No. 17-257

IN THE
Supreme Court of the United States

CORDIS CORPORATION,
Petitioner,
v.

JERRY DUNSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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

Date: September 18, 2017

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents did not respond to a request for consent. Accordingly, this motion for leave to file is necessary.

Washington Legal Foundation is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has appeared in this and other federal courts to support the right of a defendant in a state-court action to remove the case to federal court. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 247 (2014); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005); *Flagg v. Stryker Corp.*, 819 F.3d 132 (5th Cir. 2016) (*en banc*).

In particular, WLF has frequently filed briefs in support of the right of defendants to remove mass actions to federal court pursuant to the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2. *See, e.g., Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*); *Parson v. Johnson & Johnson*, 749 F.3d 879 (10th Cir. 2014). WLF also filed a brief in support of Petitioner when this matter was before the Ninth Circuit.

Congress adopted CAFA to ensure that a state-

court defendant would have the option of removing its case to federal court where the suit is substantial and involves numerous plaintiffs, and minimal diversity exists. WLF is concerned that the decision below unduly restricts the intended application of CAFA.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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

Dated: September 18, 2017

QUESTION PRESENTED

Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and mass actions. CAFA defines a "mass action" as a civil action in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of fact or law." 28 U.S.C. § 1332(d)(11)(B)(i). The federal appeals courts are sharply divided over the meaning of the phrase "proposed to be tried jointly." The question presented is as follows:

When plaintiffs request that multiple civil actions (involving more than 100 plaintiffs) be consolidated before a single judge "for purposes of pretrial discovery and proceedings along with the formation of a bellwether-trial process," are their claims "proposed to be tried jointly" within the meaning of § 1332(d)(11)(B)(i)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Constitutional Provisions:

Page(s)

Miscellaneous:

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared in this and other federal courts to support the right of a defendant in a state-court action to remove the case to federal court. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 247 (2014).

In particular, WLF has frequently filed briefs in support of the right of defendants to remove mass actions to federal court pursuant to the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2. *See, e.g., Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*). WLF also filed a brief in support of Petitioner in the Ninth Circuit.

Congress adopted CAFA to ensure that a state-court defendant would have the option of removing its case to federal court where the suit is substantial and involves numerous plaintiffs, and minimal diversity exists. WLF is concerned that the decision below unduly restricts the intended application of CAFA.

---

[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 or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file.

Indeed, if the decision below stands, WLF believes that no state-court defendant in any of the nine states comprising the Ninth Circuit will ever again be permitted to remove a mass action to federal court pursuant to CAFA. The decision below provides plaintiffs' attorneys with a roadmap demonstrating how to draft their consolidation papers in a manner that will ensure that their claims will remain in state court through trial, even when the consolidation involves hundreds of plaintiffs.

STATEMENT OF THE CASE

Congress adopted CAFA in 2005 to broaden federal court diversity jurisdiction so as to encompass "interstate cases of national importance," CAFA § 2(b)(2), including both class actions and "mass actions," a type of multi-plaintiff lawsuit that CAFA includes within the definition of "class action." 28 U.S.C. § 1332(d)(11)(A).

Congress found that over the preceding decade there had been "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" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). The legislative history explained, "Current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14 (2005) at 4. Congress adopted CAFA to, among other things, "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* at 7.

CAFA permits the removal to federal court of a "mass action" that meets requirements imposed by 28 U.S.C. § 1332(d)(2)-(11). Respondents Jerry Dunson, *et al.*, do not dispute that most of those requirements have been met: Respondents assert that their claims involve common questions of law and fact, and each claim exceeds the jurisdictional amount, § 1332(d)(11)(B)(i); the aggregate amount in controversy exceeds $5,000,000, § 1332(d)(2)(A); not all parties are citizens of the same State, § 1332(d)(2)(A)(i); almost all of the claims appear to have arisen outside California (the forum State), § 1332(d)(11)(B)(ii)(I); and the claims were not joined at the behest of the defendant, § 1332(d)(11)(B)(ii)(II). Respondents contend, however, that their claims were not removable to federal court because the claims of 100 or more plaintiffs were not "proposed to be tried jointly." § 1332(d)(11)(B)(i).

Respondents are eight individuals who claim to have suffered injuries following implantation of either of two medical devices—inferior vena cava (IVC) filters—manufactured by Petitioner Cordis Corp. Their lawsuit was one of at least 32 multi-plaintiff lawsuits—each featuring fewer than 100 plaintiffs but collectively totaling more than 300 plaintiffs—that raised nearly identical claims against Cordis and that initially were filed in state court in Alameda County, California.[2]

---

[2] Thirteen of those multi-plaintiff lawsuits are the subject of a separate certiorari petition filed by Cordis. *Cordis Corp. v. Barber*, No. 17-332. Cordis removed each of the fourteen lawsuits to U.S. District Court, which remanded them back to state court. In the decision below, the Ninth Circuit affirmed the order

Few of the plaintiffs in the 32+ cases live in Alameda County—they hail instead from 35 different States. Respondents do not contest the obvious motive for dividing the plaintiffs among multiple lawsuits: they hoped that naming fewer than 100 plaintiffs in each case would prevent removal of their claims to federal court under CAFA's "mass action" provision.

Respondents filed suit in April 2016. Their complaint was followed in rapid succession by seven other lawsuits raising nearly identical claims against Cordis, also filed in Alameda County. Almost immediately after filing the lawsuits, plaintiffs moved to have the cases designated as "complex" and marked as "related" so that they would be assigned to a single judge.

In May 2016, Respondents joined in a motion pursuant to California Code of Civil Procedure (CCP) § 1048(a) (signed by counsel for another group of plaintiffs, the "*Quinn* plaintiffs") to consolidate the eight lawsuits (with 140 total plaintiffs), as well as any other similar lawsuits filed later. Ninth Circuit Excerpts of Record ("ER") 55-80.[3] Respondents explained the reason for their motion to consolidate as follows:

---

remanding Respondents' lawsuit, then denied Cordis permission to appeal the other 13 remand orders in light of its decision affirming remand of Respondents' lawsuit.

[3] The *Quinn* plaintiffs were appellees in Ninth Circuit No. 16-80151 and are among the respondents in No. 17-332 in this Court.

> Consolidation of these Related Actions for purposes of pretrial discovery and proceedings along with the formation of a bellwether-trial process, will avoid unnecessary duplication of evidence and procedures in all of the actions, avoid the risk of inconsistent adjudications, and avoid many of the same witnesses testifying on common issues in all actions, as well as promote judicial economy and convenience.

ER71.

The motion further explained that consolidation was designed "to avoid the substantial danger of inconsistent adjudications (*i.e.* different result because tried before different judge and jury, etc.)," ER77, and "would avoid the need for [plaintiffs' expert witnesses] as well as the defendants' experts, to provide general causation testimony and written reports in each individual action." ER78. Respondents insisted, however, that they were "not requesting a consolidation of Related Actions for purposes of a single trial to determine the outcome for all plaintiffs, but rather a single judge to oversee and coordinate common discovery and pretrial proceedings." ER77.

Cordis thereafter removed each of the lawsuits to federal court, asserting that the consolidated lawsuits qualified as a CAFA "mass action" under 28 U.S.C. § 1332(d)(11). Cordis asserted that Respondents' motion to consolidate (for, among other things, "the formation of a bellwether-trial process"), along with Respondents' efforts to assign the cases to a single

judge, constituted a proposal that the claims be "tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(d)(11)(B)(i).

In September 2016, the district court remanded the eight lawsuits, as well as six other later-filed complaints (raising substantially similar IVC-filter claims against Cordis) that Cordis had also removed. Pet. App. 12a-26a. The court concluded that the motion to consolidate did not constitute a proposal that the plaintiffs' claims be "tried jointly." Although acknowledging that the motion requested "formation of a bellwether-trial process," the court stated that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA." *Id.* 21a (quoting *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015)).

The Ninth Circuit granted Cordis's petition to appeal the remand order pursuant to 28 U.S.C. § 1453(c), Pet.App.28a-29a, and thereafter affirmed. *Id.* 1a-11a. The court recognized that "[t]he question before us is whether the plaintiffs' proposal for a bellwether-trial process amounts to a proposal to try their claims jointly" and that an affirmative answer to that question would trigger the mass-action removal rights granted by CAFA. *Id.* 6a.

In addressing that question, the appeals court posited the existence of two distinct types of bellwether trials. The court claimed that in some bellwether-trial processes, "the claims of a representative plaintiff (or small group of plaintiffs) are tried, and the parties in the other cases agree that they will be bound by the outcome of that trial, at least as to common issues."

Pet.App.6a. It stated that in a second type of bellwether trial (the type that the court conceded was "far more common"):

> [T]he claims of a representative plaintiff or plaintiffs are tried, but the outcome of the trial is binding only as to the parties involved in the trial itself. The results of the trial are used in the other cases purely for informational purposes as an aid to settlement.

Id. 6a-7a. The court held that a proposal to coordinate lawsuits (with 100 or more combined plaintiffs) before a single judge for the purpose of conducting the second (non-binding) type of bellwether-trial process does not trigger a defendant's mass-action removal rights. *Id.* 7a. Rather, the court held:

> To constitute a trial in which the plaintiffs' claims are "tried jointly" for purposes of § 1332(d)(11)(B)(i), the results of the bellwether trial must have preclusive effect on the plaintiffs in the other cases as well.

Ibid. Concluding that Respondents had proposed establishing a bellwether-trial process of the non-binding variety for their consolidated cases, the appeals court held that CAFA did not authorize removal of their cases to federal court. *Id.* 11a.

SUMMARY OF ARGUMENT

The petition raises an issue of exceptional importance. Review is warranted because the Ninth Circuit resolved that issue in a manner that directly conflicts with decisions of the Seventh and Eighth Circuits. Those federal appeals courts have authorized CAFA mass-action removal in factual settings indistinguishable from this case. *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012); *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013).

The Ninth Circuit sought to distinguish *Abbott* and *Atwell* by noting that the consolidation motions filed in those cases used wording that differed slightly from the wording employed by Respondents. Pet. App. 5a. But the applicability of CAFA's mass-action removal provision cannot plausibly be interpreted as depending on whether the plaintiffs utter certain magic words. The plaintiffs in the three sets of proceedings requested that their lawsuits be consolidated in virtually identical manners (including establishment of a bellwether-trial process), yet the Seventh and Eighth Circuits held that CAFA permitted mass-action removal while the Ninth Circuit held that it did not.

Moreover, the conflict is well-entrenched. The Ninth Circuit's ruling was not an isolated decision; rather, it relied heavily on the appeals court's 2015 decision in *Briggs*. The Ninth Circuit has now twice interpreted CAFA's mass-action removal provision very narrowly; there is no reason to believe that it will agree even to hear another petition to review a mass-action remand decision, let alone revisit its decisions in this

case and *Briggs*.

Review is also warranted because of the extreme importance of the issue to a large number of companies. Recent studies have revealed a massive increase in the number of multi-plaintiff lawsuits filed against drug and medical device companies in jurisdictions with plaintiff-friendly reputations.

Among the plaintiffs' bar's favored jurisdictions are certain state courts in California and Missouri. In virtually all of those cases, plaintiffs' counsel seek to prevent removal to federal court by dividing their clients into separate lawsuits (each containing fewer than 100 plaintiffs) and then bringing them back together again before a single judge via motions to consolidate. In none of those instances (including this lawsuit) do the consolidation motions contemplate that the separate lawsuits will return, following completion of pre-trial proceedings, for a trial in front of the judges to whom they were initially assigned. As a result of the decision below, all such cases filed in States comprising the Ninth Circuit will remain in state court despite CAFA's strong preference that such cases be heard in federal court; the decision below provides the plaintiffs' bar with a roadmap for preventing removal while still ensuring that the cases proceed to trial in a consolidated manner before a single judge. In light of the large number of cases affected by the decision below, review is urgently required.

Finally, review is warranted because the Ninth Circuit's decision is inconsistent with both CAFA's statutory language and Congress's intent in adopting the statute. According to the appeals court, the claims

of 100 or more plaintiffs are not "proposed to be tried jointly" unless either: (1) all 100 plaintiffs are lined up in a single courtroom during trial; or (2) the plaintiffs all agree to be bound by the results of a single bellwether trial. Neither of those events is specified by CAFA, nor ever occurs in the real world—and certainly not in pharmaceutical cases, in which plaintiffs have zero incentive to agree to be bound by the results of a bellwether trial. Accordingly, the net effect of the Ninth Circuit's counter-textual reading of § 1332(d)(11)(B)(i) is that mass actions are not removable under CAFA so long as plaintiffs do not utter the wrong words when consolidating their cases. It is not plausible that Congress intended to create a removal right with such limited application.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS FROM THE SEVENTH AND EIGHTH CIRCUITS

The Ninth Circuit's interpretation of CAFA's mass-action removal provision directly conflicts with the Seventh Circuit's decision in *Abbott* and the Eighth Circuit's decision in *Atwell*. That conflict—which was explicitly recognized in a recent Third Circuit decision—merits review.

It is widely acknowledged that, in general, attorneys representing products-liability plaintiffs prefer to have their cases heard in state courts selected for their perceived friendliness to tort claims. Congress determined that such favoritism resulted in "abuses" in

forum-selection for multi-plaintiff lawsuits, including acts by "State and local courts" designed "to keep[ ] cases of national importance out of Federal court" and that "demonstrated bias against out-of-State defendants." CAFA §§ 2(a)(2), 2(a)(4)(A), & 2(a)(4)(B). Congress adopted CAFA to counter those abuses. CAFA's "primary objective" was to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (quoting CAFA § 2(b)(2), 119 Stat. 5)). CAFA permits removal to federal court of "mass action[s]," the requirements of which are set forth in 28 U.S.C. § 1332(d)(2)-(11).

Attorneys seeking to prevent removal of multi-plaintiff suits to federal court have focused their arguments on two of CAFA's mass-action requirements, both contained in § 1332(d)(11)(B)(i): (1) the action must involve "the monetary relief claims of 100 or more persons"; and (2) the claims must be "proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." By routinely filing two or more lawsuits, each with fewer than 100 plaintiffs, and then filing motions to consolidate their clients' claims only after the lawsuits have been filed, plaintiffs' attorneys seek to prevent a defendant from demonstrating compliance with CAFA's 100-person requirement. In addition, they seek to avoid a ruling that they "proposed" that the consolidated claims be "tried jointly" by stating in their consolidation motions that they do not desire a joint trial of all claims.

Abbott, *Atwell*, and this case all arose within that precise factual context. Attorneys filed multiple

lawsuits asserting products-liability claims against a drug or medical device manufacturer and raising common issues of law and fact; although the lawsuits (considered in the aggregate) included several hundred plaintiffs, no single lawsuit contained 100 or more plaintiffs; after filing suit, plaintiffs' attorneys sought to consolidate the lawsuits and specifically requested that a bellwether-trial process be adopted; and the attorneys explicitly disclaimed any proposal that the claims "be tried jointly." *Abbott* and *Atwell* held that, under those circumstances, "the claims of 100 or more persons are proposed to be tried jointly" and thus that CAFA authorized mass-action removal to federal court. The Ninth Circuit disagreed. Review is warranted to resolve that conflict.

Abbott involved several hundred plaintiffs who filed ten lawsuits in Illinois state court against a drug company for personal injuries allegedly caused by a prescription drug manufactured by the company. After filing the lawsuits, the plaintiffs moved the Illinois Supreme Court to consolidate the cases before a single state court. *Abbott*, 698 F.3d at 570-71. In response, the defendant removed the cases to federal court under CAFA's mass-action provision. The removed cases came before two different district judges. One judge remanded his cases to state court, employing reasoning virtually identical to the Ninth Circuit's:

> [I]t appears that Plaintiffs contemplate consolidated discovery and pretrial proceedings, but not a joint trial of the hundreds of claims in the ten subject cases. This is consistent with the Court's experience, in which so-called "mass tort"

> cases are never tried in their entirety, and instead "bellwether" claims selected by the parties are tried individually in order to answer difficult issues of causation or liability common to all the claims and/or to value the remaining claims in the case for purposes of settlement.

Id. at 571 (quoting district court decision). The other district judge disagreed and denied a remand motion, so the Seventh Circuit agreed to hear appeals from both rulings.

The Seventh Circuit upheld CAFA mass-action removal, rejecting the plaintiffs' argument that CAFA should be deemed inapplicable because they had never explicitly proposed that their claims be "tried jointly." *Id.* at 572-73. The Court explained:

> Plaintiffs argue that they never specifically asked for a joint trial, but a proposal for a joint trial can be implicit. ... We agree with [the defendant] that it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial *or an exemplar trial* with the legal issues applied to the remaining cases. *In either situation*, plaintiffs' claims would be tried jointly.

Id. at 573 (emphasis added). The Seventh Circuit determined that the plaintiffs had *implicitly* proposed that the claims be tried jointly, noting that "a joint trial

can take different forms as long as the plaintiffs' claims are being determined jointly." *Ibid.*

In contrast, the Ninth Circuit held that Respondents did not propose that their claims be "tried jointly," even though they proposed a bellwether-trial process that was identical to the one proposed by the *Abbott* plaintiffs. *Compare Abbott*, 698 F.3d at 571 (quoting district court decision), *with* Pet.App.7a (stating that "a proposal to hold a bellwether trial of the second [non-binding] type does not constitute a proposal to try the plaintiffs' claims jointly, for the verdict will not be binding on the other plaintiffs and will not actually resolve any aspects of their claims"). The Ninth Circuit sought to distinguish *Abbott* by noting that the consolidation motion filed by the *Abbott* plaintiffs requested consolidation "through trial" and "not solely for pretrial proceedings." Pet App.5a. But that alleged distinction is not material. Respondents' consolidation motion may not have used the precise words used by the *Abbott* plaintiffs, but that motion could not have been clearer that they were seeking a consolidation that would continue past completion of pre-trial procedures and through trial: they *explicitly requested* "formation of a bellwether-trial process." ER71. The Seventh Circuit held that such a request constitutes an implicit request that claims be "tried jointly" within the meaning of § 1332(d)(11)(B)(i); the Ninth Circuit disagreed. It held that a request for a bellwether-trial process is not a request that claims be "tried jointly," except in extremely rare cases in which the plaintiffs agree that the results of the bellwether trial will have preclusive effect on all plaintiffs.

The conflict between the decision below and the

Eighth Circuit's *Atwell* decision (regarding the meaning of § 1332(d)(11)(B)(i)) is even clearer. *Atwell* involved more than 100 plaintiffs divided among three lawsuits filed in Missouri state court against a medical-device company for personal injuries allegedly caused by a medical device manufactured by the company. The three groups of plaintiffs later filed separate motions requesting that the three cases be assigned "to a single judge for purposes of discovery and trial." *Atwell*, 740 F.3d at 1161. Each motion explicitly stated that, although the plaintiffs sought assignment to a single judge through trial, they were *not* formally "seeking to consolidate with other cases." *Id.* at 1164. At a hearing on the three motions, counsel explained that "'[t]here's going to be a process in which to select the bellwether case to try,'" but reiterated, "'We specifically said we don't want these cases consolidated. They should not be consolidated. We're simply asking your Honor to assign one single judge to handle these cases for consistency of rulings, judicial economy, [and] administration of justice.'" *Ibid* (quoting hearing transcript).

The Eighth Circuit held that the cases were properly removed to federal court as CAFA mass actions, stating that "the motions for assignment to a single judge filed by the three plaintiff groups to the same state circuit court, combined with plaintiffs' candid explanation of their objectives [*i.e.*, a bellwether-trial process], required denial of the motions to remand." *Id.* at 1166. The Eighth Circuit said that it agreed with the Seventh Circuit's *Abbott* decision and that proper application of *Abbott* required a finding that mass-action removal was permissible. *Id.* at 1164-65. It concluded that the plaintiffs' request for a

bellwether-trial process was inconsistent with an assertion that they were "suggesting only *pretrial* coordination" of the three lawsuits. *Id.* at 1164 (emphasis in original).

The Ninth Circuit's interpretation of § 1332(d)(11)(B)(i) cannot be reconciled with *Atwell*'s. The Ninth Circuit sought to explain *Atwell* by noting that the *Atwell* plaintiffs had "take[n] the affirmative step" of "requesting assignment of a single judge 'for purposes of discovery and trial.'" Pet.App.5a (quoting *Atwell*, 740 F.3d at 1163). But that is no distinction at all. Respondents likewise sought assignment of their cases to a single judge, and they never suggested that the cases should be returned to the transferor judge following completion of pre-trial procedures. To the contrary, their request for a bellwether-trial process indicates that they are seeking consolidation through trial. Indeed, the argument that the plaintiffs requested that the claims be "tried jointly" is even stronger here than in *Atwell*: Respondents requested not only assignment of all cases to a single judge but also *consolidation* of those cases. In contrast, the *Atwell* plaintiffs explicitly disclaimed any desire that their three cases be consolidated.

Nor is there any prospect that the Ninth Circuit will reconsider its position in light of *Abbott* and *Atwell*. The Ninth Circuit's interpretation of § 1332(d)(11)(B)(i) is well entrenched. The decision below is fully consistent with the court's earlier *Briggs* decision, which held that "a bellwether trial is not, without more, a joint trial within the meaning of CAFA." 796 F.3d at 1051. *Briggs* involved a motion by the (fewer than 100) plaintiffs in a products-liability lawsuit for

transfer to a different California state court for the purpose of coordination with an existing lawsuit against the same drug manufacturer. *Briggs* held that the motion did not constitute a proposal that claims be "tried jointly," even though the motion did not indicate that the lawsuit should return to the transferor court following completion of discovery and in advance of trial. *Id.* at 1050-51. The Ninth Circuit stated that the motion should not be deemed a proposal that claims be "tried jointly" simply because the court to which the case was transferred had adopted a bellwether-trial process. *Id.* at 1051.

While the Ninth Circuit has not explicitly acknowledged that its decisions conflict with *Abbott* and *Atwell*, another federal appeals court has recognized the conflict. In a recent opinion finding that a defendant had properly invoked CAFA's mass-action provision to remove a multi-plaintiff case to federal court, the Third Circuit explicitly noted the conflict between *Atwell* and *Briggs*, stating:

> Several circuits have also held that a "bellwether trial" is a form of a joint trial. *See, e.g., Atwell*, 740 F.3d at 1165-66; *but cf. Briggs*, 796 F.3d at 1051 ("a bellwether trial is not, without more, a joint trial within the meaning of CAFA").

Ramirez v. Vintage Pharmaceuticals, LLC, 852 F.3d 324, 332 (3d Cir. 2017) (footnote omitted).

By crafting a bellwether-trial exception to CAFA's "tried jointly" rule, the Ninth Circuit has created a clear and acknowledged circuit split that

should be resolved by this Court.

II. THE PROPER CONSTRUCTION OF CAFA'S "TRIED JOINTLY" PROVISION IS EXTREMELY IMPORTANT TO A GREAT NUMBER OF LITIGANTS

The tactics employed by Respondents in their effort to prevent removal to federal court are widespread. If the decision below is allowed to stand, a large number of defendants facing lawsuits in the States comprising the Ninth Circuit will be denied the federal forum that Congress sought to afford them when it adopted CAFA. Review of the decision below is particularly warranted in light of the significant impact it is having on broad cross-sections of the business community.

An exhaustive study recently completed by the Civil Justice Association of California documents the ubiquity of multi-plaintiff tort suits filed against drug companies in state courts favored by the plaintiffs' bar, usually on behalf of clients who do not reside in the state. Ryan Tacher, *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?*, Civil Justice Ass'n of California (2016) (*available at* http://cjac.org/what/research.CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf).

The study focused on just two California jurisdictions, the Superior Courts for Los Angeles and San Francisco Counties. It found that, between January 2010 and May 2016, 2,919 products-liability lawsuits against drug companies were filed in those two courts—on behalf of 25,503 plaintiffs. A small coterie of law firms filed more than 90% of the suits. Forum shopping indisputably played a major role in

these multi-plaintiff filings: fully 90% of the plaintiffs were not California residents. Suits of this type—asserting large damages claims against nationwide drug companies on behalf of numerous out-of-state plaintiffs—would seem to be precisely the sort of "interstate cases of national importance," CAFA § 2(b)(2), that Congress had in mind when it adopted CAFA to broaden federal court diversity jurisdiction. Yet, by ensuring that fewer than 100 plaintiffs are included in any one lawsuit and filing consolidation motions only after suits are filed, the plaintiffs' bar has succeeded in keeping most such cases in state court.

A prominent example of a successful effort to prevent CAFA removal is the *Bristol-Myers* case, which reached this Court last term on a personal-jurisdiction issue. *Bristol-Myers Squibb Co. v. Superior Court of California for the County of San Francisco*, 137 S. Ct. 1773 (2017). That case involved product-liability claims filed by 678 plaintiffs, more than 85% of whom were not residents of California; the plaintiffs were divided into eight separate lawsuits, all filed in the same state court. *Id.* at 1778. Because fewer than 100 plaintiffs were included in each suit, the defendant was unable to remove the cases to federal court as a CAFA mass action.

The Court's *Bristol-Myers* decision, by articulating due-process limits on state-court exercise of personal jurisdiction over nonresidents, is likely to reduce forum shopping somewhat. Nonresidents nonetheless are able to continue to establish personal jurisdiction in California (and other plaintiff-friendly jurisdictions) over at least some of the targets of their products-liability claims. Accordingly, review is

warranted in this case to ensure that such defendants are afforded the removal rights granted to them by CAFA.

Moreover, unless the Court grants review, defendants within the Ninth Circuit may never again have an opportunity to raise these issues. Appellate review of CAFA remand decisions is discretionary; the Ninth Circuit—having twice determined that a proposal to establish a bellwether-trial process is not a proposal that claims be "tried jointly"—is unlikely to grant a discretionary petition for the purpose of considering the issue yet again. Moreover, defendants will be very wary of attempting to remove their cases lest they be sanctioned. In this case, the district court (after ordering remand) denied Respondents' request for attorneys' fees; it determined that Cordis's removal petition was "reasonable"—but "barely so," in light of the Ninth Circuit's *Briggs* precedent. Pet.App.25a. With two Ninth Circuit precedents now on the books, defense attorneys will reasonably fear that future removal petitions raising similar claims would be sanctionable.

III. THE DECISION BELOW MISCONSTRUES CAFA'S MASS-ACTION PROVISION, WHICH IS INTENDED TO ENSURE THAT INTERSTATE CASES OF NATIONAL IMPORTANCE CAN BE HEARD IN FEDERAL COURT

The Petition explains at length why the Ninth Circuit's decision is inconsistent with both CAFA's statutory language and Congress's intent in adopting the statute. Rather than repeating that explanation here, WLF focuses on several points that render the

appeals court's interpretation of § 1332(d)(11)(B)(i) particularly unreasonable.

First, the Ninth Circuit's reliance on 28 U.S.C. § 1332(d)(11)(B)(ii)(IV), Pet.App.6a, is misplaced. That CAFA provision states that a "mass action" does not include any civil action in which "the claims have been consolidated or coordinated solely for pretrial proceedings." That provision is inapplicable on its face to civil actions, such as this one, in which the plaintiffs propose that consolidation of claims continue beyond completion of "pretrial proceedings." A bellwether-trial process cannot plausibly be classified as a "pretrial proceeding." Accordingly, when Respondents requested establishing a "bellwether-trial process," they were not requesting that the 14 lawsuits be consolidated "solely for pretrial proceedings."

When Congress referenced consolidation "solely for pretrial proceedings," it likely contemplated consolidated proceedings of the sort authorized in federal court under multidistrict litigation (MDL) rules. A federal statute, 28 U.S.C. § 1407, permits civil cases involving common questions of fact to be transferred to a single federal district judge for "coordinated or consolidated pretrial proceedings." But such transfers do not extend to the trial phase. Indeed, the statute *requires* that an MDL case be remanded "at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." § 1407(a).

In contrast, the California statute under which Respondents sought consolidation, CCP § 1048(a), includes no provision requiring that a case be returned

to the transferor judge following completion of pretrial proceedings. Nor did Respondents' motion to consolidate include a request that the lawsuits be unconsolidated following completion of pretrial proceedings. Moreover, no California case law suggests that cases consolidated under CCP § 1048(a) should or even can be unconsolidated for purposes of trial.

Accordingly, there is no reason to attach weight to an attorney's statements that he seeks consolidation "for purposes of pretrial discovery and proceedings" and that he does not propose that claims be "tried jointly"—while he simultaneously proposes establishing "a bellwether-trial process." By crediting such statements, the Ninth Circuit elevated form over substance.

As the Petition explains, the net effect of the Ninth Circuit's counter-textual reading of § 1332(d)(11)(B)(i) is that mass actions are not removable under CAFA so long as plaintiffs do not utter the wrong words when consolidating their cases—even when their consolidation motion will inevitably result in cases remaining consolidated through trial. Now that the appeals court has let attorneys know the magic words they should avoid when moving to consolidate their lawsuits, defendants within the Ninth Circuit will never again be permitted to remove mass actions to federal court under CAFA. It is not plausible that Congress intended to create a removal right with such limited application. *Bullard v. Burlington Northern Santa Fe Railway Co.*, 535 F.3d 759, 762 (7th Cir. 2008) (rejecting a narrow interpretation of CAFA mass-action removal rights that would preclude most such removals and would

render § 1332(d)(11) "defunct," and stating, "Courts do not read statutes to make entire subsections vanish into the night.").[4] *Cf. Knowles*, 568 U.S. at 595 (rejecting argument that putative class plaintiff could stipulate to a damages claim of less than $5 million in order to prevent removal under CAFA, stating that to hold otherwise would "have the effect of allowing 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*") (emphasis added).

In each of its decisions addressing whether a mass action was properly removable under CAFA, the Ninth Circuit placed undo weight on specific words employed by counsel for the plaintiffs, rather than on the substance of what they proposed. The result has been the creation of *ad hoc* rules that provide little guidance to district courts in deciding remand motions. Thus, the *en banc* Ninth Circuit held that a statement by plaintiffs' counsel that they sought coordination of multiple lawsuits "for all purposes" was strong evidence that they were proposing that the lawsuits be "tried jointly" within the meaning of CAFA. *Corber*, 771 F.3d at 1223. But that decision provided limited assistance in later district court proceedings because plaintiffs' attorneys quickly learned the obvious lesson: if one hopes to avoid removal under CAFA, one should not use the phrase "for all purposes" when explaining

[4] Indeed, the logic of the Ninth Circuit's decision suggests that CAFA removal is impermissible even if the initial lawsuit contains 100 or more plaintiffs, so long as the plaintiffs state that they do not intend that the claims of all plaintiffs be "tried jointly."

what the plaintiffs seek to accomplish by consolidating or coordinating their lawsuits.

A proper understanding of § 1332(d)(11)(B)(i) requires adoption of rules that focus on the substance of what plaintiffs are proposing when they file a motion to consolidate, rather than the form those proposals take. When, as here, the motion effectively ensures that the lawsuits will remain consolidated through trial before a single judge, then claims encompassed within those lawsuits "are proposed to be tried jointly," within the meaning of § 1332(d)(11)(B)(i). That interpretation has the added advantage of providing clear guidance to those plaintiffs' counsel who wish to "go it alone" (*i.e.*, to shun any coordination that might jeopardize their fewer-than-100-plaintiffs status) and at the same time permitting defendants to accurately predict when they are entitled to invoke the federal-forum rights granted to them by CAFA.

Indeed, this Court has repeatedly stressed the importance of adopting straightforward, easy-to-administer rules governing federal court jurisdiction, including in a case that addressed the scope of federal-court jurisdiction under CAFA's mass-action provision. In that case, the Court concluded that in calculating whether CAFA's 100-plaintiff threshold has been achieved, only individuals named in a complaint should be counted as CAFA "plaintiffs." *Mississippi ex rel. Hood v. AU Optronics*, 134 S. Ct. 736 (2014). The Court stated that limiting CAFA "plaintiffs" to named parties "leads to a straightforward, easy to administer rule." *Id.* at 744. It added, "Our decision thus comports with the commonsense observation that 'when judges must decide jurisdictional matters,

simplicity is a virtue.'" *Ibid* (quoting *Knowles*, 568 U.S. at 595).

In sum, review is also warranted because the Ninth Circuit has so clearly misinterpreted § 1332(d)(11)(B)(i) and because it would provide the Court an opportunity to adopt an easy-to-apply interpretation that comports with both the statutory language and congressional intent.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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

September 18, 2017