No. 13-719

IN THE
Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC,
and CHEROKEE BASIN PIPELINE, LLC,
Petitioners,

v.

BRANDON W. OWENS, on behalf of himself
and all others similarly situated,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, AND FEDERATION OF DEFENSE & CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Mary-Christine Sungaila
Jenny Hua
Snell & Wilmer L.L.P.
600 Anton Blvd., Ste 1400
Costa Mesa, CA 92626
714-427-7006

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

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QUESTION PRESENTED

The federal district court remanded this case to state court because the removal petition, although alleging that the amount in controversy exceeded $5,000,000, did not include evidence to support that allegation. The Tenth Circuit refused to review the district court's order. The question presented is:

Must a defendant seeking removal to federal court include evidence supporting federal jurisdiction in the notice of removal, or is it enough to include the "short and plain statement of the grounds for removal" required by 28 U.S.C. § 1446(a)?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF's primary mission is the defense and promotion of free enterprise, and ensuring that economic development is not impeded by excessive litigation.

WLF has regularly appeared in this and other federal courts to support the rights of defendants in a state court action to remove the case to federal court. *See, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005).

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

The Federation of Defense & Corporate Counsel (FDCC) was formed in 1936 and has an international

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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 have consented to the filing of this brief; letters of consent have been lodged with the clerk.

membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as general counsel, and as insurance claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil defendants.

The Tenth Circuit has condoned a narrow interpretation of the federal removal statutes that, in many instances, will create significant difficulties for defendants seeking to exercise their rights to remove cases from state to federal court. The decision below reflects a misguided view, pervasive among many lower federal courts, that federal removal jurisdiction is disfavored and that all doubts regarding jurisdiction should be strictly construed against the defendant. *Amici* believe that view is based on a misunderstanding of the history of removal jurisdiction and the important role that the Founders foresaw that removal jurisdiction would play in ensuring an impartial forum for out-of-state defendants.

Amici are concerned that unless the Court uses this case not only to overturn the decision below but also to explain that the lower courts' recognition of a presumption against removal is unfounded, many federal courts will continue to adhere to such a presumption. *Amici* have no direct interests, financial or otherwise, in the outcome of this case. They are filing due solely to their interests in the important

removal jurisdiction issues raised by this case.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioners. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

The case raises important questions regarding procedures for removing suits to federal court pursuant to the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4, a statute adopted by Congress in 2005 to broaden federal court diversity jurisdiction and to "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." CAFA § 2(b)(2). Congress found that class action lawsuits raising issues of "national importance" were being improperly "[kept] out of Federal court," and that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and otherwise "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." *Id.*, § 2(a)(4).

The case addresses whether Petitioners took sufficient steps to remove a lawsuit to federal court pursuant to CAFA and 28 U.S.C. § 1446(a), which provides that removal petitions must "contain[ ] a short and plain statement of the grounds for removal."

Respondent Brandon Owens contends that Petitioners (collectively, "Dart Cherokee") breached a contract by underpaying royalties allegedly owed him

from production of oil wells located in Kansas. He filed suit against Dart Cherokee in Kansas state court on behalf of himself and similarly situated royalty owners. In December 2012, Dart Cherokee removed the case to U.S. District Court for the District of Kansas, asserting jurisdiction pursuant to CAFA. Pet. App. 37a-42a. The notice of removal stated that Dart Cherokee had calculated the total additional royalties that would be owed if "all or substantially all of the adjustments to royalties advanced by Plaintiff were found to be required to be made" and that it had determined, based on that calculation, that "the amount of additional royalty sought is in excess of $8.2 million." *Id.* at 40a.

Owens filed a motion for remand, asserting that the removal petition inadequately demonstrated that the amount in controversy exceeded $5,000,000.[2] The district court agreed and remanded the case to state court in May 2013. Pet. App. 15a-28a. The court ordered a remand despite acknowledging that Dart Cherokee's response to the motion for remand adequately demonstrated that the amount in controversy exceeded $5,000,000 and that Owens himself asserted that the amount in controversy was at least $21.5 million. *Id.* at 20a-21a. The court concluded that under Tenth Circuit case law, evidence supporting federal jurisdiction must be included within the removal petition itself and not added later. *Id.* at 27a. Applying that standard, the court determined that the removal

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[2] CAFA grants federal district courts original jurisdiction over certain class actions; among the jurisdictional requirements is that the class action be one in which the amount in controversy exceeds $5,000,000, exclusive of interests and costs. 28 U.S.C. § 1332(d)(2).

petition was deficient because it "fail[ed] to incorporate any evidence" supporting its amount-in-controversy calculation, "such as an economic analysis of the amount in controversy or settlement estimates." *Id.* at 25a-26a.

The court explained that its decision to remand was "[g]uided by the strong presumption against removal." *Id.* at 28a. It said that the Tenth Circuit "narrowly construes removal statutes, and all doubts must be resolved in favor of remand." *Id.* at 17a-18a.

In June 2013, a divided Tenth Circuit panel summarily denied Dart Cherokee's petition for permission to appeal. Pet. App. 13a-14a. By an equally divided vote, the appeals court denied Dart Cherokee's petition for rehearing *en banc*. *Id.* at 1a-12a. Judge Hartz, joined by Judges Kelly, Tymkovich, and Phillips, filed an opinion dissenting from denial of the petition. *Id.* at 2a-12a. He asserted that 28 U.S.C. § 1446(a) does not require a defendant to include evidence in its removal petition: "a defendant seeking removal under CAFA need only allege the jurisdictional amount in its notice of removal and must prove that amount only if the plaintiff challenges the allegation." *Id.* at 11a.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decisions below were based on an implausible interpretation of the "short and plain statement" requirement of 28 U.S.C. § 1446(a). By alleging in their notice of removal

that "the amount of additional royalty sought [in the complaint] is in excess of $8.2 million," and by including a four-paragraph explanation of the steps they undertook to calculate that amount, Petitioners fulfilled their § 1446 obligation to provide a "short and plain statement" of their basis for alleging that the $5,000,000 jurisdictional amount was satisfied.

Amici write separately to focus on a factor that appears to have led the lower courts astray: their reliance on an alleged presumption against removability. The district court explicitly stated that its decision to remand was "[g]uided by the strong presumption against removal." Pet. App. 28a. The district court and the Tenth Circuit are not alone in adhering to that presumption: *every* regional federal appeals court other than the Seventh Circuit has adopted a presumption against removability and resolves all doubts in favor of remand.

There is no foundation for such a presumption in this Court's case law. *Amici* respectfully submit that adherence to the presumption is undermining the intent of Congress, which on numerous occasions has adopted statutes intended to facilitate removal of cases from state to federal court by out-of-state defendants. CAFA is the best example of such a statute; Congress adopted it for the purpose of ensuring a federal forum for all large class actions involving parties of diverse citizenship. The courts below cited no statutory language in support of their conclusion that removal statutes should be strictly construed, and there is none.

Nor does a presumption against removability derive any support from the structure of the

Constitution. Some lower federal courts have justified the presumption as a means by which they can avoid encroaching on the jurisdiction of state courts. But the Framers saw things differently; they contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government. Diversity jurisdiction provided out-of-state plaintiffs with a means of avoiding the prejudice in favor of local litigants foreseen by the Framers. Removal jurisdiction provided the self-same protection to out-of-state defendants. As the Court recognized in one of its earliest landmark cases, the Constitution was designed for the benefit of *all* citizens—not only plaintiffs who "would elect the national forum" but also defendants who sought 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).

If the Court's opinion in this case focuses solely on the meaning of § 1446(a), it can correct the Tenth Circuit's singular misinterpretation of the statute. That mistake is sufficient by itself to have a seriously adverse effect on the removal rights of many litigants. But the presumption on which the Tenth Circuit based its erroneous statutory interpretation—a presumption that disfavors removal rights to such an extent that *all* doubts regarding removability are to be resolved in favor of remand—is of far greater concern. The presumption has been adopted by 10 of 11 regional federal appeals courts and has a significant and continuing impact on the ability of defendants to exercise the removal rights granted them by Congress. Accordingly, *amici* urge the Court to include in its opinion an unequivocal rejection of the presumption against removability and to explain that nothing in the

federal removal statutes, the Constitution, or the Court's case law provides support for the presumption.

Once the presumption against removability is eliminated from consideration, the implausibility of the district court's construction of 28 U.S.C. § 1446(a) is readily apparent. By requiring that a notice of removal need only contain a "short and plain statement of the grounds of removal," Congress made clear its intent that the adequacy of a notice of removal should be subject to the same straightforward pleading standards imposed by Rule 8 of the Federal Rules of Civil Procedure on complaints initially filed in federal court. If a district court or a plaintiff later calls into question whether the defendant can demonstrate compliance with jurisdictional requirements imposed by the removal statutes, then the defendant will, of course, be required to present evidence to demonstrate the existence of jurisdiction. But nothing in the federal removal statutes suggests that a defendant forfeits its right to federal court jurisdiction if it fails to present such evidence at the same time that it submits its notice of removal.

Indeed, CAFA provides unequivocally that the notice of removal adequately alleges satisfaction of the amount-in-controversy requirement if the complaint filed by the plaintiff class alleges that the amount in controversy exceeds $5,000,000, without regard to whether the plaintiffs have affixed to the complaint evidence supporting their allegation. 28 U.S.C. § 1446(c)(2) (stating, subject to certain exceptions, that

"the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy"). Nothing in CAFA's statutory language suggests that Congress intended to accept amount-in-controversy allegations from plaintiffs even when not supported by evidence, yet not to accept similar allegations in a defendant's notice of removal.

ARGUMENT

I. The Tenth Circuit's Presumption Against Removability Is an Invention of the Lower Federal Courts That Has No Foundation in This Court's Decisions and Is Contrary to Normal Principles of Statutory Construction

Underlying the district court's decision to grant the remand motion was its understanding that removal statutes should be construed strictly against defendants seeking to exercise their removal rights; it stated that the decision was "[g]uided by the strong presumption against removal." Pet. App. 28a. It concluded that federal courts must "narrowly construe removal statutes, and all doubts must be resolved in favor of remand." *Id.* at 17a-18a. That conclusion was in accord with well-established Tenth Circuit case law. *See, e.g., Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095, 1097 (10th Cir. 2005) ("removal statutes are to be strictly construed, with all doubts resolved against removal"); *Martin v. Franklin Cap. Corp.*, 251 F.3d 1284, 1289 (10th Cir. 2001) ("the courts must rigorously enforce Congress' intent to restrict federal jurisdiction in controversies between citizens of different states").

The supposed presumption against removability has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. That presumption influenced the district court to conclude erroneously that the case should be remanded to state court.

Unfortunately, the Tenth Circuit is not alone among the federal appeals courts in erroneously adopting a generalized presumption against removability. Some form of the presumption has been adopted by every one of the regional federal appeals courts other than the Seventh Circuit.[3] In light of the widespread misperception among the lower federal courts regarding the existence of such a presumption, *amici* urge the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any

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[3] *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 76-77 (1st Cir. 2009); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013); *Brown v. JEVIC*, 575 F.3d 322, 326 (3d Cir. 2009); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 336 (4th Cir. 2008); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 212 (5th Cir. 2013); *Palkow v. CSX Transp., Inc.*, 431 F.3d 543, 554-55 (6th Cir. 2005); *Knudson v. Sys. Painters, Inc.*, 634 F.3d 968, 975 (8th Cir. 2011); *Geographic Expeditions, Inc. v. Estate of Lhotka*, 599 F.3d 1102, 1107 (9th Cir. 2010); *Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013). *But see Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular"); *Johnson v. Pushpin Holdings, LLC*, __ F.3d __, 2014 U.S. App. LEXIS 6554, at *10 (7th Cir. 2014) (stating that there is no presumption in favor of remand in CAFA cases).

presumptions for or against removability.[4]

A. Permitting Removal of Diversity Cases Is a Key Component of Federalism and Does Not Show a Lack of Respect for State Courts

In many instances, federal appeals courts have adopted a strong presumption against removal based on a conviction that removal of a case from state to federal court "implicate[s] federalism concerns" and "encroaches on a state court's jurisdiction." *See, e.g., First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462 (6th Cir. 2002). But that conviction derives no support from the historical understanding of removal rights; to the contrary, the Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government.

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, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 486 (2d ed. 1836). Similarly,

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[4] Such guidance is particularly appropriate in light of the statutory bar on appeals from most remand orders, a bar that renders erroneous remand orders largely uncorrectable. *See* 28 U.S.C. § 1447(d).

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 cases "between Citizens of different States" within the "judicial Power." U.S. Const., art. III, § 2, cl. 1.

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) at 348.

In sum, granting out-of-state defendants broad rights to remove cases to federal court is fully consistent with the federal system of government established by the Framers. It is no more an affront to state courts to permit out-of-state defendants to remove cases to federal court than it is to permit out-of-state plaintiffs to invoke diversity jurisdiction in order to file federal court lawsuits that raise state-law claims.

Indeed, there is little reason to suppose that state court judges are offended when newly filed lawsuits are removed from their courtrooms and transferred to federal court. As one scholar has observed:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal*,

53 CATH. U. L. REV. 609, 660 (2004).

B. A Presumption Against Removal Cannot Be Inferred from the Federal Removal Statutes, and This Court Has Not Endorsed Such an Inference

During the past 225 years, Congress has frequently amended the removal statutes, sometimes expanding the scope of removal jurisdiction, sometimes cutting back on its scope. The Court's decisions interpreting those statutes have employed traditional rules of statutory interpretation in an effort to effectuate Congress's intent. The decisions have never adopted a presumption against removability or otherwise suggested that the removal statutes ought not to be construed based on the most natural reading of the statutory language.

The federal government's distrust of state courts' ability to deal fairly with out-of-state litigants in the period following the Civil War led Congress to expand federal court jurisdiction. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that extended both the original and removal jurisdiction of the federal judiciary. This legislative initiative culminated in the Removal Act of 1875,[5] a law that not only vested federal courts with federal-question jurisdiction for the first time since the

[5] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

short-lived Judiciary Act of 1801,[6] but also significantly expanded removal jurisdiction. Among other provisions, the 1875 law provided for removal of state-court cases raising federal questions, permitted removal by plaintiffs, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and provided for appellate review of remand orders.

The experiment with greatly expanded removal jurisdiction lasted only 12 years. The Judiciary Act of 1887 largely eliminated the expansions adopted in 1875. *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. In particular, the 1887 statute eliminated the right of removal by plaintiffs and in-state defendants. Importantly, however, the 1887 statute was not viewed as an abandonment of the Framers' commitment to diversity jurisdiction and removal jurisdiction. To the contrary, the 1887 statute largely restored the law regarding removal of diversity jurisdiction cases to the provisions contained in the Judiciary Act of 1789. As the Court recognized in *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653 (1923), the right of removal had not been abridged beyond restrictions explicitly included in the 1887 statute:

> [W]hile the comparison between [the 1875 statute and the 1887 statute, as amended in

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[6] The fact that the federal courts did not acquire general federal-question jurisdiction until 1875 puts to rest the notion that the federal courts were created primarily for the purpose of addressing federal issues, with state-law issues more appropriately reserved for the state courts. Before 1875, the overwhelming majority of cases in the federal courts addressed state-law issues.

> 1888] shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be effected. Certainly there is nothing in this which suggests that the plain terms of the act of 1888—by which it declared that any suit "between citizens of different states" brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State"—should be taken otherwise than *according to their natural and ordinary signification*.

Id. at 660-61 (emphasis added).

Those who support the notion that removal statutes ought to be strictly construed often point to a 1941 Supreme Court decision, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). But *Shamrock* needs to be understood in the historical context discussed above—the 1875 expansion of removal jurisdiction and its subsequent retrenchment in 1887 and thereafter.[7] Certainly, nothing in *Shamrock* indicates that federal courts should apply any

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[7] *Shamrock* 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. While recognizing that such removal was authorized under 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 108-09. In other words, any "strict construction" was not constitutionally based but rather was based on "the policy of the successive acts of Congress" in the years following 1887.

constitutionally based presumptions either for or against the right of removal. Rather, jurisdiction under a removal statute is to be interpreted according "to the precise limits which the statute has defined." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 279 (1934)).

The congressional policy of strictly limiting removal rights is no longer in place; in the absence of such a congressional policy, the Tenth Circuit's presumption against removability cannot be justified. The most recent evidence that Congress does not mandate a presumption against removability is its adoption of CAFA in 2005. CAFA justified its expansion of removal jurisdiction in part by explicit findings that State courts are "sometimes acting in ways that demonstrate bias against out-of-State defendants" and that litigation abuses in State courts "undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution." CAFA § 2(a)(4), 28 U.S.C. § 1711 note. In other words, CAFA was adopted for the purpose of protecting the precise category of defendants at issue in this case: out-of-state defendants against whom large damage claims have been asserted and who fear that they may be discriminated against in state court. As one Fourth Circuit judge recently observed:

> CAFA unquestionably expanded federal jurisdiction and liberalized removal authority, thus reversing the restrictive federal jurisdiction policies of Congress that both *Healy* and *Shamrock Oil* listed as the primary justification for application of the canon [of strict interpretation of removal statutes]. . . . [T]his

stated purpose for expanding federal jurisdiction and liberalizing removal in the CAFA context is part of the statutory text, and federal courts surely have an obligation to heed it.

Palisades Collections LLC v. Shorts, 552 F.3d 327, 342 (4th Cir. 2008) (Niemeyer, J., dissenting).[8]

In the 73 years since *Shamrock Oil* was decided, the Court has not endorsed any presumption against removal. 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

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[8] Congress has expanded the scope of removal jurisdiction on numerous other occasions since 1941. For example, in 1965 Congress expanded the time period for filing a removal petition from 20 to 30 days following receipt of the complaint. *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros. v. Michetti Pipe Stringing, Inc.,* 526 U.S. 344, 352 n.3 (1999). As Petitioners note, Pet. Br. at 11, Congress amended 28 U.S.C. § 1446 in 1988 to simplify the removal process by eliminating the requirement that a "verified petition" be included in the removal papers. Instead, defendants need now only include "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642.

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.

In sum, the presumption against removability adopted by the courts below has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. The district court's reliance on a strong presumption undoubtedly contributed to its erroneous interpretation of 28 U.S.C. § 1446(a). Unfortunately, although the interpretation of the statute by the courts below is implausible, one can expect equally implausible interpretations of the federal removal statutes to continue to emanate from the lower federal courts so long as the strong presumption against removability continues to be accepted by 10 of the 11 regional circuits. Accordingly, *amici* urge the Court to include in its opinion language that strongly disavows the existence of a presumption against removability, not only in connection with CAFA cases but with respect to all other cases involving statutes authorizing removal.

II. The "Short and Plain Statement" Requirement Contemplates a Pleading Standard, Not an Evidentiary Standard, at the Notice of Removal Stage

Removal of a class action to federal court under CAFA is made "in accordance with 28 U.S.C. § 1446." 28 U.S.C. § 1453. Section 1446(a) requires a "short and plain statement of the grounds of removal" in the notice of removal. The "short and plain statement"

requirement has been in the removal statute for over 25 years; the removal statute was amended in 1988 to mirror the pleading standards in Federal Rule of Civil Procedure 8 and to make the pleading of removal simpler. See H.R. Rep. 100-889, 71, 1988 U.S.C.C.A.N. 5982, 6032. The change was also fueled by concern that the "petition" requirement had "led some courts to require detailed pleading," and the change was intended to permit more liberal pleading. *Id*; *see also Standridge v. Wal-Mart Stores, Inc*., 945 F. Supp. 252, 254 (N.D. Ga. 1996).

Congress substituted "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds of removal" for "a verified petition containing a short and plain statement of the facts which entitle him or them to removal." 1988 Amendments Subsec. (a), Pub. L. 100-702, § 1016(b)(1). The incorporation of Rule 11 standards and potential sanctions, like the verification and removal bond requirements before it, served "to assure the integrity of the grounds asserted as a basis for removal and indemnify the plaintiff for costs incurred in remanding an improperly removed action." John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Act of 1988 and 1990*, 24 U.C. Davis L.Rev. 735, 752 (Spring 1991).

Where a complaint specifies that the plaintiff is seeking damages in an amount exceeding the jurisdictional minimum, "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy." 28 U.S.C. § 1446 (c)(2). In such cases, defendants may satisfy the "short and plain

statement" requirement by citing the relevant paragraphs of the complaint and attaching a copy of it. *Rescuecom Corp. v. Chumley*, 522 F. Supp. 2d 429, 434 (N.D.N.Y. 2007). But some jurisdictions do not require a plaintiff to allege the full amount of damages sought. *See, e.g. Murchison v. Progressive N. Ins. Co.*, 564 F. Supp. 2d 1311, 1315 (E.D. Okla. 2008). And others prohibit a demand for a specific sum in the complaint or allow for recovery beyond any demand in the pleadings. *See, e.g. Spence v. Centerplate*, 931 F. Supp. 2d 779, 781 (W.D. Ky. 2013); La. Code Civ. P. art. 893 (West 2014). In such cases, or where the plaintiff for some other reason fails to assert a damage amount in the complaint, "§ 1446 permits a defendant to assert the amount in controversy in its notice of removal." *Spence*, 931 F. Supp. 2d at 781 (citing 28 U.S.C. § 1446(c)(2)(A)(ii)).

Just as when the notice of removal is founded on allegations in the complaint, there should be no requirement that the defendant produce evidentiary support for allegations founded on information outside of the complaint at the notice of removal stage either. Until there is disagreement as to whether the amount in controversy satisfies the removal threshold, additional evidence should not be required to support the notice of removal. The district court's ruling to the contrary should be reversed.

Both the complaint and the notice of removal are governed by Rule 11, pursuant to which sanctions for frivolous assertions can be granted. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391-92 (1990). Moreover, if the plaintiff disagrees with the asserted amount in controversy, it can move to remand. 28

U.S.C. § 1447(d); *see also* 29A Fed. Proc., L. Ed. § 69:71 ("A plaintiff . . . should promptly examine the propriety of a removal upon the receipt of the notice of removal. Should a defect be discovered, the plaintiff should immediately move to remand to the state court."). At the motion to remand stage, the defendant's burden of proving the sufficiency of the amount in controversy can then be tested. *See, e.g. Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006); *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009); *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 986 (7th Cir. 2008); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Morgan v. Gay,* 471 F.3d 469, 472-73 (3d Cir. 2006); *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446, 448 (7th Cir. 2005).

Placing a heavier burden on a defendant seeking removal also would obstruct the express purpose of CAFA, which 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); *Standard Fire Ins. Co.*, 133 S. Ct. at 1350. In adopting CAFA, Congress expressed grave concerns about the proliferation of state-court class actions that employed procedures unfair to non-resident defendants. Pub. L. No. 109-2, § 2(a)(4). 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. . . ." *Id*.

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").

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 Maryland Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992) (superseded by statute on other grounds, as stated in *Moehring v. Mortgage Elec. Registration Sys., Inc.*, 3:13-CV-00567-MOC, 2014 WL 1091071 (W.D.N.C. Mar. 17, 2014)). In 2013, this Court held that a class-action plaintiff could not avoid removal by stipulating to a damages amount below the jurisdictional minimum prior to class certification. *Standard Fire Ins. Co.*, 133 S. Ct. at 1347. Similarly, requiring evidence in addition to a "short and plain statement" would eviscerate CAFA's purpose and give plaintiffs "a bag of tricks" with which to avoid federal jurisdiction that Congress granted to defendants.

CONCLUSION

Amici curiae request that the Court reverse the decision of the district court. In particular, *amici* urge the Court to strongly disavow the existence of a presumption against removability, in connection not only with CAFA cases but also with respect to all other cases involving statutes authorizing removal.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Mary-Christine Sungaila
Jenny Hua
Snell & Wilmer L.L.P.
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
714-427-7006

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