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 writ of certiorari to the United States Court of Appeals for the Eighth Circuit

# BRIEF OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, INDIANA, KANSAS, MICHIGAN, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

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

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## INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici curiae* are States that share a concern about the use of novel class-action procedures to abridge the rights of their citizens. Many of them have implemented state-level reforms to prevent such abuses. Others have intervened in class litigation in the past to challenge collusive or unfair settlements. They have appeared in this case because class-action litigation affects their residents, even if it occurs in the courts of other States.

The stipulation maneuver approved by the lower courts "should raise a suspicious judicial eyebrow." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993). The procedure appears to subvert the interest of absent class members to the interests of the class's lawyers. It allows the class representative and counsel to shop for a pliant local judge to approve a class or settlement. The only logical explanation for the procedure is that counsel wish to avoid important reforms that have been incorporated into federal law, including the requirement that state officers be given an opportunity to challenge the fairness of any proposed settlement. The lower courts' ruling thus raises serious concerns about efficiency, fairness, notice, and adequacy of representation.

These are precisely the concerns that led many States to reform their treatment of class litigation and Congress to enact the Class Action Fairness Act. CAFA provides targeted federal jurisdiction for class actions with minimal diversity and an amount in controversy exceeding $5 million. Once a case is in

federal court, CAFA discourages so-called "coupon settlements" where the consideration offered to the class is in the form of discounts on future products, 28 U.S.C. § 1712, and prohibits discrimination based on the residence of class members, *id.* § 1714. CAFA's removal provision targets cases that are likely to have a nationwide impact; it expressly reserves state-court jurisdiction for "home state" cases in which most of the class members, any defendant, and the injury are all related to the same forum. *See id.* § 1332(d)(4).

The States take no position on whether the class in this case has claims worth more than $5 million. But they are troubled by the decision of the putative class's counsel and would-be representative to cavalierly forfeit the class's right to pursue damages of over $5 million in exchange for the perceived procedural advantage of state court. The States instead support a rule that precludes circumvention of CAFA, incentivizes class counsel to pursue absent class members' legitimate claims regardless of forum, and minimizes the extent to which a putative class representative can shop for a specific judge.

## SUMMARY OF ARGUMENT

The experience of the *amici* States demonstrates that class actions are uniquely vulnerable to abuses that subordinate the interest of the class members to the interests of the class's counsel and representative. In the 1990s, class actions were out of control. Certain judges routinely certified nationwide classes without scrutiny and approved inequitable class settlements that provided little compensation for absent class members. Many States recognized these abuses and instituted significant class-action reforms, such as heightened certification procedures, policies disfavoring nationwide classes, and interlocutory appeal of certification orders. The State of Alabama, the lead amicus here, was at the vanguard of both of these trends. Alabama suffered from its share of class-action abuses, but it implemented reforms after those abuses came to light. The States' experience counsels against approving the novel stipulation maneuver at issue here.

The States' experience also demonstrates that state-level reforms are not enough to protect their citizens from class-action abuse. Judgments entered in one State affect citizens in other States, and class litigation in one court generates follow-on litigation in others. The kind of judge-shopping that the lower courts' rule allows is especially problematic and difficult to address through state reforms. Although the freedom to choose between state policies is a happy consequence of Our Federalism, the freedom to shop for a specific, idiosyncratic judge is not. CAFA's targeted grant of federal jurisdiction was a

measured response to the abuses at the turn of the century. It preserves exclusive state-court jurisdiction over local disputes and solves problems that, for the most part, the States themselves cannot easily solve.

Finally, the stipulation maneuver undermines important reforms designed to protect consumers. It binds class members to limited damages without notice or an opportunity to object. This device is particularly problematic given that none of the lower courts determined whether this binding stipulation was in the best interest of absent class members or a fair exchange for the perceived procedural advantage of state court. By remanding this case, the lower courts also relieved the defendants' lawyers from the obligation to notify state regulators about a settlement. Federal law provides state regulators notice and the opportunity to object to class settlements that affect their citizens, and state Attorneys General have used those objections to derail unfair and potentially collusive settlements in the past. Three recent cases, *Honda*, *Sharper Image*, and *DirectBuy*, are good examples of the role that state regulators play in the settlement of class actions.

The lower courts' rule permits putative class representatives to limit the aggregate recovery of all class members to less than $5 million, thereby evading federal jurisdiction and CAFA's important protections. This rule undermines both state and federal reforms, and it invites a return to the days of magnet jurisdictions and judge-shopping. The Court should reverse the lower courts.

## ARGUMENT

### I. The history of abuse and reform at the state level underscores the importance of meaningful checks on class representatives and class counsel.

The *amici* States' experience has proven class actions to be an important procedural device for efficient consumer litigation, but also uniquely vulnerable to abuse. Because class actions are necessarily large, multi-party affairs, there is much more choice over where to file than in an ordinary two-party dispute. Moreover, because of the leverage of aggregated claims, a court's preliminary decision to certify a class may coerce a defendant to settle, especially when the only alternative is to "bet[] [the] company on a single jury verdict." *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 672 F.3d 482, 491 (7th Cir. 2012). Finally, there are the well-established agency problems; "[a] lawyer representing a class is in practical effect a lawyer without a client." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1199 (9th Cir. 2007) (Kleinfield, J., dissenting), *rev'd, Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). "Without individual clients to control what they do, [class] lawyers have a powerful financial incentive to [litigate] the case on terms favorable to themselves, but not necessarily favorable to their unknown clients." *Id.*

Given these features, class actions are vulnerable to abuse through devices that subordinate the interest of absent class members to the interests of class counsel and the named class representative.

During the 1990s, some class counsel and representatives wrongly exploited these features. When these abuses came to light, many States implemented far-reaching reforms to their own class-action systems. This history of abuse and reform illustrates the "serious reasons for rules constraining class actions," *id.*, and cautions against undermining those rules by validating the binding stipulation maneuver at issue here.

### A. A history of localized abuses.

Before CAFA, putative class counsel and representatives could file suit in local courts with "particular judges where the class-action device c[ould] be exploited" through a quick certification order and a rubber-stamped settlement. *Mass Torts and Class Actions: Hearings Before the Subcomm. on Courts & Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of Rep. James P. Moran). These judges were known "as 'magnet courts' for the favorable way they treat[ed] [class-action] cases." 151 Cong. Rec. S1225 (Feb. 10, 2005) (statement of Sen. Vitter). *Accord* S. Rep. No. 109-14, at 22-23 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3. Their idiosyncrasies magnified the inherent problems with class litigation.

1. The lead amicus here, Alabama, can provide a firsthand account of why class-action reform was necessary. During the 1990s, class-action abuse was a problem in Alabama, and it was mentioned throughout the Congressional debates on CAFA. *See, e.g.*, S. Rep. No. 109-14, at 14, 24, 26, 61.

One of the problems that motivated CAFA was Congress's conclusion that certain state-court judges were not thoughtful about certifying nationwide class actions. From 1995 to 1997, a total of 91 putative class actions were filed in six Alabama counties. STATESIDE ASSOCS., CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998). Judges certified classes in 43 of those cases; in at least 38, the certification was *ex parte* and entered on or shortly after the day the complaint was filed. *Id.* Lawyers coined a colorful term for these quick, *ex parte* certification orders: the "drive-by" class action. *See, e.g.*, *Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 818 (Ala. 2000) (Hooper, C.J., dissenting).

Unfortunately, some judges were no more rigorous in evaluating proposed class settlements than they were class certification. This lack of diligence led to collusion between named plaintiffs and defendants and unfairness to absent class members. In *Hoffman et. al. v. Bank of Boston*, for example, a homeowner challenged the Bank of Boston's practice of holding too much money in its mortgage escrow accounts, which prevented the homeowners from spending that money until they had paid off their mortgages. *See Kamilewicz v. Bank of Boston Corp*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) (discussing *Hoffman et al. v. BancBoston Mortg. Corp.*, No. CV-91-1880 (Ala. Cir. Ct., Jan. 24, 1994)). The settlement in that case, approved by an Alabama judge, required the bank to return the overages immediately, but also awarded more than $8.5 million in attorneys' fees to be paid by class members out of pocket. *Kamilewicz*, 92 F.3d

at 508-09. The upshot was that many absent class members paid out more in fees than they received in refunds. For one Maine resident, the settlement resulted in a $2.19 credit and $91.33 debit from his bank account. *See Kamilewicz*, 100 F.3d at 1349 (Easterbrook, J., dissenting); *see also, e.g.*, Barry Meier, *Math of a Class-Action Suit: 'Winning' $2.19 Costs $91.33*, N.Y. TIMES, Nov. 21, 1995, at A1, *available at* 1995 WLNR 3836919. Similarly, a Texas resident received no credit and a $144 debit. *See Benn v. BancBoston*, No. 3:96-CV-0974-J, at 2-4 (N.D. Tex. Oct. 4, 1996); Eddie Curran, *You Win, You Pay*, MOBILE REG. (Ala.), Dec. 29, 1999, at 1A, *available at* 1999 WLNR 7248175; Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1054-68 (1996).

2. Alabama was not alone; this was a nationwide problem. In Illinois, a class compromised its false-advertising claims against Poland Spring for a settlement of discounted water and charitable contributions. *See* Edward D. Murphy, *Poland Spring Settles Purity Suit*, PORTLAND PRESS HERALD, Nov. 6, 2003, at 6B, *available at* 2003 WLNR 13471684 (discussing *Ramsey v. Nestle Waters N. Am., Inc. d/b/a Poland Spring Water Co.*, No. 03 CHK 817 (Ill. Cir. Ct., Nov. 5, 2003)). The named plaintiff received $12,000, and the plaintiffs' lawyers received $1.35 million. *Id.* A class in Texas compromised its claim that Blockbuster charged excessive late fees for a settlement of coupons giving plaintiffs $1 off a video rental; meanwhile, the class attorneys received $9.25 million in fees. *See Blockbuster Settles Late-fee Suit with Certificate*

*Plan*, HOUSTON CHRON., Jan. 13, 2002, *available at* 2002 WLNR 13576864 (discussing *Scott v. Blockbuster Inc.*, No. DI62–535, (Jefferson Cnty., Tex., 2001)). And, in Georgia, a class compromised its claim that Coca-Cola improperly added sweeteners to its drinks for a settlement of 50-cent coupons; the class's counsel received $1.5 million. *Lawyers Get $1.5 Million*, *Clients Get 50 Cents Off*, FULTON COUNTY DAILY REP., Nov. 21, 1997. *See generally* S. Rep. No. 109-14, at 10-20 (Feb. 28, 2005) (citing examples from Alabama, California, Delaware, Florida, Illinois, Kansas, Minnesota, New York, and Texas).

### B. Many States recognized the problem and implemented reforms.

Happily, through a sustained legislative and judicial effort, many States have recognized the inherent problems with class litigation and have implemented important reforms to mitigate them. These state reforms run the gamut from venue rules to certification procedures. And they are ongoing. *See, e.g.*, H.B. 1603 (Okla. 2009) (codified at OKLA. STAT. ANN. tit. 12, § 2023(G)(4)) (providing that in class settlements that provide coupons, class counsel shall be paid in coupons as well).

The lead amicus is a prime example. Thanks to a combination of legislation and judicial decisions, Alabama's class certification process is now more "demanding[ ] than the requirements of Rule 23 of the Federal Rules of Civil Procedure itself." Elizabeth Cabraser, *The Manageable Nation-wide Class: A Choice-of-law Legacy of* Phillips Petroleum

Co. v. Shutts, 74 UMKC L. REV. 543, 548 (2006). The United States Chamber of Commerce now gives Alabama a passing score for its "treatment of class action suits and mass consolidation suits." *See* U.S. CHAMBER INST. FOR LEGAL REFORM, 2012 STATE LIABILITY SYSTEMS SURVEY: LAWSUIT CLIMATE: RANKING THE STATES 12 (2012) ("Treatment of Class Action Suits and Mass Consolidation Suits"). The American Tort Reform Association no longer lists *any* locality in Alabama as a "judicial hellhole." *See* AM. TORT REFORM ASS'N, 2011/2012 JUDICIAL HELLHOLES 6-25 (2012). And Alabama has consistently topped lists of States with the most favorable business climates. *See, e.g.*, SITE SELECTION, TOP TEN BUSINESS CLIMATES (2010); SITE SELECTION, TOP TEN COMPETITIVE STATES OF 2011 (2011); SMALL BUS. & ENTREPRENEURIAL COUNCIL, SMALL BUSINESS SURVIVAL INDEX 2011: RANKING THE POLICY ENVIRONMENT FOR ENTREPRENEURSHIP ACROSS THE NATION 2 (2011) (listing Alabama as Rank 6 of 51).

On this front as well, Alabama has not been alone. The following are three examples of common state-level reforms.

*1. Rigorous class certification procedures*. Many States have adopted rigorous procedures that a court must follow before certifying a class. In 1997, the Supreme Court of Alabama adopted the rigorous "federal approach" to certification, *Ex parte Am. Bankers Life Ins. Co. of Fla.,* 715 So. 2d 186, 187 (Ala. 1997), and held that "[a] class should not be certified without notice to the defendant." *Ex parte Citicorp Acceptance Co.,* 715 So. 2d 199, 205 (Ala.

1997). The Alabama Legislature later established detailed procedures to govern class certification. *See* ALA. CODE § 6-5-641. The Texas Legislature likewise enacted comprehensive class-action reform, which set out procedures that parties must follow during class-action litigation. *See* H.B. 4, 78 Leg. Reg. Sess. (Tex. 2003) (codified in part at TEX. CIV. PRAC. & REM. CODE § 26.001 et seq.); *see also Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004) (holding that Texas state courts "must perform a 'rigorous analysis' before ruling on class certification to determine whether *all* prerequisites have been met"). Similarly, Florida now requires that a trial court may "certify a class action only after it determines through rigorous analysis that the elements of the class action rule have been met." *Seminole Cnty. v. Tivoli Orlando Assocs. Ltd.*, 920 So. 2d 818, 824 (Fla. Dist. Ct. App. 2006) (reversing a class certification order). Other States have adopted similar reforms. *See, e.g.*, H.B. 1984 (La. 1997) (codified at LA. CODE CIV. PROC. ANN. arts. 591-97) (setting out procedures that Louisiana courts must follow when certifying a class action); *Beegal v. Park W. Gallery*, 925 A.2d 684, 691 (N.J. 2007) (holding that New Jersey courts should undertake a 'rigorous analysis' to determine if the requirements of the [class-certification] rule have been met").

2. *Disfavoring nationwide classes.* One way to ameliorate abuses in class litigation is to disfavor nationwide class actions in which most of the absent members are residents of other States. By disfavoring nationwide classes, States have decreased the size of classes and the total value of

the class claims—lowering the intensity of the litigation and its effect on other States. Several States have taken this route, either judicially or legislatively. *See, e.g.*, *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 10-11 (Ala. 1998) (decertifying a class in part because "the majority of the members of the purported class are nonresidents whose alleged claims arose in their own states"); *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 863-64 (Ill. 2005) (reversing certification of a nationwide class action on *forum non conveniens* grounds); FLA. STAT. § 768.734 (2008) (restricting class actions filed in state court to state residents, with limited exceptions); H.B. 792 (Ga. 2003) (codified at GA. CODE ANN. § 50-2-21) (limiting the jurisdiction of state courts over out-of-state claims).

3. *Immediate appeal of class certification orders.* Because of settlement pressure, the class certification decision is often the only *contested* decision that a court makes in a class-action case. One mechanism to lessen the weight attached to a certification (and to prolong the period during which the class representative and defendant are truly adverse) is to provide for immediate appellate review of the certification order. Many States have done so. *See* H.B. 1027 (Colo. 2003) (codified at COLO. REV. STAT. § 13-20-901); S.B. 19 (Ga. 2005) (codified at GA. CODE ANN. § 9-11-23(g)); H.B. 2764 (Kan. 2004) (codified at KAN. STAT. ANN. § 60-223); H.B. 1211 (Mo. 2004) (codified at MO. REV. STAT. § 512.020(3)); H.B. 394 (Ohio 1998) (codified at OHIO REV. CODE ANN. § 2505.02(B)(5)); H.B. 2008/S.B. 1522 (Tenn. 2011) (codified at TENN. CODE ANN. § 29); H.B. 4

(Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3)).

## II. Federal intervention was necessary.

The *amici* States have learned that state-level reform, though an important step forward, is not by itself enough. Congressional intervention, through CAFA, was necessary as well. This is so because, although many States have reformed their class-action procedures, some have not. *See, e.g.*, *Beverly Enters.-Ark., Inc. v. Thomas*, 259 S.W.3d 445, 453 (Ark. 2007) (Arkansas law "does not require that the circuit court conduct a 'rigorous analysis'"). State policy-makers can only be assured that their citizens are protected from class-action abuse if there are universally accepted minimum safeguards for the most significant interstate class actions.

The targeted federal jurisdiction provided by CAFA helps achieve that goal. States cannot coerce each other to adopt particular procedural reforms in their own courts. By addressing the problem of class-action abuse on the federal level, CAFA minimizes the extent to which abuses in any one State can affect the residents of another. *See* S. Rep. 109-14, at 11 (describing the "nonsensical result" of federal courts lacking jurisdiction over class actions with a nationwide impact). CAFA is targeted at class litigation with national implications; it preserves state-court jurisdiction over "home state" cases, 28 U.S.C. § 1332(d)(4), and cases involving state officers, *id.* § 1332(d)(5)(a). The stipulation procedure here undermines Congress's intent to move class actions with national implications into federal court,

and it threatens to create problems that States cannot solve by themselves.

### A. Localized abuses have consequences for the residents of every State.

The stipulation maneuver allows class counsel and a class representative to file a purportedly binding waiver of the class's right to recover more than $5 million. *See* ARK. CODE ANN. § 16-63-221 (providing that such waivers are binding). This waiver purports to be binding regardless of whether it is fair to absent class members or whether they receive notice of the waiver. Although the class in this case is limited to Arkansas residents, if the stipulation procedure works here, it will work for nationwide classes as well. The certifications and settlements that this procedure effectuates will affect all States' residents, regardless of where the abuse itself takes place. This will happen in two ways.

1. First and most obviously, class actions permit the courts of one State to "impose their view of the law on other States and bind the rights of the residents of those States." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(C), 110 Stat. 4, 5. Under the Full Faith and Credit Clause, state courts must respect the prior judgments of courts in other States, so long as the first court properly asserted jurisdiction. *See* U.S. CONST. art. IV, § 1. Given expansive personal jurisdiction, the state courts have broad power to enter binding judgments against nonresident defendants. Add to this mixture the innovation of the nationwide or out-of-state class,

and it becomes clear that a local judge can enter judgments with nationwide impact even if just a few of the named parties have a relationship to the forum. Accordingly, a few judges' inequitable practices can have an impact on States across the country.

These impacts are a special concern when it is a *state* court that enters the judgment, as opposed to a federal court. There is a widespread *perception* that local state judges favor in-state residents over out-of-state residents. That is, after all, the asserted reason for why the Founders provided for diversity jurisdiction. *See, e.g., Pease v. Peck*, 59 U.S. (18 Howe) 595, 599 (1855). It is very likely that this perception is not the reality; there is little evidence that state courts are more likely to favor in-state residents than federal courts are. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 (1928). But the *perception* of unfairness is there nonetheless. *See id.*

This perception counsels strongly against the stipulation procedure for a number of reasons. First, nonresident class members and out-of-state regulators are the persons *most in need* of the court's protection from unfairness in the class-action process. The in-state class representative is represented by chosen counsel; the out-of-state parties are not likely at the table. Second, the maneuver here—stipulating away the class's claim to damages in order to remain in state court—itself creates the perception that there is *some* valuable advantage that the class counsel and representative stand to gain by staying in state court. Under these

circumstances, removal to federal court "shore[s] up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents." *See Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 96 (1999) (statement of Professor E. Donald Elliott).

2. Second, and somewhat less apparent, is the way that out-of-state judges' decisions affect in-state litigation. By certifying far-reaching classes, judges in one state can create litigation in others. Ordinarily, *res judicata* would minimize the risk of litigation following a class action. But "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, 904 (2008) (rejecting theory of "virtual representation"). Where, as here, the named plaintiff purports to limit class recovery, it is all but inevitable that the settlement will spawn litigation by dissatisfied absent class members, even if just to recoup the portion of their claims that the named plaintiff purported to stipulate away.

The *Bank of Boston* case provides a good example of the way in which in-state abuses affect out-of-state residents and courts. *See supra* at 7-8. That

settlement was confirmed in Alabama, but it adversely resolved the claims of absent class members from Texas, New Hampshire, and elsewhere. It also governed the escrow practices of a Florida-based bank. By resolving nationwide claims in an apparently unfair settlement, the trial court generated litigation about the effect of the settlement in other States and in the federal system. *See, e.g.*, *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996); *Benn v. BancBoston*, (Doc. 89) No. 3:96-CV-0974-J (N.D. Tex. Oct. 4, 1996) (order of dismissal). The apparent unfairness of that settlement led 22 States to file an amicus brief asking this Court to give them "an effective local forum in which absent class members might raise separate and *bona fide* claims of fraud or malpractice against the class' legal counsel or others." Brief Amicus Curiae for the States of New Hampshire et al. in Support of Petitioners, *Kamilewicz v. Bank of Boston Corp.*, 520 U.S. 1204 (1997) (No. 96-1184), 1997 WL 33561347, at *4.

### B. Federal jurisdiction is an important check on uniquely problematic judge-shopping.

If the stipulation maneuver here is successful, there will be a race to file class actions in old and new "magnet" jurisdictions across the country. States cannot remedy this kind of judge-shopping, beyond their borders, through their own reforms. And it is uniquely problematic for two reasons.

1. First, the kind of judge-shopping that CAFA was meant to address has much less to do with State policy decisions than it does the personalities of individual judges. Forum-shopping from State-to-State has its proper place in Our Federalism. The freedom to choose one State's law over another's law ensures "that state legislatures remain relevant as centers of policymaking" and guarantees "the binding effect of state law." James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355, 355-56 (2008). To the extent parties shop for a forum based on different state policy choices, forum-shopping is merely "the price our system of interstate litigation pays to preserve a measure of state autonomy in the making and enforcement of state law." *Id.* at 359. In other words, that different States make different substantive policy choices is not a bad thing, and people should generally be allowed to choose between them.

But forum-shopping for the purpose of easy class certification is different. This kind of forum-shopping has much less to do with state policy decisions than it does the personality of an individual judge. For example, a single state-court judge certified 30 of the 38 classes that were certified in Alabama between 1995 and 1997. *See* STATESIDE ASSOCS., CLASS ACTION LAWSUITS IN STATE COURTS: A CASE STUDY OF ALABAMA (1998). In light of the choice-of-law rules governing the class members' claims, these cases were most assuredly not filed in Alabama to benefit from Alabama law or policy. They were filed in a specific court in Alabama to benefit from a single judge with an idiosyncratic view of class actions. His

views differed, not just from the federal bench, but from other state-court judges as well. *See, e.g.*, *Ex parte Household Retail Servs. Inc.*, 744 So. 2d 871 (Ala. 1999) (reversing the same judge's class certification order).

It is not important for state sovereignty that litigants be able to shop between individual judges. As this Court has explained under similar circumstances, forum-shopping is acceptable if it is the natural result of legislative action. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1447-48 (2010). But it is "unacceptable when it comes as the consequence of judge-made rules." *Id.* The kind of judge-specific forum-shopping that the lower courts' rule allows is much more akin to the latter than the former. And this forum-shopping most assuredly does not aid a State in creating and effectuating its own substantive law. Had the 30 class actions discussed above, *see supra* 18, been removed to federal court, they would still have been governed by the same state law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The only effect of the forum-shopping was to elevate the decisions of a single state jurist.

2. Second, in the class-action context, judge-shopping does not end with the denial of class certification by a particular judge. Class counsel who do not succeed in certifying a class before one judge can try to certify the same class in front of other judges by changing the named representative and filing a new lawsuit. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011). Even if "every state in the nation would as a matter of first principles deem

inappropriate a nationwide class," if a single judge sees it differently, then that "single positive trumps all the negatives." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003). This asymmetry is a powerful incentive for the continued filing of the same complaints.

There is no doubt that the lower courts' rule incentivizes this kind of never-ending judge-shopping. Just this year, some class-action lawyers comparison-shopped between two counties in Arkansas to find the judge most likely to certify a class. The plaintiffs first filed suit in Sebastian County, Arkansas, were removed to federal court, and then remanded. *See McClendon v. Chubb Corp.*, (Docs. 1, 54) No. 2:11-CV-02034, 2011 WL 3555649 (W.D. Ark. Aug. 11, 2011); *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, (Docs. 1, 178) No. 4:12-CV-04005, 2012 WL 3886189, at *1 (W.D. Ark. Sept. 6, 2012). But, when the state judge on remand denied a favorable ruling, the plaintiffs voluntarily dismissed the case and re-filed in the same county where the case below originated. *See Basham,* 2012 WL 3886189, at *1. The defendant then removed the action to federal court, where the plaintiffs "promised not to seek more than" $5 million in damages. *Id.* at *1-2. And the federal district court remanded again. *See id.* at *6 ("Plaintiffs have capped their amount in controversy sufficiently to create a legal certainty that they will not recover more than the federal jurisdictional minimum" under CAFA). These *ad seriatim* filings should not be foisted onto state courts, many of which are currently facing budget cuts and staff shortages.

The *amici* recognize that federal law has a role to play in ensuring a fair and efficient system of interstate litigation. The lower courts' rule raises the specter of a hand-selected judge entering an unfair judgment that affects the lives of countless residents of other States. Although federal jurisdiction should not lightly be presumed, it should also not be conclusively avoided through the stipulation maneuver at issue here.

## III. The stipulation maneuver undermines reforms at the federal and state level.

The lower courts' approval of the stipulation maneuver also raises serious questions of notice and fairness to residents of the *amici* States who are absent class members. Under the lower court's rule, absent class members' claims can effectively be settled up-front without notice to themselves or the state regulators charged with implementing the law under which their claims arose. That procedure is bad for consumers and undermines the recognized role of state officials in protecting consumers from unfair settlements. It is particularly ironic that this up-front settlement is designed to avoid CAFA, which was intended to prevent precisely this kind of potential unfairness. The Court should not approve of the stipulation maneuver as a means of avoiding these important federal reforms.

### A. The stipulation maneuver makes it harder for absent class members to protect themselves from an unfair settlement.

An absent class member's right to damages cannot be waived by a named class representative, without notice, for a perceived procedural advantage. Neither a state court nor a federal court can "bind" a nonresident class member unless the class member is provided with (1) "the best practicable" notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"; (2) "an opportunity to remove [himself] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"; and (3) "an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). None of these protections was afforded to the absent class members in this case before the supposedly "binding" stipulation purported to compromise their claim to damages over an aggregate $5 million. Nor did any of the lower courts—state or federal—weigh whether this limitation was "fair" or otherwise in the interest of the class.

The lower courts' response to these concerns was unpersuasive. The district court below explained that, if absent class members "feel that the limitations placed on the class by Plaintiff are too restrictive," they can simply "opt out of the class and pursue their own remedies." *Knowles v. Standard Fire Ins. Co.*, (Doc. 13) No. 4:11-CV-04044, 2011 WL 6013024, at *6 (W.D. Ark. Dec. 2, 2011). But this could be the response to concerns about the fairness of *any* compromise that a class counsel makes—be it a final settlement or an intermediate one like the

stipulation here. Yet the weight of federal and state law properly recognizes that absent class members are due greater procedural protections than a form notice and right to opt-out. At the very least, before the lower courts accept a stipulation to forgo damages as "binding," the court should determine whether such a stipulation is fair to absent class members.

The lower courts also discounted the potential for abuse by plaintiffs who might later modify their complaints to include greater damages because "it follows that Defendant would have the right to remove again, should removal be justified." *Id.* at *5. Once again, the lower courts ignored the very problem with class-action litigation. Right now, before class certification or settlement talks, the named class representative and his lawyers are truly adverse to the defendant. But it will not always be this way. Instead, once the procedural jousting is over and it becomes clear that a class of some size will be certified, "it is increasingly the corporate defendant that wishes to be sued in a class action" with the largest possible class. John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 851 (1995). At that point, when the case is in state court and the writing is on the wall, the defendant and class representative can expand the scope of the class and reach a settlement based on their own interests, without any removal threat and with potentially unfair effects on absent, out-of-state class members. In other words, there is a good reason for the amount in controversy to be decided earlier rather than later.

### B. The stipulation maneuver makes it harder for state regulators to protect absent class members from unfair settlements.

The ruling below is also problematic from the States' perspective because they, just like the absent class members, were not given the opportunity to object before class counsel purported to stipulate away the class's claims. In contrast, CAFA mandates that defense counsel provide notice of every class-action settlement within CAFA's purview to the attorney general of any State in which any class member lives or another state official with "primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State." 28 U.S.C. § 1715(a)(2). The statute provides the official an opportunity to object within 90 days, *id.* § 1715(d), or otherwise "voice concerns if they believe that the class action settlement is not in the best interest of their citizens," S. Rep. No. 109-14, at 5, *reprinted in* 2005 U.S.C.C.A.N. at 6. It was Congress's expectation that including state regulators in this way would provide an important "check against inequitable settlements." *Id.* at 35.

This objection provision is one of the oft-overlooked provisions of CAFA, but it is nonetheless important. Certain Attorneys General vigilantly objected to unfair settlements when they were called to their attention even before CAFA. *See* Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1981-83 (2008) (citing efforts by Texas, New York,

California, and Florida). But they generally "lacked a method for determining the existence of class actions in which they might wish to get involved." *Id.* at 1993. Instead, "[m]ost of the pre-CAFA examples fit a pattern whereby the AGs objected to private settlements when they threatened an internal investigation or ongoing lawsuits" in which the Attorney General was already involved. *Id.* at 1991.

Recently, Attorneys General have used objections to derail collusive settlements that would have harmed in-state consumers. These objections have come in lawsuits across the country:

1. *Honda.* Twenty-five state Attorneys General objected to a proposed class-action settlement with Honda based on allegations that Honda misrepresented the fuel efficiency of its Civic Hybrid. *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1058 (C.D. Cal. 2010). The proposed settlement would pay class counsel $3 million while providing "a DVD that contains tips on improving fuel economy" and partial refunds to consumers. Response Brief Amicus Curiae of the Attorneys General of California et al. in Continued Opposition to the Proposed Settlement Agreement as Amended (Doc. 161) at 2, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010) (No. 5:07-cv-00287-VAP-OP). Owners who traded in their car for certain other vehicles could claim either a $1,000 rebate or $100 in cash if they had complained previously. *True*, 749 F. Supp. 2d at 1060-61. Class members who no longer owned the car could receive a $500 rebate. *Id.* at 1060.

The Attorneys General objected on the grounds that the settlement terms "d[id] not amount to meaningful relief for unnamed class members." Brief Amicus Curiae of the Attorneys General of California et al. in Opposition to the Proposed Settlement Agreement (Doc. 120) at 7, *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010) (No. 5:07-cv-00287-VAP-OP). The DVD was "already available for free on the Internet," and the coupons and injunctive relief were "meager." *Id.* at 2. In contrast, the settlement offered the named plaintiffs $22,500 in incentive payments and the class counsel $2.95 million in attorneys' fees. *True*, 749 F. Supp. 2d at 1062. As the Attorneys General noted, "the chief benefit offered" is "not to unnamed class members." Response Brief at 8, *True*, 749 F. Supp. 2d 1052. The court ultimately rejected the settlement, concluding that "the differential treatment of class members, the low value of the settlement, and the views of the governmental participants outweigh those factors that weigh in favor of approval." *True*, 749 F. Supp. 2d at 1082.

2. *Direct Buy*. Even more recently, the Connecticut Attorney General, joined by thirty-six other States and territories, filed an objection to a settlement of a class-action lawsuit against DirectBuy. Brief Amicus Curiae of the Attorneys General of Connecticut et al. in Opposition to the Proposed Settlement, *Wilson v. Direct Buy Inc.*, (Doc. 161) No. 3:09-cv-00590-JCH, (D. Conn. April 12, 2011). The case alleged that DirectBuy misled members by claiming to sell products directly from manufacturers at wholesale price, when in fact the

company received kickbacks and incentives that increased the cost of the goods. The settlement offered no cash award to class members, only continued or renewed membership in DirectBuy. The Attorneys General argued that the proposed agreement "ha[d] all of the hallmarks of [an] abusive coupon settlement[]." *Id.* at 4. They explained that to receive any benefit from the settlement, absent class members must "either purchase new memberships from [DirectBuy]" or "make sizeable purchases" from select manufacturers and suppliers. *Id.* at 3. This "scant relief" offered to "hundreds of thousands of absent class members nationwide, st[ood] in stark contrast to the $4,000 cash incentive payments to each of the named plaintiffs" and "the $350,000 to $1,000,000 in attorneys' fees to class counsel." *Id.* The judge agreed with the Attorneys General and did not approve the settlement, holding that the agreement was "valueless to more than half the class" and did not fall "within the range of reasonableness." *Wilson v. DirectBuy, Inc.*, (Doc. 243) No. 3:09-cv-00590-JCH, slip op. at 28-29 (D. Conn. May 16, 2011).

3. *Sharper Image.* Similarly, Attorneys General in thirty-five states and the District of Columbia filed an amicus brief urging the court in *Figueroa v. Sharper Image Corp*. to reject a settlement in which class members received no cash award and only a company coupon for $19 per household and a discount on the purchase of a future Sharper Image product. 517 F. Supp. 2d 1292, 1301 (S.D. Fla. 2007). The case arose from a claim by consumers that the Sharper Image Iconic Breeze, which was sold to

purify the air, actually was harmful because it emitted excess ozone. *Id.* at 1294.

The Attorneys General argued that the proposed settlement lacked "meaningful compensation to class members" while at the same time requiring class members to waive remaining claims against the defendant and awarding $1.875 million to class counsel. Brief Amicus Curiae of the Attorneys General of Alaska et al. (Doc. 297-1) at 6, 10, *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1291 (S.D. Fla. 2007) (No. 1:05-cv-21251-CMA). The court ultimately rejected the settlement, citing the "vigor and substance" of the Attorneys General's participation. *Figueroa*, 517 F. Supp. 2d at 1328 ("What distinguishes this case . . . is the singular appearance of the Attorneys General of thirty-five states and the District of Columbia representing hundreds of thousands, if not millions, of eligible class members."). The court "agree[d] with the Attorneys General's view" that the settlement was "of negligible value" to class members. *Id.* Accordingly, it did not comport with the requirements of CAFA and was not "procedurally or substantively fair, adequate, or reasonable" under Federal Rule of Civil Procedure 23. *Id.* at 1329.

CAFA's state regulator objection provision has thus been a positive development for the States and their citizens. It is yet another important protection that the stipulation procedure would circumvent.

* * *

Some would argue that any limitation on the exclusive jurisdiction of state courts is an unjustified intrusion on state sovereignty. But the *amici* States

see it differently. The States cannot force their sister sovereigns to adopt any particular reforms. But CAFA, by limiting the effect of localized class-action abuses on out-of-state residents, puts States in charge of governing themselves. And by affording state regulators notice and the right to object to class settlements, CAFA assists efforts to protect in-state consumers. Given that federal law preserves exclusive state-court jurisdiction over local class actions and that federal courts must apply substantive state law in diversity cases, the lower courts' rule is not justified by an interest in state sovereignty.

The States' experience suggests that the Court should be wary of approving any new procedural device through which a class representative can *limit* recovery by the absent class members that he purports to represent. Class-action abuses were once so widespread that they provoked serious, sustained reforms from state legislatures and judiciaries. And the stipulation maneuver has all the hallmarks of those abuses. It permits class counsel to elude the supervision of state regulators, evade the requirements of due process, and undermine state-level reforms. The best result for the interstate litigation system and for the residents of the *amici* States would be for this Court to reverse.

## CONCLUSION

The Court should reverse the Eighth Circuit.

Respectfully submitted,

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