No. 11-1450

In The
Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,

Petitioner,

v.

GREG KNOWLES,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE ARKANSAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether, after *Smith v. Bayer*, 131 S.Ct. 2368 (2011), a named plaintiff may defeat removal under the Class Action Fairness Act of 2005 ("CAFA") by filing with a class action complaint a stipulation that limits the damages for the putative class to less than the $5 million threshold for federal jurisdiction.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Arkansas Trial Lawyers Association, Inc. (ATLA), incorporated in 1963, is a voluntary Arkansas legal organization often heard as a friend of the court by Arkansas' appellate courts and, though less often, the United States Court of Appeals for the Eighth Circuit. Its members are attorneys dedicated to protecting the health and safety of Arkansas families, to enhancing consumer protections and to preserving each and every citizen's rights of access to courts and of trial by jury. ATLA's members concentrate their time in the practice of Criminal Law, Commercial Litigation, Domestic Relations/Family Law, Employment Law, Environmental Law, Insurance Law, Personal Injury, Social Security and Workers' Compensation. They often represent defendants as well as plaintiffs in tort and contract cases. They are committed to providing high-quality legal representation for Arkansans.

But ATLA's interests stretch well beyond simply obtaining results for their clients. As members of the Arkansas Bar, ATLA's members are officers of the legal system, and public citizens "having special responsibility for the quality of justice." Arkansas Rules of Court, Model Rules of Professional Conduct,

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

Preamble. The goals of ATLA include promoting the efficient administration of justice, working constantly for the improvement of the law and serving as a line of defense against assaults on the integrity, credibility and capability of the Third Branch of Government in Arkansas, the Judiciary.

ATLA sees much of the briefing in this case as such an assault focused on the Circuit Court of Miller County, Arkansas and the Arkansas Supreme Court. ATLA's members are trial and appellate attorneys who regularly, indeed daily, appear in the courts of Arkansas before the very judges whose competence and credibility are questioned by the briefing in this case. ATLA has an interest in shedding the light of truth on the dark condemnation of the trial and appellate courts of our State. The one-sided, unsupported picture painted by Petitioner and several of its *amici* is at best incomplete and at worst dead wrong. It is important that this Court have the full and accurate picture. ATLA submits this brief in order to aid the Court by painting the rest of the picture.

SUMMARY OF ARGUMENT

Petitioner and its *amici* consistently portray the Miller County Circuit Court as a "magnet jurisdiction," a "judicial hellhole," where greedy attorneys for undeserving plaintiffs pursue senseless lawsuits and where the the trial judges presiding over those cases cavalierly certify class actions, refuse to rule on

meritorious dispositive motions, and join the plaintiffs' attorneys in "blackmailing" settlements that benefit only attorneys and short-change plaintiffs. Scratching the thin surface of the support for those contentions reveals that they have no support beyond rhetoric, one-sided hearsay newspaper reports and anecdotes. These newspaper reports and anecdotes are wholly insufficient to support the weighty allegations made against the Miller County Circuit Court.

Examination of the available and reliable facts reveals a different picture. The Clerk's examination of the record indicates very few class-action filings in Miller County. Examination of the scheduling orders appended to those very briefs reveals a trial court that aggressively and admirably moves its complex docket. And examination of the scholarship consistently cited as support for the claims of Petitioners and their *amici* reveals that it does just the opposite. It strongly calls the conclusions they make into question.

Petitioner and its *amici* also portray the Arkansas Supreme Court as doddering and incompetent to protect them and other put-upon defendants from the excesses of the Miller County Circuit Court. The Arkansas Supreme Court created a system, they write, in which trial courts are allowed to shelve merits motions for months or years and they complain that the Arkansas Supreme Court will not take any action to address discovery rulings. They either ignore or are unaware of considerable procedural tools available to them to remedy the excesses they claim exist. They

either ignore or are unaware of efforts of the Arkansas Supreme Court to monitor trial courts and to ensure against trial courts refusing to rule on dispositive motions. And they ignore or are unaware of the exceptions made by the Arkansas Supreme Court to the usual rule that discovery is in the hands of the trial court.

The criticisms of the Miller County Circuit Court and the Arkansas Supreme Court are unjustified. They certainly do not merit reversal of the Eighth Circuit or the Western District of Arkansas. For these reasons, ATLA joins Respondent in asking that the opinion below be affirmed.

ARGUMENT

I. THE MYTH OF THE MILLER COUNTY MAGNET.

Petitioner and its *amici* portray the Miller County Circuit Court in the worst manner possible. They claim that it is, in essence, corrupt, and working hand-in-hand with the plaintiffs' class-action bar to force innocent corporate actors into undeserved settlements in order to avoid disastrous class-action judgments. It is a "magnet" jurisdiction, a "judicial hellhole" where justice gives way to greed with the assistance of sitting judges.

The Miller County Circuit Court accomplishes this goal, they write, by refusing to rule on meritorious

defenses, particularly motions to dismiss for want of personal jurisdiction, until well into the case, often allowing those motions to linger on its docket for months or years. It forces defendants to engage in costly, frivolous discovery that actually motivates settlement where none should be had. These actions by the Miller County Circuit Court, according to Petitioner and its *amici*, motivate plaintiffs' class-action lawyers to file suits in Miller County knowing that the Bench will assist them in backing defendants into the corner making settlement the only viable alternative.

This dark and ominous picture of the Miller County Circuit Court is at best incomplete and distorted and at worst just wrong. Light can be shown on it in three ways: examining the so-called proof or support for the claims made and exposing it for what it really is, nothing more than rhetoric, newspaper articles and anecdotes; examining the actual reliable proof in the record revealing that Miller County is not a "magnet" but a court that admirably and aggressively moves its docket; and mining the scholarship consistently relied on by Petitioner and its *amici*, which reveals that the entire premise of their argument is suspect. That exercise follows.

First, the so-called "proof" or support for the propositions made is insufficient to allow the conclusions reached. A significant portion of the support is made up of nothing more than quotations from and citations to newspaper articles and the remainder is rhetoric and one-sided anecdotes from defendants in

past cases. Petitioner brashly writes at page 14 of its brief that prior to the Class Action Fairness Act's (CAFA), 28 U.S.C. § 1332, passage, Respondent's counsel worked with the Miller County Circuit Court to coerce untoward settlements by allowing "expensive, far-ranging, and burdensome discovery" that Petitioner implies was unwarranted. Its support for this proposition is a newspaper article, Michelle Massey, *'Failure to Communicate' Could Lead to $45 M in Discovery Costs*, Southeast Texas Record, Aug. 8, 2007, and citation to limited portions of papers filed in select cases. On the next page it cites two more press articles for the proposition that class settlements benefit only attorneys not class members, *Big Money for Lawyers*, Arkansas Times, Dec. 14, 2011; *Judge OKs $90M "Click Fraud" Settlement*, Associated Press Financial Wire, July 29, 2006.

Various *amici* engage in a similar exercise. The brief of the Manufactured Housing Institute and others cites 13 press articles, some more than once, for such broad-ranging propositions as defendants in Miller County being subjected to "inappropriate and burdensome discovery" (pages 11 to 16); class-action settlements benefiting only lawyers (pages 16 and 17); and the Miller County Circuit Court making inconsistent rulings benefiting only the plaintiffs (pages 19 and 20). The bulk of the remainder of their support for the same propositions comes from rhetoric and their personal anecdotes describing their view of what happened on various motions brought before the Miller County Circuit Court. The brief of 21st Century Casualty Company and others is the same.

Indeed, both of these *amici* brazenly offer this Court nothing more than their own biased anecdotal perspective on class-action practice in Miller County supported by select portions of the papers filed in select cases backed up by articles from the press.

This approach is inappropriate and ought to be wholly ignored by this Court. If the judges on the Miller County Circuit Court were hailed into court to answer charges from the Arkansas Judicial Discipline and Disability Commission for violations of the Arkansas Code of Judicial Conduct, not one of the plethora of newspaper articles relied on by Petitioner and its *amici* would be allowed into evidence. They are inadmissible hearsay in State court and federal court. Ark. R. Evid. 801; Fed. R. Evid. 801. They are unreliable, incomplete statements not subject to cross-examination that surely would be excluded pursuant to Rule 403 objections even if some hearsay exception could be conjured up. Ark. R. Evid. 403; Fed. R. Evid. 403. This Court should give them exactly the same amount of consideration. None.

The rhetoric and personal anecdotes of parties appearing in front of the Miller County Circuit Court on discreet motions and issues are no different. In both federal court and Arkansas state court, the management of the trial docket and of discovery is left to the sound discretion of the trial court. *E.g.*, *U.S. v. Saccoccia*, 58 F.3d 754, 770 (1st Cir. 1995) ("trial management is peculiarly within the ken of the district court"); *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 30 (2d Cir. 1981); *Drippe v. Tobelinski*, 604 F.3d 778,

783 (3d Cir. 2010) (holding that issues of discovery and case management are within the sound discretion of the trial court); *Hall v. Simes*, 350 Ark. 194, 85 S.W.3d 509 (2002); *Baptist Health v. Circuit Court of Pulaski County*, 373 Ark. 455, 284 S.W.3d 499 (2008). In order for this Court to know whether the Miller County Circuit Court abused that discretion with respect to any one of the complaints Petitioner and its *amici* lodge, this Court would need to examine the entire record relevant to the matter, the arguments made by the parties in their entirety, and the peculiar circumstances of each motion in each case. The one-sided, anecdotal viewpoint of one side or the other, backed up by catchy rhetoric, which is all that is presented, is insufficient. These anecdotes and this rhetoric might be useful in a legislative debate, but they are simply not the stuff that supports a decision of this Court.

Second, what the record actually reveals is important, and short work can be made of it. Again, Miller County is viewed as a "magnet" jurisdiction where class-action complaints are filed with abandon. Addendum B to Respondent's brief reveals something very different. The Miller County Circuit Clerk located only 28 class-action filings from 2000 to now. If Miller County is a magnet, it isn't much of one. Twenty-eight class actions in a 12-year period is a far cry from the picture painted by Petitioner and its *amici*.

And what of this notion that the Miller County Court sits on dispositive motions? The 21st Century

brief includes a letter from one Miller County Judge who informs counsel that "motions relating to Rule 12(b)(2), Rule 12(b)(3), Rule 12(b)(4), Rule 12(b)(5), and Rule 12(b)(8) *are motions that can be heard relatively early in the litigation*." Brief of 21st Century, appendix A at 2a (emphasis added). Other dispositive motions are heard, according to the court, at or near the certification hearing for reasons of efficiency. *Ibid.* The court then chastises the lawyers on both sides for failing to meet and confer on a scheduling order and tells them to get it done.

Appendix B to the same brief is, apparently, the resulting scheduling order. While some of the briefing in this case contends that the Miller County Circuit Court views the filing of motions to be a waiver of jurisdictional defenses, appendix B reflects just the opposite. And the parties are given concrete, well-defined deadlines under which the case is to progress. Motions are divided into "motion groups" where jurisdiction and venue challenges are heard early and some other dispositive motions are heard later along with certification issues.

The letter from the Miller County Circuit Court and what is portrayed as a typical scheduling order are nothing untoward. They reveal a trial judge who takes control of a complex case on his docket and moves the case. This judge, not one set of lawyers or the other, controls his docket, and admirably so.

Digging to the core, the real complaint made by Petitioner and its *amici* is that they have to comply

with discovery in civil litigation and particularly discovery in class actions that might overlap merits issues with class certification issues. No one enjoys discovery, but it is a necessary component of civil litigation. Plaintiffs cannot obtain the information necessary to prosecute cases, and defendants cannot obtain the information necessary to defend, without detailed, and sometimes voluminous, discovery. It is a reality of litigation. Cutting off discovery is but one step away from barring the courthouse door.

Further, it is both unfair and unrealistic to criticize the judges on the Miller County Circuit Court for allowing merits discovery to proceed simultaneously with certification discovery. As noted earlier, the management of the docket and discovery are within the sound discretion of trial courts. They are things trial courts do. The judges on the Miller County Circuit Court have been tasked with managing the entirety of their dockets including criminal cases, domestic-relations cases, simple and complex contract and tort cases, and the entire panoply of litigation coming before them, not just the 28 class actions filed since 2000. Judicial efficiency and common sense direct that some overlap in discovery is justified just to keep the docket moving. Moreover, "merits" discovery and "certification" discovery often overlap, thus it makes no sense at all to divide discovery into two artificial "phases" that result inevitably in duplication of efforts and motions to compel when one side calls a request "merits" discovery and the other calls it "certification" discovery. The Miller County Circuit

Court's approach is practical, sensible and appropriate.

Third, and finally, a very brief examination of one piece of scholarship offered in support of the claim by Petitioner and its *amici* is telling. A footnote from this article is repeatedly quoted for the proposition that "The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas." Brief of Petitioner at 4; brief of 21st Century and others at 10; brief of Manufactured Housing Institute and others at 10; brief of the Chamber of Commerce of the United States at 9-10 (each quoting Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76, 95 n.115 (2009)) (hereafter Ellis, *supra*). What every one of these briefs omits is the entirety of Professor Ellis's statement. Note 115 actually disputes the premise that either Miller County or Madison County, Illinois is what Petitioner and its *amici* claim it is; a magnet jurisdiction.

The relevant and telling part of footnote 115 is as follows:

> The hellhole label persists in spite of the fact that "empirical research tends to debunk the industry complaints." [Elizabeth G.] Thornburg, [*Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W.Va. L. Rev. 1097,] 1104 [(2008)] ("For example, a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was

> 'no support for the "hellhole" label.'") (quoting Neil Vidmar et al., *"Judicial Hellholes": Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, 59 Vand. L. Rev. 1309, 1341 (2006)). Thornburg points out that the use of the term is "catchy" and asserts that the "point of the hellhole campaign is not to create an accurate snapshop of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants. . . ." *Id*. at 1099. She goes so far to say that by "sheer repetition" these claims have gained some credibility, noting that "if you repeat something often enough, people will come to treat it as general knowledge." *Id*.

Ellis, *supra* at 93 n.115. The failure to mention the entirety of note 115 is misleading at best.

But the distortion created by quoting Ellis, *supra* for any of the propositions made by Petitioner and its *amici* does not end there. The entire article undercuts the position they take. The point of Professor Ellis's article is that how a "story" is framed often colors the public-policy debate and even the outcome. Where one side can create heroes, villains and victims through which to tell the story, that side can conquer the debate. She posits that advocates of tort reform in general and class-action reform in particular managed to paint state-court trial judges and plaintiffs' lawyers as villains, unsuspecting plaintiffs and innocent corporations as victims and consumers and American competitiveness as the heroes. The result was CAFA,

but neither the story nor the result was supported by actual empirical evidence. It was nothing more than rhetoric, innuendo and anecdote just like the story told by Petitioner and its *amici* here. She concludes that the precise opposite story could be told and better supported.

Professor Ellis's point is well made, and it comes to life in this case. The Miller County Circuit Court is villainized with newspaper articles, rhetoric and anecdote. "Catchy" phrases that have taken on a life of their own are used to make the Miller County Circuit Court appear to be a pawn in a game played by plaintiffs' lawyers when no actual support for the proposition exists. This myth should be put to rest. This Court ought not countenance the attack on this trial court, and it certainly should not allow it to undercut the opinion under review.

II. THE ARKANSAS SUPREME COURT'S APPELLATE AND SUPERVISORY CHECK.

Petitioner and its *amici* criticize the Arkansas Supreme Court for failing to check the described excesses of the Miller County Circuit Court, or at least to provide any means through which to check them. The first response is that the excesses do not exist, as explained above. The second response is that if they did, the Arkansas Supreme Court has in fact created strong appellate and procedural checks to protect against them. They are explained here in very brief fashion.

By virtue of our State constitution, "The Arkansas Supreme Court shall exercise general superintending control over all courts of the state. . . ." Ark. Const., amend. 80, § 4. It is similarly charged with prescribing "the rules of pleading, practice and procedure for all courts" of the State, Ark. Const., amend. 80, § 3, a role it zealously and jealously defends. *E.g.*, *Broussard v. St. Edward Mercy Medical Health System, Inc.*, 2012 Ark. 14, ___ S.W.3d ___ (2012); *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135 (2009); *Summerville v. Thrower*, 369 Ark. 231, 253 S.W.3d 415 (2007). Relevant to the complaints raised in this case, the Arkansas Supreme Court has flexed this judicial muscle in ways that would protect Petitioner and its *amici* if their problems really existed.

Arkansas is actually an advance thinker on review of class certification. Every class-certification order is subject to appeal, whether granted or denied, as a matter of right. Ark. R. App. P. – Civil 2(a)(9). The Arkansas Supreme Court assumes jurisdiction of each and every such case without a prior stop at the Arkansas Court of Appeals. See *Carquest of Hot Springs v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 53 (2006). This immediate review alone is a substantial check on any alleged abuse by a circuit court.

Our State Supreme Court also checks any effort on the part of a trial court to shelve dispositive motions and refuse to rule on them. That check begins with Administrative Order No. 3 of the Arkansas

Supreme Court. This Order requires trial courts to report quarterly all cases that have been under final submission for more than 90 days. Ark. S.Ct. Admin. Order No. 3(2)(A). Where a dispositive motion is fully briefed and argued, a case is considered "under final submission." Ark. S.Ct. Admin. Order No. 3(2)(B).

This order has teeth. If a delay is not caused by the parties or counsel, the Supreme Court may assign a judge to dispose of the case. Ark. S.Ct. Admin. Order No. 3(2)(D). Non-compliance with the order carries weighty penalties for the offending judge as follows:

> Willful noncompliance with the provisions of the order shall constitute grounds for discipline under the provisions of Canon 3B(8) of the Arkansas Code of Judicial Conduct. Any judge whose quarterly report is not received by the 15th of the month following the end of the previous quarter (i.e., January 15, April 15, July 15, October 15) will be automatically referred to the Judicial Discipline and Disability Commission for possible discipline.

Ark. S.Ct. Admin. Order No. 3(2)(E).

Parties to cases need not wait for the Arkansas Supreme Court to act where an Arkansas trial judge refuses to rule on a dispositive order. Where a trial judge refuses to rule in a reasonable time, the Arkansas Supreme Court entertains and issues writs of mandamus to require a ruling. *Higgins v. Proctor*, 2009 Ark. 496, ___ S.W.3d ___ (2009); *Hall v. Simes*,

350 Ark. 194, 85 S.W.3d 509 (2002); *Urquhart v. Davis*, 341 Ark. 653, 19 S.W.3d 21 (2000). It is unrealistic that a trial court would ignore the mandates of Administrative Order No. 3 and subject itself to being replaced on a case or sanctioned for misconduct, and it is just incorrect that the parties to the case have no enforcement arrows in their quivers to obtain rulings.

Finally, Petitioner and its *amici* complain that the Arkansas Supreme Court will not review discovery orders on an interlocutory basis. As a general proposition, that is true. *Baptist Health v. Circuit Court of Pulaski County*, 373 Ark. 455, 284 S.W.3d 499 (2008); *Chiodini v. Lock*, 373 Ark. 88, 93, 281 S.W.3d 728, 732 (2008). It is not, however, unusual. The typical rule is that discovery orders are not subject to immediate appellate review. Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 Wash. L. Rev. 733 (2006); Comment, *Reviving the Privilege Doctrine: The Appealability of Orders Compelling the Production of Privileged Information*, 62 Ark. L. Rev. 283 (2009).

That approach makes perfect sense. Interlocutory appellate review to control discovery disputes has no logical end and would embroil the appellate courts in all manner of discovery issues in the middle of litigation. Parties argue robustly, to say the least, over what can and cannot be discovered. Discovery is the engine that powers the civil suit at the trial-court level. If appellate courts open the door to refereeing disagreements over what the discovery rules mean by

way of interlocutory review, the volume of cases rushing through that door will be daunting.

Trial courts are vested with jurisdiction to decide discovery issues with good reason: they are in the best place to do so. Trial courts deal daily with discovery matters. They are well-versed in the Rules and are familiar with the cases before them and how the discovery sought fits within the case as a whole. They are familiar with the parties and their counsel, or at least more so than appellate courts can be. They are simply better suited to make day-to-day rulings on discovery issues. Discovery is a large part of what trial courts do, and no need exists to create appellate jurisdiction to review every decision that is disagreeable to one party or another.

Allowing interlocutory appellate review of discovery orders would be inefficient and would bog down cases preventing resolution of disputes. Both sides in a dispute deserve a fair, efficient and timely resolution to a case. If immediate appellate review is available to resolve discovery disputes, every case faces the real possibility of delay. That delay is not fair, efficient or timely.

Even so, as with most things, Petitioner and its *amici* overstated their position. It is not correct that the Arkansas Supreme Court refuses to entertain interlocutory-type review of *any and all* discovery orders. The Arkansas Supreme Court recently adopted a Rule change allowing discretionary review of any discovery order "compelling production of discovery or

an order denying a motion to quash production of materials pursuant to Rule 45 when the defense to production is any privilege recognized by Arkansas law or the opinion-work-product protection." Ark. R. App. P. – Civil 2(f)(1). Even before the Rule change, review by extraordinary writ was available under some circumstances. *Cooper Tire & Rubber Co. v. Phillips Cnty. Circuit Court*, 2011 Ark. 183, ___ S.W.3d ___ (2011).

This considered and advanced approach to appellate jurisdiction over discovery issues once again reveals a forward-thinking court, not the doddering incompetence Petitioner and its *amici* want to discuss. It allows run-of-the-mill discovery disputes to be decided in the trial court subject to typical appellate review as they should be. Then it opens the door to immediate review of extraordinary issues where the important rights of the parties are at stake and the circumstances of the case so warrant. The criticism launched toward the Arkansas Supreme Court for its approach to discovery is not warranted.

CONCLUSION

Petitioner and its *amici* attack the Miller County Circuit Court with rhetoric, newspaper articles and anecdotes, not proof. When the thin surface of their accusations is scratched, a different story is revealed, one of a trial court that moves the few cases on its class-action docket admirably. The attacks on the

Arkansas Supreme Court fare no better. This State's Supreme Court is forward thinking, providing administrative and appellate checks to any abuses that may exist. The attacks on the Miller County Circuit Court and the Arkansas Supreme Court are unwarranted and certainly do not justify reversal.

Respectfully submitted,

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