No. 11-1251

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF WEST VIRGINIA, EX REL. DARRELL V. McGRAW, JR., ATTORNEY GENERAL,
Plaintiff-Appellee,

v.

CVS PHARMACY, INC.; KMART HOLDING CORP.; THE KROGER CO.; WAL-MART STORES, INC.; WALGREEN CO.; and TARGET CORP.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of West Virginia, Charleston Division
(John T. Copenhaver, Jr., District Judge; No. 09-cv-1000)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

Counsel for *Amicus Curiae*

Dated: June 10, 2011

CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate *amici curiae* are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-1251 Caption: State of West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Washington Legal Foundation, a § 501(c)(3) nonprofit corporation, who is an *amicus curiae*, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?	NO
2. Does party/amicus have any parent corporations?	NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations.	N/A
3. Is 10% or more of the stock of a parent/amicus owned by a held corporation or other publicly held entity?	NO
If yes, identify all such owners:	N/A
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation?	NO
If yes, identify entity and nature of interest:	N/A
5. Is party a trade association? (amici curiae do not complete this question)	N/A
6. Does this case arise out of a bankruptcy proceeding?	NO
If yes, identify any trustee and the members of the creditors' committee:	N/A

CERTIFICATE OF SERVICE

I certify that on June 10, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system; all are registered users.

/s/ Richard A. Samp — June 10, 2011

(signature) — (date)

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No. 11-1251 Caption: State of West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Allied Educational Foundation, a § 501(c)(3) nonprofit corporation, who is an *amicus curiae*, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?	NO
2. Does party/amicus have any parent corporations?	NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations.	N/A
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/s/ Richard A. Samp (signature) June 10, 2011 (date)

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) are set forth more fully in the accompanying motion for leave to file this brief. In brief, WLF is a public interest law and policy center based in Washington, D.C., with supporters in all 50 states. AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey.

Amici fully support the assertion of Defendants-Appellants (collectively, "CVS") that this case is a "class action" within the meaning of 28 U.S.C. § 1332(d)(1)(B). *Amici* write separately to focus on the panel's rationale for adopting a narrow reading of the removal provisions of the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2. The panel expressed concern that ascribing a broad interpretation to CAFA would "risk trampling on the sovereign dignity of the State" and would be insufficiently "sensitive to deeply rooted principles of federalism." Slip op. at 14. *Amici* respectfully submit that such concerns are misplaced; the Framers viewed federal courts' diversity/removal jurisdiction as a key component of our system of federalism, and removing to federal court a lawsuit initiated by a State in its own courts raises no sovereignty concerns whatsoever.

REASONS FOR GRANTING THE PETITION

As the Petition makes clear, the panel's narrow reading of CAFA places the

Fourth Circuit in direct conflict with decisions from the Fifth Circuit. The panel held that for a representative suit to constitute a "class action" within the meaning of CAFA, "the representative party must be part of the class and possess the same interest and suffer the same injury as the class members." Slip op. at 11-12. Thus, the panel held, because the West Virginia Attorney General does not possess claims typical of those held by consumers who allegedly were overcharged by CVS, this suit is not a "class action" as defined by 28 U.S.C. § 1332(d)(1)(B). The Fifth Circuit has concluded precisely the opposite. *Louisiana ex rel. Caldwell v. Allstate Insurance Co.*, 536 F.3d 418, 429-30 (5th Cir. 2008) (suit by Louisiana Attorney General based on claims that insurance company defendants had cheated their Louisiana policyholders was properly removable under CAFA, because the policyholders had the right to enforce their own claims and thus they – not the State – were "the real parties in interest."). *En banc* review is warranted to allow the Court to determine whether it really intended to create such a direct conflict with another federal circuit court.

Review is also warranted because the panel decision was based on a misconception of the federalism issues at stake in this case. The panel asserted that "deeply-rooted principles of federalism" counsel against permitting cases of this sort to be removed from state court to federal court. That interpretation of

"federalism" wholly misconstrues the intent of the Framers of the Constitution. No defendant in this case is a citizen of West Virginia. Protecting out-of-state defendants, such as Appellants, from the discriminatory treatment it was feared they would suffer in state courts was one of the Framer's primary rationales for establishing a federal court system and creating a right of removal from state court. There is no historical support for the argument that removal rights are to be strictly construed because they run counter to traditional notions of federalism.

Nor is the federalism analysis altered in this case by the fact that the lawsuit was filed in the name of the State. The panel concluded that denying West Virginia the right to "pursue its action in its own courts" would somehow "risk trampling on the sovereign dignity of the State." Slip op. at 14. That conclusion finds no support in the Constitution and "ignores entirely the dual character of our government." *In re MTBE Prods. Liability Litig.*, 488 F.3d 112, 117 (2d Cir. 2007). Numerous other federal circuits have addressed this issue, and *all* have concluded: (1) while the Eleventh Amendment prevents States from being involuntarily drawn into a federal court suit as a defendant, it has no application to removal into federal court of a lawsuit initiated by a State in state court; and (2) removal into federal court does not otherwise interfere with the sovereignty of States. The panel's misunderstanding of state sovereignty provides further reason

to grant the petition.

I. Permitting Removal of Diversity Cases into Federal Court Is a Key Component of "Federalism," and Thus There Is No Reason to Strictly Construe CAFA or Other Federal Removal Statutes

Underlying the panel's interpretation of CAFA's removal provisions was its understanding that removal runs counter to "deeply-rooted principles of federalism," which require that "primarily local matters" be reserved to the States and their courts. Slip op. 14. That understanding prompted the panel to adopt a narrow interpretation of CAFA's removal provisions. But that understanding 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. That understanding also runs directly counter to Congress's purpose in adopting CAFA.

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 533 (2d ed. 1836). Similarly, Alexander Hamilton argued

that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between a State and Citizens of another State" and "between Citizens of different States." U.S. Const., Art. III, § 2.

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

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

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816).

The federal government's distrust of state courts' ability to deal fairly with out-of-state litigants reached a peak in the period following the Civil War. 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,[1] a law that not only vested federal courts with federal question jurisdiction for the first time,[2] 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

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

[2] The fact that the federal courts did not possess 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.

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 to removal by plaintiffs and by 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:

> While the comparison between [the 1875 statute and the 1887 statute, as amended in 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*.

Lee, 260 U.S. 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 context of the legislative history discussed above – the 1875 expansion of removal jurisdiction and its subsequent retrenchment in 1887 and thereafter.[3] Certainly, nothing in *Shamrock* indicates that federal courts should apply any 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 early twentieth century congressional policy of strictly limiting removal rights is no longer in place; in the absence of such a congressional policy, the panel's presumption against removability cannot be justified. The most recent evidence that Congress does not mandate a presumption against removability was its adoption of CAFA in 2005. CAFA justified its expansion of removal

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[3] *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.

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. *See also Johnson v. Advance America*, 549 F.3d 932, 935 (4th Cir. 2008) (citing CAFA § 2(a)(4)). 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 Judge Niemeyer 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). *See also Louisiana ex rel. Caldwell*, 536 F.3d at 424 (Congress intended that term "class action," as used by CAFA, be "broadly defined to prevent jurisdictional gamesmanship" and "should not be confined solely to suits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority")

(quoting S. Rep. No. 109-14, at 35 (2005)).

Amici recognize that although the U.S. Supreme Court itself has never suggested that courts should adopt a federalism-based presumption against the exercise of removal jurisdiction, Fourth Circuit panels have from time-to-time articulated such a presumption, at least in *dicta*. As explained above, recognition of such a presumption lacks any historical support. Granting the petition will allow the *en banc* Court to correct that error and ensure that future panels will not feel bound to follow a rule of statutory construction that runs directly counter to the intent of the Framers.

II. Permitting Removal of Lawsuits Filed by a State Does Not Offend Any Notion of Federalism

The panel concluded that a federalism-based presumption against removal was particularly appropriate in this case because the party resisting removal was the State itself. It stated, "Were we now to mandate that the State was not entitled to pursue its actions in its action in its own courts, we would risk trampling on the sovereign dignity of the State," and that a presumption against removal preserves a State's dignity "by preventing States from being involuntarily 'dragged' into any court – a prerogative of sovereigns well established at the time of the founding." Slip op. at 14-15 (citing *Alden v. Maine*, 527 U.S. 706, 715-18 (1999)).

The panel's understanding of the views of the Founders is mistaken. There

is no historical support for the assertion that a lawsuit filed by a State in state court was not removable to federal court by an out-of-state defendant. The panel's citation to *Alden* is inapposite. *Alden* addressed 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 Supreme Court explained, "The generation that designed and adopted our federal system considered immunity *from* suit to be central to sovereign dignity." *Id.* at 715 (emphasis added). The Court said nothing to suggest that a State that initiates litigation in its own courts has a dignity interest in preventing out-of-state defendants from moving the case to federal courts.

Indeed, *Alden*'s discussion of the federal judicial power makes clear that the Founders had no objection to requiring State plaintiffs to litigate in federal court. Article III, § 2 of the Constitution 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 argued that it would permit States to be involuntarily haled into federal court in suits filed against them by out-of-state plaintiffs. *Id.* at 717-19. Supporters of the Constitution responded that Article III, § 2 did not authorize such suits but rather was meant to create jurisdiction over suits by States against out-of-

state defendants. *Id.* As one example, the Court cited the statements of James Madison:

> At the Virginia ratifying convention, James Madison echoed this theme:
>
> > [The federal courts'] 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. . . . It appear to me that this [clause] can have no operation but this – to give 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.

Id. at 717 (quoting 3 J. Elliot, *Debates on the Federal Constitution* 533 (2d ed. 1854). By referring to the "right" of a citizen who has been sued by a State "to be heard in the federal courts," Madison made plain that he had no objection to removal jurisdiction when a State has "condescend[ed] to be a party" by filing suit in state court.

Despite Madison's assurances regarding the limited scope of the jurisdictional grant, the Supreme Court ruled in 1793 that Article III, § 2 permitted States to be sued in federal court by citizens of other States. *Chisholm v. Georgia*, 2 Dall. 419 (1793). 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."

A number of States have sought to invoke the Eleventh Amendment to

prevent federal courts from exercising removal jurisdiction over lawsuits initiated by a State in its own courts. In *every* such case to reach the federal appeals courts, the Eleventh Amendment has been held not to bar removal because it was deemed inapplicable to suits initiated by a State. *See, e.g., 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. 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). State sovereign immunity is, of course, broader than and independent of the immunity provided by the Eleventh Amendment. *In re MTBE*, 488 at 116. But the federal appeals courts are similarly unanimous in finding that removal to federal court of diversity jurisdiction cases filed in state court by a State does not violate state sovereign immunity. *Id.* at 119; *Dynegy*, 375 F.3d at 848.

In sum, the panel erred when it concluded that CAFA removal jurisdiction should be more narrowly construed when, as here, a State is the plaintiff.

III. The Panel Erred in Deeming Suits Against Out-of-State Defendants that Operate Nationwide to Be "Primarily Local Matters"

Underlying the panel's reluctance to permit CVS to remove this case under CAFA was its belief that the case involves "primarily local matters," and that the primary focus of CAFA is "addressing state abuses in interstate class actions." Slip op. at 14. That belief was based on an extremely limited conception of the sort of "interstate class action" that Congress intended to address in adopting CAFA. *En banc* review is warranted to determine whether CAFA was really intended to have such limited scope.

The panel apparently viewed the case as raising "primarily local matters" because West Virginia seeks to assert the rights of consumers living within the State, not the rights of those living elsewhere. But CAFA's structure belies any contention that Congress was unconcerned with class actions in which all the plaintiff class members live in a single State. CAFA provides "local matter" exceptions for two limited categories of class actions that, but for the exceptions, would be subject to CAFA removal jurisdiction. *See* 28 U.S.C. § 1332(d)(3) (outlining circumstances under which a federal district court "may" decline to exercise CAFA removal jurisdiction); § 1332(d)(4) (outlining circumstances under which CAFA removal jurisdiction is not permissible). Importantly, neither of those exceptions can have any applicability when (as here) none of the defendants

is a citizen of the forum State. 28 U.S.C. §§ 1332(d)(3) & (4)(A)(i)(II)(cc).[4] Those statutory provisions are a clear indication that Congress deemed any substantial class-action claims filed against out-of-state defendants to constitute a matter of "interstate" interest.

Indeed, the national and interstate character of this lawsuit is readily apparent. The defendants are all nationwide retailers accused of violating West Virginia law by engaging in sales practices within the State that are substantially similar to their sales practices across the country. Review is warranted, given that the panel's conclusion that CAFA did not authorize removal jurisdiction was based to a large extent on its conclusion that the lawsuit involved "primarily local matters."

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for rehearing *en banc*.

[4] Under the first exception, one factor courts must consider in deciding whether to exercise jurisdiction is "whether the claims asserted involve matters of national or interstate interest." § 1332(d)(3)(A). But that factor never comes into play when, as here, none of the defendants is a citizen of the forum state.

Respectfully submitted,

/s/ Richard A. Samp
Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amicus curiae*

Dated: June 10, 2011

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

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2135 ***CSX Transportation, Inc. v. Robert V. Gilkison***

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1. This brief complies with the page limitations of Fed.R.App.P. 32(a)(7)(A) because:

- This brief is within the 15-page limitation established by Fed.R.App.P. 35(b)(2), excluding the parts exempted by Fed.R.Civ.P. 32(a)(7)(B)(iii).

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/s/ Richard A. Samp
Richard A. Samp
Attorney for Washington Legal Foundation
Dated: June 10, 2011

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I hereby certify that on this 10th day of June, 2011, a true copy of the foregoing brief was filed with the Court Clerk through the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. In addition, per Local Rule 31(d), eight bound copies of the foregoing brief were mailed to the Court Clerk.

/s/ Richard A. Samp
Richard A. Samp