No. 12-1036

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,
EX REL. JIM HOOD, ATTORNEY GENERAL,

Petitioner,

v.

AU OPTRONICS CORP., ET AL.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state-court action filed by a state attorney general is removable under the "mass action" provision of the Class Action Fairness Act of 2005 ("CAFA") where the State is the only named plaintiff but the action includes monetary claims on behalf of more than 100 citizens of the State?

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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 one to support the right of class action defendants to remove state court actions 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., Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *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).

WLF believes that out-of-state defendants, in order to ensure that their cases will be heard in an impartial forum, ought to be permitted to remove those cases from state to federal court. Congress adopted CAFA to ensure that the right of removal is protected for most such defendants, particularly in cases where the plaintiff is seeking monetary claims on behalf of more than 100 people. WLF is concerned

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[1] Pursuant to Supreme Court Rule 37.6, 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, 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.

that remanding such cases to state court will only allow plaintiffs' lawyers to game the system and avoid removal—the very thing that Congress sought to prevent when it adopted CAFA.

STATEMENT OF THE CASE

Enacted by Congress in 2005, CAFA expands federal diversity removal jurisdiction for all "mass actions." *See* 28 U.S.C. § 1332(d)(11) (2006). CAFA defines a "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly." *Id.* § 1332(d)(11)(B). Mass actions under CAFA are deemed to be class actions removable to federal court to the extent that they otherwise satisfy the remaining requirements of a class action under § 1332(d)(2)-(10). *See id.* § 1332(d)(11)(A). CAFA's minimal diversity requirement is satisfied when "any member of a class of plaintiffs" is a citizen of a State different from any defendant. *Id.* § 1332(d)(2). Such "class members" under CAFA include those "persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action." *Id.* § 1332(d)(1)(D).

In March 2011, the Mississippi Attorney General brought suit in Mississippi state court against twenty-two multinational corporate entities "on behalf of the State of Mississippi in its proprietary capacity on its own behalf, and on behalf of Mississippi residents, including local governmental entities." Resp. App. at 65a. The complaint alleged a conspiracy to fix prices for liquid crystal display (LCD) panels in the international market from 1996 to 2006 and asserted claims for

alleged violations of the Mississippi Consumer Protection Act (MCPA), Miss. Code Ann. § 75-24-1, *et seq*., and Mississippi's Antitrust Act (MAA), Miss. Code Ann. § 75-21-1, *et seq*. *See id.* at 60a-64a. In its prayer for relief, the complaint specifically sought restitution not only for the State's purchases of LCD products, but also "for the purchases of its citizens." *Id.* at 73a.

Relying on CAFA's "mass action" provision, Respondents removed the action to the U.S. District Court for the Southern District of Mississippi. Resp. App. at 70a-87a. Petitioner moved to remand the action back to state court for lack of federal jurisdiction. Pet. App. 23a. Although agreeing that the suit constituted a mass action under CAFA because Mississippi consumers were among the "real parties in interest," the district court nevertheless held that CAFA's general-public exception, 28 U.S.C. § 1332(d)(11)(B)(ii)(III), deprived the court of federal jurisdiction. *Id.* at 23a-60a.

On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed. Pet. App. at 1a-12a. The appeals court agreed with the district court that the real parties in interest include "those more than 100 persons who, by substantive law, possess the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Id.* at 5a. Applying a claim-by-claim approach, the court recognized that both "the State (as a purchaser of LCD products) *and* individual citizens who purchased the products within Mississippi possess 'rights to be enforced.'" *Id.* at 5a (emphasis in original). Relying on this Court's precedent in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458

U.S. 592, 602 (1982), the appeals court held that "the real parties in interest include not only the State, but also individual consumers residing in Mississippi." *Id.* at 6a.

Because "individual consumers, in addition to the State, are real parties in interest," the Fifth Circuit reversed the district court's application of CAFA's general-public exception. Pet. App. at 10a-12a. In doing so, the court relied on the express language of § 1332(d)(11)(B)(ii)(III), which requires that "*all* of the claims" be asserted on behalf of the public in order for the exception to apply. Accordingly, the court held that because the statutory prerequisites of CAFA's general-public exception could not be met, removal was proper under CAFA. *Id.* at 12a.

Petitioner unsuccessfully sought rehearing *en banc*. *See* Pet. App. 64a.

SUMMARY OF ARGUMENT

Seven years ago, Congress took an important step toward the expansion of federal jurisdiction over large, unwieldy mass actions with the enactment of CAFA. The primary goal of CAFA was to expand a defendant's ability to remove to federal court any interstate mass action that did not satisfy the traditional requirements for diversity jurisdiction. Notwithstanding Congress's desire to expand the ability of mass-action defendants to remove such suits to federal court, some state attorneys general have increasingly sought to evade removal by bringing *parens patriae* suits to recoup monetary damages on behalf of the State's citizens. By

strategically omitting the real parties in interest as named plaintiffs in their complaints, state attorneys general (and their outside counsel) have been able to obtain large jury awards against foreign defendants in local courts.

Because CAFA was adopted to protect minimally diverse mass-action defendants from potential state-court bias, it makes little sense to suppose that Congress intended to grant CAFA removal rights in representative "mass actions" brought by a State plaintiff who is nominally joined in the suit by its injured citizens, but to deny such removal rights in those cases where the State brings a *parens patriae* suit to recoup damages for those very same citizens who, though unnamed, remain real parties in interest. It is precisely in this type of case—in which the potential for bias against out-of-state defendants is greatest—that Congress was most anxious to protect removal rights under CAFA.

No defendant in this case is a citizen of Mississippi. Protecting out-of-state defendants, such as Respondents, from the discriminatory treatment it was feared they would suffer in state courts was one of the Framers' primary rationales for establishing a federal court system and creating a right of removal from state court. As a result, depriving foreign defendants of a federal forum is inconsistent with the Framers' understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our system of jurisprudence. By retaining jurisdiction over this action, the appeals court decision below vindicates both the design of the Framers and the interests of Congress in enacting CAFA.

Petitioner argues that "longstanding principles of federalism" require that any doubts about removal in this case should be resolved against the exercise of federal jurisdiction. Pet. Br. at 27. Notwithstanding Petitioner's peculiar understanding of federalism, no support exists in the historical record for the suggestion that a lawsuit filed by a State in its own courts should not be removable to federal court by an out-of-state defendant. Indeed, this Court has never suggested that principles of federalism are somehow at odds with removal from state court to federal court. Federalism is not and never has been a doctrine that protects the "home cooking" of far-flung defendants in local state courts. To the contrary, the Court has repeatedly recognized the vital role that both diversity and removal jurisdiction have played in our federal system.

Equally flawed is Petitioner's insistence that a "strong presumption" exists against statutory removal rights. Such a presumption cannot be justified on historical grounds, given the Framers' robust 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, not contracted, removal jurisdiction. Petitioner's interpretation of CAFA's mass action provision is erroneous regardless of any alleged presumption against removability; but that interpretation is rendered wholly implausible in light of the fact that Congress never intended for courts to apply such a presumption in the first place.

ARGUMENT

I. PERMITTING CAFA REMOVAL OF A LAWSUIT FILED BY A STATE OFFENDS NO NOTION OF FEDERALISM OR STATE SOVEREIGNTY

Petitioner insists that any doubts about removal in this case should be resolved against the exercise of federal jurisdiction under "longstanding principles of federalism." Pet. Br. at 27. But this Nation's historical understanding of federal removal rights does not support Petitioner's view. To the contrary, the Framers of the Constitution expressly contemplated that federal removal jurisdiction—even in cases involving a State as plaintiff—would play a vital role in our federal system of concurrent jurisdiction.

Article III, Section 2 of the Constitution expressly provides that the federal "judicial Power shall extend . . . to Controversies . . . between a state and citizens of another state." U.S. Const. Art. III, § 2. The importance of protecting out-of-state defendants from the biases of state courts in cases where a State is litigating as a plaintiff was widely discussed prior to ratification of the Constitution. During the early debates on the Constitution, James Madison took to the floor at the Virginia ratifying convention to reassure delegates of the purpose behind federal jurisdiction in such cases:

> Its jurisdiction in controversies *between a state and citizens of another state* is much objected to, and perhaps without reason. It is not in the power of individuals to call

> any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot 2d ed. 1854) (emphasis added). Madison went on to explain that jurisdiction in such cases "can have no operation but this—to give a citizen a right to be heard in the federal courts." *Id.*

Alexander Hamilton agreed. "The power of determining causes . . . *between one State and the citizens of another*," Hamilton argued in *Federalist* 80, is "essential to the peace of the Union." THE FEDERALIST NO. 80 (Alexander Hamilton) (emphasis added). For that reason, "[t]he national judiciary ought to preside in all cases in which one State or its citizens are opposed to another state or its citizens." *Id.* For Hamilton, a federal forum, "having no attachments, will be 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." *Id.*

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, standing alone, could not by itself fully address the problem of state-

court bias, since it provides no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed this concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove that suit to federal court. *See* 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).

This Court has long recognized that the right of removal to federal court grants defendants the same protection from local prejudices in State court that diversity jurisdiction grants to plaintiffs: "The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular admission of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816). Those who framed the Constitution sought to preserve national harmony and promote interstate commerce by ensuring that a neutral forum, composed of nonelected judges whose independence from local attachments is secured by life tenure and salary protection, would be available for interstate disputes.

Notwithstanding Petitioner's claims to the contrary, Pet. Br. at 29-31, this Court has never suggested that principles of federalism are somehow at odds with removal from state court to federal court. As Chief Justice Marshall explained only two decades after ratification:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Nor has this Court ever suggested that lower courts should adopt a federalism-based presumption against the exercise of removal jurisdiction. Rather, the Court has repeatedly recognized the vital role that both diversity and removal jurisdiction have played in our federal system. *See Dodge v. Woolsey*, 18 U.S. (18 How.) 331, 354 (1855) (stating that the purpose of diversity jurisdiction is "to make people think and feel, though residing in different states of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit").

Petitioner argues that removal jurisdiction somehow raises special federalism concerns where, as here, a State is itself a plaintiff in the litigation. *See* Pet. Br. at 29 (citing *Alden v. Maine*, 527 U.S. 706, 709 (1999)). Despite Petitioner's idiosyncratic understanding of federalism, no support exists for

the suggestion that a lawsuit filed by a State in its own courts should not be removable to federal court by an out-of-state defendant. While federalism is concerned with protecting States and State prerogatives from federal intrusion and overreach, it has no interest in preventing legal disputes brought by States against the citizens of other States to be adjudicated in a neutral court. Rather, consistent with federalism, each State is equally protected against the depredations by other States against its own citizens.

After all, Article III, § 2 of the Constitution expressly provides that the judicial power of the United States extends to controversies "between a State and Citizens of another State." As *Alden* recounts, this provision drew criticism at the ratifying conventions from those who feared that it would permit States to be involuntarily "dragged before" a federal court in suits brought by out-of-state plaintiffs. *Id.* at 717-19 (internal citations omitted). Supporters of the Constitution, including James Madison and John Marshall, responded that Article III did not authorize such suits but rather created jurisdiction over suits *brought by* States against out-of-state defendants. *Id.*

In *Alden*, the Court addressed only whether the State of Maine could be sued in its own courts against its will for alleged violations of federal law. In answering that question in the negative, the Court explained that "[t]he generation that designed and adopted our federal system considered immunity *from suit* to be central to sovereign dignity." *Id.* at 715 (emphasis added). But *Alden* nowhere suggests that a State that initiates litigation as a plaintiff in

its own courts somehow has a sovereign interest in preventing out-of-state defendants from removing that case to federal courts. In arguing to the contrary, Petitioner's purported reliance on *Alden v. Maine*, Pet. Br. at 29, is especially misplaced.

If anything, *Alden* actually *undermines* Petitioner's position in this case by establishing that the Founders had no objection to requiring States proceeding as plaintiffs to litigate their suits in federal court. As early as 1787, James Madison had voiced his support for Article III removal jurisdiction in cases involving a State as a plaintiff, on the very grounds that in such cases, removal secures "a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it." *Alden*, 527 U.S. at 717 (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot 2d ed. 1854)). By referring to the "right" of a citizen who has been sued by a State "to be heard in federal courts," Madison revealed that he had no objection to removal jurisdiction in a case such as this one, where the State has "condescend[ed] to be a party" by filing suit in the first place.

Despite Madison's assurances regarding the limited scope of the jurisdictional grant, this Court ruled in *Chisholm v. Georgia*, 2 Dall. 419 (1793), that Article III, § 2 permitted States to be sued in federal court by citizens of other States. Widespread opposition to *Chisholm* led directly to adoption of the Eleventh Amendment, which provides, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. XI. Nevertheless, relying on the text of Article III, § 2, this Court has roundly rejected any suggestion that the Eleventh Amendment somehow bars the removal of cases in which a State is a *plaintiff*. *See, e.g., Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821) ("The [Eleventh] Amendment . . . extends to suits commenced or prosecuted by individuals, but not to those brought by States."). The federal appeals courts have repeatedly reinforced that holding. *See In re MTBE Prods. Liability Litig.*, 488 F.3d 112, 119 (2d Cir. 2007); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 848 (9th Cir. 2004); *Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co.*, 359 F.3d 1237, 1239 (10th Cir. 2004); *Regents of Univ. of Calif. v. Eli Lilly & Co.*, 119 F.3d 1559, 1564-65 (Fed. Cir. 1997); *Huber, Hunt, & Nichols, Inc. v. Architectural Stone Co.*, 625 F.2d 22, 24 n.6 (5th Cir. 1980).[2]

Finally, in enacting CAFA, Congress fully took into account states' sovereign interests in adjudicating purely local matters. These concerns are reflected in express statutory exceptions to CAFA jurisdiction. The so-called "home state" exception requires the district court to decline jurisdiction where more than two-thirds of the

[2] Of course, state sovereign immunity is broader than and exists independently of the immunity provided by the Eleventh Amendment. But the federal circuits likewise are unanimous in holding that removal to federal court does not violate state sovereign immunity. See, *e.g.*, *In re MTBE Prods.*, 488 F.3d at 119; *Dynegy*, 375 F.3d at 848.

putative class members are citizens of the state in which the action was originally filed. *See* 28 U.S.C. § 1332(d)(3). Likewise, the "local controversy" exception allows the district court to decline to exercise jurisdiction where more than one-third but fewer than two-thirds of putative class members are citizens of the state where the action was originally filed. *See* 28 U.S.C. § 1332(d)(4). Finally, CAFA excludes diversity jurisdiction for any action in which "the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C. § 1332(d)(5)(A). In doing so, CAFA fully accounts for the Eleventh Amendment because, as even Petitioner concedes, the Eleventh Amendment is not concerned with actions brought by States. *See* Pet. Br. at 30 n.6

II. NO BASIS EXISTS TO STRICTLY CONSTRUE CAFA OR OTHER FEDERAL REMOVAL STATUTES

Relying on dicta found in this Court's 1941 opinion *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), Petitioner urges the Court to strictly construe removal statutes such as CAFA. *See* Pet. Br. at 27-29 (invoking "the principle favoring narrow construction of jurisdictional statutes"). Contrary to Petitioner's call for the "narrow construction" of removal statutes, however, nothing in *Shamrock Oil* requires this Court to adopt a presumption against removal. Rather, *Shamrock Oil* must be understood in the broader context of removal jurisdiction's expanding and contracting legislative history.

The federal government's distrust of state

courts' ability to deal fairly with out-of-state litigants reached its zenith in the aftermath of the Civil War. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that broadened both the original and removal jurisdiction of the federal courts. This legislative initiative culminated in the Jurisdiction and Removal Act of 1875, which not only vested federal courts with federal question jurisdiction for the first time,[3] but also significantly expanded removal jurisdiction. *See* 18 Stat. 470 (Mar. 3, 1875). Among other provisions, the 1875 law provided for removal of state court cases raising federal questions, allowed plaintiffs to remove cases they had initially filed in state courts, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and guaranteed appellate review of remand orders. *Id.*

This experiment with vastly expanded removal jurisdiction lasted only 12 years, when the Judiciary Act of 1887 largely eliminated the expansions adopted in 1875. *See* 24 Stat. 552 (Mar. 3, 1887). That Act not only eliminated the right to removal by plaintiffs and in-state defendants, it also increased the amount in controversy requirement to $2,000, restricted "citizenship" to the state where a defendant was an "inhabitant" rather than where he

[3] The very fact that the federal courts did not enjoy general federal question jurisdiction until 1875 severely undercuts any suggestion that the federal courts exist primarily for the purpose of addressing federal issues, with state-law issues more appropriately being reserved for state courts. To the contrary, before 1875, the overwhelming majority of cases in the federal courts addressed state-law issues.

"shall be found," forbade plaintiffs who initiated a suit in state court to remove it to federal court, and returned to the original 1789 rule that suits for promissory notes could only be brought in courts where the assignor could have filed suit. *Id.*

Subsequent opinions by this Court acknowledged that Congress, beginning in 1887, adopted removal statutes narrower than the short-lived expansions of 1875. But rather than abandon the Framers' commitment to diversity and removal jurisdiction, the Judiciary Act of 1887 simply *restored* the law of diversity removal to the original provisions contained in the Judiciary Act of 1789. Thus, in 1941 the Court in *Shamrock Oil* rejected a state-court plaintiff's claim that it qualified as a "defendant" entitled to remove litigation to federal court after it was served with a counterclaim. *Shamrock Oil*, 313 U.S. at 100. Recognizing that removal by plaintiffs was authorized by the 1875 removal statute, the Court noted that such authorization was eliminated by Congress in 1887. *Id.* at 108-09. Accordingly, "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Id.* In other words, in construing the removal statute, the Court was obliged to adhere to "the policy of the successive acts of Congress" in the years following 1887.

Petitioner cites *Shamrock Oil* as the basis for its claim that CAFA must be "narrowly" and "strictly" construed. *See* Pet. Br. at 27. But *Shamrock Oil*'s "strict construction" dicta must be understood in the historical context of the legislative history discussed above—namely, the 1875

expansion of removal jurisdiction and its subsequent retrenchment in the Judiciary Act of 1887 (and the removal statutes adopted in the decades that followed). Certainly, nothing in *Shamrock Oil* even remotely suggests that federal courts should apply any constitutionally based presumptions either for or against the right of removal. Rather, jurisdiction under a removal statute must be interpreted "according to the precise limits which the statute has defined." *Shamrock Oil*, 313 U.S. at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 279 (1934)).

Any late-nineteenth-century congressional policy of strictly construing removal rights is no longer in place. In the absence of such a policy, no presumption against removability can be justified. *See generally,* Scott Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609 (2004). Over the past 70 years, Congress has enacted a series of laws that have expanded removal rights. Unsurprisingly, in the 70 years since *Shamrock Oil*, this Court has never once repeated its "strict construction" dicta. Rather, this Court's modern jurisprudence has decided removability questions solely by reference to the relevant statutory language, nothing more.

For example, in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), the availability of removal turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), which permits removal of any state-court civil action over which the federal courts would have had original jurisdiction. This Court explicitly and unanimously rejected the plaintiff's argument that *Shamrock Oil* somehow required the Court to interpret the

ambiguous clause as precluding removal. After acknowledging *Shamrock Oil*'s "strict construction" dicta, the Court went on to dismiss it: "But whatever apparent force this argument might have claimed when *Shamrock Oil* was handed down has been qualified by later statutory development." *Breuer*, 538 U.S. at 697.

Of course, the most recent evidence that Congress does not require a presumption against removability is its adoption of CAFA in 2005. The express purpose of CAFA was to greatly expand the federal courts' jurisdiction over large, nationally important class and mass actions. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. 109-14, 109th Cong. 1st Sess., at 43 (Feb. 28, 2005). Accordingly, 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. *See* 28 U.S.C. § 1332(d)(2)-(4). In short, CAFA "enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

CAFA's provisions are to be read broadly, with "a strong preference" that large interstate actions "should be heard in a federal court if properly removed by any defendant." S. Rep. 109-14, 109th Cong. 1st Sess., at 43 (Feb. 28, 2005); *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"). As the Fourth Circuit's Judge Niemeyer has rightly 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 construction 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).

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 they may be discriminated against in state court. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008) (agreeing that Congress intended that CAFA's use of the term "class action" should be "broadly defined to prevent jurisdictional gamesmanship" and not confined "solely to suits that are labeled 'class actions' by the

named plaintiff or the state rulemaking authority").

The Seventh Circuit has explicitly rejected the assertion that removal rights under CAFA ought to be strictly construed, or that federal jurisdiction should be denied if there is doubt as to the right of removal. *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."). In *Back Doctors*, the appeals court rejected plaintiffs' demand that CAFA be narrowly construed, holding instead that CAFA should be implemented "broadly" and "liberally," "according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions." *Id.*

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 state attorneys general and their outside counsel are permitted to rely on their *parens patriae* authority to circumvent CAFA at will, thereby evading congressionally-mandated protections whenever they wish, the very purpose of CAFA will be eviscerated. Accordingly, 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).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment below.

Respectfully submitted,

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