No. 07-

IN THE
Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN C. NEIMAN, JR.
BRADLEY ARANT ROSE
& WHITE LLP
One Federal Place
1819 Fifth Avenue North
Avenue West
Birmingham, AL 35203
(205) 521-8000

SCOTT BURNETT SMITH
Counsel of Record
BRADLEY ARANT ROSE
& WHITE LLP
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5198

Attorneys for Petitioner
Hanna Steel Corp.

[*Additional Counsel Listed on Signature Page*]

214250

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

This case raises two interrelated questions that determine whether civil actions, class actions, and mass actions may be removed to federal court. On the first question, the Eleventh Circuit widened a longstanding circuit split. On the second question, the Eleventh Circuit's decision contradicts this Court's jurisprudence. The questions are:

1. When a plaintiff fails to seek a sum certain in a state court complaint, what burden must a removing defendant carry to prove the amount in controversy exceeds 28 U.S.C. § 1332's jurisdictional minimum: proof of an "unambiguous statement" by the plaintiff that "clearly establishes jurisdiction," as the Eleventh Circuit held below; proof by a "preponderance of the evidence," as the Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits require; or proof by a "reasonable probability," as the Second Circuit requires?

2. If the evidence on the amount in controversy is uncertain, does a district court have discretion to permit discovery concerning the jurisdictional facts, as this Court has held, or is the district court barred from allowing jurisdictional discovery, as the Eleventh Circuit here held?

PARTIES TO THE PROCEEDINGS

Defendants-Appellants below who are Petitioners here are:

Alabama Power Company
Bailey-PVS Oxides, LLC
Butler Manufacturing Company
CertainTeed Corporation
Fritz Enterprises, Inc.
Hanna Steel Corporation
Honeywell International, Inc.
U.S. Steel Corporation
Vulcan Materials Company
W.J. Bullock, Inc.

The following were Defendants below but are not parties here:

Allied Signal, Inc.
Filler Products
ABC Acquisitions
Polymer Coil Coaters, Inc.

Allied Signal is a predecessor of Honeywell International, Inc. Polymer Coil Coaters, Inc. went through bankruptcy and was dismissed from the case. ABC Acquisitions was related to Polymer Coil Coaters, Inc.; ABC Acquisitions no longer exists.

The 9 original Plaintiffs-Appellees below who are Respondents here are:

Carolyn Brannon
Bernida Hill
Deginald Hill
Angelias Jones
Johnny Jones
Katie Lowery
Richard Lowery
Dennis Wingo
Michelle Wingo

A complete list of the remaining 408 respondents is included at App. 117a–129a.

The Southern Company is the parent of Petitioner Alabama Power Company.

Bailey Engineers, Inc. and PVS Chemicals, Inc. are the joint venture that owns Petitioner Bailey-PVS Oxides, LLC.

BIEC International, Inc. is the parent of Petitioner Butler Manufacturing; BlueScope Steel Limited, a publicly traded Australian company, is the parent of BIEC.

Saint-Gobain Delaware Corporation is the parent of Petitioner CertainTeed Corporation; Saint-Gobain Corporation is the parent of Saint-Gobain Delaware Corporation.

Hanna Holdings, Inc. is the parent of Petitioner Hanna Steel Corporation.

State Street Bank and Trust Company owns over 10 percent of Petitioner Honeywell International, Inc.'s stock.

State Farm Mutual Automobile Insurance Company owns over 10 percent of Petitioner Vulcan Materials Company's stock.

Allied Signal, Inc., Fritz Enterprises, U.S. Steel Corporation, and W.J. Bullock, Inc. do not have parents, and no publicly held company owns 10 percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

This case raises important questions concerning removal of diversity cases to federal court. The Eleventh Circuit's decision implicates a broad, mature circuit split over a removing defendant's burden of proving the amount in controversy when the complaint does not request a sum certain in damages. This circuit split is so well established that the two leading treatises on federal practice contain sections devoted to it. *See* 16 MOORE'S FEDERAL PRACTICE 3D § 107.14[2][g][v] (2007); 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3725, at 89–92 (1998 & 2007 Supp.). The Court should resolve the uncertainty because, as long as the split persists, access to federal court will depend on what standard applies in the district or circuit in which the courthouse happens to stand. Moreover, the split has even broader national impact now that the Class Action Fairness Act makes class actions and mass tort actions removable to federal court upon proof of a $5 million aggregate amount in controversy.

Certiorari should be granted.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a–88a) is published at 483 F.3d 1184. The Eleventh Circuit's order denying rehearing *en banc* (App. 115a–16a) is unpublished. The District Court's opinion (App. 89a–115a) is published at 460 F. Supp. 2d 1288.

JURISDICTION

The Eleventh Circuit entered its judgment on April 11, 2007. App. 1a. That court denied rehearing on January 3, 2008. App. 115a–16a. The case has not been remanded to state court, however. The Eleventh Circuit stayed issuance of its mandate pending review by this Court. This Court has jurisdiction over the Eleventh Circuit's judgment under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Under 28 U.S.C. § 1332, two amount-in-controversy thresholds apply to diversity actions: $75,000 for all civil actions, and $5 million for class actions and mass actions under CAFA. 28 U.S.C. §§ 1332(a) & 1332(d)(2). CAFA requires aggregation of "the claims of the individual class members . . . to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6).

A defendant may remove cases filed in state court that could have been filed originally in federal court under § 1332. In an ordinary civil action, if the removing defendant is not a citizen of the forum state, a case within the court's diversity jurisdiction "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). A class action:

> may be removed to a district court of the United States . . . (except that the 1-year limitation under section 1446(b) shall not

> apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

28 U.S.C. § 1453(b). Under CAFA, mass actions are "deemed to be . . . removable" if they satisfy the jurisdictional requirements for class actions. 28 U.S.C. § 1332(d)(11)(A).

The procedure for removal is governed by 28 U.S.C. § 1446. Under § 1446(a),

> [a] defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

STATEMENT OF THE CASE

1. This case is about determining the value of claims at the outset of litigation. Doing so is important because—assuming the citizenship requirements are satisfied—an amount in controversy that exceeds the jurisdictional minimum permits the defendant to remove a diversity case from state to federal court. But pinning down the amount in controversy is not always easy.

If the complaint does not plead a sum certain or pleads only the jurisdictional minimum of the state court, a removing defendant must itself establish the amount in controversy to get into federal court. And in practice, defendants must often carry this burden because many states have either followed Federal Rule of Civil Procedure 54(c), which does not limit damage awards to the amount specified in the complaint, or have enacted rules that prohibit plaintiffs from pleading a sum certain. *See generally* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 Mo. L. Rev. 681, 683–92 (1997).

The lower courts are split on *what* burden a removing defendant must carry when the complaint contains no definitive plea for damages. There is also uncertainty on *how* a removing defendant can carry that burden—that is, what evidence the defendant can use to establish the amount in controversy. The Eleventh Circuit's decision in this case puts it at the strictest end of the continuum on both issues.

First, the court held that without a sum certain pleaded in the complaint a defendant cannot remove a case to federal court unless it has "received from the plaintiff" "clear" and "unequivocal" evidence establishing the amount in controversy. App. 66a, 79a. If the defendant removes a case without such clear and unequivocal evidence, it will be subject to Rule 11 sanctions. App. 67a n.63. Second, the court held that a defendant cannot obtain post-removal discovery and that

district courts *never* have discretion to permit such discovery when the jurisdictional facts are unclear. App. 78a–79a, 87a.

These two holdings converge to make diversity removal practically impossible in Alabama, Florida, and Georgia. *See* Penelope A. Dixon and David J. Walz, *Removal After* Lowery v. Alabama Power Co.: *A Whole New Bag of Tricks*, 26 No. 4 TRIAL ADVOC. Q. 39 (2007). Under the Eleventh Circuit's decision, a plaintiff can block a defendant's statutory right of removal simply by omitting a sum certain from the complaint. And neither the defendant nor the district court can use discovery tools or other evidence to determine what amount is really in controversy. The impact of these holdings on diversity removal generally, and on CAFA removal specifically, explains why the case has drawn national attention. *See id.*; Georgene M. Vairo, *CAFA Mass Action Primer*, 30 No. 2 NAT'L L.J. 13, Col. 1 (Sept. 10, 2007); Thomas M. Byrne & Valerie S. Sanders, *"See No Removal, Hear No Removal": The 11th Circuit's New Posture on Removal in* Lowery v. Alabama Power Co., 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. 11 (Aug. 29, 2007).

2. This mass tort case was originally filed in Alabama state court. App. 3a. Nine plaintiffs sued twelve industrial and manufacturing plants asserting various torts. *Id.* & n.3. The plaintiffs claimed the defendants discharged pollutants that had settled onto the plaintiffs' bodies and property. Doc. 38, Attach. 2 ¶ 4. The original complaint contained a $1.25 million plea for each plaintiff on each count for lost property value, loss of use and enjoyment of property, personal injury, pain and

suffering, mental anguish, and punitive damages. *Id.* ¶ 5 & at 4–6; App. 3a–4a, 89a. Nonetheless, the case was not originally removable because a number of defendants were in-state defendants. *See* 28 U.S.C. § 1441(b). The original plaintiffs later added more than 400 additional plaintiffs asserting the same allegations. App. 4a, 90a.

In an amended complaint, the plaintiffs dropped their original $1.25 million per-plaintiff plea. App. 4a–5a. Instead, the plaintiffs sought an unspecified amount of compensatory and punitive damages. App. 90a.

After Congress passed CAFA, the plaintiffs amended their complaint again to add two new defendants, Alabama Power Company and Filler Products Company. App. 5a. Alabama Power, joined by the other defendants, removed the case to the Northern District of Alabama under CAFA's "mass action" provision, 28 U.S.C. § 1332(d)(11). App. 5a. That provision states that a mass action may be removed under 28 U.S.C. § 1453(b) if it involves "monetary relief claims of 100 or more persons . . . proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." *Id.* § 1332(d)(11)(A)–(B)(i). Alabama Power claimed that the case satisfied CAFA's new minimal diversity requirement and the $5 million aggregate amount in controversy. App. 5a.

The plaintiffs moved to remand. They argued that the amount in controversy was not satisfied because their amended complaint "references no specific amount of damages." App. 6a–7a & n.9.

In response to the remand motion, Alabama Power supplemented the evidence on the amount in controversy. App. 7a. It argued that the jurisdictional minimum was easily satisfied because the plaintiffs needed to recover only $12,500 each to exceed $5 million in the aggregate. *Id.* Alabama Power offered evidence of similar toxic tort suits in Alabama that had resulted in settlements or verdicts in excess of $5 million. *Id.* For instance, a jury verdict in a similar case awarded four property owners $1.9 million in compensatory damages and $17.5 million in punitive damages for property damage and emotional distress caused by carbon black particles emitted by the defendant's plant. Doc. 15, Ex. A. (The Eleventh Circuit recently affirmed the judgment on that verdict in full. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1323 (11th Cir. 2007).) Alabama Power also sought leave to conduct jurisdictional discovery. App. 8a.

3. Rather than rule on Alabama Power's motion for discovery, the district court ordered the plaintiffs to identify each plaintiff whose damages exceed $75,000. App. 9a–10a. The plaintiffs responded that they could not comply with the court's order, claiming that discovery was necessary before they could quantify their own damages. Doc. 33 at 2–3; Doc. 35; App. 11a.

The district court then withdrew its order and remanded the case. App. 12a–13a, 113a–14a. The court held that Alabama Power had failed to prove the jurisdictional minimum by a preponderance of the evidence. App. 103a, 108a–12a. The district court stayed its remand order pending review by the Eleventh Circuit. Docs. 46, 50, 53.

4. Although 28 U.S.C. § 1447(d) generally bars appeals of remand orders in civil cases, CAFA permits courts of appeals to grant discretionary review of remand orders in class or mass actions. 28 U.S.C. § 1453(c). The Eleventh Circuit granted the defendants' petitions for permission to appeal the district court's remand order. App. 15a. After argument, the court affirmed, holding that the defendants had failed to carry their burden of proving the amount in controversy. App. 86a–87a.

a. Concerning the burden of proof, the Eleventh Circuit acknowledged its test that, "where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence." App. 55a–56a. The court questioned whether the preponderance test was right and concluded that the test had originated from "dicta" in this Court's decision in *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). App. 58a–59a.

While the court glanced toward a preponderance test, the standard it applied (however labeled) resulted in a standard of proof much stricter. In particular, the court said, "If 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." App. 61a. Any such documents, the court said, must "unambiguously establish federal jurisdiction." App. 66a. Further, the court stated that when the complaint does not contain a sum certain, "the factual information establishing the jurisdictional amount must come from the plaintiff." App. 70a n.66. The Eleventh Circuit thus

requires a removing defendant to come forward with (1) an "unambiguous statement" (2) received directly from the plaintiff (3) that "clearly establishes" the amount in controversy. App. 79a.

The court candidly acknowledged that it was raising the removing defendant's burden of proof. The court admitted that "if a defendant can . . . carry the burden of establishing jurisdiction under these circumstances, then the defendant could have satisfied a far higher burden than preponderance of the evidence," like the "legal certainty" standard. App. 61a & n.59. The court also raised the stakes under Rule 11. It thought it would be "highly questionable" whether a defendant could file a notice of removal "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." App. 67a n.63.

b. Concerning post-removal discovery, the Eleventh Circuit acknowledged that remanding the case for jurisdictional discovery might permit the defendants to prove the amount in controversy. App. 72a & n.68. Nonetheless, the court held that discovery on the amount in controversy is *never* appropriate. App. 78a–79a. The court believed that allowing such discovery would be inconsistent with the parties' obligation under Rule 8 to set forth the factual basis for jurisdiction, as well as their obligation under Rule 11 to make such allegations in good faith. App. 73a, 76a–78a. The court went further to hold that district courts have no discretion to conduct such discovery on their own initiative. App. 79a & n.76, 87a.

5. The defendants filed a timely petition for rehearing. Although an Eleventh Circuit judge called for a poll on rehearing *en banc*, a majority did not vote for rehearing. App. 115a–16a. Although it denied rehearing, the Eleventh Circuit has stayed issuance of its mandate pending certiorari review by this Court.

REASONS FOR GRANTING THE PETITION

I. The longstanding conflict over a removing defendant's burden of proving the amount in controversy warrants this Court's review.

A. The lower courts have adopted several different standards to govern a removing defendant's burden of proving the amount in controversy.

There is a longstanding split of authority among the lower courts[1] on what burden a removing defendant must carry to prove the amount in controversy when the complaint does not seek a sum certain. *See* 16 MOORE'S FEDERAL PRACTICE 3D § 107.14[2][g][v] (2007); 14C WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3725, at 89–92 (1998 & 2007 Supp.). This split is widely acknowledged, both inside and outside the Eleventh Circuit. *See, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356–57 & n.7 (11th

[1] Splits of authority on removal issues often reach down to the district courts because the appeal bar of 28 U.S.C. § 1447(d) keeps the issues largely out of the circuit courts. *See Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999) (noting certiorari was granted on removal issue due to a split of authority among the "lower courts").

Cir. 1996), *overruled on other grounds by Cohen v. Office Depot*, 204 F.3d 1069, 1072 (11th Cir. 2000); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 & n.2 (10th Cir. 2001); *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 402–04 (9th Cir. 1996); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993).

1. The Eleventh Circuit applies a "clear and unambiguous statement" test.

When the complaint does not seek a sum certain, the Eleventh Circuit requires a removing defendant to produce an "unambiguous statement" that "clearly establishes" the jurisdictional minimum. App. 79a.[2] In deciding the issue, the district court is to consider only "the document received by the defendant from the plaintiff—be it the complaint or a later received paper." App. 66a.[3] If the documents received from the plaintiff

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[2] The rule applied by the Eleventh Circuit here is close, if not identical, to the "legal certainty test." Several district courts require a removing defendant to prove the amount in controversy to a "legal certainty" when the complaint does not seek a sum certain *See, e.g., Universal Ins. Co. v. Warrantech Corp.*, 392 F. Supp. 2d 205, 209 (D.P.R. 2005); *White v. J.C. Penney Life Ins. Co.*, 861 F. Supp. 25, 27 (S.D. W. Va. 1994). These district courts are within the First and Fourth Circuits, which have not adopted a governing standard on the issue.

[3] Although the Tenth Circuit has not taken sides on which burden of proof a removing defendant must carry, it is in accord with the Eleventh Circuit on what documents are jurisdictionally relevant. It has held that "the requisite amount in controversy (Cont'd)

do not establish the amount in controversy, "neither the defendants not the court may speculate in an attempt to make up for the notice's failings." App. 70a–71a.

The Eleventh Circuit rightly acknowledged that a removing defendant who can satisfy this clear-statement standard could prove the amount in controversy to a "legal certainty." App. 61a & n.59. The court all but jettisoned the preponderance standard by strictly limiting the relevant documents to only those "received by the defendant from the plaintiff." App. 66a. Thus, in situations "where damages are unspecified and only the bare pleadings are available," the court admitted that "we are at a loss as to how to apply the preponderance burden meaningfully." App. 60a. With no evidence to weigh, and absent the plaintiff volunteering a statement in excess of the jurisdictional threshold, the court concluded that "any attempt to engage in a preponderance of the evidence assessment . . . would amount to unabashed guesswork." App. 60a.

2. *The Third, Fifth, Sixth, Seventh, and Ninth Circuits apply a "preponderance of the evidence" test.*

A majority of the circuits requires a removing defendant, absent a plea for a sum certain, to prove the jurisdictional minimum by a "preponderance of the evidence." The Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits apply the preponderance standard.

(Cont'd)

and the existence of diversity must be *affirmatively established* on the face of either the [complaint] or the removal notice," without consideration of other evidence. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis added), *followed in Martin*, 251 F.3d at 1290.

See Frederico v. Home Depot, 507 F.3d 188, 195–96 & n.6 (3d Cir. 2007) (preponderance test applies if facts contested; legal certainty test, if not); *Gafford*, 997 F.2d at 158, *followed in Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 822 (6th Cir. 2006); *De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993); *Andrews v. E.I. DuPont de Nemours & Co.*, 447 F.3d 510, 515 (7th Cir. 2006); *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003); *Kroske v. US Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2006).

In applying the preponderance test, these courts look first to the removal papers to discern whether the jurisdictional minimum is satisfied. If the amount in controversy is still uncertain, they allow summary-judgment type evidence on the question. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995), *followed in Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997); *Harmon v. OKI Sys.*, 115 F.3d 477, 479–80 (7th Cir. 1997). This includes not only affidavits from the defendant, but also evidence of damages sought in prior complaints, damage awards in similar cases, the plaintiff's judicial admissions concerning damages, refusals to stipulate to damages, discovery responses, and the like. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541–42 (7th Cir. 2006); *Kroske*, 432 F.3d at 980; *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 573 (6th Cir. 2001) (citing *Rogers v. Wal-Mart*, 230 F.3d 868, 871 (6th Cir. 2000)); *De Aguilar*, 11 F.3d at 58.

In sharp conflict with the Eleventh Circuit here, these courts hold that when the issue is ambiguous both the defendant and the court can independently appraise

the amount in controversy. *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. 1993); *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 n.6 (5th Cir. 1992). Once the defendant has proved that the plaintiff is seeking the jurisdictional minimum by a preponderance of the evidence, the plaintiff can defeat federal jurisdiction only by disproving to a legal certainty that the minimum amount is actually in controversy. *Frederico*, 507 F.3d at 196; *Meridian Sec. Ins.*, 441 F.3d at 541; *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002).

3. The Second Circuit applies a "reasonable probability" test.

The Second Circuit applies a "reasonable probability" test. That test is a lighter burden to carry when the damages are unspecified.[4] It requires a removing defendant to prove some "reasonable probability" that the jurisdictional minimum is at stake. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 298 (2d Cir. 2000); *Ball v. Hershey Foods Corp.*, 842 F. Supp. 44, 47 (D. Conn. 1993) ("If there is a reasonable possibility that the plaintiff can recover more than $50,000 on his claim, the jurisdictional minimum is satisfied.") (internal alteration and citation omitted), *aff'd*, 14 F.3d 591 (2d Cir. 1993) (Table); *see also*

[4] The lightest burden of proof is the "inverted legal certainty" test applied by some district courts. When the complaint fails to plead a sum certain, that test requires a removing defendant to show that it does *not* appear to a legal certainty that the plaintiff's claim is for *less* than the jurisdictional amount. *See, e.g., Woodward v. Newcourt Comm'l Fin. Corp.*, 60 F. Supp. 2d 530, 531 (D.S.C. 1999).

Vermande v. Hyundai Motor Am., Inc., 352 F. Supp. 2d 195, 203 (D. Conn. 2004); *Maxons Restorations, Inc. v. Newman*, 292 F. Supp. 2d 477, 481–82 (S.D.N.Y. 2003); *Paradise Distributors, Inc. v. Evansville Brewing Co.*, 906 F. Supp. 619, 621 (N.D. Okla. 1995).

B. The burden of proof is outcome determinative in this case.

The impact of these varying standards is not theoretical. As a practical matter, "the standard of proof is determinative of jurisdiction." Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. __ (forthcoming June 2008), Draft at 23 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014966). *See also* Stephen J. Shapiro, *Applying the Jurisdictional Provisions of the Class Action Fairness Act of 2005: In Search of a Sensible Judicial Approach*, 59 BAYLOR L. REV. 77, 110 (2007) (observing that unanswered questions, including the amount-in-controversy burden "the defendant has to meet (for example, preponderance, legal certainty, or reasonable probability)" could "have an effect on the outcome, especially in close cases").

So too, here, the jurisdictional outcome depends entirely on the Eleventh Circuit's strict rule. The result would have been different if the case had arisen in another circuit. The Eleventh Circuit held that the defendants failed to produce an "unambiguous statement on the face of the amended complaint . . . sufficient to establish that plaintiffs' claims potentially exceed $5,000,000 in aggregate." App. 81a. The court reached that conclusion after considering—and rejecting—the

defendants' reliance on three types of evidence: (1) the request for $1.25 million per plaintiff in the original complaint, (2) a calculation of the damages each plaintiff would need to recover to exceed the jurisdictional threshold, and (3) damage awards in similar cases in Alabama. One or more of these types of proof would have been sufficient to establish jurisdiction in other circuits whose tests look beyond the four-corners of the complaint or other statements "received by the defendant from the plaintiff." App. 66a.

First, the Eleventh Circuit disregarded the $1.25 million per-plaintiff plea in the original complaint. App. 81a–82a. The court instead credited the statement in the amended complaint that the plaintiffs' claims involved in excess of $3,000 (the jurisdictional minimum for circuit courts in Alabama), even after more than 400 plaintiffs had joined the case. App. 84a. Had the case arisen in other circuits, the outcome would have been different. In *De Aguilar v. Boeing*, for instance, the Fifth Circuit considered the plaintiffs' $5 million plea in a prior complaint arising from the same plane crash as evidence that their claims in fact exceeded the jurisdictional threshold for federal court. 11 F.3d at 58. The Fifth Circuit rejected plaintiffs' counsel's after-the-fact affidavits claiming less than $50,000 per plaintiff was in controversy. *Id.* at 57. The court found "[t]he inconsistency between the plaintiffs' prior claims and their current claims . . . may indicate that the plaintiffs, rather than trying to clarify the actual amount in controversy, engaged in artful post-removal pleading." *Id.* at 58.

Second, the Eleventh Circuit refused to accept the defendants' per-plaintiff calculation that only $12,500 in damages for each plaintiff would put more than $5 million in controversy. App. 84a–85a. Acknowledging that was a "relatively low hurdle"—especially given the plaintiffs' claims for continuing nuisances and punitive damages—the court nonetheless refused to engage in "impermissible speculation." App. 85a. The result would have been different in other courts. For example, the Third Circuit in *Frederico v. Home Depot* found that the removing defendant had carried its burden by calculating that 2,233 class members needed to recover only $287.14 apiece, plus quintuple punitive damages under New Jersey law, to exceed the $5 million CAFA threshold. 507 F.3d at 197–99. The Seventh Circuit has also relied on similar per-plaintiff calculations to find that a removing defendant carried its burden of proving the $5 million amount in controversy under CAFA. *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005) ("Countrywide concedes that it sent at least 3,800 advertising faxes, and [the Telephone Consumer Protection Act] provides that the court may award $500 per fax, a sum that may be trebled . . . . The award thus could reach $5.7 million."), *followed in Meridian Sec. Ins.*, 441 F.3d at 537.

Third, the Eleventh Circuit discounted the defendants' use of similar damage awards to prove the amount in controversy raised by the plaintiffs' claims. App. 85a–86a. According to the court, "the facts regarding other cases tell us nothing about the value of the claims in this lawsuit." App. 86a. The Eleventh Circuit's refusal to consider judgments and settlements in similar cases stands in stark contrast to the practice

followed elsewhere. As one Alabama district court recently explained, "Prior to [*Lowery*], Alabama personal injury cases and wrongful death cases with no *ad damnum* . . . were regularly removed" via a notice of removal that proved the amount in controversy "by citing jury awards in excess of $75,000 in similar Alabama tort cases." *Constant v. Int'l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308, 1309 (N.D. Ala. 2007). That practice still prevails, for instance, in the Fifth and Ninth Circuits. *See De Aguilar*, 11 F.3d at 58; *Kroske*, 432 F.3d at 980. Had this case arisen there, the defendants' reliance on cases like *Action Marine*, 481 F.3d 1302 (11th Cir. 2007) (affirming $19 million verdict to four property owners in similar environmental particulates case), would have been sufficient to secure removal.

In sum, the outcome of the jurisdictional question presented would differ depending on which burden of proof applies and what evidence a removing defendant can use to carry that burden. This case thus presents an ideal vehicle for the Court to resolve this longstanding split of authority.

C. The split of authority over a removing defendant's burden of proof has arisen due to confusion over this Court's precedent.

Certiorari is particularly appropriate here because the existing uncertainty over a removing defendant's burden of proof can be traced to confusion over how to read two of this Court's decisions from the 1930s: *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). *See Guglielmo v.*

McKee Foods Corp., 506 F.3d 696, 702–05 (9th Cir. 2007) (O'Scannlain, J., concurring specially) (trying to harmonize *St. Paul Mercury* and *McNutt* and urging the adoption of a "single, consistent burden of proof"); *Meridian Sec. Ins.*, 441 F.3d at 539–41 (Easterbrook, J.) (tracing confusion over the Seventh Circuit's standard to *St. Paul Mercury* and *McNutt*); *Frederico*, 507 F.3d at 193–97 (Aldisert, J.) (reconciling *St. Paul Mercury* and *McNutt* based on whether the jurisdictional dispute concerns factual matters); *see generally* Noble-Allgire, *supra*, 62 Mo. L. REV. at 692–99.

The Eleventh Circuit and other courts trace the "legal certainty" test to the Court's 1938 decision in *St. Paul Mercury*. *See* App. 61a n.59; *Universal Ins.*, 392 F. Supp. 2d at 208; *Atkins v. Harcros Chems., Inc.*, 761 F. Supp. 444, 445 n.3 (E.D. La. 1991). The state court complaint in *St. Paul Mercury* pleaded $1,000 more than the amount in controversy, but post-removal evidence offered by the plaintiff revealed damages below the threshold. 303 U.S. at 285. It was in this context that the Court said "the sum claimed by the plaintiff controls" and "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount" to "oust the jurisdiction." *Id.* at 288–89. Because the complaint had pleaded damages above the jurisdictional minimum at the time of removal, the Court held removal was proper. *Id.* at 295–96. *St. Paul Mercury* has provided uncertain guidance, however, to courts faced with the tougher issue of determining the amount in controversy when damages are unspecified. *See Gafford*, 997 F.2d at 157–58. Also, *St. Paul Mercury's* precise holding says more about defeating federal jurisdiction after it has attached than about establishing removal jurisdiction in the first instance. *See Sanchez*, 102 F.3d at 401–03 (following *Garza v. Bettcher Indus., Inc.*, 752 F. Supp.

753, 755–56 (E.D. Mich. 1990)); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995) (same); *Gafford*, 997 F.2d at 160.

Courts that apply the "preponderance of the evidence" test rely on the Court's earlier 1936 statement in *McNutt* that the "party alleging jurisdiction" may be required to "justify his allegations by a preponderance of evidence." 298 U.S. at 189. *See Meridian Sec. Ins.*, 441 F.3d at 542; *Sanchez*, 102 F.3d at 403–04; *Gafford*, 997 F.2d at 160; *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67 (9th Cir. 1992), *followed in De Aguilar*, 11 F.3d at 58. But *McNutt* was not a removal case. Moreover, the jurisdictional question in *McNutt* was not raised until after the case was on appeal. 298 U.S. at 179–80. Consequently, the plaintiff had offered no evidence on the amount in controversy to support federal jurisdiction, and the district court had made no findings of fact. *Id.* at 190. These procedural details led the Eleventh Circuit here to conclude that *McNutt*'s preponderance standard is "dicta," making application of that standard in the removal context "problematic." App. 58a–59a & n.58.

Courts within the Second Circuit that apply the "reasonable probability" test have reached no consensus on whether *St. Paul Mercury* or *McNutt* or some other standard should govern. *See Mehlenbacher v. Akzo Nobel Salt, Inc.*, 207 F. Supp. 2d 71, 75–77 (W.D.N.Y. 2002) (on remand from the Second Circuit, 216 F.3d 291, for application of its "reasonable probability" test, contrasting *St. Paul Mercury* and *McNutt*, tracing the

confusion over which test to apply, and concluding that the "legal certainty" standard should be kept in mind while applying the Second Circuit's test).

Without precedent from the Court on these issues in seven decades, the lower courts have exhausted the various possible burdens that can apply and what evidence a removing defendant can use to carry those burdens. Neither *St. Paul Mercury* nor *McNutt* provides sufficient guidance to resolve the confusion. Uncertainty on these issues can only get worse, as the Eleventh Circuit's decision here shows. Prompt intervention by this Court is therefore necessary to establish uniform standards governing removal jurisdiction and practice.

II. The Eleventh Circuit's prohibition on jurisdictional discovery is inconsistent with this Court's precedent.

A removing defendant's burden of proving the amount in controversy when damages are unspecified is intertwined with its ability to conduct post-removal discovery on the amount in controversy. Discovery is one of the tools removing defendants and courts have historically used to determine the amount in controversy where none has been pleaded. But the Eleventh Circuit has stopped that practice. The court held, without citing any authority, that jurisdictional discovery into the amount in controversy is improper in diversity removals. App. 72a–79a & n.71. The court went further to hold that a district court has no discretion either to permit the parties to conduct such discovery or to engage in it on its own. App. 79a & n.76, 87a. To hold otherwise, the

Eleventh Circuit said, would "impermissibly lighten[]" a removing defendant's "burden of establishing jurisdiction." App. 78a–79a.

A. The Eleventh Circuit's discovery holding conflicts with this Court's precedent.

The Eleventh Circuit's holding is contrary to this Court's precedent. This Court has long given district courts the discretion to employ a wide variety of tools—including discovery—to determine subject matter jurisdiction. In 1939, discussing what was then the federal-question amount in controversy, the Court held that because "there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Gibbs v. Buck*, 307 U.S. 66, 71–72 (1939). *See also McNutt*, 298 U.S. at 184 ("The trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist.") (internal quotation and citations omitted). Among the steps *Gibbs* said the district court could take was "call[ing] for [the] justification" of jurisdictional allegations "by evidence." 307 U.S. at 72. *Accord Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own."). *See generally* 5B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1350, at 250–51 & nn.74–75 (2004) (stating that district court may collect evidence and allow discovery before ruling on a challenge to subject matter jurisdiction) (collecting cases).

Since *Gibbs*, this Court has repeatedly given district courts the discretion to use traditional discovery tools to assess jurisdiction. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 79 (1988) ("Nothing we have said puts in question the inherent and legitimate authority of the court to issue process and other binding orders, including orders of discovery directed to nonparty witnesses, as necessary for the court to determine and rule upon its own jurisdiction, including jurisdiction over the subject matter."). Significantly, the Court in *Martin v. Franklin Capital Corp.* noted that a plaintiff's "failure to disclose facts necessary to determine jurisdiction" following removal could justify the denial of fee-shifting under 28 U.S.C. § 1447(c)). 546 U.S. 132, 141 (2005). There is no way to square the Eleventh Circuit's outright refusal to sanction jurisdictional discovery with this Court's precedent.

B. The Eleventh Circuit's discovery holding departs from accepted practice in the lower courts.

Given this Court's precedent, it should come as no surprise that the Eleventh Circuit's discovery holding is out of step with established practice in the lower courts allowing jurisdictional discovery. *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2009, at 124 & n.2 (1994) ("Although there was once doubt on this point, it has long been clear that discovery on jurisdictional issues is proper."); 16 MOORE'S FEDERAL

PRACTICE 3D § 107.14[2][g][i][A] (2007) ("A defendant seeking removal can usually determine an appropriate range of damages through discovery.").

Where jurisdictional facts are not clear from the complaint, courts ordinarily permit a removing defendant to conduct limited jurisdictional discovery. *See, e.g., Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568, 574 (5th Cir. 2004); *Rippee v. Boston Market Corp.*, 408 F. Supp. 2d 982, 985 (S.D. Cal. 2005). This includes post-removal discovery to determine whether the jurisdictional minimum is satisfied. *See, e.g., LaSusa v. Lake Mich. Trans-Lake Shortcut, Inc.*, 113 F. Supp. 2d 1306, 1310 (E.D. Wis. 2000) ("If the plaintiffs are truly playing 'hide the ball' with respect to damages, *i.e.*, sitting on evidence of significant damages in order to defeat federal jurisdiction," then "limited discovery concerning damages will reveal them at their game."); *Harmon v. OKI Sys.*, 902 F. Supp. 176, 178 (S.D. Ind. 1995), *aff'd*, 115 F.3d 477, 479–80 (7th Cir. 1997); *McCraw v. Lyons*, 863 F. Supp. 430, 435 (W.D. Ky. 1994). Contrary to the Eleventh Circuit, the Ninth Circuit has stated that district courts have discretion to allow post-removal discovery specifically on CAFA's amount in controversy. *See Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 691 (9th Cir. 2006). The Eleventh Circuit's flat prohibition on jurisdictional discovery thus marks a sharp departure from established practice.

Certiorari is warranted on both questions presented because they go hand in hand. Both address the process by which district courts evaluate their jurisdiction. When this Court determines the proper burden of proof, it would make sense for the Court to also explain how, as a

practical matter, that proof may be obtained. Moreover, from a practitioner's perspective, whether post-removal discovery can be used is just as important as the burden of proof that applies. The Court should therefore grant certiorari on both questions.

III. The issues raised are important to the fair and uniform administration of removal jurisdiction.

This Court's resolution of the questions presented is important to the fair and uniform administration of removal jurisdiction. Under the current state of affairs, a defendant's right to a federal forum via removal turns on what standard applies in any given district or circuit. If the standard is too high, as it is now in the Eleventh Circuit, removal will almost always end in remand. *See* Byrne & Sanders, *supra*, 25 No. 15 ANDREWS TOXIC TORTS LITIG. REP. at 12 ("Can [*Lowery's*] standard be met, at least in tort cases, absent a concession from the plaintiff that the requisite amount is at stake?"). A threshold issue as important as the choice between state or federal court should not be subject to varying standards in different courts across the country. This Court should step in now to resolve this mature disagreement and establish a uniform standard for all federal courts.

CAFA's enactment has only heightened the importance of the questions presented. CAFA amended 28 U.S.C. § 1332 and added § 1453 to give federal courts jurisdiction over nationwide class actions and make them removable to federal court. An express purpose of those changes was to prevent plaintiff's lawyers from manipulating the amount in controversy to avoid federal jurisdiction over such actions. S. Rep. 109-14, at 10–11

(2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11–12 ("[C]lass action lawyers typically misuse the jurisdictional threshold to keep their cases out of federal court."). The existing split of authority on a removing defendant's burden of proving the amount in controversy has undermined this congressional purpose. *See* Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 15–23 (noting that the CAFA cases addressing the burden of proving the amount in controversy have "split badly" and arguing that setting a standard as high as that in *Lowery* means the defendant will "often fail in its removal effort"). There is also the risk that courts are tightening removal standards to counteract CAFA's expansion of federal jurisdiction. *See* Vairo, *supra*, 30 No. 2 NAT'L L.J. 13, Col. 1 ("Given CAFA's legislative history, one might wonder why the [*Lowery*] court would craft such high jurisdictional hurdles for the removing defendant to navigate. The key may well be found in self-preservation."); Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 24–36 (tracking judicial resistance to CAFA).

The sheer number of cases affected by these issues is also significant. Out of roughly 250,000 total case filings in federal court annually, approximately 30,000 reach federal court through removal. Administrative Office of the Federal Courts, *Annual Report of the Director: Judicial Business of the United States Courts*, Statistical Table S-7 (2007) (30,282 removals out of 257,507 total filings for 2007; 29,437 removals out of 259,541, for 2006; 30,178 removals out of 253,273, for 2005). Looking specifically at CAFA cases, the percentage is much higher. A recent study of decisions in CAFA cases published between 2005 and 2007 showed

that 91 percent of the cases were originally filed in state court and removed to federal court. Clermont & Eisenberg, *supra*, 156 U. PA. L. REV. __, Draft at 8.

If allowed to stand, the decision below will give plaintiffs exclusive control over a defendant's statutory right of removal. Normally, the plaintiff 's right to choose his or her forum is counterbalanced by the defendant's right to remove cases within federal jurisdiction to federal court. But by preventing diversity removals except when the defendant has received a statement from the plaintiff that clearly and unambiguously establishes federal jurisdiction, the Eleventh Circuit has impermissibly tipped the scales in favor of plaintiffs. Without a clear statement unequivocally establishing the amount in controversy, and no longer able to conduct post-removal discovery, defendants will be stuck in state court. Provided the plaintiff does not volunteer the amount of damages at issue and can stave off discovery for a year, ordinary civil actions will become removal-proof after one year. 28 U.S.C. § 1446(b). Class actions and mass actions will be subject to similar gamesmanship, contrary to CAFA's purpose.

The Eleventh Circuit's prohibition of jurisdictional discovery only exacerbates the problem. With the exception of the decision below, district courts have been given broad discretion to determine jurisdictional matters in the way they see fit. Protecting a circuit court's ability to review jurisdictional decisions *de novo* (*see* App. 79a n.76) does not justify stripping district courts of such well-established discretion. Moreover, forcing removing defendants to risk Rule 11 sanctions when the plaintiff has not volunteered evidence of the

amount in controversy (*see* App. 73a–79a) puts too high a price on the right to remove. According to the Eleventh Circuit, any request for post-removal discovery into the amount in controversy "is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists." App. 78a. But Rule 11 only requires that "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support *after a reasonable opportunity for further investigation or discovery*." Fed. R. Civ. P. 11(b)(3) (emphasis added). Only by taking away the ability to conduct discovery on jurisdictional facts could the court suggest that the party who requests such discovery be subject to Rule 11 sanctions.

In sum, the Court would be hard-pressed to find a case of greater practical and widespread importance to the practicing bar. One of the most important questions any civil litigator faces is whether a case should be in state or federal court. The decision below dramatically altered the rules of the game and has caused upheaval in the Eleventh Circuit and beyond. The discord *Lowery* has created in the law of federal jurisdiction, and the practical effect it is having on civil litigation, warrant granting certiorari on both questions presented.

CONCLUSION

For these reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

JOHN C. NEIMAN, JR.
BRADLEY ARANT ROSE
& WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

SCOTT BURNETT SMITH
Counsel of Record
BRADLEY ARANT ROSE
& WHITE LLP
200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5198

Attorneys for Petitioner
Hanna Steel Corp.

Counsel for Petitioner Alabama Power Company

Teresa G. Minor
Michael D. Freeman
Spence M. Taylor
Ed R. Haden
Balch & Bingham LLP
Alabama Power Company Building
1901 Sixth Avenue North
Birmingham, Alabama 35203-2015
(205) 251-8100

Counsel for Petitioner Honeywell International, Inc.

Jackson R. Sharman, III
W. Larkin Radney, IV
John Mayo
Lightfoot, Franklin & White, LLC
The Clark Building
400 Twentieth Street North
Birmingham, Alabama 35203-3200
(205) 581-0760

Counsel for Petitioner Bailey-PVS Oxides, LLC

John W. Scott
Scott Dukes & Geisler, P.C.
2100 Third Avenue North, Suite 700
Birmingham, Alabama 35203
(205) 251-2300

Counsel for Petitioner Butler Manufacturing Company

Steven F. Casey
J. Eric Getty
Balch & Bingham LLP
Alabama Power Company Building
1901 Sixth Avenue North
Birmingham, Alabama 35203-2015
(205) 251-8100

Counsel for Petitioner CertainTeed Corp.

Kevin Shires
Vernis & Bowling of Atlanta, P.A.
1200 Abernathy Road, Suite 1700
Atlanta, Georgia 30328
(404) 846-2001

Counsel for Petitioner Fritz Enterprises, Inc.

Alfred F. Smith, Jr.
Sela S. Blanton
Bainbridge, Mims, Rogers & Smith, LLP
600 Luckie Drive, Suite 415
Birmingham, Alabama 35223
(205) 879-1100

Counsel for Petitioner Hanna Steel Corp.

Sid J. Trant
Joel M. Kuehnert
Bradley Arant Rose & White llp
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Petitioner United States Steel Corp.

H. Thomas Wells, Jr.
Christopher J. Williams
J. Alan Truitt
Maynard, Cooper & Gale, P.C.
2400 AmSouth/Harbert Plaza
1901 Sixth Avenue North
Birmingham, Alabama 35203-4604
(205) 254-1075

Counsel for Petitioner Vulcan Materials Co.

Eugene D. Martenson
Frank E. Lankford, Jr.
S.A. Bradley Baker, III
Huie, Fernambucq and Stewart, LLP
Protective Center Building 3, Suite 200
2801 Highway 280 South
Birmingham, Alabama 35203
(205) 251-1193

Counsel for Petitioner W.J. Bullock, Inc.

Patricia Clotfelter
Christopher C. Haug
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
420 North 20th Street, Suite 1600
Birmingham, Alabama 35203
(205) 328-0480