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 United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a class action that is removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, may be remanded solely on the ground that a would-be named plaintiff purports to waive any recovery for the class above CAFA's $5 million jurisdictional threshold.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from

every region of the country.[1] The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

This case presents a question of vital importance to the Chamber's members which divides the federal courts: whether a putative class representative may evade the protections of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, § 4, 119 Stat. 4, 9-12—a law intended to guarantee a federal forum for significant class actions—by offering a stipulation purportedly waiving for herself and absent class members any recovery above CAFA's $5 million jurisdictional threshold. Many of *amicus*'s members have first-hand experience in state-court systems that refuse to subject proposed classes to anything like the meaningful scrutiny required under Federal Rule of Civil Procedure 23, and which employ procedural devices that can encourage nuisance litigation and force defendants to settle meritless claims. Because there is no vehicle that allows consolidation of related class actions in different States' courts (as exists, for example, under the federal multi-district litigation statute, see 28 U.S.C. § 1407(a)), many of the Chamber's mem-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a 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 intended to fund this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

bers have also been forced to shoulder the burden of simultaneously defending against a litany of overlapping class actions in state courts throughout the country.

Amicus has advocated strongly against abusive state class-action procedures. The Chamber was an early and vocal supporter of CAFA's enactment, and it has filed briefs on CAFA issues in this and other courts seeking to fulfill CAFA's guarantee of a federal forum for important class actions. *E.g.*, *Gay* v. *Morgan*, No. 06-1471, cert. denied, 552 U.S. 940 (2007); *Skechers U.S.A., Inc.* v. *Tomlinson*, No. 11-287, cert. denied, 132 S. Ct. 551 (2011). *Amicus* and its members thus have both a unique perspective on the question presented and a substantial interest in ensuring that CAFA's requirements are interpreted and enforced consistent with its purpose.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance to class-action defendants and absent class members. In enacting CAFA, Congress recognized that widespread "abuses of the class action device" in state courts had "harmed class members with legitimate claims and defendants that ha[d] acted responsibly." Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4. It likewise recognized that such abuses damage interstate commerce and undermine respect for the judicial system. *Id.* §§ 2(a)(2)(B)-(C), (4)(C), 119 Stat. 4, 4-5. CAFA therefore allows putative class actions to be removed to federal court, giving them the benefit of federal procedural protections, when more than $5 million is at issue.

Under the announced approach of the Eighth Circuit applied in this case, putative class representatives and their counsel may nullify CAFA's protections and defeat federal jurisdiction simply by signing a stipulation purporting to limit class recovery to $5 million or less; doing

so forces a remand to state court. That "automatic remand" rule invites the forum-shopping that Congress intended to stop by enacting CAFA. Putative lead plaintiffs and attorneys seeking to avoid federal jurisdiction in the future will invariably bring suit in those States within circuits that consider damages stipulations dispositive of CAFA's amount-in-controversy test, particularly in a select few counties notoriously hostile to class-action defendants. Absent this Court's review, the untenable regime before CAFA's enactment—where courts in a few "magnet" jurisdictions purported to bind the rights of other States' residents, effectively making policy for the Nation on significant issues—will not merely reappear but expand as well.

The Eighth Circuit's approach, moreover, prejudices the rights of plaintiffs and defendants alike and harms the public interest. Absent class members may find their individual recoveries reduced to a pittance based on a stipulation by a putative representative of undetermined adequacy. Defendants who try to settle such suits will be inevitably confronted by dissatisfied absent class members challenging any resulting settlement's enforceability under both state law and the federal Constitution. The Eighth Circuit's approach also inevitably produces splinter litigation spurred by the desire of absent class members to opt out where settlements are reduced by damage stipulations. The only beneficiaries of the chaos caused by the automatic remand rule are named plaintiffs and their counsel.

I. THE DECISION BELOW RAISES ISSUES OF VITAL IMPORTANCE TO THE NATION'S BUSINESS COMMUNITY

The question presented is of vital importance to the thousands of businesses confronted by class action litiga-

tion. Congress enacted CAFA to protect class-action defendants from arbitrary, opportunistic, and abusive forum-shopping in the state courts. Allowing a plaintiff's lawyer to evade CAFA through a stipulation purporting to limit damages artificially is directly contrary to that goal. The Eighth Circuit's approach threatens businesses across this Nation with the very problems CAFA sought to avoid.

A. Stipulating Damages To Evade CAFA Jurisdiction Encourages "Magnet Jurisdictions"

In drafting CAFA, Congress expanded federal jurisdiction over class actions to prevent the systematic abuse of the class-action procedure in state courts. The rule adopted by the court below effectively nullifies a key component of that effort.

1. Before CAFA was enacted, class-action plaintiffs regularly flocked to a small number of "magnet" jurisdictions with little or no connection to the nationwide claims they alleged. S. Rep. No. 109-14, at 13 (Feb. 28, 2005); see 151 Cong. Rec. 1551-1552 (Feb. 7, 2005) (statement of Sen. Frist). That concentration of lawsuits meant that a few courts would make important policy decisions for the rest of the country, "bind[ing] the rights of the residents of [other] States." Pub. L. No. 109-2, §2(a)(4)(C), 119 Stat. 4, 5; see also 151 Cong. Rec. 2636 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential increase in State class action cases in a handful of 'magnet' or 'magic' jurisdictions"). Unsurprisingly, the most "magnetic" courts are also the ones most willing to certify class actions with minimal scrutiny. S. Rep. No. 109-14, at 22-23 (describing how magnet courts easily certify significant class actions, even those already rejected as unsuitable for class treatment by federal or other state

courts); 151 Cong. Rec. 2071 (Feb. 10, 2005) (statement of Sen. Vitter) ("There is now in our country a full blown effort aimed at mining for jackpots in sympathetic courts known as 'magnet courts' for the favorable way they treat [class-action] cases.").

This case arises out of one of those "magnet jurisdictions"—the Circuit Court of Miller County, Arkansas. Pet. App. 15; Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind The Statute*, 35 J. Legis. 76, 95 & n.115 (2009) ("The most famous magnet jurisdictions are Madison County, Illinois and Miller County, Arkansas."). Indeed, the American Tort Reform Foundation named Miller County as a potential "judicial hellhole" given its courts' propensity to "unfair rulings" and "large awards," noting that the county has more tort cases *per capita* than any other county in the State. Am. Tort Reform Found., *Judicial Hellholes 2006*, at v, 22 (2006), available at http://bit.ly/LE8gxJ.

2. To discourage "magnet jurisdictions" and the forum-shopping they produce, CAFA creates federal jurisdiction for class actions "in which the matter in controversy exceeds the sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2). The statute goes on to clarify 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," *id.* § 1332(d)(6), "abrogat[ing] the [prior] rule against aggregating claims," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005).

Congress intended courts making that calculation to read CAFA's provisions "broadly" in favor of a federal forum. See, *e.g.*, S. Rep. No. 109-14, at 43 (Feb. 28, 2005) ("[N]ew section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its

provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant."); 151 Cong. Rec. 2637 (Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("[I]f a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction * * * ."); see *id.* at 2640. CAFA's removal provision thus should not be lightly defeated.

Notwithstanding Congress's clear intent, putative class representatives seeking to evade federal jurisdiction now regularly stipulate to limit damages to less than $5 million—to the apparent detriment of both named and potential class members who forfeit possible recovery and to the obvious detriment of the federal supervision over class actions that CAFA was designed to establish. Unsurprisingly, the Eighth Circuit's practice of reflexively remanding on the basis of such "stipulations" has allowed "magnet jurisdictions" to flourish. District courts in that circuit, for instance, have repeatedly ordered remand to state courts in recent years based on damages stipulations.[2] The frequency of such remands

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[2] See *Oliver* v. *Mona Vie, Inc.*, No. 11 Civ. 4125, 2012 WL 1965613, at *3 (W.D. Ark. May 31, 2012); *Smith* v. *Am. Bankers Ins. Co. of Fla.*, No. 11 Civ. 2113, 2011 WL 6090275, at *5-7 (W.D. Ark. Dec. 7, 2011); *Knowles* v. *Std. Fire Ins. Co.*, No. 11 Civ. 4044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011); *McClendon* v. *Chubb Corp.*, No. 11 Civ. 2034, 2011 WL 3555649, at *10 (W.D. Ark. Aug. 11, 2011); *Thompson* v. *Apple, Inc.*, No. 11 Civ. 3009, 2011 WL 2671312, at *2 (W.D. Ark. July 08, 2011); *Murphy* v. *Reebok Int'l, Ltd.*, No. 11 Civ. 214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011); *Tuberville* v. *New Balance Athletic Shoe, Inc.*, No. 11 Civ. 1016, 2011 WL 1527716, at *2 (W.D. Ark. Apr. 21, 2011); *Harris* v. *Sagamore Ins. Co.*, No. 08 Civ. 109, 2008 WL 4816471, at *2-3 (E.D. Ark. Nov. 3, 2008); *Dowell* v. *Debt Relief Am., L.P.*, No. 07 Civ. 39, 2007 WL 2907881, at *3 (E.D. Mo. Oct. 3, 2007).

has risen dramatically since the Eighth Circuit first suggested in *dicta* that a damages stipulation could defeat CAFA diversity jurisdiction. *Bell* v. *Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009). Its more recent opinion explicitly approving such stipulations, *Rolwing* v. *Nestle Holdings*, *Inc.*, 666 F.3d 1069, 1072 (8th Cir. 2012), can only encourage that trend.

Congress explicitly stated in CAFA's preamble that its goal was, in part, to "provi[de] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. 109-2, §4(b)(2), 119 Stat. 4, 5. Yet the Eighth Circuit's automatic-remand rule encourages deliberate efforts to frustrate federal jurisdiction, thereby undermining two of CAFA's central goals. Systematic evasion of the federal courts prevents the uniform and unbiased treatment of class actions, as would-be lead plaintiffs instead file only in the state courts most predisposed to their claims. S. Rep. No. 109-14, at 4 (describing how state courts often apply procedural rules inconsistently); 151 Cong. Rec. 1554 (Feb. 7, 2005) (statement of Sen. Specter) (class-action reform was meant to "prevent judge shopping to [forums with] a prejudicial predisposition on cases"). And the availability of "magnet jurisdictions" undermines Congress's attempt in CAFA to improve the quality of decision-making in class-action suits. State judges often lack law clerks or other support and can be "simply overwhelmed" by large and complex class-action cases. S. Rep. No. 109-14, at 14. Federal judges, by contrast, enjoy the use of clerks and special masters as needed. *Ibid.* A broad interpretation of CAFA's removal provisions is crucial to ensure that nationwide class actions can be handled both efficiently and fairly for all concerned.

Indeed, the automatic remand rule—remanding whenever the class representative or his counsel promises to limit the recovery—sets CAFA on its head. CAFA contains a variety of provisions mandating heightened review of *settlements* in federal court to ensure that class representatives and their counsel do not enrich themselves at the expense of absent class members.[3] But the automatic remand rule allows putative class representatives to stipulate away damages otherwise awardable to absent class members for nothing more than the chance of evading federal jurisdiction and, with it, the protections federal law would provide. Congress surely could not have intended that *settling* a case for a *guarantee* of 50 cents on the dollar would require compliance with extensive procedural safeguards, but signing a stipulation that gratuitously limits damages to a maximum of 40 cents (or 5 cents) on the dollar to avoid federal jurisdiction is permitted on the putative lead plaintiff's or counsel's unreviewable whim.

Congress, of course, established the $5 million amount-in-controversy requirement to limit the option of removal to putative class actions of sufficient magnitude. But artificial attempts to disfigure the case by anticipatorily amputating part of the recovery just to avoid federal jurisdiction does not undermine the case's importance. To the contrary, as explained below, it is far from

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[3] See 28 U.S.C. § 1712 (imposing limits on contingent fees and other attorney's fee awards in so-called "coupon settlements"); *id.* § 1713 (prohibiting a court from approving a settlement that would cause a net loss to any class member, unless the court finds in writing that nonmonetary benefits to that class member substantially outweigh the monetary loss); *id.* § 1714 (prohibiting class settlements that discriminate against class members based on geographic proximity to the court); *id.* § 1715 (requiring notification of appropriate State and federal officials).

clear that such stipulations even limit the defendants' exposure, given constitutional and ordinary class-action principles. See pp. 10-15, *infra*. And such artificial efforts actually *increase* defendants' litigation risk. See pp. 15-17, *infra*. If the protections of CAFA are to be given their proper effect, this Court's review is warranted.

B. Allowing Damages Stipulations To Defeat Federal Jurisdiction Imposes Intolerable Uncertainty In Contravention Of This Court's Precedents

The Eighth Circuit's decision does not merely promote the very "magnet jurisdictions" Congress sought to eliminate. It removes cases from federal cognizance despite intolerable uncertainty about the true amount that will be in controversy, in violation of this Court's precedents.

In *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), this Court held that a party seeking to defeat federal diversity jurisdiction by limiting the amount in controversy must demonstrate "to a *legal certainty*" that the plaintiff could not recover above the jurisdictional threshold. *Id.* at 289 (emphasis added); see also *id.* at 292 ("removal will be futile and remand will follow" where "it is *obvious* that the suit cannot involve the necessary amount" (emphasis added)). The Court so held even though, at least with respect to the diversity statute at issue there, it was the "intent of Congress drastically to restrict federal jurisdiction." *Id.* at 288.

In enacting CAFA, Congress acted to *expand* federal jurisdiction over class actions. See pp. 6-7, *supra*. As a result, CAFA must be construed to demand at least the same degree of legal certainty that this Court required in *St. Paul Mercury*. Thus, to the extent a stipulation purports to limit class-wide damages and thereby defeat

CAFA jurisdiction, the defendant at least should be permitted to insist on proof to a legal certainty that the stipulation will bind the entire class.[4]

Even setting aside case-specific defects in the stipulation at issue here,[5] the district court conducted no meaningful analysis of the stipulation's enforceability. For example, due process requires additional safeguards in class actions to ensure adequate representation and to protect the interests of absent class members. The Fifth and Seventh Circuits thus have indicated that a named plaintiff's ethical and fiduciary duties forbid her from stipulating away class recovery for the sake of defeating jurisdiction. See *Manguno* v. *Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724-725 (5th Cir. 2002); *Back Doctors Ltd.* v. *Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th Cir. 2011) (Easterbrook, C.J.); pp. 20-21, *in-*

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[4] The relevant degree of certainty and who bears the burden of proof have created an open and acknowledged conflict in the courts of appeals. *Frederick* v. *Hartford Underwriters Ins. Co.*, No. 12-1611, slip op. at 5 (10th Cir. June 28, 2012). For example, the Tenth Circuit requires that, once a defendant shows a sufficient amount in controversy by a preponderance of the evidence, *plaintiffs* must prove that it is *impossible* for them to hit the jurisdictional threshold. *Id.* at 8-9. The Seventh Circuit agrees. *Back Doctors Ltd.* v. *Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible."). By contrast, the Third and Ninth Circuits require the opposite: *Defendants* must "prove with legal certainty that the amount in controversy is satisfied." *Lowdermilk* v. *U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 996 (9th Cir. 2007) (quotation marks omitted); see also *Morgan* v. *Gay*, 471 F.3d 469, 475 (3d Cir. 2006), cert. denied, 552 U.S. 940 (2007). That conflict of authority, implicated here, weighs in favor of review.

[5] In this case, the district court ruled the stipulation sufficient even though it merely bound counsel to avoid *seeking* more than $5 million. Pet. App. 10-11. But a limit on what counsel *seeks* does not necessarily limit what a sympathetic court might award.

fra. Whether that prohibition applies in all cases is unclear; there may be situations where a properly appointed class representative might reasonably decide that the benefits to the entire class of litigating in state court outweigh the costs of a damages stipulation. But if that stipulation is to be given jurisdictional effect, the federal court would at the very least have to consider a host of due-process implications bearing on whether its enforcement is certain. It would have to consider whether the interests of absent class members "are in fact adequately represented by parties who are present." *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940). It would have to consider whether the potential conflicts of interest between the named plaintiff and her supposed constituents, see *id.* at 44—such as her ability to escape the limits on damages she set for the class by accepting "incentive payments" in settlement—are so great that the class was not, in fact, adequately represented at all. But neither the district court nor the court of appeals considered any of that here.

Moreover, where (as here) the stipulation is signed on behalf of a *putative* class representative—a plaintiff not yet certified as the *actual* representative of absent class members—her authority to bind putative class members is uncertain at best. Indeed, invoking *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368 (2011), petitioner insists that "in the absence of certification," a "proposed class action" cannot bind non-parties such as absent class members. See Pet. 11 (citing *Smith*, 131 S. Ct. at 2380, 2382)). Given that, and the inherent uncertainty of litigation, at the time of removal it may be impossible for a court to conclude with the requisite "legal certainty" that any

stipulation the lead plaintiff signs will in fact bind her would-be class.[6]

C. The Remand Rule Threatens To Deter Settlement And Spawn Satellite Litigation

The rule applied below also deters settlement, spawns litigation about the consequences of former litigation, and promotes serial lawsuits. It is no secret that the vast majority of class-action suits settle. But the risk that a damages stipulation or settlement might prove unenforceable impedes voluntary dispute resolution. In ordinary cases, the risk of follow-on lawsuits asserting the same claims is minimized by the *res judicata* effect of a judgment approving the class-action settlement. But courts have held that "a class action judgment will not bind absent members if they were not accorded due process of the law," and "[t]he preclusive effect of a prior judgment will depend upon whether absent members

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[6] Ironically, courts permitting putative class representatives to stipulate away a portion of the potential class recovery have invoked *St. Paul Mercury* for that result. But *St. Paul Mercury* concluded that a plaintiff may limit *his own* claims if he "does not desire to try his case in the federal court," even "though he would be justly entitled to more." 303 U.S. at 294. Asserting that "CAFA does not change the proposition that the plaintiff is the master of her own claim," some courts have reflexively engrafted *St. Paul Mercury* onto CAFA removal decisions. *Morgan*, 471 F.3d at 474; cf. *Lowdermilk*, 479 F.3d at 999 (noting that it was "preserv[ing] the plaintiff's prerogative" to limit recovery). But it goes well beyond *St. Paul Mercury* to hold that the plaintiff in a *putative* class action is master of *absent class members'* claims, long before any court has granted her authority as a proper class representative to bind the class. This Court has never extended *St. Paul Mercury* to allow a plaintiff to avoid federal jurisdiction by limiting the rights of other parties not before the court. Other courts have reached the opposite conclusion. See pp. 20-21, *infra*. Congress thus did not enact CAFA against a background presumption that the amount in controversy in a class action is determined solely by the putative class representative's choices.

were 'in fact' adequately represented by parties who are present." *Pelt* v. *Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). This Court has stated that "other state and federal courts are not required to accord full faith and credit to [a constitutionally deficient] judgment," *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982), and "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members," *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 900-901 (2008).

Where the named plaintiff purports to waive some of the class recovery, it is all but inevitable that dissatisfied absent class members represented by counsel seeking greater remuneration will file additional suits after settlement, asserting that they cannot be bound by its terms. Citing the putative class representative's decision to dramatically curtail the class's potential recovery for the sole purpose of avoiding federal jurisdiction, the new plaintiffs are likely to attack the lead plaintiff's representation as inadequate. And it is no answer to suggest that the original court might address those issues when first entering judgment or approving settlement. "It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1789, at 554-555 (3d ed. 2005).[7] The Eighth Circuit's approach thus does not

[7] The Advisory Committee's Note to the 1966 amendment of Rule 23 recognizes as much, noting that a court presiding over a class action should "carefully consider[]" the scope of its judgment to better fa-

merely subject defendants to potential liability far exceeding the $5 million cap. It threatens the finality of otherwise concluded class-action litigation and undermines incentives for voluntary resolution. Until this Court resolves the question presented, defendants will be caught in a Catch-22, forced to litigate or settle class-action cases knowing that the outcome might have no preclusive effect on later claims. It is thus impossible to say, at this point in time, that a damages stipulation of the sort at issue here provides the requisite "legal certainty."

D. The Eighth Circuit's Approach Threatens To Foster Splinter Litigation And Undermine The MDL Process

Even beyond the issues of enforceability and collateral attack, the Eighth Circuit's approach burdens defendants with needless splinter litigation. By artificially restricting recovery for remaining class members, the rule vastly increases each class member's incentive to opt out of any possible settlement. That multiplication of lawsuits creates the precise situation class-action settlements are meant to avoid. See, *e.g.*, Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members To Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 754-755 (1990) (explaining that defendants in a class action will grow more reluctant to settle as additional litigants opt out).

Nor is that opt-out risk merely theoretical. The plaintiffs' bar is extraordinarily competitive and responds quickly to perceived litigation opportunities. The circula-

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cilitate *subsequent* consideration of *res judicata* issues. See Fed R. Civ. P. 23 Advisory Comm. Note, 39 F.R.D. 98, 106 (1966).

tion of a notice accompanying a proposed class-action settlement will make it easy for enterprising lawyers to send out blanket solicitations of class members, offering the promise of an uncapped recovery. Several law firms, such as respondent's counsel, already have niche practices of filing class actions accompanied by binding stipulations in circuits that permit them. Pet. 8. If this Court allows that practice to continue, it will only be a matter of time before another group creates a lucrative cottage industry of assembling splinter actions composed of disaffected absent class members.

The resulting costs and consequences are aggravated further by the absence of mechanisms to organize competing claims. Congress relied on the Multidistrict Litigation (MDL) statute to assist in coordinating removed claims. That statute authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. §1407(a). By coordinating multiple cases in a single forum, the MDL statute permits litigation to progress in an orderly fashion, "prevent[ing] duplication of discovery and eliminat[ing] the possibility of conflicting pretrial rulings." *In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig.*, 423 F. Supp. 937, 939 (J.P.M.L. 1976). Just two Terms ago, this Court recognized the crucial interplay between CAFA and the MDL statute, explaining that "to the extent class actions raise special problems of relitigation, Congress has provided a remedy": CAFA allows removal of "any sizable class action involving minimal diversity," while the MDL statute allows "federal courts [to] consolidate multiple overlapping suits against a single defendant in one court." *Smith* v. *Bayer*, 131 S. Ct. at 2382.

But the MDL statute does not apply to related cases pending in state courts. The rule embraced below thus effectively nullifies the benefits and protections MDL affords to defendants. It allows a plaintiff to do away with the coordination afforded by MDL procedures at will. And it requires defendants to litigate a glut of related class actions in state courts across the Nation.

E. The Decision Below Benefits Named Plaintiffs And Class Counsel At The Expense Of Defendants And Unnamed Class Members

The Eighth Circuit's approach, at bottom, allows putative class representatives to circumvent congressionally imposed protections simply by betraying the class they purport to represent. By stipulating away absent class members' potential recovery, they can deny absent plaintiffs the benefit of federal statutory protections designed to guard against precisely such self-serving behavior. That outcome is perverse. And it also prejudices defendants by denying them the enhanced procedural protections afforded by federal court. The only persons who would benefit from the Eighth Circuit's approach are would-be lead plaintiffs and their counsel.

The impact should not be underestimated. To be sure, putative class representatives and their counsel do purport to waive recovery in excess of $5 million to gain a remand to state court. But such stipulations have become ubiquitous, particularly in courts within the Eighth Circuit. See *supra* p. 7 & n.2. And it is easy to see why. The limitations of a recovery-capping stipulation often represent little sacrifice for class representatives and class counsel. Class representatives can often expect that any decrease in their pro rata share of the capped class award will be offset by incentive payments they could receive from any settlement agreement. See, *e.g.*,

Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 Geo. J. Legal Ethics 873, 875 (2010) (noting that "incentive awards are common in class action settlements").

That class counsel's fees are also limited by the $5 million cap only aggravates the problem: Counsel's fee demands stay the same, but the pot available for paying those fees and compensating the class shrinks. State court procedures on class certification and settlement often lack the rigor of CAFA and Rule 23. And if plaintiffs' counsel sacrifices fees by limiting her clients' recovery, she can make up the difference through filing new lawsuits in bulk. As petitioner notes, see Pet. 8, respondent's counsel has filed dozens of cases with damages supposedly just under $5 million—most of them in Miller County Circuit Court.

II. THIS COURT'S REVIEW IS NEEDED TO ENSURE CAFA'S UNIFORM APPLICATION

In enacting CAFA's removal provisions, Congress recognized that even a few States' inequitable practices could have a national impact—not merely by "adversely affect[ing] interstate commerce" and "undermin[ing] public respect for our judicial system," but also by "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." Pub. L. No. 109-2, §§2(a)(2)(B)-(C), (4)(C), 119 Stat. 4, 4-5. The existing conflict among the inferior federal courts frustrates Congress's efforts to provide consistent jurisdictional rules and to prevent a handful of state courts from wielding outsized influence. This Court's review is needed to resolve that conflict and achieve the uniformity Congress intended.

A. The Circuits Have Reached Inconsistent Results

The courts of appeals are divided on whether a putative class representative may evade federal jurisdiction merely by purporting to stipulate away class members' possible recovery.

Several courts have endorsed the automatic remand rule followed below, affording putative class representatives unbridled discretion to limit the recovery of absent class members for the sole purpose of avoiding the federal courthouse. Although the Eighth Circuit initially endorsed that approach in a single line of dictum,[8] it has since ripened into a clear holding. See *Rolwing*, 666 F.3d at 1072. Three other circuits follow a similar approach. The Ninth Circuit has concluded that class representatives may avoid removal under CAFA by stipulating to limited recovery for absent class members. *Lowdermilk*, 479 F.3d at 999 n.5. In a pre-CAFA case, the Eleventh Circuit held—with no analysis—that a named plaintiff's stipulation that each individual class member would neither request nor accept damages in excess of $75,000 could be given controlling weight on a motion to remand. *Darden* v. *Ford Consumer Fin. Co.*, 200 F.3d 753, 755-756 (11th Cir. 2000). And the Third Circuit has adopted a seemingly extreme version of that approach, remanding even on the basis of a damages limitation that was nonbinding under relevant state law. *Morgan*, 471 F.3d at 476-477.

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[8] See *Bell*, 557 F.3d at 958 ("In order to ensure that any attempt to remove would have been unsuccessful, Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand; it is too late to do so now.").

By contrast, the Fifth and Seventh Circuits have taken the opposite view. In *Manguno*, for example, the plaintiff attempted to stave off removal by purporting to waive the class's right to attorney's fees otherwise available to prevailing plaintiffs under state law. 276 F.3d at 721-722. Denying the putative class representative's motion to remand, the Fifth Circuit held that she could not limit the class's recovery in order to evade federal jurisdiction. "[I]t is improbable," the Fifth Circuit reasoned, "that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* at 724-725. Although *Manguno* predates CAFA, the Fifth Circuit has since made clear that putative class representatives similarly cannot evade CAFA's removal by stipulating away the recovery of absent class members. *Ditcharo* v. *United Parcel Serv., Inc.*, 376 F. App'x 432, 437 (5th Cir. 2010) (denying motion to remand because the proffered stipulation did "not provide [putative class representatives] with the authority to deny other members of their putative class action the right to seek an award greater than $75,000").[9]

The Seventh Circuit reached the same conclusion in *Back Doctors*. Because a lead plaintiff owes a fiduciary duty to her class, the court held that she "can't throw away what could be a major component of the class's recovery" merely to "ensure that the stakes fall under $5 million." 637 F.3d at 830-831. That decision was consistent with the Seventh Circuit's earlier endorsement of

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[9] Unsurprisingly, district courts within the Fifth Circuit have reached the same result. See *Belin* v. *Int'l Paper Co.*, No. 11 Civ. 215, 2011 U.S. Dist. LEXIS 69449, *7-8 (W.D. La. June 28, 2011); *Ditcharo* v. *United Parcel Serv.*, No. 08 Civ. 3648, 2009 WL 211146, at *5 (E.D. La. Jan. 28, 2009); *Pendleton* v. *Parke-Davis*, No. 00 Civ. 2736, 2001 WL 96408, at *4 (E.D. La. Jan. 31, 2001).

the Fifth Circuit's approach in *Manguno*. See *Pfizer, Inc.* v. *Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (Posner, J.) (citing *Manguno*, 276 F.3d at 724).

B. The Circuit Division Encourages Forum-Shopping And Undermines CAFA's Purpose

The very existence of those disparate results defeats Congress's purposes in enacting CAFA. As explained below, the automatic remand rule itself has had that effect, allowing the reproduction of "magnet" jurisdictions, and circumvention of CAFA's protections, in those courts following that erroneous rule. But the current division of authority exacerbates those difficulties. For those seeking to avoid CAFA and pursue their cases in state court without federal intervention, the States within circuits following the automatic remand rule (the Third, Eighth, and Ninth Circuits) have a peculiar magnetism, particularly those States, such as Arkansas, that employ lax class-certification standards. It cannot be that Congress enacted CAFA's uniform rules to eliminate so-called magnet jurisdictions at the state level only to watch new magnet jurisdictions arise because the federal courts are divided on CAFA's application. CAFA cannot serve its important role absent this Court's review.

The conflict also undermines the interest of judicial efficiency and economy. "Nothing is more wasteful than litigation about where to litigate * * * ." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). But the current conflict has the unfortunate consequence of producing just such litigation, "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010). Without a clear, uniform answer to whether and when stipulations purporting to limit class recovery re-

quire remand, state and federal courts across the country will be caught in a game of jurisdictional tug-of-war between parties seeking to litigate in what each views as the more favorable forum.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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