No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES, individually and on behalf of all others similarly situated within the State of Arkansas,
Respondent.

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

BRIEF OF THE ARKANSAS STATE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the $5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds $5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

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STATEMENT OF INTEREST[1]

The Arkansas State Chamber of Commerce (the "Arkansas Chamber") respectfully submits this brief as *amicus curiae* in support of the Petitioner.

The Arkansas Chamber is a professional association created to promote commerce and enhance the economic prospects of Arkansas. Approximately 1,200 businesses are members of the Arkansas Chamber. An important function of the Arkansas Chamber is to advocate for a legal climate that supports existing businesses and attracts new businesses to Arkansas.

Arkansas class-action practice is among the most plaintiff-friendly in the United States. State courts in Miller County, Arkansas, are a particular magnet for the abusive class-action attacks on business and interstate commerce that Congress sought to prevent by adopting the Class Action Fairness Act of 2005 ("CAFA"). This case involves a device designed to thwart CAFA. Businesses are wary of doing business in Arkansas, lest they become ensnared in a coercive class action without the ordinary protections of removal to federal court.

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[1] No party or 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. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

SUMMARY OF THE ARGUMENT

CAFA responds to abusive class-action rules and practices in state courts by providing federal jurisdiction, hence uniform federal class-action standards, in large class actions that affect national interests. This case was removed from one of the notorious jurisdictions, Miller County, Arkansas, that Congress noted as a trap for national and global companies in abusive class actions. The Arkansas Chamber supports Petitioner's effort to overturn the district court's remand because the remand was based on a device designed to frustrate the federal forum and class-action uniformity that Congress created in CAFA.

Arkansas class-action practice, which Miller County takes to extremes, encourages jurisdictional contrivances that defeat federal jurisdiction because the state practice deviates widely from federal norms and skews overwhelmingly in favor of plaintiffs. Arkansas class-action practice:

- rejects any rigorous analysis in class certification but fails to provide any replacement standard of analysis to guide a trial court's broad discretion;

- presumes the existence of vigorous and competent class counsel, which is one of the class-action requisites challenged by a "stipulation" that gives up rights and recoveries of absent class members to avoid federal jurisdiction;

- refuses to permit any consideration of a "merits" issue on a motion for class certification, approving trial-court refusals to consider matters as basic as *res judicata*, choice of law, and standing before granting class certification;

- certifies abstract questions in huge national class actions that cannot answer any issue for each and every class member in one stroke; and

- certifies cases with predominant individual questions as class actions based on the *expectation* that they will "splinter" into individual cases before reaching judgment, with no consideration of how this will affect due process or preclusion rights of absent class members or the defendant.

These lopsided class-action rules undermine principles of preclusion and due process that any rules allowing class actions must observe. Combined with the discovery abuses and tactics that Petitioner describes in its merits brief, these state-court class-action rules provide an irresistible incentive to plaintiff's counsel to litigate in state court, particularly Miller County, Arkansas, at any cost.

ARGUMENT

As this case demonstrates, Arkansas class-action practice is so favorable to plaintiffs that putative class counsel routinely sacrifice rights and recoveries of absent class members to secure a state-court forum rather than face the scrutiny of a federal court applying federal class-action standards. This pro-plaintiff bias is built on rejection of the federal "rigorous analysis" of class certification and a bright-line rule that an Arkansas court cannot consider the "merits" of a class claim on a motion for class certification. Arkansas courts certify abstract common questions of the kind that this Court rejected in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), and employ a "certify now, splinter later" rule that divorces the class-action practice from its ultimate purpose of claim and issue preclusion for all parties.

The Arkansas Chamber will contrast Arkansas class-action practice with federal practice to illuminate stark differences that invite class counsel to resort to jurisdictional contrivances like the "stipulation" here. This Court should reject the stipulation as a device to destroy federal jurisdiction, and it should reverse the district court's order of remand.

I. Arkansas Rejects Rigorous Analysis and Refuses to Consider "Merits" Issues.

At the bottom, Arkansas courts refuse to examine proposed class actions with rigor, do not employ any defined standards, and will not examine "merits"

issues in class certification.[2] The Arkansas Supreme Court acknowledges "the federal courts apply a rigorous-analysis test for class actions, which this court has consistently rejected." *Simpson Housing Solutions, LLC v. Hernandez*, 347 S.W.3d 1, 12 (Ark. 2009) (rejecting the "federal authority" cited by class defendant for class certification standards as "not controlling on this court"); *see also General Motors Corp. v. Bryant*, 285 S.W.3d 634, 641 (Ark. 2008) (citations omitted) ("[W]e have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts [for class certification].") By contrast, federal practice holds that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied[.]'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal citation omitted).

While Arkansas law explicitly rejects rigorous analysis of proposed class actions, the Arkansas Supreme Court has not provided a replacement standard for lower courts. Instead, it requires only that the trial court "undertake enough of an analysis

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[2] For an example of an Arkansas class action that could not be certified under federal standards, compare *Tyler v. Alltel Corp.*, 265 F.R.D. 415 (E.D. Ark. 2010) (denying class certification) with *Rosenow v. Alltel Corp.*, 358 S.W.3d 879 (Ark. 2010) (reversing trial court's denial of class certification). *See also* F. Ehren Hartz, Comment*, Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707 (2009); John J. Watkins, *A "Different" Top Ten List: Significant Differences between State and Federal Procedural Rules*, Arkansas Lawyer, Winter 2010, at 14-15.

to enable us to conduct a meaningful review." *Lenders Title Co. v. Chandler*, 107 S.W.3d 157, 162 (Ark. 2003). Other than telling trial courts not to "rubber stamp the complaint," *id.*, and to make findings of fact on request of a party, *id.*, the Arkansas Supreme Court does not guide trial courts in exercising their discretion on class certification motions.

Arkansas law actually *presumes* that class counsel "will vigorously and competently pursue the litigation." *USA Check Cashers of Little Rock, Inc. v. Island*, 76 S.W.3d 243, 247 (Ark. 2002). This presumption is brought into question by the "stipulation" practice at issue in this case.[3] Sacrificing the rights and recoveries of absent class members to avoid a federal forum is inconsistent with vigorous and competent representation of the interests of absent class members in Arkansas courts. *Manguno v. Prudential Prop & Cas. Ins. Co.,* 276 F.3d 720, 724 (5th Cir. 2002) ("[I]t is improbable that [plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

Arkansas law forecloses most substantial analysis of the putative class claim as a forbidden "merits" inquiry. "'[N]either the trial court nor the appellate court may delve into the merits of the underlying claim in determining whether the elements of Rule

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[3] The "stipulation" device in this case is reminiscent of the "false and fraudulent stipulation" used (unsuccessfully) to defeat the rights of absent plaintiffs who sought to challenge the racial covenant in *Hansberry v. Lee*, 311 U.S. 32, 38 (1940).

23 have been satisfied.' Our court has said on this point that 'a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action.'" *Bryant*, 285 S.W.3d at 638 (citations omitted). Federal class actions require more: "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. … Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.'" *Dukes*, 131 S. Ct. at 2551-52 (internal citations omitted) (emphasis in original).

These fundamental defects in Arkansas class-action procedure lead Arkansas law into extreme positions that are deeply at odds with federal practice and in tension, if not outright conflict, with due process.

A. No Case or Controversy Requirement. Arkansas courts do not require a live case or controversy before they may certify a class for settlement. On a putative class member's objection that the class settlement was reached before the Arkansas class complaint was even filed, the Arkansas Supreme Court stated: "Arkansas concepts of justiciability and subject-matter jurisdiction differ significantly from the concepts based on Article III of the United States Constitution. Accordingly, we will not look to those federal cases for persuasive authority in this case." *Hunter v. Runyan*, 2011 Ark. 43, at 8 n.1, 2011 Ark. LEXIS 38, at *10 n.1. Instead, the Arkansas Court held that subject-

matter jurisdiction for state law purposes arises from Arkansas Rule 23(e)(1)'s requirement that "'[t]he court must approve any settlement, voluntary dismissal or compromise of the claims, issues, or defenses of a certified class.'" *Id.* at 11 (quoting Ark. R. Civ. P. 23(e)(1)(2010)).

Federal subject-matter jurisdiction, of course, requires an actual case or controversy. *E.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 754 (1976). This holds for class actions as well as any other federal action. For instance, the Fifth Circuit vacated a class certification because "Petitioners … never solidified the requisite Article III adverseness between members of the would be class and the [Defendant]." *Sannon v. United States*, 631 F.2d 1247, 1252 (5th Cir. 1980) (citing *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975)).

Arkansas's special subject-matter jurisdiction for class settlements, boot-strapped from Rule 23 itself, may not bind absent class members. Arkansas's law of claim preclusion requires in part that "the first suit was fully contested in good faith." *Hardy v. Hardy*, 2011 Ark. 82, at 6, 2011 Ark. LEXIS 72, at *8 (citations omitted). Arkansas's law of issue preclusion requires, among other elements, that "the issue must have been actually litigated; … the issue must have been determined by a valid and final judgment; and … the determination must have been essential to the judgment." *Id.* Dispensing with the case-or-controversy requirement or the need for adverse parties in Arkansas class actions undermines the elements of preclusion, because there is no assurance that *any claim* was "fully

contested in good faith" or *any issue* was "actually litigated."

B. Standing. Arkansas courts will not examine the standing of the class representative before addressing class certification. *Foremost Ins. Co. v. Miller County Circuit Court*, 361 S.W.3d 805 (Ark. 2010), was a putative class action based on an alleged breach of an insurance contract. Before the trial court considered class certification, the only named plaintiff insured by Foremost first went bankrupt (so that his claim was removed to federal bankruptcy court) and then died. *Id*. at 807. Foremost repeatedly asked the Miller County Circuit Court to rule on its motions to dismiss for lack of standing. The trial court refused based on the "no merits consideration before class certification" rule. *Id*. Lacking a right to appeal, Foremost sought an extraordinary writ from the Arkansas Supreme Court on the ground that the trial court lacked judicial power to proceed. *Id*.

The Arkansas Supreme Court refused relief because "determining whether the plaintiffs lacked standing on the [class] claims … would involve delving into the merits of the case, which the [trial] court stated it could not do … until it first addressed the issue of class certification… [W]hile such a determination is permissible in some cases…, it is not required in all cases. … [T]his court has not considered standing to be a question of subject-matter jurisdiction[.]" *Foremost Ins. Co.*, 361 S.W.3d at 808; *see also Chubb Lloyds Ins. Co. v. Miller County Circuit Court*, 361 S.W.3d 809, 815 (Ark. 2010) ("Arkansas, however, has not followed the

federal analysis and definition of 'justiciability' to include standing as a matter of subject-matter jurisdiction… federal cases based on Article III of the U.S. Constitution are not controlling.'" *Id*. (internal citation omitted)

Federal class-action practice, of course, requires that plaintiffs have standing: "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Federal class practice further requires that the named plaintiff be a member of the class she seeks to represent. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982).

The federal standing rules supply necessary due-process and preclusion touchstones for the class-action device because adequacy of representation, both concerning the representative's interests and the loyalty and vigor of class counsel, help produce a judgment that binds absent class members. *Hansberry v. Lee*, 311 U.S. 32, 44 (1940). Arkansas, in sharp contrast, permits class actions to proceed without standing and with a deceased person in the driver's seat as class representative. Rather than litigate against a decedent in Miller County Circuit Court, Foremost settled soon after the Arkansas Supreme Court denied extraordinary relief.

C. Res judicata. If a claim has already been resolved in a manner that is binding on the named

plaintiff or the putative class, the class-action device is pointless. Yet under the "no merits" rule, Arkansas class-action practice prohibits any consideration of whether the putative class claim is precluded by a previous judgment. "[D]etermining whether the doctrine of res judicata applies to the [class] claims asserted …would require this court to evaluate the merits of that affirmative defense, and this court has been clear it will not delve into the merits on appeal from certification." *United Amer. Ins. Co. v. Smith*, 371 S.W.3d 685, 696 (Ark. 2010). By contrast, federal law requires trial courts to determine whether the class claims are precluded, because this is a "very important issue in assessing the adequacy of representation requirement" of Rule 23. *Nafar v. Hollywood Tanning Sys*., 339 Fed. Appx. 216, 225 (3d Cir. 2009) (vacating class certification because district court failed to consider whether the class claims were barred by res judicata).

Under Arkansas class-action rules, a class defendant in Arkansas could be serially sued by the same class member, for the same claims, with no prospect of judicial relief until after class certification.

D. Choice of Law. According to the "no-merits" rule, Arkansas courts will not conduct a choice of law analysis before certifying multi-state classes. In certifying a nationwide class of four million purchasers of General Motors vehicles with alleged defective brakes, the Miller County Circuit Court refused to address GM's argument "that the significant variations among the fifty-one motor-vehicles product-defect laws defeat predominance

and prevent certification." *Bryant*, 285 S.W.3d at 638. The Arkansas Supreme Court affirmed because "we view any potential choice-of-law determination and application as being similar to a determination of individual issues, which cannot defeat certification." *Id.* at 640.

Federal class-action practice is to the contrary. "In the context of class action certification, the Supreme Court has stated that a district court 'may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.' A court 'must apply an individualized choice of law analysis to each plaintiff's claims.'" *Nafar*, 339 Fed. Appx. at 220 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985)).

Choice-of-law analysis directly touches the due process rights of non-resident absent class members. If Arkansas's substantive laws conflict with the laws of an absent class member's home state, the state courts of Arkansas "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Shutts*, 472 U.S. at 822 (quoting *Home Ins. Co v. Dick*, 281 U.S. 397, 410 (1930)).

II. Fundamental Differences in Defining Common Issues.

Arkansas and federal courts differ substantially on how to satisfy the class-action requirement of commonality. In *Bryant*, the Arkansas Supreme

Court affirmed class certification of the following "clearly common questions:" "whether the parking-brake system installed in the class members' vehicles was defective and whether General Motors attempted to conceal any alleged defect." 285 S.W. 3d at 642-43. While GM argued that the class claims sounded in fraud and would require each of the four million plaintiffs to prove individual reliance, the Court concluded: "[T]he mere fact that individual issues and defenses may be raised by the defendant regarding the recovery of individual class members cannot defeat class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members." *Id*. at 643.

Federal practice on common issues is sharply different under *Dukes*.

> The crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.' That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.' Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 131-32 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class

> certification. Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law.

Dukes, 131 S. Ct. at 2550-51 (some internal citations omitted).

The "clearly common questions" certified under Arkansas class-action practice in *Bryant* would not be certified under federal law. *Dukes* requires the common question to show a common injury—whether "the class members have suffered the same injury,'" so that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551 (internal citations omitted). *Bryant* allows class certification of any question that is a piece of the larger puzzle of common injury.

It is not clear how a trial on the "common questions" certified in *Bryant* could have led to a nationwide, binding determination of any issue as to any absent class representative. Certainly such an arduous, risky and expensive exercise would not have resolved any "issue that is central to the validity of each one of the claims in one stroke." *Id*. Rather than explore that territory, GM settled *Bryant* soon after this Court denied *certiorari*.

III. Arkansas's "Certify Now, Splinter Later" Approach to Class Certification Imperils Preclusion and Due Process.

Arkansas approves the use of the class action mechanism even when it is clear that the class action will "splinter" and be decertified before judgment. In Arkansas class-action practice, "[w]here a cohesive and manageable class exists, we have held that real efficiency can be had if common, predominating questions of law or fact are first decided, with cases then splintering for the trial of individual issues, if necessary." *Bryant*, 285 S.W.3d at 643. "In fact, we have expressed our approval for the bifurcated approach to the predominance element by allowing circuit courts to divide a case into two phases: (1) certification for resolution of the preliminary, common issues; and (2) decertification for the resolution of the individual issues." *Id*. at 642.

Earlier this month, in another case from Miller County, the Arkansas Supreme Court "recognized that a bifurcated process of certifying a class to resolve preliminary, common issues and then decertifying the class to resolve individual issues, such as damages, is consistent with Rule 23." *DIRECTV, Inc. v. Murray*, 2012 Ark. 366 at 15, 2012 Ark. LEXIS 391, at *21 (Oct. 4, 2012). In federal practice, under *Dukes*, "What matters to class certification . . . is not the raising of common 'questions' — even in droves — but, rather the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation

of common answers." *Dukes*, 131 S. Ct. at 2551 (emphasis in original) (quoting *Nagareda, Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L. Rev. 97, 132 (2009)). Thus *Dukes* emphasizes that the class action mechanism should be used when determination of common issues "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*.

In *Bryant*, as in other class-actions involving a huge number of class members, the actual path to judgment is difficult if not impossible to imagine. The trial court in *Bryant* said it "does not believe for one moment that 4,000,000 individual, phase II trials will be conducted in this case." 285 S.W.3d at 643. Arkansas's answer to this obvious problem in class actions, "certify now, splinter later," virtually assures that absent class members and the defendant will never have their day in court.

The notion of certifying an enormous class action on the premise that the case will "splinter" into individual cases is at war with the requirements for claim and issue preclusion in Arkansas. Claim and issue preclusion both require a judgment. *Hardy*, 2011 Ark. 82, at 5-6, 2011 Ark. LEXIS 72, at *8-9. For claim preclusion, a judgment operates to merge or bar claims that were or could have been tried. *Id*. For issue preclusion, a judgment defines the issues actually litigated and essential to the judgment. *Id*. But a "splintering" case, by definition, never reaches the point of a judgment on a class-wide basis. For there to be binding effects under Arkansas law in *Bryant*, it would be necessary for some or all of the four million claims to reach judgment, a prospect

that Arkansas class-action practice does not seriously entertain.

So Arkansas class-action practice in these large cases dissolves into a fractured process that by design will not result in a class-wide determination of any questions in a manner that can bind absent parties.[4] Given no realistic chance at a trial on the merits that comports with due process, class-action defendants understandably resolve this incoherent judicial conundrum in the boardroom by settlement rather than in the courtroom by trial.

CONCLUSION

The magnet jurisdiction of Miller County, Arkansas is home to notorious class-action abuses

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[4] Arkansas has never had to come to grips with what happens in "splintered" class actions—whether any facts or issues will have been resolved, whether they are binding on any party, and how and where the "splintered" cases will proceed to judgment. Florida has had experience with these issues in its decades-old tobacco litigation, involving 700,000 class members, in *Engle v. Liggett Grp. Inc.*, 945 So.2d 1246 (Fla. 2006) ("*Engle III*"). There the Florida Supreme Court decertified the class after two trials and stated by fiat that certain findings that it approved "will have res judicata effect" in individual damages actions that class members could choose to pursue. *Id*. at 1269. This determination does not resolve due-process concerns, *Hansberry v. Lee*, 311 U.S. at 40, and has spawned uncertainty and confusion in follow-on cases. *See, e.g.*, *Brown v. R.J. Reynolds Tobacco Co*., 611 F.3d 1324 (11th Cir. 2010), *vacating* and *remanding Brown v. R.J. Reynolds Tobacco Co.*, 576 F.Supp.2d 1328 (M.D. Fla. 2008); *Waggoner v. R.J. Reynolds Tobacco Co.*, 835 F.Supp.2d 1244 (M.D. Fla. 2011); *Philip Morris USA, Inc. v. Douglas*, 83 So.3d 1002 (Fla. App. 2012).

that helped prompt Congress to enact CAFA. In this case, some of the lawyers responsible for those abusive tactics attempt to avoid CAFA's jurisdictional rules by sacrificing interests of absent class members as a ruse to remain in state court. This Court should see through that ruse and reject it. The order of remand should be reversed.

Respectfully submitted,

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