IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

THE COMMONWEALTH OF KENTUCKY, *ex rel.* JACK CONWAY, ATTORNEY GENERAL,

Plaintiff, Case No: 3:13-cv-0015-GFVT

GLAXOSMITHKLINE, LLC, formerly SMITHKLINE BEECHAM CORP. d/b/a/ GLAXOSMITHLINE,

Defendant
_____/

MEMORANDUM OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Amicus curiae the Washington Legal Foundation ("WLF"), contingent upon granting of the accompanying motion for leave to file, submits this memorandum of law in opposition to the Commonwealth of Kentucky's motion (Doc. 19) to remand this action back to the Franklin Circuit Court. For the following reasons, *amicus curiae* WLF respectfully requests that the Court deny the remand motion and retain jurisdiction over this litigation.

INTERESTS OF *AMICUS CURIAE*[1]

The interests of *amicus curiae* Washington Legal Foundation ("WLF")

[1] *Amicus* WLF states that no counsel for any party authored this memorandum 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 memorandum.

are set forth more fully in its motion for leave to file this memorandum. In short, WLF is a non-profit public interest law firm that regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. WLF has participated in numerous court proceedings raising important questions about the proper scope of removal jurisdiction under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 ("CAFA"). *See, e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013); *CVS Pharmacy, Inc. v. State of West Virginia ex rel. McGraw*, 646 F.3d 169 (4th Cir. 2011), cert. denied, 132 S. Ct. 761 (2011); *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118 (11th Cir. 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 seeking significant damages and in which the plaintiff (as here) is suing in a representative capacity on behalf of numerous individuals. WLF is concerned 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 avoid when it adopted CAFA.

INTRODUCTION

Through its Attorney General, the Commonwealth of Kentucky commenced this action against Defendant GlaxoSmithKline LLC ("GSK"), alleging that GSK improperly promoted Avandia, a Type-2 diabetes drug, by making misleading and deceptive claims "in Kentucky and nationwide" about Avandia's efficacy and safety. (Doc. 1-2 at 3). The Complaint alleges that GSK's allegedly improper promotion of Avandia "caused the Commonwealth and its citizens to spend substantial sums for the purchase of and/or reimbursement for Avandia." *Id*. at 4. The Complaint further alleges that "Commonwealth-funded health plan beneficiaries who took Avandia experience[ed] cardiovascular side effects," which required "otherwise avoidable hospitalizations and medical care and treatment." *Id.* As a result, the Complaint alleges, "the Commonwealth of Kentucky and its citizens bore substantial additional costs." *Id*. To recoup those costs, the Commonwealth brought this action "on behalf of itself" and on behalf of its citizens under the Kentucky False Advertising Statute, the Kentucky Food, Drug, and Cosmetic Act, the Kentucky Consumer Protection Act, the Kentucky Insurance Code, and under common law and at equity. (Doc. 1-2, *passim*).

Invoking CAFA's "mass action" provision under 28 U.S.C. § 1332(d)(11), GSK timely removed this action on the grounds that the prerequisites of a "mass action" are easily met. (Doc. 1). Consistent with CAFA, this is a civil action where the monetary claims of 100 or more persons are proposed to be tried jointly on the grounds that the claims involve common questions of law or fact; the aggregate amount in controversy is at least $5 million; and the claims arise from more than 100 Kentucky citizens who are minimally diverse from GSK. The claims in this case are being brought by the Commonwealth in a representative capacity on behalf of those citizens who allegedly suffered the harm. Nevertheless, on April 24, 2013, the Commonwealth moved to remand this action for lack of subject matter jurisdiction back to the Franklin Circuit Court. (Doc. 19)

The Commonwealth's remand motion raises vitally important questions about the proper scope of CAFA, a statute adopted by Congress in 2005 to significantly broaden federal diversity jurisdiction. Among other things, CAFA expands the circumstances under which a "mass action" may be removed from state to federal court by dispensing with the rule that all plaintiffs must be diverse from all defendants. 28 U.S.C. §§ 1441, 1453(b). Unfortunately, the narrow and strained interpretation

of CAFA advanced by the Commonwealth in its remand motion is inconsistent with both the language and intent of the statute.

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

I. THIS CASE EASILY SATISFIES THE THRESHOLD REQUIREMENTS FOR REMOVAL UNDER CAFA

Among other things, CAFA's "mass action" provision lowers the barrier to federal court by dispensing with the rule that all plaintiffs must be diverse from all defendants. 28 U.S.C. §§ 1441, 1453(b). In this case, the Commonwealth of Kentucky has attempted to circumvent CAFA removal jurisdiction by filing this action as a *parens patriae* suit. But the mere fact that the Commonwealth is suing in a *parens patriae* capacity does not divest this court of jurisdiction under CAFA.

CAFA defines a "mass action" with reference to whether it is a "civil action" with "claims of 100 or more persons" proposed to be tried together. 28 U.S.C. § 1332(d)(11)(B)(i). Thus, CAFA expressly recognizes that separate "claims" may be part of a larger "civil action." *Id.* CAFA effectively instructs district courts to determine whether any "claims" in a civil action are asserted on behalf of or made by "100 or more persons." *Id.* To do so, courts must evaluate each "claim," and not the civil action as a whole to determine who the real parties in interest are for each claim. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). Moreover, the principle that removal jurisdiction must be based on the citizenship of the real parties in interest, rather than that of the named parties, is well established by Supreme Court precedent. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 461 (1980) ("A federal court must . . . rest jurisdiction only upon the citizenship of real parties to the controversy.").

In its prayer for relief, the Commonwealth seeks restitution (Doc. 1-2 at 42) pursuant to the Kentucky Consumer Protection Act, KRS 367.200, a Kentucky statute that authorizes the State's Attorney General to enforce a private right of action on behalf of Kentucky citizens to

obtain restitution for "any party in interest." *Commonwealth ex rel. Beshear v. ABAC Pest Control, Inc.*, 621 S.W.2d 705, 706-07 (Ky. Ct. App. 1981). "[T]he [Kentucky] legislature, in enacting KRS 367.200, intended to vest the Attorney General with the authority to seek restitution *on behalf of* defrauded consumers." *ABAC Pest Control, Inc.*, 621 S.W.2d at 706 (emphasis added).

Section 367.200 provides for a lawsuit by one person (in this case, the Attorney General) on behalf of others (Kentucky consumers). Yet any monetary recovery under the statute—in the form of "restitution" for injuries arising from allegedly deceptive acts and practices—inures to the benefit of the individuals being represented, not merely to the named plaintiff. As the Kentucky Court of Appeals explained in *ABAC Pest Control, Inc.*:

> The [trial] court found that that the statute only permits the trial court to award restitution to "any person in interest," that only persons who are actually parties to the suit may be found to be "parties in interest" under the statute, and that since no individual consumers were parties to this action, the remedy of restitution was not available. *We disagree with this finding.*

Id. (emphasis added). In other words, merely granting the Attorney General the authority "to seek restitution on behalf of defrauded consumers" does not transform him into the real party in interest. *See*

West Virginia ex rel. McGraw v. Comcast Corp., 705 F. Supp. 2d 441, 452 (E.D. Pa. 2010) ("[A] state could have statutory *parens patriae* authority to bring an action . . . without being a real party in interest.").

Likewise, in its counts for violations of the Kentucky False Advertising Statute and the Kentucky FDCA, the Commonwealth first asserts that "as a direct result of Defendant's [alleged wrongdoing], Defendant has caused damages to the Commonwealth, through the Commonwealth-funded health plans . . . .," but then goes on to assert that "Defendant has also caused the citizens of Kentucky who took Avandia to incur costs in the form of funds paid for Avandia." (Doc. 1-2 at 79-80). Wholly separate and apart from any relief the Commonwealth is seeking on its own behalf, the Commonwealth obviously seeks restitution *on behalf of* Kentucky citizens. Indeed, in its prayer for relief, the Commonwealth seeks to establish a "fund to provide for treatment of the Avandia-related medical conditions suffered by Kentucky citizens." *Id.* at 59.

Nor does CAFA's definition of mass action somehow exclude actions where a State is a real party in interest. During Congress's consideration of CAFA, forty-six state attorneys general wrote a letter to the Senate majority and minority leaders urging passage of an amendment that would have precluded CAFA's application to actions filed by state attorneys general. 151 CONG. REC. S1157, 1158-59 (daily

ed. Feb 9, 2005). The Senate considered but rejected such an amendment. 151 CONG. REC. S1157, S1165 (daily ed. Feb. 9, 2005). The proposed amendment, it was feared, would have "create[d] a loophole that . . . plaintiffs' lawyers will surely manipulate. . . to persuade a State attorney general to . . . lend the name of his or her office to a private class action." 151 CONG. REC. S1157, 1163-64 (daily ed. Feb 9, 2005).

The Fifth Circuit has already decided this very question in *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 524 (5th Cir. 2008). That case involved allegations by Louisiana's attorney general that major insurance companies had violated state antitrust laws by conspiring to minimize the value of claims paid to Louisiana policyholders, particularly in the aftermath of Hurricanes Katrina and Rita in 2005. The complaint sought forfeiture of illegal profits, treble damages, and injunctive relief. *Id*. at 423. The defendants removed the case to federal court, and the question before the Fifth Circuit was whether CAFA permitted removal, or whether the case should be remanded to state court.

The Fifth Circuit concluded that the question turned on who the real parties in interest were. Although the Attorney General was the sole

named plaintiff in the complaint, the appeals court determined that the real parties in interest also included the Louisiana policyholders because, under Louisiana law, they would benefit from monetary damages awarded by the courts. *Id.* at 429-30. Under those circumstances, the Fifth Circuit concluded that CAFA permitted removal, given that: (1) the Louisiana Attorney General represented the interests of more than 100 individuals; (2) the amount in controversy exceeded $5 million; and (3) minimal diversity of citizenship existed among the defendants and the Louisiana consumers. *Id.* at 430.

The Fifth Circuit also noted that Louisiana itself also likely qualified as a "real party in interest," given that Louisiana characterized its suit as a *parens patriae* action and that some of its requested relief (*e.g.*, an injunction against future violations) was relief to which individual policy holders would not be entitled. But the court held that CAFA removal was appropriate so long as individual policyholders were also real parties in interest, regardless how Louisiana's interests might also be characterized. *Id.*

The Fifth Circuit reiterated that holding in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 800 (5th Cir. 2012), a case involving allegations by Mississippi's attorney general that several

manufacturers and distributors of liquid crystal display ("LCD") panels had violated state antitrust law. As here, the attorney general brought claims both on behalf of the state for direct purchases of LCD products and *parens patriae* on behalf of Mississippi consumers who purchased LCD products. Defendants timely removed the action to federal district court under CAFA, and Mississippi successfully sought remand.

The Fifth Circuit reversed, holding that the suit was a "mass action" for CAFA removal purposes. The Fifth Circuit reasoned that CAFA requires it to "pierce the pleadings and look at the real nature of the state's claims" to determine if the state is the only true party in interest. Finding that Mississippi consumers were also real parties in interest, the Fifth Circuit explained:

> [W]e have been directed to no statutory or common law that permits the state to extinguish the right and remedy the consumer has for his injury. There is (also) the all too troubling suggestion by the plaintiff that Mississippi could obtain restoration for harm to individual citizens, yet keep that money for itself.

AU Optronics Corp., 701 F.3d at 801-02. Accordingly, the Fifth Circuit refused to provide Mississippi "carte blanche to recover for others' injuries under common law *parens patriae* authority." *Id.* at 802.

The facts of this case are highly similar to both *Allstate Insurance* and *AU Optronics*, and the same outcome should result here. Kentucky's

Attorney General alleges that an out-of-state drug manufacturer has injured certain Kentucky consumers by improperly promoting Avandia. The complete diversity of citizenship between the Kentucky consumers and the out-of-state defendant easily satisfies the minimal diversity requirement of 28 U.S.C. §1332(d)(2)(A), which requires only that "any member of a class of plaintiffs is a citizen of a State different from any defendant." The number of Kentucky consumers whose interests the Commonwealth represents well exceeds the 100-person minimum established by Section 1332(d)(5)(B).[2] Consistent with CAFA, this Court should deny the Commonwealth's remand motion and retain jurisdiction over this mass action.

II. THE COMMONWEALTH'S NARROW INTERPRETATION OF CAFA IS INCONSISTENT WITH THE UNDERLYING PURPOSE OF THE STATUTE

Congress enacted CAFA in 2005 to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," as a means of protecting out-of-state defendants from potential state-court bias. CAFA § 2(b)(2). This lawsuit, brought by the Kentucky

[2] Nor is the general public exception applicable to the claims asserted here. That exception applies only if "*all of the claims* in the action are asserted on behalf of the general public (*and not on behalf of individual claimants or members of a purported class*)." 28 U.S.C. § 1332 (d)(11)(B)(ii)(III) (emphasis added). Here, many of the claims for damages and restitution are necessarily asserted on behalf of individual Kentucky consumers who actually purchased and used Avandia. Those end users are real parties in interest.

Attorney General against a leading Delaware pharmaceutical company, is exactly the type of interstate case of national importance contemplated by CAFA. Because CAFA requires only minimally diverse parties under §1332(d)(2), even if the State is a real party in interest, the minimal diversity requirement can be easily met by the existence of other real parties in interest (named or unnamed).

In enacting CAFA, Congress found that the preceding decade had witnessed many "abuses of the class action device," including acts by "State and local courts" that were designed to "keep[] cases of national importance out of Federal court," which "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). 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. As the legislative history reveals, Congress sought to ensure that state-court defendants would have the option of removing their case to federal court where the suit is both substantial in nature and where minimal diversity exists. Congress thus adopted CAFA in part to "make

it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. No. 109-14, at 7 (2005).

Accordingly, CAFA was adopted for the express purpose of protecting the very category of defendants at issue in this case—out-of-state defendants against whom large money damages claims have been asserted and who fear they may be discriminated against in State court. "[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). It is precisely in this type of case—in which the potential for bias against an out-of-State defendant is greatest—that Congress can reasonably be understood to have been most anxious to protect removal rights.

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). But if state attorneys general and their counsel are permitted to evade removal under CAFA simply by labeling mass actions as *parens patriae* suits, evading congressionally-mandated protections whenever they wish, then the purpose of CAFA will be eviscerated. The

narrow interpretation of CAFA urged here by the Commonwealth is wholly inconsistent with the underlying purpose behind the statute. By refusing to recognize the particular consumers—on whose behalf the attorney general is seeking monetary relief claims—as real parties in interest, the Commonwealth is attempting to circumvent the broad expansion of federal jurisdiction that Congress intended with CAFA.

Although the Supreme Court has never addressed federal "mass action" jurisdiction under CAFA, it has unanimously acknowledged that "CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting CAFA). In that opinion, the Court found in favor of federal jurisdiction even though the named plaintiff had stipulated to damages below CAFA's minimal amount-in-controversy threshold of $5,000,000. The Court refused to "exalt form over substance," which would "run directly counter to CAFA's primary objective." *Id.* For the same reason, the Court also refused to permit "the subdivision of a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations; such an outcome would squarely conflict with the statute's objective." *Id.*

Here, too, the Commonwealth's strategic filing of an action

seeking monetary relief on behalf of hundreds of Kentucky consumers who are the real parties in interest should not be allowed to evade CAFA removal jurisdiction. Rather, the terms of CAFA should be "broadly defined to prevent jurisdictional gamesmanship," and removal "should not be confined solely to suits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." *Louisiana ex rel. Caldwell*, 536 F.3d at 524.

III. THIS CONTROVERSY FALLS SQUARELY WITHIN THE LANGUAGE AND PURPOSES OF ARTICLE III AND REMOVAL JURISDICTION

Article III provides that the federal "judicial Power shall extend. . . to Controversies. . . between Citizens of different States." U.S. Const. Art. III, § 2. Those who framed and ratified Article III sought to preserve national harmony and promote interstate commerce by ensuring that a neutral federal forum, composed of nonelected judges whose independence from "local attachments" was fortified by life tenure and salary protection, was available for disputes between parties from different States. Unfortunately, the Commonwealth's attempt to remand this matter back to State court ignores the Framer's understanding of the role of federal removal jurisdiction as an important safeguard for defendants against the potential bias of State courts. This mass action,

brought in a local court by the Commonwealth of Kentucky on behalf of its citizens against an out-of-state drug manufacturer, falls squarely within the language and purposes of Article III and removal jurisdiction.

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. James Madison cautioned that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." *McPhail v. Deere & Co.*, 529 F.3d 947, 952 (10th Cir. 2008) (quoting 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 533 (2d ed. 1836)). Similarly, Alexander Hamilton argued that "[t]he power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States" was "essential to the peace of the Union." THE FEDERALIST NO. 80 (Alexander Hamilton). Accordingly, "[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 was most "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 was founded." *Id.*

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned over the problem of bias in state courts quickly realized that diversity jurisdiction could not by itself fully address the problem, since it provided no protection for out-of-state defendants sued in state courts. 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 the case 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).

As Justice Joseph Story explained in his classic *Commentaries on the Constitution*, "Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION § 1685 (1833). Justice Story also noted "the tendency of such power to increase the confidence and credit between the commercial and agricultural states." *Id.* As he explained, "[n]o man can be insensible to the value, in promoting credit,

of the belief of there being a prompt, efficient, and impartial administration of justice." *Id.*

The Supreme Court has long recognized that the right of removal was intended to grant 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 administration of justice." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 347 (1816). Thus, federal jurisdiction "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." *Id.* at 348. And because the Framers intended "the right to litigate certain disputes in a federal forum to be equally available to all citizens," removal helps to ensure that "plaintiffs alone do not decide which cases federal courts hear." Scott Haiber, *Removing the Bias Against Removal*, 53 CATH. I.L. REV. 609, 611 (2004).

Nor has removal jurisdiction ever been deemed to raise special concerns simply because, as here, a State is a plaintiff in the litigation. As early as 1787, James Madison voiced his support for Article III removal jurisdiction in cases involving a State as a plaintiff, on the grounds that in such cases, the State has "condescend[ed] to be a party" by filing suit in State court. *Alden v. Maine*, 527 U.S. 706, 717 (1999) (quoting James Madison). Indeed, the Supreme Court has squarely rejected any suggestion that the Eleventh Amendment somehow bars 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. Lochyer 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. Ely 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). Likewise, the federal circuits 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.

CONCLUSION

For the foregoing reasons, *amicus curiae* WLF respectfully requests that the Court deny the Commonwealth's motion to remand and retain jurisdiction over this litigation.

Respectfully submitted,

/s/ M. Scott McIntyre

M. Scott McIntyre
BAKER & HOSTETLER LLP
312 Walnut St., Suite 3200
Cincinnati, OH 45202
(513) 852-2622
smcintyre@bakerlaw.com

Of Counsel:
Cory L. Andrews
Richard A. Samp
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., N.W.
Washington, DC 20036
(202) 588-0302

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

This is to certify that on May 15, 2013, I electronically filed the foregoing Memorandum of Washington Legal Foundation as *Amicus Curiae* in Opposition to Plaintiff's Motion to Remand using the CM/ECF system, which will automatically send a notification of such electronic filing (NEF) to all counsel of record in this case who are registered CM/ECF users.

/s/ M. Scott McIntyre
M. Scott McIntyre

602242446.1