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No. 11-1450

IN THE

# Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
*Petitioner,*

v.

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons Within the State of Arkansas,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Last Term, this Court held that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011). In light of that holding, the question presented is:

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

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## INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited, accountable government. To that end, WLF regularly appears in cases such as this where (WLF believes) federal courts have unduly restricted the right of a class action defendant to remove a state court action to federal court under the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12. *See, e.g., West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011); *Cappuccitti v. DirecTV, Inc.*, 611 F.3d 1252 (11th Cir. 2010), *vacated on reh'g*, 623 F.3d 118 (2010).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

The International Association of Defense Counsel (IADC) is an association of corporate and

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and standing letters of consent have been lodged with the Clerk of Court.

insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Dedicated to the just and efficient administration of civil justice, the IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable costs. In particular, the IADC has a strong interest in the fair and efficient administration of class actions, which are increasingly global in reach.

*Amici* are deeply concerned by the district court's willingness to allow a single named plaintiff to defeat CAFA removal of a putative class action merely by stipulating to damages below the jurisdictional threshold. Such an approach to federal jurisdiction, and the Eighth Circuit's recent endorsement of it in a similar case, threaten to eviscerate the important protections CAFA affords to class action defendants and absent class members. By yielding to a single named plaintiff's unilateral damages stipulation, the decision below severely undermines the rights of absent class members, whose right to a full recovery is said to be limited by a stipulation they neither knew about nor consented to. Such an approach also disregards congressional intent, by denying a class-action defendant of its statutorily protected right to defend the action in federal court. The rule adopted below thus thwarts the very purpose of removal under CAFA, which was to greatly expand the federal courts' jurisdiction over class actions to further protect class action defendants and absent class members.

## STATEMENT OF THE CASE

Respondent brought a putative class action in Arkansas state court alleging that Petitioner breached a homeowner insurance contract by underpaying certain repair claims for hail damage to Respondent's home. Pet. App. 3. Respondent seeks to represent a class comprising all similarly situated Arkansan policy holders who received payments from Petitioner for physical loss or damage to their dwelling between January 1, 2009 and December 31, 2010. *Id.* at 38-39.

Respondent's complaint includes a sworn affidavit signed by Respondent, stating:

> I do not now, and will not at any time during this case, whether it be removed remanded, or otherwise . . . seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorney's fees).
>
> I understand that this stipulation is binding, and it is my intent to be bound by it.

*Id.* at 75. Based on this stipulation, Respondent's complaint alleges that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." *Id.* at 60 (emphasis added). Respondent further alleges that because the above stipulation is "binding" for purposes of establishing the amount in controversy,

"neither diversity nor Class Action Fairness Act ('CAFA') jurisdiction" is available in this case. *Id.*

Pursuant to CAFA, Petitioner timely removed this action to the U.S. District Court for the Western District of Arkansas. *Id.* at 36-37. Conceding that Petitioner had initially met its burden of establishing, by a preponderance of the evidence, the $5 million jurisdictional threshold, the district court nonetheless concluded that Respondent's stipulation established to a "legal certainty" that the requisite amount in controversy had not been satisfied. *Id.* at 8-10. In doing so, the district court relied almost exclusively on dicta from *Bell v. Hershey Co.*, a case in which the Eighth Circuit remarked that a plaintiff who unsuccessfully attempted to avoid removal "*could have* included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand." 557 F.3d 953, 956 (8th Cir. 2009) (emphasis added).

Pursuant to § 1453(c)(1) of CAFA, Petitioner sought leave from the Eighth Circuit to appeal the district court's remand order. Pet. App. 1. When the appeals court denied review without explanation, Petitioner sought rehearing *en banc*. While the petition for rehearing *en banc* was pending, the Eighth Circuit issued its opinion in *Rolwing v. Nestle Holdings, Inc.*, 666 F.3d 1069 (8th Cir. 2012), affirming a remand order based solely on the named plaintiff's unilateral stipulation promising to seek damages below CAFA's $5 million jurisdictional threshold. After releasing its opinion in *Rolwing*, the appeals court denied rehearing *en banc* in this case without comment.

## SUMMARY OF ARGUMENT

Seven years ago, Congress took an important step toward the expansion of federal jurisdiction over large, unwieldy class actions with the enactment of the Class Action Fairness Act (CAFA). The primary goal of CAFA was to expand a defendant's ability to remove to federal court a class action that did not satisfy the traditional requirements for diversity jurisdiction. As a result, Congress intended district courts, in evaluating removal, to read CAFA's provisions "broadly" in favor of the federal forum.

Notwithstanding Congress's desire to expand the ability of class-action defendants to remove such suits to federal court, the district court in this case held, and the appeals court has agreed, that a named plaintiff in a class action defeats removal under CAFA merely by stipulating to damages below the jurisdictional threshold—even though that plaintiff is not yet authorized to represent absent class members, much less limit their right to a full monetary recovery.

But this Court has squarely held that putative class members cannot be bound by named plaintiffs (or even by district court judges) *before* certification of the class. The decision below, if left undisturbed, does violence to that rule by allowing a single named plaintiff's amount-in-controversy stipulation to bind absent class members for the sole purpose of defeating removal in a putative class action. Such an approach to removal jurisdiction in class actions not only undermines CAFA's primary goal of federal jurisdiction, it severely undermines the rights of absent class members whose rights to recovery are said to be curtailed by the stipulation.

The district court's approach also undermines the rights of class action defendants, who have a strong interest in ensuring that the entire plaintiff class is bound by any judgment ultimately rendered in class-action litigation. By encouraging putative class representatives to waive the rights of class members to a full recovery, the decision below creates an unacceptable risk that dissatisfied absent class members (and their attorneys) will one day collaterally attack any judgment or settlement reached in the case. That, in turn, will discourage settlements by defendants who are unwilling to commit significant sums to resolve the dispute when a strong likelihood exists that absent class members can avoid the *res judicata* bar of the initial lawsuit.

Finally, the jurisdictional reach of the federal courts is strictly governed by the Constitution and the Congress, not by the stipulated consent of a named plaintiff in a putative class action. By yielding to a single named plaintiff's unilateral damages stipulation, the district court disregarded congressional intent by denying a class-action defendant of its statutorily protected right to defend the action in federal court. That approach thwarts the very purpose of removal under CAFA, which sought to greatly expand the federal courts' jurisdiction over class actions.

This Court "should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186

(1907). So long as CAFA jurisdiction exists, the need to safeguard it may well be the greatest in those cases where, as here, the putative class representative tries hardest to defeat it.

## ARGUMENT

### I. THE DECISION BELOW IGNORES THIS COURT'S CLEAR PRECEDENT ON THE RIGHTS OF ABSENT CLASS MEMBERS AND DEFENDANTS

#### A. A Unilateral Stipulation Signed By The Named Plaintiff Cannot Bind Absent Class Members

It is axiomatic that, for purposes of determining federal jurisdiction, the amount in controversy must be measured at the time of removal. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1939) ("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."). And while it may be true that "the plaintiff is the master of his own claim," *id.* at 294, a named plaintiff in a putative class action is neither lord nor master over the claims of absent class members at the time of removal. Until the *putative* class representative becomes the *actual* class representative, he is without authority to bind absent class members—much less to limit their right of recovery.

This Court has consistently rejected "the novel and surely erroneous argument that a non-named class member is a party to the class-action litigation

*before the class is certified.*" *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011) (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 16 n.1 (2005)). Accordingly, the mere filing of a class action complaint, absent certification, can never bind persons who are not yet parties. *See id.* at 2381 n.11 (recognizing that "neither a proposed class action nor a rejected class action may bind nonparties."). Because they are non-parties, absent class members cannot possibly be bound, consistent with due process, by a unilateral stipulation signed by a putative class representative or his attorney. Indeed, "[t]he great weight of scholarly authority—from the Restatement of Judgments to the American Law Institute to Wright and Miller—agrees that an uncertified class action cannot bind proposed class members." *Id.* at 2381 n.11.

Even after a class has been certified, this Court has made clear that the Constitution permits absent class members to be bound by a judgment only if important principles governing non-party preclusion are adhered to. In *Phillips Petroleum Co. v. Shutts*, this Court recognized strict due process limitations on a court's ability to bind nonparties to a class action for money damages. 472 U.S. 797, 811-12 (1985). These protections include the right to notice, an opportunity to be heard, and the right to opt out. *Id.* at 812. Of course, *none* of these safeguards is available for class members at the time a putative class action is removed, and none was provided to the absent class members in this case. Without these safeguards in place, the named plaintiff has no authority to bind absent class members in this or any other matter.

Moreover, a named plaintiff has a strict fiduciary duty to represent and protect the interests of all absent class members. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (holding that class representatives "whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, do[] not afford that protection to absent parties which due process requires"). For that reason, a class representative must "possess undivided loyalties to class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). Here, the named plaintiff's attempt to bind the entire class to less than a full recovery simply cannot be reconciled with the solemn fiduciary duty a class representative owes to seek the maximum recovery on behalf of the class. *See, e.g., Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002) ("It is improbable that [the named plaintiff] can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization.").

Similarly, putative class counsel is restrained by legal and ethical obligations that do not permit him to go beyond the limitations of the lawyer-client relationship in making representations to the district court. Consistent with this Court's jurisprudence and the American Bar Association's (ABA) Model Rules of Professional Conduct, the ABA has issued a formal opinion that no lawyer-client relationship exists between class counsel and putative class members until the class is certified and the opt-out period has expired. *See* Formal Opinion 07-445 of the ABA Standing Committee on Ethics and Professional Responsibility, "Contact by

Counsel with Putative Members of Class Prior to Class Certification" (April 11, 2007) ("A lawyer-client relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired."). The rule that no attorney-client relationship exists between members of a potential class and an attorney representing the named plaintiff(s) is "the view embraced by most courts, the Restatement, and the leading class action treatise." *See* Debra Lynn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 Ga. L. Rev. 353, 355-56 (2002). Accordingly, Respondent's curious allegation in the class action complaint (drafted by putative class counsel) that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)," Pet. App. 60 (emphasis added), raises far more questions than it answers. In short, because neither the named plaintiff nor his attorney has ever been authorized to represent the rest of the class, no such stipulation on behalf of the class is permissible.

Indeed, one of the primary responsibilities of the class representative is to provide a healthy degree of independence from class counsel, so that when the interests of the class come into conflict with those of class counsel, the interests of the class will be preserved. *See, e.g., CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011) (holding that a class representative must be "able to ensure that class counsel act as faithful agents of the class"); *Kirkpatrick v. JC Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987) (finding putative class representatives inadequate because

"they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys").

In *Shutts*, this Court made clear that a putative class representative owes a fiduciary duty to absent class members "at all times" during the litigation. 472 U.S. at 812 ("[T]he Due Process Clause of course requires that the named plaintiff *at all times* adequately represent the interests of the absent class members.") (emphasis added). As the Court's phrase "at all times" indicates, the named plaintiff owes a duty to absent class members even at the removal stage. As such, a putative representative "can't throw away what could be a major component of the class's recovery" by stipulating away otherwise available money damages. *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011).

More fundamentally, the authority of a stipulation arises solely from the consent of those who agree to be bound by it. One consents to a stipulation in a putative class action the same way one consents to any other binding contract—by signing it. An absent class member cannot be bound to a unilateral stipulation merely because he may, *at some time in the future*, be sent a letter informing him that he is a member of an as-yet-uncertified class. Nor can absent class members be bound by a stipulation because other persons—even if they are ultimately members of the same class—have signed it. Legal consent is an individualized matter, and a putative class action complaint cannot possibly transform a stipulation signed by one party into a stipulation signed by absent, unrepresented persons.

Simply put, Respondent's allegation that "Plaintiff *and class* stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)," Pet. App. at 60 (emphasis added), is without legal or factual foundation. As such, it is a legal nullity that cannot conclusively establish the amount in controversy in this or any other case. *See, e.g., Back Doctors Ltd.*, 637 F.3d at 831 ("What Back Doctors is willing to accept thus does not bind the class and therefore does not ensure that the stakes fall under $5 million."); *Pfizer, Inc. v. Lott*, 417 F.3d 725, 725-26 (7th Cir. 2005) ("The named plaintiffs stipulated that they would not seek or even accept damages in excess of $75,000 [but that] stipulation would not bind the other members of the class."). For that reason alone, the decision below must be reversed.

### B. Because Absent Class Members Cannot Possibly Be Bound By A Unilateral Stipulation At The Removal Stage, Defendants Will Be Unfairly Prejudiced

As demonstrated above, a named plaintiff's unilateral damages stipulation is nonbinding on the putative class and thus unable to limit the available recovery of absent class members. At the same time, *Shutts* makes clear that a class action defendant has a strong interest in ensuring that the entire plaintiff class is bound by any judgment ultimately rendered in the case. *Shutts*, 472 U.S. at 805 ("Whether it wins or loses on the merits, [a class action defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata*

just as [the defendant] is bound."). That interest is completely upended by the Eighth Circuit's novel approach to CAFA removal, which threatens to increase the uncertainty of class action judgments.

Because only a subsequent court can decide whether the claimants before it were adequately represented and thus bound by a prior adjudication, allowing a named plaintiff to unilaterally limit the recovery of absent class members necessarily invites subsequent challenges by absent class members who do not wish to be bound and virtually guarantees future collateral attacks and satellite litigation on any judgment that may be reached in state court. Class action judgments in such cases are susceptible to being reopened years down the road by absent class members seeking to challenge the validity of a damages stipulation that limited their recovery without their knowledge, much less their consent.

Under the Eighth Circuit's approach to CAFA removal, then, class action defendants can no longer rest assured that protracted litigation, once settled or tried to verdict, has been brought to an end. Indeed, once a class is certified, defendants may well find themselves trapped in an untenable "heads-I-win-tails-you-lose" scenario. If the defendant loses at trial, he will be expected to pay damages to all class members. But any victory at trial for the defendant (or favorable class-wide settlement) may well turn out to be pyrrhic, as absent class members are likely to file a new suit raising identical claims, insisting that they are not bound by the original judgment because they never consented to limit their recovery to an amount below the jurisdictional threshold for removal.

The holding below thus threatens to transform the class action from a device designed to facilitate the efficient adjudication of similar claims into a one-sided process that places class action defendants at a severe disadvantage. Defendants face the prospect of paying large settlements or damage awards without any real assurance that those payments will bring about an end to litigation. At the very least, the rule adopted below is likely to discourage settlements by defendants who are unwilling to commit significant sums to a settlement when the strong likelihood exists that absent class members can avoid the *res judicata* bar by collaterally attacking the damages stipulation.

The goals of fairness, predictability, and consistency were all injured in this case. Only this Court can now vouchsafe the settled expectations that traditionally flow from binding resolution of class-action litigation. Otherwise, if the Eighth Circuit's approach to federal jurisdiction prevails, defendants will have far less reason to commit significant sums to the settlement of such suits if they can have no assurance that absent class members will be barred from renewing settled claims. Such a decrease in settlement rates will only further clog our nation's crowded court dockets and delay the receipt of compensation by injured plaintiffs with valid claims.

## II. THE DECISION BELOW THREATENS TO UNDERMINE CONGRESS'S BROAD GRANT OF FEDERAL JURISDICTION UNDER CAFA

### A. CAFA Was Designed To Broadly Confer Federal Jurisdiction Over Class Actions To Further Protect Both Defendants And Absent Class Members

The express purpose of CAFA was to greatly expand the federal courts' jurisdiction over large, nationally important class actions. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. 109-14 at 43 (2005). In so doing, Congress expressed grave concerns about the proliferation of state-court class actions that employed procedures unfair to non-resident defendants. It also sought to protect the rights of absent class members in light of the harm that results from those cases in which "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. No. 109-2, §§ 2(a)(2)(A), 2(a)(3)(A), 2(a)(4); *see also* S. Rep. No. 109-14, at 15 (lamenting the proliferation of "class action settlements approved by state courts in which most—if not all—of the monetary benefits went to class counsel" instead of class members themselves). In enacting CAFA, Congress also found that "[a]buses in class actions undermine[d] the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution. . . ." Pub. L. No. 109-2, § 2(a)(4).

CAFA lowers the barriers to federal court by adjusting the amount in controversy requirement, dispensing with the rule that all plaintiffs must be diverse from all defendants, and eliminating the absolute bar on removal by home-state defendants in diversity actions. CAFA permits removal of a class action to federal court in those cases where "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(2). In determining the amount in controversy, "the claims of the individual class members shall be aggregated to determine whether the amount in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). The statute thus sets forth a specific mechanism for calculating the "sum or value" of the "matter in controversy": "the *claims* of the individual class members *shall be aggregated* to determine whether" the total exceeds the jurisdictional threshold. *Id.* (emphasis added).

In addition, CAFA also liberalizes traditional diversity rules by permitting federal jurisdiction so long as minimal diversity exists among the parties. *See* 28 U.S.C. § 1332(d)(2)(A). Finally, CAFA replaces the absolute bar on removal by home-state defendants with a sliding scale founded on judicial discretion. *See* 28 U.S.C. § 1332(d)(3)-(4). In short, CAFA "enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Bayer Corp.*, 131 S. Ct. at 2382 (2011).

CAFA's provisions are to be read broadly, with "a strong preference that interstate class actions should be heard in a federal court if properly

removed by any defendant." S. Rep. No. 109-14 at 43; *see id.* at 42 ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."); 151 Cong. Rec. H723-01, at H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("If a Federal court is uncertain . . . the court should err in favor of exercising jurisdiction over the case").

Suffice it to say, Congress "did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trustees of Mayland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992). If lead plaintiffs and their counsel are permitted to unilaterally stipulate around the contours of CAFA at will, thereby evading congressionally-mandated protections whenever they wish, the purpose of CAFA will be eviscerated. Indeed, the very formula imposed by CAFA for calculating the amount in controversy (i.e., aggregating the claims of the individual class member) will be jettisoned at the whim of a single named plaintiff and his counsel.

Permitting use of stipulations to defeat removal of class actions to federal court will also defeat one of CAFA's principal goals: preventing plaintiff's attorneys from filing putative class actions in multiple states in the hopes of finding at least one judge willing to certify a class. *See* S. Rep. No. 109-14, at 23 (describing tactics used by class action plaintiffs' counsel). Unlike the federal system, state courts do not have mechanisms to consolidate

overlapping cases, which results in an enormous waste of judicial resources—something that CAFA was also enacted to avoid. *See* S. Rep. No. 109-14, at 23 ("multiple judges of different courts must spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people."); *see also id.* at 52 (discussing the "unfairness" when "[d]efendants are forced to defend the same case in many different courts, [a]nd class members are harmed because the various class counsel compete with each other to achieve the best settlement for the lawyers"). This Court should ensure that the availability of a federal forum and the accompanying protections conferred by CAFA are not so easily circumvented.

### B. If Upheld, The Decision Below Would Allow Named Plaintiffs And Their Counsel To Effectively Eliminate The Protections That A Federal Forum Affords Absent Class Members, In Contravention Of CAFA's Purpose

As demonstrated above, Congress relaxed the criteria for removing a class action to federal court based on extensive findings that state courts routinely certify classes without affording defendants the procedural safeguards necessary to protect the rights of defendants and absent class members alike. When a putative class representative is willing to limit the class's recovery in exchange for the opportunity to remain in state court, it logically follows that he fully expects to benefit from a state-court bias. A court that facilitates this trade-off, by allowing a stipulation of

damages to defeat federal jurisdiction, undermines Congress's desire to protect class-action defendants from state-court prejudices.

Among the benefits of federal jurisdiction that Congress intended to promote with CAFA are the rigorous protections Rule 23 provides to absent class members. *See* CAFA, §§ 2(a)(2)(A), 2(a)(3), 2(a)(4), 2(b)(1)-(2); S. Rep. No. 109-14, at 13-14 (citing state courts' failure to follow Rule 23's strict requirements or state's parallel governing rule); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1473 (2010) ("Congress sought to check what it considered to be the overreadiness of some state courts to certify class actions"). One of Rule 23's key functions is to protect the due process rights of absent class members. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (stating that the Rule 23 was designed "for the protection of absent class members [and] serve[s] to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness").

Among other things, Rule 23(e) provides for court review of any proposed settlement of a class action. If allowed to use unilateral damages stipulations to avoid federal jurisdiction, however, putative class representatives and their counsel will

be able to deprive absent class members of both federal court protections and the potential for a greater monetary recovery—all without requiring court review or oversight of the fairness of the stipulated amount. *See, e.g., Rolwing*, 666 F.3d at 1070–71 (acknowledging that aggregated damages from the complaint would have totaled $12 million, but affirming remand based solely on plaintiff's stipulation to seek less than $5 million for the sole purpose of evading CAFA jurisdiction). This result runs contrary to Congress's express purpose in enacting CAFA.

## CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, Allied Educational Foundation, and International Association of Defense Counsel respectfully request that the Court reverse the remand order issued below.

Respectfully submitted,

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