No. 18-1578

IN THE

Supreme Court of the United States

PFIZER, INC.,
Petitioner,

v.

ALIDA ADAMYAN, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The American Tort Reform Association ("ATRA") is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA's membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business and professional associations.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and representing indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as *amicus curiae* in cases involving issues of concern to business, such as this one.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that petitioner and respondents have consented to the filing of this brief and that *amici curiae* timely notified counsel of record of their intent to file this brief.

manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association of the country's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies encouraging the discovery of life-saving and life-enhancing new medicines. PhRMA's member companies are devoted to inventing medicines that allow patients to live longer, healthier, and more productive lives, and have led the way in the search for new cures.

The Product Liability Advisory Council ("PLAC") is a non-profit association with over 80 corporate members representing a broad cross-section of 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. 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-liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

ATRA, the Chamber, NAM, PhRMA and PLAC have a strong interest in this case because their members are increasingly the targets of sprawling multi-plaintiff lawsuits in state courts that are designed to evade federal diversity jurisdiction. In addition, their participation as *amici curiae* is desirable because the law in this area remains unsettled, and their unique perspective and expertise can help elucidate the significant statutory and public-policy issues raised by the parties' briefing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant the petition and reverse (or, at least, grant the petition and vacate and remand) the Ninth Circuit's decision. A *sua sponte* order by a state court consolidating the claims of 100 or more plaintiffs for all purposes (including trial) undoubtedly supports removal under the plain text of the mass action provision of the Class Action Fairness Act of 2005 ("CAFA"). In addition to the arguments set forth in the petition—which *amici* do not rehash in this brief—this case is an especially strong candidate for summary reversal or a GVR for two reasons:

First, CAFA emphasizes the importance of appellate guidance on class- and mass-action removal questions. In *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014), this Court recognized that the "purpose" of the interlocutory review provision of CAFA is to "develop a body of appellate law interpreting" that seminal jurisdiction-expanding statute. *Id.* at 556 (citation omitted). To effectuate

that purpose—and in light of the important, unsettled and recurring nature of the question presented in that case—this Court intervened to squarely resolve whether a defendant must submit evidence supporting CAFA's $5 million amount-in-controversy requirement in its notice of removal.

The question presented in the petition—whether CAFA supports removal based on *sua sponte* state-court proposals to consolidate 100 or more cases for all purposes (including trials)—is no less important and recurrent. Defendants throughout the United States continue to be embroiled in sprawling multi-plaintiff lawsuits in state courts, where procedural protections essential to the fair conduct of aggregate proceedings are oftentimes less well developed or robust than federal law. The specter of highly prejudicial consolidated trials in those courts underscores the importance of the question at hand.

Second, the result below contravenes Congress's intent in enacting CAFA. Congress enacted CAFA to expand diversity jurisdiction and ensure that any suit resembling a class action—including mass actions—could be heard in federal court. Noting a long track record of gamesmanship by plaintiffs' lawyers in crafting class actions to preclude federal jurisdiction under traditional diversity principles, Congress sought to make it easier to remove such cases to federal court. Essentially, Congress erected a presumption in favor of federal jurisdiction over these aggregate proceedings to eliminate plaintiffs' jurisdictional gamesmanship. If allowed to stand, the district court's decision would significantly undercut Congress's expansion of federal jurisdiction over mass actions. It would also invite precisely the kind of abusive plaintiff practices that CAFA was de-

signed to curb by encouraging plaintiffs' lawyers to outsource their bids for joint trials to the very pro-plaintiff state courts where they chose to bring their lawsuits in the first place. Neither result can be squared with the sweeping grant of jurisdiction and remedial purpose that Congress intended when it enacted CAFA.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW AND REVERSE THE NINTH CIRCUIT'S ORDER BECAUSE THE NINTH CIRCUIT'S REFUSAL TO REVIEW COULD SIGNAL APPROVAL OF THE TRIAL COURT'S ERRONEOUS RULING ON AN IMPORTANT, RECURRING ISSUE.

In *Dart*, the Court concluded that the Tenth Circuit's summary denial of the petition for review—especially given the strong policy considerations favoring appellate review in the normal course—"strongly suggest[ed] that the panel thought the District Court got it right in requiring proof of the amount in controversy in the removal notice." 135 S. Ct. at 556. As the Court ultimately made clear, the district court's order remanding the case actually "misstated the law" and was "fatally infected by legal error." *Id.* at 557-58. As a result, the Court intervened "to correct the erroneous view of the law the Tenth Circuit's" "casual ruling[]" had "fastened on district courts within the Circuit's domain." *Id.*

Similar considerations support review here inasmuch as the Ninth Circuit's refusal to review the ruling could signal an approval of the district court's

erroneous ruling on the merits. Moreover, the question presented in the petition is also of paramount importance. Indeed, *amici*'s members in particular are increasingly being forced to defend multi-plaintiff cases that are carefully crafted to make removal difficult and give rise to mass proceedings in state court—including litigation in which the state courts join the claims to facilitate coordinated proceedings. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the New Hot Spot for Litigation Tourists*, Bloomberg (Sept. 29, 2016), https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis ("Hundreds of plaintiffs with product liability claims . . . have been flocking to downtown St. Louis to a venue that over the past three years has developed a reputation for fast trials, favorable rulings, and big awards.").[2]

CAFA's mass action provision was designed precisely to address these concerns. The mass action provision represented a "[c]ongressional attempt to address notorious joinder abuses at the state level." Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier – A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 Consumer Fin. L.Q. Rep. 11, 14 (2005); *see also* Walter Dellinger, *The Class Action Fairness Act, Curbing Unfairness and Restoring Faith in our Judicial System*, Progressive Policy Institute, Mar. 2003,

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[2] For instance, Missouri Appeals Court Judge Kurt S. Odenwald recently observed that out-of-state plaintiffs flock to the St. Louis City court because the "jury pool [is] much more friendly, and they see that the requirements for expert-witness testimony in Missouri [are] less than [those required by other jurisdictions under] *Daubert*." Oral Args. Tr. 52:13-18, *Fox v. Johnson & Johnson*, No. ED104580 (Mo. Ct. App. May 10, 2017).

at 8 ("The federal court system has tended to be more circumspect about protecting the rights of both plaintiffs and defendants before allowing such mass joinder situations.").

One of the most notorious examples of such abuse that led to CAFA's mass action provision was the joint trial of more than *8,000* asbestos claims in West Virginia in 2002. The state court permitted a joint trial involving thousands of individuals notwithstanding myriad individualized differences between the claimants. *See* Dellinger, *supra*, at 8 ("[T]he claimants, who asserted widely varying injuries and different theories of recovery, worked at hundreds of locations . . . at different time periods spanning six decades, with greatly varying exposures to hundreds of different asbestos-containing products with different applications, instructions, and warning labels."). "Through this proceeding, West Virginia imposed its own asbestos claims solution by forcing defendants nationwide to either settle claims, regardless of their merit, or face the prospect of a wholly unfair trial." *Id.*

"[T]he plan worked as the court seemed to intend. Within days after the United States Supreme Court declined to stay the trial or grant certiorari to review the plan, all but one of the original 259 defendants were forced to settle for reportedly huge sums of money." Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 Pepp. L. Rev. 271, 283 (2004); *see also id.* (noting "[a] smaller, yet no less troubling consolidation . . . in Virginia" involving 1,300 asbestos claims and pointing out that the trial court freely

admitted "that consolidation of all of the cases would adversely affect the rights of the parties to a fair trial") (citation omitted). Such coercive judicial pressure to settle—as a result of lax state joinder rules—poses serious due-process concerns. *See id.* at 285 ("The 2002 West Virginia mass trial exemplifies the pressure that is exerted on defendants to settle consolidated claims and thereby waive their basic due process rights.").

The *sua sponte* proposal giving rise to the petition in these cases implicates the same concerns. This Court should weigh in on the fundamental question presented in the petition, lest businesses such as *amici*'s members are subjected to the coercive dynamics that precipitated CAFA's mass action provision in the first place.

II. THE COURT SHOULD GRANT THE PETITION TO FURTHER CAFA'S REMEDIAL PURPOSE AND PROTECT AGAINST LITIGATION GAMESMANSHIP.

The Court should also grant the petition because the panel's denial of review—and the resulting implicit statement on the merits that remand was properly granted—undermines CAFA's goals of creating expansive federal jurisdiction and making removal easier. It also promotes the sort of jurisdictional gamesmanship that Congress sought to eliminate when it enacted CAFA.

First, the approach below is at odds with Congress's intent that federal jurisdiction should be expanded over interstate class actions under CAFA. Congress enacted CAFA to curb "[a]buses in class actions," which "undermine the national judicial system, the free flow of interstate commerce, and the concept

of diversity jurisdiction as intended by the framers of the United States Constitution." Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 5 (Feb. 18, 2005). As the legislative history underlying CAFA makes clear, mass actions "are simply class actions in disguise" and "are subject to many of the same abuses." S. Rep. No. 109-14, at 46-47 (2005). "In fact, sometimes the abuses are even worse because the lawyers seek to join claims that have little to do with each other and confuse a jury," *id.* at 47—abuses that are perhaps best exemplified by the egregious joinder of 8,000 West Virginia asbestos claimants previously discussed in Part I. Further, concerns about abuse are magnified in mass actions since they do not "come close to satisfying the due process-based prerequisites of the class action rules." Dellinger, *supra*, at 8.

Congress sought to channel interstate class actions into federal court to "help minimize" the abuses "taking place in state courts and ensure that these cases can be litigated in a proper forum." S. Rep. No. 109-14, at 27. Concluding that "the current diversity and removal standards as applied in interstate class actions . . . are thwarting the underlying purpose of the constitutional requirement of diversity jurisdiction," *id.* at 6, Congress declared that the "overall intent" of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications," *id.* at 35. Indeed, CAFA "represents the largest expansion of federal jurisdiction in recent memory." Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1641, 1643 (2006).

It follows that CAFA "commensurately expands defendants' opportunities to remove class actions," making removal easier. *Id.* at 1630; *see also Stand-*

ard Fire Ins. Co. v. Knowles, 568 U.S. 588, 595 (2013) (assessment of removal under CAFA requires careful attention to the statute's "primary objective: ensuring 'Federal court consideration of interstate cases of national importance'") (citation omitted). As one of CAFA's leading sponsors squarely put it, if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. H726 (statement of Rep. Jim Sensenbrenner). In short, and as this Court explained in *Dart*, "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554.

To give effect to this intended expansion of jurisdiction, and mindful of the many abuses of traditional jurisdictional limitations by class action plaintiffs, Congress instructed courts to employ a functional, pragmatic analysis when interpreting CAFA. This Court previously recognized that the jurisdictional inquiry should be undertaken through the prism of CAFA's objectives, making sure not to "exalt form over substance." *Standard Fire*, 568 U.S. at 594-95 ("treat[ing] a nonbinding stipulation" regarding amount-in-controversy "as if it were binding" on class members would "exalt form over substance"). Consistent with this approach, CAFA eschewed formalism and commanded that application of the statute "not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff or the state rulemaking authority." S. Rep. No. 109-14, at 35. And because mass actions "are simply class actions in disguise" and subject to even greater abuse, Congress intended that the terms "class action" and "mass action" both be given liberal constructions. *Id.* at 47; *see also* Enrique Schaerer, *A Rose by Any Other Name: Why a Parens Patriae Action Can Be a "Mass*

Action" Under the Class Action Fairness Act, 16 N.Y.U. J. Legis. & Pub. Pol'y 39, 58 (2013) ("CAFA's broad mass action definition reveals a congressional intent to bestow a liberal grant of jurisdiction.").

Here, the lower courts ignored CAFA's goal of *expanding* federal jurisdiction over mass actions of interstate importance. The district court's remand decision turned on the fact that the consolidation proposal technically came from a state court rather than from the plaintiffs themselves. Pet. App. 11 ("The [c]ourt finds that a state court's *sua sponte* order cannot 'propose' a joint trial to trigger mass action jurisdiction."). This reasoning is erroneous because it contravenes Congress's intent to dramatically expand diversity jurisdiction over such truly interstate proceedings.

"The key language in the statute defines a mass action as a civil action in which 'claims of 100 or more persons *are proposed to be tried jointly*.'" *Scimone*, 720 F.3d at 881 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). To be sure, "the statute's passive syntax makes it somewhat ambiguous who can make the proposal for joint trial." *Id.* However, any such ambiguity should be resolved *in favor* of removal in light of CAFA's "overall intent" of expanding jurisdiction, S. Rep. No. 109-14, at 35. Such a conclusion is all the more logical given that CAFA "expressly *bars* removal of suits where 'the claims are joined upon motion of a defendant,'" *Scimone*, 720 F.3d at 881 (emphasis added) (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(II)). Any contrary conclusion would "exalt form over substance[] and run directly counter to CAFA's primary objective." *Standard Fire*, 568 U.S. at 595. In short, the Court should grant the petition to correct the district court's erroneous

interpretation of CAFA, which is not faithful to Congress's overarching intent, as set forth in the legislative history and as expressly recognized by this Court.

Second, if allowed to stand, the district court's ruling will also have the effect of encouraging jurisdictional gamesmanship, in further contravention of congressional intent. Congress's expansion of federal jurisdiction over interstate class and mass actions was directed in large part at reversing then-current law that "enable[d] 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." S. Rep. No. 109-14, at 10 (criticizing plaintiffs' jurisdictional gamesmanship). This Court previously recognized as much by rejecting one previously common strategic effort used by plaintiffs' lawyers to evade CAFA jurisdiction: waiving class claims in excess of $5 million through nonbinding stipulations. *See Standard Fire*, 568 U.S. at 595 (explaining that allowing plaintiffs' lawyers to subdivide "a $100 million action into 21 just-below-$5-million state-court actions simply by including nonbinding stipulations . . . would squarely conflict with the statute's objective"); *see also Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 977, 980-81 (9th Cir. 2013) (principle that plaintiff is the "master of her complaint" is "clearly irreconcilable with the Supreme Court's reasoning in *Standard Fire*" because that ruling rejects manipulative efforts to circumvent CAFA jurisdiction) (citation omitted).

Unfortunately, plaintiffs' lawyers have had great success in flouting Congress's concerns about jurisdictional gamesmanship in the mass action context. *See* Linda S. Mullenix, *Class Actions Shrugged: Mass*

Actions and the Future of Aggregate Litigation, 32 Rev. Litig. 591, 620 (2013) ("To avoid removal under CAFA's mass action provisions, plaintiffs' attorneys have utilized an array of strategies to plead around CAFA's threshold . . . ."). Plaintiffs' counsel routinely "slic[e] and dic[e] litigants, their claims, and their damages into smaller packages that fall beneath CAFA's mass action requirements." *Id.* For example, "[t]o evade CAFA's 100 claimant requirement to establish a mass action, state court plaintiffs' attorneys have structured their state litigation by dividing their individual cases among separate complaints . . . by bundling claimants into separate pleadings of fewer than 100 litigants or by separating plaintiffs' claims into identical complaints, divided incrementally by time periods." *Id.* at 621 (footnote omitted); *see also* Guyon Knight, *The CAFA Mass Action Numerosity Requirement: Three Problems with Counting to 100*, 78 Fordham L. Rev. 1875, 1900 (2010) (CAFA's "hard numerosity threshold" "practically begs a creative lawyer to structure complaints in order to evade CAFA's scope by including fewer than 100 plaintiffs in any one suit.").

The district court's approach in the present case invites another—indeed potentially more blatant—type of jurisdictional gamesmanship. If its determination is left to stand, plaintiffs' lawyers will be able to evade mass action removal by filing disparate product-liability lawsuits involving *thousands* of plaintiffs and waiting for the state court to propose consolidation. The upshot is that *plaintiffs* would be creating the very kinds of multi-plaintiff interstate cases that Congress sought to make removable under CAFA but subverting federal jurisdiction by outsourcing the proposal of joinder to the state courts.

Cf. Lester v. Exxon Mobil Corp., 879 F.3d 582, 592 (5th Cir. 2018) (rejecting another theory that would permit plaintiffs to "evade" mass action removal and "[c]onstruing CAFA to permit this procedural gamesmanship is at odds with CAFA's intent to curb abuses of the judicial system"). For this reason as well, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Pfizer Inc., the petition for writ of certiorari should be granted.

Respectfully submitted,

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