No. 17-1471

IN THE
Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

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

BRIEF FOR RESPONDENT

BRIAN WARWICK
Counsel of Record
JANET VARNELL
DAVID LIETZ
VARNELL & WARWICK, P.A.
P.O. BOX 1870
Lady Lake, FL 32158
(352) 753-8600
bwarwick
@varnellandwarwick.com

F. PAUL BLAND
KARLA GILBRIDE
LEAH M. NICHOLLS
ELLEN NOBLE
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600

JENNIFER BENNETT
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8213

Counsel for Respondent
(Additional Counsel on Inside Cover)

RASHAD BLOSSOM
BLOSSOM LAW PLLC
225 E. Worthington Avenue
Suite 200
Charlotte NC 28203
(704) 256-7766

DANIEL K. BRYSON
JOHN HUNTER BRYSON
WHITFIELD BRYSON & MASON LLP
900 W. Morgan Street
Raleigh, NC 27603
(919) 600-5000

Counsel for Respondent

QUESTIONS PRESENTED

For at least 70 years, the consensus among federal courts has been that "defendants," particularly in the context of removal, means parties against whom the plaintiff has brought claims—not counterdefendants or other third parties joined in the case by a defendant. Congress has long legislated against that backdrop, using terms such as "counterclaim defendants" or "party" rather than "defendants" when it intends to refer to additional types of parties—and using "defendants" when it doesn't. Petitioner Home Depot U.S.A., Inc. asks this Court to upend this long-established common understanding that underpins every removal statute.

The questions presented are:

1. Should this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?

2. May parties added to a case through counterclaims or third-party claims, who were not "defendants" to "a civil action brought in a state court" under 28 U.S.C. § 1441(a), nonetheless remove to federal court the entire action containing the class counterclaim(s) pled against them based only on the placement of "any" in front of the word "defendant" in 28 U.S.C. § 1453(b)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISION

STATUTES

RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

Since 1789, Congress has limited who may transfer actions from state to federal court. And with few exceptions, Congress has granted this right of removal only to "defendants." The term "defendant" in the removal context has a well-settled meaning across statutes, caselaw, and treatises: someone against whom a plaintiff brings claims. The consensus among federal courts that counterdefendants may not remove under 28 U.S.C. § 1441(a) flows directly from this well-established meaning of "defendant."

Limiting removal to "defendants" is not the only restriction Congress placed on removal jurisdiction under § 1441(a) that prevents removal based on counterclaims. Congress also limited removal jurisdiction to cases over which the federal courts would have had "original jurisdiction." This Court has long held that this restriction limits removal to cases in which *the plaintiff's* complaint could have been filed in federal court—and therefore cases cannot be removed based on a defense or a counterclaim.

Nothing in the Class Action Fairness Act alters these two restrictions. Civil actions—be they class actions or individual cases—may only be removed under § 1441(a) by "defendants," and they may only be removed if they could have been filed in federal court by the plaintiff in the first place.

Neither of these requirements is met here. This Court, therefore, should affirm.

STATEMENT OF THE CASE

A. Home Depot, Carolina Water Systems, and Citibank's Water-Treatment Scam.

1. This case arises from a coordinated scam by Home Depot U.S.A., Inc., Carolina Water Systems, Inc. ("CWS"), and Citibank, N.A., that uses deceptive, high-pressure, and flat-out prohibited tactics to sell, on credit, unneeded home water-treatment systems at extraordinary mark-ups to North Carolina homeowners.

The scam begins with a phone call from a Home Depot/CWS representative, who tells the homeowner that "contaminants" were found in nearby tap water. JA56-57.[1] The representative persuades the consumer to allow a home visit to "test" their water. JA57.

The test is a pretext for a multi-hour scripted sales pitch packed with deceptive tactics. The test itself checks only for water hardness; virtually all tap water, whether dangerous or not, will test "positive." JA60. Nevertheless, backed by charts and graphs, the representative falsely indicates that the positive test result means that the homeowner's tap water is contaminated and unsafe. JA57-58.

Playing on the fear created by this false information, the Home Depot/CWS representative, if successful, sells the homeowner on the need for a wildly overpriced home water-treatment system. The

---

[1] The Joint Appendix is cited herein as "JA." Unless otherwise stated, all underlying facts are as alleged by Respondent George Jackson. Unless otherwise specified, all internal quotation marks and citations omitted.

system Home Depot/CWS sells as part of this scam for approximately $9,000 can be purchased elsewhere for less than $1,400. JA31.

If the homeowner balks at the system's cost, the Home Depot/CWS representative suggests several "solutions." First, the representative tells the consumer that sales tax will be waived if the consumer purchases the system that day. JA58; *see also* Dist. Ct. Dkt. No. 16-1, at 4 (describing lack of tax as a "promo"). But that's misleading at best: Under North Carolina law, these water-treatment systems are *never* subject to sales tax. JA58.

Second, the representative tells the consumer that, if they refer enough other consumers who end up purchasing the system, their water-treatment system will be free. JA58. Under this referral program, the homeowner would also get credit toward the purchase price for every referral who agreed to listen to the sales pitch, even if they didn't purchase the system. JA58. But offering free or reduced cost products in exchange for referrals is categorically prohibited under North Carolina's Referral Sales statute, which provides that sales "at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, . . . is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void and a nullity[.]" N.C.G.S. § 25A-37.[2]

---

[2] Referral sales schemes—where a sale is induced by telling the consumer the cost will be reduced or free if they refer others—are prohibited, in North Carolina and elsewhere, because the promised benefits so infrequently materialize. *See,*

But the referral scheme isn't the only way the Home Depot/CWS representative offers to "help" make the system affordable: The representative also tells the consumer they are approved for a Home Depot-branded deferred-interest Citibank credit card with a credit limit that, conveniently, exactly matches the cost of the system less any down payment ($8,900 in Mr. Jackson's case). *See* Dist. Ct. Dkt. No. 13-2, at 2; JA27. In other words, consumers who purchase these systems from Home Depot/CWS do not get financing from some lender they find on their own. Instead, as part of a package deal, the overpriced water treatment systems come with specific overpriced financing provided by Citibank.

Completed transactions with successfully coerced homeowners involve three separate contracts to purchase, install, and finance the water-treatment systems: with CWS for the purchase and installation of the system, with Home Depot for the installation, and with Citibank for a credit card with a limit exactly matching the financing needed for the system. *See* JA32; Dist. Ct. Dkt. No. 16-1, at 4-6; Dist. Ct. Dkt. No. 30-1, at 2-13; Dist. Ct. Dkt. No. 13-1, at 2; Dist. Ct. Dkt. No. 13-2, at 2.

Home Depot, CWS, and Citibank carried out this scam throughout North Carolina, but similar scams

---

e.g., Ralph Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 Conn. L. Rev. 647, 717-18 (2003) (explaining why the Uniform Consumer Leases Act prohibits such sales); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 453 n.97 (1991) (citing case examples). Such referral sales schemes are also prohibited by the Uniform Consumer Sales Practices Act. U.C.S.P.A. § 3(b)(11).

have also been perpetrated in other states. In Florida, for example, state Attorney General Pam Bondi has warned consumers not to believe claims that their water is dangerous or that water-treatment systems are needed on the basis of in-home tests by salespeople. JA61 n.1. In Illinois, Home Depot partnered with a local water system seller-installer for the same basic scheme as the one here. *See Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th Cir. 2017). When Home Depot and its *amici* complain here that Home Depot has been subject to another class claim arising out of a state-court debt collection action, they are referring to *Tri-State Water*.

2. Mr. Jackson was subjected to the typical Home Depot/CWS sales tactics described above. *See* Dist. Ct. Dkt. No. 24-1. Mr. Jackson was persuaded by the representative's statements that he needed a water-treatment system to avoid carcinogens in his water, but protested that he couldn't afford the system. *Id.* at 3-4. In response, the representative told Mr. Jackson that if six of Mr. Jackson's referrals purchased a water-treatment system, his system would be free. JA27; *see* Dist. Ct. Dkt. No. 24-1, at 3; Dist. Ct. Dkt. No. 30-1, at 2. Further, the representative said Mr. Jackson would receive compensation for any referrals that listened to the sales presentation. *Id.*; Dist. Ct. Dkt. No. 24-1, at 4; JA26.

In the meantime, the representative went on, Mr. Jackson would qualify for financing arranged by Home Depot (with its partner in this enterprise, Citibank). Dist. Ct. Dkt. No. 24-1, at 4. The Home Depot/CWS representative falsely stated that Mr.

Jackson would have two years in which to pay off the financing interest-free. *Id.*; *see* Dist. Ct. Dkt. No. 16-1, at 4. In fact, the interest-free period on the Home Depot-branded Citibank credit card was only one year before the interest rate jumped to 25.99%. Dist. Ct. Dkt. No. 13-2, at 4.

Mr. Jackson signed three separate contracts for the water-treatment system and its financing, one with each of the three players. As is typical in this scam, however, he did not sign (or even have a chance to review) the Home Depot or Citibank agreements until after his system had been installed. *See* Dist. Ct. Dkt. No. 16-1, at 4; Dist. Ct. Dkt. No. 30-1; Dist. Ct. Dkt. No. 13-2, at 2.

Subsequently, Mr. Jackson made initial payments totaling $1,080 toward his Home Depot Citibank credit card balance and referred numerous potential customers to Home Depot/CWS. JA59; Dist. Ct. Dkt. No. 24-1, at 4-5. Though Mr. Jackson did receive at least one $100 check for a referral he made, at some point the Home Depot/CWS representative became unresponsive to Mr. Jackson's attempts to refer other potential customers. *Id.* at 4; JA28. Mr. Jackson unsuccessfully attempted to cancel the transaction and return the equipment to Home Depot/CWS, and stopped making payments toward the balance on the Home Depot-branded Citibank credit card. Dist. Ct. Dkt. No. 24-1, at 4.

B. State Court Proceedings.

Citibank brought a debt-collection suit against Mr. Jackson in North Carolina state court seeking to recover the balance on his Home Depot-branded Citibank credit card—the charge for the water-treatment system plus over four thousand dollars in

interest and fees, a total of more than $12,000. JA14; Compl. at 6, *Citibank v. Jackson*, No. 16-CVD-10961 (Dist. Ct. Div., Mecklenburg Cty., NC June 17, 2016).

Mr. Jackson answered the complaint, stated his affirmative defenses, and brought compulsory counterclaims against Citibank—claims he was *required* to bring as part of the *state*-court proceeding or else forfeit them. He also brought claims against Home Depot and CWS for their roles in the scheme creating the debt Citibank sought to collect—claims that he also needed to bring in the proceeding to avoid risking forfeiture. *See infra* 54-55; JA18-40. Among other things, Mr. Jackson contended that because the transaction with Home Depot and CWS that gave rise to the debt was null and void under the North Carolina Referral Sales statute, there was no valid debt on which Citibank could collect. JA20.

Mr. Jackson's third-party claims against Home Depot and CWS on behalf of a class of North Carolina victims of the water-treatment system scheme alleged that the companies violated North Carolina's Referral Sales statute and prohibition on unfair and deceptive trade practices. JA36-39. Mr. Jackson also brought an individual claim against Citibank, asserting all his claims against Home Depot and CWS against Citibank under North Carolina's holder rule. JA39-40.

Citibank responded by voluntarily dismissing its debt-collection claims against Mr. Jackson without prejudice—a fact that Home Depot leaned on heavily in its arguments for removal. JA41; *see* App. 8a-9a,

13a.[3] Because Citibank's dismissal is without prejudice, nothing precludes Citibank from reasserting its claims against Mr. Jackson. App. 13a.

Home Depot removed the case to federal district court. JA42.

C. District Court Proceedings.

Home Depot's notice of removal to federal court cited 28 U.S.C. § 1441 and the Class Action Fairness Act ("CAFA"). Home Depot contended that it was "a defendant who may properly remove the case under 28 U.S.C. §§ 1441 and 1453." JA45.

Shortly after removal to federal court, Home Depot filed a motion to realign the parties to have Mr. Jackson identified as the Plaintiff, and Home Depot, CWS, and Citibank identified as the Defendants. Mr. Jackson opposed the motion. *See* App. 17a-18a.

Mr. Jackson moved to remand the case to state court on three bases. First, under well-established precedent, additional counterdefendants like Home Depot may not remove a civil action. JA51-52; Dist. Ct. Dkt. No. 24, at 19-23.[4] Second, Home Depot failed to demonstrate that the case meets the $5 million jurisdictional threshold for class actions removed based on diversity: Based on the damages each class

---

[3] The Appendix to the Petition for Certiorari is cited herein as App. Xa.

[4] Throughout this brief, Mr. Jackson uses the term "counterdefendant" to refer to any counterclaim defendant, and the term "additional counterdefendant" to denote counterdefendants who are not plaintiffs. The broader term "derivative defendants" includes additional counterdefendants and any other party joined to an existing case by a defendant.

member would be likely to claim, to meet the $5 million threshold, the class would have to be over 1500 North Carolina homeowners. *Id.* at 6-15. Home Depot has revealed that there are 286. Dist. Ct. Dkt. No. 36, at 16.

Finally, Mr. Jackson argued, the case meets the local-controversy exception to federal-court jurisdiction under CAFA. *See* 28 U.S.C. § 1332(d)(4)(A). First, since the class comprises persons in North Carolina who purchased home water-treatment systems, more than two-thirds of the class members are citizens of North Carolina. Second, one of the defendants—CWS—is a citizen of North Carolina, the class seeks significant relief from CWS, and CWS's actions form a significant basis for the claims. Third, the injuries occurred in North Carolina. Fourth, during the prior three years, no other class action asserting similar facts had been filed. Dist. Ct. Dkt. No. 24, at 15-19. Home Depot challenged each of these arguments.[5]

While the remand motion was being briefed, Citibank—still a party to the action—CWS, and Home Depot each filed its own motion to compel individual arbitration of Mr. Jackson's claims. Citibank moved to compel arbitration on the basis of the arbitration agreement in its card agreement. Dist.

---

[5] Home Depot asserts that Mr. Jackson brought claims against Home Depot only because of its "deeper pockets." Dist. Ct. Dkt. No. 36, at 30. That ignores the ample evidence that Home Depot was an integral part of the scheme. Indeed, consumers had to sign a contract with Home Depot as part of the transaction, and Home Depot was making a 1,000% profit on the unneeded systems—it would have been illogical to leave Home Depot out. *See* JA31.

Ct. Dkt. No. 11. Rather than challenge the ability of Citibank to enforce its arbitration agreement, Mr. Jackson chose to amend his claims to eliminate allegations against Citibank. JA53-68. Mr. Jackson retains his rights to renew those claims.

CWS sought to compel individual arbitration of Mr. Jackson's claims against it on the basis of the arbitration clause in the CWS agreement. Dist. Ct. Dkt. No. 16; *see* Dist. Ct. Dkt. No. 16-1, at 5. Mr. Jackson opposed the motion. Dist. Ct. Dkt. No. 34.

The Home Depot agreement, on the other hand, contains no arbitration clause. But Home Depot argued that, even though Mr. Jackson had dropped his claims against Citibank, his claims about Home Depot's water-treatment system scam nevertheless "relat[ed] to" the Citibank account—and were therefore within the scope of the Citibank agreement—because Mr. Jackson used the Home Depot-branded Citibank account to finance the transaction. JA82.

Further, Home Depot argued, it could enforce the Citibank agreement as a nonsignatory because it was a third-party beneficiary of the agreement—that Home Depot was so "connected with Citibank" for purposes of the water-treatment sales scheme, Citibank intended to confer the benefits of its agreement on Home Depot. JA83. And Home Depot argued that for similar reasons of interconnectedness, it should be allowed to enforce the arbitration clause in the CWS agreement as well. JA85, 137. Mr. Jackson opposed Home Depot's motion. JA96-120.

The district court first addressed Mr. Jackson's motion to remand. App. 16a-23a. The district court quickly dispatched with Home Depot's argument that

it was a "defendant" entitled to remove, explaining that the Fourth Circuit, in *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008), had expressly held that "an additional counter defendant is not a 'defendant' for purposes of § 1441(a)"—a holding perfectly consistent with this Court's holding in *Shamrock Oil*. App. 19a (quoting *Palisades*, 552 F.3d at 333).

The district court also rejected Home Depot's contention that this Court's decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) overruled *Palisades*. App. 19a-21a. The district court found persuasive the Seventh Circuit's reasoning to the contrary in *Tri-State Water*. App. 20a. Because *Dart Cherokee* evinced no intent to overrule *Shamrock Oil*, and *Palisades* was built on *Shamrock Oil* and its progeny, *Dart Cherokee* could not have overruled *Palisades*. App. 21a.

The district court granted Mr. Jackson's motion to remand without reaching the amount-in-controversy or local-controversy questions. App. 23a.

The district court then denied Home Depot's motion to realign the parties, explaining that the parties remained properly aligned on the "principal purpose" of the lawsuit—Citibank's debt collection action—and that there were no antagonistic parties on the same side. App. 22a. Further, it declined to "promote forum shopping" by "allowing realignment only to create federal jurisdiction." App. 22a.

The district court denied the motions to compel arbitration without prejudice to refiling in state court. App. 23a.

D. Decision of the Fourth Circuit.

Home Depot sought permission to appeal the remand order under 28 U.S.C. § 1453(c). The Fourth Circuit ordered briefing and oral argument, and granted permission in the order resolving the appeal. App. 2a. The Fourth Circuit unanimously affirmed the district court's decision to remand. App. 15a.

First, the Fourth Circuit rejected Home Depot's argument that *Dart Cherokee* undermined *Palisades*. *Dart Cherokee* held that no antiremoval presumption applied to cases removed under § 1441 pursuant to the jurisdiction granted by CAFA, and Home Depot contended that *Palisades*' holding that an additional counterdefendant was not a defendant for purposes of removal rested on such a presumption. App. 9a. Carefully parsing the language in *Palisades*, the Fourth Circuit disagreed, explaining that the conclusion in *Palisades* was based, not on a presumption against removal, but on the "well-established" meaning of "defendant" in the removal statutes. App. 10a-11a. "When Congress," the Fourth Circuit explained, "uses a term with a well-established meaning, we presume—absent evidence otherwise—that Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations." App. 11a (citing *First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010)). The appellate court expressed agreement with the Seventh Circuit's decision in *Tri-State Water* and declined to "upend so settled a definition as 'defendant.'" App. 11a.

Second, the Fourth Circuit rejected Home Depot's argument that *Palisades* was distinguishable because here, Citibank had dismissed its claims against Mr.

Jackson, and Mr. Jackson had dismissed his claims against Citibank. App. 12a. When Home Depot removed, Mr. Jackson's claims against Citibank remained live; Mr. Jackson's later dismissal of the claims could not retroactively justify Home Depot's removal. *Id.* Thus, the only question was whether Citibank's dismissal of its debt-collection claims against Mr. Jackson could permit Home Depot to remove—and the Fourth Circuit rejected that, too. The court explained that permitting Citibank's dismissal to allow Home Depot to remove would (1) be contrary to the court's longstanding interpretation of "defendant" in the removal statutes; (2) give Citibank, the original plaintiff, the power to determine whether counterclaims against it could be removed to federal court; and (3) invite gamesmanship between the original plaintiff and the third-party defendants to manipulate jurisdiction. App. 12a-13a.

The Fourth Circuit went on to affirm the district court's denial of Home Depot's motion to realign, explaining that realignment was not warranted where, as here, there was no "attempt to fraudulently manufacture diversity jurisdiction" by the party opposing realignment. App. 15a.

SUMMARY OF ARGUMENT

I. Jurisdiction is a balancing act. Within the boundaries provided by the Constitution, Congress regulates both original and removal jurisdiction to balance the interests of litigants, the states, and the federal government. With respect to removal, the balance Congress has most often struck limits removal authority to "defendants"—parties against whom a plaintiff files a complaint.

In *Shamrock Oil*, this Court paid close attention to the balance Congress had struck. It analyzed the text of the general removal statute then in effect and noted that, while the previous removal statute had allowed a broader class of parties to remove, the statute at issue narrowed that removal authority to "defendants." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 105-07 (1941). Based on this restriction, the Court held that the plaintiff in that case could not remove even though he was the counterdefendant to a counterclaim over which there was federal jurisdiction.

Paying similarly close attention to the balance Congress struck in the current general removal statute, 28 U.S.C. § 1441(a), requires the conclusion that counterdefendants may not remove civil actions based on counterclaims. The text of § 1441(a) expressly limits removal jurisdiction to actions over which federal courts have original jurisdiction—that is, where the *plaintiff* could have filed its complaint in federal court—and it expressly limits the parties who may remove to "defendants"—a word that is widely understood in this context to exclude counterdefendants.

In the 70 years that § 1441(a) has been the general removal statute, a consensus has emerged among federal courts and commentators that derivative defendants, including counterdefendants, are not "defendants" who may remove under that statute. In response to the lower courts' near-unanimous verdict that derivative defendants may not remove, Congress has taken no steps to amend the removal statutes to include them.

If Home Depot succeeds in persuading this Court to redefine § 1441(a) to permit removal by additional counterdefendants, the effects will be far-reaching and destabilizing. For one thing, the meaning of each instance of the common word "defendant" in the U.S. Code will suddenly become uncertain. For another, litigants will have a host of new opportunities to get ordinary state-law claims into federal court.

Most of the cases in which counterdefendants and other derivative defendants attempt to remove are individual cases, not class actions. Accepting Home Depot's position would likely lead to the federal courts being inundated with run-of-the-mill state-law cases for negligence or personal injury. If such a drastic revision of removal jurisdiction is nonetheless warranted, Congress and not this Court should be the one to make that change.

II. Nothing in CAFA requires a different rule for class actions.

CAFA is a creature of compromise, enacted after years of debate amongst members of Congress with sharply differing views. The eventually-enacted compromise expanded original jurisdiction over class actions and altered some of the procedures governing removal as applied to class actions. It did not change the meaning of the word "defendant"; nor did it eliminate the requirement that actions may only be removed if they fall within the original jurisdiction of the federal courts.

Contrary to Home Depot's contention, CAFA's allowance of removal "by any defendant without the consent of all defendants," 28 U.S.C. § 1453(b), does not change the meaning of "defendant." It changes, for class actions, the rule that all defendants must

consent to removal. Home Depot argues that the mere inclusion of the word "any" in this provision entirely upends the established meaning of the word "defendant"—and transforms the provision from a targeted relaxing of removal procedures into a dramatic expansion of removal jurisdiction. But there is no indication in the text or legislative history of CAFA suggesting any such dramatic expansion. Moreover, the phrase "any defendant" appears throughout the U.S. Code, where it is used interchangeably with other phrases like "a defendant" and "the defendant," and it is never used to refer to counterdefendants. To the contrary, when Congress wants to refer to counterdefendants, it does so expressly.

Furthermore, Home Depot doesn't even attempt to argue that CAFA eliminates § 1441(a)'s "original jurisdiction" requirement. Instead, Home Depot suggests that § 1441(a) simply doesn't apply to class actions at all. But that's not what CAFA says. The source of removal jurisdiction for class actions, like other civil actions, remains § 1441(a). CAFA merely changed some of the procedures that govern such removal.

III. Home Depot's policy arguments for radically changing the way removal jurisdiction has worked for nearly a century are meritless. Home Depot argues that if counterdefendants are unable to remove, wily plaintiffs with class claims will refrain from bringing those claims in federal court and just hope that they happen to be sued in state court, so they can bring their claims as counterclaims and avoid removal. That's absurd; and there's simply no evidence that it's happening—for all of their handwringing, Home

Depot and its *amici* have come up with strikingly few cases where class counterclaims could be removed if only the longstanding rule against counterclaim removal were changed.

Congress struck a careful balance in passing the removal statutes, and CAFA. If Home Depot thinks the balance should be different, it needs to ask Congress—not this Court.

IV. The Fourth Circuit's opinion should be affirmed for additional reasons unrelated to the questions presented. First, had the lower courts reached the issues instead of ruling that Home Depot lacked authority to remove, they would likely have remanded anyway either based on the so-called local controversy exception and the substantial connections between this case and Mr. Jackson's home state of North Carolina, or based on Home Depot's inability to prove it meets CAFA's amount-in-controversy requirement, or both. Second, the Fourth Circuit did not rule on Home Depot's petition for leave to appeal the district court's remand order within 60 days as required by 28 U.S.C. § 1453(c), in violation of a jurisdictional provision Congress "designed to promote expedition." *Dart Cherokee*, 135 S. Ct. at 556 n.6.

ARGUMENT

I. NOT PERMITTING DERIVATIVE DEFENDANTS TO REMOVE A CIVIL ACTION IS CONSISTENT WITH *SHAMROCK OIL*'S REASONING, WHILE HOME DEPOT'S APPROACH WOULD GREATLY EXPAND FEDERAL JURISDICTION.

Congress balances many factors when legislating the limits of federal jurisdiction: fairness to litigants; a desire for uniformity in the law; respect for state autonomy; and "relieving the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts in order to keep them free for their distinctive federal business." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941). Ever since the first Congress passed the first jurisdictional statute, the Judiciary Act, in 1789, the balance Congress has struck with respect to removal has been, generally, to allow only "the defendant" to remove, but to extend the right of removal to other parties when fairness or other considerations warrant such an expansion. Sometimes, as during Reconstruction, concerns over fairness to out-of-state litigants led Congress to open the gates of federal courts as wide as Article III of the Constitution would allow. *See, e.g.*, Judiciary Act of 1875, ch. 137, 18 Stat. 470. But for most of this nation's history, up through today, Congress has chosen to limit the general removal statute to parties sued by plaintiffs—namely, "defendants."

Focusing on the words Congress used to delimit removal authority, and the context in which those words were chosen, this Court in *Shamrock Oil*

concluded that counterdefendants may not remove. Those same modes of analysis, applied to the general removal statute now codified at 28 U.S.C. § 1441(a), require the same conclusion. Indeed, the text of § 1441(a) makes clear that counterdefendants may not remove counterclaims, regardless of whether they are plaintiffs—as in *Shamrock Oil*—or third parties.

In the 70 years since its enactment, courts have consistently read § 1441(a) to apply only to defendants sued by plaintiffs and not to derivative defendants. Legal commentators like Wright and Miller and the members of the American Law Institute have joined this consensus view. And despite amending the general removal statute multiple times, most recently in 2011, Congress has never expanded § 1441(a) to permit removal of cases outside the federal courts' original jurisdiction or by parties other than "the defendant or defendants."

This Court should not step in where the branch of government charged with setting limits on federal-court jurisdiction has chosen not to tread.

A. *Shamrock Oil*'s Analysis Applies with Equal Force to Derivative Defendants.

In *Shamrock Oil*, this Court recognized that in determining the bounds of removal jurisdiction, Congress balances a host of competing considerations—and that when that balance shifts, Congress changes the language of the removal statutes. *Shamrock Oil* involved the general removal statute passed in 1887, which replaced the words "either party" in the previous statute with the phrase "the defendant or defendants." 313 U.S. at 104-05. With this change, the Court explained, Congress

intended "to narrow the federal jurisdiction on removal." *Id.* at 107.

The Court also found the context surrounding the 1887 legislation significant: Specifically, while Congress narrowed the general removal authority to "defendants," it retained a specific provision from the previous statute that allowed *any* out-of-state litigant, including a plaintiff, to remove if "he will not be able to obtain justice in [the] State court." *Id.* at 106-07 & n.2. This fine-tuning of removal authority convinced the Court that Congress had precise tools at its disposal for striking the balance it deemed appropriate.

This Court found it particularly important to defer to the balance Congress struck because jurisdiction raises considerations of federalism and comity: "Due regard for the rightful independence of state governments," this Court explained, "requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 108-09.

Home Depot suggests that the central concern of *Shamrock Oil* was "the rights of the plaintiff"—that this Court crafted a "rule" to ensure that plaintiffs get one, but not "two bites at the federal-election apple." Pet. Br. 17, 29. But *Shamrock Oil* did not craft the "rule" governing removal; Congress did. And under the rule Congress crafted, many plaintiffs don't get *any* bites at the federal-election apple. Like Citibank in this case, for example, many plaintiffs have no choice but to file suit in state court because their controversy is not one over which the federal district courts have original jurisdiction—and Congress

decided not to permit removal based on a defense or counterclaim.

Shamrock Oil held that the removal statute did not permit a plaintiff to remove based on a counterclaim, period. This Court did not distinguish between plaintiffs whose claims qualified for federal jurisdiction but chose to file in state court anyway (those who had one bite at the apple), and plaintiffs whose claims had to be filed in state court due to a lack of federal jurisdiction (those with no bites)—-because Congress made no such distinction in the statute. *See Shamrock Oil*, 313 U.S. at 108 (no evidence that Congress "intended to save a right of removal to some plaintiffs and not to others").

Contrary to Home Depot's characterization, *Shamrock Oil* did not "focus[] on the rights of a plaintiff" or "the role of the plaintiff as distinct from the defendant," Pet. Br. 17. It focused on the text of the statute and the importance of preserving the balance between state and federal courts that Congress had struck.

Those same considerations counsel that counterdefendants—be they plaintiffs or third parties—may not remove under today's general removal statute, 28 U.S.C. § 1441(a). Allowing counterdefendants to remove claims pled against them by defendants, as Home Depot advocates, would thwart Congress' intent as reflected in the text of § 1441(a), is at odds with the broader context of removal statutes, and would upset the balance between federal and state courts.

B. The Text of § 1441(a) Does Not Authorize Additional Counterdefendants to Remove Civil Actions.

The current general removal provision—28 U.S.C. § 1441(a)—is the successor to the statute considered in *Shamrock Oil*. Enacted seven years after that decision, the provision remains unchanged to this day: "Except as expressly provided by act of Congress, 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." Revised Judicial Code of 1948, Ch. 646, 62 Stat. 869. Like the *Shamrock Oil* statute, § 1441(a) makes clear that counterdefendants may not remove.

1. Section 1441(a) limits removal to cases in which federal courts "have *original* jurisdiction." 28 U.S.C. § 1441(a) (emphasis added). This Court has long held that the purpose of this limitation is to permit removal only where *the plaintiff's complaint* could have been filed in federal court. *See, e.g.*, *Mexican Nat'l R.R. Co. v. Davidson*, 157 U.S. 201, 208 (1895) (diversity jurisdiction); *State of Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 461-62 (1894) (federal question jurisdiction).

This "original jurisdiction" requirement, which Congress first added to the general removal statute in 1887, was a "radical" change; earlier jurisdictional statutes contained no such limitation. *Davidson*, 157 U.S. at 208. Before 1887, this Court had repeatedly held that removal could be based on the claims of "either party." *Planters' Bank*, 152 U.S. at 460. By changing the statute to "confin[e] the suits which

might be removed to those of which" federal courts are "given original jurisdiction," Congress essentially overruled those cases. *See Davidson*, 157 U.S. at 208. Since then, in case after case, this Court has reiterated that removal jurisdiction must be assessed solely based on *the plaintiff's* complaint—could the plaintiff have filed its complaint in federal court? *See, e.g.*, *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 & n.9 (1983); *Planters' Bank*, 152 U.S. at 464. Allegations made by the defendant—whether in an answer or a counterclaim—are irrelevant. *See Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009) ("[A] counterclaim . . . does not provide a key capable of opening a federal court's door."); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 & n.2 (2002) (Scalia, J.) ("[A] counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for [federal] jurisdiction.").[6]

Section 1441(a) is the successor to the 1887 removal act. To this day, it still limits removal to cases within the "original jurisdiction" of the federal courts. Where Congress has wanted to make an exception to this rule and permit removal based on a defense or a counterclaim, it has said so. *See infra* 30-

[6] The one very rare exception to this rule is "when a federal statute wholly displaces the state-law cause of action through complete pre-emption" because, in that case, the plaintiff's claim, "even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

31. In asking this Court to permit removal under § 1441(a) based on a defendant's counterclaim, Home Depot is effectively asking the Court to ignore the limits Congress imposed—to write the words "original jurisdiction" out of the statute. This Court should decline to do so.

2. Home Depot's contention that third parties may remove cases based on counterclaims not only violates § 1441(a)'s restrictions on *what* can be removed—only civil actions within federal courts' original jurisdiction—but it also violates the statute's restrictions on *who* can remove. Section 1441(a) limits removal authority to "the defendant or the defendants" to a "civil action." 28 U.S.C. § 1441(a). And the ordinary meaning of the word "defendant" in the removal context is a party sued in a plaintiff's complaint—it does not include a third party joined by the defendant.

Scores if not hundreds of cases dating back over fifty years all agree on this meaning of the word "defendant." *See, e.g.*, *White v. Baltic Conveyor Co.*, 209 F. Supp. 716, 719 (D.N.J. 1962) ("Sec. 1441(a) does not utilize the words 'third-party defendant,' but merely uses the word 'defendant.' To define the word defendant to mean not only the defendant in an original complaint but in addition a third-party defendant would be an unwarranted act of judicial legislation."); *Fiblenski v. Hirschback Motor Lines, Inc.*, 304 F. Supp. 283, 285 (E.D. Ark. 1969) ("[T]he reference in the general removal statute, § 1441, is only to plaintiff's defendants[.]" (quoting 1A Moore's Federal Practice (2d ed.) 263-64 n.8)); *Share v. Sears,*

Roebuck & Co., 550 F. Supp. 1107, 1108-09 (E.D. Pa. 1982) (same).

More recent cases have commented on the near-unanimity of this understanding. *E.g.*, *Mach v. Triple D Supply, LLC*, 773 F. Supp. 2d 1018, 1050-51 (D.N.M. 2011) ("courts have consistently interpreted" *Shamrock Oil* to preclude removal by derivative defendants, citing appellate and district court cases); *BJB Co. v. Comp Air Leroi*, 148 F. Supp. 2d 751, 752 (N.D. Tex. 2001) ("[D]istrict courts throughout the country have, in relative unison, determined that third-party defendants are not defendants within the meaning of § 1441(a)[.]" (collecting cases)); *Bank of New York Mellon v. Cioffi*, No. 15-13935, 2016 WL 3962818, at *7 (D. Mass. July 21, 2016) (surveying the caselaw and reporting that the "Court [has not] been able to locate any decision from any circuit permitting an additional counterclaim defendant to remove pursuant to § 1441(a)").

Treatises and commentators, too, consistently define "defendant" in the removal context the same way. *See* 16 Moore's Federal Practice § 107.11[1][b][iv], at 107-31 (Matthew Bender 3d ed. 2000) ("[T]hird-party defendants are not defendants within the meaning of the removal statute[.]"); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3731 (3d ed. 1998) ("Nor can third-party defendants brought into the state action by the original defendant exercise the right of removal to the federal court[.]").

Home Depot argues that instead of using the well-established definition of "defendant" in the removal

context, this Court should define "defendant" in accordance with its use in the Federal Rules of Civil Procedure. But, contrary to Home Depot's assertion, the Federal Rules also use the word "defendant" to mean a party sued by the plaintiff; when the Rules apply to counterclaim or third-party defendants, they say so expressly. Rule 30, for instance, provides that absent a stipulation between the parties, a party must get leave of the court to take a deposition if it "would result in more than 10 depositions being taken . . . by the plaintiffs, or by the defendants, *or by the third-party defendants*." Fed. R. Civ. P. 30(a)(2)(A)(i) (emphasis added). If the word "defendants" automatically included third-party defendants, Rule 30 would not need to specify that the Rule counts depositions taken by both defendants *and* third-party defendants.

Home Depot repeatedly cites Rule 12 as demonstrating that the Rules use the word "defendant" to include counterdefendants, but that Rule contains separate provisions governing "a defendant," Fed. R. Civ. P. 12(a)(1)(A), and "a party" answering "a counterclaim or crossclaim," Fed. R. Civ. P. 12(a)(1)(B). Home Depot also relies on an Advisory Committee note to the 1966 amendments, which explains that "for the purpose of" applying the joinder rules to counterclaims and crossclaims, "the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be." Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment. But this note demonstrates that an unadorned reference to

defendants is *not* necessarily understood to include counterdefendants. If it were, counterclaim or crossclaim defendants would not need to be "*regarded as*" defendants for purposes of joinder—they would always already be understood as defendants.

Home Depot also cites *Black's Law Dictionary*, but *Black's*, too, distinguishes between defendants and third-party defendants. *Black's* does not list third-party defendants as a subcategory of defendants, but defines "third-party defendant" separately as its own term. *See Black's Law Dictionary* (10th ed. 2014) (Westlaw); *see also id.* at Guide to the Dictionary (explaining that Black's uses subentries to collect related terms).

3. Congress likewise uses the word defendant in accordance with how it has always been used in this context—a party sued by the plaintiff. Where Congress intends a statute to apply to counterdefendants, it says so expressly. Take, for example, the America Invents Act (AIA), enacted in 2011. There, Congress provided that with respect to certain patent actions, "parties that are accused infringers may be joined in one action as defendants *or counterclaim defendants*." 35 U.S.C. § 299 (emphasis added). In § 1441, on the other hand, which Congress also amended in 2011, Congress didn't allow "defendants or counterclaim defendants" to remove. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(A), 125 Stat. 758 (enacted Dec. 7, 2011). Section 1441(a) continues to limit removal to just "defendants." This is a distinction that makes a

difference, and § 1441(a) should be interpreted accordingly.

4. Home Depot's arguments to the contrary are meritless. First, Home Depot asserts that "[d]etermining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim itself." Pet. Br. 23. But that's not what the statute says. Section 1441(a) authorizes the removal of "any *civil action*," not any claim. 28 U.S.C. § 1441(a) (emphasis added). A "civil action" is an entire case; a claim is merely a demand for relief—perhaps one of many—made within the case. *See Black's Law Dictionary* (10th ed. 2014) (Westlaw) (defining "action" as a "judicial proceeding" and "claim" as "a demand for money, property, or a legal remedy to which one asserts a right"); *Carey v. Bank of Am., N.A.*, 904 F. Supp. 2d 617, 619 (N.D. Tex. 2012) (citing cases).

Where Congress has intended that removal be analyzed by claim, rather than the civil action as a whole, it has said so. Indeed, in contrast to § 1441(a), which authorizes removal of "any civil action" that falls within the district court's "original jurisdiction," § 1441(c) authorizes removal of civil actions if they "include[]" certain kinds of "claim[s]," 28 U.S.C. § 1441(c). This distinction between claims and civil actions occurs throughout the removal statutes, with some statutes—like § 1441(a)—authorizing removal only of entire civil actions, while others authorize removal on a claim-by-claim basis. *See infra* 30-31. This Court should reject Home Depot's contention

that § 1441(a) should be analyzed on a claim-by-claim basis, contrary to its text.

Second, Home Depot's argument that the word "defendant" must include any party that can possibly be given a label containing the word defendant is inconsistent with its own concession that counterdefendants who are also original plaintiffs cannot remove under § 1441(a). *See* Pet. Br. 2, 15, 20. To reach Home Depot's interpretation, one would have to assume not only that § 1441(a) deviates from the longstanding interpretation of the word "defendant," but also that the statute contains an unwritten limitation—that, despite authorizing removal by "the defendant or defendants," full stop, it should be read as if it authorized removal by "the defendant or defendants who are not also plaintiffs." In contrast, if "defendant" is interpreted as it has always been interpreted—as a party sued by the plaintiff—no additional words need be read into the statute.

Finally, Home Depot argues that "defendant" can't be limited to parties sued by the plaintiff because § 1446—which provides the procedures governing cases removed under § 1441(a)—expressly permits defendants added to a plaintiff's complaint after it was initially served to remove. *See* Pet. Br. 21. But a party whom the plaintiff adds to the complaint after it is initially filed is still a party sued by the plaintiff.

Indeed, § 1446 *supports* the argument that a "defendant" for purposes of § 1441(a) is limited to someone sued by the plaintiff. Section 1446(c)(1) provides that a case may not be removed on the basis

of diversity "more than 1 year after commencement of the action, unless the district court finds the plaintiff has acted in bad faith" to prevent removal. 28 U.S.C. § 1446(c)(1). If additional counterdefendants were permitted to remove based on counterclaims, it would make no sense for this provision to be limited to the plaintiff's bad faith. Presumably, if counterdefendants could remove, Congress would also have permitted removal after one year if the *defendant* who filed the counterclaim acted in bad faith to prevent removal of that claim.

C. The History and Statutory Context of § 1441(a) Further Support the Conclusion that Additional Counterdefendants Cannot Remove.

The history and statutory context of § 1441(a) further support the interpretation demonstrated by the statute's text: that the law is limited, authorizing removal only of civil actions that the plaintiff could have originally filed in district court and only by a party sued by the plaintiff.

As discussed above, the general removal statute—§ 1441(a) and its predecessors—have, with one aberration, always been narrowly limited to "defendants"; and since 1887, they have been further limited to cases that fall within the original jurisdiction of the federal courts. *See supra* 18-24.

In contrast, when Congress has wanted to authorize broader removal for certain categories of cases, it has passed specific statutes doing so explicitly. For example, the bankruptcy removal

statute provides that "*[a] party* may remove *any claim or cause of action* in a civil action . . . to the district court for the district where such civil action is pending, if such district court has *jurisdiction of such claim or cause of action* under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added); *see* Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. 1037, 1053 (1997) (citing cases demonstrating that unlike § 1441(a), the bankruptcy removal statute permits derivative defendants to remove); *Lead I JV, LP v. N. Fork Bank*, 401 B.R. 571, 588 (E.D.N.Y. 2009) (explaining that the statute's reference to removal of a "claim or cause of action" indicates that some claims may be removed without others).

Similarly, Congress has authorized broad removal in patent litigation under the AIA, which provides that "*any party*" may remove "[a] civil action in which any party asserts a *claim for relief* arising under any Act of Congress relating to patents, plant variety protection, or copyrights." 28 U.S.C. § 1454(a) (emphasis added). The whole point of this provision (and similar provisions amending the statutes governing original and appellate jurisdiction over patent claims) was to override this Court's decision in *Holmes Group v. Vornado* that a patent counterclaim could not serve as the basis for federal jurisdiction. *See Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 644 (Fed. Cir. 2015).

The bankruptcy removal statute and the AIA demonstrate that when Congress wants to expand

removal jurisdiction to counterclaims or derivative defendants, it knows how to do so—and it does so using broad words much different from the limited language found in § 1441(a).

D. Congress Has Declined to Amend § 1441(a) to Permit Removal by Derivative Defendants.

The removal statutes are not obscure provisions hidden in a dusty corner of the U.S. Code to which Congress rarely pays attention. Congress has amended them more than ten times since 1965. Yet, while Congress repeatedly changed other provisions in § 1441, the language of § 1441(a) has remained untouched since 1948—even as court after court has joined the consensus that only defendants sued by a plaintiff may remove under this statute.

Where judicial opinions demonstrate that a removal statute has struck a different balance than Congress would prefer, it has changed the law. When Congress wanted to limit the basis for removal to the plaintiff's complaint, it added the "original jurisdiction" requirement. *See supra* 22-24. When it wanted to broaden removal jurisdiction for patent cases to encompass counterclaims after this Court's decision in *Holmes*, it passed the "*Holmes* fix"—the AIA. *See supra* 31. In the seventy-eight years since *Shamrock Oil*—in all the decades during which courts have interpreted the case (and, more generally, the text of § 1441(a)) to limit removal authority to defendants sued by plaintiffs—Congress has never implemented a "*Shamrock Oil* fix."

And that's not because Congress wasn't aware of this judicial consensus. In fact, Congress discussed a

proposal to amend the statute to permit counterdefendants to remove. *See Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary on S. 1876*, 92nd Cong. 14 (1971) (proposed § 1304(c) would have provided that "[a] counterclaim asserted in a state court shall be deemed an action for purposes of this section"); *id.* at 80 (noting that this provision "changes existing law by treating a plaintiff defending a counterclaim in a state court or a third party impleaded on such a counterclaim as a defendant for purposes of removal"). If Congress agreed with Home Depot that *Shamrock Oil* was broken, it knew how to fix it. It just chose not to.[7]

In *Shamrock Oil*, this Court honored Congress' choice to limit removal jurisdiction to defendants even if it meant that some plaintiffs who could not file in federal court originally would not get the chance to remove there either. *See Shamrock Oil*, 313 U.S. at 108. Congress has since repeatedly chosen to retain the limitations on removal in § 1441(a). This Court should honor that choice. If Home Depot and its *amici* believe such a result is unfair, they should bring those concerns to Congress.

---

[7] While in the 1970s the American Law Institute suggested amending the removal statutes to allow counterdefendants to remove, later the A.L.I. position evolved. And in its more recent statements, it has recommended against such a move. A.L.I., Federal Judicial Code Revision Project 325, 351 (2004).

E. Accepting Home Depot's Position Would Lead to Absurd Results.

Reinterpreting § 1441(a) to drastically broaden removal jurisdiction beyond what its text allows would have troubling consequences. For one thing, adopting Home Depot's position would "make hash" not just of the removal statutes, but of the entire U.S. Code. *See First Bank*, 598 F.3d at 917 (Easterbrook, J.). The word "defendant" appears in 490 federal statutes, excluding Title 18, the criminal provisions. To rule that Congress, without any indication in the text of § 1441(a), intended to expand "defendant" to include counterdefendants begs the question of whether "defendant" has a similarly expansive meaning in all other statutes in which the term appears. Not only would such a radical reinterpretation of the word "defendant" spawn satellite litigation, but it would disturb the reliance interests of Congress and all those who seek to follow its laws, for "it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes." *Id.*

Furthermore, accepting Home Depot's invitation to drastically expand removal jurisdiction under § 1441(a) would allow a huge number of individual, state-law cases into federal court. After all, Home Depot's proposed expansion isn't limited to class action counterdefendants, or even counterdefendants at all—Home Depot asks this Court to expand removal authority to "[a]ny party brought into the state-court forum involuntarily." Pet. Br. 21. This would include any counterdefendant, any third-party

defendant, any insurance company or product manufacturer or alleged co-tortfeasor that a defendant thought to implead.

Indeed, the judicial consensus that derivative defendants may not remove long predates CAFA and arose primarily through individual cases where a defendant sought removal after impleading a third-party defendant from another state. And while there have been few instances of class actions that would be removed if only Home Depot's view of § 1441(a) were the law, *see infra* 55-56, there are many examples of individual product liability or personal injury cases that would have ended up in federal court because a defendant sought indemnification from an insurer, product manufacturer or other third party located in another state—third parties who, under Home Depot's view, would all be "defendants" entitled to remove. *See, e.g.*, *White*, 209 F. Supp. at 717 (insurance carrier should cover negligence claim); *Fiblenski*, 304 F. Supp. at 284 (one of two drivers in car crash impleaded tire manufacturer); *Share*, 550 F. Supp. at 1108 (merchant's third-party claim against manufacturer of allegedly defective lawn mower). This cannot be what Congress intended.

Moreover, changing the meaning of the word "defendant" and allowing counterclaims or third-party claims to become the basis for removal in derogation of the "original jurisdiction" rule would make it much easier to manipulate federal jurisdiction. Defendants in low-value state-law cases who preferred to litigate in federal court could do so just by pleading a barely-nonfrivolous counterclaim or third-party claim over which there would be federal jurisdiction. *See Lewis v. Windsor Door Co.*, 926 F.2d

729, 732 (8th Cir. 1991) (in personal injury action involving defective door on military base, door manufacturer's third-party claim against United States for indemnification could not create diversity jurisdiction because "[a]ny other rule would encourage parties to make improvident removals and then attempt to cure them by impleading a party that supplied jurisdiction").

If any rebalancing of interests needs to be done between federalism and consistency on the one hand, and fairness to derivative defendants on the other, Congress and not this Court is charged with striking that balance. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation" that would "give the district courts power the Congress has denied them." *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). Congress has ascribed a consistent meaning to the word "defendant" in removal statutes for 230 years. Home Depot's position would not only rewrite long-established law about what the word "defendant" means, it would also require this Court to step into Congress' shoes.

II. CAFA DID NOT CHANGE THE LONGSTANDING RULE THAT COUNTER-DEFENDANTS CANNOT REMOVE COUNTERCLAIMS.

In enacting CAFA, Congress made a series of limited changes to federal-court jurisdiction over class actions in response to specific concerns. One thing CAFA—and its use of the word "any"—did *not* do was change the long-established meaning of the word "defendant." Nor did CAFA alter the general rule that

civil actions may not be removed based on a counterclaim.

A. "Any," Standing Alone, Does Not Upend the Meaning of "Defendant" for Purposes of Removal.

The use of the word "any" in front of "defendant" in 28 U.S.C. § 1453(b) does not alter the longstanding rule that only defendants sued by the plaintiff may remove cases to federal court. The last clause of § 1453(b) provides that certain actions "may be removed by any defendant without the consent of all defendants." Home Depot argues that, by using the word "any" in front of "defendant," § 1453(b) oh-so-subtly undid the settled understanding, discussed above, that only defendants sued by the plaintiff may remove cases to federal court.

But the clause merely removes the requirement that all defendants consent to removal where a case is subject to CAFA jurisdiction. 28 U.S.C. § 1453(b). Indeed, the Chamber of Commerce and its co-*amici* agree that the purpose and effect of this clause is to loosen the consent requirement. Chamber Br. 19. Notably, the Chamber Brief does *not* embrace Home Depot's argument that "any defendant" should be given a more expansive meaning.

There is no indication in the text of CAFA that Congress intended, solely through use of the word "any," to upend the settled understanding that the only "defendants" who may remove are those sued by plaintiffs. As this Court has repeatedly pointed out, Congress does not "alter . . . fundamental details . . . in vague terms"; it does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). "Had Congress intended to alter

this fundamental detail . . . we would expect the text of the amended [statute] to say so." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1947 (2016); *see also E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 528 (2014) (Scalia, J., dissenting) ("It would be extraordinary for Congress, by the use of the single word 'significantly,' to transmogrify a statute[.]").

Home Depot's argument to the contrary ignores that this Court has always looked beyond the word "any" in determining the scope of a statute; the Court looks to the statute as a whole to ensure that "the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008); *see also Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer" the question "whether the statutory reference 'convicted in *any* court' includes a conviction entered in a foreign court"). For example, while "any person" is "broad enough to comprehend every human being," in a certain statute, it referred only to persons over which the state had jurisdiction. *United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C.J.).

"[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them." *Id.* Here, Congress passed CAFA against the backdrop of a well-established meaning of the word "defendant" in the removal context. It gave no indication that by ensuring that *any* defendant could remove without the consent of *every* defendant, it intended to change the longstanding meaning of the word defendant.

B. Congress' Specific Objectives in Passing CAFA Did Not Include Allowing Removal of Class Counterclaims.

1. The history of CAFA's passage confirms that Congress did not intend to undo the well-established understanding that only defendants may remove actions to federal court. Congress passed CAFA to accomplish three broad purposes: "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(1)-(3), 119 Stat. 4. With three competing objectives, CAFA was a balancing act.

There's no doubt, to accomplish these objectives, Congress expanded federal jurisdiction over certain class actions. But, notwithstanding the cherrypicking by Home Depot and its *amici* of comments in the legislative debate that criticized state courts (ignoring the comments in support of state court class actions), Congress did not pass a statute simply stating that "federal courts will have jurisdiction over all class actions, without limit." Instead, Congress enacted a "narrowly-tailored expansion of federal diversity jurisdiction" and "modest amendments to current removal provisions that will make it harder for counsel to 'game the system.'" S. Rep. No. 109-14, at 27 (2005).[8]

---

[8] The Senate report was published ten days after CAFA was signed into law, but it accords with the legislative discussions

The Senate report explains that by the "gaming problem," Congress meant two very specific issues with the pre-existing jurisdictional statutes in the context of class actions: (1) the "complete diversity requirement" for removal that allowed plaintiffs to prevent removal simply by joining a single local defendant; and (2) the "amount-in-controversy requirement" that did not permit the aggregation of claims, meaning that some class actions that, all together, involved large amounts of money, did not fall within federal court jurisdiction because no individual plaintiff's claim was more than $75,000. *Id.* at 10. To address these issues, § 4 of CAFA amends 28 U.S.C. § 1332 to grant federal courts original jurisdiction over "interstate class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant; and (b) the amount in controversy exceeds $5 million (aggregating claims of all purported class members, exclusive of interest and costs)." *Id.* at 28.

But federalism demands a balancing act. And in this case, so did our political system. After six years of failed attempts to push the bill through Congress, compromises were made. The compromise bill that emerged in 2004 (and was eventually passed in 2005) "leaves in state court a wide range of class actions" and is "quite discriminating about which class actions will be removed to Federal court." 150 Cong. Rec. S7710 (daily ed. July 7, 2004) (statement of Sen. Dodd). The bill "rests on a delicate bipartisan

---

predating the bill's passage. *See* 150 Cong. Rec. S7567-7710 (daily ed. July 6-7, 2004). And much of what's in the report appeared in House reports for prior versions of the bill. *See, e.g.*, H.R. Rep. 108-144 (2003).

compromise." 150 Cong. Rec. S7565 (daily ed. July 6, 2004) (statement of Sen. Hatch).

As part of the compromise, the Judiciary Committee added a number of provisions to limit CAFA's expansion of federal jurisdiction, including the home state and local controversy exceptions. Under the home state exception, class actions will remain in state court if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). And under the local controversy exception, class actions with a truly local focus, determined by four specific criteria, also remain in state court. 28 U.S.C. § 1332(d)(4)(A).

Throughout the process of settling on CAFA's jurisdictional provisions, Congress did not once—in the statute, in the Senate report, or in seven years of draft bills and congressional hearings—consider changing the "longstanding, near-canonical rule" that a party to a counterclaim is without authority to remove. *Palisades*, 552 F.3d at 334 n.4. In fact, CAFA's provisions expanding federal courts' original jurisdiction repeatedly use the phrase "plaintiff classes," expressly excluding class counterclaims. *See, e.g.*, 28 U.S.C. § 1332(d)(2). This contrasts sharply with statutes like the AIA, discussed *supra,* that were passed with the specific intent to extend federal jurisdiction to cover counterclaims.

2. To complement the expansion of federal jurisdiction, CAFA's § 5 "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. In its

discussion of § 5, the Senate report clarifies that the general removal provisions already in Title 28, *see* 28 U.S.C. § 1441, *et seq.*, "would continue to apply to class actions, except where they are inconsistent" with CAFA's provisions. S. Rep. No. 109-14, at 48. For example, Congress explained that applying § 1441(b)'s complete diversity requirement "would perpetuate the current 'complete diversity' rule for class actions that new section 1332(d) rejects," and therefore is inconsistent, but that the venue provision of § 1441(a) would remain applicable. *Id.* at 48-49.

To reconcile the expanded federal jurisdiction in § 1332(d) with the requirements governing removal, § 5 amended several of the usual removal procedures. Thus, §§ 4 and 5 of CAFA, together, "create three new rules regarding the removal of class actions filed in state court." *Id.* at 29.

> First, any defendant would be able to remove a class action to federal court without the consent of any other defendant. Second, any defendant would be able to remove a class action to federal court, even if that defendant is a citizen of the state in which the action was brought. And third, the current ban on removal of a class action to federal court after one year would be eliminated.

Id.; *see also* 28 U.S.C. § 1453(b) (codification of three new rules).

The Committee explained its intent with regard to the rule permitting removal without the consent of all defendants as follows: "By this provision, it is the Committee's intent to overrule caselaw developed by the federal courts requiring the consent of all parties." S. Rep. No. 109-14, at 49. There is *no* indication

Congress meant this clause to overturn the understanding that only defendants to the original plaintiff's claims may remove.

This Court should be respectful of the significance of Congress' silence in the face of the long-standing and well-established line of cases holding that counterdefendants are not "defendants" for the purposes of removal jurisdiction. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). That is especially true here, where the statute "evidences detailed appreciation of the background legal context" and Congress took care "to reverse *certain* established principles but not others." *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). If Congress wanted to overrule *Shamrock Oil*, it easily could have done so by writing "any defendant or counterclaim defendant" as it did in the AIA or "a party" as it did in the statute governing bankruptcy removal. *See supra* 30-31. But instead, Congress used the term "defendant"—a term with a well-settled meaning.

Congress' intent to leave the ordinary meaning of "defendant" in place is further confirmed by prior, failed attempts to expand removal powers under § 1453. In the proposed Class Action Fairness Act of 2003 (and prior versions), § 1453 allowed removal "by any plaintiff class member who is not a named or representative class member without the consent of all members of such class." S. 1751, 108th Cong. § 5(a) (Oct. 17, 2003). In the 2003 House report, Congress argued "only the named plaintiffs and their counsel have control over the choice of forum" and unnamed

class members should have "the same flexibility to choose the forum" as the named plaintiffs. H.R. Rep. 108-144, at 42 (2003). The provision was deleted in the Judiciary Committee as part of a series of compromises. *See* 150 Cong. Rec. S7569 (daily ed. July 6, 2004) (statement of Sen. Grassley).

This legislative history tells us that Congress contemplated granting removal powers to additional parties but chose not to do so. This rejected proposal also undermines Home Depot's contention that a principled distinction can be made between additional counterdefendants and counterdefendants who are also original plaintiffs. Home Depot argues the latter party "did not select the state-court forum." Pet. Br. at 37. But that's also true of unnamed class members. If Congress wanted every interested party to have a say in the forum, then it wouldn't have deleted the provision granting class members removal power.

Finally, Home Depot claims the term "any defendant" under § 1453 must include counterdefendants because any other interpretation undermines Congress' goal of stopping class action lawyers from gaming the system to avoid federal court. Pet. Br. at 41-43. But Congress' "gaming" concern was specific and doesn't have anything to do with whether counterdefendants may remove: Congress thought defendants must be able to remove without the consent of other defendants "to prevent a plaintiffs' attorney from recruiting a 'friendly' defendant (*e.g.*, a local retailer) who could refuse to join in a removal to federal court." S. Rep. No. 109-14, at 49 (2005); *see also* H.R. Rep. 108-144, at 43 (2003).

3. In short, nothing in CAFA suggests Congress intended to change the well-established law that only

defendants may remove. And what *is* in the legislative history suggests that silence was no mistake. CAFA is the product of seven years of contentious debate and legislative compromises. While CAFA expands federal jurisdiction in certain respects, CAFA only made it through Congress because that expansion was narrowly tailored to remove three specific procedural barriers to removal of interstate class actions—none of which involve counterdefendants. Home Depot may wish that Congress had not made these compromises in passing CAFA and instead passed a simple statute saying "there is federal jurisdiction over all class actions, and any party may remove such cases to federal court," but that was not the statute Congress passed**.**

C. The Use of "Any Defendant" in Other Statutes Does Not Encompass Parties Added to Civil Actions by Counterclaims.

CAFA is not the only statute stating that an action "may be removed by any defendant." In none of those statutes did Congress intend for "any defendant" to refer to counterdefendants. On the contrary, when Congress sought to permit removal by parties other than defendants sued by the original plaintiffs, it said so, and it said so clearly. When Congress uses the same phrase multiple times, Congress is assumed to have intended the same result. Home Depot's argument that CAFA meant to include counterdefendants in "any defendant" would (1) require reading "any defendant" in CAFA differently than in other statutes; or (2) dramatically change the meaning of a host of other statutes. Neither is an acceptable result.

In 2010 (post-CAFA), Congress enacted the SPEECH Act, which sought to eliminate enforceability of foreign judgments against journalists in American courts unless those judgments were consistent with the U.S. Constitution. Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380 (2010). In an effort to expand federal-court jurisdiction over such enforcement actions, Congress used the exact same language it used in CAFA to require only minimal, rather than complete diversity for federal-court jurisdiction. *Compare* 28 U.S.C. § 4103 (SPEECH Act), *with* 28 U.S.C. § 1332(d)(2) (CAFA). The SPEECH Act then provides that the action "may be removed by any defendant . . . without regard to the amount in controversy between the parties." 28 U.S.C. § 4103. There is no indication that § 4103's final clause was intended to do anything other than exactly what it says: eliminate the amount-in-controversy requirement—just as there's no indication that § 1453(b) was intended to do anything other than loosen the consent requirement.

Because both the SPEECH Act's and CAFA's minimal diversity provisions are the same, and both use "any defendant," if Home Depot's argument is accepted, the same language would either have to mean two different things, or both would also have to include derivative defendants. The latter would set the stage for cases where all the plaintiffs and defendants are citizens of the same state, but parties are able to manufacture minimal diversity by bringing barely non-frivolous claims against out-of-state third parties. Nothing indicates Congress was interested in such a result in either statute.

In contrast, where Congress does intend to expand removal authority to parties beyond defendants, it does not do so in such a mousehole as "any." For example, in the AIA—enacted just one year after the SPEECH Act—Congress specifically provided that patent actions "may be removed by any party." 28 U.S.C. § 1454(b)(1) (emphasis added). And, as discussed above, the language of the AIA as a whole evinces congressional intent to address patent claims, not just against defendants, but also against counterdefendants. *See supra* 31; 35 U.S.C. § 299 (addressing "counterclaim defendants"); *MPHJ Tech.*, 803 F.3d at 643 (discussing impact and intent of AIA). In CAFA and the SPEECH Act, on the other hand, there are no indications that Congress meant to expand removal beyond defendants.

Furthermore, at the same time it enacted § 1441—in which "defendant" is universally understood to exclude counterdefendants, *see supra* Part I.B.2—Congress also enacted § 1448, which provides that when a case is removed to federal court before "any one or more of the defendants" has been served, that service of process may be completed, and the section "shall not deprive any defendant" of the right to move to remand. 28 U.S.C. § 1448. Again, nothing indicates that "any" is intended to give "defendant" a different meaning than it has in § 1441, but rather ensures all the defendants' rights are preserved. Every court to have considered whether § 1448 includes third-party defendants has rejected that argument, explaining that, regardless of the word "any," third-party defendants may not move to remand under § 1448. *See Foltz v. Columbia Casualty Co.*, No. 15-1144, 2016 WL 3829144, at *1-*2 (W.D. Okla. July 12, 2016) (defendant and third-party defendant designate

different parties); *H&H Terminals LC v. Ramos Family Tr., LLP*, 634 F. Supp. 2d 770, 776-77 (W.D. Tex. 2009) (same).

Similarly, "defendant" in the general federal venue statute refers only to defendants, not derivative defendants—even though it uses the phrase "any defendant." 28 U.S.C. § 1391(b)(1), (3); 6 Wright, et al., Federal Practice and Procedure § 1445 (3d ed.) ("[T]he statutory venue limitations have no application to Rule 14 claims even if they would require the third-party action to be heard in another district had it been brought as an independent action.").

Finally, as a general matter, Congress frequently uses "any defendant" interchangeably with "a defendant" or "the defendant" within the very same statute—Congress does not use the word "any" with the intent to meaningfully change the scope of "defendant." *See, e.g.*, 15 U.S.C. § 16(a), (g), (h) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom a judgment or consent decree in an antitrust case has been entered); 15 U.S.C. § 78u-4(a)(8), (b)(1), (b)(2)(A), (b)(3)(A), (d), (f)(8)(C) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom a securities action is brought); 42 U.S.C. § 1997e(c), (d), (g) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom prisoner litigation is brought).

Thus, even outside of CAFA, there's no indication that Congress uses "any" instead of "a" or "the" to meaningfully expand what it means by "defendant."

"Any" on its own cannot bear the heavy weight of Home Depot's argument that Congress intended it to alter decades of settled law.

D. CAFA Did Not Alter the Rule that Only Civil Actions that Fall Within the Federal Courts' Original Jurisdiction May Be Removed.

Even if—contrary to its text, legislative history, and statutory context—§ 1453(b) could be read to have silently changed the longstanding rule that counterdefendants are not "defendants" who can remove, there is nothing in § 1453(b) that overrides the limitation on removal to cases within a federal court's "original jurisdiction." There is nothing, therefore, that permits removal based on a counterclaim or defense.

As explained above, CAFA did not create an entirely new, separate removal regime to govern class actions. Under CAFA, class actions continue to be governed by the "general removal provisions"—that is, they continue to be removed pursuant to the general removal statute, § 1441(a), in accordance with the general removal procedures, § 1446. S. Rep. 109-14, at 48. What CAFA did—via § 1453(b)—is make a few surgical changes to the procedures that ordinarily govern removal to address unique problems in the class action context. *See id.*; *supra* Part II.B.[9]

---

[9] This makes perfect sense. Congress didn't need to create a new removal regime because § 1441(a), already provides for removal of civil actions over which federal courts have original jurisdiction. Thus, by expanding original jurisdiction over class actions in § 1332(d), CAFA automatically achieved a

The "original jurisdiction" rule is not one of these changes. Nothing in CAFA purports to eliminate § 1441(a)'s "original jurisdiction" requirement—the requirement that actions may only be removed if the *plaintiff's* claims could have been filed in federal court, that defenses and counterclaims are irrelevant. Home Depot does not even attempt to argue otherwise.[10]

Instead, Home Depot suggests that § 1441(a) doesn't apply to class actions at all; that class actions may be removed directly under CAFA's § 1453(b). *See* Pet. Br. 32. But that reading is not only inconsistent with the text and legislative history of § 1453(b); it would call the provision's constitutionality into question.

Section 1453(b) governs the *procedures* that apply to the removal of class actions: It states that "[a] class action may be removed to a district court of the United States in accordance with section 1446"—the general statute governing removal procedures—and then provides specific exceptions to those procedures. But Home Depot seeks to read this statute as providing removal *jurisdiction*: as independently authorizing the removal of class actions, rather than simply providing the procedures that govern class actions removed under the general removal statute § 1441(a).

---

corresponding expansion in the class actions that could be removed from state court under § 1441(a).

[10] Nor does anything in CAFA change the requirement under § 1441(a) that civil actions get removed in their entirety, not claim-by-claim (or, as Home Depot would have it, counterclaim-by-counterclaim). *See supra* 28-29.

Home Depot's reading would render the statute unconstitutional. By its terms, § 1453(b) applies to *all* class actions. If it were read as an independent source of removal jurisdiction, therefore, it would authorize removal of literally any class action. But the Constitution limits the federal judicial power to certain kinds of cases—primarily those arising under federal law or between citizens of different states. *See* U.S. Const. art. III; *Gunn v. Minton*, 568 U.S. 251, 256 (2013) ("Federal courts are courts of limited jurisdiction," possessing "only that power authorized by [the] Constitution."). Not all class actions are cases over which federal courts may constitutionally exercise jurisdiction. If § 1453(b) is read to extend removal jurisdiction to *every* class action—including those, for example, between citizens of a single state under state law—it would violate the Constitution's limits on the federal judicial power. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 584 (2005) (absent other ground for jurisdiction, Constitution requires "minimal diversity").

It makes much more sense—and avoids constitutional problems—to read § 1453(b) as limited to setting forth the procedure for class actions removed under § 1441(a), rather than as providing independent removal jurisdiction. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (explaining that "[w]hen deciding which of two plausible statutory constructions to adopt," the Court should adopt the construction that does not raise constitutional problems, "whether or not those constitutional problems pertain to the particular litigant before the Court").

In passing CAFA, Congress made clear that this was its intent. Congress did not enact § 1453(b) to authorize removal of *all* class actions. After all, CAFA only grants original jurisdiction where class actions have minimal diversity and over $5 million in controversy; it would have been bizarre if Congress then granted removal jurisdiction over *all* class actions. Rather, it passed § 1453(b) to "establish[ ] the *procedures* for removal of interstate class actions *over which the federal court is granted original jurisdiction* in" CAFA—in other words, the procedures governing class actions removed under § 1441(a). S. Rep. 109-14 at 48 (emphasis added).

And that is exactly what the text of § 1453(b) accomplishes: While § 1453(b) establishes procedures for removal—those provided by § 1446, with limited exceptions—it lacks key information that would be necessary if it were the source of removal jurisdiction. As noted above, § 1453(b) does not identify which subset of class actions within the constitutional limits of the federal judicial power—for example, those over which CAFA grants original jurisdiction—may be removed. *Compare, e.g.*, 28 U.S.C. § 1452(a) (specifying that statute applies only to cases over which the district court has jurisdiction under the bankruptcy statute). Nor does it identify the venue to which cases should be removed. *Compare, e.g.*, 28 U.S.C. § 1441(a) (providing for removal "to the district court of the United States for the district and division embracing the place where such action is pending"); 28 U.S.C. § 1454(a) (same). Construed as a source of removal authority, § 1453(b) authorizes removal of an amorphous, unconstitutionally broad set of cases to an undefined court.

But construed, as Congress intended, as a procedural statute that governs removal of class actions under § 1441(a), § 1453(b) makes perfect sense: § 1441(a) already provides that removal is limited to civil actions over which federal courts have original jurisdiction, and that cases are removed to the district court "embracing the place where" they are "pending." A procedural statute governing the removal of class actions under § 1441 need not restate these limitations; it need only establish procedures. *Cf.* S. Rep. 109-14 at 48 (explaining that class actions—like all other actions removed under § 1441(a)—are subject to § 1441(a)'s venue provision). That's precisely what § 1453(b) does.

CAFA did nothing to alter the basic structure of removal: The source of removal authority for class actions—like other civil actions—continues to be § 1441(a). And under § 1441(a), only a "civil action" within the "original jurisdiction" of the federal courts can be removed. Counterclaims cannot.

III. THE POLICY ARGUMENTS OF HOME DEPOT AND ITS *AMICI* ARE MERITLESS.

The most frequent brick tossed at Mr. Jackson by Home Depot and its *amici* is to allege that Mr. Jackson was forum shopping with the goal of undermining CAFA—completely ignoring that one of the three companies engaged in this coordinated scam chose the forum where Mr. Jackson had no choice but to raise all of his claims. Home Depot suggests that it's just an unwitting bystander to the claim Citibank filed against Mr. Jackson, and accuses Mr. Jackson of using an unrelated lawsuit to bring a counterclaim against it as a "tactic" to avoid CAFA. Pet. Br. 44-45. But Home Depot is hardly a bystander. Citibank,

Home Depot, and CWS were closely interconnected in the water-treatment scheme to defraud Mr. Jackson and other consumers. *See supra* 2-5. The wildly overpriced water-treatment systems sold through deceptive statements and an illegal referral system would be outside of the average homeowner's ability to pay, but for a Home Depot-branded Citibank credit card, with a credit limit that exactly matches the cost of the system. *See supra* 4. Citibank is part of the package deal offered to consumers by Home Depot and CWS, and the prospect of Citibank suing individuals in state court—and those consumers counterclaiming against all members of the scheme—is an entirely foreseeable consequence of the scam.[11]

Given the intertwined roles of the three parties, once Citibank sued Mr. Jackson in state court, the only way to pursue his own claims under North Carolina state law against Citibank was through a counterclaim. And once he filed counterclaims against Citibank, Mr. Jackson had to bring his claims against Home Depot and CWS in the same case, or risk forfeiting them. Put another way, under North Carolina law, his claims against all three parties to the scheme were compulsory. *See Brooks v. Rogers*, 346 S.E.2d 677, 681 (N.C. App. 1986) (claims are related—and therefore compulsory—where they involve "substantially the same evidence" and "there is a logical relationship between" them). Given that

[11] In defense to Citibank's collection action, Mr. Jackson argued that the debt is null and void because the Home Depot/CWS scheme violates the North Carolina Referral Sales statute. As such, even if Mr. Jackson had not brought any counterclaims, it's likely the state court would have had to opine on the legality of the Home Depot/CWS scheme to resolve Citibank's debt-collection claims. *Supra* 7.

these claims are compulsorily related, there is no basis to the allegations of forum shopping or misbehavior by Mr. Jackson. Far from being a tactic to evade federal court, bringing Home Depot and CWS into this action was the appropriate step for Mr. Jackson to protect his rights under North Carolina law.

Home Depot argues that allowing the Fourth Circuit's opinion in this case to stand will create "a giant loophole," through which a "very substantial proportion of class actions" could be diverted from federal to state court. Pet. Br. 42. Given that all four of the Courts of Appeals to consider this question since CAFA passed in 2005 have agreed with the decision below, one would have expected a large number of cases to be filed fulfilling these dire prophecies. No such flood of cases has manifested. In fact, Home Depot only cites one (another case involving an analogous water-treatment scam). Pet. Br. 45. Home Depot warns of a "tip of an approaching iceberg," *id.* at 44 (citation omitted), but the reality seems to be more of an ice cube.

The Chamber of Commerce, similarly, claims to identify a number of cases showing a "counterclaim end-run around CAFA," Chamber Br. 22, but the handful of cases it cites largely do not support this claim. *E.g.*, *Wells Fargo Fin. S.C., Inc. v. Mack*, No. 18-1479, 2018 WL 3687978 (D.S.C. July 13, 2018) (no class counterclaim in state court; case remanded because pro se defendants failed to comply with the federal rules); *Hart v. Knockerball MidMo*, LLC, No. 18-cv-04147, 2018 WL 4997650 (W.D. Mo. Oct. 15, 2018) (also not a class action; third-party defendants

alleged federal question, not diversity, jurisdiction, and court rejected that claim).

On the other hand, if this Court were to grant Home Depot's request to expand § 1441(a) to allow derivative defendants to remove, that *would* likely lead to many more cases coming into federal court. But they wouldn't be class actions: They would be a large number of individual cases, posing purely issues of state law. *See supra* Part I.E.

Finally, Home Depot argues that the application of the *Shamrock Oil* rule to counterdefendants is counter to the intent of CAFA. Pet. Br. 41-46. This argument stems from an absolutist view of CAFA, in which all state courts are always wrong to hear any class action. If Congress held this view, it could have expanded federal jurisdiction over class actions to the extent of its constitutional powers. But it chose not to do so. While Congress expanded federal diversity jurisdiction over class actions in a number of ways, the final legislation was a compromise. *See supra* Part II.B. Earlier versions would have created federal jurisdiction over more cases than did the final version. *See id.* The Chamber colorfully describes CAFA as the product of a "grinding eight-year effort." Chamber Br. at 14. The Chamber may have preferred a quick victory in which the parties seeking to federalize as many cases as possible had won every battle, but that is not what happened. This Court should not expand federal jurisdiction in additional ways not included in the actual legislation that passed.

IV. THIS COURT SHOULD AFFIRM THE DECISION BELOW ON THREE ADDITIONAL GROUNDS.

There are three additional reasons why this Court should affirm the decision below. Indeed, these grounds for affirmance are sufficient to permit this Court to affirm the decision below without even having to wade into questions about whether it should overrule decades of precedent that has spawned scores of cases and involves an intricate web of jurisdictional statutes.

First, even if, in general, counterdefendants may remove class counterclaims, CAFA specifically exempts local controversies from federal-court jurisdiction. *See* 28 U.S.C. § 1332(d)(4)(A). This case is exactly the kind of local controversy Congress exempted. Second, Home Depot failed to demonstrate that Mr. Jackson's counterclaims satisfy the amount in controversy required for CAFA jurisdiction. And, finally, CAFA requires that any appeal of a remand order be decided within sixty days or denied. *See* 28 U.S.C. § 1453(c)(2). The appeal here was not decided within sixty days. The Court of Appeals, therefore, was required to deny it.

A. Even if counterdefendants could remove civil actions, the district court here was required to decline jurisdiction under CAFA's local controversy exception. That exception states that a court "shall decline to exercise jurisdiction" over a class action where four criteria are met: (1) "greater than two-thirds of the members of all proposed plaintiff classes . . . are citizens of the State in which the action was originally filed"; (2) "at least" one defendant "from whom significant relief is sought" and "whose alleged

conduct forms a significant basis for the claims" is "a citizen of the State in which the action was originally filed"; (3) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed"; and (4) "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A).

This case meets each of these criteria. First, the class Mr. Jackson seeks to represent is people who purchased water-treatment systems from Home Depot and CWS in the state of North Carolina. JA62. Home Depot's own records show that out of 286 North Carolina purchasers, 259 have North Carolina addresses. Dist. Ct. Dkt. No. 42-1, at 5-15. In other words, approximately ninety percent of the proposed class—far more than the two-thirds required by the local controversy exception—are citizens of North Carolina. *Id*. Second, "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims"—CWS—is a citizen of North Carolina. Dist. Ct. Dkt. No. 24, at 16-17. Third, it's undisputed that the principal injuries of the alleged North Carolina water-treatment scheme occurred in North Carolina. *Id.* at 18-19. And, finally, no other class action asserting similar factual allegations against Home Depot or CWS was filed in the three years preceding Mr. Jackson's counterclaims. *Id.* at 19.

This is the quintessential local dispute: claims under North Carolina law brought by a North

Carolina class against at least one North Carolina defendant for conduct that occurred entirely in North Carolina. CAFA mandates that federal courts decline jurisdiction over this kind of dispute. Therefore, even if counterdefendants could remove civil actions, Home Depot could not remove this one. This Court, therefore, may affirm the decision below on this ground alone.

B. Furthermore, Home Depot failed to demonstrate that the case meets the $5 million jurisdictional threshold for class actions removed based on diversity. *See supra* 8-9. Based on the damages each class member would be likely to claim, to meet the $5 million threshold, there would have to be over 1500 class members. *Id.* There are 286. *Id.*

C. Finally, although—unlike ordinary remand orders—orders remanding a class action may be appealed, CAFA mandates that if a Court of Appeals does not "complete all action" on an appeal within "60 days after the date on which such appeal was filed," the appeal "shall be denied." 28 U.S.C. § 1453(c). The reason for this limitation is to ensure the opportunity for a body of appellate law to develop interpreting CAFA "without unduly delaying the litigation of class actions." S. Rep. 109-14, at 49; *see Dart Cherokee*, 135 S. Ct. at 556 n.6 (explaining that the reason for this provision is "to promote expedition").

Here, Home Depot filed its appeal of the district court's remand order on March 31, 2017, and the Fourth Circuit did not render judgment until January 22, 2018—far more than sixty days after the appeal was filed. App. 1a. Therefore, under CAFA, the Court of Appeals was required to deny the appeal. This too provides an alternative ground for affirmance.

CONCLUSION

The judgment for the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

BRIAN WARWICK
Counsel of Record
JANET VARNELL
DAVID LIETZ
VARNELL & WARWICK, P.A.
P.O. BOX 1870
Lady Lake, FL 32158
(352) 753-8600
bwarwick
@varnellandwarwick.com

RASHAD BLOSSOM
BLOSSOM LAW PLLC
225 E. Worthington Avenue
Suite 200
Charlotte NC 28203
(704) 256-7766

DANIEL K. BRYSON
JOHN HUNTER BRYSON
WHITFIELD BRYSON & MASON LLP
900 W. Morgan Street
Raleigh, NC 27603
(919) 600-5000

F. PAUL BLAND
KARLA GILBRIDE
LEAH M. NICHOLLS
ELLEN NOBLE
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600

JENNIFER BENNETT
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8213

Counsel for Respondent

December 10, 2018