No. 17-257

In The Supreme Court of the United States

CORDIS CORPORATION,

Petitioner,

v.

JERRY DUNSON, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Petition presents the question whether the Class Action Fairness Act of 2005, Pub. L. No. 109-2 (CAFA) allows a large number of plaintiffs from various far-flung jurisdictions to choose a particular state forum, seek to consolidate their claims for common pretrial adjudication of common issues and a bellwether trial process capable of binding the defendant to common adverse findings, and still avoid the risk of removal to federal court.

Two circuits have found a right to removal in these circumstances, concluding that such a consolidation request qualifies as a "joint trial" proposal and therefore creates a "mass action" removable under CAFA.

The Ninth Circuit held otherwise, concluding that consolidation for common adjudication, including a bellwether trial process, is not a removable joint trial unless all plaintiffs have agreed to be bound by an adverse trial result – a condition precedent difficult to imagine.

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 90 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of markets. A list of PLAC's current corporate membership is attached. App. 1. Several hundred of the leading product liability defense attorneys in the country are sustaining (*i.e.*, non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development and operation of product liability law and otherwise impact the interests of PLAC's members. Since 1983, PLAC has submitted over 1100 *amicus* briefs in state and federal courts.

PLAC's interest in this action stems from concerns over the Ninth Circuit's interpretation and application of the rules authorizing defendants, including product manufacturers, to obtain a federal forum in mass tort proceedings, as contemplated by CAFA. Particularly in this era of interstate coordinated and consolidated state court proceedings in mass tort cases, *see Bristol-Myers Squibb Co. v. Superior Court of California*, 137

[1] Counsel for a party did not author this brief in whole or in part. Such counsel or a party did not make a monetary contribution used or intended to be used to fund the preparation or submission of this brief. No person other than *amicus curiae* made such a monetary contribution. Counsel for the parties consented to the filing of this brief. The parties received timely notice of the intention to file this brief.

S. Ct. 1773, 1777 (2017), it is imperative that defendants retain the full range of safeguards for assuring a fair forum for high-stakes adjudications of their rights and responsibilities in consolidated litigation.

This case and the question presented triggers PLAC's interest in reducing the opportunities for the unfair circumvention of federal jurisdiction in mass tort cases, as well as obtaining clear guidance for its members concerning their access to the federal courts.

INTRODUCTION/SUMMARY OF ARGUMENT

In CAFA, Congress sought to assure a federal forum for defendants in high-stakes multi-state class actions and mass actions and to curb the abusive forum shopping often seen in such cases. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Corber v. Xanodyne Pharms., Inc.*, 771 F.3d 1218, 1222 (9th Cir. 2014) (en banc). The decision of the Ninth Circuit and its decisional emphasis on how Plaintiffs characterize the benefits of coordination threatens the Congressional goal, exalts form over function, and encourages gamesmanship.

There are two basic reasons why certiorari should be granted:

> (1) the rationale used in the Ninth Circuit to evaluate whether an attempted consolidation or coordination proposal qualifies as a "mass action" "joint trial" proposal, focusing

largely on the way Plaintiffs have described the benefits of aggregation, injects an unacceptable level of gamesmanship into the removal/remand determination and invites circumvention and frustration of CAFA; and

(2) the Ninth Circuit's treatment of bellwether trial proposals under the mass action provision is unrealistic, unsupported, and conflicts with the reasonable, flexible approach adopted in two other circuits.

In practical effect, what Plaintiffs proposed in this case should qualify as a "joint trial" under California law and CAFA, and therefore allow removal as a federal mass action. The contemplated joint proceedings in a consolidated mass tort action like this one involve potentially dispositive resolutions of questions of law and fact meant to be binding on the parties, and thereby constitute joint "trials" under California law. And Plaintiffs unambiguously proposed that the consolidation court establish a bellwether trial process, which should itself qualify as a proposal for a joint trial. The Ninth Circuit's unwarranted reliance on Plaintiffs' editorial decisions and explanation of the benefits of consolidation and its disregard of the practical consequences of consolidation, undermines the goals of CAFA. And its unreasonably narrow vision of the type of a bellwether trial which could support removal is without support in the statute, the case law, or the reality of modern day litigation.

For these reasons, certiorari should be granted to reverse the Ninth Circuit's opinion allowing federal jurisdiction under CAFA to be evaded.

ARGUMENT

A. The Ninth Circuit's Analytical Process Elevates Form Over Function, Undermines The Purpose Of The Mass Action Provision, And Invites Gamesmanship

As Petitioner Cordis argues, the Ninth Circuit's interpretation of what Plaintiffs had in mind when proposing aggregation to the state court was questionable, at best. Rather than interpret the request in accordance with the purpose behind CAFA, the court effectively read the state court petition in the light most hostile to removal, notwithstanding the absence of any presumption against removal jurisdiction under CAFA. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). Indeed, this Court has cautioned that, given its remedial purpose, CAFA is not to be narrowly construed. *Ibid.* The Ninth Circuit's construction here was vanishingly slim.

But there is a more fundamental and pervasive error that requires this Court's attention – the method by which the Ninth Circuit evaluates whether an aggregation request qualifies as a proposal for a joint trial under the mass action provision. In this and prior mass tort cases applying the grant of federal jurisdiction for "mass actions" it has been the court's practice

to decide whether there was a joint trial proposal by parsing the specific language plaintiffs used in requesting state court aggregation, rather than the practical effect and import of the aggregation they initiated. *See*, *e.g.*, *Briggs v. Merck, Sharp & Dohme*, 796 F.3d 1038, 1050-1051 (9th Cir. 2015) (distinguishing *Corber* because the plaintiffs there said they wanted to avoid "inconsistent judgments" while the plaintiffs in *Briggs* said they sought to avoid "inconsistent rulings").

In this case, the Ninth Circuit repeatedly relied on a charitable interpretation of the statements Plaintiffs made to the state court in seeking to convince that court to aggregate the cases for common handling and adjudication before a single judge. First, the Ninth Circuit expressly held that plaintiffs can avoid federal jurisdiction if they seek consolidation "for all pretrial purposes" and simply remain silent as to how cases should be tried. *Dunson v. Cordis Corp.*, 854 F.3d 551, 555 (9th Cir. 2017).

But the court went even further. It held that even asking the state court to create a bellwether trial process for the aggregated cases does not amount to a "joint trial" proposal within the meaning of CAFA. Rather, unless the plaintiffs "say something" which clearly evidences an intent that all of the aggregated plaintiffs would be bound by any adverse result as to common issues at the trial, a proposed bellwether trial process does not qualify as a "joint trial." *Ibid.*

According to the court, the dispositive issue was whether, beyond suggesting a bellwether process, plaintiffs "said something more" to indicate an intent to be bound to a loss. *Ibid.* Much of the court's analysis entailed parsing the language of the state court petition, which it strictly construed in favor of plaintiffs and against Cordis and removal.[2] *Id*. at 556-557.

Thus, in deciding jurisdiction based primarily on what the plaintiffs said and how they said it, *Dunson* perpetuates a system whereby Plaintiffs can defeat federal jurisdiction by using or avoiding certain magic words, no matter what the likely practical effect of the aggregation they have initiated.

This decisional process improperly elevates form over function. It disregards this Court's command that application of the mass action provision should turn on pragmatic, realistic assessments of the effect of the proposed aggregation. And it flies in the face of CAFA's central purpose – to eliminate forum-shopping abuses in high-stakes multi-state mass actions by providing defendants a federal forum in such cases. *Standard*

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[2] Notwithstanding this Court's admonition against applying a negative presumption or a narrow construction in applying CAFA, *Dart Cherokee*, 135 S. Ct. at 554, the court construed ambiguities in Plaintiffs' petition in their favor because "Cordis bears the burden of showing that the plaintiffs proposed a joint trial of their claims." *Dunson*, 854 F.3d at 556. The court also adopted a pro-plaintiff, narrow view of the procedural impact of Plaintiffs' request to consolidate under California Code of Civil Procedure § 1048(a), based solely on the lack of compelling authority that the statute *requires* that consolidation include trial proceedings. *Ibid*.

Fire Ins., 133 S. Ct. at 1350. Rather, it encourages artful drafting and gamesmanship as a means to stay out of federal court.

A proper analysis focuses not on the way plaintiffs pitched consolidation, but on how common issues are typically handled in similar consolidated mass tort cases.

Consolidation of mass tort cases routinely produces active case management designed to streamline the litigation and most efficiently resolve the consolidated claims. The primary method used to do so is a "Lone Pine Order," used to schedule, as early as reasonably practicable, hearings on common, potentially dispositive issues capable of narrowing or resolving the critical matters of law and fact in controversy. *See*, *e.g.*, *Cottle v. Superior Court*, 3 Cal.App.4th 1367 (1992); *Lockheed Litig. Cases*, 115 Cal.App.4th 558 (2004).

For example, case management orders in consolidated mass tort actions routinely target a potential motion for summary judgment on a common dispositive issue, or summary adjudication of an issue likely to have a major impact on the adjudication of all claims. *See*, *e.g.*, *Lockheed Litig. Cases*, 115 Cal.App.4th at 561-562; *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1126, 1129 (9th Cir. 2002).[3]

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[3] Summary judgment motion practice constitutes a trial under California law. *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 858 (2001). For this reason alone, motion practice to resolve

In complex toxic tort and medical product liability cases one common potentially dispositive issue is the question of "general causation" – whether the product or substance to which the plaintiffs were exposed is capable of causing the injury plaintiffs claim to have developed. *See Lockheed*, 115 Cal.App.4th at 561-562; *Hanford*, 292 F.3d at 1129, 1133. General causation is a prerequisite to a finding of medical causation. A lack of general causation is dispositive of all claims based on the same general exposure. *Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828, 836 (9th Cir. 2011); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005) ("Plaintiff must first demonstrate general causation because without general causation, there can be no specific causation. In other words, if silicone breast implants are incapable of causing systemic injuries in anyone, it follows *a fortiori* that silicone breast implants could not have caused systemic injuries in the Plaintiff."). Case management orders in consolidated proceedings typically isolate and advance the general causation issue for common adjudication, with the understanding that it will be binding upon the parties and potentially decisive. *See, e.g.*, *Briggs*, 796 F.3d at 1043; *Lockheed*, 115 Cal.App.4th at 561-562; *Hanford*, 292 F.3d at 1133-1134. Adjudication of the sufficiency of the plaintiffs' proof of general causation on summary judgment or in a dedicated general causation hearing should be considered a "joint trial" within CAFA.

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questions of law or fact common to the claims of multiple parties should be considered a "joint trial" under CAFA.

Complex toxic tort and product liability cases typically require that a plaintiff produce admissible expert testimony to support a finding of causation. Every jurisdiction has this requirement. *See In re Mirena IUD Prods. Liab. Litig.*, 202 F.Supp.3d 304, 310-312 (S.D.N.Y. 2016). This includes California. *Jones v. Ortho Pharm. Corp.*, 163 Cal.App.3d 396, 402-403 (1985); *Avila*, 633 F.3d at 836. Consolidated proceedings routinely contemplate the joint designation of experts on common issues, such as general causation, and then the common adjudication of the admissibility of their causation opinions. *See, e.g.*, *Lockheed*, 115 Cal.App.4th at 561-562; *Mirena*, 202 F.Supp.3d at 308-310; *Hanford*, 292 F.3d at 1126.

All of these procedures are commonplace features of the pretrial landscape in consolidated mass tort proceedings; they are almost certain to find their way into the case management orders. Thus, even putting aside Plaintiffs' request for bellwether trials, the consolidated proceeding sought by Plaintiffs in this case would reasonably be construed to contemplate one or more "joint trials."

It is axiomatic that much of the efficiency of a consolidated mass tort proceeding is the ability to resolve an issue as to many, if not all, plaintiffs once and for all, thereby narrowing or eliminating some or all of the claims in dispute. This prevailing custom and practice should inform the analysis of whether or not a request to consolidate or coordinate is, in effect, a proposal for a joint trial. And it should take precedence over the way Plaintiffs have chosen to describe the benefits of

aggregation in their state court petition, and should obviate the need for the court to make fine linguistic distinctions. *See Briggs*, 796 F.3d at 1051 (distinguishing between references to avoiding "inconsistent rulings" and "inconsistent judgments"); *Dunson*, 854 F.3d at 556-557 (distinguishing between references to avoid "inconsistent adjudication" and "inconsistent judgments").

Thus, no matter how Plaintiffs chose to describe the contemplated consolidated proceeding, in practical effect consolidation would produce one or more opportunities for joint resolutions after hearing.

In sum, mass action determinations should turn on pragmatic, realistic assessments of the effect of the proposed combination/joinder, and function should not be sacrificed to form. *Standard Fire Ins. Co.*, 133 S. Ct. at 1350; *Corber*, 771 F.3d at 1223, 1224. Consequently, the effect of the motion to consolidate under the statute and under local custom and practice, given the nature and context of the case, should be given far more weight than what plaintiffs chose to say or omit in an effort to poison any effort to remove. Otherwise, the actual substance and effect of the coordination or consolidation may be subordinated to artful or ambiguous messaging in the motion, which is what happened here.

Only a reality-based and primarily objective approach can effectively deliver on CAFA's promise to provide defendants a federal forum in mass tort "interstate cases of national importance," and to combat

abuses of class actions and mass actions filed in state court. The Court should grant Cordis' Petition and reverse the Ninth Circuit's misguided approach and erroneous result.

B. The Ninth Circuit's Requirement That A Bellwether Trial Include A Stipulation To Be Bound By An Adverse Bellwether Finding To Qualify As A Joint Trial Is Unreasonable, Unsupported, And Conflicts With Decisions In Other Circuits

The Ninth Circuit held that a bellwether trial is not a "joint trial" unless plaintiffs *a priori* agree to be bound by a result adverse to them on a common issue. But a proposal to initiate a bellwether trial process in cases laden with common issues of fact and law should ordinarily be sufficient to propose a "joint trial" without the necessity of a stipulation that ordinarily would border on malpractice.

There may be cases where a bellwether trial is truly nothing more than a valuation lesson for the remaining claims, but that is rarely if ever the case in the mass tort setting. Any consolidated or coordinated proceeding reasonably calculated to efficiently resolve mass tort claims and avoid inconsistent rulings and results necessarily incorporates a mechanism for common adjudication of defect, general causation, and/or other common legal issues, either through common motion practice, bellwether trials, or a combination of the two. The Seventh Circuit recognized this in *In re*

Abbott Labs, 698 F.3d 568, 573 (7th Cir. 2012), and the Eighth Circuit agreed in *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160, 1164-1166 (8th Cir. 2013).

In *Abbott Labs*, several hundred plaintiffs filed a motion to consolidate their cases through trial. After removal, plaintiffs argued that they had not addressed how the trials would be conducted, and that there would have to be a request for "a joint trial or an exemplar trial that would affect the remaining cases" in order to constitute a "joint trial" proposal. 698 F.3d at 572.

The Seventh Circuit rejected that argument and requirement. Since consolidation was sought in part to minimize the risk of inconsistent adjudication,

> it is difficult to see how a trial court could consolidate the cases as requested by plaintiffs and not hold a joint trial or an exemplar trial with the legal issues applied to the remaining cases. In either situation, plaintiffs' claims would be tried jointly. [698 F.3d at 573]

Thus, the Seventh Circuit focused on the practical realities of the proposed consolidation, and unlike the Ninth Circuit, did not require a clear expression of agreement that a bellwether trial would have bilateral preclusive effect.[4]

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[4] The Ninth Circuit in *Dunson* cited *Abbott Labs* early in its opinion, for the preliminary proposition that a proposal "requesting consolidation 'through trial' and 'not solely for pretrial proceedings' " would be a joint trial proposal. 854 F.3d at 554. But the

In *Atwell*, the plaintiffs moved for single assignment of their cases "for purposes of discovery and trial." 740 F.3d at 1161. Following *Abbott Labs*, the court held that by seeking to have all the cases tried by the same judge to promote consistency of rulings, plaintiffs had proposed a joint trial and the case was subject to removal.[5]

Under these cases, seeking consolidation for pretrial purposes as well as bellwether trials constitutes a "joint trial" proposal under CAFA and justifies removal. The Ninth Circuit's holding that a bellwether trial can only qualify as a joint trial if plaintiffs have expressly or clearly agreed to be bound is unrealistic; such a requirement is untenable, and cannot be reconciled with the reasonable and pragmatic approach taken by the Seventh and Eighth Circuits.

The Court should grant a writ of certiorari and resolve the conflict, reversing the decision of the Ninth Circuit.

court's ultimate holding, that the proposed consolidation for pretrial proceedings and a bellwether trial was not a joint trial proposal because it lacked express agreement to direct bilateral preclusive effect, is flatly inconsistent with the Seventh Circuit's decision in *Abbott Labs*.

[5] The Ninth Circuit in *Dunson* cited *Atwell* for the preliminary proposition that "requesting assignment to a single judge 'for purposes of discovery and trial' " is a joint trial proposal. *Dunson*, 854 F.3d at 554. But again, that is indistinguishable from what Plaintiffs did in *Dunson*, and it is irreconcilable with the Ninth Circuit's ultimate holding.

CONCLUSION

The Ninth Circuit's decision reflects an analytical approach which interferes with the full realization of the legislative purpose of CAFA as applied to interstate mass tort cases. It imposes an unrealistic and unreasonable hurdle to removal, conflicts with two well-reasoned decisions by other circuits, and runs afoul of this Court's instruction that there is no presumption against removal under CAFA and that the statute is not to be narrowly construed. *Dart Cherokee*, 135 S. Ct. at 554. It should be reversed, and the proper approach should be clarified. The petition for a writ of certiorari should therefore be granted.

Dated: September 15, 2017

Respectfully submitted,

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