Nos. 13-6287, 13-6288, 13-6289, 13-6290, 13-6291, 13-6292, 13-6293, 13-6294, 13-6295, 13-6296 & 13-6297

IN THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IN RE: JOHNSON & JOHNSON et al.

APPEAL FOLLOWING GRANT OF PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
TIM LEONARD, DISTRICT JUDGE • CASE NO. 5:13-CV-00833-L

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL

HORVITZ & LEVY LLP
JEREMY B. ROSEN
STEVEN S. FLEISCHMAN
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800

ATTORNEYS FOR AMICI CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PHRMA

NATIONAL CHAMBER LITIGATION CENTER, INC.
KATE COMERFORD TODD
TYLER R. GREEN
1615 H STREET, NW
WASHINGTON, D.C. 20062
(202) 463-5337

ATTORNEYS FOR AMICUS CURIAE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

PHRMA
JAMES M. (MIT) SPEARS
MELISSA B. KIMMEL
950 F STREET, NW, SUITE 300
WASHINGTON, D.C. 20004
(202) 835-3400

ATTORNEYS FOR AMICUS CURIAE
PHRMA

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amici curiae Chamber of Commerce of the United States of America and PhRMA of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(C)(1), amici are not aware of any related cases that are not identified on the caption of this brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(C)(5) 3

SUMMARY OF ARGUMENT 3

I. CAFA'S LEGISLATIVE HISTORY AND STRUCTURE ESTABLISH THAT CONGRESS INTENDED CAFA REMOVAL JURISDICTION TO BE CONSTRUED BROADLY 6

II. THE SUPREME COURT AND OTHER CIRCUITS HAVE FAITHFULLY IMPLEMENTED CAFA'S "SUBSTANCE OVER FORM" MANDATE TO ENSURE THAT LARGE CLASS AND MASS ACTIONS CAN BE REMOVED TO FEDERAL COURT 15

III. THIS COURT SHOULD FOLLOW *KNOWLES* AND THE MAJORITY POSITION AND HOLD THAT CAFA JURISDICTION IS PROPER HERE BECAUSE PLAINTIFFS HAVE IMPLICITLY REQUESTED A JOINT TRIAL 24

CONCLUSION 28

CERTIFICATION OF COMPLIANCE 30

CERTIFICATE OF DIGITAL SUBMISSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Abraham v. St. Croix Renaissance Grp., L.L.L.P.,
719 F.3d 270 (3d Cir. 2013) 14

Atwell v. Boston Scientific Corp.,
__ F.3d __, 2013 WL 6050762 (8th Cir. 2013) 5, 20, 21, 26, 27

Bank of the U.S. v. Deveaux,
9 U.S. (5 Cranch) 61 (1809) 10

Black Hawk Oil Co. v. Exxon Corp.,
969 P.2d 337 (Okla. 1998).. 27

Brook v. UnitedHealth Grp. Inc.,
No. 06 CV 12954(GBD), 2007 WL 2827808 (S.D.N.Y. Sept.
27, 2007).. 15

Bullard v. Burlington N. Santa Fe Ry. Co.,
535 F.3d 759 (7th Cir. 2008).. 19

Burgess v. Seligman,
107 U.S. 20 (1883).. 10

Davis v. Carl Cannon Chevrolet-Olds, Inc.,
182 F.3d 792 (11th Cir. 1999).. 10

Dodge v. Cotter Corp.,
203 F.3d 1190 (10th Cir. 2000).. 20

Estate of Pew v. Cardarelli,
527 F.3d 25 (2d Cir. 2008) 8

Evans v. Walter Indus., Inc.,
449 F.3d 1159 (11th Cir. 2006).. 9

Freeman v. Blue Ridge Paper Prods., Inc.,
551 F.3d 405 (6th Cir. 2008).. 5, 15, 22, 23, 26

Hart v. FedEx Ground Package Sys. Inc.,
457 F.3d 675 (7th Cir. 2006) 9

Exxon Mobil Corp. v. Allapattah Servs. Inc.,
545 U.S. 546 (2005) 11

In re Abbott Labs., Inc.,
698 F.3d 568 (7th Cir. 2012) 5, 19, 20, 21, 27

In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998) 9

Johnson v. Advance Am.,
549 F.3d 932 (4th Cir. 2008) 6

Louisiana ex rel. Caldwell v. Allstate Ins. Co.,
536 F.3d 418 (5th Cir. 2008) 8

Lowery v. Ala. Power Co.,
483 F.3d 1184 (11th Cir. 2007) 8, 13

Neidy v. City of Chickasha,
188 P.3d 128 (Okla. 2008) 27

Proffitt v. Abbott Labs.,
No. 2:08-CV-151, 2008 WL 4401367 (E.D. Tenn. Mar. 27, 2009) 15

Romo v. TEVA Pharmaceuticals USA, Inc.,
731 F.3d 918 (9th Cir. 2013) 3, 6, 21, 22

Scimone v. Carnival Corp.,
720 F.3d 876 (11th Cir. 2013) 6, 23

Shappell v. PPL Corp.,
Civil No. 06-2078 (AET), 2007 WL 893910 (D.N.J. Mar. 21, 2007) 16

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013) .... *passim*

Tanoh v. Dow Chem. Corp.,
561 F.3d 945 (9th Cir. 2009) 9

Westwood Apex v. Contreras,
644 F.3d 799 (9th Cir. 2011) 8

Zahn v. Int'l Paper Co.,
414 U.S. 291 (1973) 11

Statutes

28 U.S.C.
§ 1332(d)(2)(A)-(C) 12
§ 1332(d)(3)(C) 12
§ 1332(d)(6) 11
§ 1332(d)(11) 13
§ 1332(d)(11)(B)(i) 4, 19
§ 1332(d) 14
§ 1367 11
§ 1446(c)(1) 12
§ 1453 .... 12, 14

Class Action Fairness Act of 2005, Pub. L. No. 109-2
§ 2(a)(4)(A), (b)(2), 119 Stat 4 .... 7, 25
§ 2(a)(2)(A), (a)(2)(C) & (a)(4), 119 Stat 4 7

California Code of Civil Procedure § 404.1 21

Ok. Stat. tit. 20
§ 92.24 24
§ 95.8 25
§ 123 25

Rules

Federal Rules of Appellate Procedure
29(b) 3
29(c)(5) 3

Miscellaneous

2 William B. Rubenstein & Alba Conte, *Newberg on Class Actions* (5th ed. 2012) 16

151 Cong. Rec. H723 (daily ed. Feb. 17, 2005) 8

151 Cong. Rec. S1225 (daily ed. Feb. 10, 2005) 9

Am. Tort Reform Found., *Judicial Hellholes* (2013/2014), *available at* http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf.......... 4, 16

Joseph Story, Commentaries on the Constitution of the United States (1833) 10

S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3 .... *passim*

Webster's New International Dictionary (3d ed.1993) 20

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the world's largest federation of businesses and associations, which represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and from every geographic region of the country. One important Chamber function is to represent the interests of its members in matters before the court, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's businesses.

The Chamber was involved—on behalf of its members—in organizing support for the much-needed class action and mass action reforms embodied in the Class Action Fairness Act of 2005 (CAFA). As discussed below, CAFA expanded federal jurisdiction to ensure that class actions and mass actions of national importance would be heard in federal courts. The Chamber's members are often defendants in such lawsuits and thus are the intended beneficiaries of the reforms Congress memorialized in CAFA. In light of this historical background, the Chamber has a strong interest

in, and a wealth of experience relevant to, interpreting CAFA's jurisdictional requirements. It is also uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation that might otherwise escape the Court's attention.

PhRMA is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. Like the Chamber, PhRMA has frequently filed amicus curiae briefs in cases raising matters of significance to its members. This is such a case; like the Chamber's members, PhRMA's members are often defendants in class actions and mass actions of national importance that—under CAFA—should be heard in a federal forum.

The Chamber's and PhRMA's participation as amici curiae was recently noted by both the majority and dissenting opinions in a recent

CAFA case in the Ninth Circuit. *Romo v. TEVA Pharmaceuticals USA, Inc.,* 731 F.3d 918, 922 n.1 (9th Cir. 2013); *id.* at p. 925 n.1 (Gould, J., dissenting).

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no other person except amici curiae, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

CAFA's text and legislative history make clear that Congress enacted CAFA to end the practice of concentrating interstate litigation of national importance in a few state courts favored by plaintiffs' lawyers. Indeed, CAFA expanded federal court jurisdiction specifically to facilitate the removal of such cases to federal court. This case concerns one particular type of case of national importance for which CAFA provides a federal

forum: a "mass action," defined by CAFA as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law and fact," 28 U.S.C. § 1332(d)(11)(B)(i), and that meet other specified jurisdictional thresholds.

As this case exemplifies, despite CAFA's enactment, plaintiffs continue to repeatedly file in state court separate but related complaints that, because they are theoretically separate actions, fall shy of the number of plaintiffs or damages thresholds announced in CAFA. *See* Am. Tort Reform Found., *Judicial Hellholes* 55-58 (2013/2014) (outlining methods plaintiffs' counsel employ to avoid removal under CAFA, including "gerrymander[ing] plaintiffs into groups of less than 100").[1] Nevertheless, plaintiffs then seek in state court a primary benefit of a mass action: a single judge presiding over the purportedly separate cases, to ensure uniform rulings on the obvious alleged common issues of law and fact they raise. Plaintiffs try to justify this apparent forum shopping by invoking form over substance—they assert that their cases, which are

---

[1] Available at http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf.

functionally equivalent to a CAFA mass action and thus belong in federal court, nonetheless must remain in state court simply because they never utter the phrase "joint trial."

Amici demonstrate that such practices are inconsistent with CAFA's policies and legislative history, and with recent precedent on this issue. Indeed, under unanimous recent Supreme Court precedent, CAFA jurisdiction turns on the *substance* of the plaintiffs' tactics—not on the form. *See Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (plaintiffs cannot gerrymander their claims by entering into stipulations designed solely to evade CAFA). Recent decisions from three other circuits faithfully implement CAFA's goals and follow *Knowles* (or its reasoning) by assessing removal requests based on the substance of plaintiffs' actions rather than the form of their artful pleading. *See In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012); *Atwell v. Boston Scientific Corp.*, __ F.3d __, 2013 WL 6050762 (8th Cir. 2013); *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407-09 (6th Cir. 2008). In contrast, the Ninth and Eleventh Circuits have "exalt[ed] form over substance, and run directly counter to CAFA's primary objective," *Knowles*, 133 S. Ct. at 1350, by rejecting federal court jurisdiction over mass actions of national

importance due to the absence of magic words in plaintiffs' pleadings. *See Scimone v. Carnival Corp.*, 720 F.3d 876, 881-82 (11th Cir. 2013); *Romo*, 731 F.3d at 922-24.

This Court should adopt the substance-over-form approach—the majority position in the circuit split—because it best effectuates Congress's intent and adheres to the Supreme Court's reasoning in *Knowles*. To hold otherwise here would reward the ingenuity of artful pleading and would countenance procedural maneuvering that has concentrated over 600 individual plaintiffs' identical claims against the same defendant before a single state court judge—the precise end that CAFA was designed to avoid. Amici thus urge the Court to hold that these cases qualify as a CAFA mass action and reverse the district court's order remanding these cases to state court.

I. CAFA'S LEGISLATIVE HISTORY AND STRUCTURE ESTABLISH THAT CONGRESS INTENDED CAFA REMOVAL JURISDICTION TO BE CONSTRUED BROADLY.

"Congress enacted CAFA in 2005 to address abuses of the class action device." *Johnson v. Advance Am.*, 549 F.3d 932, 935 (4th Cir. 2008). CAFA addresses the problem of local courts "keeping cases of national importance out of Federal court" and was intended to develop a

jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), (b)(2), 119 Stat 4. That course correction became necessary because abusive state court practices that kept important cases out of federal court had harmed both plaintiffs "with legitimate claims and defendants that have acted responsibly," "undermined public respect for our judicial system," and interrupted "the free flow of interstate commerce." *Id.* § 2(a)(2)(A), (a)(2)(C) & (a)(4), 119 Stat 4. CAFA's text thus eliminates any doubt that Congress intended it to broaden—not restrict—federal jurisdiction.

CAFA's legislative history confirms that Congress intended the statute to be construed broadly. Congress recognized that plaintiffs' lawyers were "'gam[ing] the system'" to avoid removal of class actions in order to remain in "'lawsuit-friendly'" state courts. S. Rep. No. 109-14, at 10-12 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11-13. In a House floor colloquy that occurred just before CAFA's passage, then-House Judiciary Committee chairman F. James Sensenbrenner said: "The bottom line is that [CAFA] is intended to substantially expand Federal court jurisdiction

over class actions" and its provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant." 151 Cong. Rec. H723, H730 (daily ed. Feb. 17, 2005). Likewise, the Senate Judiciary Committee Report states the Committee's "belie[f] that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 3, 27;[2] *see also* S.

---

[2] Other circuits have relied on the Senate Committee Report to discern congressional intent because it was submitted to the Senate while that body was considering the bill. *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1205-06 & n.50 (11th Cir. 2007) ("[C]ourts have taken pains to discuss the fact that S. Rep. 109-14 is dated February 28, 2005, ten days after CAFA was signed into law. . . . While the report was issued ten days following CAFA's enactment, it was submitted to the Senate on February 3, 2006—while that body was considering the bill."); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 32-33 (2d Cir. 2008) ("[A]s the Eleventh Circuit has pointed out, the Report 'was *submitted* to the Senate on February 3, 200[5]—while that body was [still] considering the bill.' We therefore think it appropriate in this case to examine the legislative history of these particularly knotty provisions.") (internal citations omitted); *Westwood Apex v. Contreras*, 644 F.3d 799, 806 (9th Cir. 2011) ("The report of the Senate Judiciary Committee confirms Congress's intent to remove . . . longstanding barriers to removal."); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) ("Congress emphasized that the term 'class action' should be defined broadly to prevent 'jurisdictional (continued...)

Rep. No. 109-14, at 35, *reprinted in* 2005 U.S.C.C.A.N. at 34 (Congress intended CAFA "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"); S. Rep. No. 109-14, at 6, *reprinted in* 2005 U.S.C.C.A.N. at 7 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses, and are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction."); 151 Cong. Rec. S1225, S1235 (daily ed. Feb. 10, 2005) (statement of Sen. Sessions) (arguing that CAFA is consistent with the founders' views that out-of-state defendants should be protected from the "home cooking" of state courts). In short, CAFA furthers the important rationale for diversity jurisdiction. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 305 (3d Cir. 1998) ("From a policy standpoint, it can be argued that national (interstate) class actions

---

(...continued)
gamesmanship.'"); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1163 (11th Cir. 2006) ("Congress intended the local controversy exception to be a narrow one, with all doubts resolved 'in favor of exercising jurisdiction over the case.'"); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 681 (7th Cir. 2006) ("The Senate Judiciary Committee unambiguously signaled where it believed the burden should lie" regarding CAFA's exceptions). *But see Tanoh v. Dow Chem. Corp.*, 561 F.3d 945, 954 n.5 (9th Cir. 2009) (declining to consider the Senate Committee Report).

are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises"); *see also Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *Burgess v. Seligman*, 107 U.S. 20, 34 (1883); Joseph Story, Commentaries on the Constitution of the United States § 1684 (1833).

In invoking the founders' views as support for CAFA, the Committee decried "[t]he ability of plaintiffs' lawyers to evade federal diversity jurisdiction" that had "helped spur a dramatic increase in the number of class actions litigated in state courts—an increase that is stretching the resources of the state court systems." S. Rep. No. 109-14, at 13, *reprinted in* 2005 U.S.C.C.A.N. at 13. "To make matters worse, current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." 2005 U.S.C.C.A.N. at 4; *see also id.* at 26-27 (noting that plaintiffs' attorneys employed tactics to keep cases out of federal court that otherwise should be there); *Davis v. Carl Cannon Chevrolet-Olds, Inc.*,

182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) (noting problem of "a growing trend in class action litigation in this country" where plaintiffs' attorneys manipulate complaints in attempt to avoid cases that otherwise belong in federal court from being removed).

To end the abuses identified by Congress, CAFA created a new set of jurisdictional rules that provide for federal jurisdiction over large-scale class and mass actions, thereby "ensur[ing] that class actions that are truly interstate in character can be heard in federal court." 2005 U.S.C.C.A.N. at 27. Those new rules eliminated or reduced hurdles to federal jurisdiction that had animated plaintiffs' gamesmanship. For example, where the prior diversity jurisdiction statute had been interpreted to require each class member separately to meet the $75,000 amount-in-controversy requirement, *see, e.g.*, *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), *overruled by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546 (2005), under CAFA the claims of putative class members are aggregated to determine if the new $5,000,000 jurisdictional threshold is met, *see* 28 U.S.C. § 1332(d)(6) (2012). CAFA also replaced the requirement of complete diversity of citizenship between all plaintiffs and all defendants with a

rule requiring only minimal diversity between any member of the putative class and any defendant. 28 U.S.C. § 1332(d)(2)(A)-(C).

CAFA likewise established an entirely new removal provision that applies only to the removal of diversity class actions and mass actions. *See* 28 U.S.C. § 1453 (2012). This provision allows a defendant to remove a class action without obtaining consent from any co-defendant, eliminates the one-year time bar on removal in 28 U.S.C. § 1446(c)(1), and authorizes removal without regard to whether any defendant is a citizen of the state in which the suit was originally filed. *See id.* § 1453. These amendments were designed to "make it harder for counsel to 'game the system' and keep class actions in state court." 2005 U.S.C.C.A.N. at 27.

To highlight the depth of Congress's concern—and "prevent plaintiffs from evading federal jurisdiction by hiding the true nature of their case," *id.* at 10—CAFA even instructs district courts to evaluate removal petitions in cases that might appear to implicate only local interests with an eye to whether the action "has been pleaded in a manner that seeks to avoid Federal jurisdiction." 28 U.S.C. § 1332(d)(3)(C). This inquiry includes "determin[ing] whether the plaintiffs have proposed a 'natural' class—a class that encompasses all of the people and claims that one

would expect to include in a class action, as opposed to a class that appears to be gerrymandered solely to avoid federal jurisdiction by leaving out certain potential class members or claims." 2005 U.S.C.C.A.N. at 36. "If the federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction." *Id.*

Congress also extended CAFA's reaches to "mass actions," i.e., cases involving 100 or more persons that are "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11). Under the plain language of 28 U.S.C. § 1332(d)(11), "any 'mass action' is also considered a 'class action' for the purposes of CAFA's removal provisions." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1195 (11th Cir. 2007). The Eleventh Circuit ably explained that Congress made mass actions eligible for removal to federal court to stop gamesmanship by plaintiffs' lawyers: "In extending CAFA to large individual state court cases that are functionally indistinguishable from class actions, the mass action provision prevents plaintiffs' counsel from avoiding CAFA's expanded federal jurisdiction by simply choosing not to seek class certification." *Id.* at 1198 (citing S. Rep. No. 109-14, at 47 (2005),

reprinted in 2005 U.S.C.C.A.N. 3, 44 (noting that "mass actions are simply class actions in disguise")).

CAFA's jurisdictional amendments described above apply equally to both class and mass actions. *See* 28 U.S.C. §§ 1332(d) & 1453 (requirements for jurisdiction and removal of class and mass actions); *Abraham v. St. Croix Renaissance Grp., L.L.L.P.*, 719 F.3d 270, 275 (3d Cir. 2013) ("The plain text of this provision makes § 1453's treatment of 'class actions' equally applicable to 'mass actions.'"). Indeed, the Senate Judiciary Committee saw no difference between class actions and mass actions for CAFA purposes. 2005 U.S.C.C.A.N. at 44 ("The Committee find [sic] that mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions.").

In sum, by enacting CAFA, Congress codified a strong national policy that class and mass actions with national significance belong in federal court. Congress specifically intended those reforms to defeat artful pleading or other gamesmanship by plaintiffs' lawyers designed to keep such cases in state court.

II. THE SUPREME COURT AND OTHER CIRCUITS HAVE FAITHFULLY IMPLEMENTED CAFA'S "SUBSTANCE OVER FORM" MANDATE TO ENSURE THAT LARGE CLASS AND MASS ACTIONS CAN BE REMOVED TO FEDERAL COURT.

Despite CAFA's clear text, purpose, and legislative history, plaintiffs continue to employ a host of creative devices to skirt CAFA's mandates and funnel disputes of national importance toward plaintiff-friendly state-court venues. Those devices have included artificially structuring the time periods of alleged wrongs—or the geographic location, quantity, or damages of putative class members—to avoid CAFA's jurisdictional thresholds. *See, e.g.*, *Freeman*, 551 F.3d at 407 ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction."); *Proffitt v. Abbott Labs.*, No. 2:08-CV-151, 2008 WL 4401367, at *2, *5 (E.D. Tenn. Mar. 27, 2009) ("It is apparent to the court that the time divisions are a deliberate attempt to circumvent the CAFA," and "the court sees the intent of the CAFA being undermined by the device of filing multiple lawsuits based on completely arbitrary time periods."); *Brook v. UnitedHealth Grp. Inc.*, No. 06 CV 12954(GBD), 2007 WL 2827808, at *4 (S.D.N.Y. Sept. 27, 2007) ("Plaintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in

various state courts."); *Shappell v. PPL Corp.*, Civil No. 06-2078 (AET), 2007 WL 893910, at *3 (D.N.J. Mar. 21, 2007) ("The Court is concerned that Plaintiffs may attempt, as Defendants argue, to use this voluntary dismissal as a means of 'gerrymandering' smaller class sizes in state court, which fall beyond the purview of CAFA."); *Judicial Hellholes*, *supra*, at 55-57 (outlining methods used by plaintiffs' attorneys to avoid CAFA removal).[3]

Courts—including the Supreme Court—have forcefully rejected such continued gamesmanship designed to evade CAFA jurisdiction by focusing on the substance, rather than the form, of a plaintiff's filings or procedural maneuvers. The Supreme Court's recent decision in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), is instructive. There, the plaintiff Knowles filed a class action complaint in Arkansas's Miller County state court alleging that Standard Fire had improperly failed to include a general contractor fee in homeowner's insurance loss payments

---

[3] *See generally* 2 William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 6:17 (5th ed. 2012) ("Some plaintiffs have explicitly attempted to limit their actions to less than $5 million in controversy while others have created suits of fewer than 100 class members, and still, others appear to have structured classes so as to fit a CAFA exception. The circuit courts have adopted different approaches depending on the particular maneuver attempted.").

to its insureds. *Id.* at 1347. If certified, Knowles's class would have included possibly thousands of Arkansas plaintiffs' claims, making the case ripe for adjudication in federal court under CAFA jurisdiction. But his complaint stated that he and the members of the putative class "stipulate[d] they will seek to recover total aggregate damages of less than five million dollars"—below CAFA's jurisdictional amount-in-controversy threshold—and he further attached an affidavit stipulating that he would "not at any time during this case . . . seek damages for the class . . . in excess of $5,000,000 in the aggregate." *Id.* (internal quotation marks omitted).

Standard Fire removed the case to federal court anyway, invoking its CAFA jurisdiction. *Id.* at 1348. The district court found that without Knowles's stipulation, the action would have exceeded CAFA's $5,000,000 jurisdictional threshold and removal would have been proper. *Id.* Yet in light of the stipulation, the district court concluded that the amount in controversy fell below CAFA's threshold. It thus remanded the case to state court. *Id.*

The Supreme Court unanimously held that Knowles could not evade the federal court's CAFA jurisdiction based on his stipulation. *Id.* at 1347.

It reasoned that Knowles's stipulation was not binding on absent class members because the class had not yet been certified. *Id.* at 1349. As a result, Knowles could not have "reduced the value of the putative class members' claims" below the jurisdictional threshold. *Id.*

In so holding, the Court rejected the notion that, under CAFA, federal courts cannot evaluate the potential or practical consequences of the stipulation. "We do not agree that CAFA forbids the federal court to consider, for purposes of determining the amount in controversy, the very real possibility that a nonbinding, amount-limiting, stipulation may not survive the class certification process." *Id.* at 1350. To hold otherwise would "exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Id.* (citation omitted). A contrary ruling—that federal courts must in effect be willfully blind to the practical effects of a plaintiff's procedural maneuvers—"would also have the effect of allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations." *Id.* Such an intolerable "outcome would squarely conflict with [CAFA's] objective." *Id.* As such, the Court "believe[d] [that] the District Court, when following the

statute to aggregate the proposed class members' claims, should have ignored that stipulation." *Id.*

Consistent with *Knowles,* other circuits have focused on substance over form in deciding the propriety of CAFA removals. For example, two Seventh Circuit cases have rejected the plaintiffs' attempts to circumvent CAFA's mass action removal provision. *See In re Abbott Labs.,* 698 F.3d at 570 (7th Cir. 2012); *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008). *In re Abbott Labs* took a practical approach to the issue. There, several hundred plaintiffs filed 10 separate lawsuits in Illinois state court against the same defendant. *In re Abbott Labs.*, 698 F.3d at 570. After the plaintiffs moved to consolidate the cases in state court, the defendant removed the cases to federal court under CAFA. *Id.* at 571. The Seventh Circuit rejected the plaintiffs' argument that CAFA jurisdiction was improper because they had not expressly requested that their claims be "tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). The circuit recognized that "a proposal for a joint trial [under CAFA] may be implicit, particularly where the assumption would be that a single trial was involved." *Id.* at 573. "[I]t is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or

an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly." *Id.*

The Eighth Circuit recently followed *In re Abbott Labs* in *Atwell*, 2013 WL 6050762. In *Atwell*, plaintiffs filed numerous actions in state court against four medical-device manufacturers. *Id.* at *1. Each action named fewer than 100 plaintiffs. *Id.* Three of the groups of plaintiffs filed motions asking the state court to assign each case to "a single Judge for purposes of discovery and trial." *Id.* At the hearing on the motion, the plaintiffs' counsel disavowed any intent to have the cases consolidated, claiming instead that they wanted the cases assigned to "one single judge" only "for consistency of rulings, judicial economy, [and] administration of justice." *Id.* at *4. By doing so, plaintiffs hoped there would be a process to "select the bellwether case to try."[4] *Id.* Thereafter, the defendant removed the cases under CAFA, but the district court remanded them to state court. *Id.*

The Eighth Circuit vacated the district court's remand orders. *Id.* at *6. The court recognized that granting the plaintiffs' request for

---

[4] "The dictionary states a bellwether is 'one that takes the lead.' Webster's New International Dictionary (3d ed.1993)." *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1199 n.11 (10th Cir. 2000).

assignment to a single state court judge for pretrial purposes would result in a joint trial. *Id.* at *5. In reaching this conclusion and looking to the practical effect of plaintiffs' request, the Eighth Circuit explicitly followed *In re Abbott Labs*. *See id.*

Atwell also expressly agreed with Judge Gould's dissenting opinion in *Romo*, where a divided panel of the Ninth Circuit declined to follow *In re Abbott Labs*. *Romo* was one of forty actions filed in California state courts involving products containing propoxyphene. *Romo*, 731 F.3d at 920. The plaintiffs moved to coordinate those cases under California Code of Civil Procedure section 404.1. *Id.* at 920-21. Thereafter, the defendant removed one of the actions to federal court as a CAFA "mass action." *Id.* at 921. The district court remanded the action to state court. The defendant appealed the remand order, and by a 2-1 vote, a panel of the Ninth Circuit affirmed. The majority focused on the particular wording of the plaintiffs' motion for coordination—that is, on the form of plaintiffs' request—rather than on the substantive conditions it would create. *See id.* at 922-23. In doing so, the Ninth Circuit majority expressed its disagreement with *In re Abbott Labs* and adopted an interpretive methodology squarely at odds with *Knowles* and with the Seventh Circuit's. *Id.* at 922-24.

Judge Gould dissented. He agreed with the Seventh Circuit that requests for joint trials under CAFA may be implicit rather than explicit and "may take different forms as long as the plaintiffs' claims are being determined jointly." *Romo*, 731 F.3d at 925 (Gould, J., dissenting); *see also id.* at 927-28. Judge Gould disagreed with the majority that a request to consolidate state court cases must include an explicit request for a "joint trial" before a court may find CAFA "mass action" jurisdiction. *Id.* at 926. "I would conclude that the *substance* of what was done is controlling" because under *Knowles* there are "limits to how far plaintiffs may go in structuring their complaints to avoid federal jurisdiction." *Id.* (emphasis added).[5]

Judge Gould's reasoning is consistent with the Sixth Circuit's in a pre-*Knowles* decision, *Freeman*. In that case, 300 plaintiffs divided their claims into five separate lawsuits covering distinct six-month periods. *Freeman*, 551 F.3d at 406. Each action sought less than the $5 million CAFA jurisdictional amount. *Id.* The defendants removed the action to federal court and the district court remanded the actions to state court.

[5] The defendant in *Romo* has filed a petition for rehearing *en banc* which remains pending as of the filing of this brief.

Id. at 407. The Sixth Circuit reversed and remanded for further proceedings in federal court. The court held that the plaintiffs "put forth no colorable reason for breaking up the lawsuits in this fashion other than to avoid federal jurisdiction." *Id.* In fact, the plaintiffs' attorney admitted at oral argument that "avoiding CAFA was the only reason for this structuring." *Id.*

A clear 3-2 circuit split[6] thus exists on the issue presented here. Only the majority position maintains fidelity to *Knowles*'s plain instruction *not* to "exalt form over substance" when assessing CAFA removal requests. *Knowles,* 133 S. Ct. at 1350. Rejecting that approach, and erroneously focusing solely on "form" like the Ninth and Eleventh Circuits, would "have the effect of allowing the" plaintiffs to "subdivi[de]" a case that would meet CAFA's numerosity and damages thresholds into a number of state court cases pleaded to fall just under those thresholds—an "outcome [that] would squarely conflict with the statute's objective." *Id.*

---

[6] In *Scimone*, the Eleventh Circuit adopted a form-over-substance approach and held that a formal motion to consolidate was required for removal of a "mass action" under CAFA, even if that motion does not occur until the eve of trial. *Scimone,* 720 F.3d at 881-82.

III. THIS COURT SHOULD FOLLOW *KNOWLES* AND THE MAJORITY POSITION AND HOLD THAT CAFA JURISDICTION IS PROPER HERE BECAUSE PLAINTIFFS HAVE IMPLICITLY REQUESTED A JOINT TRIAL.

The plaintiffs' lawyers in this case have quickly made Justice Breyer's opinion in *Knowles* prophetic: instead of filing one complaint on behalf of 650 plaintiffs seeking the identical relief from the same defendants, they filed eleven separate actions, each with fewer than 100 plaintiffs, specifically to avoid CAFA jurisdiction. (1 App. 190a.) The plaintiffs' names are the only differences in each of the eleven complaints—their allegations are otherwise virtually identical, including naming the same defendants and alleging the same purportedly wrongful conduct. (1 App. 190a-91a.) Plaintiffs' counsel further ensured that their eleven identical cases would be assigned to the same trial judge by selecting the venue of Pottawatomie County, where each action could be assigned to only one judicial officer. (1 App. 190a.)[7]

---

[7] There are currently four judicial officers in Pottawatomie County: one district judge, two special judges and one associate district judge. *See Pottawatomie County*, Okla. St. Cts. Network, http://www.oscn.net/applications/oscn/start.asp?viewType=COUNTYINFO&county=POTTAWATOMIE (last visited Jan. 10, 2014). By statute, Pottawatomie County has only one district judge. (Ok. Stat. tit. 20, § 92.24). This means, as a practical matter, all large civil cases in that county are assigned to that (continued...)

If the remand order is permitted to stand in these circumstances, CAFA will effectively become a dead letter. In the future, plaintiffs' counsel will simply structure all of their mass action complaints into groups of fewer than 100 plaintiffs and will avoid using the magic words "joint trial." Such a strategy will keep in state court disputes that are large and important enough to be removable CAFA mass actions. That upends Congress's intent to provide "Federal court consideration of interstate cases of national importance under diversity jurisdiction" (Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4)(A), (b)(2), 119 Stat 4) because such cases "have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27, *reprinted in* 2005 U.S.C.C.A.N. 3, 27. It would further contravene *Knowles*'s admonition that courts should not "exalt form over substance" in considering CAFA removals. 133 S. Ct. at 1350.

Indeed, this Court need look no further than plaintiffs' own pleadings to determine that this case belongs in federal court as a CAFA mass

(...continued)
one judicial officer. Special judges cannot hear civil actions where more than $10,000 is at issue. (Ok. Stat., tit. 20, § 123.) Similarly, associate district judges can only hear contested civil cases upon the agreement of the parties. (Ok. Stat., tit. 20, § 95.8.)

action. Each of plaintiffs' eleven separate petitions specifically alleges that the joinder of the (fewer than 100) plaintiffs in each individual petition "is for the purpose of pretrial discovery and proceedings only and is not for trial." (*See, e.g.,* 1 App. 223a [¶ 17].) By seeking—eleven separate times—pretrial joinder of the *same* claims against the *same* defendants in eleven *identical* petitions, these 650 plaintiffs have requested the functional equivalent to the consolidation request deemed sufficient to establish a CAFA mass action in *Atwell*. *See* 2013 WL 6050762 at *4-5. And in *Freeman*, the Sixth Circuit found a CAFA mass action when the plaintiffs' implied request for a joint trial was even less distinct. *See Freeman*, 551 F.3d at 406-07. Thus, even a quick peek at the substance of plaintiffs' request here reveals their evident intent for a single state judicial officer to oversee all the pretrial proceedings and try all the cases of these 650 plaintiffs—that is, an evident intent to litigate in state court a case that readily constitutes a CAFA mass action.

Moreover, plaintiffs' tactical decision to file all eleven actions in a small county with just one judicial officer authorized to handle large civil cases virtually ensures that, even without a formal consolidation motion, all eleven actions will be assigned to and ultimately tried before the same

judge. This will, in all likelihood, take the form of a bellwether trial, in which the factual and legal findings in that trial are applied to all the other plaintiffs. *See Atwell*, 2013 WL 6050762 at * 4-5; *In re Abbott Labs.*, 693 F.3d at 573 ("[I]t is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly."). It strains credulity to suggest otherwise, i.e., that one judge overseeing eleven separate cases involving the same plaintiffs' and defense lawyers, the same allegations, and the same defendants will—despite that overwhelming concentricity—hold eleven separate trials and revisit anew the *same* issues in eleven separate cases. Oklahoma courts routinely consolidate cases involving much less duplication. *See, e.g.*, *Neidy v. City of Chickasha,* 188 P.3d 128, 130 (Okla. 2008) ("On 2 March 2006 the City of Chickasha moved the trial court to consolidate the two cases. Finding that the two actions presented a common question of law, the trial court consolidated the cases to avoid undue expense or delay."); *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 340 (Okla. 1998) ("Although these cases began as separate actions, and generated separate appeals, they were

consolidated both in the trial court and here. Consequently we will treat them as if only one case, and one appeal were before us.").

These eleven identical actions involving 650 individual plaintiffs seeking identical relief against the same defendants are a mass action under CAFA. Therefore, this Court should reverse the district court's order remanding these actions to state court.

CONCLUSION

The decision under review is exceptionally important. It defies congressional intent by establishing strong incentives for gamesmanship by plaintiffs' attorneys. One of the primary goals of CAFA is to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys. The decision below creates a loophole allowing plaintiffs' attorneys to invoke the benefits of a CAFA mass action (such as coordinated discovery and pretrial rulings) but avoid federal CAFA jurisdiction merely by not explicitly requesting a "joint trial." To avoid that outcome, which contravenes both CAFA's plain text and CAFA's animating policy concerns, amici urge the Court to reverse the district court order

remanding this action and the related actions and keep these actions in federal court where they belong.

January 17, 2014

HORVITZ & LEVY LLP
JEREMY B. ROSEN
STEVEN S. FLEISCHMAN

By: /s/ Steven S. Fleischman
Steven S. Fleischman

Attorneys for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and PHRMA

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

☒ 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☒ this brief contains 5,916 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

☐ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

☒ 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or

☐ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

January 17, 2014
Date

s/Steven S. Fleischman
ATTORNEY NAME

Attorney for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and PHRMA
Horvitz & Levy LLP
15760 Ventura Blvd., Ste. 1800
Encino, CA 91436-3000
sfleischman@horvitzlevy.com
(818) 995-0800

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redaction have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Symantec Endpoint Protection Small Business Edition, Version 12.1, updated January 17, 2014, and according to the program are free of viruses.

January 17, 2014
Date

s/Steven S. Fleischman
ATTORNEY NAME

Attorney for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and PhRMA
Horvitz & Levy LLP
15760 Ventura Blvd., Ste. 1800
Encino, CA 91436-3000
sfleischman@horvitzlevy.com
(818) 995-0800

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

January 17, 2014
Date

s/Steven S. Fleischman
ATTORNEY NAME

Attorney for Amici Curiae
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and PhRMA
Horvitz & Levy LLP
15760 Ventura Blvd., Ste. 1800
Encino, CA 91436-3000
sfleischman@horvitzlevy.com
(818) 995-0800