No. 11-1450

IN THE

Supreme Court of the United States

THE STANDARD FIRE INSURANCE COMPANY,
Petitioner,

v.

GREG KNOWLES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C., IN SUPPORT OF RESPONDENT

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December 2012

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INTEREST OF AMICI CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Justice, P.C., is a national public interest law firm that specializes in precedent-setting litigation designed to advance consumers' and victims' rights, workers' rights, civil rights and civil liberties, clean air and clean water, preservation of the civil justice system, and protection of the poor and powerless.

Both Public Citizen and Public Justice have represented named plaintiffs in class actions, but have also advocated on behalf of absent class members to ensure that the class action mechanism respects their right to due process. Public Citizen, for example, was co-counsel for the petitioner in *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), which held that absent class members cannot be bound by resolution of a putative but uncertified class action. Similarly, Public Justice was counsel for the appellees in *Drelles v. Metro. Life Ins. Co.*, 357 F.3d 344 (3d Cir. 2003), which held that class members who opted out of a class action could not be enjoined from pursuing

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[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

their own cases because of a settlement. And both organizations' attorneys often represent class members objecting to proposed class action settlements that threaten improperly to infringe on the absentees' rights through certification that does not comport with Rule 23's requirements, due process violations, or substantive terms that unreasonably compromise their claims and provide relief of little to no value. For example, Public Citizen represented absent class members in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), *In re Katrina Canal Breaches Litig.*, 628 F.3d 185 (5th Cir. 2010), *Bowling v. Pfizer, Inc.*, 132 F.3d 1147 (6th Cir. 1998), *Wilson v. DirectBuy, Inc.*, No. 3:09-CV-590, 2011 WL 2050537 (D. Conn. May 16, 2011), and *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010). Cases where Public Justice has represented absent class members objecting include *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007), *In re Cincinnati Radiation Litig.*, 187 F.R.D. 549 (S.D. Ohio 1999), and *Boyd v. Bell Atlantic-Maryland, Inc.*, 887 A.2d 637 (Md. 2005).

Public Citizen and Public Justice submit this brief because the position advocated by petitioner Standard Fire, while purporting to be based on protection of interests of absent class members, in fact is unnecessary to achieve that end and would undermine the interests of all class members. To be sure, the strategic litigation decisions made by a lead plaintiff and her counsel at the class certification stage may sometimes reveal that the named plaintiff and class counsel do not adequately represent the class as a whole. But that question is entirely separate from the question whether the action brought by the named plaintiff falls within the scope of federal jurisdiction. The

named plaintiff's decision to limit the amount in controversy on behalf of the class to avoid federal jurisdiction is a factor properly considered by state courts in determining whether that plaintiff is an adequate representative of the class she seeks to represent, not a choice that can properly be second-guessed by a federal court as a jurisdictional matter. A blanket rule disregarding such limitations, moreover, would disregard strategic choices that may in many instances serve the interests of class members and enhance their ability to obtain meaningful relief through the class action device.

In addition, Public Citizen and Public Justice have an interest in the proper interpretation of the jurisdictional provisions of the Class Action Fairness Act (CAFA), which were intended not only to facilitate federal jurisdiction over large, multistate class actions, but also to limit the extent to which state court jurisdiction over class actions not of national concern would be displaced. The interpretation of CAFA advanced by amicus curiae National Association of Manufacturers—which, contrary to the position of the petitioner and every court to have interpreted CAFA, posits that CAFA's removal provision, 28 U.S.C. § 1453, contains no amount-in-controversy requirement—would radically alter the framework Congress created, contrary to the structure, language, purposes, and intent of the statute.

SUMMARY OF ARGUMENT

The rights of absent class members are not diminished, nor are absent class members improperly bound to litigation choices made by others, when a federal court declines to accept jurisdiction over an uncertified class action in which the named plaintiff

has stipulated to limit the class's total recovery to no more than $5 million—the amount-in-controversy threshold established by CAFA for the expanded diversity jurisdiction it creates over class actions. *See* 28 U.S.C. § 1332(d)(2). Until the class is certified, an absent class member cannot be bound by its outcome and thus is free to seek greater relief through some other action. Disregarding the stipulation for purposes of determining jurisdiction is therefore not necessary to protect the interests of absent class members. Although absent class members might make different decisions than the named plaintiff if they were to pursue their claims independently, *the action filed by the named plaintiff*—which is the one that must satisfy CAFA's jurisdictional requirements—seeks to recover no more than $5 million and thus falls outside of federal jurisdiction.

The named plaintiff's stipulation to limit the class's recovery is properly viewed not as a matter to be second-guessed by a federal court in determining the existence of jurisdiction, but as a consideration for the state trial court when determining whether the plaintiff is an adequate representative for the class—a question that is, in the first instance, a matter of state procedural law and, ultimately, a matter of due process. Regardless of how that question may eventually be answered, there is no original or removal jurisdiction under CAFA over a putative class action that, at the time of removal, seeks a recovery that does not exceed CAFA's jurisdictional threshold. Nothing in CAFA abrogates the well-established principle that the status of the complaint at the time of removal, and not hypothetical, future events, governs the jurisdictional analysis.

Moreover, it is by no means the case that a waiver of recovery exceeding $5 million necessarily renders a class representative inadequate by failing to serve the interests of the class as a whole. As this case demonstrates, an adequate class representative could legitimately choose to waive only $25,000 of potential recovery for the class to enable litigation in a forum that, in the judgment of the representative and his counsel, may be more appropriate for the case. To conclude that the matter in controversy necessarily exceeds $5 million because of the possibility that a state court might not certify a class with the stipulation in place would confuse the adequacy of representation analysis with the jurisdictional inquiry.

The Court should also reject the argument of amicus curiae National Association of Manufacturers (NAM) that the damages stipulation is irrelevant for purposes of removal jurisdiction under CAFA. NAM argues that because 28 U.S.C. § 1453, which governs removal procedures in CAFA cases, does not expressly refer to the amount-in-controversy requirement of 28 U.S.C. § 1332(d)(2), § 1453 must be read as an unambiguous authorization of removal jurisdiction over any class action, regardless of the amount in controversy. NAM's argument that the Court must read § 1453 in isolation from the jurisdictional limits of § 1332(d) disregards the structure and express purposes of CAFA, of which both § 1453 and § 1332(d) are integral parts, as well as critical language in § 1453 and § 1332(d), and legislative history, that directly contradicts NAM's reading. Read in context, § 1453 is hardly an unambiguous authorization of removal jurisdiction over all class actions regardless of jurisdictional amount. Rather, its function is not to create an independent basis for removal

jurisdiction, but to alter removal procedures that would otherwise apply under 28 U.S.C. §§ 1441(b), 1446 and 1447. Moreover, § 1453 is in no way comparable to other statutes cited by NAM authorizing removal of cases outside the scope of original *federal question* jurisdiction in circumstances where claims and defenses will implicate federal laws and interests that favor adjudication in a federal forum.

ARGUMENT

I. The Stipulation's Potential Effect on Absent Class Members is Properly Taken Into Account at the Class Certification Stage and Is Not a Proper Consideration for Jurisdictional Purposes.

Before absent class members may be bound in a suit for money damages, due process requires that they receive notice of the litigation and be afforded an opportunity either to participate in the action or to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Further, due process "requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* (citation omitted). "The adequacy inquiry … serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem Prods., Inc.*, 521 U.S. at 625-26 (citations omitted; brackets in original).

These due process principles are incorporated in both the Federal Rules of Civil Procedure and in state procedural rules authorizing class actions. Thus, the Arkansas Rules of Civil Procedure, which

govern the conduct of proceedings in the state courts where this action was originally brought, permit certification of a class only where "the representative parties and their counsel will fairly and adequately protect the interests of the class." Ark. R. Civ. P. 23(a)(4); *see also Valley v. Nat'l Zinc Processors, Inc.*, 217 S.W.3d 832, 837 (Ark. 2005) (holding class certification improper because of inadequate representation). Indeed, even before Arkansas' rules explicitly incorporated the requirement of adequate representation, the Supreme Court of Arkansas had recognized that a finding of adequate representation is essential to certification of a class and that trial courts have a "continuing duty … to ensure that the class is adequately represented throughout the litigation." *First Nat'l Bank of Fort Smith v. Mercantile Bank of Jonesboro*, 801 S.W.2d 38, 41 (Ark. 1990). Critical to the determination of adequacy is the absence of "evidence of collusion or conflicting interest between the representative and the class," *BPS Inc. v. Richardson*, 20 S.W.3d 403, 408 (Ark. 2000), and that the named plaintiff be sufficiently qualified and interested in the litigation "to ensure vigorous prosecution of the action." *First Nat'l Bank*, 801 S.W.2d at 41.

Under these standards, a stipulation by the named plaintiff limiting the recovery sought on behalf of the class would be a factor for the court to weigh at the certification stage when deciding whether the named plaintiff is an adequate class representative. If the stipulation were not in the best interests of the class, thereby reflecting a conflict between the named plaintiff and the interests of the class, the court would deny certification for lack of an adequate class representative. For example, in *Frelin v. Oakwood Homes Corp.*, No. CIV-2001-53-3, 2002

WL 31863487 (Ark. Cir. Ct. Nov. 25, 2002), an Arkansas trial court declined to certify a class in part on the basis of inadequate representation where "for tactical litigation reasons Plaintiffs and their class counsel have attempted to limit recovery for each member of the … Class to an amount less than $75,000," and where one of the named plaintiffs did not know that this choice had been made, and others conceded either that they did not know whether the limitation was in the interest of other class members or that the limitation might well be of concern to other class members. *Id.* at *19. The court found that, under the circumstances of the case, "[t]his attempt to limit the … [c]lass's monetary claims creates potential antagonism between these representative Plaintiffs, and the class which they seek to represent." *Id.*[2]

That a court might ultimately find a particular named plaintiff to be an inadequate representative in part because of a stipulation limiting the total recovery of a class, however, means only that a class ultimately may not be certified. It does not mean that the limitation on potential recovery is ineffective or does not exist. Speculation about the possibility that a state court might find the putative class representative's agreement to limit recovery renders him inadequate thus provides no basis for holding that a

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[2] Federal courts applying the standards of Federal Rule 23 have in some cases similarly held that a plaintiff's "failure to seek full recovery" evidences a conflict with the interests of the absentees that would render her an inadequate representative. *Martin v. Home Depot USA, Inc.*, 225 F.R.D. 198, 203 (W.D. Tex. 2004) (denying motion for class certification).

federal court may assert jurisdiction over an action in which the necessary amount in controversy is not being sought. Rather, those concerns are properly taken into account when the state court decides whether certification is appropriate under state procedural law and consistent with due process. That the stipulation is not binding, at this stage of the litigation, on absent class members has no bearing on whether it establishes to a legal certainty that the potential classwide recovery in *this* action, brought by *this* plaintiff, is less than $5 million. Put another way, the possibility that a state court might decide not to certify a class on the basis that the stipulation renders Knowles an inadequate representative does not transform this action into one in which more than $5 million is in controversy.[3]

The proper approach is exemplified by decisions in which federal courts addressing motions to remand class actions removed from state courts have declined to consider the propriety of litigation choices made by putative class representatives that have the effect of limiting classwide recovery, instead leaving it to state courts to consider those choices in evaluating whether the named plaintiff is an adequate class

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[3] Standard Fire contends that the district court erred by holding that it lacked jurisdiction because of an "eventual application by a state court of judicial estoppel." Pet. Br. 32 n.8. To the contrary, the district court invoked judicial estoppel in support of its finding that the stipulation was a limitation on damages that was enforceable against Knowles *at the time* the complaint was filed and thus established to a legal certainty that the action did not meet CAFA's jurisdictional threshold. Pet App. 11a.

representative. *See*, *e.g., Thomas v. Countrywide Home Loans*, No. 3:11-CV-399, 2012 WL 527482, at *4 n.4 (M.D. Ala. Feb. 17, 2012) (noting that the "ethical ramifications" of plaintiff's limitation on class-wide recovery "need not be examined within the confines of the present motion to remand."); *In re Citric Acid Antitrust Litig.*, No. C-95-4578, 1996 WL 116827, at *6 n.7 (N.D. Cal. Mar. 12, 1996) (finding that argument regarding plaintiff's ability to limit class claims "presents an issue of the adequacy of representation … but does not affect the [c]ourt's jurisdictional analysis"); *Quebe v. Ford Motor Co.*, 908 F. Supp. 446, 453 (W.D. Tex. 1995) (remanding to state court but noting that plaintiff's "failure to request punitive damages might possibly prevent the certification of the present case as a class action"); *Four Way Plant Farm, Inc. v. Nat'l Council on Comp. Ins.*, 894 F. Supp. 1538, 1544 (M.D. Ala. 1995) (holding that state court should consider plaintiffs' decision to plead only state antitrust claims in deciding whether to certify a class or how to define a class).

A stipulation limiting class damages should be analyzed similarly. For example, in *Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827 (7th Cir. 2011), a case on which Standard Fire relies, Judge Easterbrook, writing for the court, observed that a stipulation limiting damages to an amount less than the jurisdictional threshold would, if binding under state law and filed with the complaint, suffice to prevent removal. *Id.* at 831. At the same time, the court noted that, as putative class representative, the plaintiff "has a fiduciary duty to its fellow class members." *Id.* at 830. Thus, if the named plaintiff were willing to "throw away" a major component of damages, "a state or a federal judge might insist that

some other person, more willing to seek [those] damages, take over as representative." *Id.* at 830-31. But the court emphasized that "[o]ur point is not that a federal judge should take steps to keep suits in federal court" where such a stipulation has been filed, "but that class representatives' fiduciary duty might ensure that the amount in controversy exceeds $5 million no matter where the litigation occurs." *Id.* at 831. Other courts have likewise analyzed damages stipulations as a question of adequacy of representation to be considered by the state court in determining whether to certify a class rather than ignoring the stipulations on the ground that they necessarily reflect inadequate representation.[4]

A rule that courts must disregard damages stipulations when considering CAFA jurisdiction based on concern for absentees not only confuses the adequacy-of-representation inquiry with the distinct question whether the action as pleaded meets the amount-in-controversy requirement, but also wrongly presumes that a stipulation limiting the class's recovery necessarily violates the representative's duty to the class. Although an adequate representative

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[4] *See, e.g.*, *Lowdermilk v. U.S. Bank N.A.*, 479 F.3d 994, 999 n.5 (9th Cir. 2007) (noting that a stipulation may undermine plaintiff's case for serving as class representative); *McClendon v. The Chubb Corp.*, No. 2:11-CV-02034, 2011 WL 3555649, at *5 (W.D. Ark. Aug. 11, 2011) (providing that a plaintiff's decision to limit recovery for the class should be addressed after remand at the class certification stage); *Murphy v. Reebok Int'l, Ltd.*, No. 4:11-CV-214, 2011 WL 1559234, at *3 (E.D. Ark. Apr. 22, 2011) ("Reebok's attack on the [damages] stipulations goes more to [plaintiff's] adequacy as a class representative … [and] can be addressed after remand.").

will often seek to maximize the class's recovery, he will not always do so. An adequate representative might choose to limit damages to maintain the action in a state court because the state court is a more appropriate forum from the standpoint of the class for any number of legitimate reasons. The class representative may wish to remain in a court where there are different class certification standards, where judges are more familiar with the state common-law or statutory claims at issue, where a "rocket docket" will ensure a faster resolution of the case, or where discovery will be broader or, conversely, more limited. And the price of achieving the benefits of the chosen forum may in some cases be relatively insubstantial.

Here, for example, the district court found, based on Standard Fire's submissions, that the amount in controversy if the stipulation were disregarded—calculated based on the assumptions that attorneys' fees would be 40 percent on top of the class's recovery and that the class would receive prejudgment interest if it prevailed—was "up to $5,024,150," barely clearing CAFA's jurisdictional threshold. Pet. App. 8a. Under such circumstances, forgoing $24,150—less than half of one percent of the total amount Standard Fire claims the class claims are worth, and possibly coming out of the generous fee award assumed by Standard Fire rather than the class's damages award—to gain the legitimate benefits afforded by the choice of a state court forum may well be in the best interests of the class.

Standard Fire incorrectly argues that giving effect to the stipulation at the jurisdictional stage is tantamount to recognizing Knowles's authority to reduce claims on behalf of the absent class in violation of

this Court's holding in *Smith* and the due process principles articulated in *Shutts*. The Court in *Smith*, applying the "basic premise of preclusion law" that a non-party to a suit is not bound by a court's judgment, 131 S. Ct. at 2379, held that an absent class member may not be bound by the judgment in an uncertified class action (including the decision not to grant certification). *See id.* at 2380-82. Here, no court has even considered the issue of class certification. But giving effect to Knowles's stipulation limiting damages for the purpose of assessing federal jurisdiction over this action does not bind non-parties to any ruling or judgment, or even to the stipulation itself, and is thus fully consistent with *Smith*. Absent members of the putative class remain free to proceed independently to seek whatever recovery they may wish to seek. Indeed, noting the possibility of an absent class member's intervention in this action to seek damages in excess of Knowles's limitation, Pet. Br. 37, Standard Fire implicitly acknowledges that, prior to class certification, the stipulation cannot impede absent class members who want to proceed differently with litigation of their potential claims.

Nor does stipulating to a limitation on the amount in controversy work a due process violation on absent class members. *Shutts* makes clear that the notice, opt-out, and adequate representation requirements protect the due process rights of absentees in class actions seeking monetary relief. *Shutts*, 472 U.S. at 811-12. Thus, until a state court determines that Knowles is an adequate class representative, certifies a class, and notifies absent class members, the class will not be bound to an action that limits classwide damages to less than $5 million. And even after class certification, absentees may opt out

of the suit if they do not want to be bound by the named plaintiff's litigation choices. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Shutts*, 472 U.S. at 812-13 (1985). Far from being violated by the stipulation, *Smith* and *Shutts* provide the necessary assurance that class members cannot be bound by a stipulation limiting the amount in controversy unless and until the state court determines that the named plaintiff is an adequate representative, certifies the class, and provides notice and an opportunity to opt-out. Disregarding the stipulation for purposes of jurisdiction is therefore not necessary to protect absent class members.

If, following remand, the state court determines that Knowles is an adequate representative, the stipulation will then be operative to limit the recovery in this action of absent class members who do not opt out (assuming that it is not overturned on appeal within the state court system, where it will be subject to review). If, however, the state court determines that the stipulation renders Knowles an inadequate class representative, the court will deny class certification. Whichever way the issue of the adequacy of Knowles's representation is resolved, *this* action will not be subject to removal under CAFA. Of course, if another plaintiff were to file a class action without a damages limitation, and if the claims alleged were valued at more than $5 million, Standard Fire could remove *that* action to federal court under CAFA.

Generally, "the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938). CAFA does not authorize courts to import adequacy or other class certifica-

tion considerations into the determination whether federal jurisdiction exists. To hold otherwise would disrespect the choices that plaintiffs make in crafting their cases, including limitations on damages, to select a forum within the framework established by CAFA. Although CAFA's enactment significantly expanded federal jurisdiction over class actions, Congress's allowance of a federal forum in certain cases cannot override a plaintiff's choice to prosecute a class action in state court by pleading it in a way that falls outside federal jurisdiction.

II. Removal of a Class Action Under CAFA Requires That the Action Satisfy §1332(d)'s Requirements for Original Jurisdiction, Including the Amount-in-Controversy Requirement.

Advocating a novel reading of the statute that Standard Fire itself does not advance and that finds no support in any judicial decision construing CAFA, amicus curiae NAM contends that there is federal jurisdiction over this case regardless of the stipulation because CAFA removal requires no amount in controversy. NAM contends that 28 U.S.C. § 1453, the provision of CAFA that governs the procedures for removal of class actions, provides an independent basis for federal removal jurisdiction over class actions, regardless of whether they satisfy the requirements for original jurisdiction under CAFA as set forth in 28 U.S.C. § 1332(d). According to NAM, the plain language of § 1453 allows removal of any "class action" as defined in § 1332(d)(1), without regard to whether it meets the amount-in-controversy requirement of § 1332(d)(2) or any of the other limitations on federal jurisdiction set forth in § 1332(d).

NAM's argument misreads the statute by requiring the Court to ignore its structure and purpose, as well as critical statutory language that contradicts NAM's interpretation. Moreover, as NAM itself confesses, under its interpretation of the statute, a key requirement for removal—the presence of at least minimal diversity among the parties as required by Article III—was unaccountably left out of § 1453, requiring NAM to step back from its own plain language argument by reading into the statute terms that are not there. NAM's reliance on the "unambiguous" meaning of the statutory text thus falls flat.

A. The Structure, Purpose, and Plain Language of CAFA Make Clear that the Jurisdictional Requirements Set Forth in § 1332(d) Limit the Scope of CAFA Removal Jurisdiction.

CAFA's jurisdictional provisions were enacted, as Congress stated in the findings and purposes section of the Act, to "provid[e] for Federal court consideration of *interstate cases of national importance* under diversity jurisdiction." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 5 (2005), 28 U.S.C. § 1711 note (emphasis added). Congress achieved these purposes by expanding diversity jurisdiction under 28 U.S.C. § 1332(d) to provide the district courts with jurisdiction over large, multistate class actions meeting the detailed criteria set forth in that subsection. That expanded original jurisdiction automatically carried with it an expansion in removal jurisdiction under 28 U.S.C. § 1441(a), which provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district

and division embracing the place where such action is pending." Because § 1441(b), which otherwise prevents removal by in-state defendants, and 28 U.S.C. §§ 1446 and 1447, which govern procedures applicable to cases removed under § 1441, contained limitations that Congress thought inappropriate for class actions, CAFA added a new section, 28 U.S.C. § 1453, to alter the procedural requirements that would otherwise be applicable under Chapter 89 of Title 28 to class actions removed in light of CAFA's expanded diversity jurisdiction.

Critically, the newly enacted provisions of 28 U.S.C. § 1332(d) not only expand federal jurisdiction over class actions involving diverse parties, but also impose key limitations on that expansion. Paragraph (1) of subsection (d) defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or other similar State statute." Paragraph (2) then grants the district courts original jurisdiction over any class action as so defined in which the amount in controversy exceeds $5 million and the parties are minimally diverse. Paragraph (3) defines a number of circumstances in which a federal court nonetheless may decline to exercise jurisdiction, while paragraph (4) defines cases in which a federal court *must* decline to exercise jurisdiction. Class actions where the primary defendants are state governments or officials, or that comprise fewer than 100 members are excluded from CAFA jurisdiction entirely, § 1332(d)(5), as are class actions involving certain securities or corporate governance claims, § 1332(d)(9). Paragraphs (6) and (7) instruct how the amount in controversy and citizenship of parties are to be determined for purposes of CAFA jurisdiction. Paragraph (8) provides that original CAFA jurisdic-

tion applies to uncertified class actions. Paragraph (10) defines the citizenship of unincorporated associations for purposes of CAFA's diversity requirement. And paragraph (11) provides that, under defined conditions, a "mass action" in which individual claims are consolidated for trial "shall be deemed to be a class action *removable under paragraphs (2) through (10)* if it otherwise meets the provisions of those paragraphs." (emphasis added).

Section 1453, in turn, incorporates § 1332(d)(1)'s definition of "class action." Section 1453(b) then provides that removal of a "class action" is subject to the procedures outlined in 28 U.S.C. § 1446, but that three limitations ordinarily imposed on removal of diversity actions do not apply: (1) a class action, unlike other actions "removed … on the basis of jurisdiction conferred by section 1332," 28 U.S.C. § 1446(c), may be removed more than one year after it is commenced, as long as removal is effected within 30 days of the first filing that reveals the existence of federal jurisdiction; (2) in a class action, a defendant who is a citizen of the forum state may nonetheless remove;[5] and (3) a defendant need not obtain consent of its co-defendants in order to remove an action. Section 1453(c) further alters the procedures after removal, otherwise set forth in § 1447, by allowing permissive interlocutory appeals of orders granting or denying motions to remand. Finally, section

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[5] This provision alters the otherwise applicable requirement of § 1441(b) that in a case where removal is based on diversity jurisdiction, the defendants must not be citizens of the forum state.

1453(d) provides that the provisions of § 1453 do not apply to the same types of securities and corporate governance class actions that are excluded from CAFA jurisdiction under § 1332(d)(9).[6]

The most natural reading of § 1453, in light of the statutory purpose to allow federal jurisdiction of nationally important multistate class actions and the carefully reticulated provisions of § 1332(d) that define and limit that jurisdiction, is that it alters the limitations that would otherwise apply under Chapter 89 of Title 28 to the removal under § 1441(a) of actions within the expanded original jurisdiction provided by §1332(d).

NAM, however, argues that § 1453 is not simply a provision that alters some of the details of removal jurisdiction, but a "stand-alone removal provision for class actions." NAM Br. 7. Because § 1453 says that a class action "may be removed" and does not reference the substantive provisions of § 1332(d), including the matter in controversy requirement of § 1332(d)(2), NAM argues "that Congress did not wish to limit removal under CAFA to those cases within the federal courts' original jurisdiction." NAM Br. 13. NAM is wrong.

When interpreting a statute, the Court looks first to the words chosen by Congress to determine "whether the language at issue has a plain and unambiguous meaning with regard to the particular

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[6] Subsection (d) thus appears to have the effect of excluding from the provision for interlocutory appeal orders remanding class actions involving securities and corporate governance claims.

dispute in the case." *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356 (2012) (citation omitted). In so doing, the Court does not look at words in isolation; rather, a "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 1357 (citation omitted).

NAM's argument depends on reading § 1453 in isolation from all of § 1332(d) but its definitions. But because § 1332(d) and § 1453 are part of the same Act, and both seek to serve the same purpose of allowing federal jurisdiction over multistate class actions, it makes little sense to read § 1453 as providing a new source of federal jurisdiction over class actions that is wholly independent of the limits imposed by § 1332(d). That the two provisions are intended to be read hand in hand is confirmed by, among other things, the cross-reference to § 1453 in § 1332(d)(10), which provides that both provisions will use the same definition of the citizenship of an unincorporated association.

Moreover, NAM's reading fails to recognize that the key language on which it relies—the opening phrase of section 1453(b)—does not say that "any class action may be removed"; it says that "[*a*] *class action* may be removed to a district court of the United States *in accordance with section 1446*" and then excepts such removals from otherwise applicable limits. The language is most naturally read as defining *how* a class action—otherwise removable under §§ 1441(a) because it falls within the original jurisdiction created by § 1332(d)—"may be removed," not as independently defining *whether* the action "may be removed." Thus, when the "plain language" of

§ 1453 is read in the context of the other provisions of Chapter 89 of Title 28, as well as of § 1332(d), it takes on a meaning entirely opposite to that posited by NAM.

NAM's reading also fails to account for critical language in § 1453(b) itself. That subsection states that § 1446 applies to class action removals "except that the 1-year limitation under section 1446(b) shall not apply." But that one-year limit *only* applies when a case is "removed on the basis of jurisdiction conferred by section 1332 of this title." 28 U.S.C. § 1446(b). Accordingly, if § 1453 truly created "stand-alone" removal jurisdiction *not* tied to § 1332, there would be no need to create an "exception" to the one-year limit for class actions because the limit would not apply anyway.

Similarly, § 1453(b)'s specification that a case may be removed "without regard to whether any defendant is a citizen of the State in which the action is brought" creates an exception to the otherwise applicable terms of § 1441(b), which (except in federal question cases) limits removal under § 1441(a) to cases where the defendants are not citizens of the forum state. Again, however, if § 1453 created an entirely independent basis for removal, without regard to the existence of original jurisdiction, the limits imposed by § 1441 would not be applicable, and there would be no need to exclude them.

NAM's argument also asks the Court to ignore language in § 1332(d) itself that confirms that Congress intended § 1332(d)'s provisions to limit removal jurisdiction as well as original jurisdiction. Specifically, § 1332(d)(11)(A) provides that certain "mass actions" will be deemed to be "class actions *remova-*

ble under paragraphs (2) through (10)." (emphasis added). This language confirms that Congress intended that the requirements of paragraphs (2) through (10) of § 1332(d) determine not only when a class action is within the federal courts' original jurisdiction, but also when it is "removable."

NAM's attempt to harmonize § 1332(d)(11)(A) with its interpretation of § 1453 is unavailing. NAM contends that paragraph (11)(A) means that a mass action is deemed to be a class action if it satisfies the "substantive requirements of § 1332(d)(2)-(10)" and that such a mass action is, therefore, removable under § 1453. NAM Br. 19. But that reading is not based on the words that Congress enacted. NAM construes the language as if it said "a 'mass action' that satisfies the requirements of paragraphs (2) through (10) is deemed to be a class action removable under § 1453." In fact, the provision states that a "mass action" is a "class action removable under paragraphs (2) through (10)"—language that indicates that paragraphs (2) through (10) define the circumstances where *class actions* are removable. Divorcing the adjectival phrase from the noun that it modifies, NAM's construction "impermissibly rearranges the statutory language," *Limtiaco v. Camacho*, 549 U.S. 483, 490 (2007) and renders the modifier setting forth the criteria for removability "inoperative." *See Corley v. United States*, 556 U.S. 303, 314 (2009) (holding that statutory constructions that render any part of a statute "inoperative or superfluous, void or insignificant" are to be avoided).

The more natural reading of § 1332(d)(11)(A) is that "removable under paragraphs (2) through (10)" modifies "class action," the noun that immediately precedes the adjectival phrase. The phrase thus

makes clear that paragraphs (2) through (10), which limit a federal court's exercise of original CAFA jurisdiction, also determine whether removal jurisdiction is available under CAFA, because such jurisdiction, for class actions as well as for other diversity actions, depends on the existence of original jurisdiction.

NAM's plain-language argument not only fails to account for critical language in both § 1453 and § 1332(d), but also posits a gaping hole in §1453: the failure to specify any limit on federal jurisdiction over class actions, not even the minimal diversity required by Article III. Thus, if § 1453 were a stand-alone grant of federal jurisdiction, it would lack the key requirement necessary to determine when it could and could not constitutionally be applied, as NAM itself acknowledges. NAM Br. 20-21 & n.5. To avoid this significant flaw in its reading, NAM suggests that the Court read half of 1332(d)(2)—its minimal diversity requirement—into § 1453, but not the other half—its amount-in-controversy requirement. That NAM's argument by its own admission requires selectively reading into the statute something that, on NAM's view of the statute, is plainly not there belies the notion that NAM's construction is required by the plain language of the statute.

Rather than adopting a reading under which § 1453 is a defective stand-alone jurisdictional provision that requires major surgery to save it, the Court should adopt the much more natural reading that the language, structure, and purposes of CAFA all support: namely, that § 1453 modifies certain limitations and procedures that would otherwise apply to removal of a class action but leaves intact the basic requirement of § 1441(a) that removal is limited to cas-

es satisfying the limitations on original jurisdiction under CAFA, as set forth in § 1332(d). *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

If any doubt remains, CAFA's legislative history confirms that removal under § 1453 is subject to the limits on original CAFA jurisdiction set forth in §§ 1332(d)(2)-(10). The Senate Report on the version of CAFA enacted in 2005 states unequivocally that section 5 of CAFA, which contained § 1453, "establishes the *procedures* for removal of *interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d)*." S. Rep. No. 109-14, at 48 (2005) (emphasis added). The Report goes on to state that "[t]he general removal provisions currently contained in Chapter 89 of Title 28"—including the basic grant of removal jurisdiction tied to original jurisdiction in § 1441(a)—"would continue to apply to class actions, except where they are inconsistent with the provisions of the Act." *Id.* The Report underscores the point that § 1441(a), with its requirement of original jurisdiction, continues to apply by immediately noting that § 1441(b), which otherwise limits removal under § 1441(a) in diversity cases to cases where defendants are not citizens of the forum state, "would not apply to the *removal of*

class actions under the jurisdictional provisions of section 1332(d)." Id. (emphasis added).[7]

Elsewhere, the Senate Report is replete with references to removal of class actions pursuant to the jurisdictional provisions of § 1332(d), expressing the understanding that § 1332(d)'s jurisdictional requirements, including the minimum amount in controversy, govern federal removal jurisdiction. *See* S. Rep. No. 109-14, at 42 (2005) (discussing the amount in controversy in removed cases); *id.* at 50 (stating that removals pursuant to § 1453 can happen "at any time when changes are made to the pleadings that bring the case within section 1332(d)'s requirements for federal jurisdiction"); *id.* at 70 (discussing the amount in controversy requirement with respect to CAFA's removal provision).

Similarly, the Report explains that the provisions of § 1332(d)(4), which provide that a federal court "shall decline to exercise jurisdiction" in certain cases where a single state's interests predominate, were designed to "respond to concerns that class actions with a truly local focus should not be *moved to federal court* under this legislation because state courts have a strong interest in adjudicating such disputes." *Id.* at 39 (emphasis added). By contrast, the Report explains, in a case falling outside § 1332(d)(4)'s limi-

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[7] Although it appears that the 2005 Senate Report was not prepared until after CAFA's enactment, all of the statements from the 2005 Report that are cited herein are matched by identical or substantially similar statements in the penultimate Senate Report on CAFA prepared in the immediately preceding Congress. *See* S. Rep. No. 108-123 (2003).

tations, "any defendant could *remove* [the] case to federal court." *Id.* at 41 (emphasis added). Likewise, the Report explains that the purpose of § 1332(d)(5)(a), excluding cases involving state governmental defendants from CAFA jurisdiction, is "to prevent states, state officials, or other governmental entities from dodging legitimate claims by *removing* class actions to federal court and then arguing that the federal courts are constitutionally prohibited from granting the requested relief." *Id.* at 42 (emphasis added). None of these statements would make sense if the drafters did not understand that removal jurisdiction under CAFA required satisfaction of § 1332(d)'s limits on original jurisdiction.

That Congress intended CAFA's removal jurisdiction to be coterminous with its original jurisdiction is underscored by the statutory objective to "correct[] a flaw in the current diversity jurisdiction statute" by allowing large, interstate class actions to be heard by federal courts. *Id.* at 5. Congress specifically described CAFA as making more, but not all, class actions removable. *See id.* at 6 (establishing in CAFA "a rule allowing a larger number of class actions into federal courts"); *id.* at 51-52 (citing a study analyzing proposed removal provision to conclude that more than half of class actions in which state courts issued rulings during a five-year period would *not* be removable under CAFA). Indeed, even a commentator whom NAM cites in its brief recognizes that CAFA's purpose and legislative history are inconsistent with NAM's argument. *See* Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and its Lessons for the Class Action Fairness Act*, 81 Wash. L. Rev. 279, 292-93 (2006). That no advocate

of CAFA before or after its enactment expressed an intent to provide for removal of all class actions, without regard to original CAFA jurisdiction, and that no court has thought to interpret § 1453 as NAM does in the seven years since CAFA's enactment underscore that NAM's interpretation of § 1453 is untenable.

B. Section 1453 Is Wholly Unlike Other Stand-Alone Removal Provisions Cited by NAM.

NAM cites several statutes that provide for removal jurisdiction over cases that are not subject to original federal jurisdiction as support for its argument that § 1453 expands CAFA removal jurisdiction to include cases over which CAFA does not grant original jurisdiction. NAM Br. 16-18. Each of those statutes, unlike § 1453, expressly provides for broad removal jurisdiction to protect or promote a substantive federal interest, usually one calling for the application of federal law as a defense to liability. Section 1453 is a different sort of statute altogether, as it sets forth *procedures* for removal and remand of class actions over which there is original jurisdiction, rather than defining types of actions or litigants that may be removed without regard to original jurisdiction because of a predominating federal interest.

For example, 28 U.S.C. § 1442 provides federal officers with the right to remove both civil and criminal cases arising out of actions taken under color of their office. Section 1442 was enacted to permit federal officials to raise defenses "arising out of their duty to enforce federal law," such as official immunity, in federal court. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969); *see also Mesa v. California*, 489 U.S. 121, 129 (1989) (colorable defense under federal law is re-

quired for jurisdiction under § 1442). These statutes allow the exercise of jurisdiction based on the existence of a federal question for which there is an overriding interest in providing a federal forum, but where original federal question jurisdiction under 28 U.S.C. § 1331 is absent because the federal question is not part of the plaintiff's case and does not appear on the face of a well-pleaded complaint. *See Mesa*, 489 U.S. at 136-37. Jurisdiction under § 1442a, which provides members of the United States armed forces with a federal forum for actions taken under color of their office, is predicated on the same principles. *See Mir v. Fosburg*, 646 F.2d 342, 344 (9th Cir. 1980) (finding no relevant distinction between purpose of § 1442 and § 1442a).

Similarly, an interest in enforcement of federal civil rights laws animates the broad removal provisions of § 1443, applicable to state criminal and civil cases in which a defendant is denied federal rights or is prosecuted or sued for acts authorized by civil rights laws. *See Georgia v. Rachel*, 384 U.S. 780, 804 (1966) (upholding removal of state criminal prosecutions of civil rights protestors under § 1443 where there were grounds for a "firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights" [of equality] in state courts). In the case of removal of actions affecting property liens held by the United States under § 1444, Congress provided the federal government with a right to a federal forum in exchange for its waiver of sovereign immunity from suit by private parties to determine the priority of outstanding liens on real or personal

property.[8] *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 629 (5th Cir. 2002).

These removal statutes, each of which provides a federal forum where one would not have been otherwise available, are designed to protect federal officers or members of the military who may be immune from civil or criminal liability, to prevent critical rights from being undermined by state prosecutions or lawsuits, and to address the consequences of the United States' waiver of sovereign immunity in actions affecting its security interests in real or personal property. In each case, the whole point of the statute would be lost and the important federal interests underlying it compromised if it were not read to allow removal jurisdiction in the absence of original jurisdiction.

NAM fails to identify a similar federal interest necessitating its broad construction of § 1453. Rather, the purposes of CAFA are given their full intended effect, and the language of both § 1453 and 1332 are respected and given meaning, if § 1453 is read simply as modifying the requirements and procedures for removal of the large, multistate class actions over which § 1332(d) provides original jurisdiction. Indeed, NAM itself acknowledges that § 1453 serves important functions even if not read as a stand-alone grant of jurisdiction, including outlining

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[8] 28 U.S.C. § 2410(a) provides that the United States may be named as a party "in any State court" in actions to quiet title to, foreclose upon, partition, condemn, or for interpleader with respect to, any real or personal property in which the United States holds a lien.

"procedures a defendant must follow to accomplish removal" and "provid[ing] a procedure for discretionary interlocutory appeal of a district court's order remanding a class action removed to state court." NAM Br. 7-8. The structure and procedural focus of § 1453 are very different from those of removal statutes that expand federal jurisdiction. The existence of such statutes provides no justification for tearing § 1453 from its context within CAFA, ignoring important language in both § 1453 and § 1332, and positing that Congress in enacting § 1453 unintentionally created a basis for removal of any class action, regardless of its satisfaction of CAFA's important jurisdictional limits.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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December 2012