No. 11-1450

In the
Supreme Court of the United States

The Standard Fire Insurance Company,
Petitioner,

v.

Greg Knowles,
Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,
Respondent.

On Petition for a Writ of Certiorari
to the U.S. Court of Appeals for the Eighth Circuit

Brief *Amicus Curiae* in Support of the Petition for Writ of Certiorari by the Center for Class Action Fairness

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The Center for Class Action Fairness (the "Center"), by and through the undersigned counsel, by consent of the parties, submits this brief *amicus curiae* respectfully praying that the Court grant the Petitioner a writ of certiorari.[*] In support of the petition, the Center states as follows:

Interest of the Amicus

The Center is a non-profit organization that provides legal representation in support of consumers and for the public benefit of fair and reasonable class action lawsuit settlements. The purpose of the Center is to provide *pro bono* representation to consumers and shareholders aggrieved by class action attorneys who negotiate settlements and conduct litigation that benefit themselves at the expense of their putative clients. Litigation on behalf of consumers by attorneys affiliated with the Center has been covered by the *Wall Street Journal*, *Forbes*, the *National Law Journal*, and the *ABA Journal*, among others. Unlike so-called "professional objectors" that threaten to disrupt a settlement in order to extract a share of plaintiffs' attorneys' fees, the Center makes no effort to engage in *quid pro quo* settlements for profit. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors*: *Minor Nuisance or Serious*

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[*] Pursuant to Sup. Ct. R. 37.6, the Center certifies that no counsel for either party authored any part of this brief and that no person, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation of the brief. The Center certifies consistent with Sup. Ct. R. 37.2(a) that counsel of record for both parties have been notified more than ten days before filing of the *amicus'* intention to file the brief and have given their consent.

Threat to Approval, BNA: Class Action Lit. Report, Aug. 12, 2011 (distinguishing Center from for-profit "professional objectors"). Instead, the Center's attorneys—who have never agreed to withdraw an objection in exchange for payment—represent consumers by objecting to unfair settlements that do not provide meaningful relief to class members and by seeking court rulings that protect consumers from self-serving class action attorneys. *E.g., In re Classmates.com Consolidated Litig.,* No. 2:09-cv-00104-RAJ, slip op. at 16 (W.D. Wash. Jun. 15, 2012) (slip op.)(noting Center "was relentless in [its] identification of the numerous ways in which the proposed settlements would have rewarded class counsel (and a *cy pres* charity) at the expense of class members" and "significantly influenced the court's decision to reject the first settlement and to insist on improvements to the second"). As a result, the Center can offer this Court a unique perspective on how review of this case serves the interests of absent class members.

The Center's work also makes it especially familiar with cases where class attorneys looking out for their own interests abuse class litigation and settlements at the expense of their putative clients. The unfair settlements the Center has fought are not isolated cases: Indeed, both economic theory and empirical evidence indicate a significant number of class actions leave consumers without meaningful relief. Given its commitment to helping consumers, the Center has a strong interest in seeing the Court review the decision below, which rests upon the untenable assumption that before certification, the proposed class representative may limit the recovery of the absent class members to achieve his attorneys' short-term goals.

Summary of the Argument

The Court should grant a writ of certiorari in this case because it would clarify the fiduciary duties class-action attorneys owe to absent class members. This case also merits certiorari because the *status quo* permits class action attorneys to forum shop for jurisdictions that do not afford federal Rule 23 protections. Further, if allowed to stand, class counsel may effectively shield involving national classes from removal to federal court cases in contravention of the purposes of the Class Action Fairness Act.

Reasons Why a Writ Should be Granted

I. THE LEGITIMACY OF BINDING STIPULATIONS HAS IMPORTANT IMPLICATIONS FOR THE FIDUCIARY DUTY THAT CLASS COUNSEL OWE TO CLASS MEMBERS.

Federal courts recognize that the class-action attorney owes a fiduciary duty to absent class members that begins as soon as he files a complaint seeking class-action status. *Jones v. GN Netcom, Inc.*, 654 F.3d 935, 946 (9th Cir. 2011)(noting counsel's fiduciary duty to class); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002) (Posner, J.)(same); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999)(same). Allowing the named plaintiff to bind the entire class to relief less than $5 million, when class members have claims for more than that, conflicts with the fiduciary duty to seek the maximum possible recovery on behalf of the class. Indeed, the Court of Appeals for the Fifth and Seventh Circuits, which have prohibited binding stipulations of this type, did so because enacting the stipulation violates the named plaintiff's fiduciary duty to the class. *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (Easterbrook, J.)("Back Doctors has a fiduciary duty to its fellow class members ... What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002)("It is improbable that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

This tension provides another, independent reason for review. Review of the case below would offer direction to lower courts about the nature and extent of the fiduciary duty that class counsel owe to a class. Scholarship has documented the fact that class-action attorneys do not just recruit class representatives, but in fact seek out prospective named plaintiffs over whom they can exert the maximum amount of control. *See* Stephen Meili, *Collective Justice or Personal Gain*?: *An Empirical Analysis of Consumer Class Action Lawyers & Named Plaintiffs*, 44 Akron L. Rev. 67, 111 (2011)("given that class action lawyers often have the luxury of selecting named plaintiffs who are willing to align their goals with the attorneys, this power is more pronounced in class actions than in individual cases, where the client normally chooses the lawyer"); *see also, e.g., In re Monster Worldwide, Inc. Sec. Lit.*, 251 F.R.D. 132, 136 (S.D.N.Y. 2008)(criticizing proposed lead plaintiff that "has no interest in, genuine knowledge of, and/or meaningful involvement in this case and is simply the willing pawn of counsel").

For example, in *In re Motor Fuel Temperature Sales Pract. Lit.*, 271 F.R.D. 263, 281-84 (D. Kan. 2010), the district court rejected a settlement that paid $0 to the class because there were no class representatives of important subclasses. The plaintiffs simply recruited subclass representatives who agreed to support the identical $0 settlement and resubmitted it to the court. *See id.*, No. 07-MD-1840-KHV, 2012 U.S. Dist. LEXIS 57 981, *72-74 (D. Kan. Apr. 24, 2012).

Given the tension between the best interests of class members and the financial best interests of the class attorneys, outlining the precise boundaries of the attorneys' fiduciary duty to the members of their proposed class becomes critically important.

II. THE RIGHTS OF CLASS MEMBERS IN A NATIONWIDE CLASS SHOULD NOT DEPEND ON THE JURISDICTION IN WHICH THEIR ATTORNEY BRINGS THE CASE.

The protections afforded by Rule 23 of the Federal Rules of Civil Procedure as well as the CAFA statute itself are critical to ensuring that the rights of unnamed class members are adequately protected in nationwide class actions. Indeed, CAFA explicitly states that it was passed to "assure fair and prompt recoveries for class members with legitimate claims," to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," and prevent "abuses of the class action device that have harmed class members." 28 U.S.C. § 1711 note §§ 2(a)(2)(A), (b)(1), (b)(2). Rule 23 further exists to protect the due process rights of those class members who never appear before the court. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011)("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.").

Unlike the federal courts, the state of Arkansas does not have the same concerns about due process when presiding over class actions. For example, it expressly refuses to require its courts to exercise rigorous scrutiny when certifying class actions. *See, e.g., Simpson Housing Solutions, LLC v. Hernandez*, 2009 Ark. 480, 2009 Ark. LEXIS 660, *21 (2009)("the federal courts apply a rigorous analysis test for class actions, which this court has consistently rejected"). Nor, unlike in federal court, may an unnamed class member appeal the approval of a settlement if the lower court rejects her request to intervene*. Compare Ballard v. Advance Am.*, 349 Ark. 545, 548, (2002) *with Devlin v. Scardelletti*, 536 U.S. 1 (2002) *and Robert F. Booth Trust v. Crowley*, No. 10-3285, 2012 U.S. App. LEXIS 11927 (7th Cir. June 13, 2012)(Easterbrook, J.)(district courts should free grant intervention rights to objectors to preserve their appellate rights). Arkansas is not alone in providing lesser protections to class members. New Jersey for example, has lesser notice requirements than those of the federal rules. See N.J. R. Civ. P. 4:32-2(b)(2). And California and Missouri, unlike federal courts, leaves the approval of coupon settlements entirely to the discretion of the trial-court judge. *Nordstrom Com'n Cases*, 186 Cal. App. 4th 576, 591 (2010)(approving coupon settlement as not an abuse of discretion because California courts do not disfavor coupon settlements); *Bachman v. A.G.*

Edwards, 344 S.W.3d 260, 2011 Mo. App. LEXIS 730, *12-13 (2011) (same, Missouri courts); *see also* Dan Fisher, *St. Louis Judge Hands Lawyers $21 Million For Coupons*, Forbes.com, Jun. 23, 2010. By contrast, federal courts subject these settlements to higher scrutiny because of the potential for abuse by counsel. *See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006)("CAFA required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases 'counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.'")

So long as the status of remands like these remain unresolved, the protections consumers enjoy under CAFA—including the right to be free from coupon settlements that provide no value to class members—could depend entirely on the circuit in which the action is filed. Consumers in Illinois or Mississippi would wind up as class members in federal court, subject to the protections afforded by Federal Rule of Civil Procedure 23 and CAFA, and entitled to recover the full range of remedies available to them. Meanwhile, consumers in Arkansas, New Jersey, or California would instead find themselves in state court, without these same due process protections, and with only the *pro rata* share of the $4,999,999.99 that their class representative chose to seek on their behalf. This sort of inconsistent treatment of consumers is exactly the kind that this Court is best equipped to address.

This is not an abstract concern. Courts—including this one—have long recognized that forum shopping is a common practice and cause for concern in class-action litigation. *See, e.g., Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 130 S. Ct. 1431, 1447 (2010)(forum shopping "unacceptable when it comes as the consequence of judge-made rules created to fill supposed 'gaps' in positive federal law."). Indeed, one of the motivations for passing the Class Action Fairness Act was to reduce, if not eliminate, the problematic effects of forum shopping in class actions. *See, e.g.,* S. Rep. No. 109–14, at 13–23; 151 Cong. Rec. S1225, S1228 (daily ed. Feb. 10, 2005) (statement of Sen. Orrin Hatch); 151 Cong. Rec. H723, S726 (daily ed. Feb. 17, 2005)(statement of Rep. F. James Sensenbrenner); 151 Cong. Rec. S999-02, S999 (daily ed. Feb. 7, 2005)(statement of Sen. Arlen Specter).

And, at this point, established scholars who are critics of this Court's rulings in cases like *Wal-Mart Stores, Inc. v. Dukes* and *AT&T Mobility LLC v. Concepcion* have taken to explicitly advising plaintiffs' attorneys to choose fora where the federal "rigorous analysis" will not be an obstacle to their litigation strategies. Robert H. Klonoff, *The Decline of Class Actions,* 90 WASH. U. L. REV. ____, Draft at 72 (2013)(draft available at http://ssrn.com/abstract=2038985)(recommending forum shopping to "avoid adverse precedent"). To the extent that plaintiffs' counsel deliberately limit recovery to absent class members in order to avoid the protections that Rule 23 affords to absent class members, they have added injury to injury. Resolving this split among the circuits would properly restore the focus of Rule 23 where it belongs: on the best interests of the members of the class.

Conclusion

For these reasons, your amicus respectfully urges the Court to grant a writ and promptly decide these important questions.

Respectfully Submitted,

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