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 THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether, consistent with the Due Process Clause of the Fifth Amendment and the Class Action Fairness Act of 2005, a named plaintiff may stipulate that the amount in controversy, including the claims of absent class members, does not exceed $5 million so as to defeat a defendant's right of removal.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because it concerns the due process rights of absent class members and the abuse of the class action mechanism that is a vital part of the federal civil justice system.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Class actions are an exception to the due process requirement that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this *amicus* brief are filed with the Clerk.

Money damages class actions under Rule 23(b)(3), codified in the 1966 class action amendments, were considered at the time to be "the most adventuresome innovation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (internal quotation marks omitted). Indeed, unlike the mandatory class actions encompassed in Rules 23(b)(1) or (b)(2), concerning, respectively, limited funds and injunctive or declaratory relief, "Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'" *Id.* at 615 (quoting Adv. Comm. Notes, 28 U.S.C. App. at 697). Accordingly, the courts must be especially vigilant at the outset of money damages class actions to ensure that absent class members' claims are not traded away by self-interested named plaintiffs and their counsel.

In particular, this Court has long held that, for a money damages class action to be certified and due process satisfied, absent class members must be provided notice, an opportunity to exclude themselves from the class, and adequate representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). This fundamental rule presupposes that actions that may bind absent class members not be taken *before* a certification decision and an opportunity for absent class members to decide whether to be members of the class. The class certification requirements ensure that the named plaintiff and counsel are adequate to represent the class, providing further guarantee that the due process rights of class members are protected. *Id*. Indeed, representation without certification is

anathema to due process. It is also at odds with the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), which was enacted, in part, to prevent self-serving tactics by class action plaintiffs' lawyers who are more concerned with their fees than with the recovery to the class. 151 Cong. Rec. S1157, 1178 (2005) (statement of Sen. Hatch) ("Abuse of the class action system has reached a critical point, and it is time that we as a legislative body address the problem.").

Permitting counsel for the would-be representative of an uncertified class to enter into a "binding" stipulation limiting the relief sought by the class in order to avoid federal jurisdiction violates the due process rights of absent class members. It also conflicts with the purpose of CAFA, inherent in its text, to provide a federal forum that will protect absent class members from the self-serving and abusive tactics of plaintiffs' attorneys. The possibility of later notice to the class cannot, as a legal and practical matter, cure such a fundamental violation of absent class members' rights.

ARGUMENT

I. Due Process Requirements Preclude Pre-Certification "Stipulations" that Trade Away Class Members' Claims

Like other devices that attempt to trade away absent class members' claims so that a class action

may proceed in a preferred forum, pre-certification "stipulations" violate absent members' due process rights.

This Court's seminal decision in *Shutts* holds that due process in a money damages class action requires that an absent class member "receive notice plus an opportunity to be heard and participate in the litigation," that he "be provided with an opportunity to remove himself from the class," and "that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812; *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). These requirements are fundamental because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 799 (1996) (quoting *Mullane*, 339 U.S. at 314). To the extent that adequacy of representation alone may suffice to protect absent members' rights, it is constitutionally insufficient where "the interests of those class members who had been a party to the prior litigation were in conflict with the absent members who were the defendants in the subsequent action." *Id*. at 801.

These principles have led the Court to reject mandatory class actions under Rules 23(b)(1) and (b)(2) when the plaintiffs' objective is aggregated money damages. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). The Court unanimously

reaffirmed that holding in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2559 (2011), rejecting an attempt to limit damages to back pay claims, so as to fall under the requirements of a Rule 23(b)(2) mandatory class action, because it "created the possibility . . . that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from," in violation of the Due Process Clause.

Historically, the tactics used by named plaintiffs' attorneys to obtain certification for suspect money damages class actions have not been limited to disguising those actions as limited fund or injunctive or declaratory relief actions, but have extended to trading away (in whole or in part) the claims of absent class members. This includes trimming causes of action or remedies in an effort to achieve certification, without regard to the potential preclusive effect of their decisions on absent class members. *See, e.g.*, *Pearl v. Allied Corporation*, 102 F.R.D. 921, 922-23 (E.D. Pa. 1984) (refusing to allow selective pleading of claims); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (finding that the named plaintiff's tailoring of claims came "at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action"); *Krueger v. Wyeth, Inc.*, No. 03-cv-2496, 2008 WL 481956, at *2-4 (S.D. Cal. Feb. 19, 2008) (denying certification where the named plaintiff's attempt to split off claims of class members who had actually suffered

injuries revealed her to be an inadequate class representative). *See also Arch v. American Tobacco Corporation, Inc.*, 175 F.R.D. 469, 480 (E.D. Penn. 1997) ("[N]amed plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class.").

Plaintiffs' attorneys have employed similar tactics to attempt to evade federal jurisdiction in favor of state courts that may be friendlier to class actions and less protective of absent members' rights. This includes arbitrarily breaking up a claim into separate causes of action, each covering discrete periods dating from the beginning of the statute of limitations period and each asserting damages below $5,000,000. *See, e.g.*, *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F. 3d 405, 406, 408-09 (6th Cir. 2008) (ordering aggregation where plaintiffs' counsel created five separate nuisance classes, each covering a different six-month interval and stipulating to recovery just below the CAFA jurisdictional threshold); *Hubbard v. Electronic Arts, Inc.*, Nos. 2:09-CV-233, 2:09-CV-234, 2011 WL 2792048, at *7 (E.D. Tenn. July 18, 2011) (following *Freeman*); *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 955 (9th Cir. 2009) (denying removal of seven toxic-tort suits, each with fewer than 100 plaintiffs); *Anderson v. Bayer Corp.*, 610 F.3d 390, 392-93 (7th Cir. 2010) (denying removal of four interrelated classes, each with fewer than 100 plaintiffs).

What these tactics have in common is that they serve to advance the interests of named plaintiffs and

their counsel by abrogating or even discarding the claims of absent class members, in blatant violation of "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)). The case at bar, in which the named plaintiff stipulated to a damages amount for the class below the $5 million CAFA threshold to avoid federal jurisdiction, exemplifies this conflict.

II. Due Process Requires Satisfaction of Rule 23 Criteria, Including Adequacy of Representation, *Before* Absent Class Members May Be Bound

"In the class-action context, [constitutional due process] limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008). Compliance with those safeguards thereby assumes a constitutional dimension and must be achieved *before* non-named class members' legal rights may be determined.

Consistent with this principle and its precedents, the *Smith* Court rejected "'the novel and surely erroneous argument that a nonnamed class member is a party to the class action-litigation before the class is certified'" under Rule 23. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380 (2011) (quoting *Devlin v. Scardeletti*, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting)). It recognized that certification decisions matter because

the Rule 23 requirements measure whether the named plaintiff and counsel adequately represent the interests of the class, such that class members may be fairly subject to *res judicata*. *Id*. at 2381 n.11.

As *Shutts* emphasizes, "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." 472 U.S. at 812 (citing *Hansberry*, 311 U.S. at 42-43); *see also* Restatement (Second) of Judgments § 4(1), at 393 (1982) (nonparty may be bound only when his interests are adequately represented). The Federal Rules of Civil Procedure implement this requirement. Rule 23(a)(4) provides that the named plaintiffs must "fairly and adequately protect the interests of the class." *See also Amchem*, 521 U.S. at 625. It also imposes the same requirement on the named plaintiffs' counsel. Fed. R. Civ. P. 23(g)(4).

But fair and adequate representation is precisely what is missing when a named plaintiff and his counsel are so keen to have a class certified in a friendly forum that they sacrifice potential damages for the class in order to achieve that goal.[2] Accordingly,

[2] The importance of adequate representation for absent class members is underscored by the ability of absent members who were not adequately represented to collaterally attack a class judgment and thereby escape its *res judicata* effect. In *Dow Chemical Co. v. Stephenson*, 593 U.S. 111, 112 (2003), an equally-divided Court affirmed the Second Circuit's decision that it would violate due process for a global settlement that did not address future claimants' claims to have *res judicata* effect in

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such stipulations limiting class-wide damages not only raise the risk of unfair and inadequate representation, they reveal that it is likely in a given case. The requirements of due process therefore preclude holding a damage-limiting stipulation to be binding on absent class members, unless and until the named plaintiff has *demonstrated* adequacy of representation – that is, after class certification.

Notwithstanding this clear violation of absent class members' due process rights when binding decisions are made for them by a named plaintiff and his counsel prior to class certification, the circuit courts are divided on the rights of absent class members in these circumstances. *See, e.g., Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012) (upholding named plaintiff's counsel's stipulation to avoid federal jurisdiction as binding and sufficient to defeat removal under CAFA); *Frederick v. Hartford Underwriters Ins. Co.*, 2012 WL 2443100 (10th Cir. June 28, 2012) (holding that a plaintiff cannot conclusively avoid federal removal jurisdiction under CAFA by a statement of intention not to seek more than $4,999,999.99 on behalf of the putative class); *Back Doctors Ltd. v. Metro. Prop. & Casualty Ins. Co.*, 637

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barring future claimants from proceeding. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 259-61 (2d Cir. 2001). As the Second Circuit explained, "the due process inquiry (and part of the Rule 23(a) class certification requirements) involves assessing adequacy of representation and intra-class conflicts." *Id.* at 261.

F.3d 827, 830 (7th Cir. 2011) (holding that the amount a named plaintiff is willing to accept does not bind absent class members and therefore does not ensure that the case will remain below the CAFA threshold); *Lowdermilk v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 996, 999 (9th Cir. 2007) (requiring the "legal certainty" test, notwithstanding the allegations in the complaint, in order to "guard the presumption against federal jurisdiction and preserve the plaintiff's prerogative, subject to the good faith requirement, to forgo a potentially larger recovery to remain in state court."); *Smith v. Nationwide Prop. & Cas. Ins. Co.*, 505 F.3d 405, 407 (6th Cir. 2007) (holding that a "disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court"); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) (finding it "improbable" that the named plaintiff can "ethically" and "unilaterally" waive the rights of the absent class members).

The result is that, depending entirely on where a suit is brought, absent class members may find their claims traded away before the minimum requirements of due process have received any consideration.

III. The Eighth Circuit's Approach Is Contrary to CAFA's Text and Purpose of Protecting Absent Class Members' Due Process Rights

CAFA was principally directed at ensuring that absent class members' due process rights were protected against the tactics of class action plaintiffs' attorneys who do not truly represent their interests. It should be interpreted, consistent with its plain meaning, to further that aim. By contrast, the Eighth Circuit's approach, as applied in this case, establishes a loophole for plaintiffs' attorneys seeking to return to the pre-CAFA status quo.

Prior to CAFA, in the absence of federal court oversight, class action litigation had evolved into an abusive instrument primarily used in product liability and mass tort cases to reward plaintiffs' lawyers. John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self interest."). Plaintiffs' attorneys learned they could "game the system" by focusing their litigation efforts on certain favorable state-court venues through a method of forum-shopping designed to avoid federal court rooms in favor of more lenient county courthouses,

including "magnet" jurisdictions. S. Rep. No. 109-14, at 10 (2005).

Not surprisingly, abuses occurred "when state courts [were] asked to adjudicate complex and high-stakes cases involving interstate claims." Victor E. Schwartz, Mark A. Behrens, Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. Legis. 483, 510 (2000). Plaintiffs' attorneys identified hot spots of local bias, or magnet venues, for bringing class actions, notwithstanding that the magnet jurisdictions had little or no connection to the underlying disputes or interstate policy.[3] Instead of complex litigation involving important interstate issues taking place in federal court, national policy debates unfolded on the steps of state

[3] Madison County, Illinois, for instance, surged to the top of the list of magnet jurisdictions. The 725-square mile county in a rural southwest corner of the state transformed almost overnight into a class action boomtown. In 1998, Madison County was the site of two class action filings, both of which certified nationwide classes. John Beisner, Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 Harv. J. L. & Pub. Pol'y at 169. Within two years, plaintiffs' attorneys had taken the hint and Madison County received 39 class action filings in 2000, 74 percent of which were filed on behalf of proposed nationwide classes. *Id.* Madison County, home to less than one percent of the U.S. population, became ground zero for national policy on important issues from car repairs to telecommunications to plumbing licensure. 151 Cong. Rec. H685, 686 (2005) (statement of Rep. Keller) ("[T]he movie 'Bridges of Madison County' was a love story. The 'Judges of Madison County' would be a horror flick.").

courthouses with no connection to the cases. *Beisner*, supra n.3, at 169.[4]

Through artful pleading to avoid removal to federal court, plaintiffs' attorneys increasingly sought preferred state-court venues to litigate their nationwide class claims, raising concerns of pervasive abuse and that claimants' rights were being ignored. *See Davis v. Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (concurring with remand to state court even though "[p]laintiffs' attorneys are increasingly filing nationwide class actions in various state courts, carefully crafting the language in the petitions or complaints in order to avoid" removal to federal courts). Inside those magnet venues, abusive tactics persisted, and foremost among them was disregard for due process rights.[5] 151 Cong. Rec. S1157, 1172

[4] The ill effects of state-court influence over national policy were illustrated in the Illinois case of *Avery v. State Farm Mut. Auto Ins. Co.*, 746 N.E.2d 1242 (Ill. App. 2001). In that case, the trial court purported to dictate insurance laws nationwide by holding that an insurer in a nationwide class action violated Illinois law with respect to replacement service parts even though other states' laws were in direct conflict with the holding. 151 Cong. Rec. S1157, 1172 (letter by Walter Dellinger); 151 Cong. Rec. H685, 687 (statement of Rep. Goodlatte) ("State Farm was put in a position of being in a court in Illinois in which they were going to have the decisions of the 50 State insurance commissioners, none of whom had any problem with this policy, overturned by one court judge who was not even experienced in terms of handling insurance policies[.]").

[5] Frequently during the era of magnet jurisdictions, state-court venues approached class certification with lax standards that reflected a laissez-faire attitude toward the due process

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(statement of Sen. Grassley) ("The magnet State courts . . . certify huge classes that involve claims that are completely dissimilar, to the detriment of both plaintiff and defendant. That ends up being a due process problem.").

While plaintiffs' attorneys greatly benefited by keeping their cases in state court, class members suffered. Plaintiffs' attorneys engaged in "claim shaving," which involved stipulations to waive claims – not unlike the damages stipulation in this case – thereby keeping complaints under the $75,000 damages threshold required for diversity jurisdiction, while extinguishing the claims of absent class members. *The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Adm. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. (1999) ("Hearings on S. 353") (statement of Stephen G. Morrison) ("[I]t happens every day – class counsel sacrifice the claims of unnamed class members in order to keep their cases in state courts.").

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rights of not only out-of-state defendants but also unnamed class members. *Hearings on S. 353*, Prepared Statement of Stephen G. Morrison. Out-of-state defendants, for instance, suffered gross abuses known as "drive-by class certifications," in which judges certified claims for class treatment before defendants could even respond to certification motions. *Id.*; 151 Cong. Rec. H685, 689 (statement of Rep. Goodlatte) ("The existence of State courts that broadly apply class certification rules encourages plaintiffs to forum shop for the court that is most likely to certify a purported class.").

When plaintiffs either won or their attorneys settled for large settlements, the big pay day belonged to the attorneys while class members generally received little or nothing, often in the form of "promotional coupons to purchase more products from the defendants." S. Rep. No. 109-14, at 15; 151 Cong. Rec. H685, 690 (statement of Rep. Goodlatte) ("The loser in the system is the class member whose claim is extinguished by the settlement at the expense of counsel seeking to be the one entitled to recovery of fees.").

In general, CAFA sought to combat the proliferation of state court class action settlements with terms that primarily benefited plaintiffs' lawyers, at the expense of absent class members, and the lack of meaningful oversight or scrutiny of such settlements. It included express procedures to be followed by the federal courts in evaluating coupon settlements. 28 U.S.C. § 1712. It also included specific procedures requiring notice of a settlement to appropriate state and federal officials in order to ensure protection to absent class members' rights. 28 U.S.C. § 1715; S. Rep. No. 109-14, at 35 ("The Committee believes that notifying appropriate state and federal officials of proposed class action settlements will provide a check against inequitable settlements in these cases."); *id.* ("This provision is intended to combat the "clientless litigation" problem by adding a layer of independent oversight to prohibit inequitable settlements.").

More specifically, CAFA sought to protect absent class members, as well as defendants, by putting an

end to forum shopping. *See* John Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 670 (2011). It did this by directly addressing the tactics that plaintiffs' attorneys had been using to avoid federal jurisdiction. *See* S. Rep. No. 109-14, at 27 (describing how CAFA "will make it harder for counsel to 'game the system.'"). In this way, suits seeking settlements of primary benefit to plaintiffs' attorneys could be channeled into federal court and dealt with appropriately. S. Rep. No. 109-14, at 4 ("To make matters worse, current law enables lawyers to "game" the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interest."); 151 Cong. Rec. H685, 686 (statement of Rep. Davis) ("This legislation will put an end to trial attorneys' forum shopping to find a friendly court where settlement awards will line their pocket while hitting victims and consumers in their pocketbooks.").

CAFA also expanded federal jurisdiction in the class action context, calling only for minimal diversity and an aggregate amount in controversy of more than $5,000,000. 28 U.S.C. § 1332(d)(6). The expansion of federal jurisdiction likewise was seen as a means of protecting absent class members:

> Arguments favoring such expansion focused on claims that many state courts were too willing to certify inappropriate, even frivolous, class actions, and then to approve settlements that were either forced on defendants

> in order to avoid litigation, or benefited the lawyers for the plaintiff class far more than the class members themselves, or both.

Richard Fallon, Jr., John Manning, Daniel Meltzer, David Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 1368 (6th ed. 2009).

The text of the statute reflects Congress's intention that federal courts, in assessing jurisdiction, look beyond the artifices of pleading to consider the reality of proposed class actions. Rather than rely on named plaintiffs' representations as to the value of claims, the statute directs that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(6). In this way, the statute provides broad federal jurisdiction over class actions, including those that may be contrary to absent class members' interests and that could proceed only under the lax certification requirements prevailing in certain states.

This case demonstrates the risk to absent class members posed by misinterpretation of CAFA's jurisdictional provisions. The named plaintiff's efforts to remain in Arkansas state court through a stipulation of damages purportedly made on behalf of not only himself, but a class he does not represent and may never represent, directly undermines the rights of absent class members. Class certification may be easier to obtain in Arkansas state court because Arkansas does not apply the rigorous analysis of the

class certification criteria required by this Court. *See Simpson Housing Solutions, LLC v. Hernandez*, 347 S.W. 3d 1, 17 (Ark. 2009) ("[T]he federal courts apply a rigorous-analysis test for class actions, which this court has consistently rejected."). Nor does it allow any argument as to merits of the case, even when an understanding of the merits is critical to determining the propriety of class certification. *Id.* at 21.[6] Were the district court's remand order allowed to stand, there is a very real risk that absent class members will suffer the consequences.

IV. Post Hoc Notice and Other Actions Cannot Cure Due Process Violations Stemming From "Binding" Decisions Made Prior to Class Certification

The idea that a stipulation's impact on absent class members should be ignored in assessing federal jurisdiction because there *may* be an opportunity for an absent class member to opt out of the class or there *may* be a later decision on the adequacy of representation by a state court is out of step with the practical realities of class action litigation, antithetical to the principles underlying CAFA, and ultimately dismissive of absent class members' due process

[6] That view of class certification is equally contrary to the view of this Court. *Shutts*, 472 U.S. at 811 ("[I]f the forum . . . wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection.").

rights. The assumption that a stipulation to forfeit class members' rights actually causes them no harm, because subsequent proceedings may cure any injury, is false. The possibility that a state court may eventually allow class members to opt out or may decide to deny class certification on adequacy grounds does nothing to prevent the abuses that CAFA was enacted to prevent – namely, lawyer-driven suits that place financial gain for lawyers over recovery for the class.

As an initial matter, when a named plaintiff and his counsel make what they deem to be a binding decision for a putative class before they have been appointed class counsel under Rule 23, they are acting without authority to do so. *See, e.g.*, *Smith*, 131 S.Ct. at 2279-80. That is a fundamental violation of the due process rights of absent class members that cannot be cured through an after-the-fact finding that the named plaintiff and counsel adequately represent the interests of the class or through a notice to the class that attempts to explain away how these class members' rights were violated. *Cf. id*. at 2280 ("Neither a proposed class action nor a rejected class action may bind nonparties."). *See also Richards*, 517 U.S. at 801 (citing *Hansberry*, 311 U.S. at 40; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Mullane*, 339 U.S. at 319).

The possibility that a state court may ultimately find the named plaintiff or his counsel *inadequate* provides no greater protection. For one thing, the possibility that the class representative or his counsel will ultimately be deemed inadequate should prevent

a conclusion that recovery above the stipulated amount is impossible to a legal certainty, because it means that another class member or lawyer who is not personally bound by the stipulation may later be appointed to represent the class. *See Back Doctors*, 637 F.3d at 830-31 ("A representative can't throw away what could be a major component of the class's recovery. Either a state or a federal judge might insist that some other person, more willing to seek punitive damages, take over as representative.").

In addition, permitting the infringement of class members' rights on the basis that a state court will eventually determine the adequacy of counsel is, as a practical matter, insufficient to protect absent class members' rights. Even if class certification is ultimately denied, as opposed to a substitute plaintiff or counsel being appointed as a representative, that could occur years after the decision on federal jurisdiction. At that point, any class members interested in pursuing class litigation would have to begin anew, assuming that their claims were not time-barred.

Nonetheless, some courts have permitted a named plaintiff and his counsel to make binding decisions for a class on the theory that once the class is certified and notice is sent, those absent class members who disagree with the named plaintiff's decisions can simply opt out of the class. *See, e.g.*, *Goodner v. Clayton Homes*, No. 4:12-cv-04001, 2012 WL 3961306, *5 (W.D. Ark. Sept. 10, 2012) ("If a forum-state class member doesn't like the stipulation, he must either opt-out or live with the stipulation. . . .

Members whose claims arise out of state presumably have the same two choices."); *Smith v. Am. Bankers Ins. Co.*, No. 2:11-cv-02113, 2011 WL 6090275, *8 (W.D. Ark. Dec. 7, 2011) ("[P]utative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive."); *McClendon v. Chubb Corp.,* No. 2:11-cv-02034, 2011 WL 3555649, *5 (W.D. Ark. Aug. 11, 2011) ("Any arguments Defendants may have as to the named Plaintiffs' adequacy as class representatives may be addressed after remand. Furthermore, class members who do not agree with the way Plaintiffs have structured their claims are free to opt out of this action and bring their own suit structured in the manner they see fit."); *Tuberville v. New Balance Ath. Shoe, Inc.*, No. 1:11-cv-01016, 2011 WL 1527716, *4 (W.D. Ark. Apr. 21, 2011) ("[I]t is important to keep in mind that the Plaintiff in the case at bar has not yet been named class representative, nor has the class been certified by any court. It also follows that putative class members could simply opt out of the class and pursue their own remedies. . . .").

Other courts have found it sufficient that the state court, on remand, may consider the effect of a damages-limiting stipulation on class members when assessing the adequacy of counsel or the class representative. *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-cv-214-DPM, 2011 WL 1559234, *3 (E.D. Ark. Apr. 22, 2011) ("Reebok's attack on the stipulations goes more to Murphy's adequacy as a class representative and

counsel's adequacy as class counsel than to good faith. These issues can be addressed after remand."); *Thomas v. Countrywide Home Loans*, No. 3:11-cv-399-WKW, 2012 WL 527482, at *4 n.4 (M.D. Ala. Feb. 17, 2012) ("[S]uch a restriction might be a reason to deny class certification; in other words, the state court could conclude, after remand, that Hall is not an adequate class representative. This court should not, however, force a plaintiff to seek more money than she wants.") (quoting *Hall v. ITT Financial Services*, 891 F. Supp. 580, 582 (M.D. Ala. 1994)).

But due process requires more than an uncertain possibility of relief years in the future, particularly when absent class members may face the risk of losing their claims altogether. If a stipulation is effective, after all, its effect may be to "throw away what could be a major component of the class's recovery." *Back Doctors Ltd.*, 637 F.3d at 830-31. *See also Manguno*, 276 F.3d at 723-24 ("[I]t is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization."). Or a stipulation may winding up costing the class money, in the form of attorneys' fees. *See Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-cv-W-ODS, 2008 WL 441962, at *2 (W.D. Mo. Feb. 14, 2008). In such circumstances, post hoc "cures" may not provide absent class members relief.

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CONCLUSION

Permitting plaintiffs' attorneys to artificially limit the amount of damages sought on behalf of a putative class, prior to certification or any evaluation of the adequacy of representation, violates the due process rights of absent class members and undermines Congress's attempt to protect those rights against unscrupulous legal tactics. *Amicus* therefore urges this Court to hold that such stipulations can have no bearing on federal jurisdiction under CAFA. This Court should reverse the district court's order remanding this case to Arkansas state court.

Respectfully submitted,

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