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 *AMICI CURIAE* PROFESSORS E. DONALD ELLIOTT AND JOHN J. WATKINS IN SUPPORT OF PETITIONER

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES & RULES

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae Professor E. Donald Elliott teaches courses at the Yale Law School on introductory and advanced civil procedure, administrative law, environmental law, and energy law. Professor Elliott is deeply interested in the subject of civil procedure, including class actions, and has written, taught, and testified on the subject of the Class Action Fairness Act (CAFA). He began teaching at Yale in 1981. Professor Elliott testified pro bono before both the United States House of Representatives and the United States Senate in support of CAFA. He is also a partner at the law firm of Wilkie Farr & Gallagher, LLP; a Senior Fellow of the Administrative Conference of the United States; and a former consultant on improving the relationship of law and science to the Federal Courts Study Committee, which was chartered by Congress to make recommendations

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief. Copies of petitioner's and respondent's consents are filed herewith. Funding for this brief was provided by the American Insurance Association, the Property Casualty Insurers Association of America, and the National Association of Mutual Insurance Companies.

for improving the federal courts, and to the Carnegie Commission for Law, Science and Government.

Professor Elliot is the author or co-author of seven books and has published more than 70 articles in professional journals. From 1989 to 1991, he served as Assistant Administrator and General Counsel of the U.S. Environmental Protection Agency. In 1993, he was named to the first endowed chair in environmental law and policy at any major American law school, the Julien and Virginia Cornell Chair in Environmental Law and Litigation at the Yale Law School. From 2003-2009, he was a member of the National Academy of Sciences Board on Environmental Studies and Toxicology, which advises the federal government on environmental issues. He is an elected member of the American College of Environmental Lawyers as well as a member of the boards of the Environmental Law Institute, the Center for Clean Air Policy, and New York University's Institute for Policy Integrity.

Professor John J. Watkins is the William H. Enfield Professor of Law Emeritus at the University of Arkansas School of Law in Fayetteville. From 1983 until his retirement in 2006, he taught civil procedure, federal courts, conflict of laws, appellate practice, and mass media law. Post-retirement, he continues to teach part-time at the law school. Professor

Watkins is a member of the Arkansas Supreme Court's Committee on Civil Practice, which proposes revisions to the Rules of Civil Procedure, Rules of Appellate Procedure-Civil, and Supreme Court Rules, and he has also served as its reporter and advisor. Professor Watkins has served as a Special Justice of the Supreme Court of Arkansas. He is the author or co-author of three books and four dozen law review articles. Throughout his career, Professor Watkins's particular interest and focus has been on the subject of civil procedure.

The purpose of this brief is to address matters that bear on the Court's determination of an important issue regarding class actions: whether a named class action plaintiff may successfully evade federal court jurisdiction by filing with his class action complaint a "stipulation" that attempts to limit the damages he seeks for the absent putative class members to less than the federal jurisdictional threshold of $5 million. This brief explains how such a stipulation contravenes both the plain language of 28 U.S.C. § 1332(d)(6), as amended by CAFA, as well as the history of class actions and the legislative history of CAFA.

STATEMENT

On April 13, 2011, respondent Greg Knowles ("Knowles") commenced the underlying lawsuit against petitioner The Standard Fire In-

surance Company ("Standard Fire") by way of a complaint filed in the Circuit Court of Miller County, Arkansas. The complaint alleges that Standard Fire insured Knowles's dwelling; Knowles suffered damage to his property on or about March 10, 2010; Knowles made a claim for his loss; and in making payment to Knowles, Standard Fire failed to include certain fees for general contractor services known as "general contractor overhead and profit" ("GCOP"). Pet. App. 3, 63-65. Knowles asserts that Standard Fire concealed information regarding his entitlement to GCOP and that Standard Fire's failure to compensate him for GCOP constitutes a breach of the policy contract. *Id*. at 3, 64, 69-70, 71-72.

Knowles filed his complaint as a putative class action under Arkansas Rule of Civil Procedure 23. *Id*. at 2-3, 55-75. He purports to bring his lawsuit on behalf of other policyholders in Arkansas who received payment from Standard Fire for physical loss or damage to their dwellings between January 1, 2009 and December 31, 2010, *id*. at 3, 65, excluding various persons, *id*. at 65-66. Attached to Knowles's complaint is a sworn statement by him (the "Stipulation") that he will not seek on behalf of himself or any other individual class member damages in excess of $75,000, or damages in the aggregate in excess of $5,000,000, inclusive of costs and attorneys' fees. *Id*. at 5-6, 74-75.

On May 18, 2011, Standard Fire timely removed the matter to the United States District Court for the Western District of Arkansas. *Id.* at 3, 36-54. On June 6, 2011, Knowles filed a motion to remand, asserting that the amount in controversy did not exceed the $5 million threshold for removal jurisdiction under 28 U.S.C. § 1332(d). *Id.* at 4. On December 2, 2011, the District Court entered an order granting Knowles's motion. *Id.* at 2. In entering its order, the District Court concluded that, although Standard Fire had demonstrated that the aggregated claims in the putative class exceeded $5,000,000, Knowles had properly limited the amount in controversy to $5,000,000 or less through his Stipulation. *Id.* at 10-11, 15.

Thereafter, Standard Fire filed a petition for permission to appeal the District Court's decision with the United States Court of Appeals for the Eighth Circuit. On February 2, 2012, the Court of Appeals issued its decision in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), concluding that a putative class representative could preclude removal under 28 U.S.C. § 1332(d)(6) by stipulating that the class would not accept damages (inclusive of costs and attorneys' fees) in excess of $4,999,999. Pet. App. 24. On January 4, 2012, the Court of Appeals denied Standard Fire's petition for permission to appeal, *id.* at 1, and on March 1, 2012,

the court denied Standard Fire's petition for rehearing *en banc*. *Id*. at 16. On August 31, 2012, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

In 2005, Congress enacted the Class Action Fairness Act of 2005 ("CAFA"), amending the diversity jurisdiction statute, 28 U.S.C. § 1332, to vest original jurisdiction in the federal district courts over certain class actions in which the amount in controversy exceeds "the sum or value of $5,000,000, exclusive of interest and costs." *Id.* § 1332(d)(2). To ascertain whether the $5 million threshold has been satisfied in any particular case, Congress explicitly required that "the claims of the individual class members shall be aggregated." *Id.* § 1332(d)(6). As the District Court determined, the aggregated claims of the purported class in this case exceed the $5 million threshold.

In order to defeat federal jurisdiction, Knowles offered his Stipulation, purporting to bind all members of the class to his assertion that the class would not accept payment in excess of $5 million. But Knowles could not bind the absent class members in this manner because the class has not yet been certified and Knowles lacked the capacity to speak on their behalf. Knowles's transparent attempt to avoid federal jurisdiction in this way is thus a nullity

on its face. Accordingly, in applying section 1332, the courts below should have aggregated the claims as the statute directs, rather than accept his Stipulation.

But even if the Stipulation was not a nullity on its face, the courts below still should have ignored it and aggregated the claims for purposes of determining their jurisdiction. In enacting CAFA, Congress intended to eliminate the kind of jurisdictional gamesmanship at issue here. As the legislative history reveals, Congress was well aware of the practice of litigants stipulating to artificially reduced amounts in controversy to avoid federal jurisdiction; Congress determined that this practice was abusive; and Congress amended section 1332 to address the abuse in the context of class actions. Specifically, Congress stated flatly in section 1332(d)(6) that, in determining the $5 million amount in controversy, the district court "shall" aggregate the claims. Congress did *not* say that the court shall aggregate the claims unless the litigants stipulate to an amount less than $5 million. Congress stated that the claims shall be aggregated, period. Because the courts below did not follow Congress's directive, this Court should reverse.

ARGUMENT

A. The Plain Language of Section 1332(d)(6) Defeats Knowles's Efforts to Avoid Federal Jurisdiction.

As part of its enactment of CAFA in 2005, Congress amended the diversity jurisdiction statute, 28 U.S.C. § 1332, to vest original jurisdiction in the federal district courts over certain class actions in which the amount in controversy exceeds "the sum or value of $5,000,000, exclusive of interest and costs . . . ." *Id.* § 1332(d)(2). Congress enacted this provision to facilitate the removal "to federal court [of] any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In applying section 1332(d)(2), Congress provided unambiguously that:

> In any class action, 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, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6) (emphasis added).

Congress's use of the term "shall" in section 1332(d)(6) indicates that Congress intended its directive to be mandatory. As this Court has

explained, use of "the mandatory 'shall,' . . . normally creates an obligation impervious to judicial discretion." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). There is all the more reason to adopt that conclusion here because elsewhere in section 1332, Congress used the term "may" when it wished to vest discretion in the district courts. *See, e.g.,* 28 U.S.C. § 1332(b) (providing that, in certain instances, a district court "may" deny costs to a plaintiff or "may" impose costs on a plaintiff). Where Congress uses the term "shall" in one part of a statute and the term "may" in a different part, the use of the mandatory "shall" is interpreted "to impose discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see also United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895).

In this case, the District Court determined that Standard Fire satisfied its initial burden of proving by a preponderance of the evidence that the actual amount in controversy, when aggregated, reached, if not exceeded, the minimum $5 million threshold for jurisdiction. Pet. App. 8. The question presented is whether Knowles may, by his Stipulation, artificially circumscribe the amount of the claims. The answer is that he may not.

Regardless of whether Knowles could agree by stipulation to limit the amount of *his*

individual claim to avoid federal jurisdiction, he could not do so in a putative class action lawsuit on behalf of the purported class. Where, as here, there has been no class certification, Knowles could not by stipulation bind the members of the class he did not represent. *See Smith*, 131 S. Ct. at 2381. Because the plain text of CAFA requires the aggregation of Knowles's claim with absent class members to determine whether federal jurisdiction is proper, Knowles alone cannot by stipulation keep the class action out of federal court. To the extent there is any doubt about this, the Court should err on the side of favoring federal jurisdiction and vindicating Congress's clear purposes in enacting CAFA. As stated in the legislative history (discussed in greater detail below), "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000,' the court should err in favor of exercising jurisdiction over the case." S. REP. NO. 109-14, at 42 (2005).

B. Knowles's Stipulation Is a Nullity, and CAFA Was Intended to Remedy the Very Gamesmanship at Issue Here.

The history of class actions is one of an expanding concept. It is also a history marred by significant potential for systemic abuse. Three forms of abuse are relevant here—inadequate representation, remedial unfairness to plaintiffs and defendants alike, and efforts to manipulate

the amount in controversy to avoid federal court jurisdiction in the removal context.

While the binding nature of class actions is a critical component of their utility, it is also a potential source of harm to the extent it involves a deprivation of the rights of absent class members. That is why this Court has historically emphasized the importance of adequate representation as a necessary precondition to the binding nature of class action litigation. The representation requirement is particularly important in light of the new aggregation requirement in CAFA, because Knowles seeks to bind absent class members to an artificially low stipulated value for their claims prior to certification. That effort conflicts with the historical development of class actions, and the rule that a purported class representative is unable pre-certification to bind a putative class. *See Smith*, 131 S. Ct. at 2381. Knowles's effort also conflicts specifically with Congress's intent in enacting CAFA to prevent plaintiffs from artificially limiting the amount in controversy to avoid federal jurisdiction over removed class action matters. Accordingly, the Court should reverse the decision below.

1. The History of Class Actions

Class actions have deep historical roots, extending back almost a millennium to cases brought before the English chancery courts.

Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 688-90 (1997). In the United States, the class action concept initially evolved in equity as an exception to the necessary party rule. Justice Story first articulated the exception in *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820) (no. 17,424) (riding circuit), adopting the view that cases might proceed without joinder of all interested parties

> where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree.

Id. at 722.

When the Court ultimately adopted Federal Equity Rule 48 to regulate federal equity cases

and permit representative suits in some matters, it mirrored Justice Story's exception, providing that

> [w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Equity R. XLVIII, 42 U.S. (1 How.) lvi (1843) (Federal Equity Rule 48). As the closing sentence quoted above indicates, however, a decision in a class action would *not* necessarily bind absent parties, and it was not long before courts and legislatures recognized the need for a class action device that would have that effect. Of course, the real question became how that might be accomplished fairly.

The Field Code—the first significant attempt in the United States to replace common law rules of pleading with modern rules of civil procedure—provided a type of binding class ac-

tion device. The relevant provision was fairly simple, requiring only that several parties demonstrate a common interest in law or fact:

> when the question is one of a common or general interest of many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

N.Y. CODE CIV. PROC. § 610 (1850) (relevant Field Code provision as adopted in the New York Field Codes); *see also* NEWBERG ON CLASS ACTIONS § 13:2 at 399-400 (4th ed. 2002). Beginning in 1849, numerous jurisdictions adopted the Field Code, giving rise to the modern class action concept. NEWBERG ON CLASS ACTIONS § 13:1 at 399 (4th ed. 2002); S. REP. NO. 109-14, at 6 (2005).

Following the approach taken in the Field Code, this Court effectively abandoned the last sentence of Federal Equity Rule 48 when it noted in *Smith v. Swormstedt* that a decision in a representative suit bound absent class members. 57 U.S. 288, 303 (1853) ("For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree

binds all of them the same as if all were before the court.").[2] In 1912, the Court then borrowed language from the Field Code for its new Federal Equity Rule 38, substantially revising former Rule 48 and effectively harmonizing it with *Smith*. Equity R. 38, 226 U.S. 659 (1912) (Federal Equity Rule 38).[3]

In 1937, the new Federal Rules of Civil Procedure were promulgated, merging law and equity, and adopting Rule 23 as a "substantial restatement of [former] Equity Rule 38." FED. R. CIV. P. 23 adv. cmt. n. to Subdivision (a) (1937).[4]

---

[2] Notably, however, the Court stressed the importance of the trial court ensuring that the absentees on both sides were adequately represented. *Id.* at 312-13.

[3] Federal Equity Rule 38 provided that

> [w]hen the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Equity R. 38, 226 U.S. 659 (1912).

[4] As initially formulated, Rule 23 provided:

> (*a*) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all,

Almost immediately, however, the new rule was criticized as too abstract and difficult to apply. *See* Kalven, *supra* note 4, at 695-714; ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 243-95 (1950). Among other things, it did not specify whether or when absent class members would become bound by a judgment. Kalven, *supra* note 4, at 696.

In 1940, the Court added some clarification in *Hansberry v. Lee*, concluding that persons whose interests had not been adequately represented were not bound by the judgment in a

---

> sue or be sued when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 696 (1941).

class action. 311 U.S. 32 (1940). Although not decided under Rule 23, the decision focused attention on adequate representation as a key requirement for a binding decision. *Id.* at 41-43, 45-46.

In 1966, Rule 23 was substantially amended, providing specifically that a judgment in a class action would bind absent class members premised on the concept of adequate representation. FED. R. CIV. P. 23 (1966). Under the amended rule, a class action could be brought in federal court if "the claims or defenses of the representative parties [were] typical of the claims or defenses of the class, and . . . the representative parties [would] fairly and adequately protect the interests of the class." *Id.*[5] In this case, of

---

[5] As amended in 1966, Rule 23 provided in relevant part that

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a) (1966).

course, Knowles does not yet represent anyone because the class has not yet been certified. Consistent with the historical concern of adequate representation, his effort to bind the class to an artificially manipulated amount in controversy is properly a nullity. *See Smith*, 131 S. Ct. at 2381. For this reason alone, the Court should reverse the decision below.

2. Class Action Expansion and Abuse; Congress's Response in 2005

The amendments to Rule 23 in 1966 were intended to facilitate the use of class actions to advance civil rights litigation. *The Class Action Fairness Act of 1999: Hearings on S. 353 Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. of the Judiciary*, 106th Cong. 60-61 (1999) (hereinafter "*Hearings on S. 353*") (Prepared Statement of John P. Frank). As reformulated in 1966, Rule 23 was not intended to be used frequently (if at all) in product liability or mass tort controversies. *Id.* at 65; S. REP. NO. 109-14, at 7 (2005). Underscoring the limited focus of the rule, the drafters expressed "great concern that in mass torts perhaps there should be no class actions at all." *Hearings on S. 353* at 63.

Despite those reservations, beginning in the 1980s, courts began expanding class actions beyond the civil rights context out of concern

that the sheer volume of individual tort cases would clog the judicial system if not resolved through the class action mechanism. S. REP. NO. 109-14, at 7 (2005). A major challenge since then has been to adapt and apply a tool designed to facilitate civil rights litigation for purposes it was never meant to serve. *Id.*

From the outset of its expanded use in the mass tort context, the class action mechanism has been subject to significant abuse. Among other things, lawyers representing plaintiffs in class actions have brought a "flood of class actions in . . . state courts," straining the resources of these courts. S. REP. NO. 109-14, at 13 (2005). Class action filings in state court over the ten years prior to the enactment of CAFA grew more than three times faster than class action filings in federal court—increasing by more than 1,000 percent. *See id.*

Some plaintiffs' lawyers targeted particular state "magnet courts," and in these venues, the number of class action filings filed annually increased by over 3,500 percent. *Id.* According to the Senate Report, this "dramatic explosion" occurred because "some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions." *Id.* at 14. In addition, state court judges often do not have nearly the same resources as federal judges and often lack

the ability to properly supervise proposed class action settlements. *Id.*

The plaintiffs' class action bar was quick to exploit this situation, and a predictable parade of horribles followed: "lawyers, not plaintiffs, benefit[ed] most from settlements"; "corporate defendants [were] forced to settle frivolous claims to avoid expensive litigation," which drove up consumer prices; "constitutional due process rights [were] ignored in class actions"; and "expensive and predatory copy-cat cases force[d] defendants to litigate the same case in multiple jurisdictions, driving up consumer costs." *Id.* at 14; *see also* 149 CONG. REC. S1873 (daily ed. Feb. 4, 2003) (statement of Sen. Grassley).

Congress's motivation to enact CAFA was driven by a long list of these and other abuses and perceived abuses, including a vast catalogue of cases where plaintiffs' class action attorneys reaped millions in attorneys' fees while the plaintiffs themselves received *de minimis* compensation, *see* S. REP. NO. 109-14, at 14-15 (2005), or nearly worthless promotional coupons to buy more products from the defendants, *id.* at 15-20. The Senate Report also discusses in depth the practice of "judicial blackmail," whereby plaintiffs' attorneys would bring a class action and basically force corporate defendants to settle rather than litigate expensive, frivolous actions. *Id*. at 20.

In Congress's view, this occurs because "state court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." *Id.* at 20-21; *see also Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Sen. Comm. on the Judiciary*, 106th Cong. 97 (1999) (statement of Prof. E. Donald Elliott). Intense pressure to settle arises because class actions often seek hundreds of millions of dollars in damages, and the ensuing leverage that plaintiffs' attorneys enjoy over defendant corporations, coupled with the promise of hefty attorneys' fees, has encouraged the filing of even more class action suits. S. REP. NO. 109-14, at 20-21 (2005).

Another type of class action abuse discussed in the Senate Report concerns the violation of out-of-state defendants' due process rights. For example, some state court judges have been willing to certify the class even before the defendant has received or has had a chance to respond to the complaint. *Id.* at 21-22. Other state courts have certified classes without regard to whether they meet the requisite certification requirements—sometimes even after federal

courts have already found them to be *un*certifiable. *Id.* at 22-23.

In addition, some plaintiffs' class action lawyers file "copy cat" class action claims asserting similar claims on behalf of essentially the same people, either because they want to take over the lead role from another law firm or because they want to forum shop to find a more malleable judge. *Id.* at 23. When this occurs in different jurisdictions, there is typically no state court mechanism for consolidating or coordinating the cases, resulting in enormous waste and conflict. *Id.*

One potential remedy to these problems in diversity cases has been the longstanding mechanism of removal. Plaintiffs' class action lawyers, however, have developed techniques to avoid removal, and chief among the issues discussed prominently in CAFA's legislative history were "the two most common tactics employed by plaintiffs' attorneys in order to guarantee a state court tribunal . . .: adding parties to destroy diversity and shaving off parties with claims for more than $75,000." *Id.* at 26. As the legislative history reveals, Congress considered manipulations of the amount in controversy to be abusive, *id.*, and specifically targeted them for reform, including the requirement in amended section 1332(d)(6) that claims must be aggregated in determining the $5 million threshold. In addition,

removal is the linchpin of Congress's remedial scheme: the efficacy of Congress's various mechanisms for dealing with many of the abuses outlined above turn on getting a case into federal court. Thus, the ability of a putative plaintiff to manipulate the amount in controversy to avoid federal jurisdiction strikes at the very heart of Congress's efforts.

Among other things, CAFA carefully expanded federal diversity jurisdiction so that truly interstate class action cases could be heard in federal court, specifically amending the removal provisions to make it harder for class action plaintiffs' attorneys to "game the system" by keeping cases out of federal court, and enabling "copycat" cases to be consolidated in a single federal court, *id.* at 27, and providing far greater scrutiny of class action settlements, *id.* at 27-28. In particular, the legislative history reflects Congress's specific intent that CAFA would promote the exercise of diversity jurisdiction and removal by granting federal courts original jurisdiction to hear "interstate class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant; and (b) the amount in controversy exceeds $5 million (aggregating claims of all purported class members, exclusive of interest and costs)." *Id.* at 28.

The amendments to 28 U.S.C. § 1332(d) were intended "to *strongly favor* the exercise of federal diversity jurisdiction over class actions with interstate ramifications." *See* S. REP. NO. 109-14, at 35 (2005) (emphasis added). The amendments also gave federal courts discretion, "in the interests of justice," *id.* at 36, to determine whether to exercise jurisdiction in some situations based on several factors, one of which is "[w]hether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction." *Id.* at 37. If, for example, the plaintiffs have proposed a "class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims," such that the federal court "concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction." *Id.*

Under the specific amendments to section 1332(d)(6) at issue in this matter, individual class members' claims are to be aggregated to determine whether the amount in controversy exceeds $5 million. The legislative history reflects Congress's intent that if a federal court is uncertain about whether "all matters in controversy" in a class action claim exceed, in the aggregate, $5 million, "the court should err *in favor of* exercising jurisdiction over the case." S. REP. NO. 109-14, at 42 (2005) (emphasis added). The amount in controversy is thus to be considered expansively, from either the viewpoint of the de-

fendant or the plaintiff, and regardless of the kind of relief sought. *Id.* Moreover, the Senate Report noted that, in declaratory relief cases, "the federal court should include in its assessment [of the amount in controversy] the value of all relief and benefits that would logically flow from the granting of the declaratory relief sought by the claimants." *Id.* at 43. In sum, the amendments to section 1332(d) were "intended to *expand substantially* federal court jurisdiction over class actions. Its provisions should be *read broadly, with a strong preference that interstate class actions should be heard in federal court* if properly removed by any defendant." *See* S. REP. NO. 109-14, at 43 (2005) (emphases added).

The provisions of CAFA should be interpreted in a manner consistent with the legislation's object and purpose. *E.g., Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve."); *see also Johnson v. United States*, 529 U.S. 694, 709 & n.10 (2000) (after noting that Senate Report was "explicit" about congressional purpose, holding that "we . . . have traditionally sought to construe a statute so as to reach results consistent with what Chief Justice Taney called 'its object and policy.'") (quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 12 L. Ed. 1009 (1849)); *Evans v. Jeff D.*, 475 U.S.

717, 744 (1986) (Brennan, J., dissenting) ("We must interpret the statute in the way that is most consistent with Congress' broader purpose; a result which is 'plainly at variance with the policy of the legislation as a whole' . . . cannot be correct.") (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)) (citing *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 56 (1983) (statute should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"); *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *Lynch v. Overholser*, 369 U.S. 705, 710 (1962); *United States v. Brown*, 333 U.S. 18, 25-26 (1948); *Sorrells v. United States*, 287 U.S. 435, 446 (1932); *United States v. Freeman*, 3 How. 556, 565 (1845)).

The extensive analysis in the Senate Report leaves no doubt that CAFA was enacted to thwart efforts by plaintiffs' class action attorneys to artificially manipulate the $5 million amount-in-controversy requirement. As a general rule, agreements of the parties do not control jurisdiction, especially collusive agreements. *See* 28 U.S.C. § 1359; *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828-29 (1969). In any event, pre-certification agreements by representative parties simply do not bind the class. Consistent with the legislative history of CAFA, courts

should ignore stipulations of the kind at issue in this case and properly aggregate the claims of the purported class as the statute plainly directs.

CONCLUSION

For the foregoing reasons, as well as those petitioner presents, the decision below should be reversed.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Collin O'Connor Udell
Matthew J. Delude
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

October 26, 2012 *Counsel for Amici Curiae*