No. 23-5232

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Brian Adams, et al.,

Plaintiffs-Appellees,

v.

3M Company,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case Nos. 7:21-cv-00082; 7:21-cv-00086

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-5232 Case Name: Brian Adams, et al. v. 3M Company

Name of counsel: John H. Beisner

Pursuant to 6th Cir. R. 26.1, Amicus Curiae Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 7, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ John H. Beisner

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 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. An important function of the Chamber is to represent the interests of its members by participating as amicus curiae in cases involving issues of concern to business, such as this one.

The Chamber has a strong interest in this case because its members are increasingly the targets of sprawling multi-plaintiff lawsuits in state courts that are designed to evade federal diversity jurisdiction. These cases are frequently governed by lax evidentiary standards, proceed in venues comprised of jury pools that are relatively hostile to the business community, and impose tremendous pressure on defendants to settle or roll the dice on highly prejudicial, multi-plaintiff trials. In addition, the Chamber's participation as amicus curiae is desirable because its unique perspective and expertise can help elucidate the significant statutory and public-policy issues raised by the parties' briefing.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should reverse the district court's remand order because the underlying cases joined the claims of more than 100 separate plaintiffs in a single pleading and are thus paradigmatic examples of mass actions that should be removable to federal court under the Class Action Fairness Act of 2005 ("CAFA"). The Chamber endorses the arguments set forth in appellant's briefing and does not repeat them here. Instead, this amicus brief focuses on statutory and policy concerns raised by the district court's remand order.

First, the result below contravenes Congress's intent in enacting CAFA. CAFA's purpose was to expand diversity jurisdiction and ensure that any suit resembling a class action—including mass actions—could be heard in federal court. Noting a long track record of gamesmanship by plaintiffs' lawyers in crafting class actions to preclude federal jurisdiction under traditional diversity principles, Congress sought to make it *easier* to remove such cases to federal court. Essentially, and as this Court recognized, Congress erected a presumption *in favor* of federal jurisdiction over these aggregate proceedings "to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008). If allowed to stand, the district court's decision would significantly undercut Congress's extension of federal jurisdiction to include mass actions. It would also invite precisely the kinds of

abusive plaintiff practices that CAFA was designed to curb by encouraging plaintiffs' lawyers to simply remain silent about their trial intentions in order to forestall removal of an action that indisputably belongs in federal court. If such artful pleading could permit mass action plaintiffs to avoid CAFA, "then Congress's obvious purpose in passing the statute . . . can be avoided almost at will." *Freeman*, 551 F.3d at 407.

Second, if left standing, the remand ruling would also set a troubling precedent by unnecessarily complicating the CAFA mass action jurisdictional inquiry. Undertaking a straightforward review of the complaint removed to federal court should suffice to determine jurisdiction. But the ruling below will invite other district courts to not only second-guess the four corners of the complaint but also to additionally explore plaintiffs' trial intentions by examining statements of counsel made *after* the time of removal or made in *other*, unrelated lawsuits. Such an amorphous approach to jurisdiction will only necessitate costly, burdensome and unnecessary litigation over that threshold issue, prolonging disposition of the merits of the case and making it virtually impossible for businesses to fairly predict where they will be hauled into court.

For these reasons, amicus respectfully submits that the Court should reverse the district court's remand decision.

ARGUMENT

I. REVERSAL IS NECESSARY TO FURTHER CAFA'S REMEDIAL PURPOSE AND PROTECT AGAINST LITIGATION GAMESMANSHIP.

The Court should reverse the district court's remand ruling because it undermines CAFA's goals of creating expansive federal jurisdiction and making removal easier. It also promotes the sort of jurisdictional gamesmanship that Congress sought to eliminate when it enacted CAFA.

First, the approach taken by the court below is at odds with Congress's intent that federal jurisdiction should be expanded over interstate class and mass actions under CAFA. Congress enacted CAFA to curb "[a]buses in class actions," which "undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 5 (Feb. 18, 2005). "But 'CAFA's legislative sponsors realized that CAFA's core class action provisions would not comprehensively reach all problematic state court complex litigation' because most states permitted large-scale aggregation of claims through joinder or other procedural mechanisms." *Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307, 318 (3d Cir. 2022) (citation omitted). As the legislative history underlying CAFA recognizes, mass actions "are simply class actions in disguise" and "are subject to many of the same abuses." S. Rep. No. 109-14, at 46-47 (2005). "In fact, sometimes

the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury." *Id.* at 47.[2] Further, concerns about abuse are magnified in mass actions since they do not "come close to satisfying the due process-based prerequisites of the class action rules." Walter Dellinger, *supra*, at 8.

For these reasons, "Congress's prescription for mass actions was the same that [it] applied to class actions: a broad grant of federal jurisdiction over this breed of nonclass aggregate litigation." Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1877 (2010); *see also OptumRX*, 43 F.4th at 318 ("Through CAFA, Congress 'made it *easier* both for plaintiffs to establish federal jurisdiction in original federal class actions and for defendants to remove [them] from the state courts.'") (emphasis added) (citation omitted). As one of CAFA's leading sponsors explained, if "a Federal court is uncertain about whether [the requirements of the statute are

[2] These abuses are perhaps best exemplified by the egregious joinder of 8,000 West Virginia asbestos claimants that led to enactment of the mass action provision. *See* Walter Dellinger, *The Class Action Fairness Act, Curbing Unfairness and Restoring Faith in our Judicial System*, Progressive Policy Institute, Mar. 2003, at 8. "Through this proceeding, West Virginia imposed its own asbestos claims solution by forcing defendants nationwide to either settle claims, regardless of their merit, or face the prospect of a wholly unfair trial." *Id.* "[T]he plan worked as the court seemed to intend. Within days after the United States Supreme Court declined to stay the trial or grant certiorari to review the plan, all but one of the original 259 defendants were forced to settle for reportedly huge sums of money." Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 Pepp. L. Rev. 271, 283 (2004).

satisfied] [that] court should err in favor of *exercising* jurisdiction over the case." 151 Cong. Rec. H726 (statement of Rep. Jim Sensenbrenner) (emphasis added). Simply put, regardless of the kind of aggregate lawsuit at issue, "no anti[-]removal presumption attends cases invoking CAFA." *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014); *see also* S. Rep. No. 109-14, at 35 (Congress declaring that the "overall intent" of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

The district court ignored CAFA's goal of expanding federal jurisdiction over mass actions of interstate importance. Although the district court's remand decision turned on the fact that plaintiffs made no "*explicit* proposal" to try their claims jointly, Order, R.34, PageID#1141 (emphasis added), "a proposal for a joint trial may be either explicit *or* implicit," the latter of which "may be found when all of the circumstances of the action, including the language of the complaint and the structure of the action, lead to the assumption that the claim will be tried jointly." *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 329 (3d Cir. 2017) (emphasis added). And where, as here, a single complaint joins more than 100 separate plaintiffs and requests a single jury trial, "there is a presumption that those plaintiffs have implicitly proposed a joint trial." *Id.* The district court dismissed the demand for a single jury trial as "an atypical place for jury trial phraseology," Order, R.34, PageID#1141. But even if there were any ambiguity, it should have been resolved

in favor of removal in light of CAFA's "overall intent" to expand jurisdiction, S. Rep. No. 109-14, at 35. In short, the Court should reverse the district court's erroneous interpretation of CAFA, which is not faithful to Congress's overarching intent, as set forth in the legislative history and as expressly recognized by the Supreme Court.

Second, if allowed to stand, the district court's ruling will also have the effect of encouraging jurisdictional gamesmanship, in further contravention of congressional intent. Congress's expansion of federal jurisdiction over interstate class and mass actions was directed in large part at reversing then-current law that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10 (criticizing plaintiffs' jurisdictional gamesmanship). The Supreme Court has recognized as much by rejecting one previously common strategic effort used by plaintiffs' lawyers to evade CAFA jurisdiction: waiving class claims in excess of $5 million through non-binding stipulations. *See Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (allowing plaintiffs' lawyers to subdivide "a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations . . . would squarely conflict with the statute's objective"). And this Court rejected a similar tactic: "the splintering of [class action] lawsuits solely to avoid federal jurisdiction." *Freeman*, 551 F.3d at

407-08 ("If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute . . . can be avoided almost at will . . . .").

Unfortunately, plaintiffs' lawyers have had some success in flouting Congress's concerns about jurisdictional gamesmanship in the mass action context. *See* Linda S. Mullenix, *Class Actions Shrugged: Mass Actions and the Future of Aggregate Litigation*, 32 Rev. Litig. 591, 620 (2013) ("To avoid removal under CAFA's mass action provisions, plaintiffs' attorneys have utilized an array of strategies to plead around CAFA's threshold . . . ."). Plaintiffs' counsel routinely "slic[e] and dic[e] litigants, their claims, and their damages into smaller packages that fall beneath CAFA's mass action requirements." *Id.* For example, "[t]o evade CAFA's 100 claimant requirement to establish a mass action, state court plaintiffs' attorneys have structured their state litigation by dividing their individual cases among separate complaints . . . by bundling claimants into separate pleadings of fewer than 100 litigants or by separating plaintiffs' claims into identical complaints, divided incrementally by time periods." *Id.* at 621 (footnote omitted).

The district court's approach in the present case invites another—even more blatant—type of jurisdictional gamesmanship. If its determination is left to stand, plaintiffs' lawyers will be able to evade mass-action removal by joining product-liability claims involving thousands of plaintiffs in a single or handful of complaints

that strongly imply (but do not expressly state) their desire for a joint trial. The upshot is that plaintiffs would be creating the very kinds of multi-plaintiff interstate cases that Congress sought to make removable under CAFA but subverting federal jurisdiction by strategically avoiding usage of certain "magic words" in their complaint. *Cf. Lester v. Exxon Mobil Corp.*, 879 F.3d 582, 592 (5th Cir. 2018) (rejecting another theory that would permit plaintiffs to "evade" mass action removal and "[c]onstruing CAFA to permit this procedural gamesmanship is at odds with CAFA's intent to curb abuses of the judicial system"). If such artful pleading could permit plaintiffs to avoid CAFA, "then Congress's obvious purpose in passing the statute . . . [could] be avoided almost at will." *Freeman*, 551 F.3d at 407. For this reason as well, the Court should reverse the remand ruling.

II. THE DISTRICT COURT'S APPROACH NEEDLESSLY COMPLICATES THE JURISDICTIONAL INQUIRY AND WILL LEAD TO INCREASED LITIGATION AND UNCERTAINTY.

The district court's remand ruling should also be reversed because it threatens to make the jurisdictional inquiry far more complicated, undermining "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010); *see also Knowles*, 568 U.S. at 595 ("[W]hen judges must decide jurisdictional matters, simplicity is a virtue.").

"[J]urisdictional clarity generally reduces litigant costs." Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 8 (2011). "Simple

jurisdictional rules also promote greater predictability," which "is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94. In particular, straightforward jurisdictional rules afford businesses greater certainty over where the claims asserted against them will ultimately be litigated. *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 Colum. L. Rev. 1211, 1225 (2004) ("Litigants should be able to know where they can go to have their cases litigated . . . ."). And knowing that a particular case will remain in federal court as opposed to a state-court venue (e.g., one whose jury pool is more hostile to businesses or that has lax evidentiary standards) facilitates better informed and more realistic litigation and settlement decisions.[3] *See* Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand. L. Rev. 509, 522 (2012) (clear jurisdictional rules "are also more predictable in their application, which may facilitate efficient private bargaining in the shadow of the law"); *see also* William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100

[3] For example, Missouri Appeals Court Judge Kurt S. Odenwald observed that out-of-state plaintiffs flock to the St. Louis City court because the "jury pool [is] much more friendly, and they see that the requirements for expert-witness testimony in Missouri [are] less than [those required by other jurisdictions under] *Daubert*." Oral Args. Tr. 52:13-18, *Fox v. Johnson & Johnson*, No. ED104580 (Mo. Ct. App. May 10, 2017).

Marq. L. Rev. 375, 415 (2016) (straightforward jurisdictional doctrine "allows individuals and businesses to order their affairs and have rational expectations").

By contrast, "[c]omplex jurisdictional tests complicate a case, 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"—a threshold question "[c]ourts have an independent obligation to [resolve] . . . even when no party [raises] it." *Hertz*, 559 U.S. at 94; *see also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction . . . .") (citation omitted). Complex jurisdictional tests also "produce appeals and reversals, encourage gamesmanship, and . . . diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz*, 559 U.S. at 94; *see also* Dodson, *supra*, at 8 ("[W]hen the court does resolve a jurisdictional issue under clear doctrine, that decision is likely to be accurate, causing fewer appeals and fewer reversals.").

The increased litigation costs and burdens that result from indefinite jurisdictional standards are not just bad policy for businesses, plaintiffs and the courts; consumers, too, face serious adverse consequences. The judiciary, Congress and scholars alike have recognized that increased litigation and settlement costs are necessarily passed on to the consumer in the form of higher costs or fewer options in the marketplace. *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 592

(9th Cir. 2012) ("More expansive consumer protection measures may mean more or greater commercial liability, which in turn may result in higher prices for consumers or a decrease in product availability."), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682 n.32 (9th Cir. 2022) (en banc); H.R. Rep. No. 115-25, at 4 (2017) ("[U]ltimately these [litigation] costs are paid by consumers, workers, and investors, throughout the economy—because the diversion of hundreds of millions of dollars . . . means prices are higher . . . ."). Increased litigation costs also threaten the broader economy, as money that would otherwise go to expanding businesses, creating jobs and developing new products is needlessly diverted to defending against aggregate litigation. *See* Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) (litigation costs, "which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices") (citation omitted).

In light of these serious concerns, "[j]urisdiction should be as self-regulated as breathing," *Navarro*, 446 U.S. at 464 n.13 (citation omitted)—which is simply not possible absent "predictable, bright-line jurisdictional rule[s]," *McKissick v. Yuen*, 618 F.3d 1177, 1196-97 (10th Cir. 2010); *see also* Friedman, *supra*, at 1225 ("[T]he rules regarding which court can and will adjudicate a dispute ought to be

bright."). Circuit courts have repeatedly heeded this precept in construing the mass action provision of CAFA by applying the straightforward rule that "[w]here a single complaint joins more than 100 separate claims involving common questions of law and fact, there is a presumption that those plaintiffs have implicitly proposed a joint trial." *Ramirez*, 852 F.3d at 329; *see also* Br. of Appellant at 12 (collecting cases).

The district court below opted for an entirely different (and standardless) approach, downplaying the complaints' explicit reference to a single "trial by jury," Order, R.34, PageID#1141, and focusing instead on counsel's "post-removal" pronouncements and the statements of counsel made on behalf of a different set of plaintiffs in a different lawsuit that appellant had not removed, *see id.* PageID#1148-1149. Even assuming that consideration of such extrinsic matters were permissible—and it is not, *see Hampton v. Safeco Ins. Co.*, 614 F. App'x 321, 324 (6th Cir. 2015)—the district court's approach would require time-consuming and costly collateral litigation over the import of those matters. Moreover, because that approach is devoid of any objective standards, the outcome of the jurisdictional inquiry would be completely unpredictable and likely reversible on appeal (in most cases, long after the parties conducted expensive discovery and actively litigated the claims on the merits).

In short, while the Supreme Court has "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible,"

Hertz, 559 U.S. at 80, the district court gave virtually zero weight to that need, injecting costly uncertainty into the jurisdictional inquiry and inviting other courts to employ the same misguided approach to the detriment of businesses, courts and consumers. For this reason as well, the Court should reverse the district court's remand ruling.

CONCLUSION

For the foregoing reasons, as well as those set forth in appellant's briefing, the Court should reverse the remand order of the district court.

Dated: April 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, as calculated by Microsoft Word 2016, it contains 3,260 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f); and (2) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point Times New Roman font.

Dated: April 7, 2023

/s/ John Beisner
John Beisner

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 7, 2023

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