No. 11-287

IN THE
Supreme Court of the United States

SKECHERS U.S.A., INC.,
Petitioner,
v.
PATTY TOMLINSON,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JEFFREY A. LAMKEN
Counsel of Record
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

ANDREW M. BERNIE
MOLOLAMKEN LLP
540 Madison Ave.
New York, N.Y. 10022
(212) 607-8160

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether a class action that is removed under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, and indisputably involves a potential class recovery exceeding $5 million may be remanded on the ground that the named plaintiff has purported to waive any recovery for class members above the jurisdictional threshold.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NO. 11-287

SKECHERS U.S.A., INC.,
Petitioner,
v.
PATTY TOMLINSON,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber 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 country.[1] The Chamber represents

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus 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 *amicus curiae*, its members, or its counsel made a

the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

This case presents an important question that has divided the federal courts—whether a putative class representative may evade the removal protections of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, §4, 119 Stat. 4, 9-12, by offering a stipulation that purports to waive for herself and absent class members any recovery above CAFA's $5 million jurisdictional threshold. Many of *amicus*'s members have first-hand experience in state-court systems that refuse to subject proposed classes to any meaningful scrutiny and employ other procedural devices that encourage meritless litigation and force defendants who have done nothing wrong to settle highly dubious claims. Many of *amicus*'s members have also been forced to shoulder the burden of simultaneously defending against a litany of related class actions in state courts throughout the country.

Amicus has regularly called on Members of Congress to curb abusive state class-action procedures and establish uniform removal procedures, and was an early and vocal supporter of CAFA's enactment. It has also filed briefs on CAFA issues in this and other courts. *E.g.*, *Gay* v. *Morgan*, No. 06-1471, cert. denied, 552 U.S. 940 (2007). *Amicus* and its members thus have both a unique perspective on the question presented and a substantial interest in ensuring that CAFA's requirements are inter-

---

monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

preted and enforced consistent with its purpose to resolve class actions fairly and without the uncertainty that can undermine fairness to plaintiffs and defendants alike.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance to class-action defendants and absent class members alike. In enacting CAFA, Congress recognized that widespread "abuses of the class action device" tolerated or even sanctioned in state courts had "harmed class members with legitimate claims and defendants that ha[d] acted responsibly." Pub. L. No. 109-2, §2(a)(2). It likewise recognized that such abuses damage interstate commerce and undermine respect for the judicial system. *Id.* §§2(a)(2)(B)-(C), (4)(C). CAFA therefore provides protection for putative class actions of national significance by allowing them to be removed to federal court when more than $5 million is at issue.

Under the approach endorsed by the courts below, however, putative class representatives and their counsel may nullify CAFA's protections and defeat federal jurisdiction—forcing an automatic remand—simply by pairing the complaint with a stipulation purporting to limit class recovery to no more than $5 million. That "automatic remand" rule conflicts with the decisions of other circuits. It makes the scope of federal rights vary with the happenstance of geography. It defies CAFA's central purpose of standardizing class-action procedures. And it invites precisely the forum-shopping that uniform procedures are designed to avoid. Putative class representatives seeking to avoid federal jurisdiction in the future will invariably bring suit in those States within circuits that treat such stipulations as dispositive on the amount-in-controversy requirement. Absent this Court's review, the disagreement among the lower courts threat-

ens to recreate the untenable regime that existed before CAFA's enactment, where courts in a few "magnet" jurisdictions purported to bind the rights of other States' residents and effectively made policy for the rest of the Nation on significant issues.

The Eighth Circuit's approach, moreover, threatens to prejudice the rights of plaintiffs and defendants alike. Absent class members may find their individual recoveries reduced to a pittance based on a stipulation by a putative representative whose adequacy remains undetermined. Notwithstanding the claim that the stipulation is enforceable under state law, defendants attempting to settle such cases will inevitably confront challenges (including federal constitutional challenges) to the stipulation and to the resulting settlement's enforceability by dissatisfied absent class members who demand better recoveries. The Eighth Circuit's approach will also inevitably increase the number of parties choosing to opt out, spurring splinter litigation. And it frustrates Congress's efforts to coordinate overlapping class actions through the Multidistrict Litigation process. That too will undermine defendants' ability to achieve global settlements with substantially all potential plaintiffs. Indeed, the only beneficiaries of the chaos caused by the automatic remand rule are named plaintiffs and their counsel, as both defendants and absent class members are stripped of the protections Congress intended to afford them.

I. THIS COURT'S REVIEW IS NEEDED TO ENSURE UNIFORM APPLICATION OF CAFA'S REMOVAL PROVISIONS

Congress enacted CAFA against a backdrop of "abuses of the class action device" in certain state courts that "harmed class members with legitimate claims and defendants that * * * acted responsibly." Pub. L. No. 109-2,

§2(a)(2)(A). Congress recognized that the inequitable practices of even a few States could have a national impact insofar as those practices "adversely affected interstate commerce," "undermined public respect for our judicial system," and "ma[de] judgments that impose[d] their view of the law on other States and b[ou]nd the rights of the residents of those States." *Id.* §§2(a)(2)(B)-(C), (4)(C). The existing conflict among the lower courts frustrates Congress's intent to provide a consistent rule of federal jurisdiction and to curtail the outsized role played by certain jurisdictions. This Court's review is needed to resolve the conflict and achieve the uniformity Congress intended to provide.

A. The Circuits Are Divided On Whether A Putative Class Representative May Evade Federal Jurisdiction By Purporting To Limit The Recovery Of Absent Class Members

The courts of appeals take diametrically opposed approaches to the question presented. The automatic remand rule followed below and by other circuits affords a putative class representative unbridled discretion to purportedly limit the recovery of absent class members for the sole purpose of avoiding removal to federal court. The Eighth Circuit initially endorsed that approach in a single line of dictum.[2] That dictum became dispositive here: The district court held that, "by filing a binding stipulation to limit damages below the jurisdictional threshold," respondent could "evade federal jurisdiction."

---

[2] See *Bell* v. *Hershey Co.*, 557 F.3d 953, 958 (8th Cir. 2009) ("In order to ensure that any attempt to remove would have been unsuccessful, Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand; it is too late to do so now.").

Pet. App. 8a. The Eighth Circuit then endorsed that view by denying petitioner leave to appeal. *Id.* at 2a.

Three other circuits follow a similar approach. The Ninth Circuit has concluded that class representatives may avoid removal under CAFA by stipulating to limited recovery for absent class members. *Lowdermilk* v. *U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 999 n.5 (9th Cir. 2007). In a pre-CAFA case, the Eleventh Circuit held—with no analysis—that a named plaintiff's stipulation that each individual class member would neither request nor accept damages in excess of $75,000 could be given controlling weight on a motion to remand. *Darden* v. *Ford Consumer Fin. Co.*, 200 F.3d 753, 755-756 (11th Cir. 2000).

The Third Circuit has adopted what appears to be the most extreme version of that approach. In *Morgan* v. *Gay*, 471 F.3d 469 (3d Cir. 2006), cert. denied, 552 U.S. 940 (2007), the court held remand was required because the complaint contained a damages limitation that was *non*-binding under state law. *Id.* at 476. The court was content merely to "admonish" that a verdict exceeding that limit "could well be deemed prejudicial" under a state procedural rule. *Id.* at 477.

The Fifth and Seventh Circuits have taken the opposite view. They squarely hold that a putative class representative cannot avoid federal jurisdiction by purporting to limit the recovery of absent class members. See *Manguno* v. *Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724-725 (5th Cir. 2002); *Back Doctors Ltd.* v. *Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830-831 (7th Cir. 2011). In *Manguno*, for example, the plaintiff attempted to stave off removal by purporting to waive the class's right to attorney's fees otherwise available to prevailing plaintiffs under state law. 276 F.3d at 721-722. Denying the putative class representative's motion to remand, the

Fifth Circuit held that she could not limit the class's recovery in order to evade federal jurisdiction. "[I]t is improbable," the court reasoned, "that Manguno can ethically unilaterally waive the rights of the putative class members to attorney's fees without their authorization." *Id.* at 724-725; see also *Ditcharo* v. *United Parcel Serv., Inc.*, 376 F. App'x 432, 437 (5th Cir. 2010) (denying motion to remand because the proffered stipulation did "not provide [putative class representatives] with the authority to deny other members of their putative class action the right to seek an award greater than $75,000").

District courts within the Fifth Circuit have likewise rejected putative class representatives' attempts to evade federal jurisdiction by purporting to limit the class's recovery. As the district court in *Ditcharo* observed, "though the named plaintiffs have waived any recovery of damages" above the jurisdictional threshold, "the same cannot be said of the unnamed putative class members." *Ditcharo* v. *United Parcel Serv.*, No. 08-3648, 2009 WL 211146, at *5 (E.D. La. Jan. 28, 2009). The named plaintiffs could "limit the damage claims of the unnamed plaintiffs" only if they had been granted "waiver authority * * * by the unnamed class members" or "been accepted and authorized as class representatives of a certified class, as of the time of removal." *Ibid.*; see also *Pendleton* v. *Parke-Davis*, No. 00-2736, 2001 WL 96408, at *4 (E.D. La. Jan. 31, 2001) (holding putative class representative's purported waiver ineffective absent evidence that representative obtained authorization from absent class members).

The Seventh Circuit reached the same conclusion in *Back Doctors*, holding that a class representative "has a fiduciary duty to its fellow class members" and thus "can't throw away what could be a major component of

the class's recovery" merely to "ensure that the stakes fall under $5 million." 637 F.3d at 830-831. That decision was consistent with the Seventh Circuit's statement in a pre-CAFA case endorsing the Fifth Circuit's conclusion that a putative class representative could not stipulate away the recovery rights of absent class members. See *Pfizer, Inc.* v. *Lott*, 417 F.3d 725, 725 (7th Cir. 2005) (Posner, J.) (citing *Manguno*, 276 F.3d at 724).

The decisions of the Seventh and Fifth Circuits cannot be reconciled with the approach followed in this case. Indeed, the Fifth Circuit's decision in *Manguno* declined to permit the named plaintiff to limit absent class members' recovery rights even though the purported waiver involved only *attorney's fees*—an issue of lesser importance to most class members. Obviously, neither the Fifth Circuit nor the Seventh Circuit would countenance a putative class representative's abandonment of a large percentage of the class's potential recovery, as the Eighth Circuit did here. The conflict among the circuits warrants this Court's review.

B. The Circuit Split Encourages Forum-Shopping And Undermines Congress's Intent To Provide Consistent Criteria For Removal

The current conflict defeats Congress's very purposes in enacting CAFA.

1. Before CAFA was enacted, class-action plaintiffs regularly flocked to a small number of "magnet" jurisdictions. That concentration of lawsuits meant that a few courts would make important policy decisions for the rest of the country, "bind[ing] the rights of the residents of [other] States." Pub. L. No. 109-2, §2(a)(4)(C); see also 151 Cong. Rec. H723-01, H726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) (noting that "[a] major element of the worsening crisis is the exponential in-

crease in State class action cases in a handful of 'magnet' or 'magic' jurisdictions").

The current circuit conflict threatens to reproduce the system of magnet jurisdictions CAFA was designed to eliminate. For those seeking to avoid CAFA and pursue their cases in state court without federal intervention, the States comprising the Third, Eighth, and Ninth Circuits, for example, have a peculiar magnetism (particularly those States, such as Arkansas, that also employ lax certification standards). Those circuits have approved the use of recovery-limiting stipulations like the one at issue here. By contrast, the Fifth and Seventh Circuits—which reject such stipulations—would tend to be avoided. It cannot be that Congress enacted CAFA's uniform rules to eliminate so-called magnet jurisdictions at the state level only to have new magnet jurisdictions arise because of divided law in the federal courts. CAFA cannot serve its important role absent this Court's review.

2. The circuit conflict also undermines the interest of judicial efficiency and economy. "Nothing is more wasteful than litigation about where to litigate * * * ." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). But the current circuit conflict has the unfortunate consequence of producing just such litigation, "eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010). Without a clear, uniform answer to whether and when stipulations purporting to limit class recovery are enforceable, state and federal courts across the country will be caught in a game of jurisdictional tug-of-war between parties seeking to litigate in what each views as the more favorable forum. The re-emergence of magnet jurisdictions would also channel class actions into

a few "select" forums chosen not for their connection to the case but for their class-action-friendly law—needlessly precipitating a host of personal jurisdiction and *forum non conveniens* challenges.

II. The Eighth Circuit's Approach Is Inconsistent With CAFA's Text, Structure, And Purpose

Any rule that, like the Eighth Circuit's, simply remands upon the filing of a purportedly binding stipulation by a putative class representative cannot be reconciled with CAFA. CAFA's manifest purpose is to expand federal jurisdiction over large, nationally important class actions. Consistent with both that purpose and background principles of federal jurisdiction, CAFA entitles defendants to remove unless there is legal certainty that the class's total recovery will not exceed $5 million. The approach of the courts below does not even come close to fulfillment of that mandate.

A. CAFA Is Designed To Confer Federal Jurisdiction Over Class Actions Broadly

CAFA wrought a dramatic expansion of federal class-action jurisdiction. In addition to revising the amount-in-controversy requirement, it dispensed with the rule that all plaintiffs must be diverse from all defendants. See, *e.g.*, *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806); 28 U.S.C. §1332(a)(1). Instead, CAFA requires only minimal diversity among the parties. See 28 U.S.C. §1332(d)(2)(A). And CAFA did away with the absolute bar on removal by home-state defendants in diversity actions, see *id.* §1441(b), substituting a sliding scale that incorporates elements of judicial discretion, see *id.* §1332(d)(3)-(4).

1. CAFA confers federal jurisdiction over class actions "in which the matter in controversy exceeds the

sum or value of $5,000,000." 28 U.S.C. § 1332(d)(2). The statute goes on to clarify that "the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000," *id.* § 1332(d)(6), "abrogat[ing] the [prior] rule against aggregating claims," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005). That aggregation, of course, lumps together the claims of all class members, both named and absent. But the claims of absent class members still belong to them. As a result, it cannot be that the named plaintiff's subjective intent concerning recovery controls the calculation. Nor can artful pleading distort the calculus.[3] The question of aggregate value is instead substantive and objective—what is the maximum amount that might be recovered?

CAFA's legislative history indicates that Congress intended courts making that calculation to read the statute's jurisdiction-conferring provisions broadly in favor of a federal forum. See, *e.g.*, S. Rep. No. 109-14, at 42 (Feb. 28, 2005) ("If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied)."); *id.* at 44 ("[P]laintiff should have the burden of demonstrating that 'all matters in controversy' do not (in the aggregate) exceed the sum or value of $5,000,000, exclusive of interest and costs."); *id.* at 43 ("[N]ew section 1332(d) is intended to expand substantially federal court jurisdiction

[3] Elsewhere in the statute, Congress instructed that "whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction" is one *factor* a district court should consider when exercising its *discretion* to accept or decline jurisdiction over certain class actions. 28 U.S.C. § 1332(d)(3)(C).

over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in a federal court if properly removed by any defendant."); 151 Cong. Rec. H723-01, H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("[I]f a Federal court is uncertain about whether the $5 million threshold is satisfied, the court should err in favor of exercising jurisdiction * * * ."). That history further confirms that CAFA's removal provision is to be broadly construed in favor of federal jurisdiction and may not be lightly defeated.

2. The courts permitting putative class representatives to file stipulations purporting to sacrifice a portion of the potential class recovery have often relied on this Court's decision in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938). Addressing diversity jurisdiction and the then-existing jurisdictional amount of $3,000, the Court there concluded that a plaintiff may limit *his own* claims if he "does not desire to try his case in the federal court," even "though he would be justly entitled to more." *Id.* at 294. Asserting that "CAFA does not change the proposition that the plaintiff is the master of her own claim," some courts have mechanically transplanted *St. Paul Mercury*'s result to the CAFA context. See, *e.g.*, *Morgan*, 471 F.3d at 474; cf. *Lowdermilk*, 479 F.3d at 999 (noting that it was "preserv[ing] the plaintiff's prerogative" to limit the recovery sought in order to remain in state court).

But it goes well beyond *St. Paul Mercury* to hold that the plaintiff in a *putative* class action is not merely master of *her* claim but also master of *absent class members'* claims, long before any court has held her to be a proper representative with authority to bind those absent class members. This Court has never extended *St. Paul Mer-*

cury to allow a plaintiff to avoid federal jurisdiction by limiting the rights of other parties not before the court. As noted above, see pp. 6-8, *supra*, courts in several pre-CAFA cases reached precisely the opposite conclusion, holding that class representatives cannot avoid federal jurisdiction by waiving relief otherwise available to the class. Thus, Congress did not enact CAFA against a background presumption that the amount in controversy in class actions would be determined solely by reference to the named plaintiff's choices. Instead, for putative class actions, the opposite rule prevailed.

B. This Court Should Not Allow A Stipulation To Defeat CAFA Jurisdiction Where There Is No Legal Certainty It Will Bind Class Members

In *St. Paul Mercury*, this Court noted the "intent of Congress drastically to restrict federal jurisdiction" in ordinary diversity cases. 303 U.S. at 288. It nevertheless required a party seeking to defeat federal jurisdiction to demonstrate "to a *legal certainty*" that the plaintiff could not recover above the jurisdictional threshold. *Id.* at 289 (emphasis added); see also *id.* at 292 ("removal will be futile and remand will follow" where "it is *obvious* that the suit cannot involve the necessary amount" (emphasis added)). Given Congress's manifest purpose in CAFA to *expand* federal jurisdiction over class actions, CAFA must be construed to entitle defendants to demand at least the same degree of certainty: Where a stipulation purports to limit class-wide damages and thereby defeat otherwise proper CAFA jurisdiction, the defendant at the least should be permitted to insist on proof to a legal certainty that the stipulation will bind the entire class.

The relevant degree of certainty, and who bears the burden of proof, has nonetheless divided the courts of appeals. For example, the Seventh Circuit requires that,

once a defendant shows a sufficient amount in controversy by a preponderance of the evidence, *plaintiffs must prove* that it is *impossible* for them to hit the jurisdictional threshold. *Back Doctors*, 637 F.3d at 830 ("[T]he estimate of the dispute's stakes advanced by the proponent of federal jurisdiction controls unless a recovery that large is legally impossible."); see also *Bell*, 557 F.3d at 958. But the Third Circuit requires the opposite: *Defendants* must "prove to a legal certainty that the complaint exceeds the statutory amount in controversy requirement." *Morgan*, 471 F.3d at 475. For that reason too, review is warranted.

In this case, the district court thought certainty existed because the plaintiff had stipulated to limit the class's recovery. See Pet. App. 9a. But the court failed to conduct any meaningful analysis bearing on the stipulations' likely effect. For example, in class actions due process requires additional safeguards to ensure adequate representation and protection of the interests of absent class members in the conduct of the litigation. Accordingly, under CAFA, defendants may insist that the legal certainty test address not only state law but also federal due process concerns. Unless the plaintiff can demonstrate that the waiver will limit the recovery of absent class members consistent with due process, her remand motion must be denied.

The Fifth and Seventh Circuits have indicated that a named plaintiff's ethical and fiduciary duties forbid her from stipulating away class recovery for the sake of defeating jurisdiction. See pp. 6-8, *supra*. Whether that is true in all cases remains to be seen. There may be situations where a reasonable and properly appointed class representative might, after weighing the entire class's interests, determine that the choice of forum is worth the

sacrificed recovery. But if such a stipulation is to be given jurisdictional effect, the federal court would at the very least have to consider a host of due-process implications bearing on whether its enforcement is a certainty. The court would have to consider whether the interests of absent class members "are in fact adequately represented by parties who are present." *Hansberry* v. *Lee*, 311 U.S. 32, 43 (1940). The court would have to consider whether the "potentially conflicting interests" of the named plaintiff and absent class members, *id.* at 44—such as the plaintiff's ability to escape recovery limits she would impose on class members by receiving incentive payments in a settlement—foreclose that conclusion. And the court would have to consider the fact that the class has not yet been certified: Until the *putative* class representative becomes the *actual* named representative, her authority to bind absent class members may be uncertain. Given the myriad turns a suit may take during the course of litigation, it may be impossible to conclude with legal certainty at the time of removal that a stipulation will bind the class.

Simply put, purportedly "binding stipulations" at the very least must be subject to appropriate scrutiny. Such scrutiny is not merely necessary to determine jurisdiction; it is necessary to ensure that failure to accept jurisdiction denies neither absent class members potential recovery without adequate safeguards nor defendants the federal forum Congress intended to provide. The decision below and similar cases fall well short of conducting anything like the requisite analysis.

III. THE DECISION BELOW RAISES ISSUES OF VITAL IMPORTANCE TO THE NATION'S BUSINESS COMMUNITY

The question presented is of great importance to the many thousands of businesses faced with the prospect of litigating or settling class actions. The current disarray threatens to undermine settlement efforts; expose businesses to multiple lawsuits; and undermine the MDL and other processes designed to ensure efficient judicial administration.

A. The Eighth Circuit's Approach Undermines Settlement And Creates Substantial Uncertainty for Defendants

The Eighth Circuit's approach not only creates an intolerable risk that so-called "binding stipulations" will in the end fail to restrain recoveries. It also virtually guarantees satellite litigation and collateral attacks on any resolution reached in the class action, as dissatisfied absent class members raise due process and other attacks to avoid being bound.

1. The courts below in this case allowed the as-yet uncertified putative class representative to evade federal jurisdiction by unilaterally stipulating to a total class recovery of $5 million or less. They did so even though petitioner showed that the class might recover as much as $38 million under a disgorgement theory, see Pet. 6, and the district court agreed that the amount in controversy was likely more than $5 million, see Pet. App. 8a. Respondent thus has claimed the authority to waive nearly 87% of absent class members' potential recovery.

The extraordinary authority the Eighth Circuit's approach accords putative class representatives is unaccompanied by any meaningful protections. CAFA contains a number of provisions mandating heightened re-

view of settlements.[4] But plaintiffs who stipulate to limited damages evade those safeguards along with the federal forum. Congress surely could not have intended that settling a case for 30 cents on the dollar would require compliance with myriad procedures, but signing a stipulation that limits recovery to half that amount would be permitted on a whim.

Apart from any potential issues the decision below raises for absent class members, it creates grave difficulties for defendants seeking to defend (and settle) such actions. Where a class has been properly certified, class litigation promotes consistency of results and gives defendants the significant benefit of a final, binding resolution of the matter in controversy. By encouraging class representatives to waive the rights of absent class members, however, the Eighth Circuit's rule undermines those assurances.

First, it creates an unacceptable risk that such judgments and settlements will not be given preclusive effect against later-suing absent class members. "It is well settled that the court adjudicating a dispute cannot predetermine the binding effect of its own judgment; that can be tested only in a subsequent suit." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*

---

[4] See 28 U.S.C. § 1712 (imposing limits on recovery of contingent fees and other attorney's fee awards in so-called "coupon settlements"); *id.* § 1713 (prohibiting a court from approving a settlement that would result in a net loss to any class member, unless the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss); *id.* § 1714 (prohibiting class settlements that discriminate against class members based on geographic proximity to the court); *id.* § 1715 (requiring notification of appropriate state and federal officials).

Practice and Procedure § 1789, at 554-555 (3d ed. 2005).[5] And courts have often held that "a class action judgment will not bind absent members if they were not accorded due process of the law," and "[t]he preclusive effect of a prior judgment will depend upon whether absent members were 'in fact' adequately represented by parties who are present." *Pelt* v. *Utah*, 539 F.3d 1271, 1284 (10th Cir. 2008). This Court has stated that "other state and federal courts are not required to accord full faith and credit to [a constitutionally deficient] judgment," *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982), and "adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members," *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J., concurring in part and dissenting in part); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 900-901 (2008); *Hansberry*, 311 U.S. at 42-43.

As a result, a court confronted with a putative class action encompassed within a previously-settled lawsuit may feel itself under no obligation to give preclusive effect to the prior suit if it believes that the named plaintiff provided inadequate representation. It is thus likely that, where the named plaintiff purports to waive some of the class recovery, dissatisfied absent class members and their lawyers may file additional suits after the first suit is settled, asserting that they cannot be bound by the prior result. The risk of such lawsuits and the risk they may succeed increase exponentially when the previous

---

[5] The Advisory Committee's Note to the 1966 amendment of Rule 23 recognizes as much, noting that a court presiding over a class action should "carefully consider[]" the scope of its judgment in order to better facilitate subsequent consideration of *res judicata* issues. See Advisory Comm. Note, 39 F.R.D. 98, 106 (1966).

class representative limited the class's potential recovery dramatically for the sole purpose of avoiding federal jurisdiction. And it is greater still if the subsequent lawsuit is filed in a different State. It requires little imagination to predict that state courts will often respond unfavorably to foreign judgments that purport to bind their citizens to lesser relief secured by forum-shopping plaintiffs. The Eighth Circuit's approach thus threatens not just the finality of otherwise concluded class-action litigation but also comity between the States. Until this Court resolves the question presented, defendants will be caught in a Catch-22, forced to litigate or settle cases knowing the outcome might be denied preclusive effect in later proceedings.

2. Beyond such collateral attacks, the Eighth Circuit's approach burdens defendants with needless splinter litigation. By artificially restricting recovery for those who remain class members, the rule vastly increases the relative financial benefit of opting out. That will inevitably increase opt-outs, spawning further litigation and creating the precise situation a class-action settlement is intended to avoid. See, *e.g.*, Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745, 754-755 (1990) (explaining that defendants in a class action will grow more reluctant to settle as additional litigants opt out).

Nor is the risk of significant opt-outs merely theoretical. The plaintiffs' bar is extraordinarily competitive and responds quickly to perceived litigation opportunities. The circulation of a notice accompanying a proposed class-action settlement will make it easy for enterprising lawyers to send out blanket solicitations of class mem-

bers, offering the promise of an uncapped recovery. Several law firms already have niche practices of filing class actions accompanied by binding stipulations in circuits that permit them. If the practice continues, it will only be a matter of time before another group creates a lucrative cottage industry of assembling splinter actions composed of disaffected class members.

3. Finally, the Eighth Circuit's rule frustrates congressional efforts to facilitate coordinated, uniform resolution of class actions. The Multidistrict Litigation (MDL) statute authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions with common issues of fact "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. §1407(a). By coordinating multiple cases in a single forum, the MDL statute permits litigation to progress in an orderly fashion, "prevent[ing] duplication of discovery and eliminat[ing] the possibility of conflicting pretrial rulings." *In re Liquid Carbonic Truck Drivers Chem. Poisoning Litig.*, 423 F. Supp. 937, 939 (J.P.M.L. 1976). Just last Term, this Court recognized the crucial interplay between CAFA and the MDL statute, explaining that "to the extent class actions raise special problems of relitigation, Congress has provided a remedy": CAFA allows removal of "any sizable class action involving minimal diversity," while the MDL statute allows "federal courts [to] consolidate multiple overlapping suits against a single defendant in one court." *Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011).

But the MDL statute contains no mechanism for controlling or coordinating related cases pending in state courts. The rule embraced by the Third, Eighth, Ninth, and Eleventh Circuits thus effectively nullifies the benefits and protections MDL affords to defendants. It does

away with the coordination afforded by the MDL process at a plaintiff's whim, and requires defendants to litigate a plethora of related class actions in state courts throughout the country. Indeed, in this very case, remand would require petitioner to defend separately an Arkansas-only class action, even though the case is entirely encompassed by a nationwide class action previously filed in federal court. See *Grabowski* v. *Skechers U.S.A., Inc.*, No. 10-cv-1300-JM (WVG) (S.D. Cal. filed June 18, 2010).

B. The Decision Below Benefits Named Plaintiffs And Class Counsel At The Expense Of Defendants And Unnamed Class Members

Congress relaxed the rules for removing class actions under CAFA based on extensive findings that certain state courts certified classes without anything like the rigorous analysis required by Rule 23 or other procedural safeguards necessary to protect the rights of defendants and absent class members alike. See Pet. 17. The Eighth Circuit's decision allows named plaintiffs to short-circuit the protections Congress attempted to interpose by engaging in a further extravagance: Named plaintiffs now can purport to sacrifice an enormous portion of the absent class members' potential recovery to avoid the procedures designed to protect those same absent class members. That also prejudices defendants, denying them the greater procedural protections they generally enjoy in federal court. Often, the only apparent beneficiaries are the putative class representatives and their counsel. Yet such stipulations have become ubiquitous nonetheless.

To be sure, named plaintiffs and their counsel are bound to their stipulations waiving all class recovery in excess of $5 million. But that limitation often will represent a lesser sacrifice for class representatives and class

counsel. Class representatives can often expect that any decrease in their pro rata share of the capped class award will be offset by incentive payments received as part of any settlement agreement at the conclusion of the litigation. See, *e.g.*, Elisabeth M. Sperle, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 Geo. J. Legal Ethics 873, 875 (2010) (noting that "incentive awards are common in class action settlements").

Class counsel's fees may also be limited by the $5 million cap. But that only heightens the problem: Class counsel's fee demands can be satisfied only by further reducing the already diminished recovery of the class they purport to represent. State court procedures addressing such issues often do not have the same rigor as their federal counterparts. Besides, whatever plaintiffs' counsel may give up in fees by limiting recovery for their clients can be overcome by filing in volume in state court. As petitioner notes, see Pet. 19-20, in one three-month period, counsel for respondent filed at least 20 complaints including stipulations designed to evade federal jurisdiction.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ROBIN S. CONRAD
KATE COMERFORD TODD
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JEFFREY A. LAMKEN
Counsel of Record
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

ANDREW M. BERNIE
MOLOLAMKEN LLP
540 Madison Ave.
New York, N.Y. 10022
(212) 607-8160

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

OCTOBER 2011