CA Nos. 13-56306, 13-56310

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARGALIT CORBER, *et al.*,
Plaintiffs-Appellees,
v.

MCKESSON CORPORATION, *et al.*,
Defendants - Appellant, Xanodyne Pharmaceuticals, Inc.

JUDITH ROMO, *et al.*,
Plaintiffs-Appellees,
v.

MCKESSON CORPORATION, *et al.*,
Defendants - Appellant, Teva Pharmaceuticals USA, Inc.

On Appeal from the United States District Court
for the Central District of California
Nos. CV 12-9986-PSG, CV 12-2036-PSG
(Honorable Philip S. Gutierrez)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS, URGING REVERSAL

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The interests of the Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file. In brief, WLF is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in California.[1] WLF's primary mission is the defense and promotion of free enterprise, and ensuring that economic development is not impeded by excessive litigation.

Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, to ensure that state-court defendants would have the option of removing their case to federal court where the suit is both substantial and involves numerous plaintiffs, and minimal diversity exists. WLF is concerned that the decisions below unduly restrict the intended application of CAFA.

WLF is also concerned that the district court decided these cases based on an erroneous belief that CAFA removal jurisdiction is disfavored under our federal system of government and that any ambiguities in the law ought to be construed

[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

against the party seeking removal. To the contrary, the Framers viewed federal courts' diversity/removal jurisdiction as a key component of our system of federalism. WLF is concerned that the district courts' misunderstanding is significantly interfering with Congress's intent that CAFA be fully enforced so as to protect defendants' rights to a fair and impartial forum.

WLF addresses CAFA issues only and does not address other grounds for removal asserted by Appellants.

STATEMENT OF THE CASE

This case raises important questions regarding the scope of CAFA, a statute adopted by Congress in 2005 to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and "mass actions," a type of multi-plaintiff lawsuit that CAFA includes within the definition of "class action." 28 U.S.C. § 1332(d)(11)(A).

Congress found that over the preceding decade there had been "abuses of the class action device," including acts by "State and local courts" that were designed to "keep[ ] cases of national importance out of Federal court" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). The legislative history explained, "Current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in

state courts." S. Rep. No. 109-14 (2005) at 4. Congress adopted CAFA to, among other things, "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* at 7.

As relevant to these appeals, CAFA permits the removal to federal court of a "mass action" that meets requirements imposed by 28 U.S.C. § 1332(d)(2)-(11). Appellees do not dispute that most of those requirements have been met: Appellees' claims involve common questions of law and fact, and each claim exceeds the $75,000 jurisdictional amount, § 1332(d)(11)(B)(i); the aggregate amount in controversy exceeds $5,000,000, § 1332(d)(2)(A); not all parties are citizens of the same State, § 1332(d)(2)(A)(i); almost all of the claims appear to have arisen outside California (the forum State), § 1332(d)(11)(B)(ii)(I); and the claims were not joined at the behest of Appellants. § 1332(d)(11)(B)(ii)(II). Appellees contend, however, that their claims were not removable to federal court because the claims were not "proposed to be tried jointly." § 1332(d)(11)(B)(i).

Both the Corber and Romo Appellees[2] were among more than 1,500 plaintiffs named in more than 40 multi-plaintiff lawsuits filed in California state court by the same set of law firms. Each plaintiff alleges injuries arising from use

[2] Appellees filed nearly identical briefs in the two appeals. Citations to Appellees' briefs (hereinafter "Romo Br.") and Excerpts of Record will use the pagination from the brief and excerpts filed in No. 13-56310.

of prescription pain medications containing the active ingredient propoxyphene. On October 23, 2012, Appellees' counsel filed a petition in Superior Court of California pursuant to California Code of Civil Procedure § 404.1, seeking to coordinate their propoxyphene lawsuits "for all purposes." The defendants thereafter filed removal petitions in each of the lawsuits, asserting that the coordinated suits qualified as a "mass action" under § 1332(d)(11).

On February 20, 2013, the U.S. District Court for the Central District of California issued an ordering remanding *Romo* to state court. ER 1-17. The court concluded that the defendants had failed to satisfy § 1332(d)(11)(B)(i)'s mass action requirement that the monetary claims of "100 or more persons are proposed to be tried jointly." ER 5. Explicitly declining to follow the Seventh Circuit's decision in *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012), the court held that the filing of the Petition for Coordination did not constitute a proposal that the claims subject to the Petition be "tried jointly." *Id.* The court concluded that the Petition's "for all purposes" language did not contemplate joint trials and that "the language in the petition focuses on coordination for pretrial purposes." ER 6.

The district court added that it was "sympathetic to Plaintiffs' assessment that joint trials in cases such as this one are rare, while the more common practice—which is also the approach Plaintiffs indicate they may take—is to

conduct bellwether trials." ER 7.

The court also held that "there is a strong presumption against removal jurisdiction," ER 3, and that to construe the Petition for Coordination as proposing that claims be "tried jointly" would not constitute "strict construction" of CAFA. ER 7. Relying on pre-CAFA precedent, it stated that removal statutes, including CAFA, are to be "'strictly construe[d]' against removal jurisdiction and 'federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.'" ER 4 (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)).[3]

On July 26, 2013, this Court granted two of the many petitions for appeal filed in connection with the propoxyphene remand orders: one filed by Xanodyne Pharmaceuticals, Inc. (No. 13-56306) and one filed by Teva Pharmaceuticals USA, Inc. (No. 13-56310).

SUMMARY OF ARGUMENT

These appeals turn largely on the meaning of the phrase "tried jointly," as used in § 1332(d)(11)(B)(i). The district court concluded that counsel do not

[3] The same district court judge later issued brief orders remanding each of the other multi-plaintiff propoxyphene lawsuits that had been assigned to his docket, including *Corber*. Each such order cited to the reasoning contained in the *Romo* remand order.

propose that claims be "tried jointly" unless they propose a trial proceeding at which the trier of fact is *simultaneously* deciding the claims of all 100+ plaintiffs. *See, e.g.*, ER 7. CAFA's mass action provision cannot plausibly be interpreted in that manner. Actions are commonly deemed "joint" without regard to whether they proceed identically in every respect. Rather, events occur "jointly" if they occur "in conjunction, combination, or concert." *Oxford English Dictionary* (2013). The only plausible interpretation of Appellees' request that the propoxyphene lawsuits be coordinated "for all purposes" is that they were requesting that the lawsuits be tried "in conjunction" with one another. That is sufficient to warrant CAFA removal. It is highly doubtful that anyone would propose that a single jury simultaneously hear evidence regarding 1,500 product liability claims, but nothing in § 1332(d)(11)(B)(i) suggests that such a proposal is a prerequisite to mass action removal.

Adopting Appellees' cramped interpretation of the phrase "tried jointly" would essentially eliminate CAFA's "mass action" provision, because courts virtually never conduct simultaneous trials of all issues affecting the monetary claims of extremely large numbers of named plaintiffs. Such massive trials could take years to complete, even when there exist some common questions of law or fact among the 100+ plaintiffs. Courts generally avoid construing a statute in a

manner that would render portions of the statute superfluous.

Events leading up to adoption of CAFA in 2005 confirm WLF's understanding of the phrase "tried jointly." CAFA's mass action provision was precipitated by complaints that some state courts had adopted overly lenient joinder rules that permitted lawyers to join together in a single lawsuit the product liability claims of a large, disparate group of plaintiffs from across the country. Many complained that such "mass actions" were procedurally unfair to out-of-state defendants. Yet, although these mass actions often involved 100 or more plain-tiffs, trial plans rarely called for initial jury trials involving more than 10 or 15 of the plaintiffs. Thus, under the district court's understanding of CAFA, the very sort of pre-2005 mass actions that prompted Congress to adopt CAFA's mass action provision would be unaffected by the provision. It is not plausible that Congress intended CAFA's mass action provision to operate in such a restricted manner.

The district court placed great stock in "the complete lack of any mention of joint trial in the Petition" for Coordination. ER 6. But as the Seventh Circuit has held, "a proposal for a joint trial can be implicit" even when the plaintiffs have "never specifically asked for a joint trial." *Abbott*, 698 F.3d at 572. A fair reading of the Petition—particular the request that cases be coordinated "for all purposes"—leaves no doubt that Appellees were proposing that the cases be tried

jointly.

The district court likely arrived at its pinched interpretation of CAFA because it erroneously concluded that it was required to "strictly construe" CAFA's removal provisions and to rule against removal if it had any doubts regarding the defendants' right to remove these cases to federal court. ER 4. On the contrary, this Court has never held that CAFA should be "strictly construed," and other circuits have expressly rejected claims that Congress intended that CAFA be strictly construed against removal. Moreover, the district court's strong presumption against removal is inconsistent with the Framer's understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our federal system of government. The Framers viewed removal jurisdiction as an important safeguard against the potential bias of state courts. In light of that understanding, there is no reason for the courts to put a thumb on the scale, thereby interpreting CAFA in a manner other than that which its actual language and statutory context would suggest.

ARGUMENT

I. SECTION 1332(d)(11) AUTHORIZED REMOVAL OF THE MULTI-PLAINTIFF PROPOXYPHENE COMPLAINTS

As this Court has recognized, Congress "altered the landscape for federal

court jurisdiction" over multi-party litigation when it adopted CAFA in 2005. *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 677 (9th Cir. 2006). Congress adopted CAFA to, among other things, facilitate defendants' efforts to remove interstate cases of national importance into federal court, and thereby "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. No. 109-14 (2005) at 7.

Most importantly for purposes of these appeals, CAFA authorized the removal to federal court of any "mass action" that meets the requirements set forth in 28 U.S.C. § 1332(d)(2)-(11). Corber and Romo contend that their propoxyphene complaints were not removable under CAFA's mass action provision because Xanodyne and Teva failed to demonstrate that the complaints subject to their Petition for Coordination were "proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). That contention is without merit. Once the statute's meaning is properly construed, the Petition for Coordination can best be interpreted as having constituted a proposal that the complaints be "tried jointly."

A. A Group of Plaintiffs Proposes That Claims Be "Tried Jointly" When It Proposes That Claims Be Tried in Conjunction with One Another

The Corber and Romo lawsuits are two of more than 40 multi-plaintiff lawsuits filed in California state court by the same group of law firms. On October

23, 2012, those law firms filed a petition in Superior Court of California pursuant to California Code of Civil Procedure § 404.1, seeking to coordinate their propoxyphene lawsuits "for all purposes." The Petition's language leaves little doubt that counsel was proposing that the lawsuits be "tried jointly" within the meaning of § 1332(d)(11)(B)(i).

Corber and Romo's arguments to the contrary are based primarily on their contention that the phrase "tried jointly" should be narrowly construed. They contend (as did the district court) that claims are not "tried jointly" within the meaning of CAFA unless there is a single "joint trial where more than one party (and for purposes of CAFA 100 or more parties) *simultaneously* present their claims to a trier of fact." Romo Br. at 18 (emphasis added).

Their interpretation of the statute is not plausible. The word "jointly" is commonly understood to cover a far broader range of activities than their interpretation would suggest. Actions are commonly deemed "joint" without regard to whether they proceed identically in every respect. Rather, events occur "jointly" if they occur "in conjunction, combination, or concert." *Oxford English Dictionary* (2013).

Accordingly, claims involving 100+ plaintiffs need not be heard simultaneously in one enormous proceeding before a single trier of fact in order to

be "tried jointly." It is sufficient if all trials are being conducted "in conjunction" with one another. Proceedings before a single judge can qualify as a CAFA mass action being "tried jointly" even though there is "[a] proposal to hold multiple trials in a single suit." *Bullard v. Burlington Northern Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir. 2008).[4]

Adopting Appellees' interpretation of the phrase "tried jointly" would essentially eliminate CAFA's "mass action" provision, because courts virtually never conduct simultaneous trials of all issues affecting the monetary claims of extremely large numbers of named plaintiffs. *See, e.g.*, ER 7 ("[J]oint trials in cases such as this one are rare, while the more common practice—which is also the approach Plaintiffs indicate they may take—is to conduct bellwether trials.") Such massive trials could take years to complete, even when there exist some common questions of law or fact among the 100+ plaintiffs. Corber and Romo's inability to identify any set of defendants who could successfully invoke the mass action

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[4] Terminology used in Fed.R.Civ.P. 23 class actions provides a helpful comparison. Attorneys commonly speak of claims being "tried jointly" in a class action, with the named plaintiffs representing the interests of absent class members throughout the Rule 23 proceedings. Even so, Rule 23 class actions often include multiple trials, with the interests of some but not necessarily all subclasses at stake during each trial. Moreover, following the liability phase in Rule 23(b)(3) class actions, courts routinely conduct individual proceedings to determine each class member's entitlement to damages. Few would contend, however, that such coordinated trial proceedings are not "joint."

provision under their interpretation of "tried jointly" provides a strong basis for rejecting that interpretation. It is a well-accepted rule of statutory construction that courts generally avoid construing a statute in a manner that would render portions of the statute superfluous. As the Seventh Circuit stated in rejecting another overly restrictive interpretation of the CAFA mass action provision, "Courts do not read statutes to make entire subsections vanish into the night." *Bullard*, 535 F.3d at 762.

CAFA's "tried jointly" provision encompasses proposals for bellwether trials, in which the trial judge tries one or more claims from a group of coordinated cases in hopes that resolution of issues in the early trials facilitates resolution of issues in the remaining claims. Corber and Romo argue that, in California, a proposal for the use of bellwether trials would not constitute a proposal that coordinated claims be "tried jointly" because (they assert) California does not permit the judgment from a bellwether trial "to bind the defendant in subsequent trials" while the bellwether judgment is still under appeal. Romo Br. at 23. But regardless whether the first judgment can be given *res judicata* effect, it is well recognized that bellwether trials can be very effective in bringing about the resolution of other, coordinated claims. For one thing, parties realize that the trial judge is likely to adhere during later trials to the legal rulings (s)he issued during

the bellwether trial, and thus they can much more accurately gauge in advance of trial a plausible settlement value of remaining claims. Under those circumstance, cases grouped within a bellwether trial procedure can fairly be described as being tried "in conjunction, combination, or concert" with one another and thus being "tried jointly."[5]

Section 1332(d)(11)(B)(ii)(IV) provides a strong clue regarding where CAFA intended to place the dividing line between proposed judicial coordination that constitutes a proposal that claims be "tried jointly" and proposed coordination that does not. That provision states that a "mass action" does not include any civil action in which "the claims have been consolidated or coordinated solely for pretrial proceedings." The provision suggests that plaintiffs should be deemed to have proposed that claims be "tried jointly" whenever they petition for the

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[5] Appellees contend that when Congress adopted CAFA, "it was *primarily* concerned with Class Actions where defendants faced representative trials brought by classes consisting of hundreds and sometimes thousands of plaintiffs," and that its "mass action" provision was something of an afterthought. Romo Br. at 8 (emphasis added). They cite no statutory support for that contention, and there is none. To the contrary, the Senate Report accompanying CAFA explained that reining in abusive mass actions was a major congressional concern: "The Committee finds 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." S. Rep. No. 109-14 (2005) at 47. Indeed, to emphasize Congress's finding that mass actions and class actions are two sides of the same coin, CAFA defines a "mass action" as one type of "class action." 28 U.S.C. § 1332(d)(11)(A).

coordination of proceedings that go beyond the pretrial stage, regardless whether they *explicitly* propose a mammoth proceeding of the sort envisioned by Appellees (*i.e.*, one in which the claims of all 100+ plaintiffs are simultaneously presented to the trier of fact).

Appellees apparently concede that CAFA's mass action provision would have permitted removal of one of their multi-plaintiff lawsuits if the suit had included 100 or more plaintiffs—even though it is highly unlikely that the trial judge hearing such a suit would have authorized a proceeding at which the trier of fact simultaneously heard the claims of all 100+ plaintiffs. Yet, they fail to explain why the result should be different when, as here, an equal number of plaintiffs have filed claims that Corber and Romo propose be coordinated "for all purposes," with the only difference being that the plaintiffs were initially divvied up among 40+ lawsuits, each with less than 100 plaintiffs. In determining whether cases are removable under CAFA, the Supreme Court cautioned in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), that courts should not "exalt form over substance," particularly where doing so would "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" 133 S. Ct. at 1350 (quoting CAFA § 2(b)(2), 119 Stat. 5). The Court explicitly disapproved of one tactic for creating claims worth less than

$5 million and thereby defeating CAFA jurisdiction: "the subdivision of a $100 million action into 21 just-below-$5 million state-court actions simply by including nonbinding stipulations." *Id.* The Court concluded that that tactic would not defeat CAFA jurisdiction "because such an outcome would squarely conflict with the statute's objective." *Id.* This Court should not countenance Appellees' similar jurisdiction-avoidance tactic: dividing plaintiffs up into groups of less than 100 and then bringing them back together again by means of a coordination petition.

B. Events Preceding Adoption of CAFA Confirm WLF's Interpretation of the Phrase "Tried Jointly"

CAFA did not coin the phrase "mass action." Rather, the phrase was used for many years before 2005 to describe tort suits in which the claims of a large, diverse group of plaintiffs were joined together, often in a manner that created serious procedural difficulties for defendants. One of CAFA's principal goals was to assuage the concerns of the targets of mass actions, by permitting them to remove mass actions to federal court. Adopting Appellees' narrow reading of "tried jointly" would frustrate that goal, however, because their reading would not permit defendants to remove to federal court the very types of mass actions that were the subject of pre-2005 criticism.

Pre-2005 mass actions were particularly prevalent in rural counties of

Mississippi and West Virginia and often involved hundreds of diverse individuals alleging asbestos-related injuries. Such suits were possible because some trial judges employed loose joinder and venue standards that permitted highly diverse claims to be combined in a single lawsuit and that did not require more than one plaintiff to be a resident of the forum county. A 2003 study noted that 73 mass actions were filed in Jefferson County, Mississippi in 2000 alone; less than 20% of the plaintiffs whose addresses were listed in mass actions filed in the county between 1999 and 2001 actually lived in the county. *See* J. Beisner, J. Miller, and M. Shors, "One Small Step for a County Court . . . One Giant Calamity for the National Legal System," Manhattan Institute for Policy Research, Civil Justice Report No. 7 (2003).

Complaints about abusive mass actions grew in the years preceding 2005 and led directly to inclusion of a mass action provision in CAFA. *See* S. Rep. No. 109-14 (2005) at 47. Importantly, there is no evidence that plaintiffs' counsel in such mass actions ever pushed for proceedings at which the trier of fact would simultaneously determine the claims of 100 or more of the plaintiffs. Rather, even though many of these suits listed more than 100 plaintiffs, the procedural concerns generally lay elsewhere:

Whatever reasons plaintiffs' attorneys have for choosing mass action over

> class action, the effect on defense counsel is that they must prepare for multiple cases in a short span of time. In fact, many defense attorneys claim that's the main reason plaintiffs opt for such strategies.
>
> Defense lawyers sometimes call the tactic, "trial by ambush," says Martin Beirne, a partner at Beirne, Maynard & Parsons. "The reality is that when they bundle these cases, you can end up with a hundred or more plaintiffs. The judge can say, 'We're going to try the case of Smith et al. v. XYZ Corp. in 30 days. And we're going to try them in groups of two, or six, or eight.' They don't tell you who's in that first group. That puts tremendous pressure on the defense to get fully prepared for all 100 cases."

Brian Quinton, "What Happened to Class? Plaintiffs' Lawyers Seek Mass Action, Not Class Action, to Push Large Personal Injury Cases," *Corporate Legal Times* (Jan. 1, 2005).

Defense counsel's complaints focused on the "unfairness" of opposing counsel's handpicking a few of the plaintiffs from a large mass action for a bellwether trial; if opposing counsel ever sought the simultaneous trial of 100 or more claims, defense counsel never mentioned it:

> The third problem with mass actions is that (sometimes even more so than class actions) they create enormous pressure to settle claims regardless of their actual worth. . . . This is especially true when a few very serious personal injury cases are coupled with many less serious cases (e.g., a wrongful death claim joined with numerous non-injury warranty claims). To take one recent case from Mississippi, plaintiffs' lawyers hand-picked 10 incredibly disparate plaintiffs—from a massive joined complaint involving over 100 plaintiffs—for a single trial against a pharmaceutical company; after deliberating for just two hours, the jury returned identical verdicts of $10,000,000 for each plaintiff, even though some of the plaintiffs asserted much less serious injuries than others. Given the dynamics of these "trials"

> and the dangers they pose for defendants, plaintiffs' counsel often refuse to settle serious claims unless the defendant is also willing to "buy out" the claims with lesser merit.

J. Beisner and J. Miller, "Class Actions in Disguise: The Growing Mass Action Problem," *Metropolitan Corporate Counsel* (Nov. 1, 2003).

Because overly lax joinder standards have been a particular problem in Mississippi, defendants on the losing end of trials conducted in Mississippi mass actions regularly base their appeals to the Mississippi Supreme Court on claims of improper joinder. WLF has been unable to identify any reported Mississippi Supreme Court decisions addressing joinder issues in which the claims of more than 100 plaintiffs were tried simultaneously— even though in a number of such cases, more than 100 plaintiffs were included in the initial complaint. *See, e.g., 3M Co. v. Johnson*, 895 So. 2d 151, 154 (Miss. 2005) (asbestos-related mass action was initially filed with 150 plaintiffs; appeal was from a trial involving 10 of those plaintiffs, following a trial-court order in which plaintiffs' counsel were permitted to choose 10 of their clients for an initial trial against all 62 defendants).

In sum, the evidence is conclusive that pre-2005 litigation abuses that led to enactment of CAFA's mass action provision never involved proceedings in which the claims of 100 or more plaintiffs were simultaneous determined by the trier of fact. Accordingly, if Congress really intended (as Corber and Romo argue) that the

phrase "tried jointly" should apply to simultaneous proceedings only, then the mass action provision did nothing to address any of the defendant-based concerns that gave rise to the mass action provision. That highly anomalous result provides an additional reason to reject Appellees' proffered interpretation of § 1332(d)(11)(B)(i) as not credible.

C. Appellees Implicitly Proposed That Claims Be "Tried Jointly" When They Requested That Claims Be Coordinated "For All Purposes"

On October 23, 2012, Appellees' counsel filed a petition in the Superior Court of California pursuant to California Code of Civil Procedure § 404.1, seeking to coordinate their propoxyphene lawsuits "for all purposes." The evidence is overwhelming that, for purposes of CAFA's mass action provision, the petition constituted a proposal that the claims of all 1,500 plaintiffs be "tried jointly."

Section 1332(d)(11)(B)(ii)(IV) states that a "mass action" does *not* include any civil action in which "the claims have been consolidated or coordinated solely for pretrial proceedings." But of course, that provision is of no assistance to Corber and Romo, because they proposed that their proceedings be coordinated "for all purposes," not simply for pretrial proceedings. Moreover, they do not contest that § 404.1 permits—indeed, anticipates—that proceedings assigned to a

judge for coordination will remain before that judge for trial.

That feature of § 404.1 contrasts sharply with multidistrict litigation (MDL) procedures permitted in federal court. While 28 U.S.C. § 1407 permits civil cases involving common questions of fact to be transferred to a single federal district judge for "coordinated or consolidated pretrial proceedings," such transfers do not extend to the trial phase. Indeed, the statute *requires* that an MDL case be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." § 1407(a). The language of § 1332(d)(11)(B)(ii)(IV) appears to have been drafted with an awareness of the provisions of the federal MDL statute. The implication is clear: state cases transferred pursuant to statutes akin to 28 U.S.C. § 1407 do not thereby qualify for removal under the mass action provision, but when (as here) plaintiffs' lawyers seek to transfer multi-plaintiff cases to a single judge in anticipation of coordinated trials before that judge, the "tried jointly" requirement is satisfied and the case is removable to federal court if the other prerequisites for mass action removal are met.

In concluding that Appellees had not proposed that coordinated cases be "tried jointly," the district court placed great stock in "the complete lack of any mention of joint trial in the Petition" for Coordination. ER 6. But as the Seventh

Circuit has held, "a proposal for a joint trial can be implicit" even when the plaintiffs have "never specifically asked for a joint trial." *Abbott*, 698 F.3d at 572. A fair reading of the Petition—particularly the request that the cases be coordinated "for all purposes"—leaves little doubt that Appellees were proposing that the cases be tried jointly, irrespective of their failure to utter the words "tried jointly." Such a proposal is sufficient for mass action removal under CAFA, which focuses on the substance of what has been proposed rather than on whether specific "magic words" have been uttered.

Appellants' briefs discuss at great length the numerous provisions in the Petition that demonstrate Appellees' intent that the coordinated cases be tried jointly. *See, e.g.*, Xanodyne Br. at 16. WLF will not repeat that discussion here. Suffice it to say that a plaintiff that urges coordination on the grounds that "[f]ailure to coordinate these actions creates a risk of inconsistent or duplicative judgments and orders" is proposing that cases be coordinated through trial and judgment, not that cases be coordinated for pre-trial procedures only.

The district court noted that the "duplicative judgments and orders" language was drawn directly from the standards set out for "evaluating whether coordination is appropriate" under § 404.1, and held that Appellees should not be "penalized" simply because their counsel "provided the court reviewing the

Petition with the standard by which the Petition should be analyzed." ER 6. But Appellees are not being "penalized" for providing a candid assessment regarding why the 40+ propoxyphene complaints should be consolidated "for all purposes"; it is hardly a "penalty" to have one's lawsuit heard by an impartial federal judge when it raises interstate issues of national importance. It so happens that the same factors that render a group of cases appropriate for coordination "for all purposes" under California law also render those cases appropriate for removal to federal court under CAFA. Contrary to the district court's implication, nothing in CAFA suggests that all plaintiffs ought to be provided with a sporting chance to avoid removal, or that they should be permitted to avoid removal if they simply follow the proper roadmap.

The district court cited this Court's decision in *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009), in support of its remand order. ER 6-7. The district court misread *Tanoh*, which actually supports *Appellants'* position. In *Tanoh*, the plaintiffs' counsel made no effort to coordinate their separately filed lawsuits, each of which had fewer than 100 plaintiffs. The Court stated that the only proposal that the cases be coordinated had originated with the defendant and held that CAFA "speaks directly to the issue at hand, specifying that claims 'joined upon motion of a defendant' do not qualify for removal to federal court under CAFA."

561 F.3d at 956 (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(II)). *Tanoh* noted, however, that the lawsuits might become eligible for removal under CAFA if the "plaintiffs seek to join the claims for trial. *See Bullard*, 535 F.3d at 761-62." *Id.* That is precisely what happened here: counsel for the plaintiffs in separately filed lawsuits *did* seek to join the claims for trial (and for all other purposes, for that matter) and thereby made the claims eligible for mass action removal. The Court's favorable citation to *Bullard* is particularly illuminating, because in *Bullard* the Seventh Circuit stated that a proposal that claims be "tried jointly" does not require that those precise words be used or that the plaintiff intend that all 100+ claims be tried at precisely the same time. *Bullard*, 535 F.3d at 762.

Moreover, Appellees' and the district court's efforts to distinguish the Seventh Circuit's decision in *Abbott* are unavailing. Unless this Court seeks to create an intercircuit conflict, *Abbott* requires a finding that CAFA's "tried jointly" requirement has been met here. In a memorandum in support of their state-court motion for consolidation of separately filed lawsuits, the *Abbott* plaintiffs stated that they "were requesting consolidation of the cases 'through trial' and 'not solely for pretrial proceedings.'" *Abbott*, 698 F.3d at 572. The Seventh Circuit deemed that language sufficient to support a finding that the plaintiffs were proposing that the claims be "tried jointly" and thus that the case was removable under the CAFA

mass action provision. *Id.* at 573. The court below, in addition to rejecting *Abbott*, held that it was distinguishable because Appellees here did not include identical language in their Petition for Coordination. ER 6. But the district court failed to explain why the Petition's request for coordination "for *all* purposes" (emphasis added) is not at least as broad as the language that the Seventh Circuit deemed sufficient. In sum, unless one adheres to Appellees' inappropriately narrow interpretation of the phrase "tried jointly," the conclusion is inescapable that Teva and Xanodyne have demonstrated their entitlement to remove these matters pursuant to CAFA's mass action provision.

II. THE DISTRICT COURT WAS LED ASTRAY BY ITS MISTAKEN BELIEF THAT CAFA SHOULD BE "STRICTLY CONSTRUED"

The district court likely arrived at its overly narrow interpretation of CAFA because it erroneously concluded that it was required to "strictly construe" CAFA's removal provisions and to rule against removal if it had any doubts regarding the defendants' right to remove these cases to federal court. ER 4. That conclusion finds no support in the case law of this Court, which has never held that CAFA should be "strictly construed." Other circuits have explicitly rejected such strict construction arguments. Moreover, the district court's strong presumption is inconsistent with the Framer's understanding of the important roles that diversity

jurisdiction and removal jurisdiction should play in our federal system of government.

The Framers viewed removal jurisdiction as an important safeguard against the potential bias of state courts. The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (2d ed. 1836). Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between Citizens of different States." U.S. Const., Art. III, § 2.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity

jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816). *See generally*, Scott Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004).

Congress experimented with greatly expanded federal court jurisdiction in the post-Civil War period but in 1887 scaled back that expansion. Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553. In particular, the 1887 statute reduced

somewhat the rights of state court defendants to remove cases to federal court. Subsequent Supreme Court decisions acknowledged that Congress, beginning in 1887, adopted narrower removal statutes. Thus, the Court in 1943 rejected the claims of a state-court plaintiff that it qualified as a "defendant," entitled to remove the case to federal court, after it was served with a counterclaim. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). While recognizing that removal under such circumstances was authorized by the 1875 removal statute, the Court noted that the authorization was eliminated by Congress in 1887, and that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." 313 U.S. at 108-109.

Federal appeals court decisions calling for "strict construction" of removal statutes usually cite *Shamrock Oil* as the basis for their assertion. It is important to note, however, that *Shamrock*'s "strict construction" statement was based on the policies underlying the Judiciary Act of 1887 and removal statutes adopted in the decades that followed. The Supreme Court has not asserted that there are any federalism-based reasons for narrowly construing removal statutes. On the contrary and as noted above, the Court has repeatedly recognized the important role that diversity and removal jurisdiction have played throughout our Nation's history.

The early twentieth century congressional policy of strictly limiting removal rights is no longer in place. Over the past 70 years, Congress has passed a series of laws that expanded removal rights, with CAFA being the most prominent recent example. As a result, in the 70 years since *Shamrock Oil* was decided, the Court has never repeated *Shamrock*'s "strict construction" dictum. Recent Supreme Court decisions have decided removability questions solely by reference to the relevant statutory language, without applying any presumptions. *See, e.g.*, *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). *Breuer* turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), which permits the removal to federal courts of state-court civil actions over which the federal courts would have had original jurisdiction. The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous clause as precluding removal. After noting *Shamrock Oil*'s "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development." *Id.* at 697.

The Ninth Circuit has a similar history of older cases that call for "strict construction" of removal statutes. The district court resurrected quotations from one older Ninth Circuit case in support its conclusion that "[t]he removal statute is

'strictly construe[d]' against removal jurisdiction and 'federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.'" ER 4 (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). But *Gaus* predates both *Breuer* and CAFA by more than a decade. None of this Court's post-CAFA decisions have determined that CAFA's explicit recognition of the right to remove mass actions, 28 U.S.C. § 1332(d)(11)(A), is to be "strictly construed against removal jurisdiction."[6] Indeed, several other federal appeals courts have explicitly rejected assertions that CAFA removal rights ought to be strictly construed, and/or that federal jurisdiction should be rejected if there is doubt as to the right of removal. *See, e.g.*, *Back Doctors Ltd. v. Metropolitan Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) (rejecting contention that federalism concerns require courts to construe CAFA jurisdiction narrowly, and holding that CAFA "must be implemented according to its terms"); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008).

[6] Several of the Court's post-CAFA decision have noted the early 20th century policy of narrowly construing removal statutes. *See, e.g., Abrego Abrego*, 443 F.3d at 685 (quoting *Shamrock Oil*'s statement that Congress's post-1887 policy was "one calling for strict construction" of legislation governing removal jurisdiction). But *Abrego Abrego* did *not* hold that CAFA removal rights should be strictly construed; rather, it merely held that "under CAFA the burden of establishing removal jurisdiction remains as before on the proponent of federal jurisdiction." *Id.*

In sum, the district court erred when it recognized a "strong presumption" against CAFA removal rights. Such a presumption cannot be justified on federalism grounds (given the Framers' support for removal jurisdiction as an important safeguard against the potential bias of state courts), nor can it be justified as a reflection of congressional policy (in light of Congress's repeated adoption of legislation over the past 70 years that has expanded removal jurisdiction). The district court's interpretation of CAFA's mass action provision is erroneous even if one accepts the district court's application of a strong presumption against removability; that interpretation is rendered wholly implausible once one recognizes that Congress did not intend that courts should apply such a presumption.

CONCLUSION

Amici respectfully request that the Court reverse the district court's decisions to remand these proceedings to state court.

Respectfully submitted,

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Counsel wish to thank Sara Norman, a student at Texas Tech University Law School, for her assistance in preparing this brief.

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because: this brief contains 6,966 words, 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 proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
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Dated: August 12, 2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August, 2013, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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