrow construction" rule should be extended to CAFA cases, and other circuits have expressly rejected claims that Congress intended that CAFA be strictly construed against removal. Moreover, the district court's strong presumption against removal is inconsistent with the Framers' understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our federal system of government. The Framers viewed removal jurisdiction as an important safeguard against the potential bias of state courts. In light of that understanding, there is no reason for courts to put a thumb on the scale, thereby interpreting CAFA in a

manner other than what its actual language and statutory context would suggest.

ARGUMENT

I. SECTION 1332(d)(11) AUTHORIZED REMOVAL OF THE MULTI-PLAINTIFF PELVIC MESH PETITIONS

As the Ninth Circuit has recognized, Congress "altered the landscape for federal court jurisdiction" over multi-party litigation when it adopted CAFA in 2005. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 677 (9th Cir. 2006). Congress adopted CAFA to, among other things, facilitate defendants' efforts to remove interstate cases of national importance into federal court, and thereby "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. No. 109-14 (2005) at 7. CAFA "loosened the requirements for diversity jurisdiction for two types of cases—'class actions' and 'mass actions.' " *Mississippi ex rel. Hood v. AU Optronics Corp.*, ___ U.S. ___, 2014 WL 113485 at*3 (Jan. 14, 2014).

Most importantly for purposes of this appeal, CAFA authorized the removal to federal court of any "mass action" that meets the requirements set forth in 28 U.S.C. § 1332(d)(2)-(11). Appellees contend that their 650 pelvic mesh claims were not removable under CAFA's mass action provision because Johnson & Johnson and Ethicon failed to demonstrate that the claims were "proposed to be

tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). That contention is without merit. Once the statute's meaning is properly construed, the extraordinary measures undertaken by Appellees to ensure that a single judge heard all 650 claims for all purposes can best be interpreted as having constituted a proposal that the complaints be "tried jointly."

A. A Group of Plaintiffs Proposes That Claims Be "Tried Jointly" When It Takes Steps To Ensure That the Claims Will Be Tried in Conjunction with One Another for All Purposes

The 650 Appellees are individuals from 25 States and Puerto Rico. All assert liability claims against Ethicon (and its parent company, Johnson & Johnson) based on injuries allegedly suffered from use of pelvic mesh surgical devices manufactured by Ethicon. Because Johnson & Johnson and Ethicon conduct business on a nationwide basis, they likely are subject to personal jurisdiction in virtually any American court.[2] Appellees' choice to file suit in Oklahoma was not an obvious one, given that very few plaintiffs have any connection with the State.

It turns out, however, that filing suit in the District Court of Pottawatomie County, Oklahoma provided a distinct advantage to attorneys seeking to file 11

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[2] *But cf. Daimler AG v. Bauman*, ___ U.S. ___, 2014 WL 113486 (Jan. 14, 2014) (imposing due process restrictions on a court's exercise of general jurisdiction over a corporate defendant).

separate complaints yet have the 650 claims heard by a single judge for all purposes: only one district judge sits on the court, and thus attorneys can be assured that 11 separate petitions filed in the court will be assigned for all purposes to a single judge. *See* Appellants Br. at 3 n.2. That situation contrasts sharply with the situation in courts of general jurisdiction in more populous counties across the country. Scores of civil trial judges often sit on such courts, and random-assignment systems guarantee that 11 complaints filed in such courts will not all be assigned to the same judge. If attorneys filing multiple lawsuits in such courts wish to have their cases consolidated before a single judge, it is generally incumbent upon them to call to the attention of the judges the similarities among the lawsuits and explicitly request consolidation.

Appellees cannot seriously contend that their choice of Pottawatomie County was not principally based on their desire to have the 11 complaints heard by a single judge for all purposes. The issue of "mass action" jurisdiction thus boils down to whether the Appellees' extraordinary choice of forum constitutes an implicit proposal that the 650 claims "be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i).

As the Supreme Court recently reminded in a CAFA mass action case, "Our analysis [of a statutory interpretation question] begins with the statutory text." *AU*

Optronics, 2014 WL 113485 at *5. The CAFA "mass action" provision states:

> The term "mass action" means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

28 U.S.C. § 1332(d)(11)(B)(i).

Appellees do not contest that most of those statutory requirements for "mass action" jurisdiction have been met: (1) this is a civil action for monetary relief; (2) they assert that the 650 claims "involve common questions of law or fact" (indeed, the 11 petitions are virtually identical); and (3) each of the 650 claims meets the $75,000 jurisdictional amount. They contend, however, that their petitions do not assert "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly"; they deny ever having made such a proposal.

WLF notes initially that the statute does not require that the "tried jointly" proposal be stated explicitly. Indeed, federal appellate case law is unanimous that a proposal that claims are to be tried jointly "can be implicit"—courts may infer such a proposal from the plaintiffs' conduct. *Atwell v. Boston Scientific Corp.*, __ F.3d __, 2013 WL 6050762 at *3 (8th Cir., Nov. 18, 2013); *Abbott Labs.*, 698 F.3d at 572.

More importantly, once plaintiffs have contrived to bring 100+ damage claims together before a single judge for all purposes, they should be understood to have proposed that the claims are to be "tried jointly" within any sensible understanding of those words. Actions are commonly deemed "joint" without regard to whether they proceed identically in every respect. Rather, events occur "jointly" if they occur "in conjunction, combination, or concert." *Oxford English Dictionary* (2013). By taking actions designed to ensure that the 11 petitions would be heard by a single judge, Appellees were implicitly requesting that the lawsuits be tried "in conjunction" with each other.

Appellees assert that counsel do not propose that claims be "tried jointly" unless they propose a trial proceeding at which the trier of fact is *simultaneously* deciding the claims of all 100+ plaintiffs. *See, e.g.*, Appellees' Opp. Br. 7-8. Federal appellate courts have uniformly rejected that interpretation of the statute, an interpretation that would virtually eliminate mass action jurisdiction (because attorneys recognize that attempting to try the monetary claims of 100+ plaintiffs simultaneously before a jury would be impossibly complex, and thus would virtually never make such a proposal).[3] *See, e.g.*, *Bullard v. Burlington N. Santa*

[3] Under Appellees' interpretation, even a proceeding involving more than 100 plaintiffs included *within a single complaint* would not be removable under the mass action provision, because it cannot reasonably be inferred that attorneys filing

Fe Ry. Co., 535 F.3d 759, 762 (7th Cir. 2008) (mass action removal was proper even though plaintiffs never made any proposals regarding how the claims should be tried, and even though they stated after filing their complaint that "they might be satisfied with a trial covering fewer than all 144 of their number"); *id.* (stating that "[t]he question is not whether 100 or more plaintiffs answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly."); *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918, 924 n.2 (9th Cir. 2013) (stating that " 'joint trial' does not mean everyone sitting in the courtroom at the same time.").

The more plausible interpretation is that an attorney implicitly proposes that monetary claims of 100+ individuals be "tried jointly" when he/she takes action to bring them together before a single judge.[4] There is no requirement that the

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such suits intend one massive, simultaneous trial of all claims. Moreover, even if the attorneys were to propose, at the completion of discovery, that a massive, simultaneous trial be conducted, Appellees' interpretation would preclude defendants in a 100-or-more-plaintiff lawsuit from invoking the mass action removal provision until after the case has languished for years in state court.

[4] Significantly, in legal usage, the verb "try" is rarely limited solely to judicial fact-finding proceedings that occur during a jury or bench trial. It also refers to a broad range of judicial decision-making. *See, e.g., Black's Law Dictionary* (4th ed., 1968) (defining the verb "try" broadly, as follows: "To examine judicially; to examine and investigate a controversy by the legal method called "trial," for the purpose of determining the issues it involves.").

complaint say anything that about how counsel intends to try the case; indeed, the great majority of filed cases never reach the trial stage. But the reasonable inference is that counsel who go to the trouble of bringing claims together for all purposes (*i.e.*, not claims brought together for discovery purposes only, with the explicit understanding that, following discovery, the claims will be transferred back to some other judge for trial—as in a federal multidistrict litigation proceeding) intends that the claims will proceed "jointly" (*i.e.*, "in conjunction" with one another) for all purposes, including (if things get that far) a jury trial. As *Bullard* explained, "It does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed." 535 F.3d at 762. Moreover, the mass action provision is applicable regardless whether (as is almost surely the case) counsel contemplate that the 100+ plaintiffs will be divided into smaller groups if any factual issues end up being submitted to a trier of fact; such division does not render the proceedings any less "joint." *Id.*; *Abbott Labs*., 698 F.3d at 571 (noting that "so-called 'mass tort' cases are never tried in their entirety, and instead 'bellwether' claims selected by the parties are tried individually"); *Romo*, 731 F.3d at 924 n.2; *Atwell*, 2013 WL

6050762 at *3.[5]

Federal appellate courts have rejected Appellees' interpretation of CAFA's "mass action" provision precisely because it would eliminate virtually all possibility that the provision could ever be invoked. As the Eighth Circuit explained, "[C]onstruing the statute to require a single trial of more than 100 claims would render 28 U.S.C. § 1332(d)(11) defunct." *Atwell*, 2013 WL 6050762 at *2. *See also Bullard*, 535 F.3d at 762. As Seventh Circuit Judge Easterbrook stated,

> By plaintiffs' light, no "mass action" could ever be a "class action," for a suit cannot be identified as a "mass action" until close to trial, while a suit is a "class action" or not, under § 1332(d)(1)(B), on the date of filing. *Courts do not read statutes to make entire subsections vanish into the night.*

Id. (emphasis added).

Nor is the analysis altered by Appellees' inclusion, in each of their 11 Pottawatomie County petitions, of the following statement: "Joinder of Plaintiffs'

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[5] Terminology used in Fed.R.Civ.P. 23 class actions provides a helpful comparison. Attorneys commonly speak of claims being "tried jointly" in a class action, with the named plaintiffs representing the interests of absent class members throughout the Rule 23 proceedings. Even so, Rule 23 class actions often include multiple trials, with the interests of some but not necessarily all subclasses at stake during each trial. Moreover, following the liability phase in Rule 23(b)(3) class actions, courts routinely conduct individual proceedings to determine each class member's entitlement to damages. Few would contend, however, that such coordinated trial proceedings are not "joint."

claims is for purposes of pretrial discovery and proceedings only and is not for trial." *See, e.g.*, App. 223a, ¶17 (petition filed in *Teague v. Johnson & Johnson*, No. CJ-13-305). Despite the Paragraph 17 statements, the reasonable inference drawn from Appellees' conduct (*i.e.*, conduct intended to ensure that the 650 claims would proceed in conjunction with one another *for all purposes* before a single judge) is not called into question by any Oklahoma rule of civil procedure. There is every reason to conclude that if the 650 claims continue to be heard for all purposes by a single district court judge in Pottawatomie County, they will be addressed "jointly" (*i.e.*, in conjunction with one another) for all purposes up to and continuing through trial. Notwithstanding the Paragraph 17 statements, there is no reason to conclude that following completion of pretrial discovery, some of the claims will be transferred to another Oklahoma courtroom.

Indeed, Appellees' reliance on the Paragraph 17 statements prove too much. Paragraph 17 indicates a desire that even the claims of the plaintiffs *within a single complaint* not be joined together for trial. If such a statement is sufficient to defeat CAFA removal, then even a single complaint with 100+ plaintiffs could not be removed. One can reasonably expect that a decision to that effect by this Court would result in plaintiffs' attorneys inserting a similar statement in every multi-plaintiff suit, and all CAFA mass action removals would come to a halt, regardless

of how many plaintiffs are included in each separate complaint.

Appellees also rely on two provisos included within the mass action removal statute: 28 U.S.C. § 1332(d)(11)(B)(ii)(II) & (IV). The former provides that the term "mass action" does not include an action in which "the claims are joined upon motion of the defendant." The latter provides that the term does not include an action in which "the claims have been consolidated or coordinated solely for pretrial proceedings." Neither proviso is of relevance to this case. The "joined upon motion of the defendant" proviso is inapplicable because it was Appellees, not Johnson & Johnson and Ethicon, that took extraordinary steps to ensure that the 650 claims were brought before a single trial judge. The "consolidated or coordinated solely for pretrial proceedings" proviso is inapplicable because there is no indication that the single Pottawatomie County district court judge's jurisdiction over the 650 claims is limited to pretrial proceedings or is limited in any other way.[6]

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[6] The district court's unrestricted jurisdiction over the 650 claims contrasts sharply with the limited jurisdiction of a federal district judge to whom a case has been transferred pursuant to multidistrict litigation (MDL) procedures permitted in federal court. While 28 U.S.C. § 1407 permits civil cases involving common questions of fact to be transferred to a single federal district judge for "coordinated or consolidated pretrial proceedings," such transfers do not extend to the trial phase. Indeed, the statute *requires* that an MDL case be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." § 1407(a). The language of 28

The cases cited by the district court (App. 1561a n.14) in support of its remand decisions are, with one exception, distinguishable on the basis of the § 1332(d)((11)(B)((ii)(II) proviso (no mass action removal where "the claims are joined upon motion of the defendant."). *See Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013); *Abrahamsen v. ConocoPhillips Co*., 503 Fed. App'x. 157, 160 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1820 (2013); *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010); *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009). In each of those cases, a single law firm filed numerous, largely identical multi-plaintiff tort suits, with each suit containing less than 100 plaintiffs. But in none of those cases did the plaintiffs take affirmative steps designed to bring the tort suits together before a single judge. Under those circumstances, the appeals courts correctly determined that the cases were not removable to federal court under CAFA's mass action provision because it was the *defendants* (by filing their removal petitions) who were seeking to join together the separate lawsuits.

U.S.C. § 1332(d)(11)(B)(ii)(IV) appears to have been drafted with an awareness of the provisions of the federal MDL statute. The implication is clear: state cases transferred to a single judge under statutes akin to 28 U.S.C. § 1407 do not thereby qualify for removal under the mass action provision. But when (as here) plaintiffs' lawyers have acted affirmatively to ensure that multi-plaintiff cases are assigned to a single judge for *all* purposes, CAFA's "tried jointly" requirement is satisfied, and the case is removable to federal court if the other prerequisites for mass action removal are met.

The one exception is *Romo*, in which the Ninth Circuit affirmed remand orders even though the defendants filed removal petitions only after the plaintiffs filed a petition in California state court asking that the separate lawsuits be coordinated in front of a single judge "for all purposes." *Romo*, 731 F.3d at 923. But *Romo* elicited a vigorous dissent, which noted that the decision directly conflicted with the Seventh Circuit's *Abbott Labs.* decision. 731 F.3d at 928 (Gould, J., dissenting). The Eighth Circuit later expressly disagreed with *Romo*'s holding, thereby exacerbating the conflict. *Atwell*, 2013 WL 6050762 at *5. WLF respectfully submits that the Court should follow the lead of the Seventh and Eighth Circuits and Judge Gould's dissent rather than adopting the Ninth Circuit's minority view.

In determining whether cases are removable under CAFA, the Supreme Court cautioned in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), that courts should not "exalt form over substance," particularly where doing so would "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" 133 S. Ct. at 1350 (quoting CAFA § 2(b)(2), 119 Stat. 5). The Court explicitly disapproved of one tactic for creating claims worth less than $5 million and thereby defeating CAFA jurisdiction: "the subdivision of a $100 million action into 21 just-below-$5

million state-court actions simply by including nonbinding stipulations." *Id.* The Court concluded that that tactic would not defeat CAFA jurisdiction "because such an outcome would squarely conflict with the statute's objective." *Id.* This Court should not countenance Appellees' similar jurisdiction-avoidance tactic: dividing plaintiffs up into groups of less than 100 and then effectively bringing them back together by taking steps to ensure that they are all assigned to the same judge.[7]

B. Events Preceding Adoption of CAFA Confirm WLF's Interpretation of the Phrase "Tried Jointly"

CAFA did not coin the phrase "mass action." Rather, the phrase was used for many years before 2005 to describe tort suits in which the claims of a large, diverse group of plaintiffs were joined together, often in a manner that created serious procedural difficulties for defendants. One of CAFA's principal goals was to assuage the concerns of the targets of mass actions, by permitting them to remove mass actions to federal court. Adopting Appellees' narrow reading of

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[7] In its most recent CAFA decision, the Supreme Court expressed its preference for "straightforward, easy to administer rules" governing when CAFA mass action removal is appropriate. *AU Optronics*, 2014 WL 113485 (U.S.) at *7. The rule espoused here—removal is proper once affirmative acts by the plaintiffs result in identical, multiple-plaintiff lawsuits with 100 or more total plaintiffs being assigned to a single judge—is just such an easy-to-administer rule. In contrast, the approach adopted in *Romo* will likely lead to endless litigation over precisely what actions by plaintiffs' counsel should be deemed a proposal that claims be "tried jointly."

"tried jointly" would frustrate that goal, however, because their reading would not permit defendants to remove to federal court the very types of mass actions that were the subject of pre-2005 criticism.

Pre-2005 mass actions were particularly prevalent in rural counties of Mississippi and West Virginia and often involved hundreds of diverse individuals alleging asbestos-related injuries. Such suits were possible because some trial judges employed loose joinder and venue standards that permitted highly diverse claims to be combined in a single lawsuit. A 2003 study noted that 73 mass actions were filed in Jefferson County, Mississippi in 2000 alone; less than 20% of the plaintiffs whose addresses were listed in mass actions filed in the county between 1999 and 2001 actually lived in the county. *See* J. Beisner, J. Miller, and M. Shors, "One Small Step for a County Court . . . One Giant Calamity for the National Legal System," Manhattan Institute for Policy Research, Civil Justice Report No. 7 (2003).

Complaints about abusive mass actions grew in the years preceding 2005 and led directly to inclusion of a mass action provision in CAFA. *See* S. Rep. No. 109-14 (2005) at 47. Importantly, there is no evidence that plaintiffs' counsel in such mass actions ever pushed for proceedings at which the trier of fact would simultaneously determine the claims of 100 or more of the plaintiffs. Rather, even

though many of these suits listed more than 100 plaintiffs, the procedural concerns generally lay elsewhere:

> Whatever reasons plaintiffs' attorneys have for choosing mass action over class action, the effect on defense counsel is that they must prepare for multiple cases in a short span of time. In fact, many defense attorneys claim that's the main reason plaintiffs opt for such strategies.
>
> Defense lawyers sometimes call the tactic, "trial by ambush," says Martin Beirne, a partner at Beirne, Maynard & Parsons. "The reality is that when they bundle these cases, you can end up with a hundred or more plaintiffs. The judge can say, 'We're going to try the case of Smith et al. v. XYZ Corp. in 30 days. And we're going to try them in groups of two, or six, or eight.' They don't tell you who's in that first group. That puts tremendous pressure on the defense to get fully prepared for all 100 cases."

Brian Quinton, "What Happened to Class? Plaintiffs' Lawyers Seek Mass Action, Not Class Action, to Push Large Personal Injury Cases," *Corporate Legal Times* (Jan. 1, 2005).

Defense counsel's complaints focused on the "unfairness" of opposing counsel's handpicking a few of the plaintiffs from a large mass action for a bellwether trial; if opposing counsel ever sought the simultaneous trial of 100 or more claims, defense counsel never mentioned it.

Because overly lax joinder standards have been a particular problem in Mississippi, defendants on the losing end of trials conducted in Mississippi mass actions regularly base their appeals to the Mississippi Supreme Court on claims of

improper joinder. WLF has been unable to identify any reported Mississippi decisions addressing joinder issues in which the claims of more than 100 plaintiffs were tried simultaneously— even though in a number of such cases, more than 100 plaintiffs were included in the initial complaint. *See, e.g.*, *3M Co. v. Johnson*, 895 So. 2d 151, 154 (Miss. 2005) (asbestos-related mass action was initially filed with 150 plaintiffs; appeal was from a trial involving 10 of those plaintiffs, following a trial-court order in which plaintiffs' counsel were permitted to choose 10 of their clients for an initial trial against all 62 defendants).

In sum, the evidence is conclusive that pre-2005 litigation abuses that led to enactment of CAFA's mass action provision never involved proceedings in which the claims of 100 or more plaintiffs were simultaneous determined by the trier of fact. Accordingly, if Congress really intended (as Appellees argue) that the phrase "tried jointly" should apply to simultaneous proceedings only, then the mass action provision did nothing to address any of the defendant-based concerns that gave rise to the mass action provision. That highly anomalous result provides an additional reason to reject Appellees' proffered interpretation of CAFA.

II. THE DISTRICT COURT WAS LED ASTRAY BY ITS MISTAKEN ADOPTION OF A "PRESUMPTION" AGAINST CAFA REMOVAL

The district court likely arrived at its overly narrow interpretation of CAFA because it erroneously recognized a "presumption" against CAFA removal jurisdiction. App. 1556a. That presumption finds support neither in Supreme Court case law, which has disavowed the premise that removal statutes should be strictly construed; nor in the decisions of this Court, which has never applied a presumption against *CAFA* removal jurisdiction. Other circuits have explicitly rejected such strict construction arguments. Moreover, the district court's presumption is inconsistent with the Framer's understanding of the important roles that diversity jurisdiction and removal jurisdiction should play in our federal system of government.

True, this Court has a history of older cases that call for "narrow construction" of removal statutes. The district court resurrected quotations from one pre-CAFA Tenth Circuit decision in support its conclusion that "[t]here is a presumption against removal jurisdiction." App. 1556a (quoting *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995)). But the origins of the Court's "narrow construction" rule are obscure, and any presumption against removal is in considerable tension with the Framer's strong support for the right of removal.

See, e.g., Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816). *See generally*, Scott Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004).

Those who support a presumption against removal often cite to a 1943 Supreme Court decision, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). That decision rejected the claims of a state-court plaintiff that it qualified as a "defendant," entitled to remove its lawsuit to federal court, after it was served with a counterclaim. The Court noted that Congress in 1887 had cut back on removal rights (including a previously-recognized right of plaintiffs to remove cases after being served with a counterclaim) and that "the policy of the successive

acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." 313 U.S. at 108-109. Thus, *Shamrock*'s "strict construction" language was based solely on its interpretation of removal statutes adopted between 1887 and 1942, not on a recognition of some constitutionally-based reasons (such as federalism-based concerns) for narrowly construing removal statutes.

Later Supreme Court decisions have not repeated *Shamrock*'s "strict construction" dictum. After noting the *Shamrock* dictum in a 2003 decision, the Court stated, "But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003). *Breuer* explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret an ambiguous clause in 28 U.S.C. § 1441(a) in a manner that would have precluded removal.

In light of Congress's strong embrace of the removal rights created by CAFA, it makes little sense to "strictly" or "narrowly" construe the statute against recognition of removal rights. Indeed, that position has been explicitly rejected by the Seventh Circuit. *See, Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (rejecting a contention that federalism concerns

require courts to construe CAFA jurisdiction narrowly, and holding that CAFA "must be implemented according to its terms")

Laughlin (the Tenth Circuit case on which the district court relied) predates both *Breuer* and CAFA by nearly a decade. No post-CAFA decision of this Court has asserted that CAFA's explicit recognition of the right to remove mass actions, 28 U.S.C. § 1332(d)(11)(A), should be narrowly construed against removal jurisdiction.[8]

In sum, the district court erred when it recognized a "presumption" against CAFA removal rights. Such a presumption cannot be justified on federalism grounds (given the Framers' support for removal jurisdiction as an important safeguard against the potential bias of state courts), nor can it be justified as a reflection of congressional policy (in light of Congress's repeated adoption of legislation over the past 70 years that has expanded removal jurisdiction). The district court's interpretation of CAFA's "jointly tried" provision is erroneous even

[8] Two of the Court's CAFA decision include boilerplate language repeating the Court's "narrowly construed" mantra for removal statutes. *Weber v. Mobil Oil Corp.*, 506 F.3d 1311, 1314 (10th Cir. 2007); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095 (10th Cir. 2005) (citing *Shamrock Oil* but neglecting to cite *Breuer*'s disavowal of *Shamrock Oil*'s "strict construction" language). But neither case involved the scope of CAFA's mass action provision, and in neither decision did any presumption against removal play a role in the Court's construction of CAFA's statutory language, which the Court viewed as unambigous.

if one accepts the district court's application of a presumption against removability; that interpretation is rendered wholly implausible once one recognizes that Congress did not intend that courts should apply such a presumption.

CONCLUSION

Amicus curiae respectfully requests that the Court reverse the district court's decision to remand these proceedings to state court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify:

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CERTIFICATE OF COMPLIANCE WITH RULE 25.5

This brief complies with the privacy redaction requirements of 10th Cir. R. 25.5 because this brief contains no private data that is required to be redacted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2014, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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