CA No. 17-15257

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRY DUNSON, *et al.*,
Plaintiffs-Appellees,
v.

CORDIS CORPORATION,
Defendant-Appellant,

On Appeal from the United States District Court
for the Northern District of California
No. 3:16-cv-03076-EMC
(Honorable Edward M. Chin)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

March 2, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Page(s)

Miscellaneous:

Page(s)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

The interests of Washington Legal Foundation (WLF) are set out more fully in the accompanying motion for leave to file. In brief, WLF is a public interest law and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in California.[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.

Congress adopted the Class Action Fairness Act of 2005 (CAFA), Pub. L. 109-2, to ensure that state-court defendants would have the option of removing their case to federal court where the suit is both substantial and involves numerous plaintiffs, and minimal diversity exists. WLF is concerned that the decision below unduly restricts the intended application of CAFA.

WLF agrees with Appellant that it properly removed these cases to federal court, both: (1) because a motion to consolidate cases under California law is, by definition, a request that their claims be "tried jointly," as that phrased is used in

[1] Pursuant to Fed.R.App.P. 29(c)(5), 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, contributed monetarily to the preparation and submission of this brief.

CAFA; and (2) because Appellees propose not only a bellwether-trial process but also the permanent assignment of all cases to a single judge. WLF writes separately to focus on the second of those two issues.

STATEMENT OF THE CASE

This case raises important questions regarding the scope of CAFA, a statute adopted by Congress 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). Appellees do not dispute that most of those requirements have been met: Appellees 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 Appellant, § 1332(d)(11)(B)(ii)(II). Appellees 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).

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

[2] WLF hereafter refers to these eight Appellees as "the *Dunson* Appellees." Unless specified otherwise, references to "Appellees" include all plaintiffs whose claims were removed to federal district court by Cordis and were subsequently remanded to state court.

Few of the plaintiffs in the 32 cases live in Alameda County—they hail from 35 different States and the District of Columbia. Appellees do not contest the obvious motive for dividing themselves among multiple lawsuits: they hoped that keeping the number of plaintiffs below 100 in each case would prevent removal of their claims to federal court under CAFA's "mass action" provision.

The *Dunson* Appellees filed suit on April 20, 2016. Their complaint was followed in rapid succession by seven other lawsuits raising nearly identical claims against Cordis, also filed in Alameda County Superior Court. Almost immediately after filing the lawsuits, counsel for the plaintiffs moved successfully to have the cases assigned to a single judge as "complex" cases.

On May 27, 2016, the *Dunson* Appellees joined in a motion pursuant to California Code of Civil Procedure (CCP) § 1048(a) (signed by counsel for another group of plaintiffs, the *Quinn* Appellees) to consolidate the eight lawsuits (with 140 total plaintiffs), as well as any other similar lawsuits filed later. ER55-ER80. Appellees explained the reason for their motion to consolidate as follows:

> 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 explained further 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. The plaintiffs, 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 the U.S. District Court for the Northern District of California, asserting that the consolidated lawsuits qualified as a CAFA "mass action" under 28 U.S.C. § 1332(d)(11). Cordis asserted that the motion to consolidate, along with the plaintiffs' successful effort 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). Cordis also asserted that a motion to consolidate under CCP § 1048(a) is, by definition, a request to bring matters together for joint disposition through trial.

On September 23, 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. ER8-ER18. 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." ER14 (quoting *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015) (emphasis added). The court held that other factors cited by Cordis did not constitute the "more" required by *Briggs*. ER15.

In particular, the district court dismissed the significance of statements in the consolidation motion regarding a desire to avoid having experts be required to testify "on common issues in all actions"; the court concluded that the statement was merely a reference to a desire to avoid multiple depositions of the same experts. *Ibid*. It also dismissed the significance of the plaintiffs' desire to eliminate the risk of "inconsistent adjudications," concluding that "adjudications" could well be a reference to pre-trial rulings. *Ibid*. The court classified the example of "inconsistent adjudications" provided by the motion—"i.e., different results because tried before a different judge and jury"—as a reference to "the

benefits of consolidation *in general*, not the specific benefits sought in this case." *Ibid*. The court concluded that these statements were insufficient to justify CAFA mass-action removal because they did not suggest that Appellees sought "binding, bellwether trial(s)." *Ibid*.

The court stated that its ruling was premised on a "well-established presumption against federal removal jurisdiction." ER 11. It termed plaintiffs "the masters of their complaint" and asserted that they are entitled to "defeat CAFA jurisdiction by structuring their complaints to avoid it, such as by filing multiple complaints each with fewer than 100 plaintiffs." *Ibid*.

The remand order did not address Cordis's assertion that a CCP § 1048(a) motion to consolidate is, by definition, a motion to bring matters together for joint disposition through trial. However, the court addressed that assertion in its order denying Cordis's motion for a stay pending appeal of the remand order. ER1-ER7. It disagreed with Cordis's interpretation of CCP § 1048(a), concluding that the statute contemplated "limited consolidation short of a full trial." ER4.

On February 13, 2017, this Court granted Cordis's petition to appeal the district court's remand of the *Dunson* lawsuit, one of several petitions to appeal filed by Cordis. The Court stayed action on the other petitions pending a ruling in this matter.

SUMMARY OF ARGUMENT

This appeal turns largely on the meaning of the phrase "tried jointly," as used in § 1332(d)(11)(B)(i). The district court concluded that counsel do not propose that claims be "tried jointly" unless, in addition to proposing "the formation of a bellwether-trial process," they also propose that bellwether trials be "binding" on all parties. *See, e.g.*, ER 15. CAFA's mass-action provision cannot plausibly be interpreted in that manner. Actions are commonly deemed "joint" without regard to whether they proceed identically in every respect. Rather, events occur "jointly" if they occur "in conjunction, combination, or concert." *Oxford English Dictionary* (2013).

The only plausible interpretation of Appellees' requests—their initial request that the IVC-filter lawsuits be assigned to a single judge, and their subsequent CCP § 1048(a) motion that the cases be consolidated and that a "bellwether-trial process" be established—is that they were requesting that the lawsuits be tried "in conjunction" with one another. That is sufficient to warrant CAFA removal. *Briggs* stated that a bellwether trial, "without more," is not a removable CAFA "mass action." 796 F.3d at 1051. But Cordis has demonstrated the "more," much more. By arranging to have the lawsuits assigned to a single judge *for all purposes* (*i.e.*, without a process whereby, following completion of pre-trial discovery, the

cases could be assigned for trial in accordance with normal judge-selection rules), Appellees have ensured that their proposed bellwether-trial process would be precisely what Congress had in mind when it provided for removal of "mass actions." Appellees' description—in their CCP § 1048(a) motion—of the type of proceedings they contemplate amply confirms that Appellees do, indeed, propose that their claims be "tried jointly."

Adopting Appellees' cramped interpretation of the phrase "tried jointly" would essentially eliminate CAFA's "mass action" provision, because courts virtually never conduct the "binding" bellwether trials contemplated by the district court. It is unheard of for mass-action, personal-injury litigants to agree that the results of bellwether trials will be "binding" on all parties—because, among other reasons, evidence regarding specific causation will be unique with respect to each claimant. Plaintiffs have no incentive to agree to such trials because a nonbinding bellwether trial is a no-lose proposition for those plaintiffs not participating in the trial; as the *Dunson* Appellees recognize in their brief, it is only the *defendant* in a bellwether trial that could be subject to issue preclusion in subsequent trials. Appellees Brief at 25-27. They assert that the consolidated proceeding they propose does not qualify as a removable CAFA "mass action," but they fail to identify any realistic set of litigation procedures that *would* qualify. Courts

generally avoid construing a statute in a manner that would render portions of the statute superfluous.

Events leading up to adoption of CAFA in 2005 confirm WLF's understanding of the phrase "tried jointly." CAFA's mass-action provision was precipitated by complaints that some state courts had adopted overly lenient joinder rules that permitted lawyers to join together in a single lawsuit the products-liability claims of a large, sometimes-disparate group of plaintiffs from across the country. Many complained that such state-court "mass actions" were procedurally unfair to defendants. Yet, although these mass actions often involved 100 or more plaintiffs, trial plans rarely called for initial jury trials involving more than a handful of the plaintiffs, and never mandated that the result of the initial trial would dictate the result of later trials. Thus, under the district court's understanding of CAFA, the very sort of pre-2005 mass actions that prompted Congress to adopt CAFA mass-action provision would not be covered by the provision. It is not plausible that Congress intended CAFA's mass-action provision to operate in such a restricted manner.

In support of its conclusion that Appellees never proposed that their claims be tried jointly, the district court said, "First and most significantly, the *Quinn* motion [to consolidate] clearly and emphatically disclaims any effort to seek a joint

trial." ER 13. But such precatory statements are of limited value when, as Cordis has demonstrated here, plaintiffs are operating under a misconception regarding what it means, for CAFA purposes, for actions to be "tried jointly." Moreover, Appellees' statements prove too much. They indicate a desire that even the claims within a single complaint (*e.g.*, the claims of the eight *Dunson* Appellees) not be heard together "in a single trial." ER77. If such a statement were sufficient to defeat CAFA removal, then even a single complaint with 100+ plaintiffs could not be removed; yet Ninth Circuit precedent squarely precludes that conclusion.

The district court likely arrived at its pinched interpretation of CAFA because it erroneously concluded that it was required to apply a "presumption against federal removal jurisdiction." ER11. That conclusion ignored the contrary conclusion of the U.S. Supreme Court, which recently held that "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

ARGUMENT

I. SECTION 1332(d)(11) AUTHORIZED REMOVAL OF THE MULTI-PLAINTIFF IVC-FILTER COMPLAINTS

As this Court has recognized, Congress "altered the landscape for federal court jurisdiction" over multi-party litigation when it adopted CAFA in 2005.

Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 677 (9th Cir. 2006). Congress adopted CAFA to, among other things, facilitate defendants' efforts to remove interstate cases of national importance into federal court, and thereby "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep. No. 109-14 (2005) at 7. CAFA "loosened the requirements for diversity jurisdiction for two types of cases—'class actions' and 'mass actions.'" *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014).

CAFA authorized the removal to federal court of any "mass action" that meets the requirements set forth in 28 U.S.C. § 1332(d)(2)-(11). The *Dunson* Appellees contend that their products-liability claims were not removable under CAFA's mass-action provision because Cordis failed to demonstrate that the CCP § 1048(a) motion for consolidation proposed that the claims be "tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). That contention lacks merit. Cordis's brief argues convincingly that a motion to consolidate under CCP § 1048(a) is, by definition, a request to bring matters together for joint disposition through trial. Rather than repeating those arguments here, WLF writes separately to focus on Cordis's other principal argument: that because Appellees propose a bellwether-trial process that includes assigning all claims to a single judge for all purposes, the "monetary relief

claims of 100 or more persons are proposed to be tried jointly." *Ibid.*

A. The Court Should Establish Straightforward, Easy-to-Administer Rules that Focus on the Substance of the Litigation Plan Proposed by the Plaintiffs

Before addressing the precise requirements of CAFA, we pause to suggest what ought to be an important goal of the Court's opinion in this case. District courts currently lack clear guidance regarding when a mass action is properly removable under CAFA. The result is a nearly endless cycle of removal petitions and remand motions filed by litigants who cannot accurately predict how district courts will rule. This Court's opinions in *Corber v. Xanodyne Pharmaceuticals, Inc.*, 771 F.3d 1218 (9th Cir. 2014) (*en banc*), and *Briggs* have been of some assistance, but considerable uncertainty remains.

A principal reason for that uncertainty is that both *Corber* and *Briggs* focused to a considerable degree on isolated statements made by counsel for plaintiffs during the course of state-court proceedings. That focus assisted the Court in deciding the cases before it; *e.g.*, the Court held that a statement by the *Corber* plaintiffs 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 portion of the *Corber* decision provides 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 what the plaintiffs seek to accomplish by consolidating or coordinating their lawsuits.

Instead of focusing on isolated statements, WLF urges the Court to develop rules that focus more directly on the substance of what plaintiffs are proposing when they seek to bring together lawsuits. That approach can provide 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 can permit defendants to accurately predict when they are entitled to invoke the federal-forum rights granted to them by CAFA.

Indeed, in numerous cases the Supreme Court has 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. At issue in that case, *Mississippi ex rel. Hood v. AU Optronics*, was whether a *parens patriae* lawsuit filed by Mississippi to recover damages suffered by its citizens could qualify as a CAFA mass action. The Court stated that its holding that individuals not named in a complaint could not be counted as CAFA "plaintiffs" (and thus that CAFA's

100-plaintiff threshold had not been achieved) was based in part on its conclusion that a contrary holding would unduly complicate a district court's decision-making process on a jurisdictional issue—by requiring district courts to embroil themselves in numerous factual inquiries regarding the claims of individuals not named in the complaint. *AU Optronics*, 134 S. Ct. at 743-44. The Court stated that construing CAFA "plaintiffs" to include only 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 *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013)). *Accord, Corber*, 771 F.3d at 1224 ("In the application of a jurisdictional rule, as well as in its establishment, we agree with the Supreme Court's observation that 'simplicity is a virtue.'") (citing *AU Optronics*, 134 S. Ct. at 744).

WLF submits that the "simplicity" mandated by *AU Optronics* and *Corber* can be achieved only if the Court establishes jurisdictional rules that focus broadly on the nature of the plaintiffs' consolidation and coordination requests, and that focus only secondarily on the individual statements of plaintiffs' counsel.

B. A Group of Plaintiffs Proposes that Claims Be "Tried Jointly" When It Proposes that Claims Be Litigated in Conjunction with One Another Until the Claims Are Resolved

The *Dunson* complaint is one of more than 30 multi-plaintiff lawsuits filed in state court in Alameda County by the same group of law firms. Counsel for the plaintiffs soon thereafter undertook two significant actions: (1) they arranged for the lawsuits to all be assigned to a single judge; and (2) they filed a CCP § 1048(a) motion to consolidate the cases, a motion that included a request that the court establish "a bellwether-trial process." ER71. As a matter of law, those actions constituted a proposal that the lawsuits be "tried jointly" within the meaning of § 1332(d)(11)(B)(i).

The *Dunson* Appellees argue that claims are not "tried jointly" unless a court conducts "a joint trial" that "will have binding or preclusive effect on the claims of 100 or more plaintiffs." Appellees Brief at 23. This Court's case law provides no support for that restricted definition of "tried jointly," a definition that would preclude virtually all CAFA mass-action removals.

Corber held that when plaintiffs filed a motion under CCP § 404 to coordinate civil actions pending in different courts and sharing a common question

of fact or law,[3] they satisfied CAFA's "tried jointly" requirement, and thus that the defendants had properly removed all of the lawsuits to federal court. *Corber*, 771 F.3d at 1223-25. The Court held that the "tried jointly" requirement was satisfied even though the plaintiffs had never *expressly* proposed a "joint trial," and clearly had not proposed a single trial proceeding at which the claims of 100+ plaintiffs would be simultaneously considered by a single jury. *Ibid.* The court explained that a proposal is sufficient for CAFA-removal purposes if the plaintiff's coordination motion requests something "more than pre-trial coordination." *Id.* at 1224. The court focused on one particular aspect of the plaintiffs' petition that, it held, constituted more than a request for pre-trial coordination: the plaintiffs' assertion that "one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice." *Ibid.*

The *en banc* Court expressly declined to consider whether a CCP § 404 petition should *always* be deemed a proposal that claims be "tried jointly," even when the petition seeks "only pre-trial coordination"; it stated that "that issue is not now before us." *Id.* at 1225 n.6. But the Court envisioned that a successful CCP

---

[3] Section 404 permits parties to civil actions pending in different courts to submit a petition to the Chairperson of the Judicial Council, requesting that the cases be "coordinated." CCP § 404.1 provides that coordination is "appropriate" if assigning one judge to hear the actions "will promote the ends of justice."

§ 404 petition would in most instances be deemed a proposal that claims be "tried jointly," noting that "[i]t [was] not clear whether the California Judicial Council would grant coordination for less than 'all purposes.'" *Id.* at 1224.

Appellees here did much more than simply request that their lawsuits be "coordinated." They first requested that the lawsuits be assigned to a single judge and then asked that the suits be "consolidated" pursuant to CCP § 1408(a). Appellees stated 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. But nowhere have they explained how they intend to un-consolidate the cases following completion of "discovery and pretrial proceedings." And as *Corber* explained, a request for "a single trial to determine the outcome for all plaintiffs" is not a prerequisite to satisfying CAFA's requirement that "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 law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). Rather, it is enough that the litigation plan proposed by Appellees entails "one judge hearing all of the actions for all purposes in a selected site or sites[.]" *Corber*, 771 F.3d at 1224.

One year following the Court's *en banc* decision in *Corber*, a panel of this

Court created a limited exception to the right to remove cases that contain more than 100 plaintiffs after being coordinated (at the plaintiffs' behest) under CCP § 404. The Court held in *Briggs* that plaintiffs do *not* propose that claims be "tried jointly" if: (1) their § 404 petition does no more than request that cases be coordinated "solely for pre-trial purposes"; (2) the judge conducting the coordinated proceedings expressly states in his management order that the order "does not constitute a determination that these actions should be consolidated for trial"; and (3) the plaintiffs' court filings do no more than discuss the possibility of use of bellwether trials. *Briggs*, 796 F.3d at 1050-51. The Court explained that when cases are merely coordinated and not consolidated, "a bellwether trial is not, without more, a joint trial within the meaning of CAFA." *Id.* at 1051.

Briggs's limited exception is inapplicable here, because Appellees have done much more than simply arrange for cases to be coordinated for pre-trial purposes. Appellees have not merely suggested that bellwether trials could "provide an extremely useful and practical backdrop" for resolving issues that might arise in the cases. *Ibid*. Rather, counsel for Appellees affirmatively prevented the assignment of their IVC-filter cases pursuant to regular case-assignment procedures (which would have led to multiple judges), by filing all of their suits in one county court and then successfully requesting that they be assigned to a single

judge. They then filed a motion under CCP § 1408(a) for the consolidation of all of the lawsuits and included a request for "formation of a bellwether-trial process."

Appellees' insistence that they are doing no more than seeking consolidation before "a single judge to oversee and coordinate common discovery and pretrial proceedings," ER 77, is a mere smoke screen. Now that the cases have been consolidated, they will remain consolidated before a single judge through trial. As *Corber* makes clear, that is sufficient to satisfy CAFA's "proposed to be tried jointly" requirement. It is unnecessary for plaintiffs to propose either a single trial for all plaintiffs or to arrange for "mandatory" bellwether trials whose results would be binding on all plaintiffs. Rather, *Corber* held, it is sufficient if the plaintiffs seek to coordinate or consolidate their lawsuits by asserting that "one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice." *Corber*, 771 F.3d at 1224. That is precisely what Appellees have done by consolidating their cases before a single judge and proposing that the single judge carry on past the pre-trial stage by conducting bellwether trials.[4]

---

[4] Alameda County Superior Court's unrestricted jurisdiction over the claims of all Appellees contrasts sharply with the limited jurisdiction of a federal district judge to whom a case has been transferred pursuant to multidistrict litigation (MDL) procedures permitted in federal court. While 28 U.S.C. § 1407 permits civil cases involving common questions of fact to be transferred to a single federal

Briggs accurately notes that a bellwether trial does not produce a judgment that is binding on subsequent trials. Rather, *Briggs* explained:

> A bellwether trial is a test case that is typically used to facilitate settlement in similar cases by demonstrating the likely value of a claim or by aiding in predicting the outcome of tricky questions of causation or liability. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 577-78 (2008). Ordinary principles of collateral estoppel may apply in subsequent cases, but we agree with [the district court judge] that a bellwether trial is not, without more, a joint trial within the meaning of CAFA.

Briggs, 796 F.3d at 1051.

Bellwether trials need not involve a collection of similar cases being heard together in *one court*; their utility in helping to "demonstrat[e] the likely value of a claim" or to "aid[ ] in predicting the outcome of tricky questions of causation or liability" is not dependent on all related cases being consolidated before a single

---

district judge for "coordinated or consolidated pretrial proceedings," 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). The language of 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (which excludes mass-action removal of claims that "have been consolidated or coordinated solely for pretrial proceedings") appears to have been drafted with an awareness of the provisions of the federal MDL statute. The implication is clear: state cases transferred to a judge under statutes akin to 28 U.S.C. § 1407 do not thereby qualify for removal under the mass-action provision. But when (as here) plaintiffs' lawyers have acted affirmatively to ensure that multi-plaintiff cases are assigned to a single judge and are to remain there until the case is concluded, CAFA's "tried jointly" requirement is satisfied, and the case is removable to federal court if the other prerequisites for mass-action removal are met.

judge. But bellwether trials become much more than mere demonstration projects when, as here, they *are* consolidated before a single judge. When a judge conducts a bellwether trial and the litigants know that the same judge will conduct subsequent trials, the litigants are provided with a roadmap regarding how every subsequent trial will play out. They can reasonably expect, for example, that when (as is highly likely) an evidentiary issue addressed in the bellwether trial arises again in subsequent trials, the trial judge will rule exactly as he did in the bellwether trial. Regardless whether "ordinary principles of collateral estoppel" are likely to prevent the re-litigation of issues decided at bellwether trials, proposing that trials be conducted before a judge who will eventually be trying all subsequent cases can only be described as a proposal that cases be "tried jointly" within the meaning of § 1332(d)(11)(B)(i).

Accordingly, the exception outlined in *Briggs*—that when cases have been ordered "coordinated" under CCP § 404 and the plaintiffs insist that they seek coordination for pre-trial purposes only, "a bellwether trial is not, without more, a joint trial within the meaning of CAFA"—is inapplicable to this case. Cordis has demonstrated that Appellees have proposed much "more" than the bare-bones bellwether trial proposed in *Briggs*; indeed, the *Briggs* plaintiffs proposed a trial before a judge who insisted that his § 404 coordination order "d[id] not constitute a

determination that these actions should be consolidated for trial." *Briggs*, 796 F.3d at 1051.

The *Dunson* Appellees argue that CAFA's "tried jointly" requirement is only satisfied if a scheduled trial "will have binding or preclusive effect on the claims of 100 or more plaintiffs." Appellees Brief at 23. But that argument writes the mass-action provision out of CAFA, because Appellees have failed to describe any realistic set of circumstances under which a trial would have that sort of binding or preclusive effect. They concede that the claims of 100+ plaintiffs are never presented to a single jury simultaneously. Moreover, they point out that a bellwether trial has no preclusive effect on any plaintiffs other than the ones whose claims were actually litigated in that trial. *Id.* at 25-27. Thus, a bellwether trial could have binding or preclusive effect on subsequent plaintiffs only if they voluntarily agree in advance to be bound. And plaintiffs never agree to be bound because they have no reason to do so; it is only a *defendant* that faces potential collateral estoppel consequences if the bellwether trial is decided against him.

In sum, CAFA permits mass-action removal when, as here, a group of 100 or more plaintiffs request that their cases be assigned to a single judge, move to consolidate their claims under CCP § 1048(a), and propose the formation of a bellwether-trial process—thereby signaling that they wish to have their claims

"tried jointly." The district court erred in concluding that removal is proper only if the plaintiffs seek "binding bellwether trials," ER 15, an option never exercised in the real world—before CAFA or thereafter.

C. Statements Included by Appellees in Their Motion to Consolidate Confirm that They Propose that Their Claims Be Tried Jointly

WLF urges the Court to rule that Appellees' CCP § 1048(a) consolidation motion proposed that their claims be "tried jointly," without reference to specific statements contained in the motion. But an examination of those statements amply confirms that Appellees were, indeed, requesting that the claims be "tried jointly."

In particular, the motion stated that consolidation "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. The district court dismissed the significance of that statement, asserting that it indicated nothing more than a desire to avoid multiple depositions of the same experts. ER15. That explanation is not plausible. Appellees' statement can only be understood as a proposal that the judge before whom the cases were to be consolidated would conduct a single proceeding at which a trier of fact would decide general causation issues on a multi-plaintiff basis, and that those factual findings would be binding on the claims of each plaintiff. Any such proceeding

would constitute a "joint trial" of the causation issue. There is no other plausible interpretation of Appellees' statement because, in the absence of a multi-plaintiff trial on the issue of general causation, expert testimony on the issue would be required "in each individual action."

The motion also repeatedly stated that consolidation "would avoid the risk of inconsistent adjudications," such as "different results because tried before a different judge and jury." *See, e.g.*, ER77. Those statements can only be explained by Appellees' desire to try the cases jointly; cases adjudicated before more than one judge and more than one jury always create a risk of inconsistent results. The reference to cases being "tried before a different judge and jury" cannot plausibly be explained, as the district court attempted to do, ER15, as a reference to inconsistent rulings on pre-trial motions.

Appellees apparently concede that CAFA's mass-action provision would have permitted removal of one of their multi-plaintiff lawsuits if the suit had included 100 or more plaintiffs—even though it is highly unlikely that the trial judge hearing such a suit would have authorized a proceeding at which the trier of fact simultaneously heard the claims of all 100+ plaintiffs. Yet, Appellees fail to explain why the result should be different when, as here, an equal number of plaintiffs have filed claims that they have consolidated before a single judge and

that will remain before that judge until they are resolved.

In determining whether cases are removable under CAFA, the Supreme Court cautioned in *Knowles* that courts should not "exalt form over substance," particularly where doing so would "run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" 133 S. Ct. at 1350 (quoting CAFA § 2(b)(2), 119 Stat. 5). The Court explicitly disapproved of one tactic for creating claims worth less than $5 million and thereby defeating CAFA jurisdiction: "the subdivision of a $100 million action into 21 just-below-$5 million state-court actions simply by including nonbinding stipulations." *Id.* The Court concluded that that tactic would not defeat CAFA jurisdiction "because such an outcome would squarely conflict with the statute's objective." *Id.* This Court should not countenance Appellees' similar jurisdiction-avoidance tactic: dividing plaintiffs up into groups of less than 100 and then bringing them back together again by means of a consolidation motion.

II. EVENTS PRECEDING ADOPTION OF CAFA CONFIRM WLF'S INTERPRETATION OF THE PHRASE "TRIED JOINTLY"

CAFA did not coin the phrase "mass action." Rather, the phrase was used for many years before 2005 to describe tort suits in which the claims of a large, diverse group of plaintiffs were joined together, often in a manner that created

serious procedural difficulties for defendants. One of CAFA's principal goals was to assuage the concerns of the targets of mass actions, by permitting them to remove mass actions to federal court. Adopting Appellees' narrow reading of "tried jointly" would frustrate that goal, however, because their reading would not permit defendants to remove to federal court the very types of mass actions that were the object of pre-2005 criticism.

Pre-2005 mass actions were particularly prevalent in rural counties of Mississippi and West Virginia and often involved hundreds of diverse individuals alleging asbestos-related injuries. A 2003 study noted that 73 mass actions were filed in Jefferson County, Mississippi in 2000 alone; less than 20% of the plaintiffs included in mass actions filed in the county actually lived there. *See* J. Beisner, J. Miller, and M. Shors, "One Small Step for a County Court . . . One Giant Calamity for the National Legal System," Manhattan Institute for Policy Research, Civil Justice Report No. 7 (2003).

Complaints about abusive mass actions grew in the years preceding 2005 and led directly to inclusion of a mass-action provision in CAFA. *See* S. Rep. No. 109-14 (2005) at 47. Importantly, there is no evidence that plaintiffs' counsel in such mass actions ever pushed for proceedings at which the trier of fact would simultaneously determine the claims of 100 or more of the plaintiffs. Rather, even

though many of these suits included more than 100 plaintiffs, the procedural concerns lay elsewhere:

> Whatever reasons plaintiffs' attorneys have for choosing mass action over class action, the effect on defense counsel is that they must prepare for multiple cases in a short span of time. In fact, many defense attorneys claim that's the main reason plaintiffs opt for such strategies.
>
> Defense lawyers sometimes call the tactic, "trial by ambush," says Martin Beirne, a partner at Beirne, Maynard & Parsons. "The reality is that when they bundle these cases, you can end up with a hundred or more plaintiffs. The judge can say, 'We're going to try the case of Smith et al. v. XYZ Corp. in 30 days. And we're going to try them in groups of two, or six, or eight.' They don't tell you who's in that first group. That puts tremendous pressure on the defense to get fully prepared for all 100 cases."

Brian Quinton, "What Happened to Class? Plaintiffs' Lawyers Seek Mass Action, Not Class Action, to Push Large Personal Injury Cases," *Corporate Legal Times* (Jan. 1, 2005).

Defense counsel's complaints focused on the "unfairness" of opposing counsel's handpicking a few of the plaintiffs from a large mass action for a bellwether trial; if opposing counsel ever sought the simultaneous trial of 100 or more claims, defense counsel never mentioned it:

> The third problem with mass actions is that (sometimes even more so than class actions) they create enormous pressure to settle claims regardless of their actual worth. . . . This is especially true when a few very serious personal injury cases are coupled with many less serious cases. ... To take one recent case from Mississippi, plaintiffs' lawyers

> hand-picked 10 incredibly disparate plaintiffs—from a massive joined complaint involving over 100 plaintiffs—for a single trial against a pharmaceutical company; after deliberating for just two hours, the jury returned identical verdicts of $10,000,000 for each plaintiff, even though some of the plaintiffs asserted much less serious injuries than others. Given the dynamics of these "trials" and the dangers they pose for defendants, plaintiffs' counsel often refuse to settle serious claims unless the defendant is also willing to "buy out" the claims with lesser merit.

J. Beisner and J. Miller, "Class Actions in Disguise: The Growing Mass Action Problem," *Metropolitan Corporate Counsel* (Nov. 1, 2003).

Because objections to abusive mass actions in Mississippi state court provided substantial impetus for adoption of CAFA's mass-action provision, WLF has attempted to discern how Mississippi courts adjudicated suits that included large numbers of plaintiffs. WLF was been unable to identify *any* reported Mississippi Supreme Court decisions in which the claims of more than 100 plaintiffs were tried simultaneously— even though in several such cases, more than 100 plaintiffs were included in the initial complaint. *See, e.g., 3M Co. v. Johnson*, 895 So. 2d 151, 154 (Miss. 2005) (simultaneous trial of 10 plaintiffs from among the 150 plaintiffs named in the initial complaint). Nor has WLF identified any appeal from a bellwether trial in which the parties agreed in advance that the trial judgment would be binding on subsequent trials.

In sum, the evidence strongly suggests that pre-2005 litigation abuses that

led to enactment of CAFA's mass-action provision involved proceedings that, according to Appellees, would not be removable under CAFA because they were not proceedings in which the claims of 100 or more persons were "proposed to be tried jointly," within the meaning of § 1332(d)(11)(B)(i). That highly anomalous result provides an additional reason to reject Appellees' self-serving interpretation of § 1332(d)(11)(B)(i).

III. THE DISTRICT COURT'S MISTAKEN RELIANCE ON A SUPPOSED PRESUMPTION AGAINST REMOVAL LED IT ASTRAY

The district court likely arrived at its pinched interpretation of CAFA because it erroneously concluded that it was required to apply a "presumption against federal removal jurisdiction." ER11. That conclusion ignored the contrary conclusion of the U.S. Supreme Court, which recently held that "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. The Court concluded that any such presumption is inconsistent with "CAFA's primary objective," which is "to ensure Federal court consideration of interstate cases of national importance." *Ibid*. Instead, the Court concluded, "CAFA's provisions should be *read broadly*, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Ibid* (emphasis added and citations omitted).

CONCLUSION

The Court should reverse the district court's remand decision.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: March 2, 2017

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,967 words, excluding the portions exempted by Fed.R.App.P. 32(f).

2.This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

Dated: March 2, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2017, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp