No. 12-147

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB CO., *et al.*,

Petitioners,

v.

KENNETH ANGLIN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Seventh Circuit erred in holding, consistently with all previous appellate decisions on the issue, that the Class Action Fairness Act's "mass action" provision, 28 U.S.C. § 1332(d)(11), does not permit removal of separate actions, each with fewer than 100 plaintiffs, where only the defendant has suggested that those separate actions may be tried jointly.

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INTRODUCTION

The Class Action Fairness Act (CAFA) provides that a "mass action"—a "civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly"—is a class action for purposes of CAFA's diversity jurisdiction and removal provisions. 28 U.S.C. § 1332(d)(11). To prevent defendants from manufacturing jurisdiction by combining separate actions that do not individually meet the 100-plaintiff threshold of the mass action provision, CAFA specifically provides that "the term 'mass action' shall not include any civil action in which … the claims are joined upon motion of a defendant." *Id*. § 1332(d)(11)(B)(ii)(II).

In these three cases, decided in a single order by the court of appeals, three groups of plaintiffs filed separate personal injury actions in state court, none of which met the 100-plaintiff threshold for a mass action under CAFA. None of the plaintiffs proposed that these separate actions be tried jointly. Petitioner Bristol-Myers Squibb Co. nonetheless attempted to remove them to federal court under CAFA, arguing that the number of plaintiffs in the separate actions could be added together to satisfy CAFA's 100-plaintiff mass action minimum. Relying on a previous opinion in which it had thoroughly analyzed the issue, *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010), the Seventh Circuit held that CAFA did not authorize federal jurisdiction over separate actions in which neither the plaintiff nor the court had proposed to try the claims of 100 or more plaintiffs jointly, and where the only suggestion that the actions should be combined came from the defendant.

The Seventh Circuit's decisions in these cases and in *Anderson* agree with the only other appellate decision on the issue, *Tanoh v. Dow Chemical Co.,* 561 F.3d 945 (9th Cir. 2009). Bristol-Myers, however, asserts that the Seventh Circuit's rule conflicts with a decision of the Sixth Circuit addressing a different question under a different part of CAFA. *See Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405 (6th Cir. 2008). In *Anderson*, the Seventh Circuit, like the Ninth Circuit in *Tanoh*, correctly distinguished *Freeman*. This Court has already rejected a petition for certiorari in *Tanoh* asserting the same nonexistent conflict with *Freeman*. *See Dow Chem. Co. v. Tanoh*, 130 S. Ct. 187 (2009); Pet. for Cert., *Dow Chem. Co. v. Tanoh*, No. 08-1589 (filed June 24, 2009). All that has changed since then is that the Seventh Circuit has agreed with the Ninth Circuit's straightforward construction of the statute. No court, including the Sixth Circuit, has disagreed. Given the unanimity of the federal appellate courts on the issue, and the clear statutory language, the petition should be denied.

STATEMENT

A. CAFA's Mass Action Provision

CAFA was passed to address Congress's concerns about important interstate class actions being decided in state courts and about class-action abuse. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). To alleviate the perceived problem of large class actions being decided in state courts, CAFA provides that, subject to a number of exceptions, federal courts have original and removal jurisdiction over class actions in which the amount in controversy exceeds $5 million and at least one class

member and one defendant are citizens of different states. 28 U.S.C. § 1332(d)(2).

CAFA also includes a carefully circumscribed provision allowing certain "mass actions" to be treated as class actions for purposes of CAFA removal jurisdiction. A mass action is "any 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 law or fact." *Id*. § 1332(d)(11)(B). In addition to meeting the 100-plaintiff threshold, a mass action must meet the other requirements for removal of a class action under CAFA as set forth in §§ 1332(d)(2)–(10). Unlike in a true class action, however, only plaintiffs whose individual claims meet the usual $75,000 amount-in-controversy requirement for conventional diversity jurisdiction may have their claims removed as part of the mass action. *Id*. § 1332(d)(11)(B)(i).

Congress further limited removal of mass actions by excluding four types of actions that would otherwise qualify as mass actions. Removable mass actions do not include actions in which "(I) all of the claims in the action arise from an event . . . in the State in which the action was filed, and that allegedly resulted in injuries in that State or in" contiguous states; "(II) *the claims are joined upon motion of a defendant*"; "(III) all of the claims in the action are asserted on behalf of the general public … pursuant to a State statute specifically authorizing such action"; or "(IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii) (emphasis added).

B. Facts and Proceedings Below

This petition involves three separate actions filed in an Illinois state court, each seeking damages on behalf of individually named plaintiffs for personal injuries caused by Bristol-Myers's drug, Plavix. In each of the cases, complete diversity of plaintiffs and defendants was absent, so conventional diversity jurisdiction was unavailable under 28 U.S.C. § 1332(a). Moreover, none of the cases was brought as a class action, and each case had fewer than 100 individual plaintiffs—67 in one case, 83 in another, and 71 in the third. None of the plaintiffs proposed that any of the claims in any of the cases be tried jointly with claims of the different groups of plaintiffs in the other cases.

Bristol-Myers purported to remove all three cases to the U.S. District Court for the Southern District of Illinois, claiming that they were a single mass action subject to removal under CAFA because the number of plaintiffs in the three actions together exceeded 100. On April 13, 2012, the district court remanded all three cases because, as Bristol-Myers conceded, the Seventh Circuit's decision in *Anderson* expressly rejected Bristol-Myers's theory that claimants in separate actions who had not proposed to try their cases jointly could be aggregated to meet the 100-plaintiff threshold for mass action jurisdiction under CAFA. The district court awarded attorney fees to the plaintiffs under 28 U.S.C. § 1447(c) because Bristol-Myers's claim that the actions were removable was objectively unreasonable under *Anderson*.[1]

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[1] The district court also rejected Bristol-Myers's argument, not advanced in its petition for certiorari, that there was conventional diversity jurisdiction because the plaintiffs had fraudulent-

(*Footnote continued*)

Bristol-Myers sought leave to appeal under 28 U.S.C. § 1453(c)(1), which allows permissive appeals of remand orders under CAFA. On May 1, 2012, the court of appeals denied leave to appeal in all three cases in a brief order stating that "[t]he district court correctly held that Bristol-Myers's argument is foreclosed by *Anderson v. Bayer Corp.*, 610 F.3d 390 (7th Cir. 2010)." Bristol-Myers sought rehearing en banc, which the court denied on June 11, 2012, with no judge voting for rehearing.

C. The Seventh Circuit's Decision in *Anderson*.

The *Anderson* decision, followed by the courts below, similarly involved an effort by a defendant to remove multiple cases that each fell short of the 100-plaintiff jurisdictional minimum for a mass action. The *Anderson* court held that by limiting federal jurisdiction to cases in which plaintiffs propose to try the claims of 100 or more individuals jointly, "[t]he mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA jurisdiction." 610 F.3d at 393. Citing the statute's explicit language precluding jurisdiction over mass actions when the joinder of 100 or more plaintiffs is the result of a defendant's motion, the court stated that the "argument that these separate lawsuits be treated as one action is tantamount to a request to consolidate them—a request that Congress has explicitly stated cannot become a basis for removal as a mass action." *Id.* at 393–94.

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ly joined claims of nondiverse parties, as the joinder of the parties was proper under Illinois law.

In so holding, *Anderson* noted that the only appellate court to have addressed the issue previously—the Ninth Circuit in *Tanoh*—had similarly rejected the claim that a defendant could remove separately filed lawsuits, which no plaintiff had proposed to join for trial, as a single mass action. *Id*. at 393. *Anderson* agreed with *Tanoh* that "under the plain language of CAFA, none of the state court cases were a mass action because they contained fewer than 100 plaintiffs each" and that allowing a defendant to remove under such circumstances would violate Congress's express direction that claims joined at the behest of the defendant do not qualify as mass actions. *Id*. at 393 (citing *Tanoh*, 561 F.3d at 953–54).

The Seventh Circuit also agreed with *Tanoh* that the Sixth Circuit's decision in *Freeman* does not support the assertion of jurisdiction over separate actions that individually do not meet the 100-plaintiff minimum for a mass action. *See id.* at 393; *see also Tanoh*, 561 F.3d at 955. As *Anderson* explained, *Freeman* did not involve CAFA's mass action provision at all. Rather, the issue in *Freeman* was whether a *class action* that met the minimum size requirement for CAFA jurisdiction under 28 U.S.C. § 1332(d)(5)(B) satisfied the aggregate $5 million amount-in-controversy requirement of § 1332(d)(2), where the *same class* had brought the *same claim* in five different actions, but had sought to divide that one claim into five parts, for each of which it purported to seek less than $5 million. The Sixth Circuit held that the amounts sought "must be aggregated" for purposes of determining the amount actually placed in controversy by the class's single claim, and that the actions were therefore removable. *Anderson*, 610 F.3d at 393 (quoting *Freeman*, 551 F.3d at 407).

Without expressing any disagreement with the holding of *Freeman*, *Anderson* explained that differences between CAFA's mass action provision and the parts of the statute at issue in *Freeman* rendered *Freeman*'s holding inapposite to the question whether separate actions with fewer than 100 plaintiffs each could be treated as a removable mass action at the request of a defendant:

> *Freeman* … did not address the mass action provision of CAFA. This distinction is important because CAFA states that "the term 'mass action' shall not include any civil action in which the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). By excluding cases in which the claims were consolidated on a defendant's motion, Congress appears to have contemplated that some cases which could have been brought as a mass action would, because of the way in which the plaintiffs chose to structure their claims, remain outside of CAFA's grant of jurisdiction. This is not necessarily anomalous; after all, the general rule in a diversity case is that "plaintiffs as masters of the complaint may include (or omit) claims or parties in order to determine the forum." *See Garbie v. DaimlerChrysler Corp.,* 211 F.3d 407, 410 (7th Cir. 2000) (citing *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987)).

Anderson, 610 F.3d at 393.

Finally, *Anderson* emphasized that the prohibition on treating the separate actions as a single mass action for removal purposes would last only so long as the plaintiffs refrained from proposing to try their cases jointly. Citing its previous decision in *Bullard v.*

Burlington Northern Santa Fe Railway, 535 F.3d 759, 762 (7th Cir. 2008), the court noted that "subsequent action by the plaintiffs in state court might render these claims removable," even if it occurred "long after filing." 610 F.3d at 394. The court also observed that a mass action might be found to exist if plaintiffs proposed a procedure covering multiple cases "where only a few representative plaintiffs would actually go to trial, with claim or issue preclusion to be used to dispose of the remaining claims without trial." *Id*. Such a request, however, had not been made by the plaintiffs, "and Congress has forbidden us from finding jurisdiction based on [the defendant's] suggestion that the claims be tried together. So long as plaintiffs (or perhaps the state court) do not propose to try these cases jointly in state court, they do not constitute a mass action removable to federal court." *Id*.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Decision Correctly Interprets the Statute and Conflicts with No Other Appellate Decisions.

The Seventh Circuit's holding rests on a straightforward reading of CAFA's language. The statute defines a mass action as an "action" (singular) "in which monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B). Here, there is no action in which plaintiffs propose to try 100 or more claims jointly. Rather, there are separate actions, each involving fewer than 100 plaintiffs, and the plaintiffs have not proposed trying the separate actions jointly in any way. The statute's prohibition on treating a case as a mass action when a proposal to try claims jointly emanates from a defendant, *id*. § 1332(d)(11)(B)(ii),

makes clear that plaintiffs who refrain from proposing joint resolution of the claims of 100 or more plaintiffs may avoid removal of their claims, no matter how many similar claims may be pending in a state court in other cases.

The Seventh Circuit's reading of the clear statutory language in these cases and their predecessor, *Anderson*, poses no issue that merits resolution by this Court. No circuit has held that a defendant may remove a mass action by aggregating the numbers of plaintiffs who have filed similar claims in separate suits (absent a proposal by the plaintiffs that those separate suits be filed jointly, *see Koral v. Boeing Co.*, 628 F.3d 945 (7th Cir. 2011) (recognizing that a request for a joint trial procedure would make separate actions with an aggregate of more than 100 plaintiffs removable)). The only other circuit to have addressed the issue is the Ninth, whose decision in *Tanoh* the Seventh Circuit expressly agreed with in *Anderson*. Thus, although only two circuits have yet addressed the issue, those two are unanimous.

Bristol-Myers asserts that the Seventh Circuit's holdings below and in *Anderson* conflict with what it calls the "correct approach" exemplified by the same court's previous decision in *Bullard*. Pet. 8. But *Anderson* cited and relied on *Bullard*, *see* 610 F.3d at 394, and *no* Seventh Circuit judge took the view that there is any tension between the decisions requiring en banc review here. That is not surprising, because the decisions are entirely consistent. *Bullard* held that where, unlike in these cases, 100 or more plaintiffs combine their claims in *a single action*, the necessary proposal for joint trial has been made. 535 F.3d at 762. But filing claims in *separate* actions, unlike fil-

ing them in a single action, is not in itself a proposal for *joint* trial, but for separate trials. Thus, *Bullard* simultaneously recognized that separately filed cases involving fewer than 100 plaintiffs each would only become a removable mass action *after* a "proposal for a joint trial." *Bullard*, 535 F.3d at 762. If, as Bristol-Myers acknowledges, *Bullard* represents the "correct approach," then the decisions below and in *Anderson* are correct because they faithfully *apply* that approach.

Beyond its misplaced reliance on *Bullard*, Bristol-Myers's principal contention is that the Seventh and Ninth Circuits' decisions on the mass action question conflict in principle with the decision of the Sixth Circuit in *Freeman*, which Bristol-Myers claims stands broadly for the proposition that plaintiffs may not structure their state-court complaints to avoid CAFA jurisdiction.

Anderson and *Tanoh*, however, do not conflict with *Freeman*. In those decisions, both the Seventh and Ninth Circuits considered arguments based on *Freeman*, and, without suggesting any disagreement with *Freeman*'s holding, concluded that the Sixth Circuit's resolution of the different issue before it in *Freeman* did not support the assertion of mass action jurisdiction under the circumstances here. Neither the Seventh nor the Ninth Circuit suggested that it would decide the question in *Freeman* differently than did the Sixth Circuit, nor has the Sixth Circuit ever suggested, before or after *Freeman*, that it would decide the mass action question at issue here differently than have the Seventh and Ninth Circuits.

The absence of any express disagreement between the decisions in *Tanoh* and *Freeman* was undoubtedly

a major factor in this Court's denial of the petition for certiorari in *Tanoh*, which rested heavily on the assertion that *Tanoh* and *Freeman* created a circuit conflict. *See* Pet. for Cert., *Dow Chem. Co. v. Tanoh*, No. 08-1589 (filed June 24, 2009). Since the Court denied certiorari in *Tanoh*, the Seventh Circuit has added its agreement not only with the result in *Tanoh*, but also with *Tanoh*'s view that *Freeman* is distinguishable. Meanwhile, neither the Sixth Circuit nor any other court has registered any disagreement with *Anderson* or *Tanoh*. The issue no more merits this Court's attention now than it did when the Court denied certiorari in *Tanoh*.

Moreover, *Tanoh* and *Anderson* do not just *say* that their rulings do not conflict with *Freeman*; they correctly point to the limits of the Sixth Circuit's holding in *Freeman* and to the substantial differences between the statutory provisions at issue, which belie any contention that there is a conflict even in principle between the decisions. The holding in *Freeman* is specific to the issue directly before the court in that case: whether a single class may divide a single claim among three lawsuits solely to avoid CAFA's $5 million amount-in-controversy requirement for class actions. As the Ninth Circuit pointed out in *Tanoh*, *see* 561 F.3d at 956, the Sixth Circuit in *Freeman* explicitly stated that "*[o]ur holding is limited* to the situation where there is no colorable basis for dividing up the sought-for retrospective relief into separate time periods, other than to frustrate CAFA." *Freeman*, 551 F.3d at 409 (emphasis added). Any attempt to extrapolate *Freeman* into some broader holding that plaintiffs may not structure their actions to avoid CAFA removal jurisdiction is contradicted by the very next sentence of the opinion, which "recognize[s] that

plaintiffs can avoid removal under CAFA by limiting the damages they seek to amounts less than the CAFA thresholds." *Id*. *Freeman* holds only that CAFA's class-action amount-in-controversy requirement is satisfied in the unique circumstance *where exactly the same class* asserts the *same claim* in separate cases, and arbitrarily divides the damages in order to recover more on the claim than the jurisdictional threshold.

That holding provides no basis for Bristol-Myers's conclusion that the Sixth Circuit would have decided the mass action issue presented by *Anderson*, *Tanoh*, and the present cases differently than have the Seventh and Ninth Circuits. CAFA does not explicitly address the unusual situation presented in *Freeman*. Because of that silence, *Freeman* looked to CAFA's overall purpose and legislative history, which indicate that Congress was concerned with class-action lawyers "gaming" the system, particularly in interstate or national class actions. *Id*. at 407–08.

In contrast, Congress explicitly spoke to the situation presented here. CAFA states that "mass actions" do not include "claims that are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). In denying defendants the ability to circumvent plaintiffs' decision not to bring a single larger suit, Congress unambiguously preserved plaintiffs' ability to bring multiple suits of fewer than 100 plaintiffs in state court, even if those plaintiffs could have joined together in one suit that would have been subject to CAFA removal jurisdiction.

The joinder-by-defendant exception is one of several exceptions to federal jurisdiction over class and mass actions outlined by Congress in CAFA. Others

include the local-controversy and home-state exceptions, 28 U.S.C. §§ 1332(d)(3)–(4), cases involving securities and corporate governance claims, 28 U.S.C. § 1332(d)(9), and cases involving claims asserted on behalf of the general public, 28 U.S.C. § 1332(d)(11)(B)(ii)(III). Bristol-Myers's interpretation of the Sixth Circuit's holding in *Freeman*—and the holding Bristol-Myers urges in these cases—implies that these exceptions are to be disregarded if plaintiffs structure their suit or suits to take advantage of them. Such an interpretation nullifies the provisions Congress wrote into the statute.

Furthermore, many of the policy concerns evident in *Freeman* are not present here. *Freeman* concerned the same class of plaintiffs structuring its suits to avoid federal jurisdiction over class claims in excess of $5 million, while still seeking nearly $25 million in damages. *Freeman*, 551 F.3d at 409. Here, each suit was brought by a unique group of plaintiffs, each of whom seeks to recover one time in his one lawsuit, while forgoing the possible benefits of a joint trial covering 100 or more plaintiffs.

The only other court of appeals to have commented at all on the subject has recognized that *Freeman* does not conflict with the rule applied below. In *In re Hannaford Brothers Co. Customer Data Security Breach Litig.*, 564 F.3d 75 (1st Cir. 2009), a group of plaintiffs structured the definition of their class to fall within one of CAFA's exceptions (the home-state exception of 28 U.S.C. § 1332(d)(4)(B)). The defendant removed anyway, arguing that if other actions filed by other plaintiffs were considered, the aggregate of cases would not satisfy the exception, and that remanding the case would defeat the purposes of CAFA by

allowing plaintiffs to tailor their complaints to avoid federal jurisdiction. *See* 564 F.3d at 79–80. In addressing the issue, the First Circuit took note of both *Freeman* and *Tanoh*, correctly characterizing the narrow issue addressed by each without any suggestion that it perceived a conflict between them. *See id.* at 80. The lesson correctly drawn by the First Circuit from *Freeman* and *Tanoh* is that "[t]here is no one-size-fits-all response to a claim of evasion of congressional intent. The analysis will turn on the precise language of that section of CAFA. Our job is to effectuate the intent expressed in the plain language Congress has chosen, not to effectuate purported policy choices regardless of language." *Id*.

The decision below, like *Anderson* and *Tanoh*, reflects exactly such attention to the specific language chosen by Congress, and illustrates a necessary consequence of that approach: Different issues involving different statutory provisions will sometimes lead to different outcomes. Unless and until a court of appeals disagrees with the Seventh and Ninth Circuit's straightforward reading of the mass action provisions, there is no need for review by this Court.

II. Bristol-Myers's Policy Arguments Do Not Justify Review.

Bristol-Myers complains that, under the construction given CAFA's mass action provisions in *Anderson* and *Tanoh*, plaintiffs can keep cases raising similar personal injury claims in state court if they limit each case to fewer than the minimum of 100 plaintiffs required for mass action treatment by CAFA and do not request that the separately filed cases be filed jointly. Bristol-Myers points to filings indicating that plaintiffs are making that choice in a number of cases.

If that result is troubling, it is an issue for Congress, not for this Court. In adding the mass action provision to CAFA, Congress imposed significant limitations on it as part of the legislative compromises that enabled passage of the statute. Those limitations included the requirement that a mass action, to be removable, must be a case where 100 or more plaintiffs propose to try their claims jointly, and the corollary that a request for joint trial by a defendant cannot turn separate actions, each involving fewer than 100 claimants, into a removable mass action.[2] That those limitations give plaintiffs the option of avoiding removal by not joining 100 or more claimants in a single action (and not proposing joint trial of separate actions that each involve fewer than 100 plaintiffs) is exactly the outcome Congress must have contemplated in writing the statute the way it did. That predictable consequence provides no basis for judicial rewriting of the law.[3]

Bristol-Myers's observation that cases, including the ones at issue in this petition, have been filed in St. Clair County, Illinois, and will remain there if the

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[2] *See* S. Rep. No. 108-123, at 42–43 (2003) (describing compromise that led to addition of language prohibiting removal of actions where "the defendant (not the plaintiff) seeks to join the monetary damages claims of more than 100 persons for a single trial").

[3] The apparent consequence of Bristol-Myers's view is that even a single plaintiff who filed a purely individual action could find her case removed as part of a purported mass action if enough other cases raising similar claims were filed by other plaintiffs. The statutory language provides no reason to believe that Congress contemplated or would have countenanced that result.

Seventh Circuit's decision is not overturned, likewise provides no reason to grant review. Although some members of Congress were concerned about particular jurisdictions where they believed class action abuses were prevalent, CAFA as enacted does not make federal jurisdiction dependent on the county in which a state-court action was filed. Rather, CAFA provides for jurisdiction over categories of cases—class actions as well as mass actions—that satisfy specified criteria. Cases, such as the ones at issue here, that do not meet those criteria, or are excluded by exceptions to CAFA jurisdiction, may not be removed to federal court regardless of their county of origin.

Finally, Bristol-Myers's prediction that the *Anderson-Tanoh* rule will have dire consequences in practice overlooks *Anderson*'s suggestion that if, at any time, nominally separate cases involving more than 100 plaintiffs in the aggregate are proposed to be tried jointly in the state courts, the cases will become removable as mass actions. *See* 610 F.3d at 394; *see also Koral*, 628 F.3d at 946 (characterizing removal as "premature" before plaintiffs proposed joint trial, but not foreclosing future removal). The Seventh Circuit has also indicated that it will not take an unduly narrow view of the meaning of "tried jointly." *See Anderson*, 610 F.3d at 394; *Koral*, 628 F.3d at 946–47. Thus, in cases where joint trial may occur at the behest of plaintiffs, defendants' removal rights are fully preserved. Moreover, because of the early stage of development both of the law and of the cases, the practical consequences of the Seventh Circuit's rule remain unclear. It is certainly far too early to predict how many cases will ultimately remain in state court and how many may eventually be subject to removal if proce-

dures meeting the Seventh Circuit's definition of joint trials are ultimately proposed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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