No. 07-1246

In The
Supreme Court of the United States

HANNA STEEL CORPORATION, *et al.*,
Petitioners,

v.

KATIE LOWERY, *et al.*,
Respondents.

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

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

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit association with more than 120 corporate members representing a broad cross-section of American and international product manufacturers.[2] 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 derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as *amicus curiae* in both state and federal courts, including at least 69 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and the parties consented to its filing. Copies of these consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made monetary contribution to the preparation or submission of this brief.

[2] A list of PLAC's current corporate membership is included as Appendix A to this brief.

PLAC's members often have confronted the contradictory interpretations of the different circuit courts regarding the standard for pleading diversity jurisdiction in removal. PLAC therefore is well positioned to offer a broader perspective on the issues in this case than the parties may be able to provide.

SUMMARY OF ARGUMENT

This case presents two basic questions — what is the proper pleading standard for removing a case based on diversity; and what is the proper procedure for considering a motion to remand? More specifically, what allegations must be set out in a notice of removal; and what evidence may a court consider, and according to what burden, to determine whether remand is proper? As shown in the Petition, courts have come up with at least four distinct and conflicting answers to these questions. *See* Pet. at pp. 10-15. Indeed, during the 70 years since this Court last touched on these issues, this conflict has become an uncomfortable fact of life for defendants contemplating removal. Depending upon which rule applies, a case readily removable in one circuit may subject the defendant to sanctions for attempting removal in another.

This untenable conflict has continued to sharpen even though the key to resolving it has been hiding in plain sight for almost two decades. In 1988, Congress amended 28 U.S.C. § 1446 to make clear that the same notice pleading rules applicable to a complaint apply to a notice of removal. In other words, Congress intended that "the same liberal rules employed in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of

removal." 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3733 (3d ed. 1998). Unfortunately, many courts overlooked the amendment to section 1446 and, as a result, missed an opportunity to resolve the conflict.

In the last year, however, two circuits, the Fourth and the Eleventh (in this case), both examined the 1988 amendment. As fate would have it, they reached precisely opposite conclusions and thereby opened up yet another fissure in the already fractious split among the circuits.

In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199 (4th Cir. 2008), the Fourth Circuit observed that the language of 28 U.S.C. § 1446(a) "is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure." *Id.* Accordingly, "just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter of controversy exceeds, exclusive of interests and costs, the sum specified by 28 U.S.C. § 1332,' so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner." *Id.* at 200 (citation omitted). The court also made it clear that, under appropriate circumstances, a defendant may plead the jurisdictional amount "on information and belief." *See id.*

In stark contrast, the Eleventh Circuit in this case looked at the same language of the same amended

statute and reached a very different conclusion. Instead of the notice pleading standard applicable to complaints originally filed in federal court, the Eleventh Circuit imposed a dramatically heightened burden on the removing defendant. Specifically, a notice of removal is inadequate on its face unless it "unambiguously establish[es] federal jurisdiction" by reference to the complaint or other document received by the defendant from the plaintiff. *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1213 (11th Cir. 2007) (remanding because the notice of removal "asserted no factual basis" to support jurisdiction), *petition for cert. filed*, 76 U.S.L.W. 3540 (U.S. Apr. 1, 2008). In a case like this one, the removing defendant may not rely on any other type of evidence in formulating its jurisdictional allegation no matter how clearly the evidence supports the allegation.[3] *See id.* at 1211. Nor may the defendant rely on jurisdictional allegations pleaded on information and belief as would otherwise be appropriate under FED. R. CIV. P. 11. On the

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[3] In dicta, the court hypothesized that a defendant may be able to rely on other types of evidence where "the underlying substantive law provides a rule that allows the court to determine the amount of damages." *Lowery*, 483 F.3d at 1215. As an example, it noted that, in a breach of contract case, a defendant may be able to rely on the contract itself assuming it contains a liquidated damages provision. *Id*. This "legal rule" restriction appears without basis, and, as a practical matter, it excludes a wide variety of cases in which limited extrinsic evidence might shed significant light on the amount in controversy. For example, in the product liability context, certain types of personal injuries, such as the loss of a limb, are routinely measured according to the actuarial tables. Such evidence would be strictly excluded under *Lowery*'s narrow exception.

contrary, a defendant in the Eleventh Circuit must have proof "unambiguously establish[ing] federal jurisdiction" *before* even contemplating removal. *Id.* at 1214.

Lowery cannot be squared with either *Ellenburg* or 28 U.S.C. § 1446. Both teach that a notice of removal should be treated like any other pleading under Rule 8. What flows from this is a fair and easy-to-follow procedure for testing the sufficiency of jurisdictional allegations upon removal. First, the removing defendant must offer a "short and plain statement of the grounds for removal" consistent with Rules 8 and 11. Far from requiring the defendant to await evidence in the form of a "clear and unambiguous statement" from the plaintiff, the removing defendant is free to rely on *either* (1) facts the defendant believes, "after an inquiry reasonable under the circumstances," support the jurisdictional allegations *or* (2) allegations the defendant believes are "likely [to] have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b). Second, any challenge to otherwise adequately pleaded jurisdictional allegations in the removal notice is to be resolved in the same way it would be if the case had been originally filed in federal court. *See, e.g., Ellenburg*, 519 F.3d at 200.

Although this kind of procedure may apply in the Fourth Circuit, it has been squarely rejected in the Eleventh. Indeed, after *Lowery*, it is truer than ever that a defendant's right to remove a diversity case turns as much (if not more) on *where* the case was filed than on whether the requirements of section 1332 have been met. Moreover, at least in the Eleventh Circuit,

the deck is now stacked against defendants so that it will often be impossible to remove cases in which jurisdiction would never have been questioned, had the cases been originally filed in federal court. It is exactly this sort of procedural bias against removal that Congress sought to eliminate in amending section 1446.

With *Lowery*, the time is ripe for this Court to bring an end to the decades-old split that has divided the circuits and created inconsistent, unpredictable, and unfair outcomes in cases removed to federal court. PLAC therefore respectfully urges the Court to grant the Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE 1988 AMENDMENT TO 28 U.S.C. § 1446 POINTS THE WAY OUT OF A DECADES-OLD CIRCUIT SPLIT ON THE REMOVING DEFENDANT'S BURDEN FOR PLEADING AND PROVING THE AMOUNT IN CONTROVERSY.

In 1988, Congress enacted the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669. The Act made several changes to the removal procedure statute (28 U.S.C. § 1446) intended to bring removal procedure in line with the liberal rules applicable to pleading jurisdiction in the Federal Rules of Civil Procedure. Specifically, Congress (1) changed the mechanism for effecting removal from a "petition for removal" to a "notice of removal"; (2) changed the requirements for alleging jurisdiction from "a short and plain statement

of the facts which entitle him or them to remove" to "a short and plain statement of the grounds for removal"; (3) changed the "verified petition" to a "notice" signed pursuant to Rule 11; and (4) abolished the bond requirement imposing a mandatory cost for removal. *See* 28 U.S.C.A. 1446 Historical and Statutory Notes on 1988 Amendments (West 2006).

Together, these changes signaled that a complaint and a notice of removal are to be treated equally for purposes of establishing original jurisdiction. Where the "petition" under the old procedure must be acted upon by the court, the "notice" actually removes the case from state court and places it on the federal docket (as would a complaint).[4] "Prior to the 1988 revision of Section 1446(a), the petition for removal was required to contain a 'short and plain statement of the facts' that entitled defendants to remove. . . . This requirement has been modified to require only that the grounds for removal be stated in 'a short and plain statement' — terms borrowed from the pleading requirement set forth in Federal Rule of Civil Procedure 8(a)." 14C WRIGHT, MILLER & COOPER, *supra* § 3733.

In the legislative history of the 1988 Act, Congress made clear that the purpose of these changes was to "simplify the 'pleading' requirements for removal." H.R. REP. No. 100-889, at 71 (1988) *as reprinted in*

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[4] This change was reinforced by the 1991 Amendment to the Act. This amendment changed "petition for" to "notice of" throughout the statute. Act of Dec. 9, 1991, Pub. L. No. 102-198, § 10(a)(1), 105 Stat. 1623, 1626.

1988 U.S.C.C.A.N. 5982, 6031. Congress further explained that "[t]he present requirement that the petition [for] removal state *the facts* supporting removal has led some courts to required detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)." *Id*. at 71-72 (emphasis added). As for the deletion of the old bond and verification requirements, Congress noted that they too were out of step with Rule 8. *See id.* at 72 ("[a] bond is not required on filing an action, and should not be required on removal.").[5]

After the amendment to § 1446, pleading the "amount in controversy" in a notice of removal becomes a straightforward exercise. As Wright & Miller note: "Although it has been said that the requirement of this jurisdictional statement is 'a strict one,' and that a 'mere conclusion' is insufficient, the better rule is that detailed grounds for removal need not be set forth in the notice. Rather it should be sufficient if the court is provided the facts from which removal jurisdiction can be determined. Thus, the same liberal rules employed

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[5] Interestingly, the Long Range Plan for the Federal Courts prepared by the Judicial Conference of the United States advised Congress to change the diversity statute to require plaintiffs to "plead specific facts" to satisfy the jurisdictional amount. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, RECOMMENDATION 7 at 29-32 (1995), *available at* http://www.uscourts.gov/lrp/CHO4.PDF. Congress has declined to enact such a change.

in testing the sufficiency of a pleading should apply to appraising the sufficiency of a defendant's notice of removal." 14C WRIGHT, MILLER & COOPER, *supra* § 3733 (citing cases). This consideration follows the procedure long endorsed for pleading the "amount in controversy" in a complaint by the Federal Rules themselves. *See* FED. R. CIV. P. APP. OF FORMS, Form 2(a) (showing that it is sufficient to plead that the "matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332").

Because the jurisdictional allegations in a notice of removal and those in a complaint are to be treated the same, it follows that the procedure for challenging the existence of subject matter jurisdiction should be the same. Accordingly, the procedure for assessing a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) should provide accurate guidance regarding the proper procedure for assessing a 28 U.S.C. § 1447 motion to remand for lack of subject matter jurisdiction. Again, Wright & Miller:

> [A] motion under Rule 12(b)(1) may be used to attack two different types of jurisdiction defects. The first is the pleader's failure to comply with the pleading obligation set out in Rule 8(a)(1), which means that the allegations in the complaint are insufficient to show that the federal court has jurisdiction over the subject matter of the case as the rule requires. . . . The other defect that may be challenged under Rule 12(b)(1). . . is that the district court actually lacks jurisdiction over the subject matter, a defect that may exist despite the formal

> sufficiency of the Rule 8(a)(1) allegations in the complaint.
>
> When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion. Conversely, the pleader may establish the actual existence of subject matter jurisdiction through extra-judicial material.
>
> [O]nce a factual attack is made on the federal court's subject matter jurisdiction, the district judge is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter.

5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (3d ed. 2004). The burden on the proponent of jurisdiction has been described as follows: "When the statement of jurisdictional amount [pled by the plaintiff] is traversed by the defendant, that allegation will control and be upheld except when it appears to a legal certainty from the complaint or other proofs that the plaintiff cannot in good faith claim the jurisdictional amount." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1213 (3d ed. 2004).

II. RECENTLY, THE FOURTH CIRCUIT GOT THE ANALYSIS EXACTLY RIGHT.

In *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 195 (4th Cir. 2008), the defendant removed a product liability case in which the complaint made no reference to the amount in controversy. In the removal notice, the defendant pleaded the amount in controversy as follows:

> The value of the matter in dispute in this case, upon information and belief, exceeds the sum of Seventy Five Thousand and No/100 ($75,000) Dollars, exclusive of interest and costs, as it appears from the allegations in Plaintiff's Complaint. Defendants' counsel believes in good faith that the amount in controversy in this case meets and exceeds the $75,000 limit required for diversity jurisdiction.

Id. at 195. The district court *sua sponte* entered an order of remand because the notice "was inadequate to establish … the amount in controversy … and that therefore the Defendants failed to bear the burden of establishing that the Court ha[d] jurisdiction over the matters for purposes of removal." *Id.* In reversing the district court, the Fourth Circuit observed that 28 U.S.C. § 1446(a)

> requires that a Notice of Removal contain only 'a short and plain statement of the grounds for removal' and that it be 'signed pursuant to Rule 11.' While a notice of removal is not a pleading as defined by Federal Rule of Civil Procedure 7(a), the language in § 1446(a) is deliberately

> parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure.

Id. at 199. The court also examined the legislative history and concluded that it supported this reasoning. *Id*. at 200.

> Accordingly, we conclude that it was inappropriate for the district court to have required a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint. Therefore, just as a plaintiff's complaint sufficiently establishes diversity jurisdiction if it alleges that the parties are of diverse citizenship and that '[t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332, *see* Fed. R. Civ. P. 84; Fed. R. Civ. P. app. Form 2(a), so too does a removing party's notice of removal sufficiently establish jurisdictional grounds for removal by making jurisdictional allegations in the same manner.

Id. at 200.

Finally, the Fourth Circuit correctly assessed the burden of proving jurisdiction where there has been a challenge, not to the sufficiency of the notice of removal, but to the existence of jurisdiction at all. "Of course, '[t]he party seeking removal bears the burden of demonstrating that removal jurisdiction is proper. But this burden is no greater than is required to establish federal jurisdiction as alleged in a

complaint." *Id*. (citation omitted). *See also Frederico v. Home Depot*, 507 F.3d 188, 197 (3d Cir. 2007) (noting that "a defendant's notice of removal serves the same function as the complaint" and finding that, if the plaintiff does not specifically plead the amount is below the threshold, the case may be remanded only if the plaintiff proves to a legal certainty that he cannot recover the jurisdictional amount).

III. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH CONGRESSIONAL INTENT, THIS COURT'S PRECEDENT, AND THE OPINIONS OF SISTER CIRCUITS.

As we have seen, Congress intended a notice of removal and a motion to remand to be judged according to ordinary pleading rules. *Lowery* cannot, however, be squared with either Congressional intent, the ordinary rules of pleading, or the opinions of sister circuits like the Fourth.

According to *Lowery*, "[i]f the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach, jurisdiction is either evidenced from the removing documents or remand is appropriate." *Lowery*, 483 F.3d at 1211. *Lowery* further held that a notice of removal is defective if the complaint and the notice of removal together do not "unambiguously establish federal jurisdiction." *Id.* at 1213; *see also id.* at n.63 ("[T]he document received by the defendant [showing federal jurisdiction] must contain an unambiguous statement that clearly

establishes federal jurisdiction."). *Lowery* concluded that the case under consideration had to be remanded because the defendant "asserted no factual basis to support federal jurisdiction" in the notice of removal. *Id.* at 1217. In so doing, *Lowery* adopted a *heightened* pleading standard for removing defendants, not unlike the standard for pleading found under Federal Rule of Civil Procedure 9.

As a threshold matter, the *Lowery* standard contradicts Congressional intent because, under § 1446, the pleading standard for a notice of removal is "stated in terms borrowed from the jurisdictional pleading requirement establish[ed] by civil rule 8(a)" — the "notice pleading" standard. H.R. REP. No. 100-889, at 71 (1988).

Moreover, while conceding that a court can assume that the representation made by a plaintiff who files originally in federal court "is made in good faith and that the plaintiff has factual bases for believing that the federal court has jurisdiction to hear the claims," *Lowery* refuses to extend that same presumption to the jurisdictional allegations in a notice of removal. Instead, *Lowery* forbids the defendant to file "a notice of removal prior to receiving clear evidence that the action satisfies the jurisdictional requirements." *Lowery*, 483 F.3d at 1217. This double standard belies any fidelity to symmetric Rule 8 and 11 standards for both the complaint and the notice of removal.

Compounding matters further, *Lowery* holds that "[i]n the absence of [some other paper from the plaintiff unequivocally showing the jurisdictional amount], the defendant's appraisal of the amount in

controversy may be purely speculative and will ordinarily not provide grounds for his counsel to sign a notice of removal in good faith." *Lowery*, 483 F.3d at 1215. "We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us — where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its notice — without seriously testing the limits of compliance with Rule 11." *Id*. Respectfully, the court has it exactly backwards. Far from supporting the heightened pleading standard imposed by the court, Rule 11 disproves it. As bears repeating, Rule 11 places no restriction on the type of evidence a plaintiff or defendant can rely on to plead the jurisdictional amount. Indeed, the Rule expressly permits the pleading party to rely on no evidence at all as long as the pleader says the allegations "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11.

The Eleventh Circuit's analysis also fails to appreciate the nature of the proof oftentimes applicable in removed cases. The Fourth Circuit's *Ellenburg* case provides an excellent example. There, the complaint was silent as to the amount in controversy in an action to recover the purchase price for a recreational vehicle. The defendant, however, had in its possession a bill of sale for $327,669. *Ellenburg*, 519 F.3d at 195. Under *Lowery*, the defendants' reliance on this foundation in pleading the amount in controversy would not only be improper, it would violate Rule 11. *See, e.g.*, *Lowery*, 483 F.3d at 1215. It is impossible to square this interpretation

with either Rule 11 itself or section 1446 — or with fundamental fairness. Surely, it cannot be correct that reliance on this type of evidence runs afoul of Rule 11.[6]

Under the Rule 12(b)(1) procedure, the court may certainly pierce the pleadings and consider relevant evidence on jurisdiction. The court may also, in its discretion, permit limited jurisdictional discovery. But *Lowery* pays only the barest of lip service to the first of these propositions and denies the second completely. "Post-removal discovery for the purpose of establishing jurisdiction in diversity cases cannot be squared with the delicate balance struck by Federal Rule of Civil Procedure 8(a) and 11 and the policy and assumptions that flow from and underlie them." *Lowery*, 483 F.3d at 1215.

Once again, *Lowery* has it backwards. Rules 8 and 11 do not require the pleader to take discovery first and plead (with particularity) second. On the contrary, these rules contemplate only "short and plain" allegations backed by a "reasonable" pre-filing inquiry. They also expressly permit the pleading party

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[6] Part of this misunderstanding might stem from *Lowery*'s erroneous conclusion that any "other paper" in § 1446 must come from either the plaintiff or the court. *See Lowery*, 483 F.3d at 1213 n.63 ("Under the second paragraph, a case becomes removable when. . . [a paper is] received from the plaintiff (or from the court, if the document is an order)."). That restriction does not appear in the plain language of the statute, and it does not make sense in any event. For example, plaintiffs draw from many sources outside their own personal knowledge in determining their estimated damages and amount in controversy. The same should be true for removing defendants.

to advance allegations "on information and belief" (which are, by definition, "speculative") where such allegations "are likely to have evidentiary support ***after*** a reasonable opportunity for further investigation or ***discovery*** …." FED. R. CIV. P. 11(b)(4) (emphasis added); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2009 (2d ed. 1994). ("Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper.")

In short, *Lowery*'s idiosyncratic interpretation of the interplay between Rule 8, Rule 11, and § 1446 is at odds with the plain text of these rules and statutes, Congressional intent, and sister circuits. The inevitable result of all of this is that artful pleading is back in full force in the Eleventh Circuit; he who holds the pen to draft the Complaint has unilateral power to prevent removal jurisdiction, simply by omitting any reference to the amount in controversy.

IV. ALTHOUGH THIS COURT HAS RECENTLY CLARIFIED PLEADING REQUIREMENTS FOR COMPLAINTS, IT HAS NOT ADDRESSED SUCH REQUIREMENTS FOR REMOVAL PAPERS SINCE 1938.

This Court first construed an act of Congress so as to avoid infringing on the defendant's "right of removal" in *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92, 101 (1898) (construing the removal statute liberally to allow amendments to the removal petition to reflect jurisdictional facts bearing on

diversity). Other early decisions assessed archaic pleading requirements for removing on the grounds of diversity jurisdiction. *See, e.g.*, *Hay v. May Dep't Stores Co.*, 271 U.S. 318 (1926). Later decisions considered the propriety of reviewing matters beyond the pleadings, *see Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) (when reviewing a removal petition, "it is proper to treat the removal petition as if it has been amended to include the relevant information in the later-filed affidvits"), and ancillary removal concerns such as whether a removing defendant may aggregate damages of multiple plaintiffs to meet the amount in controversy requirement, *see, e.g.*, *Snyder v. Harris*, 394 U.S. 332 (1969). But no decisions of this Court have clearly set out the pleading requirements for a notice of removal in the modern era (after the 1988 amendment), nor have they explained the proper procedure and burden for assessing a challenge to subject matter jurisdiction by a remand motion.[7]

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[7] Although this Court has not addressed these issues directly, it did recently suggest that the anti-removal bias evidenced in the approach endorsed by *Lowery* is inconsistent with Congressional intent:

> By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants. If fee shifting were automatic, defendants might choose to exercise this right only in cases where the right to remove was obvious. *See Christiansburg Garmet*, *supra*, at 422 (awarding fees simply because the party did not prevail "could discourage all but the most airtight claims, for seldom can a [party] be sure of ultimate success"). *But there is no reason to suppose Congress*

As shown above, twenty years ago, Congress amended the removal statute to clarify the pleading requirements to establish diversity jurisdiction on removal. Yet even in the wake of that amendment, courts have continued to be unable to reach a consistent interpretation that lends predictability and uniformity to an area of the law in great need of both. The recent decisions in the Fourth and Eleventh circuits lay bare the depth of this confusion, as both courts examined precisely the same statute and legislative history and yet reached opposite conclusions as to their effect. The time is ripe for this Court to grant certiorari so that it may set out, once and for all, the appropriate removal and remand procedure.

V. THE CONSEQUENCES OF ONGOING CONFLICTS AMONGST THE DISTRICT AND CIRCUIT COURTS ARE GRAVE.

A defendant's "right to remove" is important. For many of PLAC's members in particular, foreign state courts might be hostile venues for reasons wholly unrelated to the merits of the case. Avoiding local prejudice is one of the historic bases for federal diversity jurisdiction. Indeed, the Framers recognized this unfortunate reality — specifically including populist prejudices against foreign commercial

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> *meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases*.

Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005) (emphasis added).

defendants — and established federal diversity jurisdiction to neutralize it. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 82-83 (1923). According to Professor Warren:

> The chief and only real reason for this diverse citizenship jurisdiction was to afford a tribunal in which a foreigner or citizen of another State might have the law administered free from the local prejudices or passions which might prevail in a State Court against foreigners or non-citizens. . . . There is not a trace of any other purpose than the above to be found in any of the arguments made in 1787-1789 as to this jurisdiction.

Id.

The nature of local prejudice may have evolved over time, but it has never left us.[8] Congress has continued to recognize this, most recently in the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 118 Stat. 4 (codified in scattered sections of 28 U.S.C.), which protects defendants from unfair, and potentially bankrupting, class or mass actions in state courts where the issues implicate federal commerce concerns and present enormous exposure. S. REP. No. 109-14,

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[8] Following the Civil War, for example, Congress substantially expanded diversity jurisdiction by eliminating the requirement that cases involve at least one citizen of the forum state and by permitting both plaintiffs and defendants to remove. *See* Act of Mar. 3, 1887, 24 Stat. 552, corrected by Act of Aug. 13, 1888, 25 Stat. 433.

at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 6. ("One of the primary historical reasons for diversity jurisdiction is the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court."). As Judge Higginbotham recently observed, Congress enacted CAFA "to give access to federal district courts to defendants exposed to these private claims, presumably for reasons not far removed from those that led the first Congress to confer diversity jurisdiction — known then and now to the trial bar as 'home cooking.'" *In re Katrina Canal Litig. Breaches*, No. 08-30145, 2008 WL 1118174 at *8 (5th Cir. Apr. 11, 2008).

Unless corrected, *Lowery* leaves out-of-state defendants unprotected and vulnerable to exactly the kind of local prejudice removal was meant to cure. The outcome in *Lowery* — not least saber-rattling about Rule 11 — will inevitably reward artful pleading and forum-shopping on the one hand; and, on the other, breed timidity and fear of removal.

The trend has shown itself already. In a recent case, the district court remanded a case it readily acknowledged would have remained in federal court prior to *Lowery*. *See Constant v. Int'l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308 (N.D. Ala. 2007). With respect to the defendant's reliance on a number of "eye-popping" Alabama jury verdicts in similar tort cases to establish the amount in controversy, the court noted that in the past "[d]istrict courts, including this court, have, without hesitation, allowed such removals unless the plaintiff resolved the ambiguity that she herself deliberately created by conceding that she will

forever forego any claim above $75,000." *Id*. at 1309. The court believed it could no longer consider such evidence after *Lowery*. *Id.* The same fate applied to the defendant's reliance on a settlement request received from the plaintiff's counsel prior to filing the lawsuit in which he demanded exactly $75,000. *Id*. at 1310. Assuming this was, as represented, an attempted pre-suit compromise, the offer surely represented less than the value of the litigated claim, were it to be successful. Demonstrating the brute strength of *Lowery*, the court concluded that not only must it reject this evidence on the issue of amount in controversy; but that removal on these bases (*i.e.*, the description of the events and injuries in the complaint, compared to past jury verdicts involving similar events and injuries, and an offer to compromise at one dollar below the jurisdictional amount) after *Lowery* would be tantamount to asking the court to "speculate," thereby exposing the defendant to costs, attorneys fees, and Rule 11 sanctions. *Id*. Only the bravest — or most foolhardy — defendant would be willing to take such risks at the very outset of a high-stakes case.

Worse, if *Lowery* were applied in some jurisdictions, diversity removal would be close to impossible. In Michigan, for example, state court rules do not permit a plaintiff in a case that was not for a sum certain to request a specific amount of damages *unless* the claim was for an amount of $10,000 or less. *Mich. Mfrs. Serv., Inc. v. Robertshaw Controls Co.*, 134 F.R.D. 154, 155 (E.D. Mich. 1991) (citing Michigan Court Rule 2.111(B)(2)). Therefore, the plaintiff was forbidden by Michigan law from pleading an amount in excess of the federal jurisdictional minimum — even if he valued the case as such. This led one creative plaintiff to

argue that remand was required because the removing defendant failed to point to any facts supporting the allegation that the amount in controversy had been met. The court concluded that "under the 1988 amendment to 28 U.S.C. § 1446(a) the argument that the removing defendant must provide supporting facts in its notice of removal is utterly without merit." *Id.* As a result, the court rejected the plaintiff's attempt to "use its compliance with the Michigan court rule as a shield against removal." *Id.* at 156. Had the court applied *Lowery*'s analysis of § 1446, however, it would not only have remanded the case, but perhaps sanctioned the removing defendant.

Lowery recognized the obvious in observing that "a plaintiff who has chosen to file her case in state court will generally wish to remain beyond the reach of federal jurisdiction, and as a result, she will not assign a specific amount to the damages sought in her complaint." *Lowery*, 483 F.3d at 1215. In so doing, the court issued an open invitation to plaintiffs both to forum-shop and to engage in exactly the kind of "artful pleading" tailored to strip defendants of their "right to remove."

CONCLUSION

In the 20 years following the 1988 amendment to 28 U.S.C. § 1446, district and circuit courts have struggled to define the pleading requirements for removal and the procedure and burden of proof for remand. This conflict is most obvious and inescapable in the two most recent decisions from the Fourth and Eleventh Circuit. They present a well-framed opportunity for this Court to resolve these conflicts

and lend uniformity and continuity to this important body of federal law.

For the foregoing reasons, PLAC respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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