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 *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers, including many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. 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. An important function of the Chamber is to advocate for its members' interests before Congress, the executive branch, and the courts.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of

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[1] On November 5, 2018, *amici* notified the parties of their intention to file this brief. Both parties have consented to the filing of this brief. *Amici* affirm that no counsel for a party wrote this brief in whole or in part, and no counsel or party, or any other person other than *amici,* their members, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

corporate members representing a broad cross-section of more than 80 American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, in support of its members and presenting the broad perspective of product manufacturers and seeking fairness and balance in the application and development of the law as it affects product risk management.

The foregoing *amici* each regularly file *amicus* briefs in cases raising issues of vital importance to the business community. This is such a case. *Amici*'s members frequently face large interstate lawsuits, class action lawsuits, and multidistrict litigations. They have a keen interest in ensuring that courts fairly apply the rules governing removal of such actions to federal court.

The ruling below extends *Shamrock Oil & Gas Co. v. Sheets,* 313 U.S. 100 (1941) far beyond its rationale to bar removal by third-party counterclaim defendants who had no role in choosing the forum of the original claim.

The decision below also threatens the robust protections afforded by the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). It ignores Congress's practical legislative solution to state court class action abuses and instead applies an overly restrictive reading of this Court's decision in *Shamrock Oil*, which pre-dates CAFA by over 75 years.

In enacting CAFA, Congress expanded federal court jurisdiction over class actions and—critically here—made removal more broadly available. Since CAFA's enactment, *amici*'s members have come to rely on CAFA in general and the removal provisions in particular to avoid many of the abusive practices that plagued state court class action litigation.

The Fourth Circuit's restrictive view of removal will harm businesses across the country. With little extra effort, plaintiffs can now file their class claims as third-party counterclaims in the state courts of their choice, with no fear of triggering CAFA. Inevitably, an increasing number of *amici*'s members will be trapped in the same state court systems that Congress deemed unsuitable for large class actions. *Amici* and their members therefore have a strong interest in this case.

SUMMARY OF ARGUMENT

Amici fully endorse Petitioner's legal analysis of the two questions presented. The Fourth Circuit erred

in concluding that the original-plaintiff rule[2] bars removal by third-party counterclaim defendants. And it further erred holding that *Shamrock Oil*'s original-plaintiff rule supersedes CAFA's removal provisions.

Amici write separately to provide helpful context for the Court's decision. First, *amici* explain why the third-party defendant question matters to its members. Second, *amici* offer a historical perspective on the CAFA success story. We detail the rise of class action abuses and the sustained congressional effort required to pass the act. Throughout, *amici* highlight the importance of these improvements to large national corporations like those that comprise its respective memberships.

First, *Shamrock Oil* should not extend to third-party counterclaim defendants. Such parties have no say in the original choice of forum and thus should not remain locked into a state forum of their opponent's choosing.

This issue is particularly important to *amici* and their members because the flawed extension of *Shamrock Oil* will keep related cases outside of the federal multidistrict ligation system. As a result, individual plaintiffs' procedural gamesmanship will undermine the MDL statute's twin goals of nationwide consistency and fairness. This Court should accordingly

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[2] Although some of the cases refer to an "original defendant rule," *e.g. Westwood Apex v. Contreras*, 644 F.3d 799, 807-08 (9th Cir. 2011) (Bybee, J., concurring), we agree with Petitioner's brief that, for the reasons stated therein, *Shamrock Oil*'s holding is more properly viewed as an "original-plaintiff rule." Pet'r Br. 16-17.

hold that *Shamrock Oil*'s original-plaintiff rule does not extend to third-party complaints.

Second, defendants should not be permitted to weaponize *Shamrock Oil* to undo the hard-won improvements realized when Congress enacted CAFA. In 2005, the Class Action Fairness Act promised nothing less than a wholesale reform of American class action litigation. Congress made several substantive changes to eliminate the most abusive practices plaguing class actions across the country. And to ensure the widest reach of the new rules to large interstate class actions, Congress added procedural reforms expanding jurisdiction and removal. No longer could plaintiffs' lawyers stack the deck in their favor by steering large class cases into friendly state-court venues.

CAFA has largely achieved its goals. The act has extinguished many of the most egregious class action practices. Yet the Fourth Circuit's decision below threatens this progress. The justices of the *Shamrock Oil* Court never could have foreseen either the coming class action explosion or the eight-year congressional effort culminating in CAFA. Nor could they have foreseen how plaintiffs' lawyers would seize on their ruling prohibiting one type of forum shopping to launch a renaissance in class action-related forum shopping.

Shamrock Oil should not serve as a tool to defeat CAFA. This Court should hold that where a counterclaim defendant otherwise satisfies CAFA's

removal and jurisdiction requirements, *Shamrock Oil*'s original-plaintiff rule does not bar removal.

ARGUMENT

I. *Shamrock Oil* Should Not Extend to Third-Party Counterclaim Defendants.

This Court has directed the parties to address whether *Shamrock Oil* should extend to third-party counterclaim defendants. It should not.

A. The Rationale Underlying *Shamrock Oil*'s Original-Plaintiff Rule Does Not Apply to Third-Party Counterclaim Defendants.

In the language of the playground, *Shamrock Oil* imposed a procedural "no takebacks" rule. The plaintiff must "abide his selection of a forum," even if the original defendant countersues. 313 U.S. at 106 n.2, 107. This straightforward and sensible rule firmly limits plaintiff forum-shopping.

This rationale does not apply, however, to third-party counterclaim defendants. By definition, such parties remained uninvolved in the litigation until an original defendant sued them. They had no role in selecting the forum. Extending *Shamrock Oil* to third-party counterclaim defendants forces them to abide by the forum selection made by their opponent, the class action counterclaim plaintiff. That hardly seems fair.

Nevertheless, ignoring *Shamrock Oil*'s rationale, several courts of appeal force third-party counterclaim

defendants to live with their opponents' choice of forum. But these courts have uncritically extended the original-plaintiff rule without much reasoning. *See* App. to Pet. Cert. 9a ("We hold that the Supreme Court has not called into question *Palisades*' conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b)"); *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 354 (7th Cir. 2017), *cert. denied,* 137 S. Ct. 2138 (2017) ("All we know from *Shamrock Oil* is that removal is not available for a plaintiff who is a counterclaim-defendant."); *In re Mortg. Elec. Registration Sys.*, 680 F.3d 849, 853 (6th Cir. 2012) (citing *Shamrock Oil* for the proposition that a "third-party defendant is not a 'defendant' who may remove the action to federal court"); *Westwood Apex*, 644 F.3d at 804 ("Since the Supreme Court's decision in *Shamrock Oil* . . . 'defendant' in Chapter 89, thereby, excludes plaintiffs and non-plaintiff parties who become defendants through a counterclaim."); *Palisades Collection LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants[.]").

This Court should clarify that *Shamrock Oil*'s original-plaintiff rule does not extend beyond its logical bounds. That rule should not bar parties brought into the case for the first time as third-party defendants from removing to federal court.

B. Extending *Shamrock Oil* to Third-Party Counterclaim Defendants Would Frustrate the Federal Multidistrict Litigation System.

This issue has great significance to *amici*, both within and outside the class context, particularly because of the rise of the multidistrict-litigation ("MDL") system as a means of achieving fairness and consistency. Plaintiffs' approach would open a gaping hole in that system.

No procedural device allows litigants to combine or otherwise formally coordinate overlapping or related cases that are simultaneously pending in different state courts. As a result, state courts throughout the country may expend significant judicial resources only to reach inconsistent outcomes, with implications reaching beyond each state's boundaries.

The risk of inconsistent judgments from different state courts—particularly inconsistent injunctive or prospective relief—poses a serious problem for *amici*'s members. Large national companies facing conflicting judgments may find full compliance difficult if not impossible. The federal courts, meanwhile, have found a solution to this problem.

In 1968, Congress created the multidistrict litigation device and, to administer it, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). *See* 28 U.S.C. §1407. The MDL panel has the power to consolidate and transfer "civil actions involving one or more common questions of fact [that] are pending in different [federal] districts" if such a

transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* at § 1407(a). As the MDL panel explains, "[t]he purposes of this transfer or 'centralization' process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary." *Overview*, UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, https://tinyurl.com/JPMLOverview (last visited November 12, 2018).

"Since its inception, the Panel has considered motions for centralization in more than 2,750 dockets involving over 600,000 cases and millions of claims therein." *Id.* These cases "encompass litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; marketing and sales practices; patent validity and infringement; antitrust price fixing; data security breaches, securities fraud; and employment practices." *Id.*

Such centralization is key because, as federal and state judicial bodies have recognized, "litigating similar cases in multiple jurisdictions can strain the resources of the parties and result in unnecessary duplication of effort and considerable inefficiencies." Federal Judicial Center, National Center for State Courts, and United States Judicial Panel on Multidistrict Litigation, *Coordinating Multijurisdictional Litigation: A Pocket Guide for Judges*, MULTIDISTRICT LITIGATION at 2 (2013)

https://tinyurl.com/MDLPocketGuide. "Moreover, the decisions or actions of a single court can significantly affect cases pending in other jurisdictions, sometimes to the detriment of the parties' interests and the fairness of the overall resolution." *Id.*

The MDL panel assigns the cases to the district and judge it considers "best situated to handle the transferred matters," based on "the unique circumstances that each [consolidation] motion presents." Judge John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2228 (2008). In fact, "[f]inding the best district for centralization and identifying the best district judge . . . is often the most difficult decision the Panel faces." *Id.* at 2239.

This assignment function is carried out by the MDL Panel of seven "seasoned and attentive" federal judges, *id.* at 2236, and ensures that large and complex cases proceed in the best possible forum for their effective resolution, neutralizing the vagaries of a plaintiff's forum selection in cases that carry national implications. The MDL Panel thus brings expertise and deliberateness to the management of large, recurring matters that require a uniform solution.

Growing in reach and influence, MDLs now serve as a core tool in the federal judiciary's toolkit. As Judge Heyburn, former MDL panel chair, explains, "[a]s the class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning to the MDL processes as a way

of achieving some of the benefits or advantages formerly available under Rule 23." *Id.* at 2232. As a result, "over the past two decades, the Panel's role in helping manage not only putative class actions but also other complex cases seems to have grown steadily." *Id.* at 2232-33.

Plaintiffs' lawyers frustrate the MDL system's benefits, however, with procedural gambits that needlessly lock related cases in state court, such as the third-party counterclaim maneuver Respondent used below. A new third-party action may well mirror the dozens, hundreds, or even thousands of related cases proceeding simultaneously in a federal MDL. A third-party counterclaim defendant may, in fact, already be a party to such an MDL through other cases. Yet extending *Shamrock Oil* to third-party counterclaim defendants places that MDL out of reach. This result defies all good sense, squandering the resources of both federal and state courts, and amplifying the risk of inconsistent outcomes on matters of large-scale importance.

Amici urge this Court to clarify that the original-plaintiff rule does not extend to parties added to ongoing litigation as third party defendants. Instead, the ordinary removal and jurisdiction rules should apply in such cases, as if the third-party action were the original action. *Amici* believe, on behalf of their members who regularly participate in interstate litigation of national consequence, that procedural gamesmanship by individual plaintiffs should not close the federal courthouse doors.

II. The Decision Below Undermines Congress's Considered and Bipartisan Effort to Curtail Class Action Abuse in State Courts Though CAFA.

This case also asks whether a non-plaintiff original class action defendant may remove to federal court under CAFA if the class action began as a counterclaim against a co-defendant. In other words, does *Shamrock Oil* create an escape hatch for plaintiffs to avoid CAFA's protections for defendants and class members? *Amici* believe that it does not, because *Shamrock Oil*, like CAFA, aims to prevent unfair forum shopping. *Shamrock Oil*'s original-plaintiff rule should not gut CAFA's keystone protection: the right of defendants to remove qualifying class actions to federal court.

In 2005, after years of bipartisan effort, Congress passed and President Bush signed the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat 4 (codified as amended in scattered sections of 28 U.S.C.). This landmark statute focused on ending class action abuse. Before CAFA, plaintiffs' lawyers could use just a single diversity-defeating plaintiff 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 plaintiff-friendly jurisdictions attracted class actions because they tolerated or even encouraged numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class

settlements primarily benefitting plaintiffs' lawyers. *Id.* at 13-23. With incomplete diversity and no federal questions, defendants found themselves trapped. CAFA changed all that by granting federal courts jurisdiction over most large interstate class actions.

Thanks to CAFA, major class actions have largely moved from state to federal court. *See* 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[.]").

A product of countless hours of congressional fact-finding, deliberation, and negotiation, CAFA succeeded in curtailing some of the worst class action abuses. But as the decision below illustrates, state courts still exert a strong magnetic pull, and the plaintiffs' bar does not give up so easily.

The procedural tactic blessed below allows an end-run around CAFA's core procedural safeguards. It forces defendants to litigate massive class actions in the very same "magnet jurisdictions" that prompted Congress to enact CAFA in the first place. This Court should correct the Fourth Circuit's misapplication of the original-plaintiff rule and protect Congress's carefully designed class action system.

A. CAFA Resulted From Considerable Congressional Effort to Address Class Action Abuses.

To determine how CAFA and the 1941 *Shamrock Oil* decision interact, the Court should consider the significant effort it took to pass this landmark statute.

CAFA resulted from a "grinding eight-year effort" to fix the abuses plaguing state court class actions. Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1823 (2008); *see also* S. Rep. 109-14 (2005); Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005).

Passing CAFA required an exceedingly rare level of persistence and, ultimately, bipartisan cooperation. Before reaching agreement in 2005, Congress considered—and failed to pass—no fewer than four bills aimed at addressing class action abuses: the Interstate Class Action Jurisdiction Act of 1999, 106 Bill Tracking H.R. 1875 (passed by the House but not considered by the Senate); the Class Action Fairness Act of 2002, 148 Cong. Rec. H847 (daily ed. March 13, 2002) (passed by the House but not voted on by the Senate); the Class Action Fairness Act of 2003, 108 Bill Tracking H.R. 1115 (passed by the House, but due to a filibuster, was not voted on by the Senate); and the Class Action Fairness Act of 2004, 108 Bill Tracking S. 2062, (stalled in the Senate, not voted on in the House). Andreeva, 59 U. MIAMI L. REV. at 387-88.

Along the way, both the House and Senate held numerous committee hearings. The deliberations produced "multiple reports by both Houses, political compromises, . . . two unsuccessful attempts to terminate debate in the Senate by imposing cloture [on bills with bipartisan support,] and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote." Purcell, 156 U. PA. L. REV. at 1823.

As this persistence shows, widespread class action abuses in state courts strongly motivated Congress to act. Indeed, CAFA's "findings and purposes" section explains that class action abuses had: "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA § 2(a)(2) (codified at 28 U.S.C. § 1711 notes). In particular, Congress called foul on settlements primarily enriching class counsel at the expense of class members who "often receive little or no benefit from class actions, and are sometimes harmed . . . ." CAFA § 2(a)(3) (codified at 28 U.S.C. § 1711 notes). Congress also highlighted settlements unfairly distributed among class members, and notice schemes "that prevented class members from being able to fully understand and effectively exercise their rights." *Id.*; *see also* Purcell, 156 U. PA. L. REV. at 1851-56; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 743-44 (2013).

Congress's concerns about these abuses all focused on fairness to the particular litigants in class

actions. But a state-court driven class action system can create wider, more systemic problems across the economy. Interstate commerce suffers when multiple overlapping class actions pending in different state courts threaten inconsistent judgments.

The American Bar Association Task Force on Class Action Legislation recognized the national threat that inconsistent state judgments pose. *See Report of the ABA Task Force on Class Action Legislation* (2003), https://tinyurl.com/ABATaskForce. "The Task Force early on identified the filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts as one of the most serious concerns with class action practice." *Id.* at 3. The ABA report explained that "[s]uch overlapping class actions consume unnecessary litigation resources, encourage 'gaming' of court filings, and risk inconsistent treatment of like cases." *Id.* This has "result[ed] in [state] courts adjudicating cases that have a nationwide impact despite possibly small interest of the forum state in the suit." *Id.* at 4.

Shortly before CAFA passed, Professor James Underwood highlighted the problems that result from adjudicating cases with nationwide impact in remote state courts. He observed that "principles of federalism have been turned on their heads under the current jurisprudential system that permits (and in some sense requires) locally-elected state court judges to adjudicate the claims of absent nonresident class members against nonresident businesses involving causes of action that are not uniquely related to that jurisdiction." James M.

Underwood, *Rationality, Multiplicity, & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 405 (2004). Professor Underwood characterized the result as an "upside-down concept of federalism," which he found to be "particularly egregious when one considers that these decisions by state court elected judges can have a nationwide impact on how business is conducted in far-off portions of the United States." *Id.* At 405-06.

Because of these systemic risks, the Advisory Committee Report to the Federal Judicial Conference Committee of 2002 reached a "unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems." Underwood, 46 S. TEX. L. REV. at 410, *quoting* Report of the Civil Rules Advisory Committee 311 (May 20, 2002), https://tinyurl.com/RulesComm311 (presented to the Standing Comm. on Rules of Practice and Procedure); *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. REV 461, 540 (2000) (arguing for expanded removal and multidistrict transfer statutes to minimize risk of overlapping actions).

B. CAFA Created Class Action Safeguards by Expanding Federal Jurisdiction and Removal.

CAFA outlawed many of the worst class action abuses and designed safeguards to protect interstate commerce. For example, CAFA prohibits discriminating among class members based on their geographic location (CAFA § 3(a), codified at 28 U.S.C. § 1714); requires notification of state Attorneys General prior to class settlement (CAFA § 3(a), codified at 28 U.S.C. §§ 1715(b),(d)); requires improved notice to class members (CAFA § 3(a), codified at 28 U.S.C. § 1715(e)); and restricts coupon/no-cash settlements (CAFA § 3(a), codified at 28 U.S.C. § 1712).

While important, these reforms do not apply in state court, where some of the most troubling practices were commonplace. Recognizing that it lacked the power to impose procedural change on state courts, Congress instead chose to expand federal jurisdiction for class actions previously trapped in state court. The Senate Report explained that CAFA aimed to dismantle "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." S. Rep. No. 109-14 at 24 (2005).

Specifically, CAFA amended 28 U.S.C. § 1332 to grant federal courts subject matter jurisdiction over class actions with 100 or more plaintiffs if "the matter in controversy exceeds the sum or value of $5,000,000,

exclusive of interest and costs[.]" CAFA § 4 (codified at 28 U.S.C. § 1332(d)). A class action satisfies this amount-in-controversy requirement if the combined value of the class members' claims exceeds $5,000,000, whether or not any individual claim exceeds the normal $75,000 threshold for diversity jurisdiction. *See generally* 28 U.S.C. § 1332. Finally, CAFA relaxed the complete diversity requirement in favor of a "minimal diversity" standard requiring only one plaintiff and one defendant from different states. CAFA § 4 (codified at 28 U.S.C. § 1332(d)); *see also generally* Andreeva, 59 U. MIAMI L. REV. at 388-92.

Expanded federal jurisdiction would not help class defendants avoid state court abuses, however, without a corresponding right of removal to federal court. As the Senate Report noted, before CAFA, the "law enable[d] plaintiffs' lawyers who prefer[red] to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14 at 10 (2005).

To ensure that CAFA's new protections did not remain out of reach, Congress expanded removal in four ways. *See* Lee & Willging, 156 U. PA. L. REV. at 1738. First, the act loosened the defendant consent requirement, allowing "any defendant" to remove a class action. CAFA § 5 (codified at 28 U.S.C. § 1453(b)). Second, it eliminated the home-state defendant rule, permitting removal even when a defendant is a citizen of the forum state. *Id.* Third, it eliminated the one-year removal deadline for eligible class actions. *Id.* And finally, it expanded and expedited appellate review of

remand orders. *Id.* (codified at 28 U.S.C. § 1453(c)); *see also* Lee & Willging, 156 U. PA. L. REV. at 1738.

These provisions leave no doubt that Congress strongly favors removal of large class actions to federal court. This Court has agreed, emphaziaing in *Dart Cherokee Basin Operating Co. v. Owens* that "CAFA's primary objective" was "ensur[ing] Federal court consideration of interstate cases of national importance." 135 S. Ct. 547, 554 (2014). As a result, as this Court held, "no antiremoval presumption attends cases invoking CAFA." *Id.*

C. CAFA Has Transformed Class Actions.

The eight years of "grinding effort" ultimately paid off, leading to substantive and procedural reforms that have successfully transformed class action litigation. "The main point of CAFA was to permit defendants to remove large-scale class action litigation from plaintiff-favored state courts to federal courts. The data suggest that it is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment." Erichson, 156 U. PA. L. REV. at 1607. At the same time, the number of class actions in the former "magnet" jurisdictions has fallen dramatically. For example, class action filings in the Madison County, Illinois Circuit Court fell from 106 in 2003 to only 3 in 2006. *Id.* at 1609-10.

CAFA has largely achieved its central goal. By expanding both federal jurisdiction and removal, CAFA has reduced abusive state court forum-shopping for large interstate class actions.

D. The Third-Party Counterclaim Procedure Evades CAFA's Core Reforms.

Given CAFA's broad success in curbing abuses, it was only a matter of time before savvy plaintiffs' lawyers tried new methods to undermine and avoid CAFA's safeguards. And as the decision below shows, they have achieved some success. But this is just the beginning. If allowed to flourish, the procedural maneuver endorsed below threatens much of CAFA's progress.

Soon after CAFA passed, class counsel hatched plans for a path back to state court. They found a road map in Professor Jay Tidmarsh's article, *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). Offering a framework for adjudicating counterclaim class actions in state court, Tidmarsh declared that "the eulogy for state-court class-action practice is a bit premature." *Id.* at 234. He put this theoretical framework in action, serving as a consultant to the class action counterclaim plaintiffs in at least two of the actions that used the procedural techniques he suggested. *Id.* at 193.

In addition to the Fourth Circuit below, the Sixth, Seventh, and Ninth Circuits have blessed this counterclaim end-run around CAFA. *See* App. to Pet. Cert. 9a; *Tri-State Water Treatment,* 845 F.3d at 355 (prohibiting removal of class action counterclaim by third-party counterclaim defendant); *In re Mortg. Elec. Registration Sys., Inc.,* 680 F.3d at 853) (same);

Westwood Apex, 644 F.3d at 804-05 (same); *Palisades*, 552 F.3d at 334-35 & n.4 (same). And following behind these appellate cases are more and more class actions, filed as counterclaims in state court and then, after removal, remanded back from the district courts on the basis of the original-plaintiff rule. *See, e.g., Hart v. Knockerball MidMo, LLC*, No. 2:18-CV-4147, 2018 U.S. Dist. LEXIS 176624 (W.D. Mo. Oct. 15, 2018); *Williamson v. Commerce Bank*, No. 4:18-CV-00513, 2018 U.S. Dist. LEXIS 169756 (W.D. Mo. Oct. 2, 2018); *Reyes v. Fid. Invs.*, No. 3:18-CV-00134, 2018 U.S. Dist. LEXIS 129885 (S.D. Tex. July 17, 2018); *Wells Fargo Fin. S.C., Inc. v. Mack*, No. 2:18-CV-1479, 2018 U.S. Dist. LEXIS 130764 (D.S.C. July 13, 2018); *Bank of N.Y. Mellon v. Cioffi*, No. 15-13935-FDS, 2016 U.S. Dist. LEXIS 95474 (D. Mass. July 21, 2016).

This case perfectly illustrates the counterclaim maneuver. A consumer purchased a product on credit but failed to make payments. App. to Pet. Cert. 2a-3a. After the creditor brought a simple collection action against the consumer in state court, the consumer asserted a class action counterclaim against the original plaintiff and, importantly, two third parties. App. to Pet. Cert. 2a. Relying on *Shamrock Oil*, 313 U.S. at 108-09, the class action plaintiff managed to defeat removal. App. to Pet Cert. 9a-11a.

It is beyond credible dispute that CAFA would apply if Respondent had filed the class action counterclaim as a standalone complaint. The class defendants would have been able to remove the case and, once in federal court, CAFA's protections would

have applied. Instead, Respondent prompted a collection action and, according to the Fourth Circuit, thereby created CAFA immunity. And the source of that purported immunity? A case long predating CAFA that addressed neither class actions nor third-party defendants: *Shamrock Oil*.

E. This Court, in Deciding *Shamrock Oil*, Could Not Have Contemplated the Coming Class Action Abuses or CAFA's Legislative Fix.

At its heart, *Shamrock Oil* is about preventing forum shopping. The case rests on the premise that a plaintiff who chose a state forum should not gain the right to remove its own case simply by virtue of being later named as a counterclaim defendant. *Shamrock Oil*, 313 U.S. at 107-08. And yet several courts of appeals have ignored this anti-forum-shopping rationale and transformed *Shamrock Oil* into the chief weapon against CAFA, itself a landmark anti-forum-shopping statute.

The *Shamrock Oil* Court could not have foreseen CAFA and its well-crafted, interconnected reforms addressing abusive state court class actions. *Shamrock Oil* involved only two parties and contained no class allegations. Indeed, at the time, Rule 23 of the Federal Rules of Civil Procedure was barely four years old, and it did not yet permit plaintiffs to aggregate low-value, unrelated claims. Fed R. Civ. P. 23 (1937) (amended 1946); *see also* Harry Kalven, Jr. & Maurice Rosenfeld,

The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 702-04 (1941).

Another quarter-century would pass after *Shamrock Oil* before the 1966 Amendments to Rule 23 created the modern 23(b)(3) class action. Fed. R. Civ. P. 23 (1966) (amended 1987). And even then, that new type of class action provoked controversy within the Advisory Committee on Civil Rules. Committee members feared that the procedure of aggregating small claims "might be misused by lawyers who put their own financial or other interests ahead of those of the absent class members or engage in settlements that were not in the best interest of their clients or bring suits that would threaten the economic viability of companies and governmental programs." Arthur Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES IN L. 1, 6 (2018).

Few could have predicted where these 1966 Amendments would lead. Professor Miller, then unofficial assistant to the Advisory Committee's Reporter, recently noted that it was "unrealistic to expec[t] that anyone, even those extraordinarily gifted Advisory Committee members, could have predicted the tremendous increase in class actions that followed the 1966 revision or the concomitant changes in their dimension or the ways in which they are processed." *Id.* at 7. He credits "[t]he creation of various new rights of action, the changing orientation and composition of the legal profession, the larger scale and economic stakes of litigation," as well as "the egalitarian composition of Congress and the courts, and the increasingly complex

social and commercial environments [that] provided many new contexts and attractions for using the class action" for the vast expansion of class actions in the coming decades. *Id.* at 8.

If no one could foresee the class action tsunami in 1966, surely the 1941 *Shamrock Oil* decision did not contemplate how the original-plaintiff rule would apply in a post-CAFA world.

F. *Shamrock Oil* Should Not Cabin CAFA's Legislative Solution to Class Action Abuses.

Given the historical contexts of both *Shamrock Oil* and CAFA, this Court should clarify that the 1941 original-plaintiff rule does not apply to class action counterclaims that otherwise satisfy CAFA's removal provisions.

Shamrock Oil addresses a simpler problem from a procedurally simpler era. By contrast, Congress precisely tailored CAFA to address the modern problems of large, interstate class actions trapped in state court. CAFA's mandate favoring federal jurisdiction is clear. This Court recognized as much in *Dart Cherokee*, holding that the act 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." *Dart Cherokee,* 135 S. Ct. at 554. Former House Judiciary Committee Chairman James Sensenbrenner would have agreed, as he stated during the floor debate on CAFA that if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec.

H726, H727 (daily ed. Feb. 17, 2005) (Statement of Rep. Sensenbrenner).

This Court should accordingly clarify that the *Shamrock Oil* original-plaintiff rule does not supersede CAFA's jurisdiction and removal provisions.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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November 16, 2018