No. 16-1205

IN THE

Supreme Court of the United States

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

Petitioner,

v.

MICHAEL BAUER AND STACEY BAUER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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The Chamber of Commerce of the United States of America (the "Chamber") hereby moves, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The Chamber is filing this motion because the Respondents, Michael Bauer and Stacey Bauer, declined to consent to the Chamber's filing of its brief. Petitioner has consented. A copy of the proposed brief is attached.

As more fully explained in the proposed brief's "Interest of *Amicus Curiae*" section, *amicus* is the world's largest federation of businesses and business associations. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus curiae* briefs in cases raising issues of vital importance to the business community.

Because the Chamber's members operate in nearly every industry and business sector in the United States, they are frequently defendants in large interstate class actions in which the existence of federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") is at issue. These members have a strong interest in ensuring that the rules governing removal of class actions to federal court are applied fairly and in keeping with Congress's intent to establish federal courts as the forum of choice for class actions of national importance.

In addition, the Chamber was involved—on behalf of its members—in organizing support for the much-needed class-action reforms reflected in CAFA. As a result, the organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation.

Accordingly, the Chamber respectfully requests that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and business associations. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus curiae* briefs in cases raising issues of vital importance to the business community.

Because the Chamber's members operate in nearly every industry and business sector in the United States, they are frequently defendants in large interstate class actions in which the existence of federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") is at issue. These members have a strong interest in ensuring that the rules governing removal of class actions to federal court are applied fairly and in keeping with Congress's intent to establish federal courts as the forum of choice for class actions of national importance.

In addition, the Chamber was involved—on behalf of its members—in organizing support for the much-needed class-action reforms reflected in CAFA. As a result, the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, and its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation.

Accordingly, the question presented—*i.e.*, whether defendants in the posture Home Depot finds itself here are statutorily prohibited from invoking CAFA's removal provisions—is of significance and widespread importance to the Chamber and its members. The Seventh Circuit's decision not only misconstrues CAFA's removal provision, but it creates an enormous loophole in the statute, which enterprising plaintiffs' lawyers have been exploiting and will continue to exploit. Reversal of the judgment below is urgently needed to restore proper removal practice and ensure appropriate access to federal judicial review.

SUMMARY OF ARGUMENT

In 2005, our nation took an important step toward ending class action abuse with the enactment of CAFA. The preceding decade had seen an exponential increase in the number of class actions filed. By including a single plaintiff from their chosen jurisdiction, plaintiffs' lawyers were able to bring interstate class actions involving tens or even hundreds of millions of dollars in a select number of state courts that came to be known as "'magnet' jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements that primarily benefited plaintiffs' lawyers. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions.

The Seventh Circuit's decision threatens to erase these critical advances and revive magnet jurisdictions by barring counterclaim defendants from invoking CAFA's removal provisions. While hard cases may arise where the plain text and the purpose of a statute appear to conflict, this is an easy one where both the statutory text and the statutory purpose provide a straightforward answer. CAFA provides:

> A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b).

CAFA therefore permits removal under the same procedures that apply under 28 U.S.C. § 1446, *i.e.*, the general removal statute, but modifies those procedures to eliminate the 1-year limitation, to allow removal from a defendant's home state, and to allow "any defendant" to remove "without the consent of all defendants." 28 U.S.C. § 1453(b). Home Depot is a defendant in every sense of the word. And the case brought against Home Depot is precisely the sort of action in which Congress intended to allow removal when it enacted CAFA. But the lower courts, including the Seventh Circuit here, have "torture[d] 'the language of the statute when a simple, straightforward reading obviates the necessity of making such semantic contortions.'" *BWP Media USA, Inc. v. Clarity Digital Grp., LLC*, 820 F.3d 1175, 1179 (10th Cir. 2016) (citation omitted).

The Seventh Circuit claimed that it needed to treat Home Depot as if it had initiated the case in state court because Congress enacted CAFA against the backdrop of *Shamrock Oil & Gas Corporation v. Sheets*, 313 U.S. 100 (1941). But it is common ground that *Shamrock Oil* construed the general removal statute to bar only the original *plaintiff* from shifting the case to federal court. And Home Depot was never a plaintiff—only a defendant as to the Bauers' counterclaim. The Seventh Circuit's real concern was that allowing genuine defendants like Home Depot to remove class actions would be out of step with the lower courts' expansion of *Shamrock Oil*—an expansion this Court has not endorsed. There is no basis for presuming, however, that Congress incorporated this developing body of law into Section 1453(b).

Regardless, the textual differences between CAFA and Section 1446 negate any presumption that Congress adopted these lower-court decisions. The term "any," which CAFA employs, expansively sweeps away any limitation courts may have read into the definite article "the," which Section 1446 uses.

The Seventh Circuit's reliance on policy concerns to rewrite CAFA is even more inappropriate. Congress plainly granted Home Depot the authority to remove this class action to federal court. Moreover, interpreting CAFA in accordance with its ordinary meaning advances the statute's purpose. CAFA was enacted to curb abusive class action litigation tactics by ensuring a federal forum for interstate class actions of national importance. *See Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1350 (2013). For that reason, this Court has held that CAFA overrides the antiremoval presumption, replacing it with

a presumption in favor of removal jurisdiction. *See Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). In other words, by barring defendants like Home Depot from removing class actions to federal court, the lower courts have it backwards—the policies underlying CAFA support removal jurisdiction.

Unfortunately, this is not simply an academic matter; the decision below and others like it provide a roadmap for plaintiffs' lawyers seeking to evade CAFA removal. All they have to do is bait a corporation into pursuing debt collection or other small claims litigation in state court and then use that action as a platform to launch a counterclaim class action. This tactic can be replicated easily. Indeed, this type of maneuver is being used with increasing frequency.

The Seventh Circuit's erroneous interpretation of CAFA creates an enormous loophole that undermines the statute's primary objective. If left uncorrected, the ruling will enable plaintiffs' lawyers to force defendants to litigate massive class actions in the very same "magnet jurisdictions" that prompted Congress to enact CAFA in the first place. Review is therefore warranted to address this systematic effort to undermine CAFA's class-action reforms.

ARGUMENT

The Court should grant certiorari for two reasons. First, the Seventh Circuit's interpretation of CAFA conflicts with the statute's text, structure, purpose, and history. CAFA expressly allows counterclaim defendants like Home Depot to remove large class actions to federal

court. Second, it is critically important that the Court hear this case. If left uncorrected, this decision will allow plaintiffs' lawyers to resurrect the abusive class-action litigation tactics CAFA was enacted to end.

I. The Seventh Circuit's Interpretation Of CAFA Is Plainly Incorrect.

The courts that have considered the question have made it appear complex. But the law is straightforward: a state-court class action that otherwise complies with CAFA "may be removed by any defendant without the consent of all defendants." 28 U.S.C. § 1453(b). Home Depot is a defendant in the class action the Bauers filed in Illinois state court, and removal was appropriate in all other respects. According to CAFA's plain terms, then, Home Depot was within its rights to remove this case to federal court. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 339 (4th Cir. 2008) (Niemeyer, J., dissenting) ("The plain language of § 1453(b) ... gives AT&T, as a kind of defendant, authority to remove the class action in this case from state court to federal court."); Petition for Certiorari ("Pet.") 15-16.

The lower courts, including the Seventh Circuit here, have sought to introduce ambiguity into CAFA's clear meaning by relying on this Court's decision in *Shamrock Oil*. Petition Appendix ("Pet. App.") 6-7, 10-11. But these courts have all oversold the relevance of *Shamrock Oil* to this question. *Shamrock Oil* construed a different statute, with different operative language, enacted by a different Congress, for a different reason.

In *Shamrock Oil*, the Court held that the general removal statute did not permit the original plaintiff to remove a counterclaim to federal court on the basis of

diversity of citizenship. 313 U.S. at 107-09. As the Court explained, Congress's decision to amend the law to permit removal only "'by the defendant or defendants'" instead of by "'either party' to the suit," *id.* at 105 (citation omitted), was of "controlling significance," *id*. at 107. Thus, the original plaintiff (who had become the counterclaim defendant) was required to honor his decision to initiate the suit in state court. "[T]he plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Id*. at 106. There was no statutory right, in other words, for "a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim praying an affirmative judgment against him." *Id*. at 107.

The differences between this case and the situation the Court confronted in *Shamrock Oil* doom the Seventh Circuit's reliance on removal precedent to override the plain language of CAFA. The difference between "*the* defendant or *the* defendants" and "*any* defendant" matters. *Palisades Collections*, 552 F.3d at 338 (Niemeyer, J., dissenting); Pet. 13-14. Using the "definite article 'the' particularizes the subject which it precedes and is [a] word of limitation as opposed to indefinite or generalizing force 'a' or 'an.'" Black's Law Dictionary 1477 (6th ed. 1990). Congress's use of the term "any," in contrast, gives the statute a "broad" and "expansive" reach. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citation omitted); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976))).

Accordingly, the Court held in *Ali* that "Congress' use of 'any' to modify 'other law enforcement officer' [was] most naturally read to mean law enforcement officers of whatever kind." 552 U.S. at 220. As the Court explained, "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' to express [its] intent" to "cover all law enforcement officers ... 'without limitation.'" *Id.* at 221. So too here. Congress could not have selected a better word than "any" to express a desire that defendants in Home Depot's position be permitted to remove a class action to federal court.

Indeed, Congress's use of "any" is particularly significant here given that CAFA's central purpose was to *change* the procedural rules governing removal. Given that purpose, it is inappropriate to infer that when Congress altered the normal rules of removal so that "any defendant" could remove a class action, it implicitly incorporated the *Shamrock Oil* rule. The far more natural inference is that Congress included the phrase "any defendant" to *eliminate* the bar on removal by all counterclaim defendants.

The key point is this: because Congress expressly created an exception to the requirements of Section 1446, the Seventh Circuit erred when it concluded that removal is unavailable due to "the instruction in § 1453(b) to conduct a CAFA removal 'in accordance with section 1446.'" Pet. App. 8. The term "defendant" has the same meaning under the interpretations of both the Seventh Circuit and Home Depot. The dispute instead is whether the shift from the definite article "the" to the expansive term "any" is a meaningful one. The better view is that it is.

The equitable considerations that fortified this Court's interpretation of the general removal statute also are absent here. Home Depot is not a plaintiff who sued in state court and then sought to remove the case after the counterclaim was filed. Home Depot is not even a plaintiff. "All we know from *Shamrock Oil*," as the Seventh Circuit recognized, "is that removal is not available for a plaintiff who is a counterclaim-defendant." Pet. App. 7; *see id.* (acknowledging "there is no reason to believe that the Court was speaking one way or the other [in *Shamrock Oil*] to the situation that confronts us here"). Yet the lower courts are relying on *Shamrock Oil* to one degree or another, and in some cases almost exclusively, *see, e.g.*, *Palisades Collections*, 552 F.3d at 332-34, to bar removal by a party in Home Depot's posture even though it is nothing more than a "defendant who has not submitted . . . to the [state] jurisdiction," *Shamrock Oil*, 313 U.S. at 106.

To be sure, lower courts have extended *Shamrock Oil* and applied it to exclude counterclaim defendants who were not original plaintiffs from the scope of the general removal statute. *See Palisades Collections*, 552 F.3d at 333. But some of those cases post-date CAFA's enactment. *See, e.g.*, *Westwood Apex v. Contreras*, 644 F.3d 799, 805 (9th Cir. 2011) (acknowledging the Ninth Circuit "left the question of third-party removal without a definitive answer prior to the enactment of CAFA"). In any event, even if those cases are correct, which is far from clear, asking whether CAFA operates against the backdrop of the lower court's extension of *Shamrock Oil* is far different than asking whether CAFA overrides *Shamrock Oil* itself—a 1941 Supreme Court decision. CAFA's textual departure from Section 1446 is sufficient to confirm the former, and this petition, again, does not require the Court to consider the latter.

The decision below unravels without the crutch of *Shamrock Oil*. The lower courts, for example, have tried to defend their position by holding that "[t]he purpose of the modifier 'any' ... was limited to the elimination of the unanimity requirement." Pet. App. 8 (citation omitted). But CAFA's purpose is "derived from the text, not ... an assumption about the legal drafter's desires." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

There is no textual proof that Congress chose "any" for this narrow purpose. Pet. 14-17; *Palisades Collections*, 552 F.3d at 338-39 (Niemeyer, J., dissenting). Quite the opposite, this interpretation would leave the phrase "any defendant" with no effect. On the Seventh Circuit's rationale, "any defendant" could be deleted without altering the provision's meaning. In fact, Section 1453(b) begins without referencing "defendant." Thus, if the Seventh Circuit's reading were correct, it would have been more natural and efficient for Congress to state simply that "[a] class action may be removed . . . in accordance with section 1446 . . . except that such action may be removed ~~by any defendant~~ without the consent of all defendants." But Congress chose to specify that "any defendant" may remove under 1453(b). It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). That is why federal courts must "lean in favor of a construction which will render every word operative, rather than one which may make

some idle and nugatory." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (1868).

The Ninth Circuit's rejoinder that "focus on the phrase 'any defendant' takes the words out of the context in which they were written" is similarly misplaced. *Westwood Apex*, 644 F.3d at 804; *see also* Pet. App. 12 (same). Under that misguided view, the choice of "the" or "any" would make no difference to the provision's reach. Home Depot thus does not interpret the clause in a way that is inconsistent with its "structure." *Westwood Apex*, 644 F.3d at 804. Home Depot reads the sentence—as it should—in a manner that gives every word independent meaning.

Last, the Seventh Circuit relied on policy grounds to deny Home Depot its statutory right to remove the case to federal court. Among other things, the Seventh Circuit was troubled that allowing Home Depot to remove would afford the original plaintiff an "end-run around *Shamrock Oil*" by allowing it to litigate the counterclaim in federal court even though it chose the state forum. Pet. App. 11. But whether this outcome is sensible is not for the Court to decide. A federal court must "apply the statute as it is written—even if [it] think[s] some other approach might accor[d] with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (citations and quotations omitted).

Congress decided that "any" defendant should be allowed to remove a class action such as this one to federal court. Whether the Seventh Circuit believed that various approaches have "pluses and minuses" or that thwarting removal is the most "simple and efficient solution" is thus

irrelevant. Pet. App. 11. The Seventh Circuit's task was to enforce Congress's will—not "to create a more coherent, more rational statute." *Robbins v. Chronister*, 435 F.3d 1238, 1243 (10th Cir. 2006) (en banc). Regardless, as explained below, the Seventh Circuit had it backwards. Remanding this class action to state court is what would undermine Congress's stated objectives in enacting CAFA.

II. The Seventh Circuit's Decision Will Lead To The Very Litigation Abuses That CAFA Sought To Prevent.

The decision below is contrary the fundamental objectives underlying CAFA. Congress enacted CAFA to curb the abuses riddling the nation's class-action system by ensuring a federal forum for class-action defendants who are sued for substantial amounts in large, interstate disputes. Congress aimed to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire Ins. Co.,* 133 S. Ct. at 1350 (quotation omitted); *see* S. Rep. No. 109-14, at 35 (2005) (explaining that the "overall intent" of CAFA was "to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"); 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (statement of Rep. Jim Sensenbrenner) (explaining that if "a Federal court is uncertain … [that] court should err in favor of exercising jurisdiction over the case").[2]

2. Commentators at the time of CAFA's enactment recognized that the statute ushered in "fundamental changes" to diversity jurisdiction that "greatly liberalize[d] and invite[d] … federal court jurisdiction over class actions." H. Hunter Twiford, III, *et al., CAFA's New "Minimal Diversity" Standard for Interstate Class*

Dart Cherokee confirmed this understanding. *Dart Cherokee* involved a dispute over whether a defendant seeking to remove an action to federal court under CAFA may satisfy the amount-in-controversy requirement through a simple allegation or must instead incorporate evidence supporting the allegation into the notice of removal. 135 S. Ct. at 551. The lower court had wrongly "requir[ed] proof of the amount in controversy in the notice of removal itself." *Id.* at 552. Section 1446(a), the Court explained, requires that a defendant submit only "a short and plain statement of the grounds for removal" and that evidence of the amount in controversy is needed only if "the plaintiff contests the defendant's allegation." *Id.* at 553-54.

Importantly, the Court's ruling was largely driven by its rejection of the "presumption against removal" in this setting. *Id.* at 554. The Court flatly declared that "no antiremoval presumption attends cases invoking CAFA." *Id*. The Court was forced to remind the lower courts that the presumption did not apply because "CAFA's primary objective" was "'ensuring Federal court consideration of interstate cases of national importance.'" *Id.* (quoting *Standard Fire*, 133 S. Ct. at 1350). CAFA requires a converse presumption: "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" *Id.* (quoting S. Rep. No. 109-14, at 43 (2005)).

Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction, 25 Miss. C. L. Rev. 7, 9, 60 (2005); *see also* Sara S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1641, 1643 (2006) (observing that CAFA "expanded federal jurisdiction in a major way" and "represents the largest expansion of federal jurisdiction in recent memory").

Remarkably, the lower courts still will not follow this command. The Fourth Circuit—the first federal appellate court to consider the question presented here—explicitly grounded its holding in the antiremoval presumption. *See Palisades Collections*, 552 F.3d at 332-36. Over and over, the court loaded the dice against the defendant by relying on *Shamrock Oil*'s "'call for … strict construction'" of removal statutes. *Id.* at 332 (quoting *Shamrock Oil*, 313 U.S. at 108); *see also id.* at 333-34 (using the presumption to "strictly" construe removal statutes such that "remand to state court is necessary" if federal jurisdiction is in doubt); *id.* at 336 ("Again, this conclusion is consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand."). The Court thus rejected the defendant's argument that the anti-removal presumption "has no place in the interpretation of CAFA"—the very rule of construction this Court later adopted in *Dart Cherokee*. *Id.* at 336 n.5.

The Ninth Circuit did the same thing in *Westwood Apex*. *See* 644 F.3d at 803-06. Although that court did not discuss the since-rejected antiremoval presumption at length, it relied extensively on *Palisades Collections* and Ninth Circuit decisions applying *Shamrock Oil* to CAFA that did. *See id.* Like *Palisades Collections* before it, *Westwood Apex*'s interpretation of Section 1453(b) rests at bottom on the antiremoval presumption.

The decision below wrongly follows these decisions down the antiremoval path. *See* Pet. 19-21. To be sure, the Seventh Circuit disclaimed this "dim view of removal in CAFA cases," emphasizing that it had "never applied or endorsed such an anti-removal presumption." Pet. App. 13. But the ruling cannot be reconciled with that assurance. The Seventh Circuit relied on *Westwood Apex* and *Palisades Collections.* Pet. App. 12. And, it candidly

adopted the narrowest construction of CAFA possible. Pet. App. 10-12; Pet. 3, 11. Notwithstanding the Seventh Circuit's disavowal, the result it reached only follows from application of the antiremoval presumption.

But this is not just an interpretative dispute about statutory presumptions. These rulings carve an enormous "loophole" in CAFA that severely undermines the law's effectiveness. *See Palisades Collections*, 552 F.3d at 345 (Niemeyer, J., dissenting). As noted above, CAFA was enacted primarily to extend federal diversity jurisdiction to large, interstate class actions involving substantial amounts in controversy. Although the Framers created diversity jurisdiction to ensure that cases like this one were heard in federal court, the federal diversity statute, before CAFA, extended federal jurisdiction only to those class actions in which every putative class member's claim exceeded the $75,000 amount-in-controversy threshold. *See* S. Rep. 109-14, at 8, 10-11 (2005).

Through CAFA, Congress intended to restore the Framers' intent and end various stratagems that certain lawyers had devised to keep class actions out of federal court. *See id.* at 24 ("[A] system that allows state court judges to dictate national policy … from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism."); *id.* at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court.").

In the roughly 12 years since CAFA became law, it has substantially advanced these goals. Studies have noted that significantly more class actions have been removed to federal court than in the years before CAFA's

enactment. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *The Impact* of the Class Action Fairness Act on the *Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1754 (2008) (pointing to "support for the conclusion that the federal courts have seen an increase in diversity removals); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1610 (2008) ("CAFA has increased … the number of class action removals to federal court."). CAFA was having "an enormous impact in shifting most class actions to federal court." Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U.L. Rev. 729, 745 (2013).

But decisions like the one here threaten to undo much of the progress CAFA has made. The decision below and others like it provide a roadmap for "enterprising plaintiffs' lawyers wishing to remain in state court" as to how they can "use debt collection proceedings or other small claims litigation as a platform to launch a counterclaim class action." Pet. 27-28. The obvious ploy is to "invite an initial proceeding by encouraging a potential counterclaim plaintiff not to pay certain bills." Pet. 28. That is exactly what these lawyers are doing. It appears to have been their plan all along.

Shortly after CAFA was enacted, a consultant who advises class-action plaintiffs advocated for the use of counterclaims to evade removal. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007). The article is a playbook for plaintiffs' counsel seeking to remain in state court. In the "typical scenario," Tidmarsh explains, a consumer "fails to make a required payment under the contract to the other party—usually a financial institution that sells credit, mortgage, or insurance products." *Id.* at 196-97. After

the service provider sues in state court to recover the small sum due under the contract, the consumer asserts a counterclaim class action, alleging that the contractual term on which the debt collection action is based violates state law. *Id.* at 197.

"If consumers can successfully avoid federal court with this tactic," Tidmarsh boasts, "the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake," and "[t]he entire litigation dynamic and its center of gravity switches in an instant." *Id.* at 199.

In 2007, Tidmarsh presciently described the use of this tactic as "just the tip of an approaching iceberg." *Id.* He was right. This tactic is being deployed with increasing frequency. A growing number of otherwise removable class actions are being brought as counterclaims. Pet. 25 n.2 (citing numerous examples of "counterclaim class actions" in States across the country). It is not, then, mere "happenstance" that businesses are being forced into class-action litigation in state courts. *Westwood Apex*, 644 F.3d at 809 (Bybee, J., concurring). It is a coordinated campaign to flout CAFA's class-action reforms.

This is a significant problem for businesses and consumers alike. CAFA's purpose was to change the nature of class action practice in the United States by ensuring that plaintiffs' lawyers are not able to stack the deck in their favor by manipulating large cases into friendly state-court venues. CAFA has been making slow—but steady—progress and has, in turn, reduced the burdens that class action abuse imposes on the national economy. If this decision is allowed to stand, however, plaintiffs' lawyers will be able to evade CAFA and trap these cases in the many "magnet jurisdictions" for abusive

class actions. S. Rep. No. 109-14, at 13 (2005). The Court should grant review to keep that from happening.

CONCLUSION

For all these reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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